Vol. 2 No. 1

Centre for WTO Studies

WTO Dispute Watch

Disputes of 2010

Centre for WTO Studies

विश्व व्यापार संगठन अध्ययन केन्द्र

WTO Dispute Watch

Cases of 2009

Edited By

BIPIN KUMAR
Assistant Professor/Consultant

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

WTO Dispute Watch

Published by
Centre for WTO Studies
Indian Institute of Foreign Trade
IIFT Bhawan
Qutub Institutional Area
New Delhi-110016
Website: http://wtocentre.iift.ac.in
March, 2011

Edited by
Bipin Kumar
Assistant Professor (Consultant)
Centre for WTO Studies
bipin.bk@gmail.com
bipinkumar@iift.ac.in

We are thankful to Mr. Rajeev Kher, Additional Secretary, Department of Commerce, Government of India, Professors Abhijit Das, Shashank Priya and Madhukar Sinha of the Centre for WTO Studies for their comments on this work. Special thanks are also acknowledged to D. K Mittal and Rajan Sudesh Ratna.

Foreword

I am delighted that the Centre for WTO Studies is bringing out an annual "Dispute Watch". While the vitality of a research body is gauged by quality of its research and the erudition of its members, the publication of research outcomes is vital for dissemination of ideas and results of the research. I am happy to see that the Centre has been expanding its *ouvre* over the last three years.

The main difference between the multilateral system established under the WTO and other multilateral fora and systems lies in the ability of members of the WTO to settle their disputes according to a set of acceptable rules and procedures whereby both the complainants and respondents are assured of a fair hearing and impartial judgement. This happens under a system which is commonly known as the Disputes Settlement Understanding or simply the DSU. As with any new system which establishes law by precedence, the jurisprudence in trade law under the DSU is rapidly evolving. While in the initial years, the Disputes Panels at the WTO would refer mainly to judgements handed down by other courts settling international disputes, in recent years more and more reliance is being placed on precedence within the WTO.

The efforts to consolidate the salient features of all disputes settled in a year along with a reference to the background, the points of law raised and the decisions given will enable both researchers and experts as well as those with casual interest in WTO matters to immediately identify the latest developments in the working of the DSU. I compliment the Centre for WTO Studies for this effort.

I am certain that the Editor would be happy to receive feedback from the readers to improve and upgrade this journal.

K. T. Chacko
Director
Indian Institute of Foreign Trade

Editor's Note

The World Trade Organization (WTO) in the month of November 2009 reached the 'milestone' of 400th trade dispute brought to its dispute settlement mechanism. Since its inception in January 1995, the WTO members have initiated an average of twenty seven disputes per year. A dispute in the WTO is regulated by the provisions of a separate agreement – Understanding on Rules and Procedures Governing the Settlement of Disputes – which is popularly known as DSU. This agreement is the result of the Uruguay Round of negotiations held during 1986-94.

Dispute settlement is one the pillars of the multilateral trading system established under the aegis of the WTO. Without a proper mechanism for settling disputes, the rules-based system envisaged under the WTO would be rendered ineffective if there were to be no way to enforce these rules. The WTO's procedure underscores the rule of law, and makes the trading system more 'secure and predictable'. The system is based on clearly-defined rules, with timetables for completing a case. However, the priority is to settle disputes, and to the extent possible through consultations.

The Dispute Settlement Understanding Agreement- DSU- contains 27 Articles totaling 143 paragraphs plus four appendices, and is perhaps the most significant achievement of the Uruguay Round negotiations. Unique in public international law, the DSU confers compulsory jurisdiction on the Dispute Settlement Body (DSB) for purposes of resolving disputes. The interpretative role of the WTO dispute settlement system is made explicit in Article 3(2) of the DSU which provides that the system serves to 'clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law'. The advent of the WTO and the ensuing establishment of the two- level adjudication process (panels and the Appellate Body) mark the passage to a compulsory third party adjudication system; an oddity in international relations. As per Article 23 of the DSU WTO adjudicating bodies are the exclusive forum for adjudication of all disputes among WTO members with respect to issues under the preview of the covered agreements.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third party can also join the dispute if they think that they are having 'substantial interest' in the dispute and enjoy some rights. Disputes in the WTO are essentially about broken promises. WTO Members have agreed that if they believe fellow-members are violating trade rules, they will have recourse to the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments.

The GATT 1947 in the legal technical sense did not conceive of a specific procedure or provision for the settlement of disputes nor did it provide legal norms as to when a breach or breaches would amount to violation of a rule as to give rise to a dispute. The GATT even was silent for the establishment of a tribunal for resolving actual disputes or to promulgate authoritative interpretations on questions of interpretations, yet over the years the disputes with regard to breaches of substantive norms of GATT and its Articles as well as the question of interpretations have been a recurring phenomena and surprisingly enough GATT 1947 has resolved many more disputes and evolved umpteen interpretations and interpretative techniques to make the GATT functional. To some extent, the Contracting Parties acting jointly under Articles XXV: I or under more specific provisions of GATT 1947 exercised the functions of a tribunal. As GATT 1947 is drafted on conventional terms, including a liberal use of prohibitory language, the remedy provisions are not drawn in terms of sanction.

A procedure for settling disputes existed even under the GATT 1947, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a dispute should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), it is accelerated as much as possible.

The DSU agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT, 1947 procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view. Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

The Dispute Settlement Body of the WTO has been busy with cases since its inception as in the first two years of its existence more than 80 cases were filed and up to the end of year 2010, more than 400 cases were filed which implies that the international community has reposed trust and confidence in the DSB of the WTO. The profile of cases decided and filed shows how varying and conflicting political, economic and social factors of member countries are involved for settling the disputes which are essentially trade oriented. Quite often this is considered as a vote of confidence in the WTO system. Of the 400 cases filed so far, approximately half have eventually been settled bilaterally between the parties, under the DSU's mandatory consultation requirements, without going to litigation. Of the remainder, 169 have been the subject of panel and, where appealed, Appellate Body proceedings. 17 are currently in adjudication and 12 are still the subject of active consultation between the parties.

As provided in Article 3(2) of the DSU, the Appellate Body of the DSB in its various decisions has depended on Vienna Convention on Law of Treaties (VCLT) especially its Article 31 as a rule of interpreting the DSU. Article 31 of the VCLT provides that '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 objects and purpose.' This approach presumably 'is based on the view that the text of a treaty must be presumed to be the authentic expression of the intention of the parties' which represents a break from the GATT 1947 panel practices where negotiating history played a prominent role in ascertaining intention. Under the Vienna Convention Rules, recourse to negotiating history, or preparatory work, can only be a supplementary means of interpretation to confirm a meaning already arrived at by the Article 31(1) rules, or wh1ere an interpretation is in accordance with that rules leaves the meaning ambiguous or obscure or leads to a result that is manifestedly absurd or unreasonable.

The Appellate Body has interpreted the WTO Agreements by reference to ordinary meaning of the words viewed in their context in the light of object and purpose of the treaty. Although it has identified objects and purposes as part of the interpretative process, it has also said that if the terms of the treaty are given their ordinary meaning, in context, this should 'effectuate its objects and purposes.' Appellate Body notwithstanding the fundamental rule of Article 31(1) of the Vienna Convention has drawn on other interpretative mechanism more specifically on 'effectiveness' which has been endorsed by the Appellate Body as a 'fundamental tenet of treaty obligation.' Moreover, the Appellate Body in interpreting the language of a provision of one of the WTO Agreement can seek additional interpretative guidance as appropriate from the general principles of international law. In some cases, the Appellate Body has interpreted on 'case to case' basis, implying that meaning may change according to circumstances of the case. The practice of the Appellate Body shows that although Vienna Convention rules on treaty obligations are the starting and guiding principles, yet the Vienna Convention does not provide single and self contained answers to all questions of interpretation of the WTO Agreements brought before the DSB.

Some critics often claim that the Dispute Settlement Mechanism of the WTO is 'monopolized by the developed countries', especially the US and EU. Certainly, these two trading giants are the most frequent users of the system. This is not surprising since they are the world's biggest trading countries, as is increasingly the case with China. However developing countries too have started using this system to settle disputes on various occasions. They do not play 'coy hand-maidens' to their richer trading partners. During the period 1995-2009, developing countries have been complainants in more than 45 per cent of all cases, and have been respondents in more than 42 per cent of the cases.

Out of 400 disputes that have been brought to the WTO:

- 84 appear to have been resolved bilaterally but for which no outcome notified to WTO
- 95 were resolved bilaterally for which outcome notified to WTO
- 23 were resolved bilaterally after a panel was established but before the panel was composed
- 12 are currently the subject of active consultations between parties
- 186 went into litigation

WTO Members involved in disputes

Member	Complainant	Respondent	Member	Complainant	Respondent
Antigua and Barbuda	1	0	Japan	13	15
Argentina	15	16	Korea	13	14
Australia	7	10	Malaysia	1	1
Bangladesh	1	0	Mexico	21	14
Belgium	0	3	Netherlands	0	1
Brazil	24	14	New Zealand	7	0
Canada	33	15	Nicaragua	1	2
Chile	10	13	Norway	3	0
China	6	17	Pakistan	3	2
Chinese Taipei	3	0	Panama	5	1
Colombia	5	3	Peru	2	4
Costa Rica	4	0	Philippines	5	5
Croatia	0	1	Poland	3	1
Czech Rep	1	2	Portugal	0	1
Denmark	0	1	Romania	0	2
Dominican Republic	0	3	Singapore	1	0
Ecuador	3	3	Slovak Rep	0	3
Egypt	0	4	South Africa	0	3
European Communities	81	66	Spain	0	1
			Sri Lanka	1	0
France	0	3	Sweden	0	1
Germany	0	1	Switzerland	4	0
Greece	0	2	Thailand	13	3
Guatemala	7	2	Trinidad & Tobago	0	2
Honduras	6	0	Turkey	2	8
Hong Kong, China	1	0	United Kingdom	0	2
Hungary	5	2	United States	93	107
India	18	20	Uruguay	1	1
Indonesia	4	4	Venezuela	1	2
Ireland	0	3			

Disputes per Year:

Year	Disputes	Year	Disputes	Year	Disputes
1995	25	2000	34	2005	11
1996	39	2001	23	2006	21
1997	50	2002	37	2007	13
1998	41	2003	26	2008	19
1999	30	2004	19	2009	12

Keeping the web of disputes between the WTO Members, the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi has decided to bring out a **"WTO Dispute Watch"** so that the wide range of cases, brought before and being decided by the Dispute Settlement Body, is easily understood and major issues related with trade disputes are made available to the public at large in an easy to understand language.

Table of Contents

I. END OF THE BANANA DISPUTES 1

II. POSSIBLE CHANGES IN THE DSU AGREEMENT AND THE APPELLATE BODY'S WORKING PROCEDURES 8

III. ADOPTED PANEL AND APPELLATE BODY REPORTS 11

1. Colombia-Indicative Prices and Restrictions on Ports of Entry, WT/DS366/13,ARB-2009-1/25, Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes 11

1.1 Parties 11

1.2 Factual Matrix 11

1.3 Arguments of Parties 12

1.4 Colombia 12

1.5 Mandate of Arbitrator 19

1.6 Legal Basis 19

1.7 Factors Affecting the Determination of the Reasonable Period of Time under Article 21.3 (c) of the DSU 20

1.8 Final Award 23

2. China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/AB/R, Adopted on 21st December, 2009 24

2.1 Parties 24

2.2 Arguments of the Participants and the Third Participants 28

2..3 Claims of Error by China 28

2.4 The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products 28

a) Article 30 of the Film Regulation and Article 16 of the film Enterprise Rule 29

b) Article 5 of the 2001 Audiovisual Products Regulation and article 7 of the Audiovisual Products Importation Rule 32

2.5 The "Necessity" Test under Article XX (a) of the GATT 1994 33

2.6 The Scope of China's GATS Schedule Entry on "Sound Recording Distribution Services 36

2.7 In Dubio Mitius 37

2.8 Claims of Error by the United States – Other Appellant 38

2.9 Arguments of the Third Participants 41

2.10 Issues Raised in This Appeal 42

2.11 Findings and Conclusions 52

2.12 Implementation of adopted reports 55

3. China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R 55

3.1 Factual Aspects of the Dispute 55

a) Thresholds for criminal procedures and penalties 55

b) Disposal of goods confiscated by customs authorities that infringe intellectual property rights 56

c) Denial of copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China 56

3.2 Claim under Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS agreement 56

3.3 Main Arguments of the Parties 56

3.4 Claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.2 of the TRIPS agreement 64
3.5 Claim under Article 41.1 of the TRIPS Agreement 65
3.6 Conclusion with respect to the Copyright Law 66
3.7 Customs Measures 67
3.8 Claim under Article 59 of the TRIPS Agreement 68
3.9 The principles set out in Article 79
3.10 Outside the channels of commerce in such a manner as to avoid any harm caused to the right holder 84
3.11 Donation to social welfare bodies 86
3.12 Defective Goods 86
3.13 Harm to reputation 87
3.14 Later sales of donated goods 87
3.15 Sale to the right holder 88
3.16 Auction and authority to order the destruction of infringing goods 88
3.17 Auction and "simple removal of the trademark unlawfully affixed" 89
3.18 Conclusions with respect to the Customs measures 96
3.19 Criminal Thresholds 96
3.20 Selling counterfeit trademark commodities 97
3.21 Forgery of trademarks and sale of forged trademarks 98
3.22 Copyright provisions 99
i) Criminal copyright infringement 99
3.23 Selling copyright-infringing reproductions 100
3.24 Thresholds for conviction or aggravation 101
3.25 Alternative thresholds 102
3.26 Cumulative calculation over time 103

3.27 Calculation of illegal business operation volume - goods 104

3.28 Calculation of illegal business operation volume - price 104

3.29 Claim under the first sentence of Article 61 of the TRIPS Agreement 105

3.30 Procedural issues 107

3.31 Nature of the obligation 108

3.32 "Section 5: Criminal Procedures 108

3.33 Scope of the obligation 111

3.34 "On a commercial scale" 115

3.35 Conformity of the measures at issue with respect to the level of the thresholds 120

3.36 Claim under the second sentence of Article 61 of the TRIPS Agreement 121

3.37 Claim under Article 41.1 of the TRIPS Agreement 121

3.38 Conclusions with respect to the criminal thresholds 122

4. United States-Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383R 122

4.1 Parties 122

4.2 Factual Matrix 122

4.3 Burden of proof 124

4.4 Has Thailand established that the USDOC "Zeroed" in the measure at issue? 126

4.5 Has Thailand established that the methodology used by the USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in US - Softwood Lumber V? 126

4.6 Has Thailand established that the methodology applied by the USDOC is inconsistent with Article 2.4.2 of the Anti-dumping Agreement? 129

4.7 Conclusions and Recommendations 131

4.8 Implementation of adopted reports 132

5. United States-Laws, Regulations and Methodology for calculating Dumping Margins ("Zeroing") Recourse to Article 21.5 of the DSU by the European Communities WT/DS294/AB/RW, 14th May 2009 132

5.1 Parties 132

5.2 Factual Matrix 133

5.3 Arguments of the Participants and the Third Participants 137

5.4 Claims of Error by the European Communities – Appellant 137

5.5 Arguments of the United States – Appellee 141

5.6 Arguments of the Third Participants 141

5.7 Issues Raised in This Appeal 146

5.8 Introduction to the United States' System for the Imposition and Assessment of Anti-Dumping Duties 149

5.9 The Subsequent Sunset Reviews 177

5.10 Completing Analysis 182

5.11 The Non-Existence of Measures between 9 April and 23 April/31 August 2007 187

5.12 The Alleged Arithmetical Error in the Section 129 Determination in Case 11 189

5.13 The "All Others" Rates Calculated in the Section 129 Determinations in Cases 2, 4, and 5 194

5.14 Findings and Conclusions 196

6. United States- Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, WT/DS322/AB/RW, 18th August, 2009 202

6.1 Parties 202

6.2 Factual Matrix 202

6.3 Arguments of the Participants and Third Participants 207
6.4 Issues Raised in This Appeal: 212
6.5 Whether Japan's Panel Request Met the Requirement of Article 6.2 of the DSU to "Identify the Specific Measures at Issue" 213
6.6 Whether Review 9 Was Properly Included in the Panel's Terms of Reference Even Though It Had Not Been Completed at the Time of Japan's Panel Request 217
6.7 Collction of Duties after the Expiration of the Reasonable Period of Time – Reviews through 9 218
6.8 What Is the Scope and Timing of the Obligation to Comply with the DSB's Recommendations and Rulings? 221
6.9 Was the Date of Importation the Relevant Parameter for Determining Compliance? 223
6.10 What Is the Relevance of Delays Resulting from Domestic Judicial Proceedings? 227
6.11 Article II of the GATT 1994 231
6.12 Findings and Conclusions: 234

I. End of the Banana Disputes

The banana issue is one of the longest running disputes in the post-World War II multilateral trading system. It has generated considerable debate and litigation among a wide range of the WTO membership. It has resulted in multiple legal rulings by dispute panels, the Appellate Body and special arbitrators. The disputes concerned the treatment the EU gives to the import of bananas from the African, Caribbean and Pacific (ACP) countries in preference to bananas from Latin America. The dispute had lasted for more than 20 years. The dispute had destabilized the climate for the production and trade in the countries concerned.

In July 1991, Costa Rica expressed concern in the GATT Council meeting that an impending EU banana import regime would discriminate against Central American countries. It urged agreement in the Uruguay Round for free trade in bananas. This concern was shared by Colombia, Honduras, Peru, Venezuela and Mexico as well. Subsequently in June 1992, Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela requested consultations with the European Union. The consultations had failed to bring any satisfactory results. These countries had requested the GATT Director-General to use his good offices to settle the dispute. These five countries accepted the DG's suggestion that, in order to make progress, the formal good offices be suspended until January 1993 and to leave the door open for informal negotiations that would make it possible to find a solution within the Uruguay Round commitments.

As a result of the EU Council of Ministers Decision to establish a common banana regime that would enter into force in July 1993 the Good Offices effort failed. This new regime was introduced by Regulation 404/93 as a common market organization. It has been supplemented and amended by several further regulations, the most important being Regulation 1442/93 which mainly implements the scheme set out in Regulation 404/93. The regime laid down in this regulation was immediately challenged before the GATT.

According to the five Latin American countries, the new regime would violate the 20 per cent maximum tariff binding on bananas granted by the EU in the 1961 Dillon Round, as well as various other GATT provisions. At the request of the five countries, a panel was established. The panel report found that core aspects of the banana market organization violated the fundamental GATT principles like Article XI (quantitative restrictions) and that the tariff preference granted by the EU to bananas from African, Caribbean and Pacific (ACP) countries violated the MFN principle and could not be justified under GATT Article XXIV (FTAs & customs unions).The EC, however blocked the adoption of this panel report. In order to prevent further challenges, the EC offered trade preferences to the complainants within the Banana Framework Agreement which provided a higher tariff quota and a lower tariff under this quota. The major incentive, on the side of the supplying countries, to enter BFA arguably was the structural weaknesses of the old GATT.

On 1 July 1993, a new EU embarked on unifying the divergent national banana import regimes *vis.a. vis* non-EC countries. Achieving this task was seen necessary as the EC Internal Market was introduced in 1993. As is commonly known, in the internal market border controls are eliminated, and national protective measures against deflections of trade in goods imported from third countries can be adopted only exceptionally. The same five Latin American countries requested a new panel to examine the new unified banana import regime. The Banana panelist II concluded that the new regime infringed GAT Articles I, II and II: 4. The tariff relating to third-country bananas were found to infringe Article II of the GATT since they were in excess of the bound tariff rate of the ad valorem. As in Bananas I, the Bananas II panel concluded that the EC tariff preference for ACP bananas did not comply with the MFN principle. The panel did not find, however, that the tariff quota system amounted to quantitative restrictions in the sense of Article XI of the GATT since the high out of the quota tariff merely restricted imports without prohibiting them. Further, the license allocation system was found to infringe GATT Article III:4 and I, since the attribution of 30 percent of the licenses to modify EC traders created an incentive to buy domestic or traditional ACP bananas to qualify for additional licenses which then allowed operators to import third- country bananas at in quota tariffs. As this report was issued under the old GATT, the EC was once again able to block its adoption.

When the WTO was established in 1995, Guatemala and three new complainants- Honduras, Mexico and the US- requested consultations with the EC on the common market organization for bananas again on the same subject matter as in the Bananas II proceedings. The other four complainants of the Banana I and II disputes- Columbia, Costa Rica, Nicaragua, Venezuela- had in the meanwhile entered into the Banana Framework Agreement with the EC and thus secured additional preferential treatment persuading them from not pursuing their case further before the WTO. However, one major banana exporting country, Ecuador, had not been offered the opportunity to join the BFA and, hence, was a potential litigant on this issue. Ecuador was not an original member of the WTO but had applied for membership in 1995 and was admitted on 21 January 1996. It joined the other complainants, and the Bananas III panel was established on 8 May 1996. The WTO accession of Ecuador is also remarkable for another reason: it was the first time that a major issue in GATT/ WTO history, which has always been characterized by the search for consensus, came to be decided by a vote.

In February 1996,dissatisfied with the EU's implementation of the GATT panel reports, Ecuador, Guatemala, Honduras, Mexico and the US filed a new complaint, under the WTO's dispute settlement system, against the EU's banana import regime, which had been in force since July 1993, claiming that it unfairly restricted the entry of their bananas to the EU.

In September 1997, the WTO ruled that the EU's banana import regime was inconsistent with WTO rules for the following reasons:

i. the EU's tariff quota allocation, particularly to the ACP (African, Caribbean, Pacific) countries, was contrary to the rule of non-discriminatory administration of quotas (Article 13 of the GATT - General Agreement on Tariffs and Trade);

ii. the EU's licensing procedures, which involve the purchase of EU and/or ACP bananas in order to obtain rights to import some Latin American (or other third countries') bananas, were contrary to the MFN (most-favoured-nation) rule and the national treatment rule (Articles 1 & 3 respectively of the GATT); and

iii. through the impact of this licensing system on the service suppliers of the complaining countries, the licensing procedures were also contrary to the MFN rule and the national treatment rule (Articles 2 & 17) of the GATS — General Agreement on Trade in Services.

The findings of the panelists in this third round of proceeding constitute precedents for both substantive and procedural WTO law. In substantive terms, they found violations of GATT Articles I:1, III:4, X:3 and XIII:1, and GATS Articles II and XVII, as well as of Article 1.3 of the Licensing Agreement. The panel report was largely upheld by the Appellate Body on 25 September 1997.

In January 1999, the EU introduced a new banana import regime but in April 1999 the WTO ruled that this new regime was also incompatible with the EU's WTO obligations. On 19 April 1999, the WTO granted US authorization to impose sanctions up to an amount of US$191.4 million per year on EU products entering the US market. In May 2000, the WTO granted Ecuador authorization to impose sanctions up to an amount of US$201.6 million per year on EU exports to Ecuador.

In April 2001, the three countries reached an agreement whereby Ecuador and the US would suspend their sanctions so long as the EU changed its banana import regime from the existing tariff-rate quota system to a tariff-only system by 1 January 2006. Under this new tariff-only system, banana imports would not be subject to quotas; there would be a single tariff for all banana imports, except for ACP bananas which would continue to benefit from a preferential tariff arrangement but not from country-specific tariff quota shares.

In order to change from a tariff-rate quota system to a tariff-only system, the EU has to modify all its existing WTO market-access commitments relating to bananas. Hence, under WTO rules (Article XXVIII of GATT), the EU had to re-negotiate with all countries which supplied bananas on a non-preferential basis to the EU and reached agreement on the details of the new tariff-only system. At the end of these negotiations, the share of the EU market for these suppliers was no to be less than before.

In November 2001, at the WTO Ministerial Conference in Doha, Qatar, all member governments of the WTO adopted a Ministerial Decision which formalized the above elements of the agreement between Ecuador, the US and the EU. The Ministerial Decision also spelt out the procedures and timetable for possible arbitration in the event the EU is unable to reach an agreement with the banana-supplying countries on the new tariff-only system. A related Ministerial Decision adopted at Doha allows ACP bananas to be imported into the EU tariff-free until 31 December 2007.

On 31 January 2005, after several months of consultations with non-preferential banana-supplying countries, the EU informed the WTO of its new banana tariff: Euro 230/tonne. In March/April 2005, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, and Venezuela requested arbitration under Doha Ministerial Decision. In August 2005, the arbitration panel ruled that EU's proposed Euro 230/ton tariff would not maintain existing market-access for non-preferential banana suppliers in Latin America. On 12 September 2005, the EU proposed a revised tariff of Euros 187/ton. Further consultations were held among the parties but they were unable to reach a mutually satisfactory solution.

On 26 September 2005, the EU requested a second arbitration, saying that, with the exception of a proposal for a zero tariff, the EU had not been presented with an alternative figure to its proposed tariff, and that there was no basis for seeking a mutually satisfactory solution in the absence of a counter proposal from the other parties. Hence, the EU was requesting an arbitration to determine, within 30 days, whether the new EU proposal "has rectified the matter". On 27 October 2005, the second arbitration report was issued. It determined that the EU's proposed rectification, consisting of a new MFN tariff of Euro 187/ton and a 775,000 ton tariff quota on imports of bananas of ACP origin, would not result in "at least maintaining total market access for MFN banana suppliers". The arbitrator, therefore, concluded that the EU had failed to rectify the matter.

On 29 November 2005, the EU adopted new banana import measures which came into effect on 1 January 2006. A new tariff for MFN bananas was set at Euros 176/ton with a zero tariff for ACP bananas up to a level of 775,000 tons. On 30 November 2005, Honduras, Panama and Nicaragua separately requested consultations with the EU under DSU Article 21.5.

In December 2005 at the Hong Kong Ministerial, several Latin American countries expressed serious concern over what they considered to be the EU's non-implementation of the WTO's rulings in the long-standing banana dispute, particularly in the light of the two arbitrations under the Doha Waiver. WTO Director General Mr. Pascal Lamy, therefore, nominated Mr. Jonas Store, the Norwegian Trade Minister, as "Facilitator" to try to find a solution and asked him to report to the General Council accordingly. Minister Jones Store conducted regular meetings under a "good offices" process for more than 18 months.

On 28 November 2006, Ecuador requested consultations with the EU under DSU Art 21.5, and a panel was established on 20 March 2007. Panel composed on 15 June 2007. On 10 December 2007, report issued to parties, and published on 7 April 2008. The panel ruled that the duty-free tariff quota for bananas originating in ACP countries and the MFN tariff of Euros 176/ton were in violation of Art 1, 2, &13 of GATT. Time period for adoption was extended to 29 August 2008.

Colombia and Panama filed new disputes respectively on 21 March 2007 & 22 June 2007.

On 12 July 2007, the DSB established Art 21.5 panel at request of US. Panel was composed on 13 August 2007. Report was issued to parties on 29 February 2008, and published on 19 May 2008. The panel ruled that the duty-free tariff quota for bananas of ACP origin was in violation of Art I & XIII of GATT. Time period for adoption was extended to 29 August 2008.

On 28 August 2008, the EU appealed both reports. Both Appellate Body reports published on 26 November 2008, upheld the Panels' findings. On 11 December 2008, the DSB adopted the reports dealing with Ecuador's complaint. On 22 December 2008, the DSB adopted the reports dealing with the US' complaint.

Since then, the EU has regularly reported to the DSB that it is engaged in discussions with Latin American banana-supplying countries to conclude a comprehensive agreement that would include the level of the new EU bound tariff duty.

On 2 November 2007, Colombia referred the matter to the Director-General, acting in an ex-officio capacity, to use his good offices to help facilitate a solution under Article 3.12 of the DSU. Panama similarly requested the DG's good offices on 1 February 2008.

Both processes agreed to adhere to confidentiality of content of proceedings with the aim of seeking a comprehensive solution that covered all outstanding banana issues in the WTO, including the six disputes filed under the DSU (DS16, DS27, DS105, DS158, DS361 & DS364), the two arbitrations under the Doha Waiver (WT/L/616 & WT/L/625), the EU enlargement/compensation negotiations under Articles XXIV and XXVIII of GATT 1994, and the issue of non-recognition of negotiating rights raised at the Hong Kong Ministerial and discussed subsequently in the General Council (WT/MIN(05)/9, WT/GC/85, WT/GC/90 & Corr.1, and WT/GC/100).

During the period November 2007 — July 2008, the DG conducted several meetings under the Colombia/EU and the Panama/EU "good offices" processes. In addition, he had a number of meetings with other interested WTO members including other MFN suppliers, ACP banana producers, other banana producers and importers.

Parties continued to work in search of a solution, until the announcement of a comprehensive agreement on Tuesday 15 December 2009 (WT/L/784 Geneva Agreement on Trade in Bananas).

Under the Comprehensive Banana Agreement the EU agreed to:

- cut its MFN import tariff on bananas in eight stages, from the current rate of €176/ton to €114/ton in 2017 at the earliest; and

- make the biggest cut first, by €28/ton to €148/per ton, once all parties sign the deal.

In return, Latin American countries agreed to:

- not demand further cuts in the framework of the Doha Round of talks on global trade once it resumes;

- settle several legal disputes pending against the EU at the WTO, some dating back as far as 1993.

When all parties sign the agreement, the EU will make the first cut to its banana tariff, to €148 per ton. This will apply retroactively from the date when all parties initialed the agreement. The tariff will then fall again at the start of each year for seven years, in annual installments (€143, €136, €132, €127, €122, €117, €114), starting on 1 January, 2011. The EU will freeze its cuts for up to two years if WTO members do not conclude talks on agriculture in the Doha Round by the end of 2013.

Once the WTO certifies the EU's new tariff schedule, Latin American banana-supplying countries will drop:

- all their disputes on bananas with the EU at the WTO; and

- any claims they made against the EU after new member countries joined the Union, or when the EU changed its bananas tariff in 2006.

II. Possible Changes in the DSU Agreement and the Appellate Body's Working Procedures

In December 2009, the Appellate Body proposed several amendments to the Appellate Body Working Procedures, noting that while "those procedures have operated smoothly and effectively [since last revised in 2004] . . . our experience has revealed some areas where these provisions might be improved."

The proposed changes have been summarized by the Appellate Body as follows:

- First, an appellant's written submission be filed when an appeal is commenced, namely, on the same day as the filing of a Notice of Appeal, and that all other deadlines for written submissions, the Notice of Other Appeal and third-party notifications be advanced accordingly.

- Secondly, to explicitly authorize, subject to certain conditions, the electronic filing and service of documents.

- Thirdly, to introduce a procedure for consolidating appellate proceedings where two or more disputes share a high degree of commonality and are closely related in time.

The proposed changes were explained in detail by the Appellate Body. The requirement for immediate filing of an appellant's written submission would modify the current practice of not filing the submission until seven days after the notice of appeal. While the communication notes that the submission "provides an important basis for the preparation by the other parties and third parties of their detailed responses," it seems clear that the main purpose of the change would be to facilitate the Appellate Body's work under a very short period for appellate proceedings:

Given the [ninety]-day limit for appellate proceedings stipulated under Article 17.5 of DSU, such a "waiting period" [seven days] during an appeal does not appear to be the most efficient allocation of the limited time available. The [seven]-day "waiting period" seems particularly inefficient in the light of the fact that the Appellate Body currently has only around [ten] days after it receives all written submissions to prepare for the oral hearing, which typically takes place [thirty-five] to [forty-five] days after the appeal has been filed. In certain exceptionally large and complex appeals over the past three years, these problems have been further amplified by the increased length of appellants' submissions.

With regard to electronic filing, the Appellate Body has proposed to follow procedures used by many other tribunals both domestic and international.

In fact, the Appellate Body has been accepting documents filed with the Appellate Body and served on the other parties and other participants electronically for some time, while also requiring that the documents be filed and served simultaneously in paper form. The Appellate Body does not propose the complete elimination of parallel electronic and paper filing. Rather, the amendments would simply provide that a document electronically filed (by 5 p.m. on the due date) and confirmed by the Appellate Body Secretariat electronically is considered duly filed under the Working Procedures. Parties and other participants who wished to do so could continue to file documents solely in paper form, and in all cases it would be required that a paper copy would be served on the Appellate Body by 11 a.m. the day following service. The significant change would be to permit service of the documents on parties and other participants by e-mail alone.

The technical changes proposed to consolidation rules are explained largely as codification of an existing ad hoc process, as follows:

Where two or more disputes share a high degree of commonality, consolidation of appellate proceedings has proven to be a pragmatic way of conducting appeals, as it maximizes the efficient use of resources available to the parties, third parties and the Appellate Body, and fosters consistency in decision-making. To date, decisions to consolidate appellate proceedings have been made on an ad hoc basis in consultation with the parties. In the light of the frequent resort to consolidated proceedings in our recent experience, we consider it appropriate to codify this practice by adding a rule on consolidation to the Working Procedures. Such a rule would streamline the procedures where consolidation of appellate proceedings is anticipated, and would provide guidance to WTO Members in future disputes, thereby ensuring predictability of the dispute settlement system.

The Appellate Body noted the increase in the need for consolidation of appeals, observing that "[i]n 2008, for example, the Appellate Body conducted three consolidated proceedings in appeals concerning six separate panel reports."

These latest proposed changes to the Working Procedures, like earlier changes, are measured one. These changes are not radical. They seem to be based on common sense and on the desire to make the appeals process work more efficiently.

III. ADOPTED PANEL AND APPELLATE BODY REPORTS

1. Colombia-Indicative Prices and Restrictions on Ports of Entry, WT/DS366/13,ARB-2009-1/25, Arbitration under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Parties: **Colombia**
Panama

Factual Matrix

This arbitration dispute under Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) concerned the "reasonable period of time" for the implementation of the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute. This dispute concerned Colombia's use of indicative prices in customs procedures and restrictions on ports of entry available for imports of textiles, apparel, and footwear from Panama.

On 20 May 2009, the Dispute Settlement Body adopted the Panel Report[1]. The Panel Report contained, *inter alia*, the following findings:

(i) Article 128.5 e) of Decree 2685 of 28 December 1999[2] and Article 172.7

---

1 WT/DS366/9.

2 (Colombia's Ministry of Finance) *Ministerio de Hacienda y Crédito Público, Decreto 2685 de 1999*.

of Resolution 4240 of 2 June 2000 ("Resolution 4240/2000")[3] issued by Colombia's Directorate of Taxes and National Customs ("DIAN"), as well as the various resolutions establishing indicative prices, are inconsistent "as such" with the methods of valuation set out in Articles 1, 2, 3, 5, 6, 7.2(b), and 7.2(f) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the "Agreement on Customs Valuation"); and

(ii) Resolution 7373 of 22 June 2007 [4], as amended by Resolution 7637 of 28 June 2007[5] (the "ports of entry measure") is inconsistent with Article I.1, the first and second sentences of Article V:2, the first sentence of Article V:6, and Article XI:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

(iii) The Panel further rejected Colombia's defence that the ports of entry measure was justified under Article XX (d) of the GATT 1994 as a measure necessary to secure compliance with Colombia's customs laws and regulations.

Colombia informed the DSB of its intention to comply and that it needed a "reasonable period of time" to comply with the DSB recommendations. Panama requested binding arbitration under Article 21.3(c) of the DSU Agreement. Panama and Colombia were unable to agree on an arbitrator as contemplated by footnote 12 to Article 21.3(c) of the DSU. Therefore, Panama requested that the Director-General of the WTO to appoint an arbitrator pursuant to the authority conferred upon him by that provision. Director-General appointed Mr. Giorgio Sacerdoti to act as arbitrator.

On 2 October 2009, the award of the Arbitrator was circulated.

Arguments of the Parties

Colombia:

Colombia requested that "reasonable period of time" for implementation of

---

3 (DIAN) *Dirección de Impuestos y Aduanas Nacionales, Resolución 4240 de 2000 (junio 2).*

4 *Dirección de Impuestos y Aduanas Nacionales, Resolución 7373 de 2007 (junio 22).*

5 *Dirección de Impuestos y Aduanas Nacionales, Resolución 7637 de 2007 (junio 28).*

the recommendations and rulings of the DSB in this dispute would be 15 months from the date of adoption by the DSB of the Panel Report, that is, until 20 August 2010. As a matter of principle, Colombia highlighted that "the choice of the means of implementation was the prerogative of the implementing Member." Therefore, an implementing Member had a "measure of discretion" in selecting the means of implementation, which included the choice of either "withdrawing or modifying" the inconsistent measure.[6] Thus, the view expressed by previous arbitrators that "the reasonable period of time ... should be the shortest period possible within the legal system of the Member"[7] must be read as a requirement to implement "the proposed new measure" in the shortest period possible within that legal system. Referring to previous arbitrations, Colombia emphasized that it was not within the arbitrator's mandate under Article 21.3(c) of the DSU to judge the manner in which the implementing Member intended to achieve compliance.[8] Rather, arbitrator was limited to determining whether the proposed period was "reasonable" in the light of the type of implementation selected.

Colombia also underscored that the two sets of legislative and regulatory measures concerning customs control and enforcement challenged by Panama in this dispute "are related and are part of the on-going fight against under-invoicing, contraband, and contraband-related money-laundering and drug trafficking."

---

6 Colombia's submission, para. 22 (referring to Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, paras. 57 and 58, where the arbitrator stated that Brazil could "remain within the range of permissible actions to comply" by lifting the import ban to remove the inconsistency with Article XI of the GATT 1994 or by modifying the existing ban to rectify the inconsistencies with the chapeau of Article XX (in turn referring to Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 37; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para.50)).

7 Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, paras. 25 and 26).

8 Colombia's submission, paras. 25 and 26 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69; and Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 27). Colombia also refers to the arbitrator's statement in *Brazil – Retreaded Tyres (Article 21.3(c))*, that his mandate related to the "time by when the implementing Member must have achieved compliance, not to the manner in which that Member achieves compliance." Yet, the arbitrator considered that "when a Member must comply cannot be determined in isolation from the chosen means of implementation" and thus relates to the question of how a Member intends to comply (emphasis omitted) (referring to Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*)

With respect to the provisions of Decree 2685/1999 and its main implementing regulation (Resolution 4240/2000) concerning the use of indicative prices as a customs control mechanism, Colombia intended to implement the DSB's recommendations and rulings "by revising the design and implementation of its customs control system based on indicative prices to more clearly separate customs valuation from the legitimate right to exercise customs control." According to Colombia, this means of implementation requires time-consuming preparation and involves a complex legal process that would entail the following four essential steps.

(i) Colombia intended to identify and evaluate whether and to what extent various provisions of Colombia's laws, regulations, and administrative orders[9] might be implicated by the DSB's recommendations and rulings and by the amendment of the indicative prices mechanism. Colombia estimated that this initial identification and evaluation stage would take about three months to complete.

(ii) Colombia would examine different alternatives to amend its existing indicative prices system.

(iii) Colombia would implement the new measure into its computerized system of customs administration, which provided customs administrators with the software to conduct customs verification and control, and enabled the electronic filing of import declarations. Colombia estimated that the integration of any new procedures into its "sophisticated and highly integrated" computerized customs administration system, which was required by Colombian Law, would likely take up to four months.

(iv) As a fourth and final step, Colombia intended to train DIAN officials, importers, and other users of its customs control system in order to familiarize them with the new mechanism.[10] Colombia expected the initial training of DIAN officials to take two months.

---

[9] Colombia refers specifically to Decree 2685/1999, Resolution 4240/2000, and (DIAN) *Manual de Valoración – Orden Administrativa* 0005, dated 28 December 2004. (Colombia's submission, para. 30)

[10] According to Colombia, such training is "essential for the effectiveness" of its customs control system, which is based on self-declaration by importers and must be consistently applied by all customs authorities at all ports of entry.

In addition to specific steps to implement the DSB's recommendations and ruling on the use of indicative prices, Colombia intended to introduce legal reforms to ensure that customs-related bank or insurance guarantees were effectively available to importers in the context of its revised customs control system.

In respect of the ports of entry measure[11], Colombia proposed to devise a measure that did not treat imports from Panama differently from those arriving directly from the country of origin, and that it did not constitute a prohibited restriction on imports, while ensuring the enforcement of its customs laws in the most effective manner. This implementation would incorporate some "essential aspects" of the existing measures, such as the advance import declaration, exemption for goods in transit, and possibly some limitations on ports of entry with generalized application. Initially, Colombia would evaluate the Panel's findings of inconsistency in respect of different aspects of the ports of entry measure and the Panel's rejection of Colombia's defence under Article XX (d) of the GATT 1994. Next, Colombia would define and develop, in consultation with the public and private sectors, a mechanism to substitute the existing ports of entry measure. Finally, Colombia would implement the new measure that replaced the ports of entry measure into domestic law.

Colombia recalled that Article 21.3(c) of the DSU Agreement establishes a guideline of 15 months for the reasonable period of time for implementation, but that "particular circumstances" may justify a longer or shorter period. Referring to previous arbitrations, Colombia considered that it would be up to Panama to indicate the particular circumstances that would justify a departure from the 15-month. Colombia acknowledged that previous arbitrators had found that the 15-month guideline presented an "outer limit or maximum in a usual case", and that it was a rule from which arbitrators might deviate only in "exceptional" circumstances. However, Colombia considered that the 15 month period should be viewed as a "benchmark" or "a framework within which" the calculation of the reasonable period of time was performed.[12]Colombia submitted that the implementation of the Panel's "as such" findings would require it to amend its laws and regulations and to issue new rules of general application. Colombia argued

---

11 Resolution 7373/2007, as modified by Resolution 7637/2007.

12 Colombia's submission, paras. 71 and 72 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 92, where the Appellate Body interpreted the term "guideline" in Article 14 of the *Agreement on Subsidies and Countervailing Measures* as a "framework within which [the calculation of a benefit] is to be performed").

that the complexity of amending measures related to customs control and customs enforcement was another "particular circumstance" that justified a period of implementation of at least 15 months. Colombia pointed out those previous arbitrators considered that the "complex nature of implementing measures" was a relevant factor in determining the reasonable period of time under Article 21.3(c) of the DSU. Colombia noted that the field of "anti-smuggling" was heavily regulated by a series of "interdependent and overlapping" regulations affecting many sectors of activity, and when this was the case, "adequate time will be required to draft the changes, consult affected parties, and make any consequent modifications as needed".

Colombia argued further that the importance of the measures in the particular situation of Colombia also justified a period of time for implementation of at least 15 months. Colombia recalled that the arbitrator in *Chile – Price Band System* considered that the "unique role and impact of the price band system on Chilean society was a relevant factor in determining the reasonable period of time. For Colombia, the importance of ensuring that new measures addressed the complex economic, social, and political issues facing Colombia, and that such measures "are integrated with minimal disruption to the efficacy of the existing anti-smuggling regime", justifies the assessment of a longer period of time for implementation.

Finally, Colombia argued that Article 21.2 of the DSU required that Colombia's developing country status be taken into account in the determination of the reasonable period of time for implementation.

Panama requested to determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be four months and 19 days from the date of adoption by the DSB of the Panel Report, that is, until 9 October 2009. Panama argued that a joint reading of Articles 21.1 and 21.3 of the DSU suggested that "prompt" compliance is equated with "immediate" compliance. However, if it is "impracticable" to comply immediately, Article 21.3(c) provided the implementing Member with a reasonable period of time in which to do so. Panama submitted that Colombia, as the implementing Member, bore the burden of proving that the period of time it was requesting for implementation was "reasonable".[13] Panama considered that Colombia had failed to discharge this burden.

---

[13] Panama's submission, para. 26 (referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47; Award of the Arbitrator, *US – 1916 Act (Article 21.3(c))*, para. 32; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 44).

In determining the reasonable period of time for implementation, Panama submitted that the arbitrator should take into account the following "general principles" elaborated by previous arbitrators in determining the reasonable period for implementation in this case: the implementing Member must commence implementation as from the date of adoption of the DSB recommendations and rulings; the implementing Member had discretion in choosing the means of implementation, but that discretion was not an "unfettered" right to choose any method of implementation; the mandate of the arbitrator was limited to determining *when* compliance could be achieved, but such determination was closely related to the question of *how* the Member intended to implement; the implementing Member must establish that the proposed period was the "shortest period possible" within its domestic legal system to implement the recommendations and rulings of the DSB; although recourse to "extraordinary" means of compliance was not required, the implementing Member was expected to use all flexibility available within its domestic legal system to implement the recommendations and rulings of the DSB[14]; the implementing Member must not include in its method of implementation objectives that were extraneous to the specific recommendations and rulings of the DSB, such as the larger objective of an overall reform of the affected domestic system if such inclusion would prolong the implementation period; and the implementing Member must not use the implementation period to conduct studies or to consult experts to demonstrate the consistency of a measure already found to be WTO-inconsistent.

For Panama, the fact that Colombia might need to address the underlying problems of combating customs fraud and contraband, money-laundering, and drug trafficking, was not relevant to determining the reasonable period of time. Panama criticized Colombia for failing to provide the Arbitrator with adequate information on the "proper scope" and "specific content" of its implementing measure. Moreover, Panama argued that Colombia had failed to take any concrete steps towards implementation since the adoption of the Panel Report by the DSB. Panama noted that the implementing Member must commence implementation as from the date of adoption of the recommendations and rulings of the DSB, and that, if the arbitrator perceived that it had not done so, this should be taken into account in determining the reasonable period of time. Furthermore, Panama

---

14 Panama's submission, para. 30 (referring to Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42; and Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48, in turn referring to Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25).

considered that Colombia did not have to undertake a comprehensive reform of its customs control and enforcement regime in order to implement the recommendations and rulings of the DSB.

Panama also recalled that Article 21.3(c) provided a guideline that the reasonable period of time should not exceed 15 months, but arbitrators might depart from such guideline depending on the "particular circumstances" of the case. According to Panama, previous arbitrators had considered the following particular circumstances in determining the reasonable period of time for implementation: whether the means of implementation were administrative or legislative; whether the proposed means of implementation were complex or simple; whether there were legally binding, as opposed to discretionary, component steps for implementation; and whether the Member had enacted similar implementing legislation in the past.

Panama disagreed with Colombia that implementation of the recommendations and rulings of the DSB required both legislative and regulatory action. Panama recalled that only the specific measures found to be inconsistent by the Panel needed to be brought into conformity.[15] Furthermore, Panama contended that Colombia's previous repeal of similar indicative prices and ports of entry measures as a result of a mutually agreed solution with Panama illustrated that the measures at issue in this dispute could be withdrawn or modified almost immediately. Panama disagreed with Colombia that the alleged complexity of the measures relating to Colombia's customs control and customs enforcement constituted a "particular circumstance" that justified a period of implementation of at least 15 months. Panama considered that the measures "in and of themselves"[16] were not complex, and that the process for amending them was not complex. In Panama's view, what might be "complex" was the "contentiousness" of these measures in Colombia.

In the light of the foregoing, Panama requested the arbitrator to determine the reasonable period of time for implementation of the recommendations and

---

15 Panama lists Article 128.5 e) of Decree 2685/1999; Article 172.7 of Resolution 4240/2000; various specific Resolutions establishing indicative prices for certain products; and Resolution 7373/2007, which provides the legal bases for the ports of entry measure. (Panama's submission, para. 64)

16 Panama's submission, para. 92. Panama notes that Article 128.5 e) of Decree 2685/1999 and Article 172.7 of Resolution 4240/2000 each consist of only one paragraph, and Resolution 7373/2007 comprises only two pages.

rulings of the DSB in this dispute to be 4 months and 19 days from the adoption by the DSB of the Panel Report, to expire on 9 October 2009.

Mandate of the arbitrator:

Legal Basis

Article 21.3 of the DSU establishes that, if it is "impracticable" for a Member to comply "immediately" with the recommendations and rulings of the DSB, then that Member "shall have a reasonable period of time in which to do so". The task of the Arbitrator in these proceedings is to determine such reasonable period of time, taking due account of the relevant provisions of the DSU and, specifically, of the following directions set forth in Article 21.3:

... The reasonable period of time shall be:

(c) a period of time determined through binding arbitration .... 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. (footnotes omitted)

Article 21.1 of the DSU provides that "prompt compliance" is essential for the effective resolution of WTO disputes. Furthermore, the introductory paragraph of Article 21.3 indicates that a "reasonable period of time" for implementation shall be available only if "it is impracticable to comply immediately" with the recommendations and rulings of the DSB. The arbitrator pointed out that in *EC – Hormones* that these contextual elements suggest that the "reasonable period of time" within the meaning of Article 21.3 of the DSU "should be the shortest period possible within the legal system of the [implementing] Member."

It is generally accepted that Article 21.3(c) proceedings are limited to determining the "reasonable period of time" for implementation in the underlying WTO dispute. The arbitrator has acknowledged that the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate. Yet, when a Member must comply cannot be determined in isolation from the chosen means of implementation. In order to determine when a Member must comply, it may be necessary to consider how a Member proposes to do so." Thus, in making determination under Article 21.3(c), the means of implementation available to the Member concerned is a relevant consideration. While an implementing Member has discretion in selecting the means of implementation, this discretion is not "an unfettered right to choose any method of implementation". Implementation of the recommendations and rulings of the DSB in the case is an "obligation of result", and therefore the means of implementation chosen must be apt in form, nature, and content to effect compliance, and should otherwise be consistent with the covered agreements.[17] The implementing Member is expected to use whatever flexibility is available within its legal system to promptly implement the recommendations and rulings of the DSB. This is justified by the importance of fulfilling the obligation to comply immediately with the recommendations and rulings of the DSB, which have established that certain measures are inconsistent with a Member's WTO obligations. However, this did not necessarily include recourse to "extraordinary" procedures.[18]

Factors Affecting the Determination of the Reasonable Period of Time under Article 21.3(c) of the DSU

Article 3.7 of the DSU Agreement provides that "the first objective of the dispute settlement mechanism is usually to secure withdrawal" of the WTO-inconsistent measures. Hence, the arbitrator agreed with Panama that withdrawal of the inconsistent measures is the "preferred" means of implementation and

---

17 Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38. See also Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 41; Award of Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48; Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25 (referring to Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49, in turn referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, paras. 41-43; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 32; Award of the Arbitrator, *EC – Tariff Preferences (Article 21.3(c))*, para. 30; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.3(c))*, para. 26; Award of the Arbitrator, *US – Gambling (Article 21.3(c))*, para. 33; and Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 69).

18 Award of the Arbitrator, *US – Stainless Steel (Mexico) (Article 21.3(c))*, para. 42 (referring to Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 48, in turn referring to Award of the Arbitrator, *Japan – DRAMs (Korea)*, para. 25; Award of the Arbitrator, *EC – Chicken Cuts*, para. 49; Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*.

certainly falls within the range of permissible actions. However, the arbitrator notes that Colombia could bring itself into conformity with the recommendations and rulings of the DSB by modifying both the indicative prices mechanism and the ports of entry measure in a manner that rectifies the particular WTO-inconsistencies identified by the Panel. Modification of both the indicative prices mechanism and the ports of entry measure is within the "range of permissible actions" available for Colombia to implement the recommendations and rulings of the DSB in this dispute. The arbitrator draw guidance from the US – *Offset Act (Byrd Amendment)*, that the implementing Member "may choose either to withdraw or modify"[19] the WTO-inconsistent measure in exercising its discretion to select the appropriate means of implementation. In addition, the question of the WTO-consistency of measures eventually taken by Colombia to comply with the recommendations and rulings of the DSB is beyond arbitrator's mandate in these proceedings, and would fall within the purview of Article 21.5 proceedings.

Accordingly, the arbitrator made the determination on the basis of the shortest period of time possible within Colombia's domestic legal system to modify the indicative prices mechanism and the ports of entry measure so as to bring them into conformity with its WTO obligations. In so doing, he followed the guidance of the arbitrator in *Canada – Pharmaceutical Patents* that "the legally binding, as opposed to the discretionary, nature of the component steps leading to implementation should be taken into account"[20], and weighed each of the component steps and timeframes proposed by Colombia accordingly. The Member must "at the very least" promptly take concrete steps towards implementation from the date of adoption of the panel or Appellate Body reports by the DSB.[21]

Since the adoption of the Panel Report, Colombia has established an Inter-Institutional Working Group *(Grupo de Trabajo Interinstitucional)*, composed of representatives of the Ministry of Trade, Industry and Tourism, and of the DIAN, to evaluate how to implement the recommendations and rulings of the DSB. This initiative goes beyond mere "internal discussions", as argued by Panama, insofar as it establishes an institutional framework responsible for proposing and coordinating an administrative plan of action for implementation. Consultations within governmental agencies are typically a concomitant of lawmaking in

---

19 Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 50.

20 Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 51.

21 Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 43. See also Award of the Arbitrator, *US – Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

contemporary polities", and therefore should be taken into account when fixing the reasonable period of time for implementation.

Turning to the legal process necessary to modify the measures found to be inconsistent by the Panel, Colombia has established to the satisfaction that a number of the component steps for implementation seem to be administratively mandated. However, the various regulations brought to the fore by Colombia do not seem to prescribe minimum mandatory timeframes, and when they do, such timeframes are rather short. In addition, some of the steps outlined by Colombia seem duplicative, and many could be pursued in parallel, to the extent that they are not necessarily sequential.

The mere fact that Colombia contemplates a wider reform of its customs securities statutes together with the implementation of the DSB's recommendations and rulings cannot lead to a determination of a longer period of time, insofar as the measures that have to be brought into conformity are the indicative price mechanism and the ports of entry measure. In any event, even assuming that the reform of Colombia's statutory provisions on customs securities is relevant, Colombia explained that such legislative reforms can be enacted within the same timeframe estimated for the completion of the remainder of its regulatory and administrative implementing measures.

In this context, the arbitrator concurred with the statement of the arbitrator in *Canada – Pharmaceutical Patents* that "the determination of a 'reasonable period of time' must be a legal judgement based on an examination of relevant legal requirements"[22] for the enactment of the implementing measures. Colombia's component steps of incorporating its revised measures into its computerized system of customs control and the training of officials in the new system, are merely derivative, or consequential, upon the completion of the legal process necessary to the enactment of the implementing measures, and thus, in my view, do not justify a longer period of time for implementation.

In the light of the proposed means of implementation outlined by Colombia, it seems reasonable to assume that Colombia will have to engage in a certain degree of regulatory rulemaking in order to modify both its customs control system and its ports of entry measure. This action may be more time-consuming than mere administrative decision on the basis of existing rules. According to Colombia

22 Award of the Arbitrator, *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 52.

the only action would entail a legislative process is an amendment to the provisions of its Commercial Code dealing with custom securities. This element of a broader reform of Colombia's customs control system can lead to the assessment of a longer period of time for implementation insofar as the recommendations and rulings of the DSB concern the use of indicative prices for customs valuation purposes and certain restrictions on ports of entry.

Finally, both Colombia and Panama argued that Article 21.2 of the DSU requires arbitrator to take into account their respective status as developing countries in determining the reasonable period of time for implementation. Colombia's developing country status might affect the time within which it can implement the recommendations and rulings of the DSB. However, Article 21.2 of the DSU directs arbitrators acting under Article 21.3(c) to pay "'[p]articular attention' to 'matters affecting the interests' of *both an implementing* and *complaining* developing country Member or Members"[23], given that the scope of this provision is not textually limited to either of these parties. For this reason, in a situation where both the implementing and the complaining Member are developing countries, the requirement provided in Article 21.2 is of little relevance, except if one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party. In this case, neither Colombia nor Panama has demonstrated that the challenges they face as developing countries are relatively more severe than the ones faced by the other party.

Final Award

According to the Arbitrator "Colombia has promptly initiated and already concluded preliminary evaluation steps in the 4 months and 12 days that have lapsed to date since the adoption of the recommendations and rulings of the DSB, and should have started speedily with the regulatory process necessary to modify its WTO-inconsistent measures. In addition, Colombia has sufficient flexibility to modify its indicative prices mechanism and its ports of entry measure, including review of its implementing measures by different organs of its Executive Branch, within a few months. Subsequently, a limited amount of time will be necessary for Colombia to procure the signature of its amending measures by the President, and their subsequent publication in the *Diario Oficial*. Further steps, such as the implementation of the amended measures in Colombia's computerized customs administration system and the training of DIAN officials, for the reasons

---

23 Award of the Arbitrator, *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 99.

stated above, do not justify the assessment of a longer reasonable period of time. On this basis, the Arbitrator determined that the reasonable period of time for Colombia to implement the recommendations and rulings of the DSB is eight months and 15 days from the date of the adoption of the panel report. The reasonable period of time will thus end on 4 February 2010."

At the DSB meeting on 18 February 2010, Colombia said that it had undertaken measures to comply with the DSB recommendations and rulings well in advance of the expiration of the reasonable period of time. On 23 February 2010, Panama and Colombia notified the DSB of Agreed Procedures under Articles 21 and 22 of the DSU.

2. China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS/363/AB/R, Adopted on 21st December, 2009

Appellant: China

Other Appellant: United States

Third Parties: Australia, European Union, Japan, Korea, Taiwan, Penghu, Kinmen and Matsu

Factual Matrix

China and the United States each appealed certain issues of law and legal interpretations developed in the Panel Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products.[24] The Panel was established to consider a complaint by the United States concerning a series of Chinese measures regulating activities relating to the importation and distribution of: reading materials (for example, books, newspapers, periodicals, electronic publications); audiovisual home

[24] WT/DS363/R, 12 August 2009, and WT/DS363/R/Corr.1, 19 August 2009.

entertainment ("AVHE") products (for example, videocassettes, video compact discs, digital video discs ("DVDs")); sound recordings (for example, recorded audio tapes); and films for theatrical release.

On 10 April 2007, the United States requested consultations with China concerning:

- Regarding trading rights, the United States sought consultations on various Chinese measures that reserved, to certain Chinese state-designated and wholly or partially state-owned enterprises, the right to import films for theatrical release, audiovisual home entertainment products, sound recordings and publications;

- Regarding distribution services, the United States sought consultations on various Chinese measures that imposed market access restrictions or discriminatory limitations on Foreign Service providers seeking to engage in the distribution of publications and certain audiovisual home entertainment products.

  The United States claimed that in relation to the two above-mentioned categories of measures possible inconsistencies with the Protocol of Accession, the GATT 1994 or the GATS arose as follows:

- Regarding trading rights, the measures at issue appeared not to allow all Chinese enterprises and all foreign enterprises and individuals the right to import the products into the customs territory of China. It also appeared that foreign individuals and enterprises, including those not invested or registered in China, was accorded treatment less favorable than that accorded to enterprises in China with respect to the right to trade. Accordingly, the measures at issue appeared to be inconsistent with China's obligations under the provisions of paragraphs 5.1 and 5.2 of Part I of the Protocol of Accession, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Protocol of Accession (to the extent that it incorporated commitments in paragraphs 83 and 84 of the Report of the Working Party on the Accession of China). Furthermore, to the extent that the measures at issue imposed prohibitions or restrictions other than duties, taxes or other charges, on the importation into China of the Products, these measures appeared to be inconsistent with China's obligations under Article XI: 1 of the GATT 1994.

- Regarding the measures affecting distribution services for publications, these appeared to accord less favorable treatment to foreign suppliers of distribution services for publications than that accorded to Chinese suppliers. Accordingly, the measures at issue appeared to be inconsistent with China's obligations under Articles XVI and XVII of the GATS. Similarly, the measures affecting distribution services for audiovisual home entertainment products appeared to accord less favorable treatment to foreign suppliers of audiovisual distribution services than that accorded to Chinese suppliers, and to impose restrictions on market access on foreign suppliers of audiovisual distribution services for audiovisual home entertainment products. The measures at issue appeared to be inconsistent with China's obligations under Articles XVI and XVII of the GATS.

On 12 August 2009, the panel report was circulated to Members. With regard to the US claims under China's Accession Protocol, the panel concluded that a number of Chinese measures were inconsistent with China's obligation to grant "trading rights", because such measures restricted the right of enterprises in China, and in some cases foreign enterprises not registered in China and foreign individuals, to import reading materials, films for theatrical release, AVHE products, and sound recordings. At the same time, with regard to some of the measures at issue, the panel did not find that China acted inconsistently with the Protocol. Regarding China's Article XX(a) defence, which concerned reading materials and finished audiovisual products, the panel determined that, because there was at least one other reasonably available alternative, China's measures were not "necessary" within the meaning of Article XX(a). In view of this conclusion, the panel did not rule on whether China's recourse to Article XX (a) was even permissible with respect to the Protocol obligations invoked.

The panel found that Chinese measures prohibiting foreign-invested enterprises from engaging in: (i) the wholesale of imported reading materials, (ii) the master distribution (exclusive sale) of books, periodicals and newspapers and (iii) the master wholesale and wholesale of electronic publications was inconsistent with China's national treatment commitments under Article XVII of the GATS. The panel further found that Chinese measures imposing requirements relating to registered capital and operating terms for the distribution of reading materials was, inconsistent with China's national treatment commitments. In addition, the panel concluded that China's prohibition on foreign-invested enterprises with regard to the supply of sound recording distribution services was inconsistent with China's national treatment commitments. Furthermore, the panel found that Chinese measures limiting commercial presence for the distribution of videocassettes, DVDs, etc. to joint ventures with Chinese majority ownership, and measures limiting the operating term for joint ventures, but not for wholly Chinese-owned enterprises, were inconsistent with China's market access commitments under Article XVI of the GATS or its national treatment commitments under Article XVII.

Regarding reading materials, the panel found that Chinese measures restricted distribution channels for certain imported reading materials by requiring their distribution to be conducted exclusively through subscription, and by Chinese wholly state-owned enterprises, unlike for like domestic reading materials. Similarly, the panel found that Chinese measures limited the distribution of certain imported reading materials (which could be distributed other than through subscription) to wholly Chinese-owned enterprises, while the distribution of like domestic reading materials could be effected by other types of enterprises, including foreign-invested ones. The panel concluded that these measures were inconsistent with China's obligations under Article III: 4 of the GATT 1994. With regard to hard-copy sound recordings intended for electronic distribution (e.g., through the Internet), the United States claimed that Chinese measures discriminated against imported hard-copy sound recordings by subjecting them to more burdensome content review regimes than like domestic products.

The panel concluded, however, that the United States had not demonstrated that the measures were inconsistent with Article III: 4. In respect of films for theatrical release, the United States claimed that China discriminated against imported films by limiting their distribution to two state-owned enterprises, while like domestic products could be distributed by any licensed distributor operating in China, including privately owned ones. The panel found, however, that the United States had not been able to demonstrate that China's regulations and rules established, either de jure or de facto, a duopoly that would prevent other enterprises from applying for, and receiving, a licence to distribute imported films. Accordingly, the panel found no violation in respect of this claim.

On 22 September 2009, China notified its decision to appeal to the Appellate Body certain issues of law covered in the panel report and certain legal interpretations developed by the panel. On 5 October 2009, the United States notified its decision to appeal to the Appellate Body certain issues of law covered in the panel report and certain legal interpretations developed by the panel. Hence the present appeal.

Arguments of the Participants and the Third Participants

Claims of Error by China

China's appeal concerned three aspects of the Panel Report. First, China appealed the Panel's finding that China's trading rights commitments under paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report, which applied only to trade in goods, applied to China's measures concerning films for theatrical release and unfinished audiovisual products[25], which, according to China, regulated services and content. Because, in China's view, these measures were not subject to the trading rights commitments at all, China also sought reversal of the Panel's finding that such measures were inconsistent with China's trading rights commitments. Secondly, China appealed various elements of the Panel's necessity analysis, as well as its ultimate finding that various measures at issue[26] were not "necessary", within the meaning of Article XX (a) of the GATT 1994, to protect public morals in China. Finally, China disputed the Panel's finding that the inscription "Sound recording distribution services" in China's GATS Schedule encompassed the distribution of sound recordings through electronic means and, on that basis, sought reversal of the Panel's consequent finding that various measures[27] regulating such distribution were inconsistent with China's national treatment obligation under Article XVII of the GATS.

1. The Applicability of China's Trading Rights Commitments to Measures Pertaining to Films for Theatrical Release and Unfinished Audiovisual Products

---

[25] Article 30 of the *Film Regulation*; Article 16 of the *Film Enterprise Rule*; Article 5 of the *2001 Audiovisual Products Regulation*; and Article 7 of the *Audiovisual Products Importation Rule*.

[26] Articles X: 2 and X: 3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*: Articles 41 and 42 of the *Publications Regulation*; Article 27 of the *2001 Audiovisual Products Regulation*; Article 8 of the *Audiovisual Products Importation Rule*; and Article 21 of the *Audiovisual (Sub) Distribution Rule*.

[27] Article II of the *Circular on Internet Culture*; Article 8 of the *Network Music Opinions*; Article 4 of the *Several Opinions*; and Article X:7 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*.

(a) Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule

China appealed the Panel's findings that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule were inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report. Specifically, China contended that the Panel erred in determining that China's trading rights commitments, which applied only with respect to trade in goods, were applicable to the Film Regulation and the Film Enterprise Rule because, in China's view, these measures regulated the content of films and the services related to such content. China claimed that, in so finding, the Panel committed errors of law and legal interpretation, and failed to conduct an objective assessment of the facts before it, in violation of Article 11 of the DSU. Because the Panel's findings of inconsistency regarding Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule were based on its erroneous finding that China's trading rights commitments applied to these provisions, China contended that the findings of inconsistency "are equally flawed and in error, and should be reversed".

China maintained that the United States shifted the subject of its claim from "films for theatrical release" to "hard-copy cinematographic films", and that the Panel erroneously accepted this shift as "a mere clarification of the [United States'] claim". In China's view, the Panel committed a legal error in its assessment of the measures at issue when it found that Article 30 of the Film Regulation regulated who may engage in the import of hard-copy cinematographic films. Having acknowledged that the term "film" could be properly understood as referring to content, the Panel erred in not ruling out "hard-copy cinematographic films" as a possible meaning of the term "film" in the Film Regulation and in deriving instead legal inferences based on such meaning. According to China, the language of other provisions of the Film Regulation demonstrated that they were about the regulation of content and the services related to such content, and were not about goods. The plain wording of Articles 1, 2, 5, 24 through 29, and 31 of the Film Regulation indicated that this measure focused on content that could be commercially exploited, rather than on "the material used for the exploitation". In China's view, the Appellate Body had the authority to, and should, examine these other Articles in the Film Regulation in order to determine the meaning and scope of Article 30. The Appellate Body had, in prior disputes, found that the assessment of the WTO-consistency of municipal law is a process of legal characterization, and thus an issue of law subject to appellate review under

Article 17.6 of the DSU. Moreover, China highlighted that it had, in any event, claimed that the Panel failed to conduct an objective assessment of the facts, in violation of Article 11 of the DSU, when it examined China's measures concerning films for theatrical release.

China took issue with the Panel's finding that Article 30 "would necessarily affect" who may import goods also because, according to China, the Panel failed to establish how the measures at issue affected the importation of hard-copy cinematographic films. According to China, the import restrictions imposed by the measures at issue related only to the intangible content—the motion picture, as distinct from the cinematographic film that is the physical carrier of such motion picture. Consequently, the measures did not have any direct legal effect of restricting the importation of hard-copy cinematographic films. The right to import granted under the measures refers exclusively to the right to import content in the form of licensing agreements for the distribution of such content within China. Thus, the fact that the measures "may have an incidental, practical effect on hard-copy cinematographic film", which is the carrier of the content regulated by the measures, does not support the Panel's finding that Article 30 would necessarily affect who may engage in the importation of hard-copy cinematographic films. In the present dispute, cinematographic films were imported "simultaneously, physically in conjunction with the right to provide the service in question". Therefore, there was "no restriction on the carrier independently from that applicable to the service" and the demand for the service is with respect to the content, not with respect to any good carrying such content.

Finally, China alleged that the Panel's finding that the measures at issue necessarily affected the importation of goods undermined China's legitimate rights. China recalled that its legitimate right to conduct content review of imported cultural products, including films for theatrical release, was neither challenged by the United States nor questioned by the Panel. China provided the following example to illustrate that its right to conduct content review would be undermined as a result of the Panel's finding. If the content of a film failed to pass the content review and the film could not be imported for release in China, the Panel's logic necessarily implied that China would be found to be in violation of its obligations concerning trade in goods, because the hard-copy cinematographic film, in which the content was embedded, also could not be imported. In this way, China argued, its legitimate right to conduct content review would be "seriously undermined". China added that its right to conduct content review with respect to films was clearly retained by virtue of its GATS Schedule, in which China had expressly reserved its right to regulate the importation of motion pictures for theatrical release. China reiterated that its measures on films for theatrical release regulated content and serviced, and any effect on goods were merely "incidental" and "practical". Thus, China maintained that the Panel's error lay in its failure to recognize that applying WTO rules concerning goods to measures that regulate services, "on the basis of a mere practical [and] incidental effect" of the measures on goods, "would lead to absurd results".

For the above reasons, China requested the Appellate Body to reverse the Panel's findings that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule "are subject to China's trading rights commitments, in that they would either directly regulate who may engage in importing of 'hard-copy cinematographic films' or necessarily affect who may engage in importing of such goods." China also requested the Appellate Body to reverse the Panel's consequent findings that these provisions are inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.

The United States requested the Appellate Body to uphold the Panel's findings that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are subject to China's trading rights commitments under paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report. According to the United States, the Panel properly found that these provisions of the Chinese measures relating to films for theatrical release "either directly regulate who may engage in importing of 'hard-copy cinematographic films' or necessarily affect who may engage in importing of such goods."

The United States maintained that China's arguments on appeal "are premised on an artificial dichotomy between film as mere content (which China contends is not a good) and the physical carrier on which content may be embedded (which China views as a good)." However, the United States emphasized that its claim in this dispute concerned measures regulating the importation of an integrated product—a film for theatrical release—which consisted of a carrier medium containing content. The United States argued that, contrary to China's assertion that the United States shifted the focus of its claim from "films for theatrical release" to "hard-copy cinematographic films", the good subject to the United States' claim—hard-copy cinematographic film used for projecting motion pictures—had always been a tangible good.

In addition, the United States emphasized that heading 3706 in both the Harmonized Commodity Description and Coding System of the World Customs Organization (the "Harmonized System") and China's Schedule of Concessions for goods[28] read "Cinematographic film, exposed and developed, whether or not incorporating sound track or consisting only of sound track". Moreover, the Explanatory Notes[29] accompanying the Harmonized System heading provided that "this heading covers ... cinematographic film for the projection of motion pictures", which confirmed that cinematographic films are considered goods even if they are used to provide a service.

The United States recalled that, as the Panel correctly found, the mere fact that the import transaction involving hard-copy cinematographic films might not be the "'essential feature' of the exploitation of the relevant film" did not preclude the application of China's trading rights commitments to the *Film Regulation*. A film for theatrical release was a good even if its commercial value resided primarily in its utility in the supply of film projection services. In any event, a measure restricting who may import a good would be subject to China's trading rights commitments in respect of goods. Furthermore, the United States highlighted China's statement that "hard-copy cinematographic film is imported ... simultaneously, physically in conjunction with the right to provide the service in question", and argued that China conceded in this statement that films for theatrical release were goods.

(b) Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule

China asserted that the Panel erred in finding that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*, which concerned unfinished audiovisual products[30] imported for publication, were inconsistent with China's obligation under paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report to grant in a non-discretionary manner the right to trade. China sought to have these

---

28 WT/ACC/CHN/49/Add.1.

29 Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. VI-3706-1 (Panel Exhibit US-53).

30 The United States explained that unfinished audiovisual products refer to master copies to be used to publish and manufacture copies for sale in China. The Panel referred to "unfinished audiovisual products" as master copies imported for publication.

findings reversed on the specific ground that the Panel erred in finding that China's obligation to grant in a non-discretionary manner the right to trade applied to such measures.

China maintained that, like Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, Article 5 of the *Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* did not regulate the importation of goods but, rather, regulated the service of copyright licensing for the publication of audiovisual content. China argued that, to the extent that the Panel's findings were based on the same reasoning as that on which the Panel based its findings concerning Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule*, the Panel committed the same errors of law in its findings that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* were inconsistent with paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report.

The United States underlined that, as the Panel also noted, unfinished audiovisual products were classified under both the 2007 Harmonized System[31] and China's own Schedule of Concessions for goods.[32] This supported the Panel's finding that unfinished audiovisual products were goods. The Panel rightly found that Article 5 of the *2001 Audiovisual Products Regulation* "would necessarily affect who might engage in importing of hard-copy master copies, because only licensed importers could engage in importing of audiovisual content on master copies." The United States also supported the Panel's rejection of China's argument that measures restricting who might import unfinished audiovisual products should not be subject to goods disciplines simply because such products were, in China's view, accessories to services.

1. The "Necessity" Test under Article XX (a) of the GATT 1994

China requested the Appellate Body to reverse the Panel's findings that several of the Chinese measures at issue in this dispute[33] were not "necessary", within the meaning of Article XX (a) of the GATT 1994, to protect public morals, and that

---

31 Harmonized Commodity Description and Coding System, Explanatory Notes, 4th edn. (WCO, 2007), p. XVI-8523-1 (Panel Exhibit US-55).

32 WT/ACC/CHN/49/Add.1.

33 Articles X: 2 and X: 3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4

they therefore could not be justified under that provision. China pointed out that cultural goods and services had a very specific nature "[a]s vectors of identity, values and meaning, in that they did not merely satisfy a commercial need, but also played a crucial role in influencing and defining the features of society. Noting that this specificity of cultural goods had been affirmed by the UNESCO Universal Declaration on Cultural Diversity and by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, China requested the Appellate Body to be "mindful" in the present appeal of the specific nature of cultural goods. China requested the Appellate Body to reverse the Panel's finding that the requirement in Article 42(2) of the Publications Regulation that publication import entities be wholly State-owned (the "State-ownership requirement") were not "necessary to protect public morals" in China within the meaning of Article XX(a) of the GATT 1994.

China requested the Appellate Body to reverse the Panel's finding that the provisions excluding foreign-invested enterprises from importing the relevant products were not "necessary" to protect public morals in China within the meaning of Article XX (a) of the GATT 1994. China alleged that the Panel erred in finding that the provisions excluding foreign-invested enterprises from importing the relevant goods into China[34] made no material contribution to the protection of public morals in China. The Panel relied on its earlier finding with respect to the State-ownership requirement to conclude that the provisions excluding foreign-invested enterprises from importing did not contribute to the protection of public morals in China. According to China, because the Panel's finding concerning the State ownership requirement was erroneous, "[b]y necessary implication" the Panel's finding with respect to the provisions excluding foreign-invested enterprises from importing was also in error.

China requested the Appellate Body to reverse the Panel's finding that at least one of the alternative measures referred to by the United States was an alternative "reasonably available" to China. In particular, China submitted that the proposed alternative that the Chinese Government be given sole responsibility for conducting

---

of the *Several Opinions*; Articles 41 and 42 of the *Publications Regulation*; Article 27 of the *2001 Audiovisual Products Regulation*; Article 8 of the *Audiovisual Products Importation Rule*; and Article 21 of the *Audiovisual (Sub) Distribution Rule*.

[34] Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; and Article 21 of the *Audiovisual (Sub)Distribution Rule*.

content review was not "reasonably available" because it was merely theoretical in nature and would impose an undue and excessive burden on China. China alleged that the Panel erred in law and failed to properly address arguments presented by China demonstrating that the proposed alternative was not "reasonably available".

Should the Appellate Body find that China's measures were "necessary" under Article XX (a) of the GATT 1994, China requested the Appellate Body to complete the analysis and find that the measures complied with the requirements of the chapeau of Article XX and that Article XX (a) is available as a defence to a violation of China's trading rights commitments under its Accession Protocol. China referred, in this regard, to the arguments that it made before the Panel demonstrating that: the other "alternatives" proposed by the United States was not "genuine" and not "reasonably available". China's measures complied with the requirements of the chapeau and were thus justified under Article XX (a) of the GATT 1994; and Article XX (a) was available as a defence to the claim that China had acted inconsistently with its trading rights commitments under its Accession Protocol.

According to the United States, the Panel correctly found that none of the measures that it had determined to be inconsistent with China's trading rights commitments were "necessary" to protect public morals within the meaning of Article XX (a) of the GATT 1994. The United States observed that the Panel analyzed the necessity of the measures at issue by assuming, without deciding, that Article XX (a) of the GATT 1994 could be invoked as a defence to an inconsistency with China's obligation to grant the right to trade. At the oral hearing in this appeal, the United States urged the Appellate Body to review the Panel's findings under Article XX(a) using the same *arguendo* approach, and likewise to refrain from deciding whether Article XX(a) was available as a defence to a violation of China's obligation to grant the right to trade.

The United States requested the Appellate Body to reject China's appeal of the Panel's finding that the State-ownership requirement did not make a material contribution to the protection of public morals in China. The United States maintained that the Panel properly considered China's arguments with respect to the State-ownership requirement and correctly concluded that this requirement did not make a material contribution to the protection of public morals in China. The United States disagreed with China that the Panel's findings concerning the exclusion of foreign-invested enterprises from importing were "by necessary implication" in error because the Panel relied on its finding with respect to the State-ownership requirement to conclude that the provisions excluding foreign-invested enterprises from importing did not contribute to the protection of public morals in China. Rather, according to the United States, because the Panel's analysis and finding set out in relation to the State-ownership requirement were correct, and since the Panel's reasoning was based on a necessary implication from that finding, the Panel's analysis of China's measures excluding foreign-invested enterprises was also correct.

The United States submitted that the Panel was correct, in assessing the trade restrictiveness of the measures at issue under Article XX (a) of the GATT 1994, to consider not only the restrictive impact of the measures on imports, but also their restrictive impact on "those wishing to engage in importing".

The Scope of China's GATS Schedule Entry on "Sound Recording Distribution Services

China requested the Appellate Body to reverse the Panel's findings that a number of provisions of China's measures were inconsistent with Article XVII of the GATS.[35] China appealed these findings particularly on the grounds that the Panel erred in interpreting the commitment on "Sound recording distribution services" inscribed in China's GATS Schedule as encompassing the distribution of sound recordings through electronic means. China claimed that, in interpreting this entry in China's GATS Schedule, the Panel erred in its application of both Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[36] In China's view, "the only possible outcome which the Panel could have reasonably reached after applying the rules on treaty interpretation [was] that such analysis was largely inconclusive." China considered that, as a consequence, the Panel also erred and acted contrary to Article 3.2 of the DSU in failing to apply the *in dubio mitius* principle and not adopting an interpretation that was less onerous to China.[37]

---

35 Article II of the *Circular on Internet Culture*; Article 8 of the *Network Music Opinions*; Article 4 of the *Several Opinions*; and Article X:7 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*.

36 Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

37 As a preliminary matter, China observed that it would, for purposes of this appeal, adopt the terminology used by the United States and the Panel and refer to the distribution of sound recordings by electronic means as "the services at issue". China stressed, however, that this is without prejudice to its view, as expressed throughout the Panel proceedings, that the services at issue constituted new and distinct services, "network music services",

The United States requested the Appellate Body to uphold the Panel's finding that China's commitment on "Sound recording distribution services" in sector 2.D of its GATS Schedule included the electronic distribution of sound recordings. This finding led the Panel to hold that the relevant measures[38] were inconsistent with Article XVII of the GATS "as each prohibited foreign-invested enterprises, including service suppliers of other Members, from engaging in the electronic distribution of sound recordings, while like domestic service suppliers were not similarly prohibited." According to the United States, China had presented little argumentation as to why the Panel's interpretation of China's GATS Schedule was inconsistent with the standard of treaty interpretation set forth in the *Vienna Convention*, or why China's preferred interpretation should be accepted. The United States disagreed with China that, at each step of the Panel's interpretative analysis, the Panel should have found the relevant element of interpretation to be "inconclusive". For the United States, China's criticism of the Panel's analysis "misses the mark"; insofar as it ignores that the Panel conducted a comprehensive examination of all relevant elements under Articles 31 and 32 of the *Vienna Convention*, rather than determining that any single element of its analysis in isolation was conclusive.

In Dubio Mitius

Finally, China claimed that the Panel should have found that the application of both Articles 31 and 32 of the *Vienna Convention* left the issue of whether China's GATS commitment on "Sound recording distribution services" included the distribution of sound recordings by electronic means "largely inconclusive". When confronted with such a high level of ambiguity, the Panel should have applied the *in dubio mitius* principle and refrained from adopting the interpretation that was the least favourable to China. According to this principle, if the meaning of a term is ambiguous, the meaning to be preferred is the one that is less burdensome to the party assuming an obligation, or the one that interfered the least with a

---

rather than, as the United States argued, merely a new technological means to deliver sound recording services.

38 Article II of the *Circular on Internet Culture*; Article 8 of the *Network Music Opinions*; Article 4 of the *Several Opinions*; and Article X:7 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*.

party's territorial supremacy, or involves less general restrictions upon the parties.[39] In China's view, this case presented a clear ground for the Panel to apply the *in dubio mitius* principle and, in failing to do so, the Panel failed to apply properly the customary rules of treaty interpretation and acted inconsistently with Article 3.2 of the DSU.

The United States characterized China's claim that the Panel should have applied the principle of *in dubio mitius* as "without merit". The Panel correctly interpreted the meaning of the entry "Sound recording distribution services" in China's GATS Schedule as encompassing the electronic distribution of sound recordings on the basis of Article 31 of the *Vienna Convention*, and then confirmed this interpretation by resorting to supplementary means of interpretation under Article 32 of the *Vienna Convention*. For these reasons, the United States considered that there was no basis for applying the *in dubio mitius* principle in this dispute.

Claims of Error by the United States – Other Appellant

The United States requested the Appellate Body to reverse the Panel's intermediate finding that the requirement, in Article 42 of the *Publications Regulation*, that the approval of publication import entities conformed to China's State plan for the total number, structure, and distribution of publication import entities (the "State plan requirement") could be characterized as "necessary", in the absence of reasonably available alternatives, to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. Alternatively, if the Appellate Body upheld the Panel's findings on the proposed alternative measure that the Panel found to be reasonably available to China, then, rather than reversing the Panel, the United States suggested that the Appellate Body could simply declare the Panel's intermediate finding moot and of no legal effect.

The United States expressed "some concerns" about the analytical approach taken by the Panel in its analysis of the "necessity" of the State plan requirement. The United States considered that the Panel took a "two-step" approach in its analysis under Article XX(a) of the GATT 1994, examining, first, whether China had made a *prima facie* case that the measures at issue were "necessary" within the

---

[39] China recalls that, in *EC – Hormones*, the Appellate Body found that the "principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of States". (China's appellant's submission, para. 195 (quoting Appellate Body Report, *EC – Hormones*, footnote 154 to para. 165))

meaning of Article XX(a), and examining only subsequently whether reasonably available and WTO-consistent alternatives had been identified.

As for the substance of the intermediate finding made by the Panel, the United States was of the view that the Panel erred in finding that, in the absence of reasonably available alternatives; the State plan requirement could be characterized as "necessary" to protect public morals in China. The United States disputed, in particular, that the State plan requirement made a material contribution to the protection of public morals in China. Referring to the Appellate Body reports in *US – Gambling* and *Korea – Various Measures on Beef*, the United States maintained that the State plan requirement was *not* significantly closer to the pole of "indispensable" than to the opposite pole of "simply making a contribution".[40]

The United States highlighted multiple problems with the Panel's analysis of the State plan requirement. First, the Panel did not actually examine the State plan, because China did not submit the State plan, nor did it provide any information about the content of the State plan, or any past or future plan. The absence of information about the content of the State plan meant that the Panel was precluded from assessing the actual State plan and its impact, and was reduced to speaking in generalities.

Secondly, the United States contended that, because China did not provide the requested information, the Panel could not know what China meant when it asserted that there was a "limited number" of publication import entities, nor what rationale was used to justify such limit. Thirdly, the United States submitted that the Panel failed to recognize the contradiction between the requirement that publication import entities had branches in a large number of customs areas and the rationale given for limiting the number of importing entities.

Fourthly, the United States contended that the Panel did not properly take into account the role of the GAPP in content review. The Panel stated that a limitation on the number of publication import entities would allow the GAPP to devote more time to conduct its annual *ex post* controls of publication import entities' compliance with content review requirements. In the absence of information regarding the nature of these annual inspections, however, it is,

---

[40] United States' other appellant's submission, paras. 28 and 29 (referring to Panel Report, para. 7.785; Appellate Body Report, *US – Gambling*, para. 310; and Appellate Body Report, *Korea – Various Measures on Beef*.

according to the United States, impossible to assess how much of an additional burden—if any—would be caused by an increase in the number of importing entities. Finally, in addition to the fact that the Panel could not have assessed such restrictive impact in the absence of specific information on the State plan, the Panel's statement that this requirement did not *a priori* exclude particular types of enterprises in China from establishing an import entity was unclear. The State plan requirement might not exclude particular types of enterprises from establishing an import entity, but it nevertheless is intended to limit the number of publication import entities and thereby constituted a restriction.

For these reasons, the United States considered that there were "significant flaws" in the Panel's analysis of the State plan requirement, and that the Panel misinterpreted and misapplied Article XX (a) of the GATT 1994 in reaching its findings regarding the "necessity" of this requirement. The United States claimed, in the alternative, that, if the Appellate Body were to find that the Panel's analysis concerning the State plan requirement did not constitute a misinterpretation and misapplication of Article XX(a) of the GATT 1994, then the Panel's disregard of significant facts relating to this requirement, including the fact that it did not know the content of the State plan, constituted an error in the appreciation of the evidence because the Panel made a finding that had no evidentiary basis in the record, and was therefore inconsistent with Article 11 of the DSU.

China contended that the Appellate Body should dismiss the United States' "concerns" about the analytical approach taken by the Panel in its Article XX (a) analysis. China also requested the Appellate Body to dismiss the United States' other appeal and to uphold the Panel's finding that the State plan requirement made a material contribution to the protection of public morals in China.

With respect to the "two-step" analytical approach allegedly adopted by the Panel in its "necessity" analysis under Article XX (a) of the GATT 1994, China submitted that the United States' contention appeared to be based on an inaccurate representation of previous Appellate Body findings. China pointed out that the United States' reference to a statement in the Appellate Body report in US – *Gambling* was incomplete. When read in its entirety, it was clear that in *US – Gambling* the Appellate Body set out an approach of logical sequencing between the various tests to be performed as part of the "necessity" test. On substance, China submitted that the Panel was correct in finding that, in the absence of reasonably available alternatives, the State plan requirement could be characterized as "necessary" to protect public morals in China.

China characterized as "irrelevant" and "wrong "the United States' comparison of the respective numbers of domestic publication entities and approved publication import entities, and its related efforts to explain that content review for imported publications could be performed in a manner similar to that for domestic publications.

Arguments of the Third Participants

Australia submitted that the Appellate Body should reverse or modify the Panel's finding that China's Accession Protocol commitments relating to trade in goods were applicable to the measures concerning films for theatrical release and unfinished audiovisual products. Australia considered that the Panel erred in finding that China's trading rights commitments applied to the measures concerning films for theatrical release and unfinished audiovisual products.[41]

The European Communities submitted that Article XX (a) of the GATT 1994 might be indirectly applicable to China's obligation under paragraph 5.1 of China's Accession Protocol to grant the right to trade, and contended that the Panel erred in law by examining China's Article XX (a) defence on an *arguendo* basis. The European Communities submitted that Article XX (a) of the GATT 1994 did not directly apply to China's Accession Protocol because exceptions might be invoked only within the specific agreement in which they were contained, and accession protocol commitments are not part of the GATT 1994. With respect to the analysis of the "necessity" of the State-ownership requirement, the European Communities did not believe that the Panel misrepresented China's arguments, erred in law, or failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU.

With regard to China's trading rights commitments, Japan submitted that the Appellate Body should uphold the Panel's findings with regard to the measures relating to films for theatrical release and unfinished audiovisual products. Japan urged the Appellate Body to reverse the Panel's finding that, in the absence of reasonably available alternatives, the State plan requirement was "necessary" to protect public morals in China, but to otherwise uphold the Panel's conclusions in

---

41 These measures are, with regard to films for theatrical release, Articles 5 and 30 of the *Film Regulation* and Articles 3 and 16 of the *Film Enterprise Rule*, and with regard to unfinished audiovisual products, Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule*.

respect of Article XX (a) of the GATT 1994. Finally, Japan urged the Appellate Body to uphold the Panel's interpretation of China's GATS Schedule entry "Sound recording distribution services" as including the distribution of sound recordings in electronic form.

Korea submitted that the Panel's analysis of China's defence of the State plan requirement under Article XX(a) of the GATT 1994 might constitute legal error, but that the Panel's interpretation of China's GATS Schedule entry "Sound recording distribution services" should be upheld by the Appellate Body. Korea also noted that some of the issues raised in this appeal appeared to be a re-discussion of factual, rather than legal, issues. Korea cautioned that the parties should not be given a second chance to discuss the facts, but added that the Appellate Body should closely scrutinize the Panel's findings so as to determine whether the Panel complied with its duties under Article 11 of the DSU.

Issues Raised in This Appeal

The following issues were raised in this appeal:

(a) Whether the Panel erred in finding that China's measures pertaining to films for theatrical release and unfinished audiovisual products were subject to China's trading rights commitments and, more specifically:

(i) whether the Panel erred in finding that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule were subject to China's trading rights commitments as set out in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report, and whether, in making this finding, the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU;

(ii) whether the Panel erred in finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule were subject to China's obligation to grant in a non discretionary manner the right to trade, as set out in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, and whether, in making this finding, the Panel failed to make an objective assessment of the facts, in violation of Article 11 of the DSU;

(b) Whether, by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, Article XX(a) of the GATT 1994 may be invoked by China in this dispute as a defence to the violations of its trading rights commitments; and whether, in finding that China had not demonstrated that the provisions[42] that China sought to justify under Article XX(a) of the GATT 1994 were "necessary" to protect public morals:

The Panel erred in law, or failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU, in its analysis of the contribution to the protection of public morals in China made by:

- the requirement in Article 42 of the Publications Regulation that publication import entities be wholly State-owned enterprises;

- the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products[43]; and

- the State plan requirement in Article 42 of the Publications Regulation;

(i) the Panel erred in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing; and

(ii) the Panel erred in finding that there was a less-restrictive alternative measure "reasonably available" to China, and whether, in making this finding, the Panel failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU;

Whether the Appellate Body could complete the analysis under Article XX(a) and the chapeau of Article XX should it find that the

---

42 Articles X: 2 and X: 3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; Article 41, and Article 42 in conjunction with Article 41, of the *Publications Regulation*; Article 27 of the *2001 Audiovisual Products Regulation*; Article 8 of the *Audiovisual Products Importation Rule*; and Article 21 of the *Audiovisual (Sub) Distribution Rule*.

43 Such exclusion is set out in the following provisions: Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; and Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

Panel erred in its analysis of the "necessity" of China's measures to protect public morals, within the meaning of Article XX(a) of the GATT 1994; and

(c) Whether the Panel erred in finding that the entry "Sound recording distribution services" in sector 2.D of China's GATS Schedule extended to the distribution of sound recordings in non-physical form, notably through electronic means, and in finding, as a consequence, that the provisions[44] prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form were inconsistent with Article XVII of the GATS.

Appellate Body noted that each good or service at issue in this dispute and its related importation and distribution activities were regulated by several of China's measures. The relevant provisions of three measures examined by the Panel—that is, China's foreign investment regulations (the *Foreign Investment Regulation*, the *Catalogue*, and the *Several Opinions*)—applied to all of the goods and services at issue in this dispute, whereas the remaining measures contained provisions that apply to only one such category of goods and services. They also noted that, in respect of 15 of the challenged measures, the Panel found one or several violations of China's WTO obligations in respect of: (i) trading rights under China's Accession Protocol and Working Party Report; (ii) services under Articles XVI and XVII of the GATS; and/or (iii) goods under Article III:4 of the GATT 1994.[45]

The Appellate Body found that the Panel did not commit the errors alleged by China in concluding that Article 30 of the Film Regulation, which allowed "only ... designated film import entities ... to be engaged in the business or activity of importing relevant contents", was subject to China's trading rights commitments

---

44 Article II of the *Circular on Internet Culture*; Article 8 of the *Network Music Opinions*; Article 4 of the *Several Opinions*; and Article X:7 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*.

45 The Panel found that the *Film Distribution and Exhibition Rule* was outside the Panel's terms of reference in respect of claims concerning China's trading rights commitments, and that the United States had not otherwise established a violation of China's WTO obligations in respect of the *Film Distribution and Exhibition Rule* and the *Internet Culture Rule*.

because it necessarily affected who might engage in importing hard-copy cinematographic film carrying relevant content (a good). Because the reasons that led the Panel to conclude that Article 30 of the Film Regulation was subject to China's trading rights commitments also applied, mutatis mutandis, to Article 16 of the Film Enterprise Rule, the Appellate Body also found that the Panel did not commit any error in finding that Article 16 of the Film Enterprise Rule was subject to China's trading rights commitments under paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.

Consequently, the Appellate Body found that the Panel did not err in finding that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule were subject to China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report. They therefore upheld the Panel's conclusions, in paragraph 8.1.2(c)(ii), (iii), (vi), and (vii) of the Panel Report, that these provisions were inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report.

The Appellate Body also found that the Panel did not err in finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule were subject to China's obligation, under paragraph 1.2 of its Accession Protocol and paragraph 84(b) of its Accession Working Party Report, to grant the right to trade to foreign-invested enterprises in a non-discretionary manner.

On this basis, the Appellate Body found that the Panel did not err, in paragraphs 7.652 and 7.674 of the Panel Report, in finding that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule were subject to China's obligation, in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade. The Appellate Body upheld the Panel's conclusions, in paragraph 8.1.2(d)(i) and (v) of the Panel Report, that these provisions were inconsistent with China's obligation, in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade.

The Appellate Body then turned to the Panel's analysis of China's defence under Article XX(a) of the GATT 1994. They might observe that reliance upon an assumption *arguendo* was a legal technique that an adjudicator might use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body might choose to employ this technique in particular circumstances, it might not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique might also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law.[46] In doing so, panels and the Appellate Body were not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[47]

In this case, China asserted that the introductory clause of paragraph 5.1 of its Accession Protocol allowed it to justify the provisions of its measures found to be inconsistent with its trading rights commitments as necessary to protect public morals in China within the meaning of Article XX (a) of the GATT 1994. The Panel did not decide whether paragraph 5.1 gave China access to this defence. Instead, the Panel proceeded on the *assumption* that such a defence was available. Yet, if China cannot rely on Article XX (a) to defend its measures as ones that protect public morals in China, the findings of inconsistency with China's trading rights commitments would be the end of the matter and any analysis of the measures under Article XX (a) would be unnecessary. Moreover, certain elements

[46] Article 3.2 of the DSU

[47] Article 11 of the DSU... not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In our view, *if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, it makes sense to consider how much these measures restrict the right to import*.

of the Panel's reasoning under Article XX(a), notably its analysis of the appropriate restrictive effect to be taken into account, depended, at least to some extent, on the availability of Article XX(a) as a defence to a violation of China's trading rights commitments.[48]

Thus, these parts of the Panel's analysis rest upon an uncertain foundation as a result of the absence of a ruling on the applicability of Article XX (a) in this case. In addition, the absence of clarity on the issue of whether China may rely on Article XX (a) as a defence to a violation of paragraph 5.1 of its Accession Protocol may leave the participants uncertain as to the regulatory scope that China enjoys in implementation and as to whether any implementing measure is, in fact, consistent with China's WTO obligations or susceptible to further challenge in proceedings under Article 21.5 of the DSU.[49]

The Appellate Body observed that, assuming *arguendo* that China can invoke Article XX(a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risked creating uncertainty with respect to China's implementation obligations. They noted that the question of whether the introductory clause of paragraph 5.1 allowed China to assert a defence under Article XX (a) was an issue of legal interpretation falling within the scope of Article 17.6 of the DSU. For these reasons, the Appellate Body decided to examine this issue themselves.

The first two sentences of paragraph 5.1 of China's Accession Protocol provide:

> Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively

---

48 In its analysis of the "restrictive impact" of the inconsistent measures, the Panel found it "appropriate", in this case, "to consider two different types of restrictive impact":

> ... not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade. In our view, *if Article XX is assumed to be a direct defence for measures in breach of trading rights commitments, it makes sense to consider how much these measures restrict the right to import.*

49 The European Communities expresses similar concerns regarding the uncertainty that may result absent a ruling on the applicability of Article XX (a) in the circumstances of this case.

> liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods.

Looking first to the overall structure of the first sentence of paragraph 5.1, the Appellate Body noted that the sentence contained a commitment, or obligation, undertaken by China, namely, to progressively liberalize the right to trade and ensure that, within three years of accession, all enterprises in China have the right to import and export all goods.[50] This obligation is, however, qualified by the introductory clause of the first sentence: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement". An obligation that is "without prejudice to" a right may not detrimentally affect, encroach upon, or impair such right.[51] In the introductory clause of paragraph 5.1, the "right" that may not be impaired is "China's right to regulate trade". This right is itself

---

50 Paragraph 5.1 provides that China's obligation to grant the right to import and export all goods does not apply to the specific goods listed in Annex 2A to China's Accession Protocol, the import and export of which may be reserved to State trading enterprises in accordance with that Annex. Thus, Annex 2A carves out certain goods from the scope of China's obligation to grant the right to trade. For all goods not listed in Annex 2A, including all of the goods at issue in this dispute, China is subject to an obligation to grant all enterprises in China the right to import and export such goods, irrespective of the meaning and scope of "China's right to regulate trade in a manner consistent with the WTO Agreement". The question of the meaning and operation of the introductory clause to paragraph 5.1—"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"—is distinct from the question of whether China has acted inconsistently with the obligation set out in the first sentence of paragraph 5.1. Thus, Appellate Body did not agree with the argument made by the United States to the Panel that accepting that China's "right to regulate trade" may justify certain restrictions on trading rights would, in effect, permit China to add new goods to the Annex 2A list.

51 The Panel referred to the following dictionary definitions of "without prejudice to": "without detriment to any existing right or claim; *spec*. in LAW, without damage to one's own rights or claims" (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2324); and "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party" (*Black's Law Dictionary*, 7th edn., B.A. Garner (ed.) (West Group, 1999), p. 1596).

further qualified by the phrase "in a manner consistent with the WTO Agreement". The Appellate Body examined the content of each of these phrases in turn.

In the abstract, "rights" may encompass both entitlements or powers, and immunities or protected interests.[52] Within the first sentence of paragraph 5.1, the word "right" is used twice. In the introductory clause, China is identified as enjoying a "right" to regulate trade. Subsequently, China is identified as being subject to an obligation to grant the "right" to trade. The first time the word "right" is used, it seems to us to refer to an *authority*, or *power* that China enjoys, whereas the second time the word is used, it refers to a legal entitlement that China is under an obligation to *grant* to all enterprises in China.[53] The next component of the phrase "China's right to regulate trade" is the verb "regulate". As noted by the Panel, to "regulate" means to "[c]ontrol, govern, or direct by rule or regulations; subject to guidance or restrictions". As for the word "trade", it is used as a noun in the phrase "China's right to regulate trade"[54], and seems to refer, generally, to commerce between nations.[55]

Thus, the analysis so far suggests that the phrase "China's right to regulate trade" is a reference to China's power to subject international commerce to regulation. As explained above, this power may not be impaired by China's

---

52 Among the definitions of "right" are: "[e]ntitlement or justifiable claim ... to act in a certain way", and "[a] legal, equitable, or moral title or claim to the possession of ... authority, the enjoyment of privileges or immunities, etc." (*Shorter Oxford English Dictionary*, 5th edn. W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2583.); as well as "a recognized and protected interest the violation of which is a wrong" (*Black's Law Dictionary*, 7th edn., B.A. Garner (ed.) (West Group, 1999), p. 1322).

53 Thus, the direct beneficiaries of China's obligation to grant the "right to trade" in paragraph 5.1 are not other WTO Members, as such, but rather, enterprises in China.

54 As a noun, trade is defined as: "[b]uying and selling or exchange of commodities for profit, *spec*. between nations; commerce, trading ..." (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A.Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p 3316)

55 The word "trade" is used three times in the first sentence of paragraph 5.1. The first time is as a noun in "China's right to regulate trade". The second and third times, it is used as a verb in the phrase "right to trade". Paragraph 5.1 expressly defines "the right to trade" as "the right to import and export goods", which in turn suggests that, in the phrase "the right to trade", the verb "trade" means "import and export". Such meaning is consistent with, but narrower in scope than, the dictionary definition of the verb trade: "[e]ngage in trade or commerce, pursue trade". (*Shorter Oxford English Dictionary*, 5th edn., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3316)

obligation to grant the right to trade, *provided that* China regulates trade "in a manner consistent with the WTO Agreement". The introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments.[56] Rather, whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand. The Appellate Body noted that the provisions that China sought to justify had a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, it was held that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX (a) of the GATT 1994. Successful justification of these provisions, however, requires China

[56] In this dispute, the United States challenged a variety of provisions within various Chinese measures as inconsistent with paragraph 5.1 of China's Accession Protocol. All of the provisions challenged by the United States regulate the right to import the products at issue into China. The United States did not raise claims under any other provisions of the covered agreements, notably under Article III: 4 or Article XI:1 of the GATT 1994, with respect to these provisions. As explained, *supra*, in paragraphs and, the United States did, however, raise a number of claims under Article III:4 in respect of the *distribution* of the relevant products. With respect to one provision—Article 16 of the *Film Enterprise Rule*—the United States raised claims that China had acted inconsistently with *both* Article III:4 of the GATT 1994 and its trading rights commitments. That provision relates to *both* the *importation* of films for theatrical release, in its first sentence, and the *distribution* of films for theatrical release, in its second sentence. Ultimately, the Panel found that the United States had not made out its claim under Article III:4 of the GATT 1994 regarding films for theatrical release. The United States further claimed that the provisions relating to the *distribution* of the relevant products that it alleged to be inconsistent with Article III:4 were also inconsistent with China's obligations under the *third* sentence of paragraph 5.1 of China's Accession Protocol, which refers to China's obligation to accord to imported goods national treatment under Article III of the GATT 1994, especially paragraph 4 thereof. In respect of such claims, the Panel either exercised judicial economy or found that the United States had not made out its claim.

to have demonstrated that they comply with the requirements of Article XX of the GATT 1994 and, therefore, constitute the exercise of its right to regulate trade in a manner consistent with the WTO Agreement.

The Appellate Body also found that China may invoke Article XX (a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report. With respect to the Panel's analysis of the contribution made by the relevant provisions of China's measures to the protection of public morals within the meaning of Article XX (a), the Appellate Body found that the Panel did not err in its findings regarding the contributions made by the State-ownership requirement in Article 42 of the Publications Regulation and by the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products. The Appellate Body found, however, that the Panel erred in finding that the State plan requirement in Article 42 of the Publications Regulation is apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative; it can be characterized as "necessary" to protect public morals in China. The Appellate Body further upheld the Panel's conclusion that China has not demonstrated that the relevant provisions are "necessary" to protect public morals, within the meaning of Article XX (a) of the GATT 1994 and that, as a result, China has not established that these provisions are justified under Article XX (a).

The Appellate Body also upheld the panel's conclusion that the provisions of China's measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with Article XVII of the GATS. The Appellate Body observed that the reference to audiovisual "products" in the scheduled market access limitation could encompass both physical and non-physical sound recordings, because, as the Panel found, the term "product" is used to refer to both tangible and intangible goods, as well as services.[57] Thus, China's commitment on "Sound recording distribution services" does not specify whether it is limited to the distribution of physical goods, but it does include a market access limitation on the distribution of audiovisual "products" that refers to both tangibles and intangibles. Such commitment might have expressly indicated that it relates only to the distribution of tapes, videocassettes, CDs, digital video discs ("DVDs"), and/or other physical media, but it does not. The Appellate

---

57 The Panel noted that the CPC, on the basis of which the WTO Services Sectoral Classification List was prepared, "is about 'products' that include both goods and services."

Body therefore found that the Panel did not err, in paragraph 7.1265 of the Panel Report, in finding that the entry "Sound recording distribution services" under the heading "Audiovisual Services" (sector 2.D) in China's GATS Schedule extended to the distribution of sound recordings in non-physical form, notably through electronic means.

In the light of the above, they upheld the Panel's conclusion, in paragraph 8.2.3(b) (i) of the Panel Report, that, as regards the electronic distribution of sound recordings, "[t]he Circular on Internet Culture (Article II), the Network Music Opinions (Article 8), and the Several Opinions (Article 4), each was inconsistent with China's national treatment commitments under Article XVII of the GATS. Article X:7 of the [List] of Prohibited Foreign Investment Industries of the Catalogue, in conjunction with Articles 3 and 4 of the Foreign Investment Regulation, is also inconsistent with Article XVII of the GATS."

Findings and Conclusions

For the reasons set forth with respect to China's measures pertaining to films for theatrical release and unfinished audiovisual products, the Appellate Body gave the following findings:

(a) found that the Panel did not err, in paragraphs 7.560 and 7.584 of the Panel Report, in finding that Article 30 of the Film Regulation and Article 16 of the Film Enterprise Rule are subject to China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report;

(b) upheld the Panel's conclusions, in paragraph 8.1.2(c)(ii), (iii), (vi), and (vii) of the Panel Report, that Article 30 of the *Film Regulation* and Article 16 of the *Film Enterprise Rule* are inconsistent with China's trading rights commitments in paragraphs 1.2 and 5.1 of China's Accession Protocol and paragraphs 83(d) and 84(a) and (b) of China's Accession Working Party Report;

(c) The Panel did not err, in paragraphs 7.652 and 7.674 of the Panel Report, in finding that Article 5 of the *2001 Audiovisual Products Regulation* and Article 7 of the *Audiovisual Products Importation Rule* are subject to China's obligation, in paragraph 1.2 of China's Accession Protocol and paragraph

84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade;

(d) upheld the Panel's conclusions, in paragraph 8.1.2(d)(i) and (v) of the Panel Report, that Article 5 of the 2001 Audiovisual Products Regulation and Article 7 of the Audiovisual Products Importation Rule are inconsistent with China's obligation, in paragraph 1.2 of China's Accession Protocol and paragraph 84(b) of China's Accession Working Party Report, to grant in a non-discretionary manner the right to trade.

For the reasons set forth above the Appellate Body:

(e) found that, by virtue of the introductory clause of paragraph 5.1 of China's Accession Protocol, China may, in this dispute, invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report;

(f) with respect to the Panel's analysis of the contribution made by the relevant provisions of China's measures[58] to the protection of public morals within the meaning of Article XX(a):

   (i) found that the Panel did not err, in paragraphs 7.860 and 7.863 of the Panel Report, in its finding regarding the contribution made by the State-ownership requirement in Article 42 of the Publications Regulation;

   (ii) found that the Panel did not err, in paragraphs 7.865 and 7.868 of the Panel Report, in its finding regarding the contribution made by the provisions excluding foreign-invested enterprises from engaging in the importation of the relevant products[59]; and

---

[58] Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3 and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions* Article 41, and Article 42 in conjunction with Article 41, of the *Publications Regulation*; Article 27 of the *2001 Audiovisual Products Regulation*; Article 8 of the *Audiovisual Products Importation Rule*; and Article 21 of the *Audiovisual (Sub)Distribution Rule*.

[59] Such exclusion is set out in the following provisions: Articles X:2 and X:3 of the List of Prohibited Foreign Investment Industries in the *Catalogue*, in conjunction with Articles 3

(iii) found that the Panel erred, in paragraph 7.836 of the Panel Report, in finding that the State plan requirement in Article 42 of the Publications Regulation was apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative, it could be characterized as "necessary" to protect public morals in China;

(g) found that the Panel did not err in taking into account the restrictive effect that the relevant provisions and requirements have on those wishing to engage in importing;

(h) found that the Panel did not err in finding, in paragraph 7.908 of the Panel Report, that at least one of the alternative measures proposed by the United States is an alternative "reasonably available" to China; and, therefore

(i) upheld the Panel's conclusion, in paragraph 8.2.(a)(i) of the Panel Report, that China had not demonstrated that the relevant provisions were "necessary" to protect public morals, within the meaning of Article XX(a) of the GATT 1994 and that, as a result, China had not established that these provisions were justified under Article XX(a).

(j) found that the Panel did not err, in paragraph 7.1265 of the Panel Report, in finding that the entry "Sound recording distribution services" in sector 2.D of China's GATS Schedule extended to the distribution of sound recordings in non-physical form, notably through electronic means; and, therefore

(k) upheld the Panel's conclusion, in paragraph 8.2.3(b)(i) of the Panel Report, that the provisions of China's measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form were inconsistent with Article XVII of the GATS.

The Appellate Body recommended that the DSB request China to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with China's Accession Protocol, China's Accession Working

---

and 4 of the *Foreign Investment Regulation*; Article 4 of the *Several Opinions*; and Article 21 of the *Audiovisual (Sub-)Distribution Rule*.

Party Report, the GATS, and the GATT 1994 into conformity with China's obligations there under.

Implementation of adopted reports

At the DSB meeting on 18 February 2010, China informed the DSB of its intention to implement the DSB recommendations and rulings. This dispute involved many important regulations on culture products. China, therefore, would need a reasonable period of time to implement the DSB recommendations and rulings.

3 China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R, 26th January 2009

**Parties – Unites States
China**

Third Parties – Argentina, Australia, Brazil, Canada, EC and Chinas Taipei

Factual Matrix

United States filed a complaint against China concerning mainly three aspects of Chinese law and practice discussed below under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The measures at issue in this dispute identified in the United States' request for establishment of a panel are as follows:

1. Thresholds for criminal procedures and penalties

The United States claimed that China has not provided for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale that fail to meet certain thresholds.

2. Disposal of goods confiscated by customs authorities that infringe intellectual property rights

The United States claimed that China's measures for disposing of confiscated goods that infringe intellectual property rights are inconsistent with China's obligations under the TRIPS Agreement.

3. Denial of copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China

The United States claimed that China acted inconsistently with its obligations under the TRIPS Agreement by denying the protection of its Copyright Law to creative works of authorship (and, to the extent Article 4 of the Copyright Law applies to them, sound recordings and performances) that have not been authorized for, or are otherwise prohibited from, publication or distribution within China.

The Dispute Panel accepted the complaint on the first point but mostly rejected the other two. The Panel Report is interesting because it suggested an unexpected degree of the flexibility in the WTO Member's compliance with the TRIPS Agreement. It may also have blurred both the traditional distinction between "as such" and "as applied" claims and the line separating TRIPS violations from non-violations.

Claim under Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement

Main Arguments of the Parties:

The United States claimed that Article 4(1) of China's Copyright Law denies protection to certain categories of works. The Copyright Law of China was adopted by the Standing Committee of the National People's Congress and promulgated in 1990. The claim concerned the Copyright Law addresses, in particular the first sentence of Article 4. The first sentence of Article 4 provides "Works the publication and/or dissemination of which are prohibited by law shall not be protected by this law."

The United States further claimed that China, during a review of its legislation in the Council for TRIPS in 2002, explained that this sentence referred to works whose publication or distribution was prohibited by such laws and regulations as the Criminal Law, the Regulation on the Administration of Publishing Industry, the Regulation on the Administration of Broadcasting, the Regulation on the Administration of Audiovisual Products, the Regulation on the Administration of Films and the Regulations on the Administration of Telecommunication. The United States claimed further that Article 4(1) of China's Copyright Law denies to the authors of works "the publication or distribution of which is prohibited by law" the broad set of rights enumerated in Article 10 of the Copyright Law, which largely encompasses the rights contemplated by the provisions of the Berne Convention (1971). Nor do authors of works denied protection of the Copyright Law benefit from the remedies specified in Articles 46 and 47 of the Copyright Law. Consequently, the authors of such works do not enjoy the minimum rights that are "specially granted" by the Berne Convention, inconsistently with Article 5(1) of that Convention.

China responded that copyright vests upon creation and is independent of publication. Article 2 of the Copyright Law grants full copyright protection by expressly incorporating into Chinese law the rights conferred under international agreements, including the Berne Convention and the TRIPS Agreement. In contrast, Article 4(1) of the Copyright Law is extremely limited in scope. China, like many other countries in the world, bans publication and dissemination of such works as those that consist entirely of unconstitutional or immoral content. Article 4(1) simply provides that such a work shall not be protected by the Copyright Law. China argued in its first written submission that the application of Article 4(1) was not dependent on content review or any other regulatory regime related to publication and that the only result of a finding of prohibited content in that process was a denial of authority to publish, not a denial of copyright. Specifically, China argued that works that fail content review were not denied copyright protection. Article 17 of the Berne Convention (1971) is subjected to the sovereign power of governments all of the rights otherwise granted by that Convention.

The United States claimed that China admitted that it denies copyright protection to certain works whose contents Chinese authorities determine are prohibited by law and submits that, therefore, China has confirmed that it is acting inconsistently with its obligations under Article 9.1 of the TRIPS Agreement. The United States rebutted China's arguments on the following grounds: first, even if Article 2(2) of the Copyright Law grants protection to foreigners' works, Article 4(1) denies protection to those whose publication or distribution is prohibited by law. Article 2 cannot, by the terms of Article 4, apply to such works. Second, as

Article 4 denies the exclusive rights enumerated in Article 10 of the Copyright Law, the minimum set of exclusive rights guaranteed by Article 5(1) of the Berne Convention (1971) is denied to such works. The distinction between "copyright" and "copyright protection" is not found in the text of the Berne Convention and is irrelevant. Third, Article 4(1) creates significant commercial uncertainty and, where it is clear that a work has been denied copyright protection, allows pirates to profit at the expense of the legitimate right holder, including by exporting. Article 17 of the Berne Convention (1971) does not permit Members to deny copyright protection to authors in their respective works.

China responded that the United States failed to make a prima facie case with respect to its view that copyright protection is contingent upon content review. The whole claim with respect to Article 4(1) of the Copyright Law must therefore fail. With respect to the claim of a facial violation, there was a strong presumption that a Member's law is WTO-compliant and the United States had offered no evidence in support but the text of Article 4(1) of the Copyright Law itself. Article 2 of the Copyright Law directly implements an author's rights under the Berne Convention into Chinese law. The scope and operation of Article 4(1) of the Copyright Law are extremely limited. The sovereign power to prohibit works, recognized in Article 17 of the Berne Convention (1971), permits Members to maintain a provision of law such as Article 4(1) of the Copyright Law.

The Panel noted that this claim challenged China's Copyright Law, in particular Article 4(1), not as it has been applied in any particular instance but "as such". The parties disagreed on the proper interpretation of that measure. Therefore, the Panel was obliged, in accordance with its mandate, to make an objective assessment of the meaning of the relevant provisions of that measure. In this context, the Panel was mindful that, objectively, a Member is normally well-placed to explain the meaning of its own law. However, in the context of a dispute, to the extent that either party advances a particular interpretation of a provision of the measure at issue, it bears the burden of proof that its interpretation is correct. The Panel emphasized that it examined the measure solely for the purpose of determining its conformity with China's obligations under the TRIPS Agreement.

The Panel found that the Copyright Law was sufficiently clear, on its face, to show that Article 4(1) denied the copyright protection to certain works based upon the content, including those of WTO Member nationals, as the United States claimed. The Panel noted that China equated the "protection" of the Copyright Law referred to in Article 4(1) with enforcement rights. However, China did not show any suitable basis in the text of Article 4(1) that would limit its effect to a subset of the protection under the Copyright Law. China contrasted the "protection" of the Copyright Law referred to in Article 4(1) with the "enjoyment" of copyright in accordance with Article 2 of the Copyright Law. However, the concepts referred to in Articles 2(2) and 4(1), on their face, was identical. China pointed out that Article 4(1) did not state that certain works "shall not enjoy copyright". That was true, but the protection of the Law *is* copyright.

The Panel considered that the distinction drawn by China was inapposite. It appeared to be a consequence of the rule that the enjoyment and exercise of copyright shall *not* be subject to any formality whilst the denial of protection, in China's view, *is* subject to a formal determination. Even accepting the distinction at face value, it did not properly address the situation *after* a court or the NCAC had denied protection to a work under Article 4(1) of the Copyright Law. It is difficult to conceive that copyright would continue to exist, undisturbed, after the competent authorities had denied copyright protection to a work on the basis of the nature of the work and the prohibition in the Copyright Law itself. China's argument distinguishing "copyright" from "copyright protection" also contrasts the vesting of copyright under Article 2 of the Copyright Law, which allegedly occurs upon creation of a work automatically without formality, on the one hand, with the procedure for denial of copyright under Article 4(1) of the same Law, which allegedly occurs only after a determination by a court or the NCAC during an enforcement proceeding, on the other hand.

After a denial of copyright protection under Article 4(1) of the Copyright Law, China did not explain in what sense authors would enjoy copyright, or copyright would exist, in their works. For example, it did not explain how authors would be able to assert ownership of, license, or transfer copyright in their works. To the extent that any copyright exists under Article 2 in this situation, it would seem to be no more than a phantom right, the existence of which could not be demonstrated. Therefore, on the basis of the evidence submitted, the Panel was unable to conclude that, after a work is denied protection under Article 4(1) of the Copyright Law, the author could enjoy "copyright" in that work.

In any event, according to the panel, the scheme of the TRIPS Agreement is one which provides for certain subject matter to enjoy protection under Part II, and Members must ensure that procedures to enforce that protection are available as specified in Part III. Where a Member's law provides that eligible subject matter shall not be protected by an intellectual property law, this is not simply a provision that the enforcement procedures shall not be available, inconsistent with Part III. Rather, it is inconsistent with Part II as well. Whilst China's judicial authorities may decide that they will not provide particular remedies in particular circumstances in the exercise of their own discretion, Article 4(1) of China's Copyright Law goes further by denying protection of eligible subject matter altogether.

On the issue of the criteria for prohibited works the Panel considered the range of works that are subject to Article 4(1) of the Copyright Law. This depends in large part on the meaning of the phrase "the publication and/or dissemination of which are prohibited by law" as used in Article 4(1). The Panel said that, on its face, was not limited to any particular law. The Panel accepted that prohibited works for the purposes of Article 4(1) of the Copyright Law include works that contain content considered illegal under the criteria set out in the law and regulations, including the content review regulations. The Panel noted that the range of works "prohibited by law" may depend not only on the criteria by which content is considered illegal but also on the procedure for determination that a work contains illegal content for the purposes of Article 4(1) of the Copyright Law. The Panel recalled that Article 4 (1) of the Copyright Law denied prohibited works the protection of the Copyright law, not just a subset of the protection of that Law.

For the reasons set out above, the Panel found that the class of works denied protection under Article 4(1) of the Copyright Law included works that had failed content review and, to the extent that they constituted copyright works, the deleted portions of works edited to satisfy content review. The Panel considered that the United States had not made a prima facie case with respect to works never submitted for content review in China, works awaiting the results of content review in China and the unedited versions of works for which an edited version has been approved for distribution in China.

The Panel observed that the US as well China were bound by the TRIPS Agreement, including the incorporated provisions of the Berne Convention, 1971. The provisions of the Berne Convention (1971) incorporated by Article 9.1 of the TRIPS Agreement include Article 5(1) of that Convention, which provides as follows:

> *"(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."*

Article 5(1) of the Berne Convention (1971) provides for the enjoyment of two overlapping sets of rights that have been described as "the twin pillars on which protection under the Convention rests". First, there are "the rights which their respective laws do now or may hereafter grant to their nationals". This is a national treatment obligation. The request for establishment of a panel included a claim under this part of Article 5(1) with respect to the Copyright Law in conjunction with certain other measures. This claim was not pursued.

Second, there are "the rights specially granted by this Convention". This term is not defined. However, Article 5(1) refers to rights that authors shall enjoy in respect of works. Articles 6*bis*, 8, 9, 11, 11*bis*, 11*ter*, 12, 14, 14*bis* and 14*ter* all provide for such rights. Nevertheless, the incorporation of provisions of the Berne Convention (1971), including Article 5, is subject to the terms of Article 9.1 of the TRIPS Agreement. Therefore, "the rights specially granted by this Convention" as used in Article 5(1) of that Convention, as incorporated by Article 9.1 of the TRIPS Agreement, do not include the rights referred to in Article 6*bis* of the Berne Convention (1971).

The Panel observed that the "rights specially granted" by the Berne Convention (1971), as incorporated by the TRIPS Agreement, included the exclusive right of making and of authorizing translation of works (in Article 8) and the exclusive right of authorizing reproduction of works (in Article 9), to name but the first two substantive rights. The Panel noted that both sets of rights under Article 5(1) of the Berne Convention (1971) relate to "works" for which authors are protected under that Convention. The categories of "works" in respect of which authors shall enjoy the rights specially granted by the Convention vary according to the terms of each Article granting the relevant right. For example, the rights of reproduction (Article 9) and of broadcasting (Article 11*bis*) are granted to authors of "literary and artistic works". That expression is defined, in a non-exhaustive manner, in Article 2(1) of the Berne Convention (1971).

The Panel recalled that the class of works denied protection under Article 4(1) of the Copyright Law included works that have failed content review and, to the extent that they constitute copyright works, the deleted portions of works edited to satisfy content review. The Panel also recalled its findings regarding the meaning of the word "works" as used in the Copyright Law, in particular in Article 4(1). No party had disputed that the "works" to which the Copyright Law, in particular Article 4(1), applied include at least some, if not all, the categories of works falling within the definition of "literary and artistic works" in Article 2(1) of the Berne Convention (1971). It was not disputed that the "works" to which Article 4(1) of China's Copyright Law applies are more extensive than those for which protection may be refused or limited under other provisions of Article 2, and under Article 2*bis*, of the Berne Convention (1971).

For the above reasons, the Panel found that the Copyright Law was sufficiently clear on its face for the United States to have established that the Copyright Law, specifically Article 4(1), was inconsistent with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement.

The Panel confirmed that this conclusion did not apply to works never submitted for content review in China, works awaiting the results of content review in China and the unedited versions of works for which an edited version has been approved for distribution in China. However, the Panel recognized that the potential denial of copyright protection, in the absence of a determination by the content review authorities, implies uncertainty with respect to works that do not satisfy the content criteria prior to a determination under Article 4(1) of the Copyright Law, with the consequent impact on enjoyment of rights described above. Therefore, the Panel reiterated for the record the firm position of China taken in these proceedings that: "Copyright vests at the time that a work is created, and is not contingent on publication. Unpublished works are protected, foreign works not yet released in the Chinese market are protected, and works never released in the Chinese market are protected." and "Works that are un-reviewed are decidedly not 'prohibited by law'."

According to the panel China has an international obligation to protect copyright in such works in accordance with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement. China raised a defence under Article 17 of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement. China submitted that all rights granted to authors under the Berne Convention (1971) were limited by Article 17 of that Convention, that Article 17 was not an exhaustive codification of the sovereign right to censor and that Article 17 was drafted using very expansive language "that effectively denies WTO jurisdiction in this area". The United States responded that Article 17 of the Berne Convention (1971) did not authorize a content review system that denied all enforceable copyright protection to all works that had not been approved for publication or distribution.

The Panel recalled that Article 9.1 of the TRIPS Agreement incorporated Article 17 of the Berne Convention (1971). Article 17 of the Berne Convention (1971) provides as follows:

> *"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."*

The Panel observed that the terms of Article 17 include certain broad phrases, notably "cannot in any way affect" and "any work or production". The use of the words "any work" (although it is slightly different in the French text) confirms that the subject-matter dealt with by Article 17 is the same as that addressed by the other substantive provisions of the Convention. However, these phrases are not used in isolation but refer to the right of a government to "permit, to control, or to prohibit ... the circulation, presentation, or exhibition" of any work or production.

The Panel accepted that the three terms "circulation, presentation, or exhibitions" were not necessarily an exhaustive list of the forms of exploitation of works covered by Article 17. However, a noticeable feature of these three terms was that they did not correspond to the terms used to define the substantive rights granted by the Berne Convention (1971), although they might be included within some of those rights or they might refer to acts incidental to the exercise of some of those rights. The word "exhibition" was not even used in the provisions setting out the substantive rights granted by the Convention. Therefore, it could not be inferred that Article 17 authorized the denial of all copyright protection in any work.

China drew the Panel's attention to the WIPO Guide to the Berne Convention; it covers the right of governments to take the necessary steps to maintain public order. On this point, the sovereignty of member countries is not affected by the rights given by the Convention. Authors may exercise their rights only if that exercise does not conflict with public order. The former must give way to the latter. The Article therefore gives Union countries certain powers to control.

The Panel agreed with this interpretation. A government's right to permit, to control, or to prohibit the circulation, presentation, or exhibition of a work may interfere with the exercise of certain rights with respect to a protected work by the copyright owner or a third party authorized by the copyright owner. However, there is no reason to suppose that censorship will eliminate those rights entirely with respect to a particular work.

With respect to those rights that are granted by the Berne Convention (1971), the Panel held that China was unable to explain why Article 4(1) of its Copyright Law provided for the complete denial of their protection with respect to particular works. It noted that without prejudice to the range of rights that were granted by the Berne Convention (1971), it was suffices to note that they were mostly exclusive rights of authorizing certain acts with respect to protected works. An exclusive right of authorizing necessarily entails the right to prevent others from carrying out the relevant acts with respect to protected works. China was unable to explain why censorship interfered with copyright owners' rights to prevent third parties from exploiting prohibited works. The Panel noted that copyright and government censorship addressed different rights and interests. Copyright protected private rights, as reflected in the fourth recital of the preamble to the TRIPS Agreement, whilst government censorship addressed public interests.

For the above reasons, the Panel concluded that, notwithstanding China's rights recognized in Article 17 of the Berne Convention (1971), the Copyright Law, specifically Article 4(1), is inconsistent with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement.

Claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement

The United States claimed that China subjected the enjoyment and exercise of copyright to the formality of successful conclusion of content review, inconsistently with Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement. Works that have not successfully completed content review under the Regulation on the Administration of Films, the Regulation on the Management of Publications, the Regulation on the Management of Audiovisual Products or the Regulations on the Management of Electronic Publications may not legally be published or distributed within China. The United States submitted that, consequently, works in this unauthorized status fell within the scope of Article 4(1) of the Copyright Law, and thus they were not protected by that Law. The United States submitted that the Copyright Law's protection attached only after such a work had been submitted for content review and, if it passed that review unchanged, an authorization to publish and distribute the work was issued. As a formal matter, therefore, copyright protection was dependent, in part, on the issuance of the authorization to publish and distribute resulting from successful conclusion of the content review process.

China responded that, under Article 2 of the Copyright Law and Article 6 of the Copyright Law Implementing Regulations, copyright protection vested upon creation of a work. While such works were pending review they enjoyed the full panoply of copyright. In response to the Panel's questions, China asked the Panel to note that under the Chinese system of copyright, "copyright" and "copyright protection" was distinguishable. To the extent that Article 4(1) of the Copyright Law would come into play with respect to a work, it would operate not to remove copyright, but to deny the particularized rights of private copyright enforcement. Article 4(1) of the Copyright Law thus did not operate in any manner that would violate Article 5(2) of the Berne Convention (1971) as it was not a condition precedent to copyright formation, nor did it destroy the residual copyright granted under Article 2 of the Copyright Law.

The Panel observed that this claim concerned the denial of copyright protection under Article 4(1) of the Copyright Law. The Panel had already ruled on that issue in its consideration of the claim under Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement. It noted that additional findings regarding this claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement, would not contribute further to a positive solution to this dispute. Therefore, the Panel declined to rule on this issue as a matter of judicial economy.

Claim under Article 41.1 of the TRIPS Agreement

The United States claimed that the enforcement provisions of Chapter V of China's Copyright Law were unavailable with respect to works denied copyright protection under Article 4 of that Law. Therefore, China failed to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement were available under its law, as required by Article 41.1 of the TRIPS Agreement. China responded that this claim failed in light of the fact that copyright was not in fact denied under the Copyright Law as alleged by the United States, for the reasons set out above in relation to Article 5(1) of the Berne Convention (1971).

The Panel observed that the Copyright Law, specifically the first sentence of Article 4, was inconsistent with China's obligations (with respect to the rights specially granted by the Berne Convention) under Article 5(1) of that Convention, as incorporated by Article 9.1 of the TRIPS Agreement. In the absence of protection of the rights specially granted by the Berne Convention, there could be no enforcement procedures against any act of infringement of such rights with respect to the relevant works. The Panel observed further that, in reaching that conclusion, it dismissed China's argument that Article 4(1) of the Copyright Law did not remove copyright but only "the particularized rights of private copyright enforcement". However, the Panel accepted that argument *arguendo* for the purposes of the claim under Article 41.1 of the TRIPS Agreement.

The Panel observed that, whilst right holders whose works were denied protection under Article 4(1) of the Copyright Law might or might not have access to process, the enforcement procedures "as specified in [Part III]" of the TRIPS Agreement were far more extensive. This was clear, among other things, from the text of Article 41.1 of the TRIPS Agreement which specifies that these procedures include "remedies". For example, Articles 44, 45, 46 and 50 of the TRIPS Agreement specified that the judicial authorities shall have the authority to make certain orders, such as injunctions, orders to pay damages, orders for the disposal or destruction of infringing goods, and provisional measures. Where copyright protection was denied to a work under Article 4(1) of the Copyright Law, the judicial authorities had no such authority under Chapter V of the Copyright Law Panel. It was noted that not asserted that they were available in China under any other law. Therefore, this set of enforcement procedures, including remedies, was not available to the right holders as required by Article 41.1 of the TRIPS Agreement.

Conclusions with respect to the Copyright Law

The Panel held that the Copyright Law, specifically the first sentence of Article 4, was inconsistent with China's obligations under:

(a) Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement; and

(b) Article 41.1 of the TRIPS Agreement.

The Panel exercised judicial economy with respect to the claim under Article 5(2) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement, and the claims under Article 61 of the TRIPS Agreement (with respect to the Copyright Law).

CUSTOMS MEASURES

Three of China's Customs measures were the subject matter of dispute in this case. Firstly, The Regulations on Customs Protection of Intellectual Property Rights ("Customs IPR Regulations") which entered into force in March 2004. Article 27 provides for the confiscation of goods determined to have infringed an intellectual property right and, in the third paragraph, sets out different options for the disposal or destruction of such goods. The relevant text is as follows:

> *"Where the confiscated goods which infringe on intellectual property rights can be used for the social public welfare undertakings, Customs shall hand such goods over to relevant public welfare bodies for the use in social public welfare undertakings. Where the holder of the intellectual property rights intends to buy them, Customs can assign them to the holder of the intellectual property rights with compensation. Where the confiscated goods infringing on intellectual property rights cannot be used for social public welfare undertakings and the holder of the intellectual property rights has no intention to buy them, Customs can, after eradicating the infringing features, auction them off according to law. Where the infringing features are impossible to eradicate, Customs shall destroy the goods."*

The second issue under consideration was the Measures for the Implementation of the Customs IPR Regulations ("Implementing Measures") which entered into force in July 2004. Article 30 of the Implementing Measures is as follows:'

"Article 30: Customs shall dispose of infringing goods it has confiscated according to the following provisions:

(1) Where the goods concerned may be used directly for the social public welfare or the holder of the intellectual property rights wishes to purchase the goods, Customs shall hand the goods over to the relevant social welfare bodies for the use in social public welfare or assign them to the holder of the intellectual property rights with compensation;

(2) Where the goods concerned cannot be disposed of in accordance with Item (1) but the infringing features can be eradicated, they shall be auctioned off according to law after eradicating the infringing features. The proceeds arising from the auction shall be turned into the state treasury; and

(3) Where the goods concerned cannot be disposed of in accordance with Items (1) and (2), they shall be destroyed. When Customs destroys the infringing goods, the holder of the intellectual property rights shall provide necessary assistance. In cases where relevant social welfare bodies use the infringing goods confiscated by Customs for the social public welfare, or the holder of the intellectual property rights assists Customs in destroying the infringing goods, Customs shall carry out necessary supervision."

The third issue under the consideration was Public Notice No. 16/2007 was notified by the General Administration of Customs in April 2007. Public Notice No. 16/2007 was notified in order *inter alia* to regulate the auction of infringing goods by Customs in accordance with Article 27 of the Customs IPR Regulations.

1. Where the confiscated infringing goods are auctioned by Customs, Customs shall completely eradicate all infringing features on the goods and the packaging thereof strictly pursuant to Article 27 of the Regulations, including eradicating the features infringing trademarks, copyright, patent and other intellectual property rights. Any goods the infringing features of which cannot be completely eradicated shall be destroyed and shall not be auctioned.

2. Customs shall solicit comments from the holder of the intellectual property rights before the infringing goods are auctioned.

Claim under Article 59 of the TRIPS Agreement

The United States claimed that the competent Chinese authorities lacked the scope of authority to order the destruction or disposal of infringing goods required by Article 59 of the TRIPS Agreement. The measures at issue created a "compulsory scheme" so that the Chinese customs authorities could not exercise their discretion to destroy the goods and must give priority to disposal options that allowed infringing goods to enter the channels of commerce or otherwise cause harm to the right holder. Donation to social welfare bodies could be harmful to a right holder and nothing appeared to prevent such bodies from selling the infringing goods; sale to the right holder harmed the right holder in the amount that the right holder pays for the infringing goods; and auction did not constitute disposal outside the channels of commerce and, absent his consent, may harm the right holder. Where any of these three options was available, the authorities were not authorized to order destruction of the infringing goods.

China responded that its Customs authorities possessed the authority to order both disposal and destruction of infringing goods in accordance with Article 59 of the TRIPS Agreement. Donation to social welfare bodies and sale to the right holder constituted disposal outside the channels of commerce in such a way as to avoid harm to the right holder. Article 59 must be read in conjunction with Article 1.1 of the TRIPS Agreement. Chinese law set forth criteria that reflected an official preference for the use of disposition methods besides destruction but Customs had the discretion to determine whether the criteria were met and therefore which disposition method was appropriate. China Customs chose to destroy 58 per cent of the total value of infringing goods between 2005 and 2007 which proved that the putative hierarchy of disposition options does not hinder Customs' ability to order destruction of infringing goods. The obligation in Article 59 to grant "authority" to order destruction did not mean that Members must make a grant of unfettered and unguided discretion and those domestic agencies must have the absolute power to order destruction of infringing goods in any circumstance whatsoever.

The United States responded that Article 59 requires full authority to be granted to dispose of or destroy confiscated infringing goods in accordance with the principles of Article 46. The authorities should have the power to choose among any legitimate options for dealing with these goods from the outset when the goods were found to be infringing, and thereafter until the goods were finally dealt with. Article 1.1 of the TRIPS Agreement only offers flexibility in how a Member implemented TRIPS obligations and did not exempt a Member from full compliance with TRIPS obligations. Statistics provided no response to this claim because the United States is not arguing that the TRIPS Agreement obligations required China to destroy or dispose of all infringing goods in accordance with the principles in the first sentence of Article 46. The pertinent issue was what decisions China Customs was permitted by law to make in particular circumstances.

China responded that it did not have an obligation under the TRIPS Agreement to ensure that every infringing good disposed of outside the channels of commerce avoided harm to the right-holder. Rather, Customs must have the authority to dispose of seized goods outside the channels of commerce in such a way as to avoid harm to the right-holder. The determination of what constituted an appropriate grant of authority under the TRIPS Agreement was highly circumstantial. China Customs' authority was appropriate in light of the level of discretion that it enjoyed in making decisions, its autonomy, that the rules constraining it serve legitimate government interests and the deterrence of infringement and the avoidance of harm to the right-holder.

The Panel noted that this claim challenged the Customs measures "as such". The parties disagreed on the proper interpretation of the measures at issue. The Panel was therefore obliged, in accordance with its mandate, to make an objective assessment of the meaning of the relevant provisions of those measures. The Panel confirmed that it examined the Customs measures solely for the purpose of determining their conformity with China's obligations under the TRIPS Agreement.

This claim was made under Article 59 of the TRIPS Agreement, which provides as follows:

"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."

The Panel observed that Article 59 of TRIPS Agreement contains a number of key terms, such as "the right holder", "the defendant", "competent authorities" and "infringing goods" which were not defined in the Article itself but could only be understood by reading the whole Article in context. Article 59 was found in Section 4 of Part III of the TRIPS Agreement on Special Requirements Related to Border Measures. Section 4 sets out procedures for the suspension at the border by the customs authorities of the release into free circulation of goods. Article 59 sets out the step in these procedures that applies after goods had been found to be infringing. As such, Article 59 formed part of a set of procedures and its key terms must be understood in that context.

The Panel further observed that this reading was confirmed by the opening provision of Section 4. The first sentence of Article 51 provides as follows: "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." (footnotes omitted)

This sentence refers to "procedures to enable a right holder ... to lodge an application ... for the suspension by the customs authorities of the release into free circulation" of certain goods. These procedures must conform to "the provisions set out below". The "provisions set out below" are the provisions of Section 4, which include Article 59.

The Panel observed that the description of the procedure as one for an "application" for "suspension" did not appear to exclude related aspects of the procedure in the provisions set out below, such as the provisions on *ex officio* action in Article 58 or the remedies as a result of application and/or suspension set out in Article 59. Rather, the procedures in Section 4 form a set that must be read together. This was reflected in the second sentence of Article 51 that referred to "such an application" (i.e. an application such as that referred to in the first sentence) being subject to "the requirements of this Section". This tended to confirm that the "provisions set out below" Article 51 include the whole of Section 4.

The Panel further observed that the need to read provisions in the context of the relevant Section was a feature of Sections 2, 3 and 4 of Part III of the TRIPS Agreement. Whilst some provisions referred expressly to prior provisions, such as Articles 52, 54 and 56, many others do not, such as Articles 53.1, 55, 57 and 59, but rather relied on context for clarity. This confirmed that the provisions of Section 4 must be read as a coherent set of procedures and not in isolation. Therefore, the Panel refereed to other provisions of Section 4, in particular to Article 51, in its interpretation of certain terms used in Article 59.

The first sentence of Article 59 applies to "infringing goods". The ordinary meaning of these words was not limited to goods that infringe any specific rights. However, read in context, there are certain limitations. The first sentence of Article 51 provides for the relevant procedures to apply, as a minimum, to "the importation" of "counterfeit trademark or pirated copyright goods".

Article 51 expressly allowed Members to provide for procedures at the border for other infringing goods as well. The second and third sentences of Article 51 provide as follows: "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."

The Panel observed that both these sentences use the word "may", indicate that they are optional provisions. The second sentence provides for an optional extension to "other infringements of intellectual property rights". This is a reference both to goods that infringe trademarks and copyright without constituting counterfeit trademark goods or pirated copyright goods, as well as to goods that infringe other categories of intellectual property rights, such as patents. The second sentence includes an express condition that applies where Members provide border measures for other infringements of intellectual property rights, namely "provided that the requirements of this Section are met". The requirements of that "Section" include those found in Article 59. Therefore, to the extent that a Member provides for such an application to be made in respect of goods involving other infringements of intellectual property rights, such as patents, the obligation in Article 59 applies.

The third sentence of Article 51 provides for an optional extension to "infringing goods destined for exportation" from a Member's territory. The terms of the third sentence do not attach any express condition to this option. An option with respect to "corresponding procedures" is not, on its face, an obligation that procedures shall correspond. The omission of any express condition in the third sentence stands in contrast to the proviso in the second sentence, which also serves the purpose of providing for an optional extension of the border measures. Whilst it would not have been appropriate to include an identical condition to that found in the second sentence, as the requirements of Section 4 refer to importation, the third sentence could nevertheless have included an express condition that the procedures with respect to infringing goods destined for exportation shall correspond to those set out in the Section, or shall comply with the principles thereof. However, it does not. Read in context, this omission is not ambiguous. Therefore, the Panel found that there is no obligation to apply the requirements of Article 59 to goods destined for exportation.

Turning to the measures at issue, the Panel observed that the Customs IPR Regulations, in Article 2, provide that "Customs protection of intellectual property rights in these Regulations means the protection provided by the Customs for the exclusive rights to use a *trademark, copyrights and their related rights, and patent rights* (hereinafter referred to as intellectual property rights) ..." (emphasis added). The same is true of the Implementing Measures and Public Notice No. 16/2007, that both implement the Customs IPR Regulations. It is apparent that the intellectual property right infringements covered by the Customs measures include not only counterfeit trademark goods and pirated copyright goods, but certain other infringements of intellectual property rights, namely other trademark-infringing goods, other copyright-infringing goods, and patent-infringing goods. The Panel found that Article 59 applies to the Customs measures as those measures apply to all these infringements of intellectual property rights.

The Panel observed that the Customs IPR Regulations, in Article 2, also provide that "Customs protection of intellectual property rights in these Regulations means the protection provided by the Customs ... related to *imports or exports* ..." (emphasis added). The same is true of the Implementing Measures and Public Notice No. 16/2007, that both implement the Customs IPR Regulations. In this respect, China's border measures provide a level of protection *higher* than the minimum standard required by Section 4 of Part III of the TRIPS Agreement. The practical effect of this is that, according to uncontested statistics prepared by China Customs, 99.85 per cent by value of infringing goods disposed of or destroyed under the measures at issue in the years 2005 to 2007 were destined for exportation.

The Panel concluded that Article 59 of the TRIPS Agreement is not applicable to the Customs measures insofar as those measures apply to goods destined for exportation. The obligation in the first sentence of Article 59 is that competent authorities "shall have the authority" to order certain types of remedies with respect to infringing goods. It is clear from the context within Section 4 that the obligations in Article 59 apply where customs authorities have suspended the release into free circulation of goods suspected of infringing intellectual property rights. The fact that Article 59 applies to "infringing goods" indicates that the obligations in this Article are triggered when competent authorities find that the goods subject to the suspension are infringing. The fact that Article 59 addresses the authority to order remedies implies that the obligations continue until the time that a remedy has been ordered. The text of the Article does not indicate any other limitation on the temporal scope of the obligations. Therefore, the obligation that competent authorities "shall have the authority" to make certain orders applies from the time that competent authorities find that goods subject to suspension at the border are infringing, right up until the time that a remedy is ordered.

The Panel observed that the word "authority" can be defined as "power or right to enforce obedience; moral or legal supremacy; right to command or give a final decision." The obligation is to "have" authority not an obligation to "exercise" authority. The phrase "shall have the authority" is used throughout the enforcement obligations in Sections 2, 3 and 4 of Part III of the TRIPS Agreement, specifically, in Articles 43.1, 44.1, 45.1, 45.2, 46, 48.1, 50.1, 50.2, 50.3, 50.7, 53.1, 56 and 57. It can be contrasted with terminology used in the minimum standards of protection in Part II of the TRIPS Agreement, such as "Members shall provide" protection, or that certain material "shall be" protected. The obligation in Article 46 that certain authorities "shall have the authority" to make certain orders reflects *inter alia* that orders with respect to specific infringements are left to enforcement authorities' discretion.

Article 41.1 of the TRIPS Agreement, obliges Members to ensure that enforcement procedures as specified in Part III are "available" under their law so as to "permit" effective action against infringement, which addresses the potential for action.

Given the potential importance of this interpretation to the operation of much of Part III of the TRIPS Agreement, the Panel observed was further confirmed by the records of the negotiation of the Agreement. Previous drafts of the TRIPS Agreement had provided that the authorities shall "provide for" certain remedies, but this phrasing was changed to read shall "have the authority", as were a number of other draft provisions. Therefore, the obligation that competent authorities "shall have the authority" to make certain orders is not an obligation that competent authorities shall exercise that authority in a particular way, unless otherwise specified.

Moreover, the obligation to have the authority to order certain types of remedies is not an obligation to have the authority to order those remedies only. Both parties to the dispute, and certain third parties, expressly recognize that the obligation that competent authorities "shall have the authority" to order certain types of remedies leaves Members free to provide that competent authorities may have authority to order other remedies not required to be within their authority by Article 59 of the TRIPS Agreement.

The Panel agreed that the terms of Article 59 do not indicate that the authority to order the specified types of remedies must be exclusive. This interpretation is confirmed by Article 46, which forms part of the context of Article 59, as Article 59 incorporates the principles of Article 46, and both Articles are phrased as obligations that authorities "shall have the authority" to order certain types of remedies. The first sentence of Article 46 provides, basically, that authorities shall have the authority to order that goods be disposed of outside the channels of commerce or destroyed. At the same time, the fourth sentence of Article 46 relates to release into the channels of commerce which does not correspond to either of the remedies required by the first sentence. This is an express recognition that the remedies set out in the first sentence of Article 46 are not exhaustive. The same position applies under Article 59.

Given the potential importance of this interpretation to the operation of Part III of the TRIPS Agreement, the Panel observed that it is confirmed by the circumstances of conclusion of the Agreement. One of the most important such circumstances was the fact that the pre-existing international intellectual property agreements contained comparatively few minimum standards on enforcement procedures beyond national treatment and certain optional provisions. One of the major reasons for the conclusion of the TRIPS Agreement was the desire to set out a minimum set of procedures and remedies that judicial, border and other competent authorities must have available to them. This represented a major advance in intellectual property protection, as reflected in the second recital of the preamble to the Agreement as follows:

> *"Recognizing, to this end, the need for new rules and disciplines concerning: (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"*

At the same time, the negotiators appear to have considered it unnecessary to state in either Article 46 or Article 59 that the authorities could not release goods that had been found infringing into the channels of commerce. This may have been due *inter alia* to the fact that such an action itself could constitute infringement or otherwise expose the authorities to liability. Such an action would not constitute infringement if the circumstances of disposal were non-commercial or if the state of the goods was altered so that the goods no longer infringed. The negotiators addressed both these issues: in the first sentence of Article 46, by providing for disposal outside the channels of commerce (and destruction) and, in the fourth sentence, in regard to counterfeit trademark goods, by setting a minimum degree of alteration of the state of goods before release into the channels of commerce.

In the Panel's view, an interpretation that applies the phrase "in such a manner as to avoid any harm caused to the right holder" to all authority to order remedies is based on a selective reading of Article 46. The requirement that authority to order a remedy be "in such a manner as to avoid any harm caused to the right holder" is linked in the text of Article 46 to one remedy only, namely disposal outside the channels of commerce. This does not exclude the possibility that other actions, notably release into the channels of commerce, may be subject to requirements, provided that those requirements are set out in the terms of Article 46 or Article 59.

The parties disagreed as to the circumstances, in which competent authorities may be considered to have "authority" in accordance with Article 59, in particular, the extent to which the availability of authority may be subject to conditions. China submits examples of other Members' legislation that, in its view, subject customs' authority to conditions.

The Panel observed that the reference to alternatives in Article 59 of the TRIPS Agreement implies a particular type of condition. Article 59 requires authority to order "destruction *or* disposal" (emphasis added). It is not disputed that where competent authorities have authority in any given situation within the scope of Article 59 to order either destruction or disposal (in accordance with applicable principles), this is sufficient to implement the obligation in the first sentence of Article 59. Therefore, a condition that precludes the authority to order one remedy (e.g. destruction) could be consistent with Article 59 as long as competent authorities still had the authority to order the other remedy (in this example, disposal).

The Panel observed that a common feature of Sections 2, 3 and 4 of Part III of the TRIPS Agreement is that the initiation of procedures under these Sections is generally the responsibility of private right holders. This is reflected in the first sentence of Article 42 and the first sentence of Article 51, the reference to an "applicant" in Article 50.3 and 50.5, the reference to "request[s]" in Articles 46 and 48.1, and the option (not obligation) to make ex officio action available under Article 58. Viewed in context, the phrase "shall have the authority" does not require Members to take any action in the absence of an application or request. Therefore, a condition that authority shall only be available upon application or request seems to be assumed in much of Sections 2, 3 and 4 of Part III. This is consistent with the nature of intellectual property rights as private rights, as recognized in the fourth recital of the preamble of the TRIPS Agreement. Acquisition procedures for substantive rights and civil enforcement procedures generally have to be initiated by the right holder and not ex officio.

The above observations did not imply that other types of conditions that do *not* find such a reflection in the text may not be attached to the required authority. However, the Panel did not consider it necessary, for the purposes of its examination of this claim, to consider what other conditions, if any, may be attached to "authority" consistently with Article 59. Therefore, other than the two conditions mentioned above, the Panel will accept *arguendo* that the availability of the "authority" required by Article 59 may not be subject to conditions in any given situation within the temporal scope of that Article.

The "authority" required by Article 59 concerns two types of remedies, namely "destruction or disposal". The meaning of "destruction" is not controversial. As for "disposal", the Panel noted that the English text of Article 59 does not qualify this word so that it could, in accordance with its ordinary meaning, refer both to disposal outside the channels of commerce as well as to release into the channels of commerce. However, read in context, the word "disposal" could be a reference to an order that goods be "disposed of" outside the channels of commerce as set out in Article 46. This ambiguity is resolved by reference to the French and Spanish texts, which are equally authentic. The French text of Article 59 refers to authority to order "la mise hors circuit" which is a reference to the authority to order that infringing goods be "écartées des circuits commerciaux" in Article 46. The Spanish text of Article 59 refers to authority to order "eliminación" which, read in its context as an alternative to "destruction", is evidently a reference to the authority to order that infringing goods be "apartadas de los circuitos comerciales" in Article 46. Accordingly, the correct interpretation of the term "disposal" in the first sentence of Article 59 is disposal "outside the channels of commerce".

The Panel referred to "destruction" and "disposal" collectively as "disposition methods" for ease of reference. It is not disputed that China's Customs measures provide the authority to order destruction of infringing goods in accordance with the principles set out in Article 46. However, the United States takes issue with what it considers the "highly limited circumstances" in which the Customs measures permit destruction. China did not deny that its authority to order destruction is, in principle, subject to certain limitations but argues that China Customs has considerable discretion to decide whether such limitations apply. The statistics show that, in practice, over half of infringing goods seized by Customs in terms of value are in fact destroyed.

The Panel observed that China is permitted to limit the authority to order destruction of infringing goods provided that its competent authorities have the authority in such situations to order disposal of infringing goods in accordance with the principles set out in Article 46. The limitations on Customs' authority to order destruction of infringing goods are relevant to the claim only to the extent that they show that Customs has authority to order *neither* destruction of infringing goods *nor* disposal in accordance with those principles.

It was in this context that the United States claimed that the measures establish a mandatory sequence of steps, as the authorities will not have either of the required forms of authority in a given situation if the measures at issue compel them to order another disposition method that is not required by Article 59. This raises the so-called "mandatory/discretionary distinction" that has been discussed in a number of GATT and WTO Panel Reports relating to trade in goods. Whilst authority to order a disposition method *not* required by Article 59 does not, in itself, lead to WTO inconsistent action, to the extent that such authority mandates a disposition method in any given circumstance it may preclude authority that *is* required by Article 59. The preclusion of such authority may be WTO-inconsistent. For that reason, the Panel had examined whether certain aspects of the Customs measures are mandatory.

The Panel also observed that authority to order a disposition method within the scope of Article 59 will often be discretionary, as the obligation that Members' competent authorities "shall have the authority" to make particular orders applies to what those authorities are permitted to order by domestic law. Accordingly, the obligation in Article 59 is applicable to both mandatory and discretionary measures and, in principle, both mandatory and discretionary measures "as such" can be examined for conformity with that obligation.

The Customs measures at issue provide for three disposal options besides destruction. These are donation to social welfare bodies; sale to the right holder; and auction. The United States claimed that none of these disposal options is in accordance with the principles set out in Article 46 and that all preclude authority to order destruction. China responded that the first two of these disposal options constitute authority to order disposal in accordance with the principles set out in Article 46, and that the United States has not established that China Customs lacks authority to order destruction.

Therefore, the Panel proceeded as follows: First, the Panel determined what are "the principles set out in Article 46"; Second, the Panel assessed China Customs' authority to order donation to social welfare bodies and, if necessary, sale to the right holder, in order to determine whether they constitute authority to order disposal in accordance with the principles set out in the first sentence of Article 46; and Third, the Panel assessed China Customs' authority to order auction of infringing goods (plus either of the first two disposal options that is found to be disposal not in accordance with the principles set out in the first sentence of Article 46) to determine whether such authority mandates a particular disposition method and thereby precludes authority to order destruction.

"the principles set out in Article 46"

The first sentence of Article 59 provides that 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". The phrase referencing the principles set out in Article 46 attaches to "the authority to order the destruction or disposal of infringing goods". This directs the treaty interpreter to those principles in Article 46 that attach to such authority.

The Panel made the following observations. First, Article 59 refers to "authority". Second, Article 59 incorporates principles that attach to authority to order "destruction or disposal". Third, Article 59 relates to the authority to order destruction or disposal of "infringing goods" but not principles applicable to the disposition of materials and implements.

Article 46 of the TRIPS Agreement provides as follows:

"*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."

The first sentence of Article 46 refers to "authority" to order that "infringing goods" be "disposed of ... or ... destroyed". Therefore, it seems pertinent to

Article 59. The second sentence of Article 46 refers to disposal of materials and implements and is therefore inapposite. Indeed, materials and implements used to create infringing goods would not normally be suspended at the border with the infringing goods; unlike during enforcement actions within a Member's territory. The third sentence of Article 46 refers to "such requests" although the previous sentences do not refer expressly to any requests. The content of the third sentence clearly relates to materials and implements as addressed in the second sentence but it could equally relate to infringing goods as addressed in the first sentence. The text is ambiguous on this point. This ambiguity can be resolved by reference to the records of the negotiation of the TRIPS Agreement.

The TRIPS Agreement was negotiated during the Uruguay Round in the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. The Chairman's draft text of the Agreement of 23 July 1990 included a draft article corresponding to what is Article 46 in the text as finally agreed. In that draft article, the principle of proportionality and the interests of third parties were related to a request of the right holder under the previous sentence. That request could be for remedies with respect to infringing goods as well as materials and implements. In a later draft, the first sentence of the provision on remedies was divided into two separate sentences, one with respect to infringing goods and the other with respect to materials and implements. Both sentences included the phrase "upon request from the right holder". In the same draft, the phrase "[i]n considering such a request" was revised to read "[i]n considering such requests" (in the plural). This is the version of the third sentence that was retained in the so-called "Brussels Draft" and the final text of Article 46 of the TRIPS Agreement. Accordingly, the records of the negotiation of the TRIPS Agreement clarify that the terms of Article 46 in the third sentence refer *inter alia* to the consideration of requests for orders that infringing goods be disposed of outside the channels of commerce or destroyed. Therefore, the third sentence seems pertinent to Article 59 as well.

The fourth sentence refers to a category of infringing goods, i.e. counterfeit trademark goods. It does not refer expressly to authority to order destruction or disposal outside the channels of commerce. However, the context shows that the principle of proportionality in the previous sentence guides the competent authorities' choice between the remedies specified in the first sentence and any alternative remedies. Similarly, the fourth sentence of Article 46 sets out a consideration that the authorities must take into account when choosing between the required remedies, namely those specified in the first sentence, and release into the channels of commerce, if such an order is available. The fourth sentence attaches to the scope of authority to choose between destruction or disposal outside the channels of commerce and release into the channels of commerce, if that remedy is available. Therefore, the fourth sentence of Article 46 seems pertinent to Article 59.

Article 59 refers to the "principles" set out in Article 46. Therefore, it was necessary to determine what precisely that refers to in the first, third and fourth sentences of Article 46. The word "principles" can be defined as "a general law or rule adopted or professed as a guide to action."

Each of these sentences of Article 46 contains language that is a guide to action by authorities and none dictate the precise terms of orders in specific cases.

The Panel did not consider that the choice of the word "principles" was intended to reflect a hierarchy of provisions within Article 46 that would include only the most general concepts and exclude the less general. There is a strong similarity in the language and purpose of the two provisions that both provide for authority to order destruction or disposal with respect to goods that have been found to infringe intellectual property rights at the conclusion of an enforcement procedure.

However, there are also differences in the government agencies to which they relate ("competent authorities" to order remedies in border measures under Article 59 but "judicial authorities" under Article 46) and also in the scope of property to which the remedies apply ("infringing goods" under Article 59 and "infringing goods as well as materials and implements the predominant use of which has been in the creation of the infringing goods" under Article 46). These differences make it inappropriate simply to provide that the obligation in Article 59 applied "in accordance with Article 46" or otherwise incorporate the whole of Article 46. Instead, the cross-reference to "principles" avoided the duplication of a relatively large amount of text. Therefore, in the Panel's view, the reference to "principles" is a reference to language that is a guide to action by authorities with respect to orders for the destruction or disposal of infringing goods.

Accordingly, for the purposes of Article 59, the Panel considered that the first sentence of Article 46 sets out the following "principles":

(a) authorities shall have the authority to order disposal or destruction in accordance with the first sentence "without compensation of any sort"; and

(b) authorities shall have the authority to order disposal "outside the channels of commerce in such a manner as to avoid any harm caused to the right holder"; or

(c) authorities shall have the authority to order destruction "unless this would be contrary to existing constitutional requirements".

The third sentence sets out the following principle that applies *inter alia* to the authority to order disposal or destruction of infringing goods under the first sentence:

(d) 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".

The fourth sentence sets out the following principle that attaches to the authority to order destruction or disposal of infringing goods under the first sentence:

(e) 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.

The interpretation of all these principles was informed by the common objective set out at the beginning of Article 46, i.e. "to create an effective deterrent to infringement" which is, in itself, also a guide to action with respect to orders for the destruction or disposal of infringing goods and, hence, a principle set out in Article 46.

In the Panel's view, the above are the "principles set out in Article 46" incorporated by the first sentence of Article 59. China disagreed, arguing, in effect, that the second sentence of Article 59 constitutes a *lex specialis* that would exclude the incorporation of the fourth sentence of Article 46 into Article 59.The Panel observed certain similarities in the respective texts of the fourth sentence of Article

46 and the second sentence of Article 59. The second sentence of Article 59 provides as follows:

> *"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."*

Like the fourth sentence of Article 46, this sentence begins with the words "[i]n regard to counterfeit trademark goods" and includes the words "other than in exceptional" circumstances (as opposed to cases). There is also a similarity in that the second sentence of Article 59 applies to goods "in an unaltered state" whilst the fourth sentence of Article 46 applies to "the simple removal of the trademark unlawfully affixed" which is a means of altering the state of counterfeit trademark goods. Both sentences are found in Articles that provide for remedies after particular enforcement procedures.

However, Article 59 applies to procedures at the border with respect to goods destined for importation whilst Article 46 applies to civil judicial procedures within Members' territories. The second sentence of Article 59 refers to re-export or release into a different customs procedure (for example, into transit) which is specific to the enforcement procedure in Section 4. Article 46 refers to release into the channels of commerce which can be applicable to importation and domestic sale in both Sections 2 and 4. The second sentence of Article 59 and the fourth sentence of Article 46 apply in different circumstances and neither is in fact more specific than the other.

There was no reason to infer that the risk of further infringement presented by counterfeit trademark goods was only intended to be addressed when the goods were re-exported or subject to another customs procedure and not when they were released at the border into the channels of commerce. Counterfeit trademark goods suspended at the border and then released present a risk of further infringement whether the goods are released into the channels of commerce within a Member's territory, or transit through the Member's territory or are re-exported to another Member's territory, as under the second sentence of Article 59.

Indeed, read in context, the relevance of "release" of goods into the channels of commerce is even clearer in Article 59 than it is in Article 46. Section 4 concerns the suspension of "release" of goods to importers, and uses that word in Articles 51, 53.2, 54, 55, 56 and 58. In contrast, Article 46 is part of Section 2, on civil and administrative procedures and remedies, so the limited sense of "release" to an importer cannot apply. Read in context, a broader meaning, equivalent to release to any party in the channels of commerce, must apply when this word is used in relation to remedies.

"outside the channels of commerce in such a manner as to avoid any harm caused to the right holder"

The parties disagreed as to the meaning of the principle set out in the first sentence of Article 46 that refers to disposal "outside the channels of commerce in such a manner as to avoid any harm caused to the right holder". The United States raised concerns regarding the harm that donations may cause to right holders and the possibility that the donated goods may later be sold by the social welfare bodies.

The Panel observed that this principle, by its terms, relates to disposal of goods "outside" the channels of commerce, and not into the channels of commerce. It was not disputed that this principle is applicable to donations (i.e. gifts) to social welfare bodies for their own use or for charitable distribution. However, if the social welfare bodies later sell goods donated to them by Customs for charitable distribution, even to raise money for charitable aims, the goods are not in fact disposed of outside the channels of commerce but into the channels of commerce. If the social welfare bodies charitably distribute goods donated to them by Customs but the goods later find their way back into the channels of commerce, this does not alter the fact that the goods were disposed of outside the channels of commerce, in the ordinary sense of "disposal". Instead, the later sale of the distributed goods is relevant to the assessment of whether the disposal outside the channels of commerce was "in such a manner so as to avoid any harm caused to the right holder".

This principle, by its terms, provided that authorities shall have the authority to order that the goods "be disposed of", in the passive voice. There was no obligation that the relevant authorities carry out the disposal themselves but rather they may entrust the actual disposal to another body. The carrying out of disposal "outside the channels of commerce" recognizes the opportunity for involvement of other bodies, such as charities, or non-commercial use by government. The principle attaches to the "manner" in which infringing goods are disposed of, not to the actual disposal. Authorities were not held responsible for acts of the bodies carrying out the disposal that is beyond the authorized manner. Further, the principle is that the manner shall be "so as to" avoid harm. This is phrased in terms of purpose, not result. The responsibility of the authorities is to ensure that the manner in which the goods are disposed of outside the channels of commerce is designed in such a way that it will comply with the principle. The principle is that the manner of disposal shall "avoid" harm. China argued that this is an obligation to "pay due regard to". However, the Panel noted that the ordinary meaning of "avoid" can be defined as "keeps off, prevent; obviate". Further, the principle is that the manner shall avoid "any" harm caused to the right holder, not just "harm" or "some" harm. Therefore, the manner of disposal must be designed in such a way as to prevent any harm occurring to the right holder.

It must be recalled that disposal of infringing goods outside the channels of commerce, in context, is an alternative to destruction of the goods. In the Panel's view, this implies that any inherent risk of harm due simply to the fact that the goods have not been completely destroyed is insufficient to disqualify a disposal method, as it would nullify the choice between disposal and destruction. However, more specific concerns linked to harm caused to the right holder by a particular manner of disposal are relevant in assessing conformity with the principle that disposal outside the channels of commerce be "in such a manner as to avoid any harm caused to the right holder".

The Panel found confirmation of this interpretation within Article 46. The fourth sentence of Article 46 expressly provides that simple removal of the trademark unlawfully affixed is not sufficient to permit release of counterfeit trademark goods into the channels of commerce other than in exceptional cases. In contrast, the first sentence of Article 46 contains a more general requirement that the requisite authority to order disposal of goods outside the channels of commerce shall be "in such a manner as to avoid any harm caused to the right holder". Whilst this reflects, in part, the fact that the first sentence does not only apply to counterfeit trademark goods, it also demonstrates that when goods are disposed of outside the channels of commerce it is not assumed that the removal of the trademark is required (or insufficient).

It remained possible that the trademark unlawfully affixed may cause confusion, depending on the circumstances in which goods were disposed of outside the channels of commerce. Practical requirements, such as removal of the trademark, affixation of a charitable endorsement or controls over the use of goods or distribution methods, may avoid confusion. The cooperation of the right holder would be valuable in this regard but the terms of the Article do not indicate that

that is a requirement. However, the issue of harm to the right holder, whether to its reputation or through lost sales, through disposal of goods outside the channels of commerce without removal of the trademark unlawfully affixed depends on the circumstances. Otherwise, any disposal outside the channels of commerce where persons could simply observe a counterfeit trademark would be presumed to cause harm to the right holder. This result was not contemplated by the terms of Article 46, as the possibility of observing the counterfeit trademark is incidental to the requisite authority not to destroy the goods.

The obligation that competent authorities "shall have the authority" to order certain types of remedies leaves Members free to provide that competent authorities may have authority to order other remedies not required by Article 59. The remedies specified in Article 59 are not exhaustive.

Donation to social welfare bodies

The Panel assessed Customs' authority to order donation to social welfare bodies in order to determine whether it constitutes authority to order disposal of infringing goods in accordance with the principles set out in the first sentence of Article 46 of the TRIPS Agreement, specifically, whether it constitutes disposal "outside the channels of commerce in such a manner as to avoid any harm caused to the right holder".

Defective Goods

The United States did not object to donation of goods to charity *per se*. It accepted that donation with the right holder's consent may observe the principles of Article 46. The United States alleged that the measures do not provide any discretion to the Customs authorities to determine that transfer to a social welfare body is not appropriate in circumstances where the right holder would be harmed. The United States argued that the donation of "shoddy counterfeit goods", if they fail to perform properly and especially if defective or dangerous, will damage the right holder's reputation or even expose it to claims for compensation.

The Panel observed that the United States' argument was based on the legal structure of the measures that allegedly allows defective goods to be donated. The United States did not allege that any sub-standard, defective or dangerous goods have actually been donated by China Customs to social welfare bodies. China responded that its Customs would never donate defective or dangerous goods.

Article 27 of the Customs IPR Regulations sets out a condition for donation, in that it provides for donation "[w]here the confiscated goods which infringe on intellectual property rights can be used for the social public welfare undertakings". Article 30 of the Implementing Measures restates the condition, providing for donation "[w]here the goods concerned may be used directly for the social public welfare".

The Panel saw no reason why defective or dangerous goods would satisfy this condition. Nothing else in the evidence suggests that Customs would donate defective or dangerous goods to charity. Therefore, the Panel found that it had not been demonstrated that Customs lacks authority to donate goods to social welfare bodies in such a manner as to avoid any harm to the right holder caused by defective or dangerous goods.

Harm to Reputation

The United States submitted that the above considerations do not address the situation of counterfeit and pirated goods those are usable but likely of lower quality. In its view, such goods could easily harm the right holder's reputation.

The Panel observed that any inherent risk of harm due simply to the fact that the goods have not been completely destroyed is insufficient to disqualify a disposal method, and that evidence of actual harm caused to the right holder by the manner of disposal could be relevant in assessing whether the manner of disposal conforms to this principle. Under ordinary circumstances, consumers may be misled as to the origin of counterfeit and pirated goods, and counterfeit goods with quality problems may harm right holders' reputations. The Panel took due note that nothing in the measures at issue obliges Customs or the social welfare bodies to remove counterfeit trademarks. Therefore, the Panel found that it has not been demonstrated that Customs lacks authority to donate goods to social welfare bodies in such a manner as to avoid any harm to the right holder caused by lower quality goods.

Later Sales of Donated Goods

The United States also alleged that "nothing appears to prevent [social welfare bodies] from selling the infringing goods they receive under the first "item" thus moving these goods back into commerce". China .... it by giving reference to Article 30 of the Implementing Measures, which specifically provides in a final paragraph as follows:

"In cases where relevant social welfare bodies use the infringing goods confiscated by Customs for the social public welfare, or the holder of the intellectual property rights assists Customs in destroying the infringing goods, Customs shall carry out necessary supervision."(emphasis added)

The Panel observed that these terms, on their face, (a) require the Red Cross to restrict the use of infringing goods and take measures to prevent their sale; and (b) obliges Customs to monitor use and entitles Customs to require the Red Cross to correct any violation of the restriction on use or its duty to take measures to prevent their sale. These measures, on their face, show that Customs has a responsibility for the manner in which the goods are disposed of, and that it has provided that that manner avoids their return to the channels of commerce.

Sale to the Right Holder

The second disposal method set out in the measures at issue was sale to the right holder. Sale to the right holder is voluntary in that it requires the consent of the right holder. If the right holder consents, it pays for the infringing goods at a price to be agreed. Article 27 of the Customs IPR Regulations sets out sale to the right holder after donation to social welfare bodies. It uses the modal verb translated as "can" (or "may"). Article 30 of the Implementing Measures sets out donation to social welfare bodies and sale to the right holder as alternatives with no apparent order between them. Therefore, there appear to be no circumstances in which sale to the right holder is the only option available and could preclude any authority required by Article 59. The Panel found it unnecessary to assess this option to determine whether the Customs measures are consistent with Article 59 of the TRIPS Agreement.

Auction and authority to order the destruction of infringing goods

The Panel considered Customs' authority to order that infringing goods be auctioned. Auction is the third disposal method set out in the measures at issue. Auction was not a form of destruction, and it is undisputed that auction is not a form of disposal outside the channels of commerce. Accordingly, this disposal method was clearly not required by Article 59.However, the Panel recalled that the remedies specified in Article 59 are not exhaustive. Therefore, the fact that authority to order auction of infringing goods was not required is not in itself inconsistent with Article 59.

Auction and "simple removal of the trademark unlawfully affixed"

The Panel observed that "the principles set out in Article 46" as incorporated by Article 59 of the TRIPS Agreement include the fourth sentence of Article 46. That sentence provides as follows:

"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."

The Panel found that the Customs measures are not mandatory with respect to the auction of infringing goods. However, the Panel did not consider that this was fatal to the United States' claim with respect to the fourth sentence of Article 46. The Panel recalled that the parties had differing views as to the applicability of this principle. The United States submitted that the fourth sentence of Article 46 was applicable under the first sentence of Article 59. China considered that Customs was not subject to the principles articulated by the fourth sentence of Article 46.The Panel found that the fourth sentence of Article 46 is so applicable and will now interpret the principle that it sets out.

The fourth sentence of Article 46 reads as follows:

"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."

The term "counterfeit trademark goods" is defined by footnote 14(a) to the TRIPS Agreement as follows:

"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;"

Turning to the measures at issue, the Panel observed that the measures at issue apply *inter alia* to counterfeit trademark goods and following that the measures permit auction of such goods. In this regard, Article 27 of the Customs IPR Regulations provides as follows:

> *"Where the confiscated goods infringing on intellectual property rights cannot be used for social public welfare undertakings and the holder of the intellectual property rights has no intention to buy them, Customs can, after eradicating the infringing features, auction them off according to law." (emphasis added)*

It seemed clear from this provision that the eradication of infringing features is a condition attached to auction of goods confiscated by Customs. Article 27 of the Customs IPR Regulations is implemented and confirmed by Article 30(2) of the Implementing Measures and is expressly confirmed by the first operative paragraph of Public Notice No. 16/2007 which provides, relevantly, as follows:

> *"Where the confiscated infringing goods are auctioned by Customs, Customs shall completely eradicate all infringing features on the goods and the packaging thereof strictly pursuant to Article 27 of the Regulations, including eradicating the features infringing trademarks, copyright, patent and other intellectual property rights."*

It was undisputed that in all cases in which Customs auctions goods that it has confiscated under the measures at issue, Customs first removes the infringing features. It was clear from the measure on its face that the phrase "infringing features" refers to features that infringe any intellectual property rights covered by the measures, including not only trademarks, but also copyright and patents. With respect to counterfeit trademark goods, it seemed obvious that the infringing features will comprise the counterfeit trademarks. Therefore, the fact that the measures refer to infringing "features" does not suggest that anything besides the counterfeit trademark is eradicated in these cases. China confirmed that "with regard to trademark-infringing goods, elimination of infringing features refers to removal of the infringing trademark from the goods".

Therefore, insofar as the state of the counterfeit trademark goods were concerned, the only action taken prior to auction was the removal of the trademark. The question arose whether this constituted "simple" removal of a trademark within the meaning of the fourth sentence of Article 46 of the TRIPS Agreement. China argued that its measures do not provide for "simple" removal of the trademark because they also provide an opportunity for the trademark right holder to comment prior to auction. This procedure was set out in the second operative paragraph of Public Notice No. 16/2007. China did not allege that Customs has an obligation to take any right holder's comments into account.

The Panel observed that the word "simple" can be defined as "with nothing added; unqualified; neither more nor less than; mere, pure". A situation in which a trademark is removed from a good and no other action is taken will constitute "simple" removal of the trademark. Therefore, the Panel's preliminary view was that eradication of the infringing features under the measures at issue constitutes "simple" removal of the trademark as contemplated by the fourth sentence of Article 46, as incorporated by Article 59.

It is inevitable that a Member's authorities exercising authority under Article 59 will take certain actions of a procedural nature in releasing the good into the channels of commerce, such as physically transferring them to the custody of another party. The question was which other actions render removal of the trademark unlawfully affixed not "simple".

The context within the fourth sentence of Article 46 shows that simple removal of the trademark unlawfully affixed "shall not be sufficient" to permit release of the goods into the channels of commerce. The text does not prohibit the release of the goods into the channels of commerce *per se*. Rather, by specifically addressing the case of counterfeit trademark goods, and stating what is "not ... sufficient" to permit release, the provision impliedly permits release of counterfeit trademark goods into the channels of commerce where more than simple removal of the trademark is carried out. Removal of a counterfeit trademark would ensure that the goods do not infringe the exclusive rights set out in Article 16 of the TRIPS Agreement. However, the fourth sentence of Article 46 provides that that shall not be sufficient, other than in exceptional cases. The fact that the negotiators included an additional requirement shows that this principle is intended to achieve more than simply the cessation of an infringement.

The context within Article 46 shows that the fourth sentence is one of a series of expressions of an objective set out at the beginning of that Article, namely, "to create an effective deterrent to infringement". Where counterfeit trademark goods are released into the channels of commerce after the simple removal of the trademark unlawfully affixed, an identical trademark can be produced or imported separately and unlawfully reaffixed, often with relative ease, so that the goods will infringe once again.

This problem applies to counterfeit trademark goods in particular because, as provided in the definition of "counterfeit trademark goods" in footnote 14(a) to the TRIPS Agreement, the counterfeit trademark is identical to the valid trademark or cannot be distinguished in its essential aspects from the valid trademark. Counterfeit trademark goods are more likely to imitate the appearance of genuine goods in their overall appearance and not simply in the affixation of the counterfeit trademark, as the likelihood that a counterfeit trademark good will confuse a consumer is related to the degree to which all its features, infringing and non-infringing, resemble the genuine good. Where the counterfeit trademark is removed, the resulting state of the goods may still so closely resemble the genuine good that there is a heightened risk of further infringement by means of re-affixation of a counterfeit trademark. Whilst this may be true of other, non-infringing goods as well, the goods confiscated by Customs are already counterfeit and are being released into the channels of commerce. The negotiators evidently considered that the heightened risk of further infringement warranted additional measures to create an effective deterrent to further infringement.

Viewed in light of the objective, the "simple" removal of the trademark is principally a reference to the fact that the state of the goods is not altered in any other way so that the absence of the trademark is not an effective deterrent to further infringement. Removal of the trademark is not "simple" if the state of the goods is altered sufficiently to deter further infringement. The Panel found confirmation for this interpretation in the second sentence of Article 59, which addresses the same issue but in a different context, and provides as follows: "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."

This sentence addresses the same basic problem as the fourth sentence of Article 46. It confirms that the state of the counterfeit trademark goods is the relevant consideration, although the obligation in the second sentence of Article 59 is less specific with respect to removal of the trademark, suggesting that "simple removal of the trademark" is an example of a means of altering the state of infringing goods. However, in the present dispute, the applicable obligation is found in the fourth sentence of Article 46, as incorporated by Article 59.

China argued that right-holders have a legal right to protection from goods that infringe their intellectual property, but not from unmarked goods that do not. The Panel observed that the fourth sentence of Article 46, by its specific terms, is not limited to an action to render goods non-infringing, which the simple removal of the trademark would achieve.

Rather, the fourth sentence of Article 46 imposes an additional requirement beyond rendering the goods non-infringing in order to deter further acts of infringement with those goods. Therefore, it is insufficient, other than in exceptional cases, to show that goods that have already been found to be counterfeit are later unmarked. The release into the channels of commerce of such goods, while they may no longer infringe upon the exclusive rights in Article 16 of the TRIPS Agreement, will not comply with the requirement in the fourth sentence of Article 46, as incorporated by Article 59. Turning to the measures at issue, the Panel observed that the procedure for seeking comment by right holders does not affect the state of the goods, nor is there any obligation to take right holder's comments into account. Therefore, it was irrelevant to the question whether the measures at issue provide for "simple removal of the trademark unlawfully affixed".

China alleged that auctions of goods confiscated by Customs are subject to a reserve price that ensures that infringers do not have the opportunity to purchase the seized goods at an unreasonably low cost and reaffix counterfeit marks.

The Panel did not agree as China itself stated in its rebuttal submission, "the very principle of trademark protection is that a trademark distinguishes a good and allows for a significant market premium". The Panel pointed out that a counterfeit trademark is designed to obtain some or that entire economic premium. When the counterfeit trademark is removed, the value of the good is diminished and is less than its market value if it is resold with a counterfeit trademark reaffixed. In other words, it remained economically viable for the importer or a third party to purchase the goods at auction and reaffix the trademarks in order to infringe again, with the heightened risk of this occurring. In any case, there was no evidence that the prices established by the method used by China Customs are so high that it is no longer economically viable to purchase the goods and reaffix the trademarks.

China argued that the measures at issue prevent the cheap return of the seized good to the infringer and, by ensuring that the infringers reap no economic benefits, effectively deter infringement. The Panel **saw** no reference to the original infringer in the relevant obligation or in the objective set out in Article 46. There was no reason to suppose that the text is aimed at deterring infringement by the importer only and not by other parties, such as purchasers at auction. The use of the word "release" into the channels of commerce does not imply such a limitation as the sentence reads “release into the channels of commerce” not “release to the importer”. Therefore, the Panel considered that, in regard to counterfeit trademark goods, China’s Customs measures provide that the simple removal of the trademark unlawfully affixed is sufficient to permit release of the goods into the channels of commerce.

The Panel did not conclude on this basis alone that the measures at issue are inconsistent with the requirement of the fourth sentence of Article 46, as incorporated by Article 59, because that sentence contains the phrase “other than in exceptional cases”. This phrase, read in context, implies that “in exceptional cases” the simple removal of the trademark unlawfully affixed may be sufficient to permit release of the goods into the channels of commerce.

The United States, in response to a question, submitted that the ordinary meaning of “exceptional” suggests that there is something about the circumstances that is unusual or special, not that there is some *de minimis* number of cases where it is permissible to release the goods into normal channels of commerce after simply removing the infringing mark. If the negotiators had intended it to be the number of cases, they might have been expected to phrase the provision more in terms of “other than in a very limited number of cases” or “other than in a *de minimis*/insignificant number of cases”.

China, in response to the same question, submitted that the ordinary meaning of “exceptional” includes “special”, which suggests a qualitative test, and “unusual”, which refers to frequency and suggests a quantitative test. An interpretation in terms of the set of circumstances, and an interpretation in terms of the number of cases, is both consistent with the plain meaning of “exceptional cases”. The Panel noted that the phrase “other than in exceptional cases”, read in context, refers to a subset of the cases covered by the fourth sentence of Article 46, as incorporated by Article 59, namely, those cases in which a Member’s competent border authorities permit the release of goods that have been found to be counterfeit trademark goods into the channels of commerce. The question was how to determine when any such case may be considered “exceptional”.

The word “exceptional” may be defined as “of the nature of or forming an exception; unusual, out of the ordinary; special;” This definition did not explain in what way a case must be different from other cases in order to be considered “exceptional” within the meaning of the fourth sentence of Article 46. Further, the question of how different a case must be from others is also a question of degree.

The Panel considered that the phrase "other than in exceptional cases", like the rest of the principle set out in the fourth sentence of Article 46, must be interpreted in light of the objective of that Article, namely, "to create an effective deterrent to infringement". There might well be cases in which the simple removal of the trademark prior to release of the goods into the channels of commerce would not lead to further infringement. For example, an innocent importer who has been deceived into buying a shipment of counterfeit goods, who has no means of recourse against the exporter and who has no means of reaffixing counterfeit trademarks to the goods, might constitute such a case. However, such cases must be narrowly circumscribed in order to satisfy the description of "exceptional". Even when narrowly circumscribed, application of the relevant provision must be rare, lest the so-called exception become the rule, or at least ordinary.

The Panel considered that the phrase "other than in exceptional cases", like the rest of the principle set out in the fourth sentence of Article 46, must be interpreted in light of the objective of that Article, namely, "to create an effective deterrent to infringement". There might well be cases in which the simple removal of the trademark prior to release of the goods into the channels of commerce would not lead to further infringement. For example, an innocent importer who has been deceived into buying a shipment of counterfeit goods, who has no means of recourse against the exporter and who has no means of reaffixing counterfeit trademarks to the goods, might constitute such a case. However, such cases must be narrowly circumscribed in order to satisfy the description of "exceptional". Even when narrowly circumscribed, application of the relevant provision must be rare, lest the so-called exception become the rule, or at least ordinary.

The Panel did not consider that "exceptional cases" for the purposes of the fourth sentence of Article 46 may simply be demonstrated by a low rate of cases in which simple removal of the trademark is treated as sufficient to permit release of goods into the channels of commerce. Firstly, "exceptional cases" within the meaning of the fourth sentence of Article 46, as incorporated in Article 59, is not assessed in terms of a proportion of all cases of infringing goods seized at the border. Secondly, such an approach to goods that had already been found to be counterfeit trademark goods would amount to a margin of tolerance of further infringement that is not consistent with the objective of Article 46 of creating an effective deterrent.

Therefore, the Panel considered that, in regard to counterfeit trademark goods, China's Customs measures provide that the simple removal of the trademark unlawfully affixed is sufficient to permit release of the goods into the channels of commerce in more than just "exceptional cases".

For the above reasons, the Panel concluded that the Customs measures were inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principle set out in the fourth sentence of Article 46.

Conclusions with respect to the Customs measures

(a) Article 59 of the TRIPS Agreement was not applicable to the Customs measures insofar as those measures apply to goods destined for exportation;

(b) United States had not established that the Customs measures were inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principles set out in the *first* sentence of Article 46 of the TRIPS Agreement; and

(c) Customs measures were inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principle set out in the fourth sentence of Article 46 of the TRIPS Agreement.

CRIMINAL THRESHOLDS

This Section of the Panel's findings concerns criminal thresholds established by the following measures.

Trademark provisions

· Use of a counterfeit trademark

Article 213 of the Criminal Law may be translated as follows:

"Whoever, without permission from the owner of a registered trademark, uses a trademark which is identical with the registered trademark on the same kind of commodities shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined." (emphasis added)

Article 1 of Judicial Interpretation No. 19 [2004] interprets the phrase "the circumstances are serious" in Article 213 of the Criminal Law and may be translated as follows:

> *"Whoever, without permission from the owner of a registered trademark, uses a trademark which is identical with the registered trademark on the same kind of commodities, in any of the following circumstances which shall be deemed as 'the circumstances are serious' under Article 213 of the Criminal Law, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention for the crime of counterfeiting registered trademark, and shall also, or shall only, be fined*:

(1) the *illegal business operation volume* of not less than 50,000 Yuan 369 or the *amount of illegal gains* of not less than 30,000 Yuan;

(2) in the case of counterfeiting two or more registered trademarks, the *illegal business operation volume* of not less than 30,000 Yuan or the *amount of illegal gains* of not less than 20,000 Yuan;

(3) other serious circumstances." 370 (emphasis added)

Article 12(1) of Judicial Interpretation No. 19 [2004] defines the term "illegal business operation volume" and may be translated as follows:

> *"The 'illegal business operation volume' herein means the value of the infringing products manufactured, stored, transported or sold during the course of commission of the act of infringing intellectual property rights. The value of the sold infringing products shall be calculated at the actual sale price. The value of the infringing products manufactured, stored, transported and unsold shall be calculated at the labeled price or at the average actual sales price of the infringing products as verified. If there is no labeled price on the infringing products or the actual sales price is unable to be verified, the price of the infringing products shall be calculated at the middle market price of the infringed products."*

Selling counterfeit trademark commodities

Article 214 of the Criminal Law may be translated as follows:

> *"Whoever sells commodities, knowing that such commodities bear counterfeit registered trademarks shall, if the amount of sales is relatively large, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall*

only, be fined; if the amount of sales is huge, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined." (emphasis added)

Article 2 of Judicial Interpretation No. 19 [2004] interpreted the phrase "the amount is relatively large" under Article 214 of the Criminal Law and may be translated as follows:

"Whoever sells commodities, knowing that such commodities bear counterfeit registered trademarks, with the amount of sales of not less than 50,000 Yuan, this shall be deemed as 'the amount is relatively large' under Article 214 of the Criminal Law, and the offender shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention for the crime of selling commodities bearing a counterfeit registered trademark, and shall also, or shall only, be fined."

Forgery of trademarks and sale of forged trademarks

Article 215 of the Criminal Law may be translated as follows:

"Whoever forges or, without the authorization of another person, makes representations of that person's registered trademarks, or sells representations of another person's registered trademark that are forged or made without authorization, shall, if the circumstances are serious, be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and shall also, or shall only, be fined; if the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined." (emphasis added)

Article 3 of Judicial Interpretation No. 19 [2004] interpreted the phrase "the circumstances are serious" under Article 215 of the Criminal Law and may be translated as follows:

"Whoever forges or, without the authorization of another person, makes representations of that person's registered trademarks or sells such representations, in any of the following circumstances which shall be deemed as 'the circumstances are serious' under Article 215 of the Criminal Law, shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance for the crime of illegally producing or selling illegally made representations of the registered trademark, and shall also, or shall only, be fined:

(1) forging or, without the authorization, making representations of the registered trademarks or selling such representations of not less than 20,000 pieces, or with the illegal business operation volume of not less than 50,000 Yuan, or the amount of illegal gains of not less than 30,000 Yuan;

(2) forging or, without the authorization, making two or more kinds of representations of the registered trademarks or selling such representations of not less than 10,000 pieces, or with the illegal business operation volume of not less than 30,000 Yuan, or the amount of illegal gains of not less than 20,000 Yuan;

Copyright Provisions

(i) Criminal Copyright Infringement

Article 217 of the Criminal Law may be translated as follows:

"Whoever, for the purpose of making profits, commits any of the following acts of infringement of copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined:

(1) reproducing [/] distributing written works, musical works, cinematographic works, television or video works, computer software or other works without permission of the copyright owner;

(2) publishing a book of which the exclusive right of publication is enjoyed by another person;

(3) reproducing [/] distributing audio recording [/] video recording made by another person without permission of the maker;

(4) making, selling a work of fine art with the forged signature of another rperson." (emphasis added)

Selling Copyright-Infringing Reproductions

Article 218 of the Criminal Law may be translated as follows:

"Whoever, for the purpose of making profits, sells infringing reproductions, knowing that such infringing reproductions are those stipulated in Article 217 of this Law shall, if the amount of illegal gains is huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined." (emphasis added)

Article 6 of Judicial Interpretation No. 19 [2004] interpreted the phrase "the amount of illegal gains is huge" under Article 218 of the Criminal Law and may be translated as follows:

"Whoever, for the purpose of making profits, commits any of the acts as stipulated in Article 218 of the Criminal Law, where the amount of illegal gains is not less than 100,000 Yuan, this shall be deemed as 'the amount of illegal gains is huge', and the offender shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention for the crime of selling infringing reproductions, and shall also, or shall only, be fined."

(d) Crimes of Infringing Intellectual Property Rights Committed by a Unit

The Panel's terms of reference also referred to Article 220 of the Criminal Law on crimes under Articles 213 to 219 where committed by a unit. The United States did not request relief in respect of that Article. Therefore, the Panel did not consider this aspect of the measure.

The Panel observed that the claim challenged China's criminal measures "as such". The parties disagreed on certain aspects of the measures at issue. The Panel was therefore obliged, in accordance with its mandate, to make an objective assessment of the meaning of the relevant provisions of those measures. The Panel recalled its observations confirm that it examines these measures solely for the purpose of determining their conformity with China's obligations under the TRIPS Agreement.

China informed the Panel that it employed thresholds across a range of commercial crimes, reflecting the significance of various illegal acts for overall public and economic order and China's prioritization of criminal enforcement, prosecution and judicial resources. China submitted that the criminal thresholds for counterfeiting and piracy were reasonable and appropriate in the context of this legal structure and the other laws on commercial crimes. The United States responded that what China chose to do with its domestic non-IPR criminal thresholds had no bearing on the Panel's assessment of whether China met its international obligations under the first sentence of Article 61 of the TRIPS Agreement.

Thresholds for Conviction or Aggravation

The Panel noted that some thresholds in the Criminal Law set minimum requirements for conviction ("conviction thresholds") whilst others set minimum requirements for higher penalties ("aggravation thresholds"). Most of the Articles at issue in this dispute include both. The conviction thresholds comprise "serious circumstances" in Articles 213 and 215, "relatively large amount of sales" in Article 214, "relatively large amount of illegal gains" or "other serious circumstances" in Article 217 and "huge amount of sales" in Article 218. The aggravation thresholds comprise "especially serious circumstances" in Articles 213, 215 and 217 and "huge amount of sales" in Article 214.

The United States only challenged the conviction thresholds as these render prosecution impossible in the absence of certain criteria. Therefore, the Panel did not consider the aggravation thresholds further.

The Panel noted that each of these Articles contain provisions that appear to be of general application and that relate explicitly to "a crime". The Articles to which China referred contain no express limitation to certain specific provisions of the Criminal Law. They form part of Chapter II on "Crimes" found in Part One on "General Provisions", which also sets out the aim, basic principles and scope of application of the Criminal Law in Chapter I, provisions on punishments in Chapter III and the concrete application of punishments in Chapter IV. On their face, there were no reason to suppose that Articles 22 and 23 do not apply to the crimes of infringing intellectual property rights in Articles 213, 214, 215, 217 and 218 of the Criminal Law. This reading was confirmed by examples of judicial decisions submitted by China that show courts applying Articles 22 and 23 of the Criminal Law in cases of crimes of infringing intellectual property rights.

The Panel observed that, as regards the trademark offences, two of the thresholds under Article 213 of the Criminal Law, as interpreted by Article 1 of

Judicial Interpretation No. 19 [2004], were set in terms of "illegal business operation volume" and "illegal gains" (i.e. amount of profits obtained). Article 214 of the Criminal Law applied to the act of selling, and the corresponding threshold in Article 2 of Judicial Interpretation No. 19 [2004] was set in terms of "amount of sales". These all imply a purpose of obtaining financial gain or making profits. Article 215 of the Criminal Law did not expressly refer to a profit-making purpose.

As regards the copyright offences, both Articles 217 and 218 of the Criminal Law expressly referred to acts carried out for "the purpose of making profits". This language was reiterated in the corresponding interpretations in Articles 5 and 6 of Judicial Interpretation No. 19 [2004] and Article 1 of Judicial Interpretation No. 6 [2007].

Alternative thresholds

The parties agreed that the thresholds refer to a range of different factors, comprising illegal business operation volume, amount of illegal gains (or profits), amount of sales, number of "copies" and "other serious circumstances". The first three are, by their own terms, indicators of business activity and are either expressly, or impliedly, linked to selling, in other words, commercial activity. The first four were all expressed in numerical terms.

China emphasized that the multiple standards set forth in each of Articles 213, 215 and 217 of the Criminal Law were all alternatives. The United States agreed and claimed that application of any or all of the alternative thresholds left many acts of commercial scale piracy and counterfeiting immune from criminal prosecution or conviction.

The Panel observed that Articles 213 and 215 of the Criminal Law each contain a single threshold. However, these were interpreted by Articles 1 and 3 of Judicial Interpretation No. 19 [2004] in terms of a series of distinct circumstances. It was clear from the text of Articles 1 and 3 that each of these circumstances applied in the alternative as Articles 1 and 3 each provide that the conviction threshold under the relevant Article of the Criminal Law should be deemed satisfied in "any of the following circumstances".

The Panel observed that Article 217 of the Criminal Law contained two conviction thresholds namely, "the amount of illegal gains" and "other serious circumstances". The text of Article 217 made it clear that these were alternatives to each other by the use of the word "or". Both of these thresholds were interpreted by Article 5 of Judicial Interpretation No. 19 [2004]: the former in terms of a numerical amount and the latter in terms of a series of distinct circumstances. It was clear from the text of Article 5 that each of these circumstances applied in the alternative as Article 5 provided that the conviction threshold of "other serious circumstances" under Article 217 of the Criminal Law shall be deemed satisfied in "any of the following circumstances". Satisfaction of any one of those circumstances, or "the amount of illegal gains" threshold, shall be deemed to satisfy the relevant conviction threshold.

Cumulative Calculation over Time

China submitted that the thresholds were calculated over a prolonged period of time. This was reflected in the general limitation period for crimes of a continuous nature, and the specific provision on cumulative calculation in Article 12(2) of Judicial Interpretation No. 19 [2004]. China asserted that this principle also applies to thresholds in terms of numbers of copies. Therefore, the thresholds for crimes infringing intellectual property rights could be calculated over the entire duration of the infringing activity.

The United States noted that Article 12(2) of Judicial Interpretation No. 19 [2004] was subject to a condition, namely, that no administrative penalty or criminal punishment has been imposed. China responded that administrative enforcement forestalls the commission of the crime.

The Panel observed that Part One, Chapter IV, Section 8 of the Criminal Law sets out limitation periods for the prosecution of crimes. Article 87 provided for limitation periods calculated according to the maximum punishment for the relevant crime, of which the shortest period is five years. Article 89 of the Criminal Law provides that the limitation period for a criminal act of a continual or continuous nature shall be counted from the date the criminal act is *terminated*.

The Panel also noted that Article 12(2) of Judicial Interpretation No. 19 [2004] may be translated as follows:

> "In the case of infringement committed for [*sic*] more than once for which no administrative penalty or criminal punishment has been imposed, the illegal business operation volume, the amount of illegal gains, or the amount of sales shall be calculated accumulatively."

Calculation of Illegal Business Operation Volume – Goods

China submitted that the calculation of "illegal business operation volume" thresholds was not limited to goods in a single location at the same point in time. Rather, the threshold covered all infringing goods associated with the infringer, even those no longer in the infringer's possession. The United States acknowledged that, in certain circumstances, the definition of "illegal business operation volume" appears to permit an infringer's goods on different premises to be taken into account in calculation of the threshold.

The Panel observed that three conviction thresholds under Articles 213, 215 and 217 of the Criminal Law were set in terms of "illegal business operation volume". The definition of "illegal business operation volume" in Article 12(1) of Judicial Interpretation No. 19 [2004] referred to infringing products "manufactured, stored, transported or sold" during the course of commission of the act of infringing intellectual property rights. On its face, this did not restrict the calculation of these thresholds to the value of goods seized in a single place at the same point in time. This interpretation was confirmed by examples of judicial decisions submitted by China showing that courts had taken into account the value of goods already sold, as well as of goods seized at different locations when calculating the illegal business operation volume.

Calculation of Illegal Business Operation Volume – Price

The United States claimed that the calculation methodology required for "illegal business operation volume" was based on the prices of infringing goods, not the value of legitimate no infringing goods.

China responded that the calculation methodology was based on the actual, labeled or average sales price of the infringing goods but, where this cannot be determined; the price would be calculated based on the average market price of the infringed, i.e. genuine, goods. In response to a question from the Panel, China agreed that the price of the genuine goods is used as a last resort.

The Panel observed that three conviction thresholds under Articles 213, 215 and 217 of the Criminal Law are set in terms of "illegal business operation volume", which can be calculated by alternative methods. Ultimately, the parties agreed that, in accordance with the definition of "illegal business operation volume" in Article 12(1) of Judicial Interpretation No. 19 [2004], the primary method of calculation of those thresholds were based on the actual price at which infringing goods were sold or labeled or, if unsold, the average actual sales price of the infringing products as verified. It was only where there **is** no labeled price or the actual sales price was unable to be verified that the illegal business operation volume **is** calculated according to the "middle" market price of the infringed products. In other words, the threshold primarily relates to the value of the counterfeit trademark or copyright infringing goods but might, as a last resort, relate to the value of the genuine products.

Claim under the first sentence of Article 61 of the TRIPS Agreement

The United States submitted that the concept of "commercial scale" extends both to those who engage in commercial activities in order to make a "financial return" in the marketplace, and who were, by definition, therefore operating on a commercial scale, as well as to those whose actions, regardless of motive or purpose, are of a sufficient extent or magnitude to qualify as "commercial scale" in the relevant market. Later, it clarified that the concept of "commercial scale" referred to counterfeiting or piracy that reach a certain extent or magnitude with a link to the marketplace. Whether a particular counterfeiting or piracy activity was "on a commercial scale" would depend on the facts and circumstances surrounding that activity. Relevant factors would include the market for the infringed goods, the object of the infringement, the value of the infringed goods, the means of producing the infringed goods, and the impact of the infringement on the right holder. Some activity would be so trivial or of a *de minimis* character so as *not* to be "on a commercial scale" in some circumstances, such as occasional infringing acts of a purely personal nature carried out by consumers, or the sale of trivial volumes for trivial amounts unless there are circumstances indicating to the contrary.

China responded that "commercial scale" referred to a significant magnitude of infringement activity. This was a broad standard, subject to national discretion and local conditions. The United States failed to interpret "commercial scale" as a single term and its interpretation reads the word "scale" completely out of the definition. The context of Articles 1.1 and 41.5 of the TRIPS Agreement shows that Members retain considerable discretion with respect to law enforcement, and that the ability to define the standards of Article 61 is reserved for Members. Later, it clarified that while these Articles did not provide an absolute defence against the substantive obligation of Article 61, they did provide relevant context and counseled strongly against interpretations of Article 61 in ways that would be inconsistent with China's legal system and would require the diversion of enforcement resources. The negotiating record of the TRIPS Agreement, as well as subsequent actions of Members show that they understood "commercial scale" to impose only a high and broad standard which only covered significant infringement activity.

The United States' claim related to cases of willful trademark counterfeiting and copyright piracy in respect of which China did not provide for criminal procedures and penalties to be applied but which the United States claims are "on a commercial scale". The claim was based on two alleged "fundamental problems" referred to in this Report as the two limbs of this claim. The first limb concerned the level and method of calculation of the thresholds. By specifying certain levels, the thresholds allegedly eliminate whole classes of counterfeiting and piracy from risk of criminal prosecution and conviction. The second limb concerned the limited set of numerical tests in the thresholds. By focusing solely on these tests, the thresholds allegedly require law enforcement officials to disregard other indicia of counterfeiting and piracy.

The Panel noted that the first limb of the claim addressed the numbers specified in the numerical tests, and the way in which some of them were calculated, in order to show that the thresholds were too high. These are quantitative issues. The second limb addressed certain factors that the numerical tests do not take into account. These are qualitative issues. Neither limb was a broad claim that numerical thresholds could not capture all cases "on a commercial scale". In response to the Panel's requests for clarification of the claim after both the first and the second substantive meetings, the United States clarified that it did not object to the use of numerical thresholds *per se*.

Therefore, in its assessment of the claim, the Panel proceeded as follows:

(a) with respect to the first limb of the claim, the Panel would assess whether the *levels* in China's thresholds are too high to capture all cases on a commercial scale; and

(b) with respect to the second limb of the claim, the Panel would assess whether the other factors raised by the United States can be taken into account by China's thresholds to capture all cases on a commercial scale and, if not, whether this was a TRIPS requirement.

Procedural Issues

China argued that the United States had "a significantly higher burden [of proof] than it would normally encounter" because this claim concerned criminal law matters. China argued that the Panel should treat sovereign jurisdiction over police powers as a powerful default norm, departure from which can be authorized only in light of explicit and unequivocal consent of State parties. China later clarified that it was not referring to a factual burden of proof but rather to the inability of the United States to provide the evidence to support its legal interpretation of Article 61 of the TRIPS Agreement. China also argued for the application of the "interpretative canon" of *in dubio mitius* which, it submits, has a particular justification in the realm of criminal law.

The United States responded that the fact that Article 61 of the TRIPS Agreement touches on criminal law does not change the provisions of Article 3.2 of the DSU or the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties ("Vienna Convention"). In this dispute, the meaning of "commercial scale" was reached through the general rule of interpretation in Article 31 of the Vienna Convention. There was no "doubt" which is a precondition of reliance on the concept of *in dubio mitius*.

The Panel observed that this claim was brought under Article 61 of the TRIPS Agreement, which concerned criminal procedures and penalties. Article 64.1 of the TRIPS Agreement provides that: "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."

The application of the rules and procedures of the DSU to the settlement of disputes under the TRIPS Agreement **is** confirmed by Article 1.1 of the DSU, in conjunction with Appendix 1 of the DSU which lists the TRIPS Agreement as a "covered agreement". In accordance with Article 3.2 of the DSU, the Panel applied "the customary rules of interpretation of public international law" to its task of interpreting the TRIPS Agreement in this dispute. The general rule of interpretation, expressed in Article 31 of the Vienna Convention, and the rules on supplementary means of interpretation in Article 32 of the Vienna Convention, have attained the status of rules of customary or general international law. The Panel would apply the general rule of interpretation and, to the extent warranted, supplementary means of interpretation. The Panel was mindful that Article

3.2 of the DSU also provides that "recommendations and rulings of the DSB could not add to or diminish the rights and obligations provided in the covered agreements".

The Panel acknowledged the sensitive nature of criminal matters and attendant concerns regarding sovereignty. These concerns might be expected to find reflection in the text and scope of treaty obligations regarding such matters as negotiated by States and other Members. Section 5 of Part III of the TRIPS Agreement, dedicated to criminal procedures and remedies, was considerably briefer and less detailed than the other Sections on enforcement in Part III. Brief as it is, the text of Section 5 also contain significant limitations and flexibilities. The customary rules of treaty interpretation oblige the treaty interpreter to take these limitations and flexibilities into account in interpreting the relevant provision.

Nature of the Obligation

This claim was brought under the first sentence of Article 61 of the TRIPS Agreement. Article 61 constitutes the whole of Section 5 of Part III of that Agreement and provides as follows:

"SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful 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 willfully and on a commercial scale."

The first sentence of this Article uses the word "shall", indicating that it is mandatory. This stands in contrast to the fourth sentence, which addresses the same issue with respect to other cases of infringement of intellectual property rights but uses the word "may", indicating that it is permissive. Unlike the third sentence, the first sentence contained no language such as "in appropriate cases" which might expressly introduce some margin of discretion. The terms of the first sentence of Article 61, read in context, impose an obligation.

This interpretation was confirmed by Article 41 of the TRIPS Agreement on "General Obligations", which is the first provision of Part III of the TRIPS Agreement and forms part of the context of Article 61. Article 41.1 provides, relevantly, as follows: "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."

In the Panel's view, the general obligation in Article 41.1 confirmed that Article 61 contains obligations, as one of the specific provisions on enforcement procedures in Part III.

China submitted that the first sentence of Article 61 cannot set forth a specific obligation because it provides for enforcement against certain types of infringement but neither the TRIPS Agreement nor the Berne Convention (1971) define what constitutes substantive infringement. Rather, they defer to national discretion to define the rights being infringed.

The Panel agreed with China that the first sentence of Article 61 contains a number of terms that are not defined by the Agreement and that this can affect the proper interpretation of the provision. However, even though the first sentence did not use the term "infringement", it is important to note that Part II of the TRIPS Agreement, including the provisions of the Paris Convention (1967) incorporated by Article 2.1, and the provisions of the Berne Convention (1971) incorporated by Article 9.1, provide for minimum standards concerning the availability, scope and use of intellectual property rights that apply irrespective of national treatment. These provisions define the rights conferred by intellectual property and the circumstances in which those rights are infringed. Part III of the TRIPS Agreement provides for the enforcement of those rights, to varying degrees. Therefore, the Agreement contains substantive obligations that are not simply matters of national discretion.

China submitted that Article 61 of the TRIPS Agreement was less specific than the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures and lacks the clarity required to demonstrate a specific, concrete obligation. China also argued that the TRIPS Agreement lacks a provision such as Article 18.4 of the Anti-Dumping Agreement requiring Members to take steps to ensure the conformity of their laws with its provisions.

The Panel agreed that the TRIPS Agreement differs from trade remedy agreements. However, the Panel decided to apply the usual rules of treaty interpretation to the terms used in the TRIPS Agreement and make its assessment on that basis in accordance with Article 11 of the DSU. The Panel drew China's attention to Article XVI: 4 of the WTO Agreement which provides as follows: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

The "annexed Agreements" include the TRIPS Agreement. Therefore, Members were obliged to ensure conformity of their respective laws with their respective obligations as provided in the TRIPS Agreement.

China submitted that the third sentence of Article 1.1 of the TRIPS Agreement sets forth the overall context for interpreting the specificity of the standards in the TRIPS Agreement. It described Article 1.1 as a specific "caveat" that establishes boundaries on obligations, specifically in the realm of enforcement.

The Panel observed that Article 1.1 of the TRIPS Agreement provides as follows:

> "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."

The first sentence of Article 1.1 sets out the basic obligation that Members "shall give effect" to the provisions of this Agreement. This means that the provisions of the Agreement were obligations where stated, and the first sentence of Article 61 so states. The second sentence of Article 1.1 clarifies that the provisions of the Agreement were minimum standards only, in that it gives Members the freedom to implement a higher standard, subject to a condition. The third sentence of Article 1.1 did not grant Members freedom to implement a lower standard, but rather grants freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect under the first sentence. The Panel agreed that differences among Members' respective legal systems and practices tend to be more important in the area of enforcement. However, a coherent reading of the three sentences of Article 1.1 did not permit differences in domestic legal systems and practices to justify any derogation from the basic obligation to give effect to the provisions on enforcement.

Therefore, the standard of compliance with Article 61 was the minimum internationally agreed standard set out in that Article. The minimum standard in Article 61 did not defer to China's domestic practice on the definition of criminal liability and sanctions for other wrongful acts in areas not subject to international obligations under the TRIPS Agreement, unless it so states. For example, the second sentence refers to "crimes of a corresponding gravity" which might refer to domestic practice in other areas. However, the first sentence of Article 61 did not make any such reference.

For the above reasons, the Panel observed its view at paragraphs 7.503 to 7.505 above that the first sentence of Article 61 of the TRIPS Agreement imposes an obligation. The Panel now turned to the terms used in that provision, read in context and in light of the object and purpose of the Agreement, to determine the scope and content of that obligation.

Scope of the Obligation

The terms of the obligation in the first sentence of Article 61 of the TRIPS Agreement were that Members shall "provide for criminal procedures and penalties to be applied". That obligation applies to "willful trademark counterfeiting or copyright piracy on a commercial scale". Within that scope, there were no exceptions. The obligation applies to all acts of willful trademark counterfeiting or copyright piracy on a commercial scale.

The Panel observed that, in China, acts of trademark and copyright infringement falling below the applicable thresholds are not subject to criminal procedures and penalties. The issue that arises was whether any of those acts of infringement constitute "willful trademark counterfeiting or copyright piracy on a commercial scale" within the meaning of the first sentence of Article 61. This required the Panel to consider the interpretation of that phrase.

The Panel noted that the first sentence of Article 61 contains no fewer than four limitations on the obligation that it sets forth. These define the scope of the relevant obligation and were not exceptions. The first limitation was that the obligation applies to trademarks and copyright rather than to all intellectual property rights covered by the TRIPS Agreement. The fourth sentence of Article 61 gives Members the option to criminalize other infringements of intellectual property rights, in particular where they were committed willfully and on a commercial scale. Despite the potential gravity of such infringements, Article 61 creates no obligation to criminalize them. This can be contrasted with Sections 2 and 3 of Part III of the TRIPS Agreement, regarding civil and administrative procedures and remedies, which apply to any act of infringement of intellectual property rights covered by the Agreement. It should also be contrasted with Section 4 of Part III which attaches conditions to the option to apply its procedures to other infringements of intellectual property rights.

The second limitation in the first sentence of Article 61, which was related to the first, is that it applies to counterfeiting and piracy rather than to all infringements of trademarks and copyright. This could also be contrasted with Sections 2 and 3 of Part III of the TRIPS Agreement. This limitation, like the first, indicated an intention to reduce the scope of the obligation. Indeed, the records of the negotiation of the TRIPS Agreement confirm that the term "infringements of trademarks and copyright" on a commercial scale was considered in the draft provision on criminal procedures but ultimately rejected.

The terms "trademark counterfeiting" and "copyright piracy" were not defined in the TRIPS Agreement. They were distinct from the concepts of "trademark infringement" and "copyright infringement". They were similar to the terms "counterfeit trademark goods" and "pirated copyright goods" which were defined for the purposes of the TRIPS Agreement in footnote 14 as follows:

"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."

The terms used in the first sentence of Article 61 denoted classes of acts or activity whilst the terms used in footnote 14 denote classes of goods only. This reflects the fact that Article 61 provides for criminal enforcement against infringing acts whilst Section 4 of Part III (in which the terms defined in footnote 14 are used) provides for enforcement at the border against infringing goods. The definitions in footnote 14 also refer to the law of the country of "importation" whilst Article 61 relates to the law of the Member to which the obligation applies – generally speaking, the law of the Member where the infringing act occurs. Subject to these observations, the Panel considered that the definitions in footnote 14 are relevant in understanding the terms used in Article 61.

The third limitation in the first sentence of Article 61 is indicated by the word "willful" that precedes the words "trademark counterfeiting or copyright piracy". This word functions as a qualifier indicating that trademark counterfeiting or copyright piracy was not subject to the obligation in the first sentence of Article 61 unless it is "willful". This word, focusing on the infringer's intent, reflects the criminal nature of the enforcement procedures at issue. It was absent from Section 4 of Part III, even though that Section is similarly limited, as a minimum, to counterfeit trademark goods and pirated copyright goods. The penalties for criminal acts, such as imprisonment, fines and forfeiture of property, were relatively grave, as reflected in the second sentence of Article 61. There was no obligation to make such penalties available with respect to acts of infringement committed without the requisite intent.

The fourth limitation in the first sentence of Article 61 is indicated by the phrase "on a commercial scale" that follows the words "trademark counterfeiting or copyright piracy". This phrase, like the word "willful", appeared to qualify both "trademark counterfeiting" and "copyright piracy". The limitation to cases on a commercial scale, like the limitation to cases of willfulness, stands in contrast to all other specific obligations on enforcement in Part III of the TRIPS Agreement.

The principal interpretative point in dispute was the meaning of the phrase "on a commercial scale". This phrase functions in context as a qualifier, indicating that willful trademark counterfeiting or copyright piracy was included in the scope of the obligation provided that it also satisfies the condition of being "on a commercial scale". Accordingly, certain acts of willful trademark counterfeiting or copyright piracy were excluded from the scope of the first sentence of Article 61.

Despite the fact that trademark counterfeiting and copyright piracy infringe the rights of right holders, and despite the fact that they could be grave, the two qualifications of willfulness and "on a commercial scale" indicate that Article 61 does not require Members to provide for criminal procedures and penalties to be applied to such counterfeiting and piracy *per se* unless they satisfy certain additional criteria. This is highlighted by the fourth sentence of Article 61, which allows Members to provide for criminal procedures and penalties to be applied in other cases of infringement, "in particular" where they are committed willfully and on a commercial scale. This indicated that the negotiators considered cases of willful infringement on a commercial scale to represent a subset of cases of infringement, comprising the graver cases. This is useful context for interpreting the first sentence of Article 61, even though it does not refer to "infringement" in general, because the first sentence refers to both "counterfeiting" and "piracy" and willfulness and commercial scale, evidently to limit the cases of infringement in different ways. Therefore, the text of Article 61 indicates that it must not be assumed that the nature of counterfeiting and piracy *per se* is such that Members were obliged to provide for the application of *criminal* procedures and penalties.

This was consistent with the nature of the obligation, being a minimum standard, as expressly confirmed by the use of the words "at least" in the first sentence of Article 61 and, more generally, by the second sentence of Article 1.1. Members may, and many do, criminalize other acts of trademark counterfeiting, other acts of copyright piracy, other acts of infringement of trademarks and copyright, and acts of infringement of other intellectual property rights such as patents, but there was no obligation to do so under the TRIPS Agreement.

Part III of the TRIPS Agreement distinguishes between the treatment of willful trademark counterfeiting and copyright piracy on a commercial scale, on the one hand, and all other infringements of intellectual property rights, on the other hand, in that only the former were subject to an obligation regarding criminal procedures and penalties. This indicated the shared view of the negotiators that the former are the most blatant and egregious acts of infringement. This view must inform the interpretation of Article 61.

The Panel recalled as to the circumstances of conclusion of the TRIPS Agreement with respect to enforcement procedures. Whilst some of the pre-existing international intellectual property agreements or conventions contain provisions on the characteristics of enforcement mechanisms, it was striking that none of them create any specific minimum standard for criminal enforcement procedures. Among the international intellectual property agreements with wide membership, Article 61 of the TRIPS Agreement was, in this sense, unique.

This reflects, in part, the fact that intellectual property rights are private rights, as recognized in the fourth recital of the Preamble to the TRIPS Agreement. In contrast, criminal procedures were designed to punish acts that transgress societal values. This was reflected in the use of the word "penalties" in Article 61.

Bearing in mind these aspects of the context of the first sentence of Article 61, and the object and purpose of the TRIPS Agreement, the Panel turned to the ordinary meaning of the words "on a commercial scale".

"on a commercial scale"

The parties adopt different approaches to the task of interpreting the phrase "on a commercial scale".

The ordinary meaning of the word "scale" is uncontroversial. It might be defined as "relative magnitude or extent; degree, proportion. Freq. in *on a grand, lavish, small,* etc. *scale*". The ordinary meaning of the word includes both the concept of quantity, in terms of magnitude or extent, as well as the concept of relativity. Both concepts were combined in the notions of degree and proportion. Therefore, a particular "scale" compares certain things or actions in terms of their size. Some things or actions would be of the relevant size and others will not.

The relevant size was indicated by the word "commercial". The ordinary meaning of "commercial" might be defined in various ways. The following two definitions had been raised in the course of these proceedings:

"1. Engaged in commerce; of, pertaining to, or bearing on commerce.
2. (...)

3. Interested in financial return rather than artistry; likely to make a profit; regarded The Panel considered the first definition to be apposite. It includes the term "commerce" which may, in turn, be defined as "buying and selling; the exchange of merchandise or services, esp. on a large scale". Reading this definition into the definition of "commercial" indicates that "commercial" means, basically, engaged in buying and selling, or pertaining to, or bearing on, buying and selling. A combination of that expanded definition of "commercial" and the definition of "scale" would render a meaning in terms of a relative magnitude or extent (of those) engaged in buying and selling, or a relative magnitude or extent pertaining to, or bearing on, buying and selling.

This draws a link to the commercial marketplace. The Panel noted that the third definition, which included the qualifiers "rather than artistry" and "mere", refers to usages such as a "commercial artist", "commercial film" or "commercial writing" in the sense of those who are more interested in financial return than the artistic merit of a work, works that are of such a nature that they are likely to make a profit and works that are regarded as a mere matter of business rather than as expressions of other values. This definition is not apposite in the first sentence of Article 61.

Therefore, the Panel considered that the first definition is appropriate. However, the combination of that definition of "commercial" with the definition of "scale" presented a problem in that scale is a quantitative concept whilst commercial is qualitative, in the sense that it refers to the nature of certain acts. Some acts were in fact commercial, whilst others are not. Any act of selling can be described as commercial in this primary sense, irrespective of its size or value. If "commercial" was simply read as a qualitative term, referring to all acts pertaining to, or bearing on commerce, this would read the word "scale" out of the text. Acts on a commercial scale would simply be commercial acts. The phrase "on a commercial scale" would simply mean "commercial". Such an interpretation failed to give meaning to all the terms used in the treaty and is inconsistent with the rule of effective treaty interpretation.

There are no other uses of the word "scale" in the TRIPS Agreement, besides the first and fourth sentences of Article 61. However, the wider context shows that the TRIPS Agreement frequently uses the word "commercial" with many other nouns, although nowhere else with "scale". The other uses of the word "commercial" include "commercial rental", "commercial purposes", "commercial exploitation" ,"commercial terms", "public non-commercial use" , "first commercial exploitation" , "honest commercial practices" , "commercial value" , "unfair commercial use", "non-commercial nature" and "legitimate commercial interests".

The provisions of the Paris Convention (1967) incorporated by Article 2.1 of the TRIPS Agreement include uses of the word "commercial" in the phrase "industrial or commercial establishment" (in the singular or plural) and in the phrases "industrial or commercial matters" and "industrial or commercial activities". The provisions of the Berne Convention (1971) incorporated by Article 9.1 of the TRIPS Agreement include the phrase "any commercial purpose". The provisions of the IPIC Treaty incorporated by Article 35 of the TRIPS Agreement include the phrase "commercially exploited" and "exploits ordinarily commercially".

The context shows that the negotiators chose to qualify certain activities, such as rental, exploitation and use, as "commercial". They also chose to qualify various nouns, such as "terms", "value", "nature" and "interests", as "commercial" or "non-commercial". In a similar way, they could have agreed that the obligation in the first sentence of Article 61 would apply to cases of willful and "commercial" trademark counterfeiting or copyright piracy. This would have included all commercial activity. Indeed, the records of the negotiation of the TRIPS Agreement show that this formulation was in fact suggested (by the United States) at an early stage.

The context shows that the negotiators used the term "commercial purposes" in two provisions on the scope of protection of certain categories of intellectual property rights, and that the Appendix to the Berne Convention (1971) already did use that term in the singular in provisions on possible limitations to particular rights. However, the negotiators did not agree that the obligation in the first sentence of Article 61 would apply to cases of willful trademark counterfeiting or copyright piracy "for commercial purposes". This would have included all activity for financial gain or profit.

Instead, the negotiators agreed in Article 61 to use the distinct phrase "on a commercial scale". This indicates that the word "scale" was a deliberate choice and must be given due interpretative weight. "Scale" denotes a relative size, and reflects the intention of the negotiators that the limitation on the obligation in the first sentence of the Article depended on the *size* of acts of counterfeiting and piracy. Therefore, whilst "commercial" is a qualitative term, it would be an error to read it solely in those terms. In context it must indicate a quantity.

A review of the uses of the word “commercial” throughout the TRIPS Agreement indicated that it links various activities, not simply selling, to the marketplace. It also shows that “commercial” activities could not be presumed to be on a larger scale than others, such as “public non-commercial” activities, even though they would generally be larger than, say, “Personal” or “domestic” use. The distinguishing characteristic of a commercial activity was that it was carried out for profit. The review of the uses of the word “commercial” also shows that, unlike all the others, Article 61 uses the word “commercial” to qualify a notion of size.

In the Panel’s view, the combination of the primary definition of “commercial” and the definition of “scale” can be reconciled with the context of Article 61 if it is assessed not solely according to the nature of an activity but also in terms of relative size, as a market benchmark. As there was no other qualifier besides “commercial”, that benchmark must be whatever “commercial” typically or usually connotes. In quantitative terms, the benchmark would be the magnitude or extent at which engagement in commerce, or activities pertaining to or bearing on commerce, were typically or usually carried on, in other words, the magnitude or extent of typical or usual commercial activity.

Given that the phrase uses the indefinite article “a”, it refers to more than one magnitude or extent of typical or usual commercial activity. The magnitude or extent would vary in the different “cases” of counterfeiting and piracy to which the obligation applies. In the Panel’s view, this reflected the fact that what was typical or usual varies according to the type of commerce concerned. The Panel understood that this refined approach interprets “commercial scale” as basically everything that is “commercial” with the exception of some trivial or *de minimis* activities. It was not clear how “seriously” and “genuinely” indicates “non-trivial” activities – if anything, “seriously” indicates something more important. However, there was no need to consider its meaning further as the word “seriously” is not used in the terms of the treaty, nor is it implied by the terms that are used.

Whilst the United States’ refined approach has the merit of ensuring that its interpretation of “commercial scale” did not capture an identical class of acts as the term “commercial purpose”, the difference seems minimal. This refined approach did not read the word “scale” *out* of the text but nevertheless it read the word *down* to such an extent that it lacks the significance that the negotiators evidently intended. The negotiators chose the word “scale”, which refers to size, rather than other words that they actually used elsewhere in the Agreement that do not exclude activities on the basis of size. They also used the word “scale” in the fourth sentence of Article 61, together with the term “in particular”, which would be virtually redundant if the sentence simply meant that Members could provide for criminal procedures and penalties to be applied “in particular” to more than trivial or *de minimis* cases. The context throughout Part III shows that the limitations in Section 5 reflect an effort to address only the more blatant and egregious infringements.

As to the view that “on a commercial scale” was basically a *de minimis* provision, the Panel was of the view that it need look no further than the preceding provision, Article 60, to see how the negotiators addressed that issue. Article 60 forms part of Section 4 on special requirements related to border measures and serves an analogous purpose to the phrase “on a commercial scale” in Article 61 in that both define the lower end of infringement at which a particular type of enforcement procedure must be available. However, the terms of each were quite different: Article 60 defines *de minimis* infringement in terms of volume (“small quantities”), nature (“of a non-commercial nature”) and circumstances (“in travelers’ personal luggage or sent in small consignments”). Had the negotiators wanted to exclude only *de minimis* infringement from the minimum standard of Article 61, they had a model in Article 60, or they could have used words such as “except for minor or personal use”. However, they did not. Instead, Article 61 refers to size (“scale”) qualified only by the word “commercial”. This indicated that the negotiators intended something different from *de minimis*. Article 60 also indicates that the negotiators did not equate small with non-commercial, confirming that a “commercial” scale is not necessarily small-scale nor large-scale.

The circumstances surrounding the inclusion of the phrase “on a commercial scale” show that the phrase had been used and, in some cases, defined in the intellectual property legislation of various\ countries for periods stretching back almost a century. Specifically, the patent laws of these countries refer to the working of inventions, or failure to work inventions, “on a commercial scale”. The term was used in relation to the exploitation of protected subject matter, as in Article 61, but the purpose of these non-working provisions, and the considerations relevant to their operation, were distinct from those of criminal procedures and penalties as addressed in Article 61 of the TRIPS Agreement. There was insufficient indication that the meaning ascribed to the term “on a commercial scale” in such legislation was that intended by the negotiators of the TRIPS Agreement when they used the term in the first and fourth sentences of Article 61. However, this circumstance shows the phrase in use in an intellectual property context long before the negotiation of the TRIPS Agreement.

China submitted that the phrase "on a commercial scale" refers to "a significant magnitude of infringement activity". China referred to four isolated uses of the phrase "commercial scale" spread out over a period of forty years: one at the 1947-1948 Havana Conference, one in a 1985 GATT Council meeting, and two in US national legislation on alternative energy development. From these uses, China posited an interpretation suggestive of industrial scale activity.

The Panel considered that this interpretation was predetermined by the context of the uses that China had selected, which referred to commercial scale activities at an industrial level. This was inapposite in the context of Article 61 of the TRIPS Agreement which applied to acts of infringement of individual rights, including those subsisting in individual products. This interpretation simply replaces the term "commercial" that was used in the text, with "significant", that was not used in the text, effectively reading out the term "commercial".

Conformity of the Measures at Issue with Respect to the Level of the Thresholds

The Panel recalled its finding above regarding the interpretation of the phrase "willful trademark counterfeiting or copyright piracy 'on a commercial scale'", as used in Article 61 of the TRIPS Agreement. The Panel recalled, in particular, that this was a relative standard, which would vary when applied to different fact situations.

The Panel noted that it is the standard in the treaty obligation that varies as applied to different fact situations, and not necessarily the means by which Members choose to implement that standard. The Panel recalled that the third sentence of Article 1.1 of the TRIPS Agreement provides as follows:

"Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

This provision confirmed that the TRIPS Agreement did not mandate specific forms of legislation. The Panel might not simply assume that a Member must give its authorities wide discretion to determine what was on a commercial scale in any given case, and might not simply assume that thresholds, including numerical tests, were inconsistent with the relative benchmark in the first sentence of Article 61 of the TRIPS Agreement. As long as a Member in fact provided for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale, it would comply with this obligation. If it is alleged that a Member's method of implementation did not so provide in such cases, that allegation must be proven with evidence. Therefore, the Panel would assess whether the evidence shows that China failed to provide for criminal procedures and penalties to be applied in any such cases.

Claim under the Second Sentence of Article 61 of the TRIPS Agreement

The United States claimed that, as China's criminal measures did not comply with the first sentence of Article 61 of the TRIPS Agreement; they are accordingly also inconsistent with China's obligations under the second sentence of that Article. In the United States' view, China could not make the necessary remedies "available" or sufficient to deter piracy and counterfeiting. China responded that the obligation in the second sentence of Article 61 is supplementary to, and contingent on, that of the first sentence of that Article. The obligation in the second sentence is only triggered in the event that a Member has an obligation under the first sentence to provide criminal procedures and penalties.

The Panel observed that the United States had made this claim contingent upon the outcome of its claims under the first sentence of Article 61 of the TRIPS Agreement. Additional findings regarding this claim under the second sentence of Article 61 would not contribute further to a positive solution to this dispute. Therefore, it was unnecessary for the Panel to rule on this claim.

Claim under Article 41.1 of the TRIPS Agreement

The United States claimed that China had failed to make the procedures and penalties required by the first and second sentences of Article 61 "available" as required by Article 41.1 of the TRIPS Agreement. China responded that the United States had failed to show that China breaches its obligations under Article 61 and therefore failed to show that China breaches its obligations under Article 41.1. The Panel observed that this claim was consequent upon the outcome of the claims regarding the criminal measures under Article 61 of the TRIPS Agreement. Additional findings regarding this claim under Article 41.1 of the TRIPS Agreement would not contribute further to a positive solution to this dispute. Therefore, it was unnecessary for the Panel to rule on this claim.

Conclusions with respect to the criminal thresholds

The Panel held that United States had not established that the criminal thresholds were inconsistent with China's obligations under the first sentence of Article 61 of the TRIPS Agreement. The Panel exercised judicial economy with respect to the claims under Article 41.1 of the TRIPS Agreement and under the second sentence of Article 61 of the TRIPS Agreement with respect to the criminal thresholds.

4. United States-Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383R

Parties

Thailand
United States

Third Party

Argentina, the European Communities, Japan and Chinese Taipei and Korea

Factual Matrix

On 26 November 2008, the Government of the Kingdom of Thailand requested consultations pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 , Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, and Articles 17.2, 17.3 and 17.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, concerning the United States' alleged application of the practice known as "zeroing" of negative dumping margins in the United States' determination of certain margins of dumping in its anti-dumping investigation of polyethylene retail carrier bags from Thailand. Thailand and the United States held consultations, but failed to resolve the dispute. Dispute Settlement Body of the WTO established a panel pursuant to the request of Thailand.

The measures at issue in this dispute are the anti-dumping order imposed by the United States on polyethylene retail carrier bags from Thailand and the Final Determination by the United States Department of Commerce (the "USDOC"), as amended, leading to that Order. Thailand claimed that in its Final Determination, as amended, the USDOC used the "zeroing" methodology to determine the final dumping margins for individually investigated Thai exporters subject to the Order whose margins of dumping were not based on total facts available. In particular, Thailand claimed that, in calculating the anti-dumping margins for the relevant exporters, the USDOC:

I. identified different "models," *i.e.*, types, of products based on the most relevant product characteristics;

II. calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation;

III. compared the weighted average normal value of each model to the weighted average United States price for that same model;

IV. calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and

V. set to zero all negative margins on individual models before summing the total amount of dumping for all models.

Thailand submitted that through the above method, the USDOC calculated margins of dumping and collected anti-dumping duties in amounts that exceeded the actual extent of dumping, if any, by the investigated companies, contrary to the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

The United States acknowledged the accuracy of Thailand's description of the USDOC's use of "zeroing" in calculating the dumping margins for the individually investigated exporters whose margins of dumping were not based on total facts available. The United States recognized that, in *US – Softwood Lumber V*, the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2, in an integrated manner. The United States also acknowledged that this reasoning was equally applicable with respect to Thailand's claim in the present case.

The Panel issued its Interim Report to the parties on 11 December 2009. On 18 December 2009, both parties submitted written requests for the review of precise aspects of the Interim Report. Neither party exercised its right to submit written comments on the other party's written request, or to request an interim review meeting.

• Burden of proof

The issues raised in this case were very similar to those addressed first by the panel in *US – Shrimp (Ecuador)*, and subsequently by the panel in *US – Shrimp (Thailand)*. Like the latter panel, *the panel in the present dispute* agreed with the approach adopted by the *US – Shrimp (Ecuador)* panel. In light of the fact that the United States did not contest Thailand's claim, the burden of proof stood discharged by Thailand. Notwithstanding the United States' decision not to contest Thailand's claim, the Panel considered that they were still bound by Article 11 of the *DSU* to make an "objective assessment of the facts of the case and the applicability of and conformity with 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".

The panel in *US – Shrimp (Ecuador)* made the following findings in respect of burden of proof:

"Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof. The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence. The burden would then shift to the responding party (here the United States), to adduce evidence to rebut the presumption. In this context, the Panel recall 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 favor of the complaining party presenting the prima facie case."

According to the Panel the issue of the burden of proof was of particular importance in this case. The Panel took note in this regard that the Appellate Body had cautioned panels against ruling on a claim before the party bearing the burden of proof has made a *prima facie* case. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a *prima facie* case and shifted the burden of proof to the responding party: "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 arguments 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."

More recently, in *US – Gambling*, the Appellate Body indicated that "[a] panel erred when it ruled on a claim for which the complaining party had failed to make a *prima facie* case", and noted that: 'A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments. In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request: ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.

Given that such a requirement applied to panel requests at the outset of a panel proceeding, the panel was of the view that a prima facie case— made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.

The Panel agreed with this reasoning of the panel in *US – Shrimp (Ecuador)*, and adopted it as their own. Accordingly, notwithstanding the fact that the United States was not seeking to refute Thailand's claim, the panel took upon itself to satisfy that Thailand had established a prima facie case of violation of Article 2.4.2 of the Anti-Dumping Agreement.

Has Thailand established that the USDOC "Zeroed" in the Measure at Issue?

In support of its factual assertion that the USDOC "zeroed" in the measure at issue, Thailand referred to a copy of the computer program used by the USDOC to calculate dumping margins in the Final Determination, as amended, that was provided to some of the investigated exporters. The Panel found that it indicated the use of "zeroing" in the calculation of the dumping margins for the relevant Thai exporters. In particular, lines 2567-2570 provide that "IF EMARGIN LE 0 THEN EMARGIN = 0", i.e., that margins on individual models less than zero should be set to zero. In addition, lines 2633-2637 and 2693-2696 provide that the overall margin of dumping shall only be calculated on the basis of comparisons "WHERE EMARGIN GT 0", i.e., where the margin for a particular model was greater than zero. Furthermore, "the United States acknowledged the accuracy of Thailand's description of the [USDOC]'s use of 'zeroing' in calculating the dumping margins for the individually investigated exporters whose margins of dumping were not based on total facts available". In these circumstances, Panel was satisfied that Thailand had demonstrated that the USDOC "zeroed" in the measure at issue.

Has Thailand established that the Methodology used by the USDOC is the same in all legally relevant respects as the Methodology reviewed by the Appellate Body in *US – Softwood Lumber V*?

The Panel went on to determine whether the "zeroing" methodology used by the USDOC to calculate the dumping margins at issue here was, as alleged by Thailand, the same in all legally relevant respects as the one the Appellate Body, in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

The Appellate Body in *US – Softwood Lumber V*, described "zeroing" as applied by the USDOC in that investigation as follows:

"First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the "dumping margin" for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no "dumping margin" for that comparison. USDOC aggregated the results of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price—those where the USDOC considered there was a "dumping margin"—after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada)."

In support of its claim that the methodology used by the USDOC was the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*, Thailand relied on the description of the methodology set forth in the USDOC's notice of preliminary determination of sales at less than fair value in the investigation at issue, as well as the computer program used to determine the dumping margins. In its notice of preliminary determination, the USDOC stated that:

"To determine whether sales of PRCBs to the United States by Thai Plastic Bags and Universal in this investigation were made at less than fair value, we compare EP [export price] or constructed export price (CEP) to normal value, as described in the 'US Price' and 'Normal Value' sections of this notice. In accordance with section 777A (d) (1) (A) (i) of the Act, we calculated weighted-average EPs and CEPs.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance ..."

The USDOC further explained that: "We compared U.S. sales with sales of the foreign like product in the home market on the basis of the physical characteristics described under Fair Value Comparisons above. Wherever we were unable to match a U.S. model to identical merchandise sold in the home market, we selected the most similar model of subject merchandise in the home market as the foreign like product."

Thereafter, the USDOC explained that the weighted-average dumping margin was "equal to the weighted-average amount by which the normal value exceeds the EP or CEP".

In addition, the abovementioned USDOC computer program shows that the USDOC determined weighted-average U.S. prices by model (lines 1976-2005); determined weighted-average normal values by model (lines 985-1037); matched home market and U.S. sales by model (lines 2007- 2179); and made model-by-model calculations (lines 2417-2555), including the subtraction of U.S. price from normal value (lines 2541-2543).

The Panel viewed that these evidences were sufficient to establish that the USDOC

(i) identified different "models," *i.e.*, types, of products based on the most relevant product characteristics,

(ii) calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation,

(iii) compared the weighted average normal value of each model to the weighted average United States price for that same model, and

(iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated U.S. price for all models.

In light of these considerations, and in the absence of any denial by the United States, the Panel was satisfied that Thailand had demonstrated that the methodology applied by the USDOC in calculating the margins of dumping that were not based on total facts available in the Order imposing antidumping duties on certain polyethylene retail carrier bags from Thailand, and the Final Determination (as amended) leading to that Order, was the same in all legally relevant respects as the methodology that was found by the Appellate Body in *US – Softwood Lumber V* to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

Has Thailand established that the Methodology applied by the USDOC is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement?

Article 2.4.2 provides as follows:

"Article 2

Determination of Dumping

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

Thailand relied on the Appellate Body Report in *US – Softwood Lumber* V in support of its claim of inconsistency with Article 2.4.2. In particular, Thailand relied on the Appellate Body's finding that the terms "margins of dumping" and "all comparable export transactions" in Article 2.4.2 must be interpreted in an "integrated manner", such that where "an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".

While the Panel was not bound by the reasoning in prior Appellate Body and/ or panel reports, adopted Reports create legitimate expectations among WTO Members, and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".

The panel in *US – Shrimp (Ecuador)* explained its understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* as follows: "The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centered on whether a Member could take into account 'all' comparable export transactions only at the sub-group level or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the Anti-Dumping Agreement. The Appellate Body found that 'it [was] clear from the texts of [Article VI: 1 of the *GATT 1994* and Article 2.1 of the Anti-Dumping Agreement] that dumping is defined in relation to a product as a whole as defined by the investigating authority'. The Appellate Body further considered that the definition of 'dumping' contained in Article 2.1 applies to the entire Agreement, including Article 2.4.2, and that "'[d]umping', within the meaning of the Anti-Dumping Agreement, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type model, or category of that product."

Next, the Appellate Body relied on its Report in *EC – Bed Linen*, in which it stated that '[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole'. Thus, the Appellate Body noted that "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product". The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole. On this basis, the Appellate Body held that zeroing, as applied by the USDOC in *US – Softwood Lumber V*: mean[t], in effect, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price.

Zeroing thus inflates the margin of dumping for the product as a whole. The Appellate Body on this basis concluded that the treatment of comparisons for which the weighted average normal value is less than the weighted average export price as "non-dumped" comparisons was not in accordance with the requirements of Article 2.4.2 of the Anti-Dumping Agreement. As a result, the Appellate Body upheld the Panel's finding that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing."

The panel in *US – Shrimp (Ecuador)* further found that "there is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2".

Given that the issues raised by Thailand's claim was identical in all material respects to those addressed by the Appellate Body in *Softwood Lumber V*, Panel was satisfied that Thailand has established a prima facie case that the use of zeroing by the USDOC in the calculation of the margins of dumping in respect of the measures at issue is inconsistent with the United States' obligations under Article 2.4.2 of the Anti-Dumping Agreement because the USDOC did not calculate these dumping margins on the basis of the "product as a whole", taking into account all comparable export transactions in calculating the margins of dumping. The Panel observed that the United States "acknowledges" that the reasoning of the Appellate Body in *US – Softwood Lumber* V "is equally applicable with respect to Thailand's claim regarding the individually investigated exporters whose margins of dumping were not based on total facts available in the investigation at issue".

CONCLUSIONS AND RECOMMENDATION

In light of the above findings, the Panel concluded that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement by using "zeroing" in the Final Determination, as amended, and the

Order to determine the dumping margins for individually investigated Thai exporters whose margins of dumping were not based on total facts available.

Under Article 3.8 of the DSU, in cases where there was an infringement of the obligations assumed under a covered agreement, the action was considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, the Panel concluded that, to the extent the United States had acted inconsistently with the provisions of the Anti-Dumping Agreement, it had nullified or impaired benefits accruing to Thailand under that Agreement. The Panel therefore recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

Implementation of adopted reports

At its meeting on 19 March 2010, the United States informed the DSB that it intended to implement the DSB recommendations and rulings in this case and that it would need a reasonable period of time to do so. On 31 March 2010, Thailand and the United States informed the DSB that they had agreed that the reasonable period of time shall be six months, expiring on 18 August 2010.

5. United States-Laws, Regulations and Methodology for calculating Dumping Margins ("Zeroing") Recourse to Article 21.5 of the DSU by the European Communities WT/DS294/AB/RW, 14th May 2009

PARTIES

European Communities, Appellant/Appellee
United States, Other Appellant/Appellee

Third Party

India, Japan, Korea, Mexico, Norway, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and Thailand

Factual Matrix

The European Communities and the United States each appealed certain issues of law and legal interpretation developed in the Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*[60]. The Panel was established pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider a complaint by the European Communities concerning the existence and consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body in the original proceedings in *US – Zeroing (EC)*.[61]

The original proceedings concerned the use of the so-called "zeroing" methodology by the United States Department of Commerce (the "USDOC") when calculating margins of dumping in the context of various anti-dumping proceedings. The original panel found that the United States' zeroing methodology, as it relates to original investigations, "is a norm which, as such, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement." The original panel also found that the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by applying "model zeroing"[62] in 15 specific original investigations.[63] The original panel also found that the use of "simple zeroing" in 16 specific administrative reviews was not inconsistent with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement").

---

[60] WT/DS294/RW, 17 December 2008.

[61] The recommendations and rulings of the DSB resulted from the adoption on 9 May 2006, by the DSB, of the Appellate Body Report, WT/DS294/AB/R, and the Panel Report, WT/DS294/R, in *US – Zeroing (EC)*.

On appeal, the Appellate Body upheld, on the basis of modified reasoning, the original panel's finding that the zeroing methodology, as it relates to original investigations in which the weighted average-to-weighted average comparison methodology was used to calculate margins of dumping, was inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement.* However, the Appellate Body reversed the original panel's finding that the United States did not act inconsistently with Articles 9.3 of the *Anti-Dumping Agreement* and Article VI: 2 of the GATT 1994 in the 16 administrative reviews at issue, and found instead that the use of zeroing in those administrative reviews was inconsistent with those provisions. The Appellate Body stated that the terms "dumping" and "margins of dumping" in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole, and that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI: 2 of the GATT 1994, margins of dumping were established for foreign producers or exporters. The Appellate Body reasoned that Article 9.3 of the *Anti-Dumping Agreement* and Article VI: 2 of the GATT 1994 require investigating authorities to ensure that the total amount of anti-dumping duties collected on entries of a product from a given exporter shall not exceed the margin of dumping for that exporter or foreign producer as established under Article 2 of the *Anti-Dumping Agreement*.

The Appellate Body held that, "if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole" and, therefore, "the margins of dumping with which the assessed anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 were foreign producers' or exporters' margins of dumping that reflect the results of all of the multiple comparisons carried out at an intermediate

---

[62] European Communities used the term "model zeroing" to describe a methodology whereby an investigating authority compares the weighted average normal value and the weighted average export price for each model of the product under investigation, and treats as zero the results of model specific comparisons where the weighted average export price exceeds the weighted average normal value when aggregating comparison results for the purposes of calculating a margin of dumping for the product under investigation.

[63] Original Panel Report, paras. 7.32 and 8.1(a). The original panel exercised judicial economy in relation to the European Communities' claims under Articles 1, 2.4, 3.1, 3.2, 3.5, 5.8, 9.3, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.

stage of the calculation." According to the Appellate Body, the USDOC acted inconsistently with this requirement because, by disregarding the results of comparisons for which the export price of specific transactions exceeded the contemporaneous average normal value, it assessed anti-dumping duties in excess of the exporters' margins of dumping. However, the Appellate Body found that it could not complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such, with Articles 1, 2.4, 2.4.2, 9.3, 11.1, 11.2, and 18.4 of the *Anti-Dumping Agreement*, Articles VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the *WTO Agreement*.[64]

On 9 May 2006, the Dispute Settlement Body adopted the original panel and Appellate Body reports. The reasonable period of time for the United States to implement the recommendations and rulings of the DSB, mutually agreed by the parties pursuant to Article 21.3(b) of the DSU, was 11 months, expiring on 9 April 2007.[65]

On 27 December 2006, the United States announced that it would terminate the use of "model zeroing" in original investigations in which the margins of dumping are determined on the basis of weighted average-to-weighted average comparisons of export prices and normal value. This modification became effective on 22 February 2007. On 1 March 2007, the USDOC initiated proceedings pursuant to Section 129 of the Uruguay Round Agreements Act[66] (the "URAA") covering 12 of the 15 original investigations at issue in the original proceedings.[67] On 9 April 2007, the USDOC issued Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for 11 of the original investigations at issue in the original proceedings. The results of those Section 129 determinations became effective two weeks later, on 23 April 2007. The Section 129 determination in the remaining case was issued on 20 August 2007, effective 31 August 2007. The recalculation without zeroing of the margins of dumping for the exporters concerned led to the revocation of two of the remaining 12 anti-dumping duty orders. The remaining 10 original anti-dumping duty orders were revoked for the exporters or producers for which the USDOC found zero or *de*

---

64 Appellate Body Report, *US – Zeroing (EC)*, paras. 228 and 263(c)(ii).

65 WT/DS294/19.

66 Section 129 of the Uruguay Round Agreements Act, Public Law No. 103-465, 108 Stat. 4836, *United States Code*, Title 19, Section 3538 (2000).

67 Three of the 15 anti-dumping duty orders underlying the original investigations challenged by the European Communities had been previously revoked.

minimis margins, whereas, for other exporters or producers, duties were either reduced or increased as a result of the recalculation. In addition, the USDOC issued, in the ordinary course, administrative review determinations with respect to anti-dumping duty orders relating to the original investigations at issue in the original proceedings. The USDOC continued to apply zeroing when calculating margins of dumping in those administrative reviews.

With respect to the 16 administrative reviews at issue in the original proceedings, the United States considered that the cash deposit rates calculated in those proceedings—with the exception of one exporter—were no longer in effect because they had been superseded by subsequent administrative reviews. Consequently, "no further action was taken by the United States in order to implement the DSB recommendations and rulings in respect of this administrative review[s]."

Sunset reviews[68] were also conducted with respect to some of the measures at issue in the original proceedings. On 7 March 2007, following negative determinations by the United States International Trade Commission (the "USITC") of the likelihood of continuation or recurrence of injury, the USDOC revoked anti-dumping duty orders in four Cases where the original determinations had been challenged in the original proceedings. Twelve sunset review determinations issued in relation to the measures at issue in the original proceedings resulted in the continuation of the relevant anti-dumping duty order.

On 13 September 2007, the European Communities requested that the matter of compliance with the recommendations and rulings of the DSB in *US – Zeroing (EC)* be referred to the original panel pursuant to Article 21.5 of the DSU.[69] On 25 September 2007, the DSB established the Article 21.5 panel. In an exchange of views relating to the composition of the compliance panel, the Secretariat of the World Trade Organization indicated to the parties that two members of the original panel were not available to serve on the compliance panel. In a letter to the WTO Secretariat dated 1 October 2007, the European Communities expressed the view that, as the remaining panellist was available; he should not be excluded from serving on the compliance panel. On 28 November 2007, the European

---

[68] Article 11.3 requires the USDOC to conduct a review to determine, five years after the date of publication of an anti dumping duty order, whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and material injury.

[69] WT/DS294/25

Communities requested the Director-General of the WTO to determine the composition of the panel. On 30 November 2007, the Director-General established the composition of the Panel by appointing three new panellists.

The European Communities made claims in relation to certain of the Section 129 determinations adopted by the United States to implement the recommendations and rulings of the DSB. In addition, the European Communities challenged in these Article 21.5 proceedings subsequent administrative reviews, changed circumstances reviews , and sunset reviews adopted in relation to the 15 original investigations and the 16 administrative reviews at issue in the original proceedings (the "subsequent reviews"), as well as liquidation and assessment instructions and final liquidation of duties resulting from those subsequent reviews. The European Communities further challenged related omissions and deficiencies in the United States' implementation of the DSB's recommendations and rulings. The European Communities also claimed that the Panel composition was not consistent with Articles 21.5 and 8.3 of the DSU.

Arguments of the Participants and the Third Participants

Claims of Error by the European Communities – Appellant

The European Communities alleged that the Panel failed to comply with the "basic requirements of due process" and failed to ensure the "proper exercise of its judicial function" by not addressing the European Communities' claim that the Panel was composed in a manner inconsistent with Articles 8.3 and 21.5 of the DSU.[70] The European Communities maintains that the United States' erroneous interpretation of the DSU was followed by the WTO Director-General, and ultimately by the Panel, because there would have been no basis for the application of Article 8.7 of the DSU in relation to the panellist for which an agreement existed pursuant to Article 8.3. For the European Communities, the Panel erred in finding that Article 8.7 applies "whenever there is no agreement between the parties", because the disagreement between the parties related to the correct interpretation of Article 8.3. Instead of presupposing the absence of an agreement under Article 8.3, the Panel should have addressed the question of whether or not the United States could withdraw unilaterally its agreement under Article 8.3.

---

[70] European Communities' appellant's submission, para. 25. The European Communities believes that the Panel also acted inconsistently with Articles 1.1, 3.2, 3.3, 7.2, 11, 12.7, 19.2, and 23.1 of the DSU.

The European Communitie1s argued that the Panel erred in excluding, in response to a request by the United States for a preliminary ruling, from its terms of reference the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings in the original proceedings. The European Communities urged the Appellate Body to reverse this finding, and to find instead that all the subsequent reviews listed in the European Communities' panel request fell within the Panel's terms of reference under Article 21.5 of the DSU, because they were:

(i) amendments to the original investigations and administrative reviews at issue in the original proceedings;

(ii) omissions or deficiencies in the United States' implementation of the DSB's recommendations and rulings; and, in the alternative, those reviews

(iii) had a "close nexus" to those DSB rulings.

The European Communities argued that the Panel erred in rejecting its claims that certain actions or omissions by the United States based on zeroing after the end of the reasonable period of time were inconsistent with the United States' obligations to comply immediately with the recommendations and rulings of the DSB, and with Articles 9.3 and 11.3 of the *Anti-Dumping Agreement*, Article VI: 2 of the GATT 1994, and Article 21.5 of the DSU. The European Communities request the Appellate Body to modify or reverse these findings, and to find that the United States acted inconsistently with these provisions by continuing to assess and collect duties and to impose cash deposit rates based on zeroing after the end of the reasonable period of time, on the basis of determinations made before that date.

The European Communities explained that rulings contained in reports adopted by the DSB were not treaty-making by the WTO Members but, rather, constitute judicial activity aimed at clarifying, interpreting, and applying the covered agreements, which are binding since their entry into force. Turning to the administrative reviews concluded *after* the end of the reasonable period of time (9 April 2007), and in particular the 2004-2005 administrative review concluded on 22 June 2007 in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1), the European Communities underscored that the temporal scope of that administrative review was a factual element of United States municipal law that is not in dispute between the parties.

The European Communities requested the Appellate Body to modify the Panel's reasoning in relation to the 2004 2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6). Specifically, the European Communities sought review of the Panel's finding that assessment instructions are entirely "consequent" upon administrative reviews, and requested a specific finding with respect to final liquidations occurring after the end of the reasonable period of time. With respect to the 2005-2006 administrative review in Case 1, the European Communities contended that the Panel also erred in finding that the United States did not fail to bring its measures into conformity by issuing assessment instructions on 16 April 2007, and by liquidating the relevant duties on 23 April 2007.

The European Communities submitted that several interpretative considerations provide "overwhelming support" for the principle that immediate compliance by the end of the reasonable period of time precludes all actions or omissions based on zeroing after that date. Thus, the European Communities pointed to the requirements in Articles 19.1 and 21.3 of the DSU that "Members must comply *immediately* following the end of the reasonable period of time." The European Communities also maintained that several provisions of the *Anti-Dumping Agreement* support its approach to compliance, which seeks to preserve the rights of exporters and importers, at no detriment to the domestic industry, and was opposed to a logic that would result in "using a 'transitional period' to perpetuate an *unlawful* situation". For the European Communities, its analysis was not affected by the possibility that assessment instructions (or final liquidations) might be delayed as a result of judicial proceedings. The European Communities underscored that there was an obligation in Article 13 of the *Anti-Dumping Agreement* to provide for adequate judicial review of determinations, and that footnote 20 of the *Anti-Dumping Agreement* recognized the possibility that assessment proceedings be delayed as a result of judicial proceedings.

As a separate matter, the European Communities claimed that the Panel erred in its treatment of the "domino theory" advanced by the European Communities that, once an anti-dumping duty order was revoked pursuant to a Section 129 determination (because in the absence of zeroing, no dumping was found), the United States was not entitled, after the end of the reasonable period of time, to conduct administrative reviews based on zeroing, or to take other actions based on zeroing, in relation to that revoked order. For the European Communities, a measure could not be understood to have been withdrawn if its effects are still in place.

The European Communities claimed that the Panel erred in finding that the European Communities did not demonstrate that the United States had failed to comply with the DSB's recommendations and rulings in the subsequent sunset review proceedings at issue, because "the results of those sunset reviews had not yet materialised at the time when the Panel was established (*i.e.*, 25 September 2007)." The European Communities also claimed that the Panel, in so doing, failed to fulfil its duties pursuant to Article 11 of the DSU. The European Communities requested the Appellate Body to reverse the Panel's findings and to find instead that, by relying in the sunset review proceedings on margins calculated in prior proceedings with the use of zeroing, the United States failed to comply with the DSB's recommendations and rulings in the original proceedings and acted inconsistently with Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

The European Communities further submitted that, pursuant to Article 11.3 of the *Anti-Dumping Agreement*, the anti-dumping duty may remain in force pending the outcome of a sunset review so that, during sunset review proceedings, imports were still subject to duties/cash deposits. The European Communities contended that, when the Panel was established, the original measures were kept in effect and "the United States was requiring cash deposits based on zeroing because the United States had extended the duration of the sunset review proceedings pursuant to [the] USDOC's determinations which relied on dumping margins based on zeroing." The European Communities therefore concluded that the failures by the United States in these sunset review proceedings had already materialized at the date of the establishment of the Panel and had allowed the United States to extend the life of the original measures found to be in violation of Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* and the DSB's recommendations and rulings.

Finally, the European Communities contended that the Panel acted inconsistently with Article 11 of the DSU because it did not address the claim that, by keeping in place certain aspects of the measures at issue in the original proceedings (that is, the dumping margins based on zeroing), the United States failed to comply with the DSB's recommendations in the original proceedings. In particular, regarding Case 19, the European Communities contended that, in carrying out its determination of the likelihood of recurrence of dumping, the USDOC relied on the same dumping margin based on zeroing calculated in the original investigation and in the administrative review, and that such a determination could not constitute a proper foundation for the continuation of anti dumping duties under Article 11.3 of the *Anti-Dumping Agreement*. Therefore, contrary to the Panel's conclusion, the European Communities considered that a finding on this separate claim was necessary to solve the dispute.

The European Communities submitted that the Panel disregarded its mandate and erred in failing to make findings regarding the non-existence of measures taken to comply between 9 April and 23 April/31 August 2007. The European Communities requested the Appellate Body to find that the Panel erred in this respect, and to complete the analysis and find that the United States violated Articles 19.1, 21.3, and 21.3(b) of the DSU in not putting into effect measures taken to comply between 9 April and 23 April/31 August 2007. For the European Communities, in rejecting its claim on the basis of judicial economy, the Panel acted in a manner inconsistent with its obligations under Article 11 of the DSU.

The European Communities submitted that the Panel erred in finding that the European Communities' claim in respect of an alleged arithmetical error in the Section 129 determinations in Case 11 were not properly before it. The European Communities requested the Appellate Body to reverse this finding, complete the analysis, and find that the United States, by failing to correct the arithmetical error in the calculation of the margin of dumping in the Section 129 determination in Case 11, failed to comply with the DSB's recommendations and rulings, and acted inconsistently with Articles 2, 5.8, 6.8, 9.3, 11.1, and 11.2 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

The European Communities claimed that the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rates in the Section 129 determinations in Cases 2, 4, and 5 and in failing to examine its claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities requested the Appellate Body to reverse these findings, complete the analysis, and find that the United States acted inconsistently with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* in calculating the "all others" rates in the Section 129 determinations in Cases 2, 4, and 5.

Arguments of the United States – Appellee

The United States argued that the Panel correctly rejected the European Communities' claim that it was improperly composed, in violation of Articles 8.3 and 21.5 of the DSU. The United States observed that the European Communities' appeal did not "fundamentally pertain" to the substantive dispute between the

European Communities and the United States. Rather, it appeared to be grounded on "a concern about the functioning of the WTO as an institution".

In addition, the United States argued that the European Communities' claim on the panel composition did not fall within the Panel's jurisdiction. For the United States, it was difficult to see how the composition of the Panel could fall within its terms of reference, as panel composition invariably follows panel establishment. This was particularly the case in proceedings under Article 21.5 of the DSU, which were limited to resolving a "disagreement as to the existence or consistency with the covered agreements of measures taken to comply with the recommendations and rulings" of the DSB. Moreover, according to the United States, an improperly composed panel would not have the authority to make findings on the merits of the European Communities' claims, including on claims related to its own composition; it would have no authority to issue a report and there would be no basis for an appeal.

The United States argued that the Panel was correct in making the preliminary finding that the subsequent reviews that were completed before the adoption of the DSB's recommendations and rulings did not fall within the Panel's terms of reference under Article 21.5 of the DSU. The United States requested the Appellate Body to uphold this finding, because these subsequent reviews were not

(i) "amendments" to the original investigations and administrative reviews at issue in the original proceedings, or

(ii) "omissions", or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings; nor, were they

(iii) sufficiently connected to these compliance proceedings.

The United States submitted that an anti-dumping duty was a border measure and that, in disputes involving border measures, compliance was achieved when the measure was withdrawn or brought into compliance with respect to entries of goods after the end of the reasonable period of time. The United States contended that it brought itself into compliance with the recommendations and rulings of the DSB by withdrawing the border measures, or by implementing new WTO-consistent border measures, to future entries subject to the 31 measures that were the subject of the DSB's recommendations and rulings in the original proceedings. Accordingly, the United States rejected the European Communities' view that the

DSB's recommendations and rulings encompass the liquidation of entries after the end of the reasonable period of time, when the entries were made before or during the reasonable period of time, if for any reason those entries remained unliquidated at the end of the reasonable period of time.

For the United States, the fact that Article 21.3 of the DSU might provide a Member with a reasonable period of time to bring itself into compliance with DSB recommendations and rulings did not imply that the Member was not subject to the underlying obligation during that period. The United States referred to a previous statement of the Appellate Body that "remedies in WTO law were generally understood to be prospective in nature." The United States agreed that Article 28 of the *Vienna Convention* was inapplicable to the present dispute because DSB recommendations and rulings do not create new obligations. The United States considered that the reasonable period of time allows a Member sufficient time to bring its measure into compliance with its obligations without being required to provide compensation or being subject to the suspension of concessions. The United States reasoned that recommendations and rulings by the DSB did not create an obligation to comply with the covered agreements, as that obligation already existed in the covered agreements themselves. Rather, it was the right to a remedy against a breach of the covered agreements (in the sense of compensation or suspension described in Article 22.1 of the DSU) that arose only after a Member failed to comply with the DSB's recommendations and rulings within the reasonable period of time. Thus, according to the United States, a Member is not "permitted" to breach the covered agreements during the reasonable period of time. Instead, that Member was merely not subject to the remedies contemplated in Article 22 of the DSU for such breaches.

The United States requested the Appellate Body to reject the European Communities' claim that all subsequent sunset reviews listed in its panel request fell within the Panel's terms of reference. The United States submitted that none of the subsequent sunset reviews—neither those that the Panel found to be within its terms of reference, nor those excluded by the Panel from its terms of reference—were in fact within the scope of these compliance proceedings. The United States argued that the DSB's recommendations and rulings in the original proceedings were limited to 15 original investigations and 16 administrative reviews, and there were no recommendations and rulings regarding determinations made in sunset reviews; therefore, there was no question as to the existence of measures taken to comply with respect to sunset reviews. The United States also contended that the sunset reviews "have no sufficient 'close connection' or 'nexus' to either the measures at issue in the original dispute or to the DSB's recommendations and rulings that would bring those determinations within the jurisdiction of the compliance Panel." Regarding those sunset reviews that the Panel found to be within its terms of reference, the United States requested the Appellate Body to uphold the Panel's finding that the European Communities failed to demonstrate that the USDOC determinations it challenged had caused the continuation of the orders at the time the Panel was established.

According to the United States, the Panel correctly rejected the European Communities' request for a finding that the United States had failed to comply with the recommendations and rulings of the DSB in certain Cases by not taking any measures between the end of the reasonable period of time and the date on which the Section 129 determinations entered into force. The United States considered that, as there was no disagreement within the meaning of Article 21.5 of the DSU that the United States did not implement the Section 129 determinations before 23 April/31 August 2007, the European Communities' request was not within the scope of these compliance proceedings.

The United States considered that the Panel correctly found that the European Communities' claim regarding the alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) was not properly before it. Contrary to the European Communities' allegation, the USDOC never acknowledged in either the original investigation or during the Section 129 preceding in this Case that an arithmetical error had been made. Moreover, the United States did not acknowledge, as the European Communities claimed it does, that the dumping margin would have been negative if the USDOC had corrected the alleged calculation error in the Section 129 proceeding, in addition to eliminating zeroing.

The United States argued that the Panel erred in finding that the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) fell within the Panel's terms of reference under Article 21.5 of the DSU by virtue of their close nexus with the original measures at issue and the DSB's recommendations and rulings. The United States distinguished the facts of this case from the facts in *US – Softwood Lumber IV (Article 21.5 – Canada)*, where the panel and Appellate Body found significant that

i. the administrative review at issue resulted in a cash deposit rate that superseded the revised cash deposit rate established in the Section 129 determination and

ii. a particular aspect of the analysis in the administrative review was made "in view of" the DSB's recommendations and rulings in the original proceedings in relation to that type of analysis. The United States emphasizes that, by contrast, the DSB's recommendations and rulings with respect to Cases 1 and 6 in this dispute concerned only the original investigations in those Cases, and that it had taken measures to comply with those rulings by issuing Section 129 determinations in which the underlying anti-dumping duty orders had been revoked.

According to the United States, the purpose of the "nexus-based test" was to determine whether measures that were not declared to be "measures taken to comply" are nonetheless "closely connected" to those measures so that they should be reviewed by the compliance panel in order to avoid "circumvention" of a Member's implementation obligations.[71] The United States argued that the *timing* of the 2004-2005 administrative reviews in Cases 1 and 6 was insufficient to justify their inclusion in the scope of the compliance proceedings, because administrative reviews that modify measures taken to comply with DSB recommendations and rulings would always be issued after the adoption of those recommendations and rulings. The United States claimed that the Panel erred in finding that the United States failed to comply with the DSB's recommendations and rulings, and acted inconsistently with Article 9.3 of the *Antidumping Agreement* and Article VI: 2 of the GATT 1994, by making determinations and issuing assessment instructions based on zeroing in the 2004-2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6).

The European Communities requested the Appellate Body to uphold the Panel's findings that the 2004-2005 administrative reviews in Cases 1 and 6 and respective assessment instructions fell within the Panel's terms of reference under Article 21.5 of the DSU, for the following reasons.

---

[71] United States' other appellant's submission, para. 66 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 245).

First, the European Communities disputed the United States' argument that the DSB's recommendations and rulings applied exclusively to the original investigations in Cases 1 and 6. Thus, the 2004-2005 administrative reviews in Cases 1 and 6 and respective assessment instructions were covered by the DSB's recommendations and rulings and, as such, fell within the Panel's terms of reference. Secondly, The European Communities disagreed with the United States' claim to have achieved "full and complete compliance" in these Cases, and underscored that the fact that the United States failed to stop making determinations, and continues to collect duties based on zeroing with respect to the original measures at issue, indicated that the necessary "measures taken to comply" did not exist. Thirdly, the European Communities argued that the 2004-2005 administrative reviews in Cases 1 and 6 undermined the measures taken to comply by the United States and circumvented compliance with the DSB's recommendations and rulings. According to the European Communities, a compliance panel might examine measures on the basis of the close connection of those measures either with the declared "measure taken to comply", the measure at issue in the original proceedings, and/or the DSB's recommendations and rulings. Thus, the United States was incorrect in suggesting that the "close-nexus test" applied exclusively to measures that undermine the declared "measure taken to comply". Fourthly, the European Communities contended that the Panel correctly applied the "nexus-based test" with respect to the 2004-2005 administrative reviews in Cases 1 and 6 by examining the *nature*, *effects*, and *timing*. As regards the links, in terms of *nature*, between those reviews and the DSB's recommendations and rulings, the Panel correctly identified the issue of zeroing as the element closely connecting the subsequent administrative reviews and the DSB's recommendations and rulings.

Issues Raised in This Appeal

The following issues were raised in this appeal.

- Whether the Panel erred in refraining from ruling on the European Communities' claim that the Panel was improperly composed.

- Whether the Panel erred in finding that certain administrative and sunset reviews issued under the same anti-dumping duty orders as the measures at issue in the original proceedings fell within the Panel's terms of reference under Article 21.5 of the DSU.

In particular, whether the Panel erred:

- in finding that certain subsequent reviews did not fall within its terms of reference as "amendments" to the measures at issue in the original proceedings;

- in finding that the subsequent reviews that pre-dated the adoption of the recommendations and rulings of the DSB did not fall within its terms of reference, because they did not have a sufficiently "close nexus" with the original measures at issue and the recommendations and rulings of the DSB;

- in finding that the 2004 2005 administrative reviews in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1) and *Stainless Steel Wire Rod from Sweden* (Case 6) fell within its terms of reference, in the light of their close nexus with the original measures at issue and the recommendations and rulings of the DSB; and

- in failing to address the European Communities' claim that the subsequent reviews fell within its terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB, and in so doing, acted inconsistently with Article 11 of the DSU.

- Whether the Panel erred by not extending the United States' compliance obligations to actions consequent to the assessment of duties, including the collection or liquidation of duties occurring after the end of the reasonable period of time related to administrative review determinations completed before that date.

- Whether the Panel erred in its examination of specific subsequent administrative reviews and consequent actions to collect anti-dumping duties when it evaluated whether the results of these reviews or these actions establish failures to comply with the recommendations and rulings of the DSB; in particular:

- regarding *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1), whether the Panel erred in its analysis of the 2004 2005 administrative review, the rescission of the 2005-2006 administrative review, as well as consequent assessment instructions and liquidation instructions;

- regarding *Stainless Steel Wire Rod from Sweden* (Case 6), whether the Panel erred in its analysis of the 2004-2005 administrative review, as well as consequent assessment instructions and liquidation instructions;

- regarding *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), whether the Panel erred in refraining from making a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports of an exporter; and

- with respect to *Stainless Steel Plate in Coils from Belgium* (Case 18), *Certain Pasta from Italy* (Cases 19 and 20), *Stainless Steel Sheet and Strip in Coils from Italy* (Cases 21 and 22), *Granular Polytetrafluoroethylene Resin from Italy* (Cases 23 and 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Cases 27 and 28), *Ball Bearings and Parts Thereof from France* (Case 29), and *Ball Bearings and Parts Thereof from Italy* (Case 30), whether the Panel erred in refraining from making additional substantive findings on the grounds that the European Communities did not substantiate its claims.

With respect to the subsequent sunset reviews relating to the measures at issue in the original proceedings:

- whether the Panel erred in finding that the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in the subsequent sunset review proceedings in *Stainless Steel Bar from France, Germany, Italy, and the United Kingdom* (Cases 2, 3, 4, and 5) and *Certain Pasta from Italy* (Case 19), because the results of those sunset reviews had not yet materialized at the time the Panel was established;

- whether the Panel acted inconsistently with Article 11 of the DSU in not addressing the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the original proceedings given that certain aspects of the measures at issue in the original proceedings remained in place; and

- in the event the Appellate Body reverses the Panel's findings in subparagraphs (i) and (ii) above and the Panel's findings that certain sunset reviews did not fall within its terms of reference, whether, by relying, in all the sunset review proceedings mentioned in the Annex to the European

Communities' request for the establishment of a panel under Article 21.5 of the DSU, on margins calculated in prior proceedings using zeroing, the United States acted inconsistently with Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the DSU and failed to comply with the recommendations and rulings of the DSB in the original proceedings.

- Whether the Panel erred in declining to make findings with respect to the claims of the European Communities regarding the non-existence of measures taken to comply between 9 April 2007 and 23 April/31 August 2007.

- Whether the Panel erred in finding that the European Communities' claim regarding an alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) was not a claim that the European Communities could properly make in the context of these Article 21.5 proceedings.

- Whether the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* when calculating the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France, Italy, and the United Kingdom* (Cases 2, 4, and 5), and in failing to address the European Communities' related claim under Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

Introduction to the United States' System for the Imposition and Assessment of Anti-Dumping Duties

Because this dispute concerned the use of zeroing by the United States when determining anti-dumping duties, the Panel considered it useful to provide a brief overview of the United States' retrospective system for the imposition and assessment of anti-dumping duties. The overview was based on the description contained in the Panel Report and the original panel report, as clarified by the participants during the course of these appellate proceedings.

The first stage of the system was the "original investigation" for the imposition of anti-dumping duties. The United States Department of Commerce (the "USDOC") conducted an investigation to determine whether dumping by one or more exporters has occurred during a given period of time (the "period of investigation") and, if so, what the initial margin of dumping was for each exporter. This was done by calculating an individual weighted average dumping margin for each known exporter and producer.[72] The USDOC then issued a Notice of Final Determination of Sales at Less than Fair Value, setting out its assessment of the existence and level of dumping. The United States International Trade Commission (the "USITC") then determined whether the relevant United States industry was materially injured or threatened with material injury by reason of the dumped imports. If the USDOC found that dumping existed during the period of investigation and the USITC finds that the domestic industry was materially injured or threatened with material injury by reason of the dumped imports, the USDOC issues a Notice of Antidumping Duty Order and imposes "a cash deposit of the estimated amount of antidumping duties at the time of importation"[73], equivalent to the individual weighted average dumping margin for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an "all-others" rate applicable to exporters that were not individually examined in those cases in which the number of exporters was too large to make determining individual margins for each practicable.

In order to determine the existence of dumping and the individual weighted average dumping margin for each exporter investigated, the USDOC normally groups the exports into specific models or varieties of the product where each grouping or model contains only those varieties of the product at issue those were virtually identical in physical characteristics. The weighted average-to-weighted average comparison between the normal value and the export price was then made within each such averaging group. In the past, if the export price exceeded the normal value for one or more of the models being compared, the dumped amount for that model was considered to be zero. This practice had been referred to as "model zeroing". The Panel found, as a factual matter, that the United States abandoned the practice of model zeroing in original investigations in which the weighted average-to-weighted average comparison methodology was used as from 22 February 2007. In other words, in aggregating model-specific comparisons, the USDOC currently taken into account all the results regardless of whether the weighted average export price was above or below the weighted average normal value for each model. If the individual weighted average dumping margin for a

---

72 United States' other appellant's submission, para 11 (referring to Section 777A of the United States Tariff Act of 1930 (Public Law No. 1202-1527, 46 Stat. 741, *United States Code*, Title 19, Chapter 4, as amended (the "Tariff Act")) (Panel Exhibit US-3)).

73 United States Code, Section 1673e (a) (3).

particular exporter thus calculated was zero, or below *de minimis* levels, that exporter was not found to be dumping and the investigation was terminated in relation to it. If, however, the weighted average dumping margin was above *de minimis* levels, the exporter was found to be dumping and was liable for payment of anti-dumping duties.

The second stage of the United States' system was the assessment of the final liability for anti-dumping duties for specific entries of the subject product by individual importers. The United States' system of duty assessment operates on a retrospective basis under which liability attaches at the time of entry, but duties were not actually assessed at that time. Instead, the United States collects at the time of entry cash deposits in the amount determined for each exporter during the original investigation stage of the process. Subsequently, once a year during the anniversary month of the anti-dumping duty order, interested parties—including importers, domestic interested parties, foreign producers and exporters—might request the USDOC to conduct a periodic review ("administrative review") to determine the final amount of anti-dumping duties owed on entries that occurred during the previous year, as well as to determine a new cash deposit rate for future entries. If no review is requested, the cash deposits made on the entries during the previous year were automatically assessed as the final duties. The results of this "assessment review" were published in a Notice of Final Results of Antidumping Duty Administrative Reviews.

When calculating the magnitude of any margin of dumping for the purpose of assessing an importer's final liability for paying anti-dumping duties and any future cash deposit rates, the United States normally used the average-to-transaction methodology and applies what had been referred to as "simple zeroing". Under this methodology, when comparing the monthly weighted average normal value with the price of each individual export transaction, the USDOC considered the amount by which the normal value exceeds the export price to be the "dumped amount" for that transaction. If the export price exceeded the normal value, the dumped amount for that export transaction was considered to be zero. The "duty assessment rate" for each importer was then determined by aggregating the results of each comparison for which the average normal value exceeds the export price.[74]

---

[74] The USDOC includes the value of all import transactions in the denominator of the fraction used to calculate the importer's liability, but the results of the comparisons for which export prices exceed the average normal value are excluded from the numerator of that fraction.

The same zeroing methodology was also reflected in the going-forward cash deposit rate for all future entries of the subject merchandise from the exporter concerned.

Once the Notice of Final Results of Antidumping Duty Administrative Reviews was published, the USDOC communicates the results of its determination to the United States Customs and Border Protection ("Customs") by issuing "assessment instructions". The instructions inform Customs of the "assessment rate", and thus the final amount of anti-dumping duty to be paid by each importer on all entries made during the relevant period.[75] Customs then instructed the United States ports of entry to "liquidate" the relevant entries of subject imports at the established rates. When Customs liquidated an entry, the importer of record (or its authorized customs broker) generally received a notice of the liquidation. For each entry made, the importer receives either:

(i) only a notice, if the cash deposit amount collected at entry is the same as the amount due at liquidation;

(ii) a notice and an invoice, if the cash deposit amount collected at entry is less than the amount due at liquidation; or

(iii) a notice and a refund cheque, if the cash deposit amount collected at entry is more than the amount due at liquidation.

Five years after publication of an anti-dumping duty order, the USDOC and the USITC conduct a "sunset review" to determine respectively whether revocation of the order would be likely to lead to a continuation or recurrence of dumping, and the continuation or recurrence of material injury. The anti-dumping duty order is revoked unless both the USDOC and the USITC make affirmative "likelihood" determinations.

The Appellate Body addressed first the issue of whether the Panel erred in refraining from ruling on the European Communities' claim that the Panel was improperly composed. On the substance of the European Communities' appeal, the panel noted that, the Director-General was requested to determine the composition of the compliance panel under Article 8.7 of the DSU. In Appellate Body view, Article 8.7 confers on the Director-General the discretion to compose panels, which was properly exercised in this case. The Appellate Body therefore

75 *United States Code of Federal Regulations*, Title 19, Section 351.212(b).

found that the Panel did not err in refraining, from making a finding on whether it was improperly composed. In the light of this conclusion, Appellate Body did not consider it necessary to address the other arguments made by the parties on this matter.

The Appellate Body turned next to the issues raised on appeal by the European Communities and by the United States in its other appeal relating to the Panel's findings on whether certain subsequent administrative, changed circumstances, and sunset reviews (collectively, the "subsequent reviews") following the 15 original investigations and the 16 administrative reviews at issue in the original proceedings fell within the Panel's terms of reference under Article 21.5 of the DSU.

The European Communities' allegation of error on appeal raised the question of whether the references in the original panel and Appellate Body reports to "any amendments" could be read so broadly as to encompass subsequent reviews issued under the specific anti-dumping duty orders at issue in the original proceedings. In *Chile – Price Band System*, the Appellate Body sought to determine whether an amendment to Chile's price band system was part of the measure at issue in that dispute. First, the Appellate Body observed that Argentina's panel request referred to the particular measures at issue "and/or amendments". The Appellate Body reasoned that the "broad scope of the Panel request suggests that Argentina intended the request to cover the measure even as amended. Secondly, the Appellate Body observed that the amendment of the measure at issue "[did] not change the price band system into a measure *different* from the price band system that was in force before the [a]mendment."[76] The Appellate Body reasoned that, despite subsequent modifications, Chile's price band system "remain[ed] essentially the same" after the amendment, because the amendment modified Chile's price band system "without *changing its essence*".[77]

Like the Appellate Body in *Chile – Price Band System*, the Appellate Body read references by the European Communities, the original panel, and the Appellate

---

76 Appellate Body Report, *Chile – Price Band System*, para. 137.The Appellate Body also cited with approval the reasoning of the panel in *Argentina – Footwear (EC)*, which decided to examine modifications made to the measure at issue in that dispute because they were "*modifications of the legal form of the original definitive measure, which remains in force in substance* and which is the subject of the complaint." *ibid*, para. 138 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.45) (emphasis added by the Appellate Body))

77 Appellate Body Report, *Chile – Price Band System*, para. 139.

Body in this dispute to "any amendments" to the specific measures at issue in the original proceedings as addressing situations where subsequent legal instruments would modify these measures without changing their essence or effects.[78] In Appellate Body view, if a subsequent modification were to change the essence or substance of the measures challenged in the original proceedings, this would transform those measures into measures that were different from the original measures.

In this respect, the Appellate Body considered that successive administrative, changed circumstances, and sunset review determinations issued in connection with the measures at issue in the original proceedings constitute separate and distinct measures, which therefore could not be properly characterized as mere "amendments" to those measures. The Appellate Body noted that the Appellate Body recently held in *US – Continued Zeroing* that "[t]he *successive determinations* by which duties are maintained are connected stages ... involving imposition, assessment, and collection of duties under the same anti-dumping order."[79] Although the Appellate Body recognized that subsequent reviews are "connected stages" under the same anti-dumping duty order, it also made clear that subsequent reviews involve "successive determinations". Such successive determinations, Appellate Body did not constitute mere "amendments" to the immediately preceding measure, because they constitute *distinct* determinations.

Moreover, as the Panel correctly observed, the European Communities itself seemed to identify, before the original panel, determinations made in the subsequent reviews issued under the same anti-dumping duty order as distinct measures. Indeed, the European Communities' original panel request identified as separate "Cases" administrative reviews that superseded the original investigations at issue in three instances.[80] It also identified as separate "Cases" successive administrative reviews

---

78 In *Chile – Price Band System*, the Appellate Body addressed the question of whether amendments to Chile's price band system that were issued during the course of the panel proceedings were part of the measure at issue in that appeal.

79 Appellate Body Report, *US – Continued Zeroing*, para. 181.

80 The 2000-2001 administrative review in *Certain Stainless Steel Plate in Coils from Belgium* (Case 18), the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from France* (Cases 25 and 26), and the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Italy* (Cases 21 and 22) were all identified as separate "Cases", even though they had been issued in connection with original investigations that were also challenged by the European Communities (Cases 9, 10, and 11, respectively).

under the same anti-dumping duty order in five instances.[81] The European Communities argued that it decided to separate original investigations and administrative reviews into different "Cases" in order to allow for a separate examination of those measures and due to the structure of its claims (separate "as such" and "as applied" claims in relation to original investigations and administrative reviews, respectively). The Appellate Body was not persuaded by this argument. If the European Communities' references to "any amendments" also encompassed successive administrative reviews issued under the same anti-dumping duty order, it would not have been necessary for the European Communities to list successive reviews under the same anti-dumping duty order as separate "Cases", because the Panel's findings in relation to the original measure would automatically cover subsequent administrative reviews.

In view of the above considerations, the Appellate Body saw no error in the Panel's conclusion that references to "any amendments" to the specific measures at issue in the original proceedings "must be read as referring to amendments ... to correct the original investigation and administrative review determinations specifically identified by the European Communities ... for ministerial or similar errors or, in some cases, to amend the determination following US court rulings."

For these reasons, the Appellate Body *upheld* the Panel's finding, that the subsequent reviews identified in the European Communities' panel request did not fall within the Panel's terms of reference under Article 21.5 of the DSU as "amendments" to the original measures at issue.

The Appellate Body next turned its attention to the European Communities' and the United States' challenges to different aspects of the Panel's finding as to which of the subsequent reviews identified in the European Communities' panel request fell within its terms of reference under Article 21.5 of the DSU by virtue of their close nexus, in terms of *nature*, *effects*, and *timing*, with the original measures

---

[81] Cases 19 and 20 concern the 1999-2000 and 2000 2001 administrative reviews in *Certain Pasta from Italy*; Cases 21 and 22 concern the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Italy*; Cases 23 and 24 concern the 1999-2000 and 2000-2001 administrative reviews in *Granular Polytetrafluoroethylene Resin from Italy*; Cases 25 and 26 concern the 1999-2000 and 2000-2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from France*; and Cases 27 and 28 concern the 1999-2000 and 2000 2001 administrative reviews in *Stainless Steel Sheet and Strip in Coils from Germany*.

at issue and with the recommendations and rulings of the DSB. Both the European Communities' appeal and the United States' other appeal raised the question of whether and to what extent subsequent administrative, changed circumstances, and sunset review determinations that followed the specific 15 original investigations and the 16 administrative reviews at issue in the original proceedings could have fallen within the Panel's terms of reference under Article 21.5 of the DSU.

The text of Article 21.5 indicated that proceedings under that provision concern a disagreement as to the "existence" or "consistency with a covered agreement" of measures "taken to comply" with the recommendations and rulings of the DSB in the original proceedings. Thus, the mandate of panels acting pursuant to Article 21.5 of the DSU encompasses, in principle, the specific measures "taken to comply" with the recommendations and rulings of the DSB and measures that should have been taken to achieve compliance. As the Appellate Body explained in *Canada – Aircraft (Article 21.5 – Brazil)*:

> 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."[82] (original emphasis)

The first sentence of Article 21.5 establishes an "express link" between the measures taken to comply and the recommendations and rulings of the DSB.[83] For this reason, a panel's determination of the scope of measures "taken to comply" under Article 21.5 "must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB." These recommendations and rulings, in turn, must be interpreted in the light of the particular factual and legal circumstances in the original proceedings, including the original measures at issue. As the Appellate Body noted, "[b]ecause such recommendations and rulings are directed at the measures found to be inconsistent

[82] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

[83] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

in the original proceedings, such an examination necessarily involves consideration of those original measures."

Thus, on its face, Article 21.5 seemed to suggest that the mandate of a compliance panel was limited to reviewing the existence or consistency with the covered agreements of measures taken "*in the direction of*, or *for the purpose of achieving*, compliance"[84] by the implementing Member. The scope of the measures "taken to comply", in turn, should be determined with reference to the recommendations and rulings of the DSB in the original proceedings and to the original measures at issue.

However, the Appellate Body also expressed the view that a panel's mandate under Article 21.5 of the DSU was not necessarily limited to measures that the implementing Member maintains were taken "in the direction of" or "for the purpose of achieving" compliance with the recommendations and rulings of the DSB. Rather, the Appellate Body considered that a panel's mandate under Article 21.5 might extend to measures that the implementing Member maintains were *not* "taken to comply" with the recommendations and rulings of the DSB. Indeed, the Appellate Body explained in *US – Softwood Lumber IV (Article 21.5 – Canada)* that, under its interpretation of Article 21.5:

> The fact that Article 21.5 mandates a panel to assess "existence" and "consistency" tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance. These words also suggest that an examination of the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a "measure[] taken to comply". (original emphasis)

On the basis of this interpretation, the Appellate Body concluded that a panel's mandate under Article 21.5 was not limited to the measures that an implementing Member maintains were "taken to comply" with the recommendations and rulings of the DSB. Although a Member's designation of a measure as one "taken to comply" would always be relevant, the Appellate Body explained that:

---

84 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 66. (original emphasis)

> [s]ome measures with a *particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB*, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such another measure as one "taken to comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.[85] (emphasis added)

Thus, the Appellate Body confirmed that a Member's designation of a measure as one "taken to comply" with the recommendations and rulings of the DSB was not determinative of the panel's mandate under Article 21.5 of the DSU. The Appellate Body also held that measures with a "particularly close relationship" with the declared measure "taken to comply", and to the recommendations and rulings of the DSB, might also fall within the purview of a compliance panel. This was because Article 21.5 mandates a panel to examine the existence and consistency with the covered agreements of measures taken to comply, which suggested that the effects of another measure may be relevant in determining whether it falls within the scope of Article 21.5 proceedings. According to the Appellate Body, a panel's determination of whether such a "close relationship" exists would depend upon the particular factual and legal background, and might call for an examination of the timing, nature, and effects of the various measures before the panel.

A panel's determination of whether a particular measure fall within the scope of Article 21.5 proceedings was an objective inquiry and must necessarily involve an examination of any measure designated as one "taken to comply", and of the recommendations and rulings of the DSB, in the light of the particular factual and legal background in which they were adopted. In determining the scope of its jurisdiction, the compliance panel might also be called upon to determine whether

---

85 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

no measure taken to comply exists, as the word "existence" in Article 21.5 suggests "that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*."[86] Therefore, if measures to comply with the DSB's recommendations and rulings were not taken, that omission would also fall within the scope of the compliance proceedings.

Where a compliance panel determined that measures taken to comply do exist, it should then seek to determine whether such measures fully implement the recommendations and rulings of the DSB. Pursuant to Article 19.1 of the DSU, these recommendations and rulings require the Member concerned to bring the measures found to be inconsistent with a covered agreement into conformity with that agreement. Therefore, the compliance panel should seek to determine whether the measures taken to comply achieve full or partial compliance "in situations where the measures taken to comply, through omissions or otherwise, might achieve only partial compliance."[87] Article 21.5 also required the compliance panel to examine, in the light of the claims raised, whether the measures taken to comply were consistent with the relevant covered agreement, as the word "consistency" in Article 21.5 "implied that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements."[88]

Furthermore, a party seeking recourse to Article 21.5 of the DSU might request the compliance panel to examine measures that the implementing Member maintains were *not* measures "taken to comply". In that event, the compliance panel should seek to determine whether such distinct measures were particularly closely connected to the measures the implementing Members asserts are "taken to comply", and to the recommendations and rulings of the DSB, so as to fall within the purview of the compliance panel.[89] Determining whether this was the case might call for an examination of the timing, nature, and effects of the various

86 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. (original emphasis)

87 Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 60.

88 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. Similarly, the Appellate Body held in *EC – Bed Linen (Article 21.5 – India)* that "the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the '*consistency with a covered agreement*' of implementing measures." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 79 (original emphasis))

measures.[90] Once a compliance panel determines that such closely connected measures fall within its terms of reference, Article 21.5 directs it to examine these measures for consistency with the relevant provisions of the covered agreements in the light of the claims raised.

Both the European Communities and the United States agreed that the timing of a measure was not determinative of whether there was a sufficiently close nexus between such measure, the declared measure "taken to comply", and the recommendations and rulings of the DSB.

However, the participants diverged as to the significance of the timing of the subsequent reviews for the Panel's "close nexus" analysis. The European Communities suggested that the Panel erred in mechanistically excluding from its terms of reference the subsequent reviews issued *before* the adoption of the recommendations and rulings of the DSB, because the challenged subsequent reviews "*perpetuate[d]*" the WTO-inconsistent measures beyond the end of the reasonable period of time.

The Appellate Body agreed with the Panel that measures taken to comply with recommendations and rulings of the DSB ordinarily post-date the adoption of the recommendations and rulings. As the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*, "[a]s a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."

However, the Panel's finding that "a measure taken before the adoption of the DSB's recommendations and rulings could rarely, if ever, be found to be a measure taken 'to comply' with such recommendations and rulings" seemed premised on the notion that a panel's mandate under Article 21.5 was limited to those measures taken "in the direction of" or "for the purposes of achieving" compliance with the recommendations and rulings of the DSB. As Appellate Body had noted earlier, in the Appellate Body's interpretation, "[t]he fact that Article 21.5 mandates

---

[89] *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body found that the fact that the "Understanding on Bananas" was itself a measure "taken to comply" did not require the panel to determine whether it had a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings. (See Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 252)

a panel to assess 'existence' and 'consistency' tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that *move in the direction of*, or *have the objective of achieving*, compliance." For this reason, measures with a "particularly close relationship" with the declared measures "taken to comply", and to the recommendations and rulings of the DSB, might also fall within the scope of a panel proceeding under Article 21.5 of the DSU, even though such measures were not, strictly speaking, measures taken with the purpose of achieving compliance with those recommendations and rulings.

In this respect, the Appellate Body agreed with the European Communities and the United States that the *timing* of a measure could not be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding. Since compliance with the recommendations and rulings of DSB could be achieved before the recommendations and rulings of the DSB were adopted[91], a compliance panel might have to review events pre dating the adoption of those recommendations and rulings in order to resolve a disagreement as to the "existence" or "consistency with a covered agreement" of such measures. The Appellate Body also noted the United States' argument that, where a measure was withdrawn prior to the DSB's recommendations and rulings, a Member might not need to take any further measures to comply with those recommendations and rulings after they were adopted. The Appellate Body did not see why a compliance panel should be unable to take such prior withdrawal into account.

The Appellate Body considered that the timing of a measure remained a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB.[92] Indeed, the fact that a measure is adopted simultaneously with, shortly before, or shortly after

---

[90] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[91] In that vein, we note the statement by the United States in *US – Gambling (Article 21.5 – Antigua and Barbuda)* that "compliance need not necessarily occur subsequent to the DSB recommendation and rulings, as a WTO Member might modify or remove measures at issue after establishment of a panel but prior to adoption of the panel or Appellate Body report." (Panel Report, *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 5.11)

[92] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 84; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(22); and Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.

specific actions introduced by Members with a view to implementing the recommendations and rulings of the DSB may provide support for a finding that those measures are closely connected. Conversely, there might be situations where the fact that the alleged "closely connected" measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between that measure and a Member's implementation obligations.

In Appellate Body's view, the Panel's formalistic reliance on the date of issuance of the subsequent reviews in ascertaining whether these reviews had a close nexus with the recommendations and rulings of the DSB was in error. The relevant inquiry was not whether the subsequent reviews were taken with the intention to comply with the recommendations and rulings of the DSB; rather, in their view, the relevant inquiry was whether the subsequent reviews, despite the fact that they were issued before the adoption of the recommendations and rulings of the DSB, still bore a sufficiently close nexus, in terms of *nature*, *effects*, and *timing*, with those recommendations and rulings, and with the declared measures "taken to comply", so as to fall within the scope of Article 21.5 proceedings.

Accordingly, the Appellate Body *reversed* the Panel's finding, that "none of the subsequent reviews challenged by the European Communities that were decided before the adoption of the DSB's recommendations and rulings fall within our terms of reference".

Having reversed the Panel's finding that the subsequent reviews that were issued *before* the adoption of the DSB's recommendations and rulings did not have a sufficiently close nexus with those recommendations and rulings, and with the declared measures "taken to comply", so as to fall within its terms of reference under Article 21.5 of the DSU, the Appellate Body examined next whether any of those reviews fall within the scope of these compliance proceedings.

As the Appellate Body had noted earlier, in determining whether measures that were ostensibly *not* "taken to comply" with the recommendations and rulings of the DSB had a particularly close connection to the declared measure "taken to comply", and to the recommendations and rulings of the DSB, a panel was required to scrutinize the links, in terms of *nature*, *effects*, and *timing*, between those measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. Only then is a panel in a position to determine whether there are sufficiently close links for it to characterize such other measures as "taken to comply" and, consequently, to assess their consistency with the covered agreements.[93]

In the Appellate Body view, the use of zeroing in the excluded subsequent reviews provided the necessary link, in terms of *nature* or subject matter, between such measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. All the excluded subsequent reviews were issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, and therefore constituted "connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order".[94] Moreover, as the Panel correctly noted, the issue of zeroing was the precise subject of the recommendations and rulings of the DSB, the only aspect of the original measures that was modified by the United States in its Section 129 determinations, and was the only aspect of the excluded subsequent reviews challenged by the European Communities in these proceedings. These pervasive links, in A Appellate Body view, weighed in favour of a sufficiently close nexus, in terms of *nature* or subject matter, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, insofar as the use of zeroing was concerned.

With respect to the links, in terms of *effects*, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, the Appellate Body had a more mixed picture. Many of the excluded subsequent reviews were administrative reviews that generated assessment rates calculated with zeroing, and replaced the cash deposit rates that were found to be WTO-inconsistent in the original proceedings, either as a result of an original investigation or an administrative review, with cash deposit rates calculated with zeroing in such subsequent reviews. Therefore, to the extent that these administrative reviews generated assessment rates and cash deposit rates calculated with zeroing that replaced those found to be WTO-inconsistent in the original proceedings with the effects of assessment rates and cash deposit rates that continued to reflect the zeroing methodology, this would provide a sufficient link, in terms of *effects*, between those administrative reviews and the recommendations and rulings of the DSB, insofar as the requirement to cease using the zeroing methodology was concerned.

---

93 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5- Canada)*, para. 77.

94 Appellate Body Report, *US – Continued Zeroing*, para. 181.

However, with respect to the 15 original investigations subject to the recommendations and rulings of the DSB, the United States issued Section 129 determinations in which it recalculated margins of dumping without zeroing that served as the basis for the going-forward cash deposit rates for the relevant anti-dumping duty orders. This recalculation without zeroing replaced the effects of the cash deposits calculated with zeroing in previous administrative reviews with the effects of cash deposits calculated *without* zeroing. Consequently, to the extent that the effects of the administrative and sunset reviews excluded from the Panel's terms of reference were replaced with those of a subsequent Section 129 determination in which zeroing was not applied, those subsequent reviews would generally not have the necessary link, in terms of *effects*, with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference.

Likewise, with respect to the 16 administrative reviews covered in the original proceedings, subsequent administrative reviews provided assessment rates calculated with zeroing, and generated cash deposit rates based on zeroing that replaced the effects of the administrative reviews found to be WTO-inconsistent in those proceedings. As Appellate Body had noted earlier, such assessment rates and cash deposit rates calculated with zeroing provided a sufficiently close link, in terms of *effects*, between such subsequent reviews and the recommendations and rulings of the DSB, insofar as the requirement to cease using the zeroing methodology was concerned. Administrative reviews could also have an effect on the United States' implementation of the recommendations and rulings of the DSB after the end of the reasonable period of time to the extent that the respective anti-dumping duty orders had been continued as a result of a sunset review in each of those Cases. Accordingly, to the extent that sunset review determinations led to the continuation of the relevant anti-dumping duty orders, which in turn provided the legal basis for the continued imposition of assessment rates and cash deposits calculated with zeroing in subsequent administrative reviews with continued effects after 9 April 2007, these sunset reviews had a sufficiently close link, in terms of effects, with the recommendations and rulings of the DSB. These were the sunset reviews in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31).[95]

95 These sunset reviews were excluded from the scope of these compliance proceedings because the relevant likelihood-of-dumping determinations by the USDOC had been

Finally, with respect to the links, in terms of *timing*, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, the Appellate Body relied on reasons articulated above do not consider the fact that they were issued before the adoption of the recommendations and rulings of the DSB to be determinative. In particular, the fact that the likelihood-of-dumping determinations in the sunset reviews listed above pre-dated the adoption of the recommendations and rulings of the DSB was not sufficient to sever the pervasive links that the Appellate Body had found to exist, in terms of *nature* and *effects*, between such sunset reviews, the recommendations and rulings of the DSB, and the declared measures "taken to comply".

Accordingly, the Appellate Body found that the sunset reviews in Cases 24, 28, 29, 30, and 31 had a sufficiently close nexus with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU.

In its other appeal, the United States argued that the Panel erred in finding that there were sufficiently close links, in terms of *nature*, between the original investigations at issue in the original proceedings and the 2004-2005 administrative reviews in Cases 1 and 6. The Appellate Body recalled that these administrative reviews were issued on 22 June 2007 and 9 May 2007 respectively, that was, *after* the reasonable period of time had expired on 9 April 2007.

The United States argued that the Panel erred in finding that successive determinations of different types made in the context of a single trade remedy proceeding "form part of a continuum of events and measures that was all inextricably linked". The European Communities responded that the Panel correctly limited its analysis "to the question of whether the use of zeroing in the calculation of margins of dumping in the subsequent reviews bears a sufficiently close nexus ... to the findings of the panel and Appellate Body in the original dispute so as to warrant ... consideration of that precise aspect of the subsequent reviews".

At the outset, the Appellate Body agreed with the United States that identity in terms of product and country coverage alone would be an insufficient basis for

---

made before the adoption of the DSB's recommendations and rulings in the original proceedings.

determining that the 2004-2005 administrative reviews in Cases 1 and 6 had a sufficiently close nexus, in terms of nature, with the recommendations and rulings of the DSB with respect to the original investigations in those Cases. The Appellate Body recognized in *US – Softwood Lumber IV (Article 21.5 – Canada)* that not "every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel."[96] However, in this particular case, the Appellate Body considered that the use of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6 established a link in terms of nature or subject matter between those reviews, the recommendations and rulings of the DSB, and the declared measures "taken to comply"—that is, the Section 129 determinations in those Cases.

The Appellate Body saw no error in the Panel's finding that the use of zeroing in the calculation of margins of dumping "is the only aspect of the subsequent reviews that is challenged by the European Communities; it is also the precise issue that was challenged in the original dispute, and which was the subject of the DSB rulings and recommendations." The Appellate Body also agreed with the Panel's statement that, where the Appellate Body made findings of inconsistency under different legal provisions in the original proceedings, they were premised on the same fundamental obligations under the *Anti-Dumping Agreement*, following from the definition of the term "margin of dumping" in Article 2.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

The Appellate Body found it significant that the use of zeroing was the only aspect of the original measures at issue that was corrected by the United States in response to the recommendations and rulings of the DSB. Indeed, the Section 129 determinations in Cases 1 and 6, which were the United States' declared measures "taken to comply", simply recalculated—without zeroing—the margins of dumping calculated in the original proceedings. This, Appellate Body, tended to confirm the close nexus, in terms of subject matter and nature, between the declared measures "taken to comply", the recommendations and rulings of the DSB in the original proceedings, and the use of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6.

Whilst the distinctions between comparison methodologies were not insignificant, the Appellate Body did not consider them to be decisive as to the links, in terms of nature or subject matter, between these reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB.

---

96 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 93.

In the Appellate Body view, the use of zeroing in the original investigations and in the 2004-2005 administrative reviews in Cases 1 and 6 similarly involved treating as zero the results of comparisons for which the export price(s) exceeded the normal value when these results were aggregated. The Appellate Body noted the Appellate Body's statement in *US – Softwood Lumber IV (Article 21.5 – Canada)* that differences between original investigations and administrative reviews in countervailing duty cases did not prevent the latter from falling within the scope of compliance proceedings, and that municipal law classifications and differences in legal bases for original investigations and assessment reviews were not determinative in WTO dispute settlement.[97]

The Appellate Body noted, furthermore, the Appellate Body's finding in *US – Continued Zeroing* that the use of zeroing in "successive determinations" under the same anti-dumping duty order constitutes a measure that is challengeable in WTO dispute settlement. If the zeroing methodology in "successive determinations" "involving the imposition, assessment and collection of duties under the same anti dumping duty order" in original investigations, administrative reviews, and sunset reviews was challengeable as a measure in original proceedings, this suggested that the subsequent reviews at issue in this case, in which that zeroing methodology was applied, was sufficiently connected in nature or subject matter so as to fall within the scope of these Article 21.5 proceedings.[98]

These considerations, in Appellate Body view, weighed in favour of a sufficiently close nexus, in terms of nature, between the 2004-2005 administrative review determinations in Cases 1 and 6, the declared measures taken to comply, and the recommendations and rulings of the DSB, insofar as the use of zeroing was concerned.

Given the above, the Appellate Body considered that the 2004-2005 administrative reviews in Cases 1 and 6 had a sufficiently close nexus, in terms of nature, effects, and timing, with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU. Accordingly, the Appellate Body *uphold* the Panel's findings, in paragraph 8.126(i) and (v) of the Panel Report, that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference.

---

97 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82.

98 Appellate Body Report, *US – Continued Zeroing*, para. 181.

The Appellate Body turned next to the European Communities' challenge against the Panel's exercise of judicial economy in relation to its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB. Before the Panel, the European Communities argued that the subsequent reviews identified in its panel request fell within the Panel's terms of reference under Article 21.5 of the DSU as "omissions" or "deficiencies" in the United States' implementation of the DSB's recommendations and rulings.

At the outset, the Appellate Body observed that the Panel was correct in noting that its authority under Article 21.5 of the DSU "extends not only to those acts which the United States has taken to comply ... but also to those acts which the United States allegedly *should have taken to bring itself into compliance*." In resolving a disagreement as to the "existence" or "consistency with the covered agreements" of measures taken to comply within the meaning of Article 21.5 of the DSU, panels acting under that provision were required to determine whether measures taken to comply exist, and whether such measures achieve full compliance with the recommendations and rulings of the DSB. As the Appellate Body noted in *US – Softwood Lumber IV (Article 21.5 – Canada)*, "[t]he word 'existence' suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also *omissions*."[99] Therefore, "an Article 21.5 panel may be called upon to examine either the 'existence' of 'measures taken to comply' with DSB recommendations and rulings, or, when such measures exist, the 'consistency' of those measures with the covered agreements, or a combination of both, in situations where the measures taken to comply, through omissions or otherwise, may achieve only partial compliance."

Consistently with this reading of Article 21.5 of the DSU, the Panel did not disregard, in ascertaining whether the United States has failed to comply with the DSB's recommendations and rulings, the particular "omissions" challenged by the European Communities, in the form of cash deposits, final assessment and liquidation of duties that remained unliquidated by the end of the reasonable period of time, and the United States' failure to recalculate margins of dumping upon which sunset reviews rely. Rather, the Panel correctly noted that its jurisdictional findings "[did] not mean that they may not take into consideration

99 Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67. (original emphasis)

omissions to implement on the part of the United States as part of our substantive analysis of the EC claims".[100]

Having said that, the Appellate Body had reservations about the Panel's statement that any omissions or deficiencies of the United States in the form of a subsequent review would be "captured" in the Panel's "close nexus" analysis. As the Panel's substantive analysis demonstrated, the Panel only examined the specific "omissions" challenged by the European Communities with respect to the specific subsequent reviews that the Panel later found to have fallen within its terms of reference, in the light of their "close nexus" with the recommendations and rulings of the DSB. Indeed, the Panel examined only whether the United States had failed to implement the recommendations and rulings of the DSB by imposing cash deposits, assessing and liquidating duties, and by failing to recalculate margins of dumping in the context of sunset reviews, for the subsequent reviews which it later determined to have a sufficiently close nexus with the recommendations and rulings of the DSB. This, the Appellate Body could have led to a partial resolution of the dispute, insofar as it could have resulted in the Panel disregarding particular "omissions" in the United States' implementation with respect to subsequent reviews that the Panel later determined not to fall within its terms of reference.

However, to the extent that the Panel's error in this regard would stem from its erroneous application of the "close nexus" analysis to the subsequent reviews challenged by the European Communities, which the Appellate Body had reversed, the Appellate Body did not consider it necessary to make additional findings in relation to the European Communities' claim that the Panel erred in declining to rule on its claim that the subsequent reviews fell within the Panel's terms of

---

[100] Panel Report, para. 8.127. (original emphasis) The Panel also noted that: ... alleged omissions in the form of the continued imposition of cash deposit requirements at rates calculated with zeroing, after the end of the reasonable period of time, should be considered in order to make findings with respect to whether the United States has complied with the recommendations and rulings of the DSB. To conclude otherwise would allow the United States to circumvent its obligation to implement those recommendations and rulings by virtue of the fact that the cash deposit rate originally at issue and found to be inconsistent with US obligations is replaced by a new, potentially similarly-inconsistent, rate calculated in another review. In this sense, and insofar as they continued to apply, we make no distinction between cash deposits requirements established in subsequent administrative reviews decided before and after the adoption of the DSB's recommendations and rulings.

reference as “omissions” or “deficiencies” in the United States’ implementation of the recommendations and rulings of the DSB.

The Appellate Body then turned to the question of the scope of the United States’ obligation to comply with DSB recommendations and rulings and recalled that, in this case, the recommendations and rulings of the DSB concern the use by the United States in its retrospective anti-dumping system of “model zeroing” in original investigations and “simple zeroing” in the assessment and collection of anti-dumping duties.

The Appellate Body also addressed the United States’ compliance obligations resulting from these recommendations and rulings of the DSB and the appeal by the European Communities, as well as the United States’ position, with respect to the Panel’s findings on these issues. The European Communities did not disagree with the Panel’s interpretation that any administrative review determination issued after the end of the reasonable period of time must not reflect zeroing.[101] However, the European Communities appealed the Panel’s findings that the United States’ compliance obligations did not extend to assessment instructions and final liquidation of anti-dumping duties in relation to administrative reviews made prior to the end of the reasonable period of time. In the next section, the Appellate Body discussed the European Communities’ and the United States’ appealed of certain aspects of the Panel’s findings regarding Cases 1 and 6 and the European Communities’ appeal of a finding by the Panel regarding Case 31, as well as the Panel’s decision not to make specific findings with respect to 11 other Cases.[102] Before turning to the general issues regarding the United States’ compliance obligations, the Appellate Body observed that the European Communities, in its appeal, and the United States, in its other appeal, had not appealed the findings the Panel made in relation to the application after the end of the reasonable period of time of cash deposits calculated with zeroing.

On appeal, the European Communities claimed that the Panel erred in rejecting its claims that certain actions or omissions by the United States based on zeroing after the expiry of the reasonable period of time were inconsistent with the United

---

[101] The Panel clarified that it referred to the date of the final determination in the administrative review proceeding, as well as the date on which the right to request such a review has lapsed. (Panel Report, para. 8.174)

[102] The relationship between the implementation obligations of the United States and subsequent sunset reviews is addressed in section IX of this Report.

States' obligation to comply with the rulings and recommendations of the DSB, and with various provisions of the *Anti-Dumping Agreement* and the DSU, and Article VI of the GATT 1994. The European Communities submitted that several interpretative considerations in the *Anti-Dumping Agreement* and the DSU provide support for the principle that immediate compliance by the end of the reasonable period of time precludes all actions or omissions based on zeroing after the end of the reasonable period of time.

In response, the United States argued that an anti-dumping duty was a border measure, and that, in disputes involving border measures, compliance was achieved when the measure was withdrawn or rendered WTO-consistent for goods entered after the reasonable period of time. The United States contended that, by withdrawing the border measures or applying new WTO consistent border measures to entries occurring after the end of the reasonable period of time subject to the 31 measures covered by the recommendations and rulings of the DSB, it brought itself into compliance with those recommendations and rulings.

The Appellate Body began analysis by recalling provisions of the DSU that are of relevance to the issues addressed on appeal. Under the DSU, panel and Appellate Body reports adopted by the DSB have to be unconditionally accepted by the parties to the dispute. Article 19.1 of the DSU requires the Member concerned to bring its measure found to be inconsistent with a covered agreement into conformity with that agreement. Article 3.7 of the DSU provides that "the first objective of the dispute settlement system is usually to secure the withdrawal" of the inconsistent measure. The Appellate Body has recognized that the implementing Member may bring an inconsistent measure into compliance also "by modifying or replacing it with a revised measure". Article 21.1 of the DSU provides that prompt compliance with the recommendations and rulings of the DSB is essential to the effective resolution of disputes. Article 21.3 implies that compliance should be immediate, but also provides that the implementing Member may obtain in certain circumstances a reasonable period of time in which to comply:

> If it is impracticable to comply immediately with the [DSB] recommendations and rulings, the Member concerned shall have a reasonable period of time *in which to do so*. (emphasis added)

The implementing Member may obtain a reasonable period of time in which to comply by: (i) DSB approval; (ii) agreement among the parties; or (iii) arbitration under Article 21.3 of the DSU.

The parties agreed that the fact that Article 21.3 might provide a Member with a reasonable period of time to bring itself into compliance with DSB recommendations and rulings did not mean that the Member was not subject to the underlying WTO obligation during that period. They also agreed that Article 28 of the *Vienna Convention* [103] was inapplicable to the present dispute because DSB recommendations and rulings did not create new WTO obligations. The Appellate Body therefore disagreed with the analogy drawn by the Panel between, on the one hand, Article 28 of the *Vienna Convention* on the "non-retroactivity of treaties" and, on the other hand, "non-retroactive" or "non-retrospective" remedies under the DSU, in its description of what prospective compliance with DSB recommendations and rulings requires the implementing Member to do.

The Appellate Body disagreed with the United States. The Appellate Body observed, first, that an administrative review determination issued after the end of the reasonable period of time in which duty liability had been assessed for entries that occurred before that date also has an impact on entries taking place after the end of the reasonable period of time, because this determination sets going-forward cash deposit rates that apply to future entries. Under the United States' approach, prospective implementation would imply that cash deposit rates on entries after the end of the reasonable period of time did not reflect zeroing. Moreover, because compliance with the recommendations and rulings of the DSB implied cessation of zeroing in the assessment of final duty liability, and in the measures that, in the ordinary course of the imposition of anti-dumping duties, derive mechanically from the assessment of duties, whether the implementation was prospective or retroactive should not be determined by reference to the date when liability arises, but rather by reference to the time when final dumping duty liabilities were assessed or when measures that result mechanically from the assessment of duties occur. The Appellate Body considered that the obligation to cease using zeroing in the assessment of anti-dumping duty liability at the latest as of the end of the reasonable period of time "is eminently prospective in nature". By contrast, the approach based on the date of entry advocated by the United States would allow a WTO Member operating a retrospective duty assessment system to resort to a

---

103 Article 28 of the *Vienna Convention* reads:

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

methodology for assessing duty liability that had been found WTO-inconsistent beyond the end of the reasonable period of time. Thus, the implementing Member would be able to extend the reasonable period of time and delay compliance depending on when it chooses to undertake final duty assessment. Such a result would deprive of meaning the notion of "reasonable period of time" in which a Member should comply, as provided for in Article 21.3 of the DSU, and be contrary to the implementation mechanism of the DSU.

The Appellate Body then moved to the European Communities' claim on appeal that the Panel erred in concluding that the implementation obligations of the United States did not extend to the collection (or liquidation) of duties, assessment instructions, or liquidation instructions issued after the end of the reasonable period of time, when such actions result from determinations of final duty liability made before that date. The Appellate Body was of the view that, by implication, compliance with the recommendations and rulings of the DSB with respect to Cases 16 through 31 implies not only cessation of zeroing in the assessment of duties, but also in consequent measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties. Accordingly, to the extent that a measure of this kind would be based on zeroing, the United States would fail to comply with the recommendations and rulings of the DSB regarding Cases 16 through 31 if it were to apply that measure after the end of the reasonable period of time.

In the light of the above considerations, the Appellate Body agreed with the Panel that "any definitive duty determination made after the end of the reasonable period of time must be consistent with the provisions of the *Anti-Dumping Agreement* and with the DSB's recommendations and rulings." The Appellate Body also agreed with the Panel's statement that "[t]o implement the DSB's recommendations and rulings, the United States was at least obligated, after 9 April 2007, to cease using the 'zeroing' methodology in the calculation of anti-dumping duties, not only with respect to imports entered after the end of the reasonable period of time, but also in the context of decisions involving the calculation of dumping margins made after the end of the reasonable period of time with respect to imports entered before that date." In other words, in relation to the Cases at issue in the original proceedings, the Appellate Body considered that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing is used, or, if no such review was requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability was assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB. However, the Appellate Body disagreed with the Panel's view regarding measures that were consequent to assessment reviews in the Cases at issue in the original proceedings. The Appellate Body considered that measures that, in the ordinary course of the imposition of anti-dumping duties, derive *mechanically* from the assessment of duties would establish a failure to comply with the recommendations and rulings of the DSB to the extent that they were based on zeroing and that they were applied after the end of the reasonable period of time. Accordingly, the Appellate Body *reversed* the Panel's interpretation, that the United States' obligation to implement the recommendations and rulings of the DSB did not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions result from administrative review determinations made before the end of the reasonable period of time.

The Appellate Body then moved to the European Communities' appeal concerning the Panel's finding that the European Communities had not established that the United States failed to comply with the recommendations and rulings of the DSB by liquidating, after the end of the reasonable period of time, duties that were assessed with zeroing pursuant to administrative review determinations issued before the end of the reasonable period of time. The Appellate Body observed that this finding of the Panel was based on its position that actions to liquidate entries are outside the scope of the implementation obligations of the United States merely because they result from assessments made before the end of the reasonable period of time. The Appellate Body had explained above why they reject this approach. Resting upon an erroneous reasoning, this finding of the Panel, "*is moot and has no legal effect*."

Having said that, the Appellate Body observed that the unliquidated entries as of the end of the reasonable period of time to which the European Communities referred[104] were derived from administrative reviews that were outside the Panel's terms of reference, with the exception of the unliquidated duties assessed in the 2004 2005 administrative review in Case 1.[105] Accordingly, it was not necessary for the Appellate Body to make findings with respect to those unliquidated entries.

[104] European Communities' response to Panel Question 5, Annex A. According to the Annex, there were unliquidated entries as of the end of the reasonable period of time in seven Cases out of 31, namely, Cases 1, 5, 22, 28, 29, 30, and 31.

[105] The appeal and the other appeal relating to Case 1 are discussed in the next section of this Report. In any event, we observe that, in Case 1, the 2004-2005 administrative

The Appellate Body did not express any opinion on the question of whether actions to liquidate duties that was based on administrative review determinations issued before the end of the reasonable period of time, and that have been delayed as a result of judicial proceedings, fall within the scope of the implementation obligations of the United States, as the Appellate Body did not need to do so in the context of analysis of the issue in this case.

The Appellate Body moved to the claims raised in the European Communities' appeal and the United States' other appeal with respect to subsequent administrative reviews in specific Cases, as well as cash deposits applied or duties liquidated after the end of the reasonable period of time in specific Cases. The Appellate Body examined in turn Cases 1, 6, and 31 with respect to which the Panel made specific findings. The Appellate Body then discussed the European Communities' appeal concerning Cases 18 through 24 and 27 through 30 with respect to which the Panel did not make substantive findings, and addressed the question of whether it could complete the analysis.

Accordingly, the Appellate Body *upheld* the Panel's finding, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in issuing the results of the 2004-2005 administrative review on 9 May 2007, as well as the consequential assessment and liquidation instructions. The Appellate Body also *uphold* the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in *Stainless Steel Wire Rod from Sweden* (Case 6) in conformity with its WTO obligations.

The Appellate Body had noted that, apart from the alleged non-existence of measures taken to comply between 9 April 2007 and 23 April/31 August 2007, the European Communities did not appeal the Panel's finding, in paragraphs 8.212 and 9.1(b)(v) of the Panel Report, that the United States had not failed to comply with the recommendations and rulings of the DSB in the original proceedings

---

review was concluded *after* the expiry of the reasonable period of time. In our view, the analysis of whether the United States has complied or not with the recommendations and rulings of the DSB should focus on the results of the 2004-2005 administrative review. For purposes of proceedings under Article 21.5 of the DSU, we do not see what a separate review of unliquidated entries relating to the 2004-2005 administrative review would add to the analysis of the results of that review.

and had not acted inconsistently with Articles 2.4.2 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by establishing a new cash deposit rate based on zeroing in the 2004-2005 administrative review determination in *Stainless Steel Wire Rod from Sweden*, because, due to the revocation of the anti-dumping duty order, no cash deposit requirement was actually imposed after 23 April 2007.

As far as Case 31 was concerned, Appellate Body held that the recommendations and rulings of the DSB covered the use of zeroing in the assessment of anti-dumping duty liability and in the establishment of cash deposit rates. In the United States, duty liability is assessed and going-forward cash deposit rates are established in an administrative review or, if no administrative review was requested, at the time when it is determined that duties will be assessed on the basis of the collected cash deposits.

In Case 31, no subsequent administrative review was requested by NSK after the 2000 2001 administrative review. Thus, the cash deposit rates applied on imports from NSK after the end of the reasonable period of time were derived from the latest determination in which duties were assessed on the basis of the collected cash deposits, and reflected the margin of dumping calculated with zeroing in the 2000 2001 administrative review. In Case 31, the anti-dumping duty order was published on 15 May 1989.[106] Under United States law, the right to request an administrative review lapsed at the end of the anniversary month of the publication of the order, that is, in this Case, 31 May 2007.[107] When the right to request an administrative review lapsed on that date, duties were finally assessed on the basis of the collected cash deposits. The Appellate Body concluded that the duty liability determination on 31 May 2007 made on the basis of cash deposits previously collected constituted a failure to comply with the recommendations and rulings of the DSB in relation to Case 31, as the assessed duties reflected a margin of dumping calculated with zeroing and the assessment took place *after* the end of the reasonable period of time.

On the basis of the above considerations, the Appellate Body *found* that the Panel erred in refraining, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK in *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), and that

---

106 *United States Federal Register*, Vol. 54 (15 May 1989) 20909.

107 *United States Code of Federal Regulations*, Title 19, Section 353.53a.

duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing establish a failure by the United States to comply with the recommendations and rulings of the DSB.

The Appellate Body observed that subsequent administrative reviews in which zeroing was used after the end of the reasonable period of time established a failure by the United States to comply with the recommendations and rulings of the DSB. Furthermore, the AB observed the Panel's statement that:

> ... in order to comply with the recommendations and rulings of the DSB, the United States had to ensure that any cash deposit rate applied after the end of the reasonable period of time in relation to one of the measures at issue in the original dispute was not one that derived from a margin of dumping calculated with zeroing, even where that cash deposit was established as a result of a subsequent review, and not a measure at issue in the original dispute. Concluding otherwise would mean that the United States is allowed to circumvent its obligation to bring its measures and action into conformity with those recommendations and rulings by the mere replacement of the cash deposits established in the measures challenged in the original dispute by subsequent ones established in administrative reviews in which zeroing was again used.[108]

The Appellate Body shared the Panel's view that the United States failed to comply with the recommendations and rulings of the DSB if it continues to apply cash deposits established on the basis of zeroing after the end of the reasonable period of time in respect of the Cases at issue here.

The Subsequent Sunset Reviews

The Appellate Body then turned to the European Communities' appeal of the Panel's finding that the European Communities had not demonstrated that the United States failed to comply with the DSB's recommendations and rulings in the subsequent sunset reviews at issue.

---

[108] Panel Report, para. 8.218. Footnote 820 to that paragraph reads: "... a Member must, to implement the DSB's recommendations and rulings, ensure that actions it undertakes after the end of the reasonable period of time are consistent with its obligations under the DSB. The continuing requirement to provide cash deposits constitutes, in our view, such an action."

The Appellate Body started its analysis by observing that, of the five sunset review determinations the Panel considered to be within its terms of reference, four resulted in revocation orders[109] (Cases 2, 3, 4, and 5) and one resulted in a continuation order[110] (Case 19) *after* the Panel was established. These sunset reviews fall into three subcategories in terms of the determinations that the authorities had made by the date of the establishment of the Panel (25 September 2007). The first subcategory includes Case 3, in which the USDOC had made an affirmative preliminary likelihood-of-dumping determination by the date of establishment of the Panel; the second subcategory includes Cases 2, 4, and 5, in which the USDOC had made affirmative final likelihood-of-dumping determinations by the date of establishment of the Panel; and the third subcategory includes Case 19, in which the USDOC had made an affirmative final likelihood-of-dumping determination and the USITC had made an affirmative injury determination by the date of establishment of the Panel. In all sunset reviews considered by the Panel, the USDOC had not yet issued a formal continuation order at the time the Panel was established.

With respect to the first category of sunset review determinations, the Appellate Body noted that in Case 3, the USDOC had made an affirmative preliminary likelihood-of-dumping determination on 30 May 2007. A final affirmative likelihood-of-dumping determination was made by the USDOC on 5 October 2007, that is, 10 days after Panel establishment. The USITC then made a negative injury determination on 31 January 2008 and the USDOC revoked the anti-dumping duty order on 7 February 2008, and effective as of 7 March 2007.

The Appellate Body observed that, in its preliminary likelihood-of-dumping determination in Case 3, the USDOC stated that it "preliminarily determines that revocation of the antidumping duty order on [stainless steel bar] from Germany is

---

109 The revocation orders were issued by the USDOC on 7 February 2008, following negative injury determinations by the USITC. (USDOC, Revocation of Antidumping Duty Orders on Stainless Steel Bar from France, Germany, Italy, South Korea and the United Kingdom and the Countervailing Duty Order on Stainless Steel Bar from Italy, *United States Federal Register*, Vol. 73, No. 26 (7 February 2008) 7258 (Panel Exhibit US-13)) These revocation orders were effective as from 7 March 2007.

110 The continuation order was issued by the USDOC on 12 October 2007, following an affirmative injury determination by the USITC. (USDOC, Certain Pasta from Turkey and Italy: Continuation of Countervailing Duty and Antidumping Duty Orders, *United States Federal Register*, Vol. 72, No. 197 (12 October 2007) 58052)

likely to lead to continuation or recurrence of dumping" at specified margins, and invited interested parties to submit comments on the preliminary results within certain deadlines. The USDOC also explained that it would "issue a notice of final results of this sunset review, which will include the results of its analysis of issues raised in any [comments submitted by the interested parties], no later than September 29, 2007."

In the Appellate Body view, the evidence before the Panel in these compliance proceedings regarding the sunset review determination in Case 3 did not warrant a conclusion different from the one reached by the Appellate Body in *US – Continued Zeroing*. In view of the preliminary nature of the determination by the USDOC in Case 3, the Appellate Body considered that the European Communities' challenge of the USDOC's preliminary determination was premature. Therefore, the Appellate Body found that the Panel did not err in finding, in paragraph 8.140 of the Panel Report, that the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in respect of the sunset review in Case 3.

Regarding the second subcategory of sunset reviews in Cases 2, 4, and 5, the USDOC had made final likelihood-of-dumping determinations on 4 June 2007, but when the Panel was established on 25 September 2007, the sunset review proceedings were still pending before the USITC, which had not yet determined whether the expiry of the anti-dumping duty order would be likely to lead to the continuation or recurrence of injury. The USITC subsequently made negative injury determinations on 31 January 2008 and the USDOC revoked the anti-dumping duty order on 7 February 2008 with respect to all these Cases with an effective date of 7 March 2007.

The Appellate Body observed that, while the USDOC's likelihood-of-dumping determinations should be consistent with Article 11.3 of the *Anti-Dumping Agreement*, a sunset review was not completed in the United States until both the USDOC and the USITC have made likelihood-of-dumping and likelihood-of-injury determinations. The Appellate Body further noted that these were compliance proceedings and that whether or not the United States had ultimately failed to comply with the recommendations and rulings of the DSB depends on whether any allegedly WTO-inconsistent likelihood-of-dumping determinations by the USDOC had actually resulted in the continuation of the anti-dumping duty orders.

In the present dispute, the anti-dumping duty orders in Cases 2, 4, and 5 were revoked on 7 February 2008 by the USDOC following negative injury determinations by the USITC (these revocations were effective as from 7 March 2007, prior to the end of the reasonable period of time). The Panel declined to assess the WTO-consistency of the USDOC's affirmative final likelihood-of-dumping determinations in those sunset reviews that resulted in revocations orders after the Panel was established.[111]

As the Appellate Body had noted above, these were the compliance proceedings and the issue before the Panel was whether the United States had failed to comply; that is, the Panel was called on to establish whether the USDOC's determinations in these sunset reviews had any impact on compliance by the United States. The Appellate Body considered that the USDOC's affirmative final likelihood-of-dumping determinations in these sunset reviews did not ultimately undermine compliance by the United States with the recommendations and rulings of the DSB, considering that the anti-dumping duty orders were revoked at the end of the sunset reviews with an effective date of 7 March 2007. The Appellate Body considered this to be the case even assuming that the European Communities had demonstrated that these likelihood-of-dumping determinations relied on margins of dumping calculated using zeroing. The Appellate Body underlined that the Appellate Body was not determining whether or not the USDOC's final likelihood-of-dumping determinations in these sunset reviews were in compliance with the recommendations and rulings of the DSB after the end of the reasonable period of time. However, the Appellate Body considered that these determinations did not ultimately undermine compliance by the United States, considering that the sunset reviews resulted in revocation orders and that these revocation orders became effective on a date prior to the end of the reasonable period of time.

Under these circumstances, the Appellate Body did not consider it appropriate to conclude that the United States failed to comply with the recommendations and rulings of the DSB in the original proceedings. The Appellate Body therefore *declined* to make a finding on whether the Panel erred in not ruling, on the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews in Cases 2, 4, and 5.

111 The anti-dumping duty order was also revoked in Case 3 on 7 February 2008, effective 7 March 2007.

Finally, the Appellate Body considered the Panel's findings with respect to the third subcategory of sunset determinations, which includes Case 19. The Appellate Body recalled that, in Case 19, both the USDOC and the USITC had made their respective final likelihood-of-dumping and likelihood-of-injury determinations by the time the Panel was established. However, the USDOC issued a continuation order on 12 October 2007, *after* the Panel was established on 25 September 2007.

The Appellate Body recalled that, in *Chile – Price Band System*, the Appellate Body found that a panel could examine amendments to a measure that post-dated its establishment, provided they did not change the essence of the measure at issue. In the present case, the Appellate Body observed that, even if the continuation order post-dated the establishment of the Panel, it was issued only a few days after this date and did not change the essence of the determinations under this sunset review. The Appellate Body considered that the continuation order is relevant in judging compliance by the United States with the recommendations and rulings of the DSB. The Appellate Body also observed that, at the time the Panel was established, both determinations required by Article 11.3 of the *Anti-Dumping Agreement* in a sunset review had been made and, therefore, considering that both determinations were affirmative, the sunset review would result in a continuation order by operation of law[112] in the United States' anti-dumping system.[113]

The Appellate Body was of the view that the Panel should have considered that this sunset review resulted in a continuation order in its evaluation of whether it affected compliance by the United States with the recommendations and rulings

---

[112] In response to questioning at the oral hearing, the United States confirmed that, if both the USDOC and the USITC have made affirmative likelihood-of-dumping and likelihood-of-injury determinations, the USDOC has no discretion not to issue a continuation order, as this is a "ministerial function".

[113] Section 351.218(f)(4) of Title 19 of the *nited States Code of Federal Regulations* provides that:

> ... the [USDOC] normally will issue its determination to continue an order or suspended investigation, or to revoke an order or terminate a suspended investigation, as applicable, not later than seven days after the date of publication in the Federal Register of the [USITC's] determination concluding the sunset review.

In its press release of 7 September 2007 relating to the likelihood-of-injury determination in Case 19, the USITC stated that, "[a]s a result of the [USITC's] affirmative determination, the existing orders on imports of pasta from Italy and Turkey *will* remain in place". (emphasis added) (See European Communities' appellant's submission, footnote 163 to para. 117) of the DSB in this particular sunset review. Thus, the Appellate Body disagreed with the Panel that the fact that the proceedings had not been formally concluded in Case 19 prevented it from considering the effects of the sunset review on the implementation of the DSB's recommendations and rulings by the United States.

The Appellate Body therefore *reversed* the Panel's findings, that any failure by the United States in the sunset review in Case 19 had not yet materialized as of the date of establishment of the Panel and thus had no effect on the United States' implementation of the DSB's recommendations and rulings and that, as a consequence, the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB.

Completing the Analysis

This brought the Appellate Body to the question of whether the Appellate Body could complete the analysis, as requested by the European Communities, and find that, by relying in the sunset review proceedings in Case 19 on margins of dumping calculated in prior proceedings using zeroing, the United States failed to comply with the recommendations and rulings of the DSB and with its obligations pursuant to Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

A similar question had arisen with respect to Cases 24, 28, 29, 30, and 31, which the Panel found not to fall within its terms of reference. The Appellate Body reversed this finding by the Panel, and the European Communities therefore requested the Appellate Body to complete the analysis and find that, by relying also in the sunset review proceedings in Cases 24, 28, 29, 30, and 31 on margins of dumping calculated in prior proceeding using zeroing, the United States failed to comply with the recommendations and rulings of the DSB and with its obligations pursuant to Articles 2.1, 2.4, 2.4.2, and 11.3 of the *Anti-Dumping Agreement*.

The Appellate Body started the analysis by considering whether the Appellate Body could complete the analysis in Case 19. The Panel found, with respect to the USDOC's likelihood-of-dumping determination in Case 19, that "[t]he Issues and Decision Memorandum submitted to the Panel by the United States ... indicates that the USDOC found that dumping was likely to continue or recur if the order[] were revoked based on its finding that dumping had continued at above *de minimis* levels since the issuance of the order".[114] Therefore, it concluded that "[i]t seems clear ... from the Issues and Decision Memorand[um] in [Case 19] that the finding[] that dumping had continued at above *de minimis* levels since the issuance of the relevant [anti-dumping duty] order refer[s] to [a] dumping margin[] that had been calculated in administrative reviews, using zeroing."

The Appellate Body recalled that, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."[115] The Appellate Body added that, "[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*." In such circumstances, the "likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3." The Appellate Body made similar findings in *US – Anti-Dumping Measures on Oil Country Tubular Goods*, *US – Zeroing (Japan)*, and *US – Continued Zeroing*.[116]

The Appellate Body considered that the findings by the Panel in Case 19 constitute a sufficient factual basis to allow the AB to complete the analysis and *find* that the sunset review in Case 19 was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and results in failure by the United States to comply with the recommendations and rulings of the DSB, which had established that the use of zeroing by the United States in the original investigation and administrative reviews relating to the same Case was inconsistent with the *Anti-Dumping Agreement*.

The Appellate Body then considered next whether they could complete the analysis in respect of the subsequent sunset reviews in Cases 24, 28, 29, 30, and 31. These sunset reviews had all resulted in continuation orders and the relevant anti-dumping duty orders had not been fully revoked following the adoption of the DSB's recommendations and rulings in the original proceedings. The sunset

---

114 Panel Report, para. 8.138 (referring to USDOC Issues and Decision Memorandum from Notice of Final Results of Expedited Sunset Reviews of the Antidumping Duty Orders: Certain Pasta from Italy and Turkey (5 February 2007), at p. 5 (Panel Exhibit US 25)).

115 Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review, para. 127.

116 Appellate Body Report, US – Anti-Dumping Measures on Oil Country Tubular Goods, para. 181; Appellate Body Report, US – Zeroing (Japan), para. 185; Appellate Body Report, US – Continued Zeroing, paras. 183-185.

reviews in these Cases provided the legal basis for the continued imposition of anti-dumping duties after the expiry of the reasonable period of time and still provided the legal basis for their continued imposition as of that date.

The Panel made no express factual findings on Cases 24, 28, 29, 30, and 31[117], as it had excluded these sunset reviews from its terms of reference. The European Communities submitted to the Panel the USDOC's Issues and Decision Memoranda of the sunset reviews in Cases 28, 29, 30, and 31. The Appellate Body observed that the Issues and Decision Memoranda in these Cases indicate that the USDOC found that dumping was likely to continue or recur if the orders were revoked, based on margins of dumping calculated in original investigations and previous administrative reviews using zeroing.[118] The European Communities, however, did not submit to the Panel the USDOC's Issues and Decision Memorandum relating to Case 24.[119] In the absence of express factual findings by the Panel and undisputed evidence in the Panel record regarding Case 24, the AB was unable to complete the analysis in respect of this Case.

---

117 Panel and Appellate Body in *US – Continued Zeroing* had already found that the sunset reviews in Cases 18, 22, 28, 29, 30, and 31 were inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. (See Appellate Body Report, *US – Continued Zeroing*, para. 383)

118 For Case 28, see USDOC Issues and Decision Memorandum for the Expedited Sunset Review of the Antidumping Duty Order on Stainless Steel Sheet and Strip in Coils from Germany; Final Results, at p. 4 (published in *United States Federal Register*, Vol. 69 (22 November 2004) 67896 (Panel Exhibit EC-58). For Case 29, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 9 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37). For Case 30, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 9 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37). For Case 31, see USDOC Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Antifriction Bearings and Parts Thereof from France, Germany, Italy, and the United Kingdom; Final Results, at p. 10 (published in *United States Federal Register*, Vol. 70 (5 October 2005) 58183 (Panel Exhibit EC-37).

119 In its reply to Panel Question 6, the European Communities indicated that to the best of its knowledge there was no Issues and Decision Memorandum relating to the sunset review in Case 24.

In contrast, the Issues and Decision Memoranda in Cases 28, 29, 30, and 31, which were in the Panel record, indicate that, in making its likelihood-of-dumping determinations in these Cases, the USDOC relied on dumping margins that had been calculated in original investigations and previous administrative reviews with the use of zeroing. The AB considered that this constitutes a sufficient factual basis to allow them to complete the analysis and *find* that the sunset reviews in Cases 28, 29, 30, and 31 are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and result in failure by the United States to comply with the recommendations and rulings of the DSB, which had established that the use of zeroing by the United States in the original investigation and in administrative reviews relating to the same Cases was inconsistent with the *Anti-Dumping Agreement*.

In this respect, as the Appellate Body had already considered above for Case 19, in previous cases, the Appellate Body had found that, if an investigating authority relied upon a margin of dumping calculated using a WTO-inconsistent methodology to support its likelihood-of-dumping determination, the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The Appellate Body considered that the failure to revise the likelihood-of-dumping determination so as to eliminate reliance on margins of dumping calculated using zeroing, effective as from the expiry of the reasonable period of time, undermined compliance by the United States with the recommendations and rulings of the DSB. The Appellate Body observed that, while continuation orders in these cases were issued before the expiry of the reasonable period of time, such continuation orders resulted in the extension of the anti-dumping duty orders for another five years, thus beyond the expiry of the reasonable period of time. The Appellate Body further noted that, based on the anti-dumping duty orders that were continued by means of these sunset reviews, the United States conducted administrative reviews after the expiry of the reasonable period of time that assessed duty rates and established cash deposit rates based on zeroing.

Based on the Panel's findings and on undisputed evidence in the Panel record, the Appellate Body reached the conclusion that, in the likelihood-of-dumping determinations in the sunset reviews in Cases 19, 28, 29, 30, and 31, the USDOC relied on margins of dumping calculated using zeroing in previous administrative reviews and original investigations. The Appellate Body, therefore, concluded that, because the likelihood-of-dumping determinations in these sunset reviews relied on margins of dumping calculated inconsistently with the *Antidumping*

Agreement, they were inconsistent with Article 11.3 of that Agreement and undermines compliance by the United States.

The Appellate Body turned finally to the claim by the European Communities that the Panel acted inconsistently with Article 11 of the DSU because it did not address the claim by the European Communities that the United States failed to comply with the DSB's recommendations in the original proceedings by keeping in place certain aspects of the original measures—that is, margins of dumping based on zeroing—and by relying on those margins for the determination of likelihood of recurrence of dumping in subsequent sunset review proceedings concerning the same anti-dumping measures.

The Appellate Body had noted that, in respect of the five sunset reviews it considered to fall within its terms of reference, the Panel initially determined, based on the Issues and Decision Memoranda in the sunset reviews in Cases 2, 3, 4, 5, and 19, that the USDOC's likelihood-of-dumping determinations were based on margins of dumping calculated in administrative reviews using zeroing. However, the Panel later concluded that, considering that none of the sunset reviews at issue had been concluded by the time the Panel was established, it could not find that the United States had violated the provisions of the *Anti-Dumping Agreement* because it had relied on margins of dumping calculated with zeroing.

The Appellate Body therefore took the view that the Panel addressed the claim by the European Communities that the United States failed to comply with the DSB's recommendations and rulings by relying on certain aspects of the measures at issue in the original proceedings (the margins of dumping based on zeroing) in these sunset reviews. The Panel, however, found that the European Communities had not demonstrated that the United States failed to comply with the DSB's recommendations and rulings, because none of the sunset reviews had been concluded by the time the Panel was established. The Appellate Body recalled that the Appellate Body had reversed this finding by the Panel in respect of Case 19.

The Appellate Body further noted that, in *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body found that a Member could not base its claims under Article 11 of the DSU "on the same grounds" as its claims under substantive provisions in the covered agreements. In particular, the Appellate Body ruled that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements."[120] In that case, the Appellate Body also referred to its decision in *US – Steel Safeguards*, where it found that:

> [a] challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.[121] (footnote omitted)

In the present case, the Appellate Body was not persuaded that the claims and arguments by the European Communities under Article 11 of the DSU differed from its claims that the Panel failed to apply correctly other provisions of the DSU and the *Anti-Dumping Agreement*. Therefore, the AB found that the Panel did not act inconsistently with Article 11 of the DSU.

The Non-Existence of Measures between 9 April and 23 April/31 August 2007

The Appellate Body then moved to the issue of whether the Panel erred in declining to make findings with respect to the contentions of the European Communities on the non-existence of measures "taken to comply" between 9 April 2007 and 23 April/31 August 2007.

At the outset the Appellate Body underscored that, under Article 21.1 of the DSU, "[p]rompt compliance with recommendations or rulings of the DSB was essential in order to ensure effective resolution of disputes to the benefit of all Members." Therefore, when it is impracticable for the responding WTO Member to comply immediately with the recommendations and rulings of the DSB and a reasonable period of time for implementation had been established pursuant to Article 21.3 of the DSU, the responding WTO Member was expected to comply with the recommendations and rulings of the DSB within this reasonable period of time, that is to say, at the latest, as of the end of the reasonable period of time.

---

120 Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

121 Appellate Body Report, *US – Steel Safeguards*, para. 498.

In its assessment under Article 21.5 of the DSU, the Panel took into account events that occurred between the end of the reasonable period of time and the establishment of the Panel (25 September 2007), namely, the entry into force of 11 Section 129 determinations (issued by the USDOC on 9 April 2007) on 23 April 2007, the issuance of another Section 129 determination on 20 August 2007, and its entry into force on 31 August 2007. The appeal of the European Communities raised the question of whether the Panel was permitted to do so and to refrain from making a finding that there was a failure to comply in the periods between 9 April 2007 (when the reasonable period of time ended) and 23 April/31 August 2007 (when the Section 129 determinations entered into effect). In the Appellate Body view, these actions by the Panel had to be considered in the light of the objective of the WTO dispute settlement system, which was to secure a positive and effective solution to a dispute.[122] In this case, the Panel acted in a manner consistent with the objective of securing a positive and effective solution to the dispute, and did not exceed the bounds of its discretion when, in its analysis of whether the United States had complied with the recommendations and rulings of the DSB, it took into account implementation actions taken subsequent to the expiry of the reasonable period of time but before the Article 21.5 Panel was established.

When an Article 21.5 panel made a finding that a WTO Member had not complied with the recommendations and rulings of the DSB in the original proceedings, the implication of that finding was that the WTO Member remained subject to obligations flowing from the recommendations and rulings issued by the DSB in the original proceedings. However, if the compliance panel found that compliance had been achieved at the time of its establishment, but not at the end of the reasonable period of time, the responding WTO Member would not need to take additional remedial action.

In the light of these considerations, the Appellate Body found that the Panel did not act inconsistently with Article 11 of the DSU in declining, to make findings

---

[122] Article 3.7 of the DSU. See also Article 3.4 of the DSU, which provides that "[r]ecommendations or rulings of 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." In *Australia – Salmon*, the Appellate Body recalled, in the context of an analysis on judicial economy, that a panel should perform its assessment of the matter in a way so as "to ensure effective resolution of disputes to the benefits of all Members." (Appellate Body Report, *Australia – Salmon*, para. 223 (quoting Article 21.1 of the DSU))

on the European Communities' claim that, by not taking measures to comply between 9 April and 23 April/31 August 2007, the United States violated Article 21.3 of the DSU.

Having said that, the Appellate Body emphasized that, in principle, a measure found to be inconsistent is to be brought into conformity immediately, and that a reasonable period to do so can be agreed to or awarded only in circumstances where immediate compliance was impractical. In particular, Article 21.3 of the DSU provided that the Member concerned should have a reasonable period of time "*in which*" to comply with recommendations and rulings of the DSB. The reference to a reasonable period *in which* to comply suggests that a Member should bring its measure into conformity *within* the reasonable period of time, so that compliance is in effect by the end of that period.

The Alleged Arithmetical Error in the Section 129 Determination in Case 11

The Appellate Body now turned to the European Communities' appeal of the Panel's finding that the European Communities was precluded from raising claims against an arithmetical error relating to *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11) allegedly committed by the USDOC in the recalculation of the margin of dumping in its Section 129 determination.

The AB disagreed with the notion that a Member might be entitled to assume in Article 21.5 proceedings that an aspect of a measure that was not challenged in the original proceedings is consistent with that Member's obligations under the covered agreements. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body held that, "[o]n the basis of the original panel's conclusions [regarding the likelihood-of-dumping determination], the USDOC could not assume that its findings regarding the alleged decline in the volume of imports were WTO-consistent"[123], as these concerned a different aspect of the original measure. If certain claims against aspects of a measure were not decided on the merits in the original proceedings, they were not covered by the recommendations and rulings of the DSB and, therefore, a Member should not be entitled to assume that those aspects of the measure are consistent with the covered agreements.

---

[123] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

The Appellate Body observed that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body found that a complaining Member that had failed to make a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged after implementation may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings where this unchanged element is separable from the changed part of the implementation measure.[124] In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body found that a complaining Member might not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO consistent in the original proceedings.[125]

Referring to these two cases in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body observed that, "[b]ecause adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that had been decided in adopted reports would indeed provide an unfair 'second chance' to that party."[126] However, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body distinguished the claims in *EC – Bed Linen (Article 21.5 – India)* and *US – Shrimp (Article 21.5 – Malaysia)* from those at issue in that dispute, and found that allowing a complaining Member to make a case that it did not establish in the original proceedings would not provide it with an unfair "second chance", nor would it compromise the finality of the DSB's recommendations and rulings.

While claims in Article 21.5 proceedings could not be used to re-open issues that were decided on substance in the original proceedings, the unconditional acceptance of the recommendations and rulings of the DSB by the parties to a dispute did not preclude raising new claims against measures taken to comply that incorporate unchanged aspects of original measures that could have been made, but were not made, in the original proceedings. The Appellate Body did not see how allowing such claims in Article 21.5 proceedings would "jeopardize the principles of fundamental fairness and due process"[127], or how it would unfairly

---

124 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 86 and 93.

125 Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96.

126 Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. (footnote omitted)

127 Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.75.

provide a "second chance"[128] to the complaining Member, provided these new claims relate to a measure "taken to comply" and do not re-argue claims that were decided in the original proceedings.

The Appellate Body observed that, in the present case, the European Communities did not raise a claim regarding the alleged arithmetical error in the original proceedings. As such, this issue was not decided in the original recommendations and rulings of the DSB, which concerned only the zeroing methodology. Therefore, allowing the European Communities to raise claims against such an alleged error in these Article 21.5 proceedings would not raise due process concerns, because it would not in itself provide another chance to the European Communities to make a case it failed to make in the original proceedings, such that the finality of the DSB's recommendations and rulings would be compromised.

The Appellate Body therefore disagreed with the Panel, to the extent it relied on the principles of fundamental fairness and due process as applied by the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, to support its finding that the European Communities was precluded from raising claims against the arithmetical error in these Article 21.5 proceedings.

In finding that "the scope of Article 21.5 of the DSU was not so broad as to allow a complaining party to make claims that it could have made, but did not make, in the original proceeding, with respect to aspects of the original measure at issue that were incorporated, but remained unchanged, in the measure taken to comply", the Panel also relied on the statement by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* that "[a] complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[129]

Thus, if the Appellate Body read the Appellate Body's statement in *US – Upland Cotton (Article 21.5 – Brazil)* together with its statement in *Canada – Aircraft (Article 21.5 – Brazil)*, it excludes, in principle, ("ordinarily") from Article 21.5 proceedings new claims that could have been pursued in the original proceedings, but not new claims against a measure taken to comply—that is, in principle, a new

[128] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

[129] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

and different measure. This was so even where such a measure taken to comply incorporated components of the original measure that were unchanged, but was not separable from other aspects of the measure taken to comply.

The Appellate Body observed that the Panel found that "the scope of Article 21.5 of the DSU was not so broad as to allow a complaining party to make claims that it could have made, but did not make, in the original proceeding, with respect to aspects of the original measure at issue that were incorporated, but remained unchanged, in the measure taken to comply". The Appellate Body disagreed with this finding by the Panel, insofar as it precluded new claims against inseparable aspects of a measure taken to comply, which were unchanged from the original measure. The Appellate Body, therefore, *found* that the Panel erred in finding, that the European Communities could not properly raise claims with respect to the alleged error in the calculation of TKAST's dumping margin in these Article 21.5 proceedings because it could have raised them in the original proceedings but failed to do so.

The Appellate Body considered that, in the present dispute, the critical question before the Panel was whether the alleged arithmetical error was an integral part of the measure taken to comply. If it was, as the European Communities alleged, then the Panel should have addressed the claims against the alleged arithmetical error as new claims against the measure taken to comply; if it was not, as the United States alleged, then the Panel was correct in declining to rule on these claims.

The Panel relied, in its finding that excluded the claims against the alleged arithmetical error, on the fact that the relevant aspect of the compliance measure was "unchanged" and was "separable" from other parts of that Section 129 determination. Having reached the conclusion that the alleged arithmetical error concerned an unchanged aspect of the measure, the Panel, however, did not further address the parties' arguments as to whether the alleged error was an integral part of the measure taken to comply or whether it was separable from the rest of the measure taken to comply, that is, the Section 129 determination.[130] The Panel

---

[130] The Panel stated:

> As a consequence of our analysis that the alleged error concerns an unchanged aspect of the original measure, we do not consider that we need to examine further the parties' argument as to whether the calculation error is part of the measure taken to comply; we also need not decide whether

simply stated that the alleged error "is distinct from any of the claims made by the European Communities in the original dispute", which relate to zeroing, and that the recalculation of the dumping margin without zeroing did not affect the alleged error.

The Appellate Body considered that a determination of whether the alleged error was part of the measure taken to comply could only be done based on undisputed facts and factual findings concerning the existence and nature of such an alleged error. The European Communities argued that "the error consisted of inverting a fraction in the calculation of the average unit value of 84 TKAST US sales: instead of dividing total value by total volume, the USDOC divided total volume by total value" and that "[t]his error artificially inflated the unit value and, therefore, the amount of dumping found." The European Communities further contended that the United States "acknowledges that such an error in the dumping margin calculation had been made by the USDOC in the original investigation" and that "[i]n the Section 129 Determination concerned, the USDOC realised that there was an arithmetical error". In particular, the European Communities relied on the fact that the USDOC extended the duration of the Section 129 proceedings to consider the allegations made by the parties concerning the alleged arithmetical error as evidence that the USDOC accepted that an error was made.

The United States, however, denied that it ever acknowledged that an arithmetical error was made in the original investigation and argued that, during the Section 129 proceeding, the USDOC neither realized nor agreed that an error had been made. The European Communities also submitted to the Panel calculations made by TKAST, which showed that, by eliminating zeroing and by correcting the alleged error, the margin of dumping would have been negative. At the oral hearing, the United States did not comment on the calculations by TKAST. The United States, however, denied that it ever acknowledged that if it had corrected the alleged error the dumping margin would have been negative. The Panel made no factual finding as to whether an arithmetical error was made and the exact nature of such an error.

Having reviewed the Panel record, the Appellate Body was of the view that there was insufficient undisputed facts and evidence in the record that would allow

---

the alleged calculation error should be found to be part of that measure on the basis of the *close nexus* argument put forward by the European Communities. (Panel Report, footnote 864 to para. 8.243

them to reach any conclusion as to the precise nature and consequences of such an alleged error, in terms of whether it is separable from the compliance measure or was an integral part thereof. Even assuming *arguendo* that the USDOC extended the duration of the Section 129 proceeding for the sole purpose of considering the allegations concerning the alleged arithmetical error, this did not amount to an admission by the USDOC that an error was committed, nor did it shed light on the nature and content of the alleged error made in the calculation of the margin of dumping. Nor did the Appellate Body consider that the arguments of the European Communities and the calculations made by TKAST of the dumping margin without the alleged arithmetical error were in themselves sufficient to show whether the nature and the effects of the alleged arithmetical error were such that the alleged error was separable from or incorporated into the re determination.

Given the lack of factual findings by the Panel and of undisputed evidence in the Panel record, the Appellate Body did not have a sufficient factual basis to complete the analysis of the European Communities' claim on this issue. For these reasons, Appellate Body were unable to rule on whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error.

The "All Others" Rates Calculated in the Section 129 Determinations in Cases 2, 4, and 5

The Appellate Body then turned to the European Communities' claims that the Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5), and in failing to examine the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities requests the Appellate Body to reverse these findings, and to find instead that the United States acted inconsistently with Articles 9.4 and 6.8 and Annex II of the *Anti-Dumping Agreement* by using margins of dumping based on facts available in the calculation of the "all others" rates in the Section 129 determinations in Cases 2, 4, and 5.

The Appellate Body recalled that, in order to implement the recommendations and rulings of the DSB, the United States issued Section 129 determinations in which it recalculated, without using zeroing, the margins of dumping for the exporters investigated individually. In Cases 2, 4, and 5, the recalculation of margins of dumping without zeroing resulted in either zero or *de minimis* margins of dumping for all the cooperating exporters. The margins of dumping for the non-cooperating exporters, entirely based on "facts available", pursuant to Article 6.8 and Annex II of the *Anti-Dumping Agreement*, remained unchanged. As a result, all company-specific margins of dumping in Cases 2, 4, and 5 were either zero or *de minimis*, or based on facts available. The USDOC then calculated the margins of dumping applicable to the exporters not individually investigated (the "all others" rates) based on a simple average of the zero, *de minimis*, and "facts available" margins of dumping. This led to an increase in the "all others" rate from 3.9 per cent to 35.92 per cent in Case 2; from 3.81 per cent to 6.6 per cent in Case 4; and from 4.48 per cent to 83.95 per cent in Case 5.

In this regard, the Appellate Body did not agree with the Panel's statement that, in situations where all margins of dumping was either zero, *de minimis*, or based on facts available, Article 9.4 "simply imposes no prohibition, as no *ceiling* can be calculated." In the Appellate Body view, the fact that all margins of dumping for the investigated exporters fall within one of the categories that Article 9.4 directs investigating authorities to disregard, for purposes of that paragraph, did not imply that the investigating authorities' discretion to apply duties on non-investigated exporters was unbounded. The lacuna that the Appellate Body recognized to exist in Article 9.4 was one of a specific *method*. Thus, the absence of guidance in Article 9.4 on what particular methodology to follow did not imply an absence of any obligation with respect to the "all others" rate applicable to non-investigated exporters where all margins of dumping for the investigated exporters are either zero, *de minimis*, or based on facts available. In any event, the participants had not suggested specific alternative methodologies to calculate the maximum allowable "all others" rate in situations where all margins of dumping calculated for the investigated exporters fall into the three categories to be disregarded, and the Appellate Body did not need to resolve this issue to dispose of this appeal.

Turning to the appeal the Appellate Body noted that, on 7 February 2008, the USDOC revoked the anti-dumping duty orders in Cases 2, 4, and 5, following negative likelihood-of-injury determinations made by the USITC in the context of sunset reviews. These revocation orders took effect as of 7 March 2007. As a result, any cash deposits imposed on imports of non-investigated exporters between 7 March 2007 and 7 February 2008, including those resulting from the recalculated "all others" rate, had been refunded. Consequently, no anti-dumping duties were imposed on imports of non-investigated exporters as a result of the Section 129 determinations in Cases 2, 4, and 5.

Accordingly, the Appellate Body did not consider it necessary to make findings in relation to the European Communities' claim that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rate in the Section 129 determinations in Cases 2, 4, and 5.

The Appellate Body then turned to the European Communities' claim that the Panel erred in exercising judicial economy in relation to its claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*. The European Communities basically argued that those provisions established an "independent basis" for a prohibition of the use of "facts available" margins in the calculation of the "all others" rate, even in cases where the calculation of the "all others" rate is consistent with Article 9.4.

The Appellate Body noted, however, that by its express terms Article 6.8 permitted the application of "facts available" to an "interested party" who "refuses access to, or otherwise does not provide, necessary information within a reasonable period, or significantly impedes the investigation". This, in the Appellate Body view, confirmed that Article 6.8 applied exclusively to those "interested parties" from which information *was* required, rather than to those parties from which information was not requested. Thus, the disciplines in relation to the application of "facts available" under Article 6.8 and Annex II did not apply to non investigated exporters that eventually would be subject to the "all others" rate. The investigating authorities' discretion to impose duties on non-investigated exporters was subject to the disciplines provided in Article 9.4, including the exclusion of any "facts available" margins of dumping in the calculation of the maximum permissible duty applied to those exporters.

For this reason, the Appellate Body found that the Panel did not err in not making findings, in respect of the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement* in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5).

Findings and Conclusions

For the reasons set out above, the Appellate Body:

- found that the Panel did not err in refraining, in paragraphs 8.17 and 9.1(a) of the Panel Report, from making a finding on whether it was improperly composed;

In respect of the Panel's terms of reference:

- upheld the Panel's finding, in paragraph 8.80 of the Panel Report, that the subsequent reviews identified in the European Communities' panel request did not fall within the Panel's terms of reference under Article 21.5 of the DSU as "amendments" to the original measures at issue;

- reversed the Panel's finding, in paragraph 8.119 of the Panel Report, that none of the subsequent reviews challenged by the European Communities that were decided before the adoption of the recommendations and rulings of the DSB fell within the Panel's terms of reference, and found, instead, that the sunset reviews in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24), *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), and *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31), had a sufficiently close nexus with the declared measures "taken to comply", and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU;

- upheld the Panel's findings, in paragraph 8.126(i) and (v) of the Panel Report, that the 2004-2005 administrative reviews in Cases 1 and 6 fell within the Panel's terms of reference under Article 21.5 of the DSU; and

- found that the Panel did not act inconsistently with Article 11 of the DSU in addressing the European Communities' alternative "close nexus" claim without first addressing the European Communities' "omissions" claim; and id not consider it necessary to make additional findings in relation to the European Communities' claim that the Panel erred in declining to rule on its claim that the subsequent reviews fell within the Panel's terms of reference as "omissions" or "deficiencies" in the United States' implementation of the recommendations and rulings of the DSB;

With respect to the United States' compliance obligations in relation to the Cases at issue in the original proceedings:

- considered that a subsequent administrative review determination issued after the end of the reasonable period of time in which zeroing was used, or, if no such review was requested, a determination issued after the end of the reasonable period of time by which anti-dumping liability was assessed on the basis of cash deposit rates calculated with zeroing, would establish a failure to comply with the recommendations and rulings of the DSB;

- found, with respect to measures that were consequent to assessment reviews that, in the ordinary course of the imposition of anti-dumping duties, derived *mechanically* from the assessment of duties would establish a failure by the United States to comply with the recommendations and rulings of the DSB to the extent that they were based on zeroing and that they were applied after the end of the reasonable period of time; and, accordingly, reversed the Panel's interpretation, in paragraph 8.199 of the Panel Report, that the United States' obligation to implement the recommendations and rulings of the DSB did not extend to the actual collection and liquidation of duties, and to the issuance of assessment or liquidation instructions, when these actions resulted from administrative review determinations made before the end of the reasonable period of time; and

- declared the Panel's finding, in paragraphs 8.200 and 9.1(b)(iii) of the Panel Report, that the European Communities had not established that the United States failed to comply with the recommendations and rulings of the DSB by liquidating, after the end of the reasonable period of time, duties that were assessed with zeroing pursuant to administrative review determinations issued before the end of the reasonable period of time, moot and of no legal effect, as it was based on an erroneous reasoning;

With respect to *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands* (Case 1):

- upheld the Panel's findings, in paragraphs 8.208 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in its determination in the 2004 2005 administrative review and in issuing the consequent assessment instructions; and that, as a result of the final results of this administrative review, the United States had failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity; and

- reversed the Panel's finding, in paragraphs 8.209 and 9.1(b)(iv) of the Panel Report, that the assessment instructions issued on 16 April 2007 and the liquidation instructions issued on 23 April 2007 did not establish that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 1 into conformity with its obligations under the covered agreements by virtue of those instructions; and found, instead, that these instructions, derived mechanically from the assessment of final duty liability in the ordinary course of the imposition of anti-dumping duties, were measures that were adopted after the end of the reasonable period of time, and thus established a failure by the United States to comply with the recommendations and rulings of the DSB;

With respect to *Stainless Steel Wire Rod from Sweden* (Case 6):

upheld the Panel's findings, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States acted inconsistently with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in issuing the results of the 2004-2005 administrative review determination on 9 May 2007, as well as the consequential assessment and liquidation instructions; and also upheld the Panel's finding, in paragraphs 8.213 and 9.1(b)(i) of the Panel Report, that the United States failed to comply with the recommendations and rulings of the DSB to bring the original investigation in Case 6 into conformity;

With respect to *Ball Bearings and Parts Thereof from the United Kingdom* (Case 31):

found that the Panel erred in refraining, in paragraph 8.217 of the Panel Report, to make a specific finding with respect to the assessment after the end of the reasonable period of time of duty liability for imports from NSK Bearings Europe Ltd. in Case 31; and found further that duties assessed after the end of the reasonable period of time on the basis of cash deposits reflecting zeroing established a failure by the United States to comply with the recommendations and rulings of the DSB;

With specific respect to Cases 18 through 24 and 27 through 30, was not in a position to complete the analysis in relation to these Cases and declined to rule on whether the Panel did not comply with its duties under Article 11 of the DSU;

With respect to the subsequent sunset reviews:

- found that the Panel did not err in concluding, in paragraph 8.140 of the Panel Report, that the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB in respect of the sunset review in *Stainless Steel Bar from Germany* (Case 3);

- declined to make a finding on whether the Panel erred in not ruling, in paragraph 8.141 of the Panel Report, on the European Communities' claim that the United States failed to comply with the recommendations and rulings of the DSB in the sunset reviews in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), *and Stainless Steel Bar from the United Kingdom* (Case 5);

- reversed the Panel's findings, in paragraph 8.140 the Panel Report, that any failure to comply by the United States in the sunset review in *Certain Pasta from Italy* (Case 19) had not yet materialized as of the date of establishment of the Panel and thus had no effect on the United States' implementation of the recommendations and rulings of the DSB and that, as a consequence, the European Communities had not demonstrated that the United States failed to comply with the recommendations and rulings of the DSB;

- found that the sunset review in *Certain Pasta from Italy* (Case 19) was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and resulted in failure by the United States to comply with the recommendations and rulings of the DSB;

- was unable to complete the analysis in respect of the sunset review in *Granular Polytetrafluoroethylene Resin from Italy* (Case 24) in the absence of express factual findings by the Panel and undisputed facts in the Panel record;

- found that the sunset reviews in *Stainless Steel Sheet and Strip in Coils from Germany* (Case 28), *Ball Bearings and Parts Thereof from France* (Case 29), *Ball Bearings and Parts Thereof from Italy* (Case 30), *and Ball Bearings and Parts Thereof from the United Kingdom* (Case 31) were inconsistent with Article 11.3 of the *Anti-Dumping Agreement* and resulted in failure by the United States to comply with the recommendations and rulings of the DSB; and

- found that the Panel did not act inconsistently with Article 11 of the DSU in addressing the claims by the European Communities that the United States failed to comply with the recommendations and rulings of the DSB in subsequent sunset review proceedings;

- found that the Panel did not act inconsistently with Article 11 of the DSU in declining, in paragraphs 8.227 and 9.1(b)(vii) of the Panel Report, to make findings on the European Communities' claim that, by not taking measures to comply between 9 April and 23 April/31 August 2007, the United States violated Article 21.3 of the DSU;

In relation to the alleged arithmetical error in the Section 129 determination in *Stainless Steel Sheet and Strip in Coils from Italy* (Case 11):

- found that the Panel erred in finding, in paragraph 8.244 of the Panel Report, that the European Communities could not properly raise claims with respect to the alleged error in the calculation of TKAST's dumping margin in these Article 21.5 proceedings, because it could have raised them in the original proceedings, but failed to do so;

- however, was unable to complete the analysis on whether the European Communities could raise such claims, nor therefore to rule on whether the United States failed to comply with the recommendations and rulings of the DSB by failing to correct such an alleged error;

  With respect to the establishment of the "all others" rates in the Section 129 determinations in *Stainless Steel Bar from France* (Case 2), *Stainless Steel Bar from Italy* (Case 4), and *Stainless Steel Bar from the United Kingdom* (Case 5):

- did not consider it necessary to make findings in relation to the European Communities' claim that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of the "all others" rate; and

- found that the Panel did not err in not making findings, in paragraphs 8.284 and 9.1(c)(iii) of the Panel Report, in respect of the European Communities' claims under Article 6.8 and Annex II of the *Anti-Dumping Agreement*; and

- declined the request by the European Communities to make a suggestion on how the United States could implement the recommendations and rulings of the DSB in this case.

To the extent that the United States had failed to comply with recommendations and rulings of the DSB in the original proceedings, they remain operative. The Appellate Body recommended that the DSB request the United States to implement fully the recommendations and rulings of the DSB.

6. United States- Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, WT/DS322/AB/RW, 18th August, 2009

PARTIES

United States- Appellant
Japan- Appellee
Third Party

China, European Communities, Hong Kong, China, Korea, Mexico, Norway, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand

Factual Matrix

In the present dispute United States appealed certain issues of law and legal interpretations developed in the Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*.[131] The Panel was established pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* to consider a complaint by Japan concerning the existence and consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *General Agreement on Tariffs and Trade 1994* of measures taken by the United States

---

[131] WT/DS322/RW, 24 April 2009.

to comply with the recommendations and rulings of the Dispute Settlement Body in *US – Zeroing (Japan)*.[132]

This dispute concerned the use of the so-called "zeroing" methodology by the United States Department of Commerce (the "USDOC") when calculating margins of dumping.[133] In the original proceedings, the Appellate Body upheld the panel's finding that the United States' zeroing procedures constituted a measure that could be challenged "as such" in dispute settlement proceedings in the World Trade Organization.[134] The original panel found that, by maintaining model zeroing procedures in the context of original investigations, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*.

The Appellate Body also found that:

- the United States acted inconsistently with Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* by maintaining zeroing procedures when calculating margins of dumping on the basis of transaction-to-transaction comparisons in original investigations;

- the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews[135]; and

---

132 The recommendations and rulings of the DSB resulted from the adoption, on 23 January 2007, by the DSB, of the Appellate Body Report, WT/DS322/AB/R, and the Panel Report, WT/DS322/R, in *US – Zeroing (Japan)*. In this Report, we refer to the panel that considered the original complaint brought by Japan as the "original panel", and to its report as the "original panel report".

133 Before the original panel, Japan used the term "zeroing" to denote the methodology under which the USDOC "disregards intermediate negative dumping margins ... through the USDOC's [Anti-Dumping] Margin Calculation Computer Programme and other related procedures, in the process of establishing the overall dumping margin for the product as a whole". (Original Panel Report, footnote 668 to para. 7.45, quoting the original Request for the Establishment of a Panel by Japan, WT/DS322/8, para. 1(a) (attached as Annex A-2 to the Original Panel Report))

134 Appellate Body Report, *US – Zeroing (Japan)*, para. 190 (a).

135 Appellate Body Report, *US – Zeroing (Japan)*, para. 190(c). In this Report, we use the term "periodic review" to describe the periodic review of the amount of anti-dumping duty as required in Section 751(a) of the United States Tariff Act of 1930, *United States Code*, Title 19, Section 1675(a). That provision requires the USDOC to review and determine

- the United States acted inconsistently with Articles 2.4 and 9.5 of the *Anti-Dumping Agreement* by maintaining zeroing procedures in new shipper reviews.

As regards Japan's "as applied" claims, the original panel held that, by using model zeroing in the anti-dumping investigation regarding imports of cut-to-length carbon quality steel products from Japan, the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement*. This finding of the original panel was not appealed. The Appellate Body additionally found that:

(a) the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing procedures in the 11 periodic reviews at issue in that appeal; and

- the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* by relying, in two sunset review determinations, on margins of dumping calculated in previous proceedings through the use of zeroing.

The Appellate Body recommended that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994.

On 23 January 2007, the Dispute Settlement Body adopted the original panel and Appellate Body reports. Pursuant to Article 21.3(b) of the DSU Agreement, the United States and Japan agreed that the reasonable period of time to implement the recommendations and rulings of the DSB would be 11 months, expiring on 24 December 2007. On 14 February 2007, the USDOC published a notice of revocation of the anti-dumping duty order on corrosion-resistant carbon steel flat products from Japan, which related to one of the sunset reviews that Japan challenged in the original proceedings.[136]

---

the amount of any anti-dumping duty at least once during each 12-month period, beginning on the anniversary of the date of publication of an anti-dumping duty order, if a request for such a review has been received.

136 Revocation Pursuant to Second Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products from Australia, Canada, Japan, and France, *United States Federal Register*, Vol. 72, No. 30 (14 February 2007) 7010 (Panel Exhibit US-A20).

In its status report of 8 November 2007, the United States informed the DSB that the USDOC had published a notice indicating its intention to no longer use zeroing when performing weighted average-to-weighted average comparisons in original investigations. This change became effective as of 22 February 2007.[137] The United States added that it was "continuing to consult internally on steps to be taken with respect to the other DSB recommendations and rulings."[138]

On 21 January 2008, the United States informed the DSB that, through the elimination of zeroing in weighted average-to-weighted average comparisons, it had eliminated the single measure that Japan had challenged in the original proceedings and that the Appellate Body had found to be inconsistent "as such", and that the United States considered that it had complied with the DSB's recommendations and rulings with respect to that measure.

Japan did not consider that the United States had brought itself into compliance with the DSB's recommendations and rulings. Consequently, Japan requested that the matter be referred to the original panel pursuant to Article 21.5 of the DSU. Japan requested the Panel to find that the United States had failed to implement the DSB's recommendations and rulings by maintaining zeroing procedures in the context of transaction-to-transaction comparisons in original investigations, and under any comparison methodology in periodic and new shipper reviews, contrary to Articles 17.14, 21.1, and 21.3 of the DSU, Articles 2.4, 2.4.2, 9.3, and 9.5 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Further, Japan claimed that the United States had failed to bring one of the two sunset review determinations found to be WTO-inconsistent in the original proceedings into conformity with its obligations, in violation of Articles 17.14, 21.1, and 21.3 of the DSU, and Article 11.3 of the *Anti-Dumping Agreement*.[139] Finally, Japan submitted that the United States acted in violation of Articles II:1(a) and II:1(b) of the GATT 1994 when it took certain actions to liquidate the entries covered by Reviews 1, 2, 7, and 8 after the expiry of the reasonable period of time.

---

[137] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, *United States Federal Register*, Vol. 72, No. 17 (26 January 2007) 3783 (Panel Exhibit US-A8).

[138] WT/DS322/22. On 6 December 2007, the United States provided the same status report to the DSB, with no additional information. (WT/DS322/22/Add.1)

[139] Panel Report, para. 3.1(c). Specifically, Japan referred to the sunset review determination of 4 November 1999 regarding the anti-dumping duty order on anti-friction bearings from Japan found to be WTO-inconsistent in the original proceedings.

The United States contended that the zeroing procedures challenged "as such" by Japan in the original proceedings no longer existed because the United States had ceased to apply the zeroing procedures in weighted average-to-weighted average comparisons in original investigations. The United States requested a preliminary ruling that "subsequent closely connected measures", including Review 9, were not within the Panel's terms of reference. Furthermore, the United States requested a preliminary ruling that Reviews 4, 5, 6, and 9 were not "measures taken to comply" within the meaning of Article 21.5 of the DSU, and therefore fell outside the scope of the compliance proceedings. The United States also argued that it did not have any implementation obligations in relation to Reviews 1 through 9 because they covered imports that entered the United States prior to the expiration of the reasonable period of time. Moreover, the United States argued that it had complied with the DSB's recommendations and rulings regarding Reviews 1, 2, and 3 by withdrawing the WTO-inconsistent cash deposit rates with prospective effect, and replacing them with new cash deposit rates determined in subsequent periodic reviews. The United States asserted that it was not required to take any action to comply with the DSB's recommendations and rulings regarding the sunset review of 4 November 1999, because the relevant likelihood-of-dumping determination continued to be based on a number of dumping margins not called into question by the findings of the Appellate Body in the original proceedings. Finally, the United States asked the Panel to refrain from ruling on Japan's Article II claims, because it was not necessary to do so. The United States also asserted that the anti-dumping liability giving rise to the liquidation actions challenged by Japan was incurred prior to the expiry of the reasonable period of time.

The Panel Report was circulated to WTO Members on 24 April 2009. The Panel found that:

(c) ... the United States had failed to comply with the recommendations and rulings of the DSB regarding the United States' maintenance of zeroing procedures challenged "as such" in the original proceedings. In particular, ... the United States has failed to implement the DSB's recommendations and rulings in the context of [transaction-to-transaction] comparisons in original investigations and under any comparison methodology in periodic and new shipper reviews;

(i) Accordingly, ... the United States remained in violation of Articles 2.4, 2.4.2, 9.3 and 9.5 of the [*Anti-Dumping*] *Agreement* and Article VI:2 of the GATT 1994;

(ii) The United States has failed to comply with the DSB's recommendations and rulings with respect to the 1999 sunset review.

(iii) Accordingly, the Unites States remained in violation of Article 11.3 of the Anti-dumping Agreement.

The Panel concluded that, to the extent that the United States had failed to comply with the DSB's recommendations and rulings in the original proceedings, these recommendations and rulings remain operative. The Panel also recommended that the DSB requested the United States to bring review and the relevant liquidation actions, into conformity with the *Anti-Dumping Agreement* and the GATT 1994.

On 20 May 2009, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law and legal interpretations covered in the Panel Report and filed a Notice of Appeal[140], pursuant to Rule 20 of the *Working Procedures for Appellate Review*[141] (the "*Working Procedures*"). On 27 May 2009, the United States filed an appellant's submission.[142] On 15 June 2009, Japan filed an appellee's submission.[143]

European Communities, Korea, Mexico, and Norway each filed a third participant's submission[144]; and China, Hong Kong, China, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Thailand each notified its intention to appear at the oral hearing.[145]

Arguments of the Participants

United States:

The United States submitted that the Panel erred in finding that Review 9 was within its terms of reference. The United States argued that, contrary to the Panel's finding, the phrase "subsequent closely connected measures" in Japan's panel request does not meet the requirement in Article 6.2 of the DSU to "identify

---

140 WT/DS322/32 (attached as Annex I to this Report).
141 WT/AB/WP/5, 4 January 2005.
142 Pursuant to Rule 21 of the *Working Procedures*.
143 Pursuant to Rule 22 of the *Working Procedures*.
144 Pursuant to Rule 24(1) of the *Working Procedures*.
145 Pursuant to Rule 24(2) of the *Working Procedures*.

the specific measures at issue". The United States argued that the phrase "subsequent closely connected measures" in Japan's panel request was "broad" and "vague" and could encompass a variety of measures, including subsequent administrative determinations, ministerial corrections, or remand determinations in court proceedings.

The United States submitted that the Panel further departed from the text of the DSU when it examined whether Japan's challenge to "subsequent closely connected measures" would "violate any due process objective of the DSU", because there was no requirement in Article 6.2 of the DSU, or elsewhere in the covered agreements, to show that the respondent's due process right or entitlement to notice was not respected by the lack of specificity in the panel request.

The United States pointed out that the Appellate Body, in *US – Zeroing (EC) (Article 21.5 – EC)*, recognized that each periodic review was "separate and distinct", and that each review serves as a basis for the calculation of the assessment rate for each importer of the entries of subject merchandise.[146] For this reason, the United States believed that each review must be identified in the panel request.

Finally, the United States submitted that systemic considerations militate against the Panel's approach. In particular, the Panel's approach would allow parties to make new legal claims on new or amended measures midway through compliance panel proceedings, when Article 21.5 proceedings should be limited to an examination of whether a Member had complied with the DSB's recommendations and rulings at the time of the panel request.[147] Disputes would become "moving targets" in a manner not contemplated by the DSU. Further, the United States observed that the Panel's approach was "asymmetrical" as only complaining parties would be allowed to include new measures. The United States referred to previous panels that had rejected respondents' requests to examine measures that came

---

[146] United States' appellant's submission, para. 44 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 192 and 193).

[147] In particular, the United States explains that certain procedural concerns would arise from this approach, including that parties would be obliged to make legal claims and undertake analysis of new or modified measures on short notice, without an opportunity to review the measures; and compliance panels would have to react to changes, in some cases after submissions and meetings with the parties, resulting in possible delays or the panel making findings without the benefit of parties' views. (United States' appellant's submission, para. 57)

into existence after the panels' establishment with a view to showing that the alleged inconsistency no longer existed.[148]

Japan:

Japan argued that the Panel properly found Review 9 was within its terms of reference. First, Japan submitted that its panel request satisfied the requirement in Article 6.2 to identify the specific measures at issue. Japan explained that it used the term "closely connected" to identify Reviews 4, 5, and 6 and that it used the same term to identify the subsequent "closely connected" measures.

Secondly, Japan contended that the phrase "subsequent closely connected measures" identified a "category of measure", which was sufficiently specific to satisfy the requirement of Article 6.2 of the DSU. Japan submitted that accepting that a category of measure could be sufficiently specific to satisfy Article 6.2 did not imply that measures falling within the category were not themselves "separate and distinct", as referred to by the United States; it meant only that the category was in itself sufficiently specific to satisfy Article 6.2. In this regard, Japan referred to *Australia – Salmon (Article 21.5 – Canada)* and *EC – Bananas III*, which, in its view, illustrated that panels and the Appellate Body had accepted a reference to a category of measures in a panel request as being sufficiently specific to satisfy Article 6.2.[149]

Japan also supported the Panel's reliance on the fact that the United States anticipated the inclusion of subsequent periodic reviews like Review 9 in its first written submission to the Panel. Japan rejected the United States' argument that its statement "was a lucky 'guess' or 'speculation' [that] proved to be accurate", because, as the Panel noted, under the United States' retrospective anti-dumping duty system, periodic reviews were highly predictable. Moreover, at the time of Japan's panel request, the USDOC had already initiated Review 9 and was scheduled to issue its final determination in mid-August 2008, which was shortly thereafter extended to 4 September 2008.

---

148 United States' appellant's submission, para. 57 (referring to Panel Report, *India – Autos*, paras. 7.23 7.30; and Panel Report, *Indonesia – Autos*, para. 14.9).

149 Japan's appellee's submission, paras. 390-393 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10; Panel Report, *EC – Bananas III (US)*, para. 7.27; and Appellate Body Report, *EC – Bananas III*, para. 140).

Japan observed that, in *EC – Chicken Cuts*, the Appellate Body identified a "general rule" that a measure must exist at the time of panel establishment to be included in a panel's terms of reference. However, the Appellate Body in that case also held that there were "limited circumstances" in which departing from the "general rule" was consistent with Article 6.2 and the purposes which that provision serves. Japan considered that, as the compliance panel in *Australia – Salmon (Article 21.5 – Canada)* found, the "ongoing or continuous" nature of compliance offers circumstances where an exception from the "general rule" was warranted. Japan observed that, in this dispute, the compliance process was "ongoing or continuous", as each of Reviews 4, 5, 6, and 9 served as a "replacement" measure that "supersedes" the previous periodic review relating to entries of ball bearings. Review 9 was the "latest link in the chain" of measures under the same anti-dumping duty order and was a "measure taken to comply". Failure to include Review 9 would have made the Panel's findings incomplete, as the "zeroed" cash deposit rate established in Review 6 had "ceased to exist" during the course of the proceedings. According to Japan, excluding a post-establishment measure taken to comply from the terms of reference, where the panel request was broad enough to cover that measure and the process of achieving and undermining compliance was "ongoing or continuous", "would go against the objective of 'prompt compliance'" in Article 21.1 of the DSU.

Japan explained that panels and the Appellate Body have noted that, in order to be consistent with Article 6.2, the inclusion of a measure adopted during panel proceedings within a panel's terms of reference must not compromise the "due process objective of notifying the parties and third parties of the nature of a complainant's case".[150] Japan submitted that the inclusion of Review 9 did not compromise the due process objectives of Article 6.2 of the DSU. This was because the United States was not deprived of the opportunity to examine sufficiently Review 9 and understand its legal consequences, nor was it deprived of the opportunity to prepare and present its defence to claims against Review 9. Japan added that the sole element of Review 9 subject to Japan's challenge was the USDOC's use of the zeroing procedures, and the evidence in this regard was identical to the evidence submitted with respect to Reviews 4, 5, and 6. Moreover,

---

150 Japan's appellee's submission, para. 422 (quoting Appellate Body Report, *EC – Chicken Cuts*, para. 155, in turn referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10). Japan also refers generally to Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *Korea – Dairy*, paras. 126 and 127; Appellate Body Report, *EC – Computer Equipment*, para. 70; and Appellate Body Report, *Thailand – H-Beams*, para. 95. (Japan's appellee's submission, para. 422 and footnote 565 thereto)

the United States presented a defence with respect to Review 9 that was virtually identical to its defence with respect to these other periodic reviews. Japan also observed that the United States took advantage of ample opportunities to address the one aspect of its defence relating to Review 9 that varied from its defence relating to Reviews 4, 5, and 6, namely, that Review 9 was not properly within the Panel's terms of reference.

Further, Japan argued that third parties had the opportunity to present their views concerning Review 9, and potential third parties were not deprived of their rights. Three third parties—the European Communities, Mexico, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu—addressed whether Review 9 fell within the Panel's terms of reference, and agreed that it did.[151] Moreover, according to Japan, there was no reason to assume that potential third parties did not interpret the phrase "any subsequent closely connected measures" to include Review 9.

Finally, Japan disagreed with the United States' contention that the inclusion of Review 9 in the Panel's terms of reference would create "asymmetry" in the sense that the Panel would exercise jurisdiction over a post-establishment measure challenged by a complaining Member, but not over one relied upon by a responding Member. Japan pointed out that, in this case, the United States asserted that it "came into compliance" with the DSB's recommendations and rulings by adopting the subsequent periodic reviews, including Review 9, and the Panel examined and addressed each of them. Japan argued that previous panels had examined post-establishment measures offered by a responding Member as evidence that an alleged WTO-inconsistency no longer existed. In Japan's estimation, a panel's failure to do so would in fact constitute legal error.[152]

---

[151] Japan's appellee's submission, para. 441 (referring to European Communities' oral statement at the meeting with the Panel, paras. 47 and 48; European Communities' third party submission, para. 27; oral statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu at the meeting with the Panel, paras. 7, and 12-15; and Mexico's oral statement at the meeting with the Panel, para. 12). Japan notes that an additional third party, Norway, "expressly declined to offer its views" on Review 9. (Japan's appellee's submission, footnote 596 to para. 441 (referring to Norway's third party submission to the Panel, para. 7))

[152] Japan's appellee's submission, paras. 450 and 451 (referring to Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 271 and 479; Appellate Body Report, *US – Upland Cotton*, para. 272; Appellate Body Report, *US – Certain EC Products*, paras. 80 and 81; and Panel Report, *Chile – Price Band System*, para. 7.112).

Third Parties:

The European Communities agreed with Japan that the Appellate Body should reject the United States' appeal in its entirety. Korea submitted that the Appellate Body should uphold the Panel's findings in this dispute. Mexico urged the Appellate Body to adhere to its prior reasoning in *US – Zeroing (EC) (Article 21.5 – EC)* and to affirm the findings of the Panel.[153] Norway supported the Panel's findings that Review 9 fell within the Panel's terms of reference, and that the United States failed to comply with the DSB's recommendations and rulings with respect to the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8.

Issues Raised in This Appeal:

The following issues were raised in this appeal:

- Whether the Panel erred in finding that Review 9 fell within its terms of reference. It was not properly identified in Japan's panel request as required by Article 6.2 of the DSU nor had it not been completed when Japan requested the establishment of the Panel.

- Whether the Panel erred in finding that the United States had failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to imports covered by those Reviews that were, or will be, collected after the expiry of the reasonable period of time, because:

    i. the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties; and

    ii. collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings.

- Whether the Panel erred in finding that the United States had acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9, because:

[153] Mexico's third participant's submission, para. 10.

i. the United States' compliance obligations must be determined based on the date of importation and not on the basis of the date of collection of the anti-dumping duties;

ii. collection was delayed beyond the reasonable period of time due to the periodic reviews being subjected to domestic judicial proceedings; and

iii. Reviews 4, 5, and 6 had not had effects after the reasonable period of time, given that collection had been suspended as a result of court injunctions.

- Whether the Panel erred in finding that the United States was in violation of Articles II: 1(a) and II: 1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.

Analysis of the Claims:

Whether Japan's Panel Request Met the Requirement of Article 6.2 of the DSU to "Identify the Specific Measures at Issue"

The United States' appeal focused on two aspects of the Panel's analysis.[154] First, the United States argued that the phrase "subsequent closely connected measures" in Japan's panel request did not meet the requirement of Article 6.2 of the DSU to "identify the specific measures at issue". Secondly, the United States submitted that the Panel erred in finding that Review 9 was properly within the Panel's terms of reference because Review 9 had not been completed when Japan submitted its panel request to the DSB. The United States considered that Review 9 was a "future measure" that "cannot form part of a [p]anel's terms of reference".

[154] The United States included in its Notice of Appeal the paragraph in which the Panel found that Review 9 was a "measure taken to comply". (See WT/DS322/32, footnote 1 to para. 1 (referring to, *inter alia*, Panel Report, para. 7.114)) However, the United States did not make any arguments with respect to this finding in its appellant's submission. At the oral hearing, the United States confirmed that it does not appeal the Panel's finding that Review 9 is a "measure taken to comply" within the meaning of Article 21.5 of the DSU.

In order to evaluate whether Japan's panel request complied with the requirements of Article 6.2 of the DSU, the Appellate Body took into account the fact that the claim in the present dispute was compliance proceedings brought pursuant to Article 21.5 of the DSU. Article 21.5 of the DSU directs compliance panels to examine the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. The Appellate Body in US-FSC case had stated that, although Article 6.2 was generally applicable to panel requests under Article 21.5, "the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5."[155] In Article 21.5 proceedings, the "specific measures at issue" were measures "that have a bearing on compliance with the recommendations and rulings of the DSB." This indicated that the "requirements of Article 6.2 of the DSU, as they apply to an Article 21.5 panel request, must be assessed in the light of the recommendations and rulings of the DSB in the original ... proceedings that dealt with the same dispute." The complaining party must, *inter alia*:

> "... cite the recommendations and rulings that the DSB made in the original dispute as well as in any preceding Article 21.5 proceedings, which, according to the complaining party, have not yet been complied with ... either identify, with sufficient detail, the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein, or state that *no* such measures have been taken by the implementing Member ... provide a legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-

---

155 The Appellate Body stated in *US – FSC (Article 21.5 – EC II)*:

> The Appellate Body has, to date, not been called upon to determine the precise scope of the phrase "these dispute settlement procedures" in Article 21.5 and how it relates to Article 6.2 of the DSU. We do not consider it necessary, for purposes of resolving the present dispute, to determine the precise scope of this phrase. However, we are of the view that the phrase "these dispute settlement procedures" does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5.

inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies.[156](original emphasis; footnote omitted)"

The Appellate Body held that the plain meaning of the phrase "subsequent closely connected measures", as it appears in paragraph 12 of Japan's panel request, indicated that the measures being referred to would have to be enacted after (that is, "subsequent" to) the eight periodic reviews identified by Japan in its request and would have to relate (be "closely connected") to these eight reviews. As paragraph 12 fell within the sub-section entitled "Periodic Reviews", the necessary implication was that the phrase referred to periodic reviews that followed some or all of the eight periodic reviews listed in the panel request. These eight periodic reviews related to the three anti-dumping duty orders identified in Japan's request. However, given that the anti-dumping duty orders on cylindrical roller bearings and spherical plain bearings had been revoked by the USDOC at the time of Japan's panel request[157], any subsequent periodic review could relate only to the anti-dumping duty order on ball bearings. The Appellate Body therefore disagreed with the United States that the phrase "subsequent closely connected measures" was too "broad" and "vague" for purposes of identifying the measure at issue under Article 6.2 of the DSU.[158] The Appellate Body shared the Panel's view that the use of the term "closely connected" earlier in paragraph 12 of the panel request provided additional support for finding that "subsequent closely connected measures" referred to periodic reviews of the anti-dumping duty order on ball bearings, which were conducted after the reviews listed in the panel request.

The Appellate Body did not believe that the Appellate Body's prior reference to subsequent periodic reviews as "separate and distinct" contradicted the notion

---

156 Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 62 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67).

157 Japan's appellee's submission, para. 387 (referring to United States' first written submission to the Panel, para. 66, in turn referring to Revocation of Antidumping Duty Orders on Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom, *United States Federal Register*, Vol. 65, No. 133 (11 July 2000) 42667 and 42668 (Panel Exhibit US-A19)).

158 Although the United States argues that "subsequent closely connected measures" could encompass measures such as ministerial corrections or remand determinations in court proceedings, it acknowledges that "subsequent administrative determinations" could fall within the measures contemplated by the reference to "subsequent closely connected measures".

that a periodic review could be identified for purposes of Article 6.2 of the DSU through the use of the phrase "subsequent closely connected measures". Although recognizing that each periodic review was a "separate and distinct" measure (in the sense that it was not an "amendment" of the previous periodic review), the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* nonetheless underscored the link between subsequent periodic reviews by stating that "subsequent reviews ... issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, ... constitute[] 'connected stages ... involving the imposition, assessment and collection of duties under the same anti-dumping order'."[159] The periodic reviews, moreover, involved the same products, from the same countries, and formed part of a continuum of events. It was precisely because it had similar connections that Review 9 could be properly described as a "subsequent closely connected measure".

Further, the text of Article 6.2 of the DSU did not require that a measure be referred to individually in order to be properly identified for purposes of that Article. The Appellate Body had stated that the measures at issue must be identified with sufficient precision in order that the matter referred to a panel might be discerned from the panel request. Whereas a more precise way to identify a measure would be to indicate its name and title in the panel request[160], there might be circumstances in which a party described a measure in a more generic way, which nonetheless allowed the measure to be discerned. In this case, the phrase "subsequent closely connected measures" was sufficiently precise to identify Review 9, given that was is a periodic review of the same anti-dumping duty order on imports of ball bearings from Japan and immediately followed Reviews 1 through 6.

The Appellate Body considered that the previous analysis was sufficient to establish that Japan's panel request met the requirement of Article 6.2 to "identify the specific measures at issue". The United States, however, disagreed with the Panel that a "relevant consideration "for determining whether the specific measures at issue were properly identified under Article 6.2 was whether the panel request adequately put the responding party on notice regarding the case against it. The United States submitted that the Panel elevated "due process objectives" over the

---

159 Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230 (quoting Appellate Body Report, *US – Continued Zeroing*, para. 181).

160 For example, Japan could have referred to the notice of initiation of Review 9 in its panel request.

text of Article 6.2 by considering whether Japan's challenge to "subsequent closely connected measures" would "violate any due process objective of the DSU".[161]

Further, the Appellate Body did not believe that the inclusion of Review 9 in the Panel's terms of reference adversely affected the United States' due process rights. In addition to the factors taken into account by the Panel, which were noted above, the Appellate Body observed that, once the final results of Review 9 were published, and Japan had filed its supplemental submission, the United States was given an opportunity to respond in writing to the arguments raised in that submission.

Whether Review 9 Was Properly Included in the Panel's Terms of Reference Even Though It Had Not Been Completed at the Time of Japan's Panel Request

The second error alleged by the United States was that Review 9 was a "future measure" that had not yet come into existence at the time of Japan's panel request, and therefore could not have been included within the Panel's terms of reference. The United States submitted that the DSU did not allow for the inclusion of such "future measures" within a panel's terms of reference.

The requirements of Article 6.2 must be read in the light of the specific function of Article 21.5 proceedings and that the "specific measures at issue" to be identified in these proceedings were measures that have a bearing on compliance with the recommendations and rulings of the DSB. A measure that was initiated before there had been recourse to an Article 21.5 panel, and which was completed during those Article 21.5 panel proceedings, might have a bearing on whether there was compliance with the DSB's recommendations and rulings. Thus, if such a measure incorporated the same conduct that was found to be WTO-inconsistent in the original proceedings, it would show non-compliance with the DSB's recommendations and rulings. To exclude such a measure from an Article 21.5 panel's terms of reference because the measure was not completed at the time of the panel request but, rather, was completed during the Article 21.5

161 In response to questioning at the oral hearing as to whether or not it had been prejudiced by the alleged lack of specificity in Japan's panel request, the United States responded that it was not required to make any showing of prejudice in this case in addition to proving that Japan's panel request did not meet the specificity requirement in Article 6.2 of the DSU.

proceedings, would mean that the disagreement "as to the existence or consistency with a covered agreement of measures taken to comply" would not be fully resolved by that Article 21.5 panel. New Article 21.5 proceedings would therefore be required to resolve the disagreement and establish whether there was compliance.

Thus, an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings. It would also be inconsistent with the objectives of the DSU to provide for 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", as reflected in Article 3.3, and to "secure a positive solution to a dispute", as contemplated in Article 3.7. The AB disagreed with the United States that the elements identified by the Panel were not relevant to the determination of whether Review 9 could properly be included in the Panel's terms of reference.

The Appellate Body, therefore, agreed with the Panel that Japan's panel request met the requirement of Article 6.2 of the DSU to "identify the specific measures at issue" as regards Review 9. Further, the Appellate Body agreed that, in the particular circumstances of these compliance proceedings, it was proper to include Review 9 within the Panel's terms of reference, even though Review 9 had not been completed when Japan requested the establishment of a panel. Accordingly, the Appellate Body upheld the Panel's finding that Review 9 was properly within its terms of reference.

Collection of Duties after the Expiration of the Reasonable Period of Time – Reviews through 9

Reviews 1 through 6 and 9 were periodic reviews of an anti-dumping duty order on imports of ball bearings from Japan.[162] Review 7 was a periodic review of an anti-dumping duty order on imports of cylindrical roller bearings from

[162] The Panel noted that Japan's claims also referred to certain amendments to Reviews 1, 2, and 3 and that these amendments were covered by Japan's request for panel establishment. Before the Panel, the United States asserted that these amendments were not relevant to the Article 21.5 proceedings, because "they were the result of [United States] court orders unrelated to the DSB's recommendations and rulings in this dispute and did not alter the zeroing procedures employed in Reviews 1, 2 and 3." However, the Panel observed that the importer-specific assessment rates resulting from Reviews 1, 2, and 3 were recalculated following the amendments challenged by Japan. The Panel therefore included these recalculated importer-specific assessment rates in the scope of its findings, since the

Japan. Review 8 was a periodic review of an anti-dumping duty order on imports of spherical plain bearings from Japan. Reviews 1, 2, 3, 7, and 8 were challenged by Japan in the original proceedings. The Appellate Body found in those proceedings that, by applying zeroing procedures in these five Reviews (along with six others), the United States acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and with Article VI: 2 of the GATT 1994. In these Article 21.5 proceedings, Japan had claimed that the United States had failed to comply with the DSB's recommendations and rulings in respect of Reviews 1, 2, 3, 7, and 8. Japan had also challenged Reviews 4, 5, 6, and 9, asserting that they were "measures taken to comply" within the meaning of Article 21.5 of the DSU.

The United States argued, first, that it had no compliance obligations in respect of Reviews 1, 2, 3, 7, and 8, because they covered merchandise imported into the United States before the expiration of the reasonable period of time; and, secondly, that any liquidations pursuant to Reviews 1, 2, 3, 7, and 8 would have occurred before the expiration of the reasonable period of time but for the fact that they were challenged in domestic judicial proceedings. The AB had found above that both arguments of the United States were premised on an incorrect interpretation of the Anti-Dumping Agreement and the DSU. Consequently, the Appellate Body uphold the Panel's finding that "the United States had failed to comply with the recommendations and rulings of the DSB regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7 and 8 that applied to entries covered by those Reviews that were, or will be, liquidated after the expiry of the RPT". For the same reasons, the AB upheld the Panel's finding that "the United States remains in violation of Articles 2.4 and 9.3 of the Anti-Dumping Agreement, and Article VI: 2 of the GATT 1994, in respect of those importer-specific assessment rates."

United States had not appealed the Panel's finding that Reviews 4, 5, and 6 were "measures taken to comply" within the meaning of Article 21.5 of the DSU. Nor did the United States appeal the Panel's finding that "the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, [and] 6 ... were affected (in the sense of being inflated) by zeroing". Moreover, the

---

recalculated importer-specific assessment rates replace those initially determined by the USDOC. As the Panel explained, "it is the recalculated importer-specific assessment rates that should have been brought into conformity". The Panel further noted that the United States had not formally challenged the inclusion of the amendments. The Panel's inclusion of the amendments has not been challenged by the United States in this appeal.

United States did not allege on appeal that the exporter-specific margins of dumping and importer-specific assessment rates determined in Reviews 4, 5, and 6 with the use of zeroing had been rectified and brought into compliance with the DSB's recommendations and rulings. In other words, the United States was not claiming that it had brought itself into compliance as regards the use of zeroing in Reviews 4, 5, and 6. The Appellate Body stated that the DSU required WTO Members to comply fully with the DSB's recommendations and rulings by the end of the reasonable period of time. In this case, compliance with the DSB's recommendations and rulings required the cessation of zeroing in the application of anti-dumping duties by the end of the reasonable period of time. This had not occurred given that, as the Panel found, "the exporter-specific margins of dumping and importer-specific assessment rates in Reviews 4, 5, [and] 6 ... were affected (in the sense of being inflated) by zeroing"; "Reviews 4, 5 and 6 continued to have legal effect long after the adoption of the DSB's recommendations and rulings"[163]; and some of the import entries covered by Reviews 4, 5, and 6 had not been liquidated when the reasonable period of time expired.

Furthermore, the Appellate Body noted that pursuant to Article 3.8 of the DSU, "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."[164] This meant that there was a presumption that a breach of the WTO agreements had an adverse impact on other Members. Thus, the AB disagreed with the United States that there was no basis to find that the application of zeroing in Reviews 4, 5, and 6 was inconsistent with the United States' obligations under the Anti-Dumping Agreement and the GATT 1994. Even if liquidation of the entries covered by Reviews 4, 5, and 6 had not taken place after the expiration of the reasonable period of time, the exporter-specific margins of dumping and importer-specific assessment rates determined in these reviews remained in force and these rates continued to be inflated due to the use of zeroing. Accepting the United States' argument would mean that, once domestic litigation was completed, anti-dumping duties improperly inflated by the use of zeroing could be collected long after the end of the reasonable period of time.

---

[163] Panel Report, para. 7.79.This finding was made in the context of the Panel's analysis of whether Reviews 4, 5, and 6 are "measures taken to comply" within the meaning of Article 21.5 of the DSU.

[164] See also Appellate Body Report, *EC – Bananas III*, paras. 252 and 253 (quoting GATT Panel Report, *US – Superfund*, paras. 5.1.9 and 5.1.10); and Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 469 and 470).

Accordingly, the Appellate Body upheld the Panel's finding that "the application of zeroing in the context of Reviews 4, 5 [and] 6 ... was inconsistent with Articles 2.4 and 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994."

What was the Scope and Timing of the Obligation to comply with the DSB's Recommendations and Rulings?

The obligation to comply with the DSB's recommendations and rulings arose once the DSB had adopted a panel or Appellate Body report that had concluded that a measure was inconsistent with a covered agreement. In accordance with Article 19.1of the DSU, implementation requires that the Member concerned bring the WTO-inconsistent measure into conformity with the relevant covered agreement(s). Article 3.7 of the DSU stated that, "[i]n 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." Although the "withdrawal" of the WTO-inconsistent measure could be understood as requiring abrogation of the measure, it had been accepted that "alternative means of implementation may exist and that the choice belongs, in principle, to the Member".[165] As the Appellate Body has explained, "the inconsistent measure to be withdrawn can be brought into compliance by modifying or replacing it with a revised measure."

Under Article 21.5 of the DSU, disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" must be resolved through recourse to WTO dispute settlement procedures, and, wherever possible, must be referred to the original panel. Article 21.5 had been interpreted by the Appellate Body, in *US – FSC (Article 21.5 – EC II)*, to mean that, "in compliance proceedings, an Article 21.5 panel may have to examine whether the 'measures taken to comply' implement fully, or only partially, the recommendations and rulings adopted by the DSB".[166] The Appellate Body had additionally explained that "[t]he requirements in Article 21.5 to examine whether compliance measures exist and whether the measures

---

165 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 173. In its interpretation, the Appellate Body relied on the second sentence of Article 19.1 and on Article 21.3 of the DSU.

166 Appellate Body, *US – FSC (Article 21.5 – EC II)*, para. 93.

taken to comply are consistent with the covered agreements ... suggest that substantive compliance is required".[167] This, in turn, required that the implementing Member rectify the inconsistencies found in the original proceedings and that the implementing measure was not in other ways inconsistent with the covered agreements.

The timeframe within which compliance must be effected was addressed in Article 21, which was entitled "Surveillance of Implementation of Recommendations and Rulings". Article 21.1 provided that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The reference to "essential" underscored the importance of the obligation to comply with the DSB's recommendations and rulings. The reference to "prompt" compliance emphasized the need for the timely implementation of DSB recommendations and rulings.

The timing of implementation was also addressed in Article 21.3 of the DSU, which reads, in relevant part:

> *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. (footnote omitted)*

According to the above provision, implementation of the recommendations and rulings of the DSB must be done "immediately", unless it was "impracticable" to do so. In other words, the requirement was immediate compliance. However, Article 21.3 recognized that immediate compliance might not always be practicable, in which case it foresaw the possibility of the implementing Member being given a reasonable period of time to comply. An important consideration is that the reasonable period of time was not determined by the implementing Member itself. Instead, the reasonable period of time might be proposed by the implementing Member and approved by the DSB, mutually agreed by the parties, or determined through binding arbitration. This confirms that the reasonable period of time

---

[167] Appellate Body Reports, *US – Continued Suspension* and *Canada – Continued Suspension*, para. 308. The United States indicated that "Article 21.5 must also be read in the context of provisions such as DSU Article 22.8", at least for purposes of ascertaining whether a "measure taken to comply" exists.

was a limited exemption from the obligation to comply immediately. As the Appellate Body had stated, "the obligation to comply with the recommendations and rulings of the DSB had to be fulfilled by the end of the reasonable period of time at the latest".

Accordingly, the mandate of an Article 21.5of the DSU panel has to determine whether a WTO Member had implemented the DSB's recommendations and rulings fully and in a timely manner. An Article 21.5 panel was not called upon to modify the reasonable period of time agreed or determined under Article 21.3. A WTO Member will not have met its obligation to implement the DSB's recommendations and rulings if measures taken to comply were inconsistent with the covered agreements or if there is an omission in implementation. Moreover, Article 21.3 required that the obligation to implement fully the DSB's recommendations and rulings be fulfilled by the end of the reasonable period of time at the latest and, consequently, the WTO-inconsistent conduct must cease at the latest by that time.

Was the Date of Importation the Relevant Parameter for Determining Compliance?

The measures at issue in the present dispute were periodic reviews of anti-dumping duty orders. The Panel explained that, in the United States' anti-dumping system, periodic reviews involved the determination of "importer-specific assessment rates for previous entries imported during the review period" and "exporter-specific cash deposit rates that will apply prospectively to future import entries". Where the importer-specific assessment rates or cash deposits rates determined by the implementing Member were found to be WTO-inconsistent, that Member was under an obligation to rectify the inconsistencies. In order to comply fully with this obligation, the inconsistencies must be rectified by the end of the reasonable period of time. Where the periodic reviews covered imports that entered the implementing Member's territory prior to the expiration of the reasonable period of time, the WTO-inconsistencies might not persist after the reasonable period of time had expired. Thus, for example, importer-specific assessment rates that were found to be WTO-inconsistent might not remain in effect after the expiration of the reasonable period of time. In other words, the WTO-inconsistent conduct must cease completely, even if it was related to imports that entered the implementing Member's territory before the reasonable period of time expired. Otherwise, full compliance with the DSB's recommendations and rulings could not be said to have occurred.

In order to support its view that the date of entry was the relevant parameter for assessing compliance, the United States relied on Article VI and the interpretive Note to paragraphs 2 and 3 of Article VI (the "*Ad* Note") of the GATT 1994, and Articles 8.6, 10.1, 10.6, and 10.8 of the Anti-Dumping Agreement, which it considered to be relevant context. According to the United States, these provisions "confirm that it is the legal regime in existence at the time that an import enters the Member's territory that determines whether the import is liable for the payment of antidumping duties".

The first sentence of Article VI:2 of the GATT 1994 stated that, "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". Article VI:6(a) provides that a WTO Member shall not levy an anti-dumping duty on the importation of any product of the territory of another WTO Member "unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry." The AB had failed to see how these provisions support the view that the date of entry was the relevant parameter for determining compliance. These provisions did not address the issue of whether the implementing Member may leave a measure found to be inconsistent with the *Anti-Dumping Agreement* and Article VI of the GATT 1994 in place unchanged after the end of the reasonable period of time, because that measure covered imports that entered the implementing Member's territory prior to the expiration of the reasonable period of time.

The United States argued further that disregarding the date of entry of the merchandise, for purposes of determining compliance with the DSB's recommendations and rulings, disadvantages WTO Members with retrospective anti-dumping systems.

The United States' argument was difficult to reconcile with the text of Article 9.3.2 of the *Anti-Dumping Agreement*, which required that WTO Members with prospective anti-dumping systems provide a mechanism allowing importers to request refunds of any duty paid in excess of the margin of dumping. Under Article 9.3.2, a WTO Member with a prospective anti-dumping system might be required to take administrative action subsequent to the entry of the merchandise if an importer requests a refund of any duty paid in excess of the margin of dumping. This had been acknowledged by Japan and the European Communities.[168] Like Article 9.3.1, which concerned retrospective anti-dumping systems, Article 9.3.2 provided for strict time-limits on the duration of a refund procedure. Footnote 20, on which the United States relied for its arguments on judicial delay, and which applies to both Articles 9.3.1 and 9.3.2, recognized that the observance of these time-limits "may not be possible where the product in question is subject to judicial review proceedings."

Therefore, where actions or omissions relating to a refund procedure were challenged both domestically and in WTO dispute settlement, delays in the completion of a refund procedure until after the end of the reasonable period of time could not be excluded. Should such a refund procedure not be completed before the end of the reasonable period of time, a WTO Member with a prospective anti-dumping system would have compliance obligations in respect of that refund procedure concerning past imports. Such a Member would thus find itself in a situation similar to that of an implementing Member applying a retrospective anti-dumping system. This confirmed that, under both retrospective and prospective anti-dumping systems, entries made prior to the expiration of the reasonable period of time also might be affected by compliance obligations. As a consequence, the AB disagreed with the United States that disregarding the date of entry of the merchandise for purposes of determining compliance would result in retrospective anti-dumping systems being treated less favourably than prospective anti-dumping systems.

An additional concern raised by the United States was that failing to determine compliance by reference to the date of entry would amount to retroactive relief, which, in the United States' view, was "at odds with the prospective nature of

---

168 In support of the proposition that WTO Members with prospective anti-dumping systems grant refunds to importers, the European Communities refers to the decision of the European Court of Justice in *Ikea Wholesale Ltd v. Commissioners of Customs & Excise* (C 351/04 – 27/9/07). (See European Communities' third participant's submission, para. 48. At the oral hearing, the European Communities explained that, in that case, importers were granted refunds on duties paid in the specific context of zeroing, following the decision in the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)*. The European Communities also directed our attention to the refund procedures that were undertaken in the context of the *EC – Countervailing Measures on DRAM Chips* case. The European Communities stated that refunds were granted with respect to imports that entered the European Communities prior to the expiry of the reasonable period of time and were calculated using a WTO-consistent methodology after the expiry of the reasonable period of time. At the oral hearing, Korea confirmed that refunds had been granted in this case.

compliance under the WTO dispute settlement system". The United States considered that such an approach results in retroactive relief because it concerns entries that occurred prior to the expiry of the reasonable period of time. As the AB explained earlier, the DSU requires cessation of all WTO-inconsistent conduct either immediately upon adoption of the DSB's recommendations and rulings or no later than upon expiration of the reasonable period of time, regardless of the date of importation. There was no "retroactive relief" involved when a WTO Member's conduct was examined as of the end of the reasonable period of time, which is the proper reference point. As the Appellate Body stated in *US – Zeroing (EC) (Article 21.5 – EC)*, "the obligation to comply with the recommendations and rulings of the DSB had to be fulfilled by the end of the reasonable period of time at the latest, and ... the WTO-inconsistency had to cease by the end of the reasonable period of time with prospective effect."[169]

Article 9 of the *Anti-Dumping Agreement* covered the imposition and *collection* of anti-dumping duties.[170] Any actions taken to collect anti-dumping duties based on importer-specific assessment rates determined in a periodic review were also subject to the obligation set out in Article 9, including the obligation in paragraph 3 that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".[171] Where a WTO Member had been

---

[169] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299. (footnote omitted) The Appellate Body also stated:

> ... because compliance with the recommendations and rulings of the DSB implies cessation of zeroing in the assessment of final duty liability, and in the measures that, in the ordinary course of the imposition of anti-dumping duties, derive mechanically from the assessment of duties, whether the implementation is prospective or retroactive should not be determined by reference to the date when liability arises, but rather by reference to the time when final dumping duty liabilities are assessed or when measures that result mechanically from the assessment of duties occur. We consider that the obligation to cease using zeroing in the assessment of anti-dumping duty liability at the latest as of the end of the reasonable period of time "is eminently prospective in nature".

[170] The title of Article 9 of the *Anti-Dumping Agreement* is "Imposition and Collection of Anti-Dumping Duties".

[171] As Japan points out, the United States stated before the Panel that it "does not dispute that Article 9.3 of the [Anti-Dumping] Agreement obliges WTO Members to ensure that the amount of antidumping duty collected not exceed the margin of dumping established under Article 2 of the [Anti-Dumping] Agreement". (United States' second written submission to the Panel, para. 64 (quoted in Japan's appellee's submission, para. 242))

found to have violated the *Anti-Dumping Agreement* and the GATT 1994 by using zeroing in a periodic review, it failed to comply with the DSB's recommendations and rulings if it collects, subsequent to the expiration of the reasonable period of time, anti-dumping duties based on rates that were determined in the periodic review using zeroing. If it did so, the obligation in Article 9.3 that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2" would not be respected.[172]

Therefore, the Appellate Body disagreed with the United States' argument that "the determinative fact for establishing whether a Member had complied with the DSB's recommendations and rulings are the date merchandise enters that Member's territory." The AB had found, instead, that the DSU requires cessation of all WTO-inconsistent conduct immediately upon the adoption of the DSB's recommendations and rulings or no later than upon expiration of the reasonable period of time. Consequently, in the case of periodic reviews of anti-dumping duty orders, the obligation to comply covers actions or omissions subsequent to the reasonable period of time, even if they relate to imports that entered the territory of a WTO Member at an earlier date.

What was the Relevance of Delays Resulting from Domestic Judicial Proceedings?

The second issue raised by the United States' appeal related to the specific reason for which collection of anti-dumping duties was delayed in respect of the periodic reviews subject to these Article 21.5 proceedings. The question was whether actions or omissions that occur after the expiration of the reasonable

---

172 This is similar to what would occur if zeroing were allowed in periodic reviews, while being disallowed in the original anti-dumping determination. As the Appellate Body explained in *US – Stainless Steel (Mexico)*:

> … a reading of Article 9.3 of the *Anti-Dumping Agreement* that permits simple zeroing in periodic reviews would allow WTO Members to circumvent the prohibition of zeroing in original investigations that applies under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. This is because, in the first periodic review after an original investigation, the duty assessment rate for each importer will take effect from the date of the original imposition of anti-dumping duties. Consequently, zeroing would be introduced although it is not permissible in original investigations. (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 109)

period of time due to domestic judicial proceedings were excluded from the implementing Member's compliance obligations.[173]

According to the United States, the relevant provisions for purposes of deciding the question before the AB were Article 13 and footnote 20 to Article 9.3.1 of the *Anti-Dumping Agreement*. Japan, by contrast, referred to several provisions of the DSU that it considers indicate the actions that a respondent Member must take to implement the DSB's recommendations and rulings. The AB noted, in this regard, that neither provision of the *Anti-Dumping Agreement* to which the United States referred was listed in Appendix 2 of the DSU as a special or additional rule and procedure that would prevail in case of conflict, in accordance with Article 1.2 of the DSU.[174] Accordingly, the rule in Article 1.2 was inapplicable in this case. Therefore, both the *Anti-Dumping Agreement* and the DSU should be taken into account in this dispute and should be interpreted harmoniously.

Relying on the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)*, the United States argued further that, where liquidation was delayed because of domestic judicial proceedings, it can no longer be said to "derive mechanically" from the periodic reviews challenged by Japan. According to the United States, "judicial review severs any so-called 'mechanical' link between the assessment of liability in the original review determination and the liquidation instructions". To support its argument that liquidation actions that were delayed as a result of judicial proceedings do not derive mechanically from the challenged periodic reviews, the United States points out that "the timing of liquidation was controlled by the independent judiciary and *not* the administering authority."

The Appellate Body noted that a WTO Member "bears responsibility for acts of all its departments of government, including its judiciary."[175] This was supported

---

173 The United States itself framed the issue as follows: "a key question in this appeal is whether the United States failed to comply with the DSB's recommendations and rulings after the end of the RPT, because it liquidated entries after that date for which liquidation had been suspended due to judicial review". (United States' appellant's submission, para. 92)

174 Japan argues that "there are *no* 'special or additional rules and procedures' in the *Anti-Dumping Agreement* that justify excusing the United States from the requirement to 'bring [Reviews 1, 2, 3, 7 and 8] into conformity' with WTO law, under Article 19.1 of the DSU." (Japan's appellee's submission, para. 205 (original emphasis and square brackets))

175 Appellate Body Report, *US – Shrimp*, para. 173.

by Article 18.4 of the *Anti-Dumping Agreement*, Article XVI: 4 of the *WTO Agreement*, and Article 27 of the *Vienna Convention*.[176] The judiciary was a state organ and even if an act or omission derives from a WTO Member's judiciary, it was nevertheless still attributable to that WTO Member. Thus, the United States could not seek to avoid the obligation to comply with the DSB's recommendations and rulings within the reasonable period of time, by relying on the timing of liquidation being "controlled by the independent judiciary". In any event, the periodic reviews, and the collection of duties after the reasonable period of time by the USDOC and Customs were neither judicial acts nor has Japan attributed the failure to comply with the United States courts. The Appellate Body also noted that the actions that follow the completion of judicial proceedings in the present case did not appear to be in any way different from the collection of duties in the absence of such proceedings, such as was the case in the scenarios examined in *US – Zeroing (EC) (Article 21.5 – EC)*.

The United States argued further that liquidation was a "ministerial" act because Customs "collects the antidumping duties based on [USDOC's] determination" and Customs "does not have the authority to recalculate or otherwise revise these duties".[177] The Appellate Body noted that the Panel record indicated that what occurred after the expiry of the reasonable period of time was not just the action of liquidation, that is, collection of anti-dumping duties by Customs, but also the issuance of liquidation instructions by the USDOC to Customs to assess those anti-dumping duties.[178] In any event, defining the act of collection of anti-dumping duties as "ministerial" did not shield it from being subject to the disciplines of

---

[176] Article 18.4 of the *Anti-Dumping Agreement* requires each Member to "take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question." Article XVI:4 of the *WTO Agreement* states that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Article 27 of the *Vienna Convention* provides that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

[177] United States' response to Panel Question 14, para. 27. The term "ministerial" is defined by Merriam Webster's Dictionary of Law as "relating to or being an act done after ascertaining the existence of a specified state of facts in obedience to legal and esp. statutory mandate without exercise of personal judgment or discretion". (*Merriam Webster's Dictionary of Law*, L.P.Wood (ed.) (Merriam-Webster Inc., 1996), p. 313)

[178] Panel Exhibits JPN-40.A, JPN-77, JPN-78, JPN-79, and JPN-80.

Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, in particular, Article 9, which was entitled "Imposition and Collection of Anti-Dumping Duties". Irrespective of whether an act was defined as "ministerial" or otherwise under United States law, and irrespective of any discretion that the authority issuing such instructions or taking such action might have, the United States, as a Member of the WTO, was responsible for those acts in accordance with the covered agreements and international law.[179]

An additional concern would arise if the United States' position concerning delays resulting from judicial review was accepted, because the requirement to provide independent review was not limited to anti-dumping measures. For example, Article X: 3(b) of the GATT 1994 required that there be independent review of administrative determinations dealing with customs matters.[180] Article 23 of the *Agreement on Subsidies and Countervailing Measures* required that there be tribunals or procedures for independent review of certain countervailing duty determinations.[181] Article VI: 2(a) of the *General Agreement on Trade in Services* (the

---

[179] Article 4 of the ILC Draft Articles. Japan has relied on the ILC Draft Articles in its appellee's submission, paras. 261-276.

[180] Article X:3(b) of the GATT 1994 provides:

> Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

[181] Article 23 of the *SCM Agreement* states:

> *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.

"GATS") called for the establishment of tribunals or procedures for the review of administrative decisions affecting trade in services.[182] Thus, exempting measures subject to domestic judicial proceedings from the obligation to comply with the DSB's recommendations and rulings by the end of the reasonable period of time could potentially have considerable implications for the effectiveness of WTO dispute settlement in areas beyond anti-dumping.

Therefore, the fact that collection of anti-dumping duties was delayed as a result of domestic judicial proceedings did not provide a valid justification for the failure to comply with the DSB's recommendations and rulings by the end of the reasonable period of time.

Article II of the GATT 1994

Finally, the Appellate Body turned to the United States' appeal of the Panel's findings that certain liquidation actions taken by the United States were inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994.

The measures at issue consist of certain liquidation instructions issued by the USDOC and certain liquidation notices issued by Customs. The liquidation instructions were set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the liquidation notices were those in Panel Exhibits JPN 81 to JPN-87. United States had explained that liquidation instructions were issued by the USDOC after publication of the final results of a periodic review and instruct Customs to collect anti-dumping duties from importers at the rates determined in that periodic review. To effect liquidation, Customs issues a liquidation notice to importers setting out the amount of definitive duties to be paid on each entry. Depending on whether the amount to be collected exceeds the amount of the cash deposit that was paid at the time of importation, a request for additional payment or a refund cheque would also be sent to importers.

---

182 Article VI:2(a) of the GATS reads:

> 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.

The liquidation actions challenged by Japan pursuant to Article II of the GATT 1994 relate to Reviews 1, 2, 7, and 8. These four Reviews (along with seven others) were found, in the original proceedings, to be inconsistent with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Japan did not make claims pursuant to Article II of the GATT 1994 in the original proceedings.

The United States submitted that the Panel erred in making a finding of violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to the USDOC liquidation instructions and Customs liquidation notices. First, the United States argued that Japan's Article II claims were derivative of Japan's claims under Article 2.4 and 9.3 of the *Anti-Dumping Agreement* and, as such, that "[i]t was entirely unnecessary [for the Panel] to make any Article II findings". The United States further contended that, if the Appellate Body reversed the Panel's non-compliance findings in relation to Reviews 1, 2, 3, 7, and 8, then the Appellate Body must reverse the "derivative findings" that the United States violated Article II. Secondly, the United States asserted that the relevant date by which compliance was to be assessed was the date of entry of the merchandise and, because this occurred before the expiration of the reasonable period of time, there could be no finding of non-conformity. Thirdly, the United States submitted that liquidation that occurred after the reasonable period of time could not support a finding of non-compliance, because its delay was due entirely too domestic judicial review.

Japan submitted that the Panel properly found the United States to be in violation of Articles II:1(a) and II:1(b) of the GATT 1994. Japan first argued that the USDOC liquidation instructions and Customs liquidation notices were "measures taken to comply", and thus fall within the jurisdiction of the Panel.[183] Next, Japan refuted the United States' argument that Japan's claims under Article II were "entirely derivative" of its claims under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, stating that its Article II claims involve "different measures, and different claims", that is, the consistency of the USDOC liquidation instructions and Customs liquidation notices with Article II. Furthermore, Japan submitted that the United States had failed to cite any provisions of the covered agreements that "shield[] measures that effect the collection or levy of import duties at WTO-

183 Japan makes these submissions despite the United States not arguing that the liquidation actions are not measures taken to comply.

inconsistent rates from scrutiny under Article II of the GATT 1994, if a related periodic review is challenged under separate WTO provisions."[184]

The United States had not challenged the Panel's interpretation of Article II and the AB need not engage in an extensive analysis of this provision. The Appellate Body referred the case of India – *Additional Import Duties,* for guidance in the matter. The Appellate Body in that case examined the relationship between paragraphs 1(b) and 2 of Article II. Although that appeal focused on paragraph 2(a) of Article II, the Appellate Body's remarks provide general guidance on the relationship between paragraphs 1(b) and 2:

The chapeau of Article II: 2, therefore, connects Articles II: 1(b) and II: 2(a) and indicates that the two provisions are inter-related. Article II: 2(a), subject to the conditions stated therein, exempts a charge from the coverage of Article II: 1(b). The participants agree that, if a charge satisfies the conditions of Article II: 2(a), it would not result in a violation of Article II: 1(b). Thus, we consider that, in the context of this case involving the application of duties that are claimed to correlate to certain internal taxes, Article II: 1(b) and Article II: 2(a) is closely related and must be interpreted together. (footnote omitted)

The Panel understood Article II: 2(b) as providing a "safe harbour" to Article II: 1 to the extent that the anti-dumping duties were applied consistently with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. Thus, the Panel's approach was coherent with the Appellate Body's interpretation of the relationship between Articles II: 1(b) and II: 2(a) quoted above.

On appeal, the United States did not contest that Japan's Article II claims were properly within the Panel's terms of reference, nor does it challenge the Panel's finding that the liquidation instructions and notices were "measures taken to

---

184 Japan additionally asserts that the United States' final two arguments—that the relevant date for determining compliance is the date of entry of the merchandise, and that the duty collection measures would have occurred within the reasonable period of time but for domestic litigation—are jurisdictional in nature and are "explicitly directed towards [challenging] whether the Panel had a valid 'basis'—*i.e.*, authority—to rule upon the 'consistency' of the duty collection measures." Japan argues that the Panel did have a valid legal basis to rule upon the consistency of the liquidation actions, because they are "measures taken to comply".

comply" within the meaning of Article 21.5 of the DSU.[185] The first ground of appeal raised by the United States was that it was "unnecessary" for the Panel to have made a finding under Article II because of the "derivative" nature of the claims. At the oral hearing, the United States clarified that it was not arguing that the Panel violated Article 11 of the DSU or otherwise erred by not exercising judicial economy.[186] The United States explained that, instead, its argument was that the Appellate Body's reversal of the Panel's findings relating to Reviews 1, 2, 7, and 8 would necessarily require a reversal of the Panel's findings under Article II of the GATT 1994. Because the AB had upheld the Panel's findings relating to Reviews 1, 2, 7, and 8, the condition on which the United States' request was premised was not met.

The United States additionally reiterated two of the arguments that it made in connection with the Panel's findings concerning Reviews 1 through 9, namely, that:

(i) the relevant date for determining compliance was the date of entry of the subject imports; and that

(ii) liquidation would have occurred before the expiration of the reasonable period of time but for the domestic judicial proceedings. Thus, these two arguments raised by the United States also did not provide a basis to disturb the Panel's findings concerning Article II of the GATT 1994.

For these reasons, the Appellate Body upheld the Panel's finding that the United States was in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.

Findings and Conclusions:

For the reasons set out in this Report, the Appellate Body:

---

185 Before the Panel, the United States did not dispute that Japan's Article II claims were within the Panel's terms of reference. Nor did the United States raise a jurisdictional objection before the Panel to the inclusion of the relevant liquidation instructions and notices in the Article 21.5 proceedings.

186 Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133

(a) upheld the Panel's findings, in paragraphs 7.107, 7.114, and 7.116 of the Panel Report, that Review 9 was properly within the Panel's terms of reference;

(b) upheld the Panel's finding, in paragraphs 7.154 and 8.1(a) of the Panel Report, that the United States had failed to comply with the DSB's recommendations and rulings regarding the importer-specific assessment rates determined in Reviews 1, 2, 3, 7, and 8 that apply to entries covered by those Reviews that were, or will be, liquidated after the expiry of the reasonable period of time; and also upheld the Panel's finding, in paragraphs 7.154 and 8.1(a)(i) of the Panel Report, that the United States was in continued violation of its obligations under Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994;

(c) upheld the Panel's finding, in paragraphs 7.168 and 8.1(b) of the Panel Report, that the United States had acted inconsistently with Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the context of Reviews 4, 5, 6, and 9; and

(d) upheld the Panel's finding, in paragraphs 7.208 and 8.1(d) of the Panel Report, that the United States was in violation of Articles II:1(a) and II:1(b) of the GATT 1994 with respect to certain liquidation actions taken after the expiry of the reasonable period of time, namely, with respect to the USDOC liquidation instructions set forth in Panel Exhibits JPN-40.A, and JPN-77 to JPN-80, and the Customs liquidation notices set forth in Panel Exhibits JPN-81 to JPN-87.

To the extent that the United States had failed to comply with the recommendations and rulings of the DSB in the original dispute, the recommendations and rulings remain operative. The Appellate Body recommended that the DSB request the United States to bring into conformity with its obligations under the *Anti-Dumping Agreement* and the GATT 1994 the measures found in this Report and in the Panel Report to be inconsistent with those Agreements.

About the WTO Centre

The Centre for WTO Studies was set up in 1999. It is situated in IIFT since November, 2002. The objectives of the Centre are:

- To be a permanent repository of WTO negotiations related knowledge and documentation
- To conduct research on WTO and trade issues
- To interface with industry and Government through Outreach and Capacity Building programmes
- To act act as a platform for consensus building between stakeholders and policy makers

The Centre is currently engaged in research on the following WTO related subjects:

- Agriculture
- Intellectual Property Rights
- Agreement on Sanitary and Phytosanitary Measures
- Agreement on Technical Barriers to Trade
- Trade Facilitation
- Environment and Trade
- Subsidies including Fishery Subsidies
- Anti-dumping
- Regional Trade Agreements

More information about the Centre and its activities can be accessed on its website: http://wtocentre.iift.ac.in

Centre for WTO Studies
Indian Institute of Foreign Trade
IIFT Bhawan, B-21, Qutab Institutional Area, New Delhi-110016
Tel: 011-26564409
E-mail: editor_wtocentre@iift.ac.in