

## V. INTERIM REVIEW<sup>421</sup>

### A. INTRODUCTION

5.1 The interim report of the Panel was issued to the parties on 28 February 2000, in application of Article 15.2 of the DSU. On 6 March 2000, Japan and the United States submitted written requests to the Panel to review some aspects of the interim report. Neither Japan nor the United States requested that the Panel hold a further meeting with the parties.

5.2 As a preliminary remark, the Panel notes that the parties did not comment on the factual assessments made in its interim report, with the exception of the factual error in footnote 552 to paragraph 6.192, which related to when in the proceedings the United States raised a particular argument.<sup>422</sup>

### B. COMMENTS BY JAPAN

5.3 Japan requested that we review paragraphs 6.52, 6.76, 6.103 and 6.170 of the interim report.

5.4 Regarding paragraph 6.52, Japan is critical of the last sentence of the paragraph. While we agree with Japan that the starting-point of our analysis was the text of the 1916 Act, we acknowledge that court interpretations could substantially elaborate on such a concise text as that of the 1916 Act, as was apparently the case with the Sherman Act, for instance. We therefore used the term "US law" as meaning US law in general, not the 1916 Act. We also used the term "select" in order to confirm that we would not interpret US law in general or judgements of US courts in particular. We would only compare the court decisions with what we perceived to be the current status of US law in that field. We therefore did not find it appropriate to modify the last sentence of paragraph 6.52.

5.5 We clarified paragraph 6.76 to address Japan's concern. However, we did not consider it necessary to modify paragraph 6.103 along the line suggested by Japan, since the issue addressed in that paragraph was the interpretation of the 1916 Act by courts, currently or in the future.

5.6 Regarding paragraph 6.170, the Panel did not take position on the issue to which Japan refers. It simply noted that an isolated domestic market has *often* been considered as *one of the reasons* why dumping is possible in the first place. Second, the fact that the issue is very controversial among WTO Members is not as such a reason for removing that statement from a panel report. However, the Panel considered that the statement at issue was not essential for its reasoning. It consequently redrafted the sentence concerned to focus more precisely on its actual purpose.

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<sup>421</sup> According to Article 15.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"), "the findings of the final report shall include a discussion of the arguments made at the interim review stage". The following section entitled "Interim Review" is therefore part of the findings of our report.

<sup>422</sup> The Panel is of the view that if it had misunderstood or misrepresented some factual aspects of the case in its findings, the parties would need the opportunity of the interim review stage to make the appropriate corrections or clarifications because, contrary to errors of law, errors of fact normally cannot be corrected on appeal. Parties should seize this last opportunity to correct factual assessments by the Panel because, otherwise, the Panel could needlessly be exposed to the risk of being accused of not having made an objective assessment of the facts. It could be argued that for a party not to inform the Panel of a factual error in its findings may be contrary to the obligation laid down in Article 3.10 of the DSU, which provides *inter alia* that "all Members will engage in these [DSU] procedures in good faith in an effort to resolve the dispute".

C. COMMENTS BY THE UNITED STATES

5.7 The United States commented on the content of paragraph 6.36, footnote 552 to paragraph 6.192, and footnote 599 to paragraph 6.292 of the interim report.

5.8 Regarding paragraph 6.39, we do not read the statement at issue ("both Article 3.2 of the DSU and the practice of the Appellate Body make it clear that we have, whenever appropriate, to develop our approach on the basis of that of international courts in similar circumstances") in the interim report as stating that panels have an *obligation* under the DSU to take other international court's practice into consideration. First, we note that the verb "have to" is qualified by the terms "whenever appropriate" and "on the basis of". Second, we recall that the Appellate Body in its report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* considered whether certain judgements of the International Court of Justice "establish[ed] a general rule that in all international litigation, a complaining party must have a legal interest in order to bring a case." The Appellate Body determined that the judgements referred to by the parties did not deny the need to consider the question of standing under the dispute settlement provisions of any multilateral treaty, by referring to the terms of that treaty.<sup>423</sup> We assume from that report that if the judgements of the International Court of Justice had established a general rule on demonstration of legal interest, and the terms of the WTO Agreement did not prevent its application to dispute settlement, the Appellate Body would have applied that principle. However, in order to avoid misunderstanding, we clarified the phrase at issue.

5.9 We also modified the factual error relating to the stage at which the United States raised a particular argument in these proceedings.

5.10 Regarding footnote 599 to paragraph 6.292, we agree with the United States that no specific claim was raised by Japan in relation to the settlements reached between parties in the *Wheeling-Pittsburgh* case. The footnote was intended to complement the phrase according to which the 1916 Act "has never led to the imposition of any remedies by courts." The Panel meant to show that it had considered carefully all the potential aspects of the factual situation, including the situation where the court concerned would have formally sanctioned the settlements reached by Wheeling-Pittsburgh Steel Corporation, with the consequence that such settlements might be enforced if necessary by the US authorities, such as courts or the customs or competition authorities. In this respect, the Panel recalls that the responsibility of the Members under international law applies irrespective of the "branch of government" at the origin of the action having international repercussions. Footnote 599 was only intended to clarify that "remedies" in the form of a settlement sanctioned by a court had not been the subject of a claim of Japan. We therefore modified footnote 599 in the final report in order to make our purpose clearer.

**VI. FINDINGS**

A. ISSUES TO BE ADDRESSED BY THE PANEL

**1. Facts at the origin of the dispute**

6.1 The law, the WTO-consistency of which is contested by Japan, is a United States legislative text enacted under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.<sup>424</sup> It has been known since as the "Antidumping Act of 1916."<sup>425</sup> The 1916 Act, which provides for civil

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<sup>423</sup> Adopted on 25 September 1997, WT/DS27/AB/R, para. 133.

<sup>424</sup> Act of 8 September 1916. The Revenue Act can be found at 39 Stat. 756 (1916). Title VIII of the Revenue Act is codified at 15 U.S.C. §§ 71-74.

<sup>425</sup> A number of official documents of the United States government and a number of US court decisions refer to Title VIII of the Revenue Act of 1916 as the "Antidumping Act of 1916". Authors have also

and criminal penalties by US federal courts for a certain form of transnational price discrimination<sup>426</sup> when conducted with specific intent,<sup>427</sup> reads as follows:

"It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."

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called it the "1916 Antidumping Act" or qualified it as an act dealing with certain forms of dumping, irrespective of whether they considered it to be an "anti-dumping" law or an "anti-trust" law. See, e.g., A. Paul Victor: *The Interface of Trade/Competition Law and Policy: An Overview*, 56 Antitrust Law Journal 397, at p. 401; John H. Jackson, *World Trade and the Law of GATT* (1968), at p. 403, footnote 4. However, we note that the word "anti-dumping" does not appear as such in the text of the law. Since the question whether this law is an anti-dumping law within the meaning of Article VI of GATT 1994 is one of the issues that this Panel has to address, we find it more appropriate to refer to it in our discussion as the "1916 Act".

<sup>426</sup> Even though the word "discrimination" may have specific meanings in certain circumstances, it is used throughout the findings as meaning a differentiation (see, e.g., *The New Shorter Oxford English Dictionary* (1993), p. 689). As a result, the term "transnational price discrimination" in these findings refers only to the existence of a difference in price between two markets located in different countries, irrespective of the intent of the exporter behind that price difference or the effects thereof. See also Jacob Viner's definition of "dumping" as a "price-discrimination between national markets" (*Dumping, A Problem in International Trade* (1923), p. 3).

<sup>427</sup> The 1916 Act was part of a legislative effort of the United States to address a number of practices perceived at that time as "unfair competition". A number of major anti-trust and trade laws of the United States still applicable today were adopted by the Congress of the United States (hereinafter the "US Congress") between the end of the 19<sup>th</sup> century and the 1930's. The Sherman Act (15 U.S.C. 1-7) dates back to 1890 and the Clayton Act to 1914 (15 U.S.C. 12, 13, 14-19, 20, 21, 22-27; 29 U.S.C. 52, 53). Subsequent to the 1916 Act came the 1921 Anti-Dumping Act, the 1930 Tariff Act (which has become since the basis of the current US anti-dumping legislation) and the 1936 Robinson-Patman Act, amending Section 2 of the Clayton Act of 1914.

Two significant features of the 1916 Act are that:

- (a) it provides for a review of the practices concerned by the judiciary branch of government<sup>428</sup> at the federal level, not by the executive branch of government; and
- (b) it provides for two "tracks" of litigation before US federal courts: (i) civil proceedings through which a person may seek to recover damages, and (ii) criminal proceedings whereby the US Department of Justice may seek the imposition of a fine or imprisonment, or both.

## **2. Issues to be addressed by the Panel**

- (a) Summary of issues before the Panel

6.2 The understanding of the Panel as to the claims and defences of the parties is, in a summarized form, as follows.<sup>429</sup>

6.3 Japan challenges the 1916 Act as such, not a particular instance of application. It claims that the 1916 Act violates Article III:4, Article XI of the GATT 1994, Article VI:2 of the GATT 1994 and Article 18.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994<sup>430</sup>, Article VI of the GATT 1994 and Article 1 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article 3 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Articles 4 and 5 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article 9 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article 11 of the Anti-Dumping Agreement, Articles 1 and 18.1 of the Anti-Dumping Agreement by failing to comply with Article VI of GATT 1994 and Articles 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement, Article XVI:4 of the Agreement Establishing the World Trade Organization<sup>431</sup> and Article 18.4 of the Anti-Dumping Agreement. Finally, Japan requests that the Panel recommend that the United States repeal the 1916 Act in order to bring its legislation into conformity with US obligations under the WTO Agreement.

6.4 Japan claims that the 1916 Act falls within the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement because the 1916 Act targets a form of international price discrimination defined as "dumping" in that Article. Japan argues that recent US court decisions support the view that the 1916 Act has been applied as an anti-dumping law. The anti-dumping nature of the 1916 Act has also been recognised by officials of the US executive branch.

6.5 Japan also claims that, by providing for treble damages, fines or imprisonment, the 1916 Act violates Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement, which provide that the imposition of duties is the only remedy allowed to counteract dumping under the WTO Agreement.

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<sup>428</sup> The terms "judiciary branch of government", "executive branch of government" and "legislative branch of government" are, throughout this report, used within the meaning given to them in US constitutional law.

<sup>429</sup> The claims and arguments of the parties are reported in greater detail in sections II and III of this Report.

<sup>430</sup> Referred to hereafter as the "Anti-Dumping Agreement".

<sup>431</sup> Throughout these findings, the Marrakesh Agreement Establishing the World Trade Organization, including its annexes, will be referred to as the "WTO Agreement". The Marrakesh Agreement Establishing the World Trade Organization, without its annexes, will be referred to as the Agreement Establishing the WTO. In that context, Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization will be referred to as "Article XVI:4 of the Agreement Establishing the WTO". The agreements annexed to the Agreement Establishing the WTO will be referred to as the "WTO agreements".

6.6 Furthermore, Japan claims that the 1916 Act violates a number of requirements of Article VI and the Anti-Dumping Agreement, *inter alia* by not providing for the same elements in terms of comparison for the purpose of establishing the dumping margin, regarding the determination of material injury and with respect to procedural requirements regarding the initiation and conduct of the investigation and the imposition and duration of measures.

6.7 In addition, Japan claims that the 1916 Act violates Article III:4 of the GATT 1994 to the extent that it provides less favourable treatment to imported goods than is granted to US goods under the Robinson-Patman Act<sup>432</sup> in terms of the difference in (i) pleading requirements, (ii) the use of the intent requirement in the 1916 Act instead of a requirement of "effect" under the Robinson-Patman Act, (iii) cost recoupment requirement, (iv) the statutory defences available under the Robinson-Patman Act and not expressly provided for in the 1916 Act, and (v) the conducts subject to penalties.

6.8 Moreover, Japan claims that the 1916 Act violates Article XI because it establishes impermissible import prohibitions or restrictions other than duties, taxes or other charges.

6.9 Japan finally claims that the United States, because it has failed to conform the 1916 Act with the provisions of the Anti-Dumping Agreement and the provisions of the GATT 1994 referred to above, also violates Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the Agreement Establishing the WTO.

6.10 The United States argues that the Panel has no jurisdiction to address the compatibility of the 1916 Act with the Anti-Dumping Agreement since, pursuant to Article 17.4 of that agreement, and as confirmed by the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*,<sup>433</sup> a panel may consider a violation of the Anti-Dumping Agreement only when one of three specific measures have been adopted. The Panel cannot review the compatibility of the 1916 Act as such with the Anti-Dumping Agreement. Moreover, given the relationship between the Anti-Dumping Agreement and Article VI of the GATT 1994, the Panel cannot make a finding under Article VI separately from the Anti-Dumping Agreement.<sup>434</sup>

6.11 The United States also argues that the 1916 Act, to the extent that the US Department of Justice enjoys discretion to file - or not - a suit with a federal court, is a "non-mandatory" law within the meaning given to that concept by GATT 1947 panels and by panels and the Appellate Body under the WTO. The United States further argues that the 1916 Act is susceptible to, and indeed has been interpreted in, a WTO-compatible manner. In application of past GATT 1947 panel practice, this also makes the 1916 Act "non-mandatory" legislation.

6.12 The United States also argues that the 1916 Act is an anti-trust statute. It is not subject to the disciplines of Article VI of the GATT 1994 since it does not address injurious dumping within the meaning of Article VI but a specific form of international price discrimination with predatory intent. The United States considers that Article VI applies only to laws purporting to impose border measures in the form of anti-dumping duties against dumping causing injury. Members are free to address dumping, including injurious dumping, through other WTO-consistent means. The 1916 Act, because it imposes damages on importers rather than border measures in the form of anti-dumping duties, is an internal measure subject to Article III, but not to Article VI. On that basis, the Panel should find that the 1916 Act does not violate Article VI of the GATT 1994. If the Panel were to follow Japan's arguments on Article VI and the Anti-Dumping Agreement, all anti-trust laws of Members, including Japan's legislation and the EC competition rules (under Article 82 of the Treaty of Amsterdam),

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<sup>432</sup> See footnote 279 above.

<sup>433</sup> Adopted on 25 November 1998, WT/DS60/AB/R, hereinafter "*Guatemala – Cement*".

<sup>434</sup> The United States refers to the Panel and Appellate Body Reports on *Brazil – Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/R, WT/DS22AB/R, hereinafter "*Brazil - Desiccated Coconut*".

would be subject to Article VI of the GATT 1994 to the extent that they rely on transnational price discrimination.

6.13 The United States also contends that Article VI:2 of the GATT 1994 and the Anti-Dumping Agreement do not provide that duties are the sole remedy allowed to counteract dumping. A Member is bound to respect the provisions of the Anti-Dumping Agreement only to the extent it intends to impose duties.

6.14 Finally, the United States claims that the 1916 Act does not violate Article III:4 of the GATT 1994. Compared with the Robinson-Patman Act, the 1916 Act actually grants more favourable treatment to imported goods than to US goods. The 1916 Act requires an *intent* to destroy or injure an industry in the United States, or to prevent the establishment of an industry in the United States, or to restrain or monopolize any part of trade and commerce in the articles concerned in the United States. According to the United States, this requirement that an "intent" be demonstrated by the plaintiff has been considered to be the main reason for the very rare and generally unsuccessful application of the 1916 Act compared with the Robinson-Patman Act. Apart from this, the procedural requirements under the two statutes are either similar or more favourable to defendants under the 1916 Act.

6.15 The United States also states that the 1916 Act does not violate Article XI of the GATT 1994, since none of the remedies provided in the 1916 Act are of such a nature as to fall within the scope of Article XI:1.

6.16 The United States further argues that, since the 1916 Act is susceptible to an interpretation that is fully consistent with all WTO obligations of the United States and, in fact, has been so interpreted to date, there is no requirement under Article XVI:4 of the Agreement Establishing the WTO that the United States change that law.

(b) General approach of the Panel

6.17 From the above, it appears to the Panel that the two parties address the WTO-compatibility of the 1916 Act through approaches that are diametrically opposed. Japan, basing its arguments on the definition of "dumping" found in Article VI:1 of the GATT 1994, seems to be of the view that any law which targets "dumping" within the meaning of Article VI is a "trade" law and is therefore subject to the relevant WTO disciplines. The approach of the United States, on the contrary, seems to be that the disciplines of Article VI of the GATT 1994 apply only to the extent that a law purports to address "injurious dumping" through the imposition of duties. If what the law targets is not "injurious dumping" within the meaning of Article VI of the GATT 1994, and if the measures imposed are not border measures in the form of anti-dumping duties, the WTO disciplines on anti-dumping do not apply to it.

6.18 On the basis of the arguments developed by the parties, the Panel considers that it needs to approach the matter before it as follows.<sup>435</sup>

6.19 First, since we are called to determine the compatibility of a law of the United States with the WTO obligations of that Member, we must determine how we should consider that law and its "surrounding", i.e. the circumstances of its enactment (including the legislative history)<sup>436</sup> and the

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<sup>435</sup> We note that Japan referred to the negative trade impact of the 1916 Act, in particular the "chilling effect" it has on exports from Japan. However, Japan did not link its statement to the violation of any particular provision, nor to a non-violation claim. We therefore did not entertain it.

<sup>436</sup> Since the term "legislative history" is used throughout this report in relation to the preparation of US pieces of legislation, it will be given the meaning it has under US practice, i.e. "The background and events, including committee reports, hearings, and floor debates, leading up to the enactment of a law." Black's Law Dictionary, 6<sup>th</sup> Ed. (1990), p. 900.

subsequent interpretation(s) by the judiciary branch of the US government. This is in our view important since both parties have substantially discussed the role of the Panel in that respect. How we consider judicial interpretation, as evidence of the meaning given to the terms of a legal text, may affect the way we should understand the terms of the 1916 Act.

6.20 Second, we should proceed to address the issue whether we review the 1916 Act under Article VI of the GATT 1994 and the Anti-Dumping Agreement or under Article III:4 of the GATT 1994 first, or if we review it under either provision or agreement at all. The reason for this is that, while the 1916 Act addresses transnational price discrimination, it imposes internal measures. Article VI of the GATT 1994 and the Anti-Dumping Agreement relate to actions by Members *vis-à-vis* a particular practice whereas Article III:4 ensures that foreign products, once imported, are not subject to less favourable treatment than domestic products. We believe that it falls within our competence and duty to determine the applicability of Article III:4 of the GATT 1994 on the one hand and Article VI and the Anti-Dumping Agreement on the other hand as part of our review of the compatibility of the 1916 Act under the provision(s) found applicable, without prejudice to judicial economy.

6.21 On the basis of our conclusions, we shall address the compatibility of the 1916 Act under Article III:4 and/or Article VI of GATT 1994 and the Anti-Dumping Agreement to the extent necessary to assist the WTO Dispute Settlement Body<sup>437</sup> in making its recommendations. We should do this having first dealt with the "jurisdictional" argument of the United States according to which the Panel cannot review the 1916 Act as such under Article VI and the Anti-Dumping Agreement. We will also consider the defence of the United States based on the alleged "mandatory/non-mandatory" nature of the 1916 Act. If we proceed with the analysis of Article VI of the GATT 1994 and the Anti-Dumping Agreement, we shall consider the scope of our jurisdiction under those provisions. We shall also address the relationship between Article VI and the Anti-Dumping Agreement and how this relationship should affect the findings we shall make.

6.22 Once this is done, we may also consider the claims of Japan under Article XI of the GATT 1994, and Articles XVI:4 of the Agreement Establishing the WTO and 18.4 of the Anti-Dumping Agreement.

6.23 However, before reviewing the substantive issues of the case, we will address the procedural issues raised by the parties in the course of the proceedings.

(c) Burden of proof

6.24 We recall the Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*,<sup>438</sup> which stated that:

"the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

6.25 Applying this rule to the factual evidence submitted in the present case, Japan, as the complainant, should adduce sufficient evidence to raise a *prima facie* case that each of its claims has merit. If it were to do so, it would then be for the United States to adduce sufficient evidence to rebut that *prima facie* case. If the United States were to assert the affirmative of a particular defence, it would bear the burden of proving it. This rule however is only applicable to determine whether and

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<sup>437</sup> Hereinafter also referred to as the "DSB".

<sup>438</sup> Adopted on 23 May 1997, WT/DS33/AB/R, p. 14.

when a party bears the burden of proof. Once both parties have submitted evidence meeting those requirements, it is up to the Panel to weigh the evidence as a whole. In cases where the evidence as a whole regarding a particular claim or defence remains in equipoise, the issue must be decided against the party bearing the burden of proof on that claim or defence.

6.26 With respect to the interpretation of the covered agreements, the Panel will be aided by the arguments of the parties but will not be bound by them. Pursuant to Article 3.2 of the DSU, our decision on such matters must be in accord with the rules of treaty interpretation applicable to the WTO.

### **3. Relationship of this case with the EC complaint**

6.27 The subject matter of the present case is basically the same as that of the case on *United States – Anti-Dumping Act of 1916*, complaint by the EC (WT/DS136), and some of the issues that have to be addressed by the Panel are largely similar. However, the claims and arguments made by Japan and the arguments developed by the United States in reply in the present case are sometimes quite different from the claims and arguments of the European Communities and the arguments submitted by the United States in WT/DS136. We also recall that, even though this Panel is composed of the same members as the panel which addressed the EC complaint, the two panels are procedurally distinct. As a matter of fact, the proceedings initiated by Japan started several months after the beginning of the case initiated by the EC and none of the parties requested that the panels harmonise their timetables or hold concurrent deliberations in the two procedures (WT/DS136 and WT/DS162). The United States objected to concurrent deliberations by the two panels and the European Communities was not in favour of delaying the proceedings in WT/DS136, which concurrent deliberations would have resulted in. In such a context, the panel in the EC complaint considered that it had to conduct its review independently from the present case initiated by Japan, both in terms of procedure and of analysis of the substantive issues before it.

6.28 The same reasoning should apply to this case. Consequently, each case has to be decided on the basis of the claims and arguments submitted by the parties in that specific case. This also implies that our reasoning on a similar issue may sometimes be different, depending on the arguments developed by the parties. We note, *inter alia*, that since the defence of the United States has, in our opinion, evolved between the two cases, this Panel had to consider aspects that the panel in WT/DS136 did not have to consider and it would not be consistent with the obligation of the two panels to separately conduct their examination of the 1916 Act to review the findings of the panel in WT/DS136 on the basis of the arguments raised in this case, and *vice-versa*. However, whenever the claims and arguments of the parties raise issues identical to those addressed by the panel in WT/DS136, we will apply the same reasoning as has been applied by the panel in WT/DS136.

## **B. PRELIMINARY ISSUES**

### **1. Request for enhanced third party rights by the European Communities**

6.29 The European Communities reserved its third party rights in this case and made both a written submission and an oral presentation to this Panel at our first substantive meeting. On 25 August 1999, the EC also requested enhanced third party rights so as to allow it to fully participate in the proceedings, that is to be present throughout both substantive meetings of the Panel and to be able to make a submission on each occasion. The EC recalled that a similar decision had been taken in the case on *European Communities – Measures Concerning Meat and Meat Products ("Hormones")*.<sup>439</sup> In that case, the Appellate Body found that "Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant this opportunity [...] we believe that this discussion falls within

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<sup>439</sup> Adopted on 13 February 1998, WT/DS26/R (complaint by the United States); WT/DS48/R (complaint by Canada), hereinafter the "*EC – Hormones*" case.

the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law."

6.30 Japan informed the Panel that it shared the concern of the European Communities and accepted its request for enhanced third party rights. In turn, Japan requested access to the documents exchanged by the parties in WT/DS136 and the right to attend the second substantive meeting of the panel in that case. The United States strongly objected to the request of the EC. In the opinion of the United States, enhanced third party rights were not necessary in order to obtain access to the submissions of the parties. In the *EC - Hormones* case, the panels had granted enhanced third party rights essentially because they intended to conduct concurrent deliberations in the case initiated by the United States and in the case initiated by Canada. The United States mentioned that it would not support concurrent deliberations in this case and that it could not agree to a request of which the apparent purpose was to provide the third party with an opportunity to make an additional submission in relation to its own panel process.

6.31 On 13 September 1999, the Panel, through its Chairman, informed the parties and the European Communities that it could not accede to the request of the EC. The Panel reserved its right to reconsider the issue in light of subsequent events and informed the parties and the European Communities that it would address the matter in detail in its findings.

6.32 The Panel carefully considered the arguments raised by the parties. While the DSU does not provide for enhanced third party rights, neither Article 10 of the DSU nor any other provision of the DSU prohibits panels from granting third party rights beyond those expressly mentioned in Article 10. We also note that Article 9.3 of the DSU, which deals with situations where more than one panel is established to examine complaints related to the same matter, does not address the question of enhanced participation of third parties. Finally, we recall that the Appellate Body in the *EC - Hormones* case confirmed that granting enhanced third party rights was part of the discretion of panels under Article 12.1 of the DSU.<sup>440</sup>

6.33 However, we note that the DSU differentiates in terms of rights between main parties and third parties and that this principle should be respected in order to keep within the spirit of the DSU in that respect. Enhanced third party rights have so far been granted for specific reasons only. In the *EC - Hormones* case, like in this case and the case initiated by the European Communities (WT/DS136), the two panels were composed of the same panelists and dealt with the same matter. While these elements appeared to play a significant role in the decisions taken by the panels and in their confirmation by the Appellate Body, we consider that they are not decisive. Otherwise, enhanced third party rights would have to be granted in almost all cases where the same matter is subject to two or more complaints with the same panel composition.<sup>441</sup> We note that particular circumstances existed in the *EC - Hormones* case which certainly contributed to the decisions of the panels to review the two cases concurrently, such as their highly technical and factually intensive nature, as well as the fact that the panels had decided to hold one single meeting with the parties and the experts consulted pursuant to Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures. These decisions were largely based on practical reasons and due process had to be preserved. We conclude from the reports in the *EC - Hormones* case that enhanced third party rights were granted primarily because of the specific circumstances.

6.34 We find that no similar circumstances exist in the present matter, which does not involve the consideration of complex technical facts or scientific evidence. Moreover, none of the parties requested that the panels harmonise their timetables or hold concurrent deliberations in the two

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<sup>440</sup> *Op. Cit.*, para. 154.

<sup>441</sup> Our remark is based on our understanding of the current state of the WTO practice. It is without prejudice to the question whether enhanced third party rights would be advisable or not in general.

procedures (WT/DS136 and WT/DS162). In fact, the United States objected to concurrent deliberations.

6.35 We therefore find that there was no reason to grant enhanced third party rights to the European Communities in these proceedings.

## **2. Context in which the 1916 Act should be examined by the Panel**

### **(a) Issue before the Panel**

6.36 We note that Japan contests the compatibility of the 1916 Act as such – not of particular instances of application – with certain provisions of the WTO Agreement. While it is clear from the terms of Article 3.2 of the DSU that it falls within the competence of the Panel to "clarify the existing provisions of [the covered agreements] in accordance with customary rules of interpretation of public international law", the DSU does not expressly provide how panels should address domestic legislation. Article 11 of the DSU only specifies that panels "should make [...] an objective assessment of the facts of the case". However, both Article 3.2 of the DSU and the practice of the Appellate Body make it clear that we should, whenever appropriate, take into consideration the practice of international tribunals in this respect.

6.37 This case has an additional dimension. Although panels often have to address domestic laws, in the present case we are called upon to review the consistency of a law which was drafted more than eighty years ago, and the historical, cultural, legal and economic context of the time undoubtedly influenced its terms. We also note that the parties seem to have diverging views regarding the weight which the Panel should give to the court decisions relating to that law.

6.38 Furthermore, the 1916 Act was seldom applied since its enactment. It is the understanding of the Panel, based on the information provided by the parties, that no criminal case was ever prosecuted under the 1916 Act and that, until the early 1970's, there was only one reported court decision based on the civil procedure provided for in the 1916 Act.<sup>442</sup> Since 1975, there has been only a limited number of judicial interpretations of the provisions of the 1916 Act. All these interpretations come from US circuit courts of appeals or US district courts.<sup>443</sup> No claim under the 1916 Act was ever expressly reviewed by the Supreme Court of the United States.<sup>444</sup>

6.39 Therefore, we find it appropriate to clarify from the outset how we shall take into consideration the text of the 1916 Act itself, the historical context of its enactment (including the legislative history) and its subsequent interpretation as it results from the US case-law and any other relevant element of information.

(b) How should the Panel consider the text of the 1916 Act, the context of its enactment, the case-law relating to it and other relevant pieces of information?

### *(i) Arguments of the parties and approach of the Panel*

6.40 Japan claims that the text of the 1916 Act is unambiguous. Thus, the Panel's analysis should begin and end with the text. The Panel should not defer to the characterisation of the 1916 Act by the

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<sup>442</sup> *H. Wagner and Adler Co. v. Mali*, F.2d 666 (2d Cir. 1935).

<sup>443</sup> Federal courts (district courts and circuit courts of appeals) are competent to review cases brought under the 1916 Act, under the supervision of the Supreme Court of the United States (hereinafter also the "Supreme Court").

<sup>444</sup> In *United States v. Cooper Corporation* (312 U.S. 600, 1941), hereinafter the "*Cooper*" case, p. 745, the Supreme Court made a reference to the 1916 Act as "supplemental" to the Sherman Act. This decision is discussed further in section VI.C.2(d)(ii) below.

United States as an "anti-trust" remedy. The existence and characteristics of the 1916 Act are questions of fact that are "left to the discretion of a panel as a trier of facts". The term "examination", as used by the Appellate Body in its report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*<sup>445</sup> encompasses all the aspects of the "objective assessment of the matter" provided for in Article 11 of the DSU. Thus, the Panel should not accept the US judicial interpretation of the 1916 Act as binding.

6.41 Japan also considers that the historical context and the legislative history confirm the textual interpretation of the 1916 Act.

6.42 Moreover, Japan claims that official statements by members of the executive branch of the US government contradict the position taken by the United States in the present case. Japan refers to letters of US officials to congressmen or statements before the US Congress that the 1916 Act was "grandfathered" under GATT 1947 as "existing legislation" within the meaning of the Protocol of Provisional Application. For Japan these statements demonstrate that, for years, the United States has viewed the 1916 Act as GATT-inconsistent and requiring grandfathering.

6.43 Finally, Japan refers to a 1995 document of the US Department of Justice and the US Federal Trade Commission, called *Antitrust Enforcement Guidelines for International Operations*,<sup>446</sup> which states that "the 1916 Act is not an antitrust statute, it is a trade statute that creates a private claim against importers". This document shows that the two US government agencies that enforce US anti-trust law agree that the 1916 Act is not an anti-trust law, but an anti-dumping law. Japan also refers to a compilation prepared for the Committee on Ways and Means of the US House of Representatives, which includes the 1916 Act as a trade statute.

6.44 The United States argues that it is an accepted principle of international law that municipal law is a fact to be proven before an international tribunal. In *India – Patent (US)*, the Appellate Body affirmed the panel's review of India's domestic law as a question of fact. It was proper for the panel to conduct an extensive review of the Indian law at issue to determine whether India had met its obligations under the TRIPS Agreement. The Appellate Body had also approved the fact that the panel had not interpreted Indian law as such but, rather, had reviewed that law to determine whether it was WTO-consistent. This Panel must determine the fact of the 1916 Act under US law, which includes US judicial decisions interpreting the 1916 Act. If the Panel were to interpret the 1916 Act, it would run the risk of adopting an interpretation that does not match the true application of the law in the United States. The Panel should deem the case-law interpreting the 1916 Act as dispositive for purposes of determining the fact of US law. The role of the Panel is to assess the facts and then determine their conformity with the relevant WTO agreements, which generally entails interpreting the scope and applicability of those agreements to the facts. The proper interpretation of the 1916 Act is a question of fact to be established, as it is an accepted principle of international law that municipal law is a fact to be proven before international tribunals. The Panel must review the current weight of judicial authority and decide for itself whether the 1916 Act is inconsistent with any WTO obligations. However, it is not the role of the Panel to agree or disagree with any US judicial decision relevant to the interpretation of the 1916 Act.

6.45 The United States also considers that statements of officials of the executive branch of government of the United States cited by Japan deserve no weight in the Panel's consideration for two reasons. First, statements as to the GATT consistency of an amendment to the 1916 Act are not relevant in this case because the amendments were never enacted. Second, the United States considers that the notifications to the GATT of its "grandfathered" laws (document L/2375/Add.1), which does not include the 1916 Act, is evidence that the official view of the United States that the 1916 Act was

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<sup>445</sup> Adopted on 16 January 1998, WT/DS50/AB/R, hereinafter "*India – Patent (US)*", paras. 66-67.

<sup>446</sup> April 1995, available on <http://www.usdoj.gov/atr/public/guidelines/internat.txt>.

not incompatible with Part II of the GATT 1947. Thus, the statements referred to by Japan are mistaken as a matter of fact.

6.46 Finally, the United States mentions that the *Antitrust Enforcement Guidelines for International Operations* are not regulations with the force of law, but rather are intended to provide anti-trust guidance to businesses engaged in international operations on questions that relate specifically to the relevant agencies' international enforcement policy. The United States also points at its codification system, which classifies the 1916 Act as a text dealing with unfair competition, and at a compilation prepared for the Committee on the Judiciary, which lists the 1916 Act as one of the US anti-trust laws.

6.47 The Panel is of the view that the understanding of a law, the WTO-compatibility of which has to be assessed, begins with an analysis of the terms of that law. However, we consider that we should not limit ourselves to an analysis of the text of the 1916 Act in isolation from its interpretation by US courts or other US authorities, even if we were to find that text to be clear on its face. If we were to do so, we might develop an understanding of that law different from the way it is actually understood and applied by the US authorities. This would be contrary to our obligation to make an objective assessment of the facts of the case, pursuant to Article 11 of the DSU. Therefore, we must look at all the aspects of the domestic law of the United States that are relevant for our understanding of the 1916 Act. However, looking at all the relevant aspects of the domestic law of a Member may raise some methodological difficulties, such as how much deference must be paid to that Member's characterisation of its legislation. In that context, we will determine first how to deal with that aspect of the examination of a domestic law and how we should consider the case-law related to it, since courts are, *inter alia*, responsible for interpreting the law. Moreover, in light of the fact that the law at issue was enacted more than eighty years ago and not regularly invoked, and since the parties have referred to other elements such as the historical context, the legislative history and subsequent declarations of US authorities made in relation to the 1916 Act, we shall also explain how we will consider them.

(ii) *Consideration by panels of domestic law in general*

6.48 We note that in *India – Patent(US)*, the Appellate Body addressed in some detail the issue of how panels should consider municipal law. The Appellate Body stated that:

"In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of fact and may provide evidence of State practice."<sup>447</sup>

"It is clear that the examination of the relevant aspects of Indian municipal law [...] is essential to determining whether India has complied with its obligations under Article 70.8(a) [of the TRIPS Agreement]. [...] To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This, clearly, cannot be so."<sup>448</sup>

6.49 The extent to which panels may examine the laws of Members was illustrated by the Appellate Body in the same report. Having to determine whether India provided for legal protection commensurate with the requirements of Article 70.8 of the TRIPS Agreement, the Appellate Body asked itself the question of "what constitutes [...] a sound legal basis in Indian law".<sup>449</sup> Moreover, it

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<sup>447</sup> *Op. Cit.*, para. 65. See also M.N. Shaw, *International Law* (1995), at p. 106, mentioning that domestic law "can be utilised as evidence of compliance or non-compliance with international obligations".

<sup>448</sup> *Ibid.*, para. 66.

<sup>449</sup> *Ibid.*, para. 59.

agreed with the conclusion of the panel that "the current administrative practice [of India, based on so-called "administrative instructions" from the government] creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patent Act."<sup>450</sup> The Appellate Body also agreed that "it was necessary for the Panel in this case to seek a detailed understanding of the *operation* of the Patent Act as it relates to the 'administrative instructions' in order to assess whether India had complied with Article 70.8(a) [of the TRIPS Agreement]."<sup>451</sup>

6.50 Thus, our understanding of the term "examination" as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.<sup>452</sup>

(iii) *Consideration of the case-law relating to the 1916 Act*

6.51 In the present case, unlike India in the *India – Patent (US)* case, the United States does not claim that some administrative interpretation determines the meaning of the 1916 Act. The situation is different to the extent that both parties rely, in order to support their claims, on a number of judgements by US courts which have applied and interpreted the 1916 Act since the 1970's.<sup>453</sup> In many Members, final judicial decisions regarding the interpretation of a given law may not be contested any further, whereas administrative interpretations of a law may generally be overruled by a

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<sup>450</sup> *Ibid.*, para. 63, Panel Report, para. 7.35.

<sup>451</sup> *Ibid.*, para. 68 (emphasis added).

<sup>452</sup> This is evidenced by the examples used by the Appellate Body (*Ibid.*, para. 67):

"Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930* [footnote omitted], the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the difference between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947."

<sup>453</sup> The following – final or interlocutory - court decisions relate to claims made under the 1916 Act: *H. Wagner and Adler Co. v. Mali, Op. Cit.*; *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese Electronic Products I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2<sup>nd</sup> Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re Japanese Electronic Products III*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*"); *Wheeling-Pittsburgh Steel Corporation v. Mitsui Co.*, 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

domestic judge called upon to apply that law. However, an administrative interpretation will normally provide one single interpretation. In contrast, depending on the judicial structure of a Member, judicial interpretations may emanate from several courts positioned at different levels in the judicial order. The diversity of the sources of the case-law may make it more difficult to assess the respective value of the judgements of which that case-law is composed.

6.52 We recall that the International Court of Justice, in the *Elettronica Sicula S.p.A (ELSI)* case, referred to the judgement of the Permanent Court of International Justice<sup>454</sup> in the *Brazilian Loans* case – to which the United States also refers in its submissions - and noted that:

"Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)."<sup>455</sup>

We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the *Brazilian Loans* case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from "weigh[ing] the jurisprudence of municipal [US] courts" if it is "uncertain or divided". This would not require us to develop our own independent interpretation of US law, but simply to select among the relevant judgements the interpretation most in conformity with the US law, as necessary in order to resolve the matter before us.<sup>456</sup>

6.53 We note that the 1916 Act is applied by US federal courts. Interpretations by the Supreme Court of the United States prevail over interpretations made by the courts of appeals of the various circuits. Interpretations by courts of appeals, in turn, prevail over interpretations by district courts, but only within the same circuit.<sup>457</sup>

6.54 We understand from the submissions of the parties that the Supreme Court has yet to address the interpretation of specific provisions of the 1916 Act. It mentioned the 1916 Act in only one of its judgements.<sup>458</sup> Thus, the case-law submitted by the parties that would allow us to understand the actual meaning of the 1916 Act today essentially comes from district courts and courts of appeals of various circuits of the US federal judicial system. We also note that the parties in their submissions have relied on different judgments, which they claim support their interpretations of the 1916 Act.

6.55 We will respect the formal hierarchy of court decisions in the US federal system to the extent that it is applicable. In that context, we should allow a circuit court of appeals decision to prevail over

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<sup>454</sup> Hereinafter "PCIJ".

<sup>455</sup> *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), ICJ Reports 1989, p. 15, at p.47, para. 62.

<sup>456</sup> We do not consider that this would be engaging into *interpreting* US law, with the risks highlighted by the United States in its submissions. Our approach is consistent with the reasoning of the PCIJ in the *Brazilian Loans* case, where it stated that:

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case." (PCIJ, Series A, Nos. 20/21, p. 124)

<sup>457</sup> A description of the organization of the US federal judicial system is found in para. 2.14 and footnote 20 above.

<sup>458</sup> *Cooper, Op. Cit.*

a district court decision. However, applying such a formal approach may prove insufficient in some instances, for example when the decisions to be compared come from different circuits.<sup>459</sup> Therefore, in all instances, we shall first ascertain whether the judgements subject to our comparison address (i) the same issue, and (ii) at the same level of detail. In other words, we should always make sure that a comparison can reasonably be made, both in terms of fact and in terms of the legal issues addressed, before giving preference to the interpretation contained in one judgement compared with the interpretation contained in another judgement of a court belonging to another circuit.

6.56 Moreover, we should normally, with respect to a given issue, allocate more weight to a final judgement than to an interim or "interlocutory" decision, since the latter does not definitively determine a cause of action, but only "decides some intervening matter pertaining to the cause."<sup>460</sup> However, we should also determine which argumentation is more convincing. Again, we will not substitute our judgement for that of US courts. Our analysis should be based not only on the quality of the reasoning, but also on what we would perceive to be in line with the dominant interpretation, "paying utmost regard to the decision of the municipal courts". This is consistent with the US court practice that if a precedent is not binding, the weight afforded to it will depend on the persuasive value of the reasoning in the decision.

6.57 If, after having applied the above methodology, we could not reach certainty as to the most appropriate court interpretation, i.e. if the evidence remains in equipoise, we shall follow the interpretation that favours the party against which the claim has been made, considering that the claimant did not convincingly support its claim.

6.58 Finally, we also consider that we should not accept at face value the use of certain terms such as "dumping", "anti-dumping", "anti-trust", "protectionism" or "predatory pricing" in court decisions, in other administrative documents or in academic works, when those terms are not further substantiated. We recall that the mere description or categorisation of a measure by a Member, be it internally or before a panel, should not be considered as a decisive factor for the application of the WTO Agreement to that measure.<sup>461</sup> In the present case, such descriptions or categorisations may be valid under US law but not necessarily in the WTO context. Likewise, having regard to the importance of the legislative history in the interpretation of statutes by the US judiciary branch, terms used in 1916 will have to be interpreted within the meaning they had at the time, not in light of the meaning they have today, unless we have evidence that US courts have done so.

(iv) *Consideration of the historical context and other evidence of the meaning of the 1916 Act*

6.59 The historical context of the 1916 Act encompasses several elements. The first one, to which US courts also extensively refer in order to determine "the intent of Congress", is the legislative history as it appears, *inter alia*, from the Congressional Records. Since we have to examine the 1916 Act and understand its actual scope and operation, we should, as US courts do, pay attention to the legislative history of that statute, as appropriate. The political and economic context as it emerges from public declarations of the time or studies of the period may also be relevant. When considering

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<sup>459</sup> From the replies of the United States to our questions, we understand that the *stare decisis* effect which can be attached to precedents in common law does not apply between court decisions handed down in different circuits.

<sup>460</sup> See *Black's Law Dictionary* (1990), p. 815.

<sup>461</sup> See, Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132 (hereinafter "*EC – Parts and Components*"), paras. 5.6 and 5.7. In para. 5.7, the panel stated that:

"if the description or categorization of a charge under the domestic law of a contracting party were to provide the required "connection with importation", contracting parties could determine themselves which of these provisions would apply to their charges."

this evidence, we should not lose sight of the degree of development of anti-trust and trade law concepts at the time of the enactment of the 1916 Act.

6.60 Regarding the statements of US officials referred to by Japan,<sup>462</sup> we note that Japan considers them as showing that for many US executive branch officials, including officials of the current Administration, the 1916 Act could be maintained under GATT 1947 only because it was "grandfathered." We also note that the United States considers that these statements do not represent the official position of the United States and are mistaken as a matter of fact. The 1916 Act was not included in the survey of existing mandatory legislation not in conformity with part II of the GATT 1947<sup>463</sup> because the 1916 Act was GATT-legal and therefore did not require "grandfathering".

6.61 The main question is whether these statements should be treated as admissions of facts or of the legal nature of the 1916 Act under the WTO. We note that the factual accuracy of the statements mentioned in this case has been put in doubt by the United States before the Panel. While this is not sufficient to reject those statements out of hand, we are reluctant to consider them as "admissions" of the United States without prior verification of the context in which they were made.

6.62 For these reasons, we consider that these statements should be used only to the extent that they confirm other established evidence.

6.63 Japan and the United States have also referred to compilations prepared for committees of the US Congress. Japan refers to the *Overview and Compilation of US Trade Statutes*, prepared for the House Committee on Ways and Means. The United States considers this document to be an unofficial compilation which has not been officially approved by that committee and may not reflect the views of its members. As a result, it should be given less weight than a compilation made for the use of the Committee on the Judiciary of the US House of Representatives, which is the committee also responsible for the revision and codification of the statutes of the United States under Rule 10 of the Rules of the US House of Representatives. This compilation confirms that the 1916 Act is an anti-trust statute. We consider these documents to be informative regarding the opinions of the authorities of the United States as to the classification of the 1916 Act as an anti-trust or as an anti-dumping statute. However, as such, the codification of the 1916 Act or its inclusion in a compilation for a committee of the US Congress cannot, in our view, affect our determination of the compatibility of the 1916 Act with the WTO provisions.<sup>464</sup>

6.64 With regard to the 1995 *Antitrust Enforcement Guidelines for International Operations* of the US Department of Justice and the US Federal Trade Commission referred to by Japan, we note their role as "antitrust guidance to business engaged in international operations". We therefore consider that they are indicative of the position of a particular department of the executive branch of the US government. Moreover, to the extent that these guidelines do not substantiate the reasons why the 1916 Act should be considered as a trade statute and, in fact, mention that "its subject-matter is closely related to the anti-trust rules regarding predation", we consider that we should refer to them only as a confirmation of other established evidence, if necessary.

6.65 Having clarified how we shall consider the materials before us in assessing the WTO-compatibility of the 1916 Act, we now proceed to discuss the preliminary issue of the

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<sup>462</sup> The arguments of the parties on this issue are reported in section III:D.2.(c) above.

<sup>463</sup> See GATT Doc. L/2375/Add.1 of 19 March 1965.

<sup>464</sup> See Panel Report on *EC – Parts and Components*, *Op. Cit.*, para. 5.7. That panel addressed the description or categorisation of a charge under domestic law and concluded that if the description or categorisation of a charge under the domestic law of a contracting party were to provide the required "connection with importation", contracting parties could determine themselves which of these provisions would apply to their charges. With such an interpretation the basic objective underlying Articles II and III could not be achieved. We consider that the same reasoning applies with respect to the application of Article VI.

applicability of Articles III:4 of the GATT 1994, and of Article VI of the GATT 1994 and the Anti-Dumping Agreement.

**3. Relationship between, on the one hand, Article III of the GATT 1994 and, on the other hand, Article VI of the GATT 1994 and the Anti-Dumping Agreement**

(a) Issue before the Panel

6.66 Japan claims that the 1916 Act violates Article VI of the GATT 1994 and certain provisions of the Anti-Dumping Agreement. It also claims that the 1916 Act violates Article III:4 of the GATT 1994.<sup>465</sup> The United States claims that the 1916 Act is not subject to the disciplines of Article VI essentially because it is not aimed at counteracting injurious dumping and because it does not impose border measures in the form of anti-dumping duties.

6.67 Article III:4, first sentence, of the GATT 1994 provides in relevant parts as follows:

"The products of the territory of any contracting party imported into the territory of another contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

6.68 Article VI provides in relevant parts as follows:

"1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the product, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. [...]

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such product. [...]"

6.69 The arguments of the parties raise the question whether the 1916 Act could, by its nature, fall within the scope of Article VI only, of Article III:4 only, or partly or wholly within the scope of both. This question is prompted by the positions taken by the parties on this issue. According to Japan, a measure found inconsistent with Article VI can also violate Article III:4 by regulating imported products under a separate, less favourable regime than applicable to domestic products. For the United States, a law falls within the scope of Article III:4 when it can be characterised as an "internal" law. Since the 1916 Act does not provide for border adjustment measures, such as the imposition of duties on an imported product, it is an "internal" law subject to Article III:4 of the GATT 1994.

6.70 It seems to us that Articles III and VI are based on different premises: Article III (entitled "National Treatment") operates on the basis of a comparison between the treatment granted to domestic and imported products respectively, once the latter have been cleared through customs. Thus, Article III:4 applies to measures imposed by Members internally, irrespective of the objective of the measures. In contrast, Article VI does not compare the treatment of domestic and imported products, since it applies only to imported goods. The basis for the applicability of Article VI to the law of a Member does not seem to be the type of *measures* which is imposed by that Member, since other

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<sup>465</sup> Japan also claims a violation of Article XI of the GATT 1994. However, we find it appropriate to address the relationship of Article XI with Article VI and Article III:4 once we have dealt with the relationship between Article III:4 and Article VI.

reasons than dumping may lead to the imposition of duties, but the type of trade practice *at the origin* of the measure.

6.71 The Panel thus is of the opinion that the *nature* of the 1916 Act might be such as to affect the relevance of the claims made by Japan under Article III:4 or Article VI. Irrespective of the question of judicial economy, the Panel considers that it has the "competence of its competence", i.e. that it may determine whether a given claim can be addressed, irrespective of the positions expressed by the parties on the issue.<sup>466</sup> Japan, in its submissions to the Panel, addressed first its claims based on Article VI. However, the Panel should not be obliged to address those claims if it were to find that Article VI is not applicable because the *qualification juridique* made by Japan is not correct.<sup>467</sup> On the other hand, the Panel may not have to address Japan's claims under Article III:4 if it were to find that the 1916 Act falls exclusively within the scope of Article VI.

6.72 Therefore, it would be relevant to consider whether Article III:4 or Article VI of GATT 1994 - or both – are *applicable* to the 1916 Act, irrespective of whether the 1916 Act is *compatible* with those provisions or not.

(b) Approach to be followed by the Panel

6.73 The issue whether the 1916 Act should be addressed under Article III:4 only, Article VI only, or both, is not obvious from the outset. In our opinion, reaching conclusions on this matter requires that we address the substance of the case, since one of the issues before us is whether the 1916 Act can be subject to the disciplines of Article VI and the Anti-Dumping Agreement. It is therefore appropriate to address this question as part of the substantive issues of this case, but separately from the actual WTO-compatibility of the 1916 Act. Based on our findings regarding the applicability of Articles III:4 and VI to the 1916 Act, we shall proceed to review the compatibility of that law with either provision or both.

6.74 However, even though we do not reach yet any conclusion on the applicability of either provision, we need to decide at this stage whether to begin our analysis with Article VI or Article III:4.

6.75 It is a general principle of international law recalled by the Appellate Body that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it.<sup>468</sup> As a result, one way to reply to the question above is to determine which article more specifically addresses the 1916 Act. We agree that this will require us to touch upon the substance of the case, but we recall that this test is used here for purely procedural reasons, that is to determine the order of our review. Such a *prima facie* analysis is, of course, without prejudice to the final findings on the issue of the applicability of Articles III:4 and VI, to be reached after a more detailed review of the scope of each provision, as necessary.

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<sup>466</sup> This is different from exercising judicial economy, which is based on the necessity to address a claim in light of findings made on another claim. It is also different from determining whether a claim is properly before the Panel on the basis of the request for establishment of a panel. It is a question of knowing whether the Panel can rule on two claims which, on the basis of a first consideration of the facts and arguments before it, might be mutually exclusive.

<sup>467</sup> For instance, if a complainant were to claim a violation of Article XI of GATT 1994 in relation to a small tariff increase, the panel called upon to address the issue may be entitled to reject the claim on the ground that the measure at issue is not a quantitative restriction within the meaning of Article XI, without addressing any further the claim and the related arguments.

<sup>468</sup> See Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R (hereinafter "*European Communities – Bananas*"), para. 204, and PCIJ decision in the *Serbian Loans* case (1929), where the PCIJ stated that "the special words, according to elementary principles of interpretation, control the general expression" (PCIJ, Series A, No. 20/21, at p. 30). See also György Haraszti, *Some Fundamental Problems of the Law of Treaties* (1973), at p. 191.

6.76 We note that the parties agree that the 1916 Act deals with transnational price discrimination. We also note that dumping is a form of transnational price discrimination. However, the United States argues that other requirements under the 1916 Act, such as the fact that it does not lead to the imposition of border measures, make that law fall outside the scope of Article VI and into the realm of Article III:4. We recall that Article III:4 states that imported products:

"shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

It is not *a priori* impossible to determine that damages, fines or imprisonment, which are imposed on persons, may accord less favourable treatment to imported products with respect to their internal sale, offering for sale, purchase, transportation, distribution or use. This was done by previous panels.<sup>469</sup> However, a preliminary examination of the scope of application of Article III:4 (i.e. internal sale, offering for sale, purchase, transportation, distribution or use) would tend to show that the terms of Article III:4 are less specific than those of Article VI when it comes to the notion of transnational price discrimination. Indeed, the 1916 Act refers to internal sales, but such sales relate to imported products and the application of the 1916 Act is based on an international price difference, like Article VI. We also consider that the main object of the 1916 Act is to counteract a certain form of price discrimination, and that the sanctions imposed are, in that respect, the instruments of that object, not the object itself.

6.77 In application of the principle recalled by the Appellate Body in *European Communities – Bananas* and by the Permanent Court of International Justice in the *Serbian Loans* case,<sup>470</sup> there seems to be reasons to reach the preliminary conclusion that we should review the applicability of Article VI to the 1916 Act first, as that article apparently applies to the facts at issue more specifically. This preliminary conclusion is based on our understanding of the arguments of the parties and on a preliminary review of the terms of Articles III:4 and VI.

6.78 Our preliminary conclusion does not address the question whether the 1916 Act could fall within the scope of both provisions. Should we determine that the 1916 Act actually falls within the scope of Article VI, we would continue with Japan's claims of violation of Article VI and the Anti-Dumping Agreement, as necessary to enable the DSB to make sufficiently precise recommendations and rulings. Once this part of our terms of reference has been addressed, we shall also decide whether pursuing our review with an analysis of the applicability of Article III:4 would be necessary to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance "in order to ensure effective resolution of disputes to the benefit of all Members."<sup>471</sup> If we do not find that the 1916 Act falls within the scope of Article VI of the GATT 1994, we will proceed to consider the applicability of Article III:4 to the 1916 Act and, if applicable, the compatibility of the 1916 Act with that provision.

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<sup>469</sup> See, e.g., Panel Report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36/345, para. 5.10. See also Panel Report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, which mentioned at para. 12 that:

"The selection of the word "affecting" [in Article III:4] would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market."

<sup>470</sup> See footnote 464 above.

<sup>471</sup> See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, para. 223.

6.79 Consequently, we proceed with a review of the applicability of Article VI to the 1916 Act. However, before doing that, we need to address the question of the relationship between Article VI and the Anti-Dumping Agreement. Indeed, Japan makes claims based concurrently on Article VI and the Anti-Dumping Agreement. The United States argues that the jurisdiction of the Panel under the Anti-Dumping Agreement is limited to situations where specific measures have been adopted; the Panel cannot review the conformity of a law as such under the Anti-Dumping Agreement. Moreover, the United States argues that the Panel cannot entertain claims based on Article VI independently from the Anti-Dumping Agreement. In other words, the United States argues that the Panel has no jurisdiction to review Japan's claims under either Article VI of the GATT 1994 or the Anti-Dumping Agreement.

#### **4. Relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement**

##### **(a) Issues before the Panel**

6.80 We note that Japan, in its request for establishment of a panel, states that the 1916 Act "is neither consistent with nor justified by the following relevant provisions:

[...]

##### **(2) Article VI of GATT 1994 and the Anti-Dumping Agreement, and in particular:**

- Article VI:2 of GATT 1994 and Article 18:1 of the Anti-Dumping Agreement which permit imposition of anti-dumping duties as the only possible remedies for dumping;
- Articles 1, 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement which stipulates necessary requirements for an anti-dumping duty to be applied only under the circumstances provided for in Article VI of GATT 1994."<sup>472</sup>

6.81 In its first submission, Japan has concurrently invoked the violation of Article VI of the GATT 1994 and of Articles 1, 2, 3, 4, 5, 9, 11 and 18.1 of the Anti-Dumping Agreement.

6.82 The United States has argued that, as demonstrated by the Appellate Body in *Guatemala – Cement*, the only matter that may be challenged under the Anti-Dumping Agreement are the three types of anti-dumping measures set forth in the Anti-Dumping Agreement (i.e. a definitive anti-dumping duty, acceptance of a price undertaking, or a provisional measure). Similarly, in light of the reasoning of the panel in *Brazil – Measures Affecting Dessicated Coconut*, which was affirmed by the Appellate Body, the Panel has no jurisdiction to decide a claim under Article VI because that article is not independently applicable to a dispute to which the Anti-Dumping Agreement is not applicable.

6.83 In our opinion, the fact that Japan has claimed a violation of Article VI in relation to a violation of certain provisions of the Anti-Dumping Agreement would seem to imply that the Panel is expected to make findings under both Article VI of the GATT 1994 and the Anti-Dumping Agreement. In that context, the arguments of the parties require the Panel to address the following issues:

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<sup>472</sup> WT/DS162/3.

- (i) what is the actual scope of the "jurisdiction" of the Panel under the Anti-Dumping Agreement and to what extent does that scope influence the Panel's "jurisdiction" under Article VI? And
- (ii) what is the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement in terms of the respective application of those provisions and of the findings to be made (including judicial economy)?

We will address these questions successively.

- (b) Jurisdiction of the Panel under Article VI of the GATT 1994 and the Anti-Dumping Agreement

6.84 We first consider the provisions of the Anti-Dumping Agreement relating to consultation and dispute settlement. Paragraphs 1 to 4 of Article 17 provide as follows:

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."

6.85 We first note that Article 17 of the Anti-Dumping Agreement does not replace the DSU as a coherent system of dispute settlement for that Agreement.<sup>473</sup> In this respect, the Appellate Body in *Guatemala – Cement* explained that "the rules and procedures of the DSU [...] apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17".<sup>474</sup>

6.86 We also note that nothing in the terms of either Article 17.2 or Article 17.3 limits the scope of possible consultations under the Anti-Dumping Agreement. The Appellate Body in *Guatemala – Cement* explained that Article 17.3 was not listed in as a special or additional provision in Appendix 2 of the DSU because "it provides legal basis for consultations to be requested by a complaining member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the Anti-Dumping Agreement to Articles XXII and XXIII of the GATT 1994, which serves as the basis for consultation and dispute settlement under the GATT 1994 [and] under most of the other agreements in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*".

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<sup>473</sup> *Op. Cit.*, para. 67.

<sup>474</sup> *Ibid.*, para. 64.

Thus, nothing in Articles 17.2 and 17.3 of the Anti-Dumping Agreement supports the view that consultations are limited to circumstances where certain measures have been adopted by the Member investigating dumping.

6.87 In our opinion, Article 17.4 deals with a particular situation under the Anti-Dumping Agreement, hence its status of a special or additional provision under the DSU. As stated by the Appellate Body in *Guatemala – Cement*:

"We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. The special or additional provisions listed in Appendix 2 of the DSU are designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU."<sup>475</sup>

6.88 This paragraph illustrates the function of Article 17.4. Article 17.4 deals with the particular question of challenging actions taken by anti-dumping authorities. However, there is nothing in that provision expressly limiting the scope of application of the DSU except in relation to the specific issue of Members' anti-dumping actions.

6.89 Our reading of Article 17.4 is not only confirmed by the immediate context of that provision, i.e. Article 17.1, 17.2 and 17.3, but also by other provisions of the Anti-Dumping Agreement. Article 18.4 provides that:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no 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."

We understand the term "to ensure, no later than the date of entry into force of the WTO Agreement" in Article 18.4 of the Anti-Dumping Agreement as requiring the conformity of Members' anti-dumping laws as of the date of entry into force of the WTO Agreement for those Members. Moreover, a Member's anti-dumping legislation must be compatible with the WTO Agreement continuously, whether that legislation is applied or not. If dispute settlement could be initiated in relation to some specific anti-dumping *action* only, i.e. if the conformity of a domestic anti-dumping law could only be reviewed when that law is applied, the provisions of Article 18.4 would be deprived of their meaning and useful effect. A Member could maintain a WTO-incompatible law in total impunity as long as none of the measures referred to in Article 17.4 is adopted. Even if, on the occasion of a review of a particular action, the law on which the action was based could be found to be WTO-incompatible, the interpretation advocated by the United States would still fail to give meaning and legal effect to the terms of Article 18.4 and would be contrary to the principle of effectiveness.<sup>476</sup> Moreover, Article 18.4 requires that *all necessary steps*, of a general or particular nature, be taken by Members to ensure the conformity of their laws. These terms would be redundant

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<sup>475</sup> Ibid., para. 66.

<sup>476</sup> See, e.g., Appellate Body Report on *Argentina – Safeguard Measures on Import of Footwear*, adopted on 12 January 2000, WT/DS121/AB/R, para. 88 and Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, page 23.

if the anti-dumping laws of Members only had to be WTO-consistent in specific instances of application.

6.90 As could already be noticed from the previous paragraphs, the interpretation of Article 17 of the Anti-Dumping Agreement by the Appellate Body confirms our view. The argument of the United States is essentially based on an interpretation of paragraph 79 of the Appellate Body Report in *Guatemala – Cement* taken out of its context.<sup>477</sup> The facts at issue in the *Guatemala – Cement* case were different from those before us. In that case, Mexico contested a specific investigation carried out by Guatemala against imports of Portland cement from Mexico. If one reads the reasoning of the Appellate Body in the factual context to which it pertains, it is not possible to draw the extensive conclusion suggested by the United States. The specific scope of the findings in that case is confirmed by the Appellate Body itself in the paragraph following the one quoted by the United States:

"80. For all of these reasons, we conclude that the Panel erred in finding that Mexico did not need to identify "specific measures at issue" in this dispute. We find that in disputes under the *Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations*, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU." (emphasis added)

Thus, the findings of the Appellate Body in *Guatemala-Cement* were limited to the taking of action in situations contemplated in Article 17.4. They could not be – and actually were not - intended to exclude the review of anti-dumping laws as such.

6.91 We therefore conclude that Article 17 of the Anti-Dumping Agreement does not prevent us from reviewing the conformity of laws as such under the Anti-Dumping Agreement, irrespective of whether the measures referred to in Article 17.4 have been adopted or not. The same applies, *a fortiori*, with respect to Article VI of the GATT 1994. In that respect, we consider that the findings of the panel and the Appellate Body in *Brazil – Desiccated Coconut* referred to by the United States are not applicable to this case, since those findings dealt with the question of the non-applicability of

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<sup>477</sup> Paragraph 79 of the Appellate Body report in the *Guatemala – Cement* case referred to by the United States reads as follows:

"79. Furthermore, Article 17.4 of the *Anti-Dumping Agreement* specifies the types of "measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measures at issue -- in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 -- and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement."

the Agreement on Subsidies and Countervailing Measures to existing measures or investigations initiated pursuant to applications made before the entry into force of that Agreement.<sup>478</sup>

(c) Relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement

6.92 Regarding the relationship between Article VI and the Anti-Dumping Agreement and, in particular, the question whether we could make findings regarding Article VI independently from the Anti-Dumping Agreement, we note that the issue addressed by the panel and the Appellate Body in *Brazil - Desiccated Coconut*, to which the United States refers, must be differentiated from the one before us. In *Brazil - Desiccated Coconut*, the question was one of application of Article VI of the GATT when the WTO Agreement on Subsidies and Countervailing Measures did not apply. In the present case, the issue is whether the Panel can make findings in relation to Article VI only or whether the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only.

6.93 We note that the panel in the *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*<sup>479</sup> case did not make findings under Article XVIII:11 of the GATT 1994 in isolation from the Understanding on Balance-of-Payments Provisions of the GATT 1994. Likewise, we have no intention to address Article VI in isolation from the Anti-Dumping Agreement. In the present case, the complainant has made claims based on the violation of provisions of Article VI and the Anti-Dumping Agreement. In our opinion, if the panel in *Brazil - Desiccated Coconut* confirmed that Article VI and the Agreement on Subsidies and Countervailing Measures were an "inseparable package of rights and obligations", this is because the solution proposed by the complainant would have led to apply Article VI in total disregard of the Agreement on Subsidies and Countervailing Measures. Such a solution cannot even be considered in our case. Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention,<sup>480</sup> the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an "inseparable package of rights and obligations" and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning.<sup>481</sup> However, this obligation does not prevent us from making findings in relation to Article VI only, as the panel did in its report on *India - Quantitative Restrictions*.

6.94 We conclude that we can make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*. However, the fact that Article VI and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines requires that we interpret each of the provisions invoked by Japan in its claims in

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<sup>478</sup> See Article 32.3 of the Agreement on Subsidies and Countervailing Measures.

<sup>479</sup> Adopted on 22 September 1999, WT/DS90/R (hereinafter "*India - Quantitative Restrictions*"), paras. 5.18-5.19. These findings were not modified by the Appellate Body.

<sup>480</sup> We recall that the official title of the Anti-Dumping Agreement is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994". This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 of the Anti-Dumping Agreement confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the case on *Brazil - Desiccated Coconut*, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that "the context for the purpose of the interpretation of a treaty shall comprise, [...] the text, including its preamble and annexes...". We are therefore not only entitled to consider the Anti-Dumping Agreement, but we are also *required* to do so under the general principles of interpretation of public international law.

<sup>481</sup> See, also, *Argentina - Safeguards, Op. Cit.*, paras. 74 and 81-83.

conjunction with the other relevant provisions of this "inseparable package", so as to give meaning to all of them.

C. APPLICABILITY OF ARTICLE VI OF THE GATT 1994 AND OF THE ANTI-DUMPING AGREEMENT TO THE 1916 ACT

1. **Preliminary remarks on the possibility of interpreting the 1916 Act in a WTO-compatible manner and on its "mandatory/non-mandatory" nature**

(a) Issue before the Panel

6.95 The United States argues that if the complaining party is challenging a law as such, the first question for the Panel is whether that law is mandatory or discretionary. The United States contends that the 1916 Act is non-mandatory legislation within the meaning of the GATT1947/WTO practice essentially because (i) with respect to both civil and criminal proceedings, there is a possibility for US courts to interpret the provisions of the 1916 Act in a manner consistent with the WTO obligations of the United States - as evidenced by court decisions so far - and (ii) the US Department of Justice has discretion to initiate or not criminal proceedings under the 1916 Act.<sup>482</sup> Japan considers that the 1916 Act is mandatory legislation because it is not susceptible of a range of meanings but rather mandates the imposition of sanctions. Japan adds that panels have consistently ruled that laws that mandate GATT/WTO-inconsistent actions can be challenged as such. Japan also considers that the obligation set out in Article XVI:4 of the Agreement Establishing the WTO "to ensure the [WTO] conformity of [...] laws, regulations and administrative procedures" should apply in the present dispute, rather than the mandatory/non-mandatory dichotomy.

6.96 For the reasons presented below, we shall address these arguments as part of our review of the claims raised by Japan under Article VI of the GATT 1994 and the Anti-Dumping Agreement and, if necessary, Article III:4 of the GATT 1994, rather than as a question of admissibility of the claims of Japan.<sup>483</sup>

6.97 As a preliminary remark, it should be noted that, even though the parties have used the terms "mandatory/non-mandatory" or "discretionary" legislation in their arguments with respect to different aspects of the 1916 Act, we consider that we should differentiate the issues before us. We consider that the question whether the US Department of Justice has discretion to initiate or not criminal proceedings under the 1916 Act is indeed a question of application of the doctrine on mandatory/non-mandatory legislation within the meaning usually given to it in the GATT and in public international law. The question whether the 1916 Act could be, or has been, interpreted in a way that would make it fall outside the scope of Article VI is, however, simply a question of assessing the current meaning of the law.

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<sup>482</sup> The United States does not seem to allege that a similar discretion exists in relation to the civil proceedings which would make the 1916 Act non-mandatory.

<sup>483</sup> Such an approach is also consistent with the practice of other panels, which addressed this issue in the course of their review of the conformity of measures with provisions of the GATT 1947. See *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, BISD 41S/131, para. 118. That report refers to the Report of the Panel on *United States – Taxes on Petroleum and certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, p. 160; the Report of the Panel on *EEC – Regulation on Imports of Parts and Components*, *Op. Cit.*, pp. 198-199; the Report of the Panel on *Thailand, Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200 pp. 227-228; the Report of the Panel on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, pp. 281-282, 289-290; and the Report of the Panel on *United States – Denial of MFN Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, p. 152. See also, under the WTO Agreement, the report of the panel on *Canada – Measures Affecting the Export of Civilian Aircraft*, adopted on 20 August 1999, WT/DS70/R, para. 9.124.

(b) The possibility of interpreting the 1916 Act in a WTO-compatible manner

6.98 Concerning the argument according to which US courts have interpreted in the past and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States, the United States refers to the panel report on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*<sup>484</sup> as being the case whose facts most closely resemble the present case. For the United States also, there is a presumption that if a law is susceptible to an interpretation that is WTO consistent, domestic authorities will interpret that law so as to avoid a conflict with WTO obligations. This presumption may be seen as underlying the finding of the Panel in *United States – Tobacco* that a domestic law susceptible of multiple interpretations would not violate a party's international obligations so long as one possible interpretation permits action consistent with those obligations.

6.99 In our opinion, the United States refers to *United States - Tobacco* for essentially two reasons. First, the United States argues that a law which can be interpreted in a WTO-consistent manner is a law that does not mandate a WTO-illegal action. Second, the United States claims that, for Japan's challenge to succeed, Japan must demonstrate not only that the 1916 Act authorises WTO-inconsistent action, but that it mandates such action. In other words, it must show that this legislation is not susceptible to an interpretation that would permit the US government to comply with its obligations.

6.100 The issue in this case is primarily, like in the *United States – Tobacco* case, a question whether the text of a law contains ambiguities or not. However, in our opinion, similarities are limited to that aspect. In the *United States – Tobacco* case, the panel had to deal with the question whether the ambiguous term at issue mandated a violation of Article VIII of GATT 1947. In the present case, what is at issue is whether the terms of the 1916 Act are such as to make Article VI *applicable* to that law. We are consequently at an earlier stage of our analysis than the panel in the *United States – Tobacco* case. Moreover, in the *United States – Tobacco* case, the United States had as yet neither changed the fee structure nor promulgated rules implementing the law at issue. In the present case, the 1916 Act did not require any implementing measures from the US government and, contrary to the law at issue in the *United States – Tobacco* case, it has been applied in a number of instances by US courts. Consequently, the situations faced by this Panel and the panel in the *United States – Tobacco* case are factually different.

6.101 These differences have implications for the burden of proof. In the *United States – Tobacco* case, the extensive burden of proof imposed on the complainants was obviously related to the absence of any application of the ambiguous term by the executive branch of the US government at the time of the findings. The United States had until then applied its law in conformity with Article VIII of the GATT 1947 and there was no evidence that the United States intended to apply the law in a GATT-incompatible manner. Therefore, imposing on the complainants the burden to prove that the US law at issue could not be applied in a GATT-consistent manner was consistent with the presumption that the United States would continue to apply the GATT in good faith.

6.102 In contrast, several courts have interpreted and applied the 1916 Act. In fact, reaching a decision on the US argument requires the Panel to determine whether the interpretation of the 1916 Act by US courts has been such as to actually make the 1916 Act WTO-compatible by making it fall outside the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement. In such a context, Japan only needs to prove that the 1916 Act, as it has been interpreted and applied so far by US courts, meets the conditions to fall within the scope of Article VI and the Anti-Dumping Agreement. If Japan succeeds in proving this, we will proceed with a review of the compatibility of the 1916 Act with Article VI and the Anti-Dumping Agreement.

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<sup>484</sup> *Op. Cit.*, hereinafter "*United States – Tobacco*".

6.103 The question whether there could be a possibility to interpret the 1916 Act in the future so that it would fall outside the scope of Article VI would be relevant, according to the *United States – Tobacco* case, only if the 1916 Act had not yet been applied. Since the 1916 Act has actually been applied and has been subject to interpretation by US courts, the issue before us is (i) whether Article VI and the Anti-Dumping Agreement are found to be applicable to the 1916 Act on the basis of the current court interpretation of the terms of the 1916 Act and (ii) whether a violation of Article VI and/or the Anti-Dumping Agreement by the 1916 Act as currently applied, is identified.

6.104 Even if the factual circumstances in the present case and in the *United States – Tobacco* case were considered to be comparable, we recall that, in *United States – Tobacco*, a crucial element in the finding of the panel had been the presence of an *ambiguity* in the text of the law under review. In that case, the term "comparable" could be interpreted in GATT-compatible as well as in GATT-incompatible ways. Assuming that the reasoning of the panel in the *United States – Tobacco* case could be extended to the present situation in spite of the differences highlighted above, if we find that no such ambiguity exists regarding the applicability of Article VI to the text of the 1916 Act itself or as interpreted by the US courts, (i) the burden of proof which the United States alleges was applied in the *US - Tobacco* case will not apply in this case and (ii) we will conclude that the 1916 Act falls within the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement and will address its compatibility with these provisions as we would for any other legislation.<sup>485</sup>

(c) Mandatory/non-mandatory nature of the 1916 Act

6.105 The United States argues that, in relation to the criminal proceedings provided for in the 1916 Act, the US Department of Justice has the discretion to decide whether or not to bring a criminal prosecution. In other words, while the 1916 Act authorises the Department of Justice to bring a criminal prosecution, it does not mandate it. Japan is of the view that the obligation set out in Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the Anti-Dumping Agreement should apply in the present dispute, rather than the mandatory/non-mandatory dichotomy drawn from GATT 1947 practice.

6.106 We note that the terms of Article 18.4 of the Anti-Dumping Agreement require that Members bring their laws into conformity with the Anti-Dumping Agreement at the time of the entry into force of that agreement for them. This requirement seems to contradict the concept of mandatory/non-mandatory legislation, which does not require laws as such to be compatible, but only instances of application.<sup>486</sup> We recall that Article 16.6(a) of the Tokyo Round Agreement on Implementation of Article VI of GATT<sup>487</sup> contained provisions almost identical to Article 18.4 of the Anti-Dumping Agreement. We also note that, in relation to Article 16.6(a) or its equivalent under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT,<sup>488</sup> past panels found that a countervailing duty law as such could be reviewed by a panel and that the discretion to

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<sup>485</sup> If we conclude that the 1916 Act falls within the scope of Article VI, we will not need to take position on the issue whether, in light of Article XVI:4 of the Agreement Establishing the WTO, the reasoning in the *United States – Tobacco* report, which was adopted under the GATT 1947, would still be valid after the entry into force of the WTO Agreement.

<sup>486</sup> We recall that the panel on *United States – Section 301-310 of the Trade Act of 1974*, adopted on 20 January 2000, WT/DS152/R, claimed that its findings did not require the wholesale reversing of earlier GATT and WTO jurisprudence on mandatory and discretionary legislation (see paragraph 7.54 and footnote 675). We nevertheless understand that the reasoning of the panel in that case was apparently based on the fact that Article 23 of the DSU may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. We note that Article 18.4 of the Anti-Dumping Agreement may have a similar effect.

<sup>487</sup> Hereinafter the "Tokyo Round Anti-Dumping Agreement".

<sup>488</sup> Hereinafter the "Tokyo Round Subsidies Agreement".

initiate an investigation was insufficient to consider as "non-mandatory" a law reviewed under those agreements.<sup>489</sup>

6.107 From the above, it would seem to us that the issue of the "mandatory/non-mandatory" nature of a law has apparently been addressed differently under Article VI of the GATT 1947 and the Tokyo Round anti-dumping and subsidies agreements than under Article III of the GATT 1947 and the other GATT 1947 provisions referred to by the United States. In order to avoid making unnecessary findings, we consider it appropriate to address this issue once we have determined whether the 1916 Act falls within the scope of Article VI and the Anti-Dumping Agreement or not, a determination to be made in any event for the reasons mentioned in the previous paragraphs.

## **2. Does the 1916 Act fall within the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement?**

(a) Preliminary remarks

(i) *Scope of Article VI of the GATT 1994 and scope of the Anti-Dumping Agreement*

6.108 A first methodological question to be clarified from the outset is how we should approach the compatibility of the 1916 Act with Article VI and with the Anti-Dumping Agreement, respectively. In this respect, we note that Article 1.1 of the Anti-Dumping Agreement establishes a link between Article VI and the Anti-Dumping Agreement:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated [footnote 1 omitted] and conducted in accordance with the provisions of this Agreement."

Article 18.1 of the Anti-Dumping Agreement also confirms this link:

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[footnote 24]"<sup>490</sup>

We also recall our consideration of the relationship between Article VI and the Anti-Dumping Agreement in section VI.B.4.(c) above. We concluded that Article VI and the Anti-Dumping Agreement are one "single package of rights and obligations". We are of the view that if we find that the 1916 Act falls within the scope of the provisions of Article VI of the GATT 1994 dealing with dumping, it also must fall within the scope of the Anti-Dumping Agreement. As a result, we will consider primarily whether the 1916 Act falls within the scope of the provisions on anti-dumping of Article VI, bearing in mind the terms of the Anti-Dumping Agreement and the extent to which they may influence the interpretation of Article VI.

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<sup>489</sup> See *Panel on United States Definition of Industry Concerning Wine And Grape Products*, adopted on 28 April 1992, BISD 39S/436 (hereinafter "*United States – Definition of Wine Industry*") and the report of the panel on *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP 136, 28 April 1995 (hereinafter "*EC – Audio Cassettes*"). The latter was not adopted. However, we recall that in its report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8; 10; 11/AB/R, p. 15, the Appellate Body confirmed that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant." Therefore, we will refer to the reasoning of the panel in *EC – Audio-Cassettes* as guidance to our own reasoning.

<sup>490</sup> Footnote 24 to Article 18.1 reads as follows:

"This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate."

(ii) *Approach of the Panel to the question of the definition of the scope of Article VI of GATT 1994 in relation to the 1916 Act*

6.109 According to Japan, Article VI of GATT 1994 and the Anti-Dumping Agreement address international price discrimination where prices in the importing market are lower than prices in the exporting market. When these conditions giving rise to this type of price discrimination are met, a law, whatever it may be called, is an anti-dumping measure and must conform to Article VI of GATT 1994 and the Anti-Dumping Agreement. Japan considers that the terms of the 1916 Act are unambiguous. The conduct targeted by the 1916 Act is the same as "dumping" as defined in Article VI and the Anti-Dumping Agreement and the addition of qualifying elements on the core features of the law does not alter the fundamental nature of the 1916 Act as an anti-dumping law.

6.110 The United States considers that Article VI only addresses actions taken for the purpose of offsetting or preventing injurious dumping, not actions that are not designed to offset or prevent injurious dumping, as is the case with the 1916 Act. Nowhere does the text of Article VI or the Anti-Dumping Agreement state that its disciplines govern any law based upon the concept of international price discrimination regardless of any other elements required to be proven under the law. The 1916 Act addresses a specific form of price discrimination with predatory intent. Moreover, the 1916 Act imposes damages on importers, not a border adjustment in the form of a duty on imported products. The nature of the measure imposed in application of the law removes any doubt that the 1916 Act is an "internal law" subject only to Article III of GATT 1994.

6.111 We note that the views of the parties are diametrically opposed as to the criteria that should be used to determine the applicability of Article VI of the GATT 1994 to the 1916 Act. Japan favours a broad interpretation of Article VI based on the definition of dumping found in Article VI:1. The United States favours a narrow interpretation: Article VI applies only when a Member wishes to address dumping practices through anti-dumping duties.

6.112 First, the Panel considers that its role, pursuant to Article 3.2 of the DSU, is to clarify the meaning of Article VI in order to determine whether it applies, as claimed by Japan, to the type of measures addressed by the 1916 Act. For the sake of clarity, we consider that we should first address the applicability of Article VI to the *terms* of the 1916 Act as such, in isolation from subsequent interpretation(s). We will then review the circumstances of the enactment of the 1916 Act (including the legislative history) as well as the relevant US court case-law and determine to what extent they may affect the conclusions that we will have reached on the basis of the text only.<sup>491</sup>

6.113 Second, we note that we are called upon to consider the compatibility of a specific law with Article VI of GATT 1994, not to make an interpretation of the scope of that Article in absolute terms. Thus, any assessment we may make regarding the scope of Article VI will be limited to the specific issues raised by the terms of the 1916 Act.

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<sup>491</sup> As recalled in paragraph 6.58 above, the mere description or categorization of a measure under the domestic law as well as the policy purpose behind the measure cannot be a decisive factor in the categorization of that measure under the WTO Agreement. We therefore do not consider as decisive the classification of the 1916 Act under the US Code or the fact that it is generally called the "Antidumping Act of 1916". We consider that we should exclusively rely at this stage on what the text of the law expressly says. This does not mean that we should disregard the objective of the 1916 Act. However, for now we will consider it only to the extent that it results from the terms of the law only, to the exclusion of the legislative history or the subsequent court practice, which we will address later. This also seems to be consistent with US court practice. In *Zenith I* (1975), *Op. Cit.*, at p. 246, Judge Higginbotham stated that "as always, when a court is called to construe a statute, it is wise to begin by reading the statute itself."

6.114 Third, in the light of the arguments of the parties and of the above-mentioned comment, we note that the determination of the scope of Article VI *vis-à-vis* the 1916 Act requires that we reply to the following questions:

- (i) Does the 1916 Act address the same type of price differentiation as Article VI?
  - (ii) If this is the case, is the type of "effects" targeted by the 1916 Act (i.e. "intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States") relevant to determining whether the 1916 Act falls within the scope of Article VI? And;
  - (iii) is the type of measures imposed under the 1916 Act relevant to determining whether the 1916 Act falls within the scope of Article VI?<sup>492</sup>
- (b) Analysis of the text of the 1916 Act in light of Article VI:1 of the GATT 1994
- (i) *Does the 1916 Act address the same type of price discrimination as Article VI of the GATT 1994?*

6.115 Article VI:1 provides, in relevant parts, as follows:

"The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purpose of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." [notes *Ad Article VI:1* omitted]

6.116 We note that, for measures to be applied under Article VI, three conditions have to be met: there must be (a) "dumping", i.e. the pricing practice at the origin of the application of Article VI; (b) material injury or threat of material injury to an established domestic industry or material retardation of the establishment of a domestic industry, i.e. the effect of the dumping; and (c) a causal link between the two. Article VI and the Anti-Dumping Agreement clearly separate these conditions.

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<sup>492</sup> This question is different from the issue whether anti-dumping duties are the only remedy allowed under Article VI. This issue is addressed in the section concerning the violation of Article VI:2.

6.117 Article VI:1 defines "dumping" as the introduction of products of one country into the commerce of another country at less than their normal value.<sup>493</sup> Apart from an additional explanation of how to determine normal value,<sup>494</sup> this definition of "dumping" is not qualified anywhere in Article VI.<sup>495</sup> The conditions for "dumping" to exist are the following:

- (i) there must be products imported and cleared through customs ("introduction into the commerce"); and
- (ii) those imported products must be priced at a price lower than their normal value, i.e. their price in a foreign country, be it the country of production or another country of export, or a constructed value based on a calculation of cost and profits.

In other words, dumping within the meaning of Article VI exists when there is a price difference between like products sold in two markets, one of which is not within the jurisdiction of the same Member. In addition, the price of the products in the country of exportation must be lower than the price of the like products in the country of production or in a third country to which they are exported.<sup>496</sup>

6.118 Neither the context of the first paragraph of Article VI, nor the object and purpose of the GATT 1994 or the WTO Agreement contradicts this assessment. On the contrary, Article VI:1(a) and (b) confirm that no qualification applies to the definition of the price difference requirement. There is no requirement that the export price be above or below fixed or variable costs or that price undercutting, price suppression or price depression be identified for "dumping" to exist, even though they may be considered for injury purposes. In other words, dumping exist as soon as there is a price difference, as small as it may be, subject to the *de minimis* provisions of the Anti-Dumping Agreement.

6.119 When considering the terms of the 1916 Act, we note that it also contains a price discrimination test:

"It shall be unlawful for any person *importing or assisting in importing* any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States *at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries* to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States..." (emphasis added)

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<sup>493</sup> We note that this definition is close to the definition of dumping given by Jacob Viner in Dumping, A Problem in International Trade (1923), p. 3, i.e. "price-discrimination between national markets." The court in *Zenith III*, *Op. Cit.*, p. 1213, refers to the 1966 edition which includes, at p. 4, a slightly revised definition: "price discrimination between purchasers in different national markets."

<sup>494</sup> We do not read the language "For the purpose of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another..." as qualifying anything but the term "normal value".

<sup>495</sup> See Article VI:2, second sentence, which provides that "For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." Additional conditions have been introduced in the Anti-Dumping Agreement, such as the *de minimis* requirement for the margin of dumping (Article 5.8 of the Anti-Dumping Agreement) but they do not affect the original definition to such an extent that they would change our conclusions.

<sup>496</sup> The existence of a price difference between two markets *located in two different Members*, together with a lower price in the importing country than in the country of export, are essential features to differentiate dumping from other forms of price discrimination and pricing practices. See, e.g., Viner, *Op. Cit.*, pp. 2-3.

This test includes requirements similar to the requirement of Article VI (i.e., the introduction of the dumped product into the commerce of one Member) since it refers to "import or sell or cause to be imported or sold [...] within the United States". We further note that the 1916 Act is premised on a comparison between two prices, one in the United States, the other in the country of production of the product or in a third country where the product is also sold. There is consequently a very close similarity between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act.

6.120 The United States argues that the 1916 Act has additional requirements compared with Article VI. In the first place, the 1916 Act requires the price difference to be "substantial" and the importation and sales to be done "commonly and systematically". Secondly, the 1916 Act includes additional requirements that are not found in Article VI, which make it an instrument addressing specific forms of price discrimination in an anti-trust context.

6.121 We do not consider that conditions which make the establishment of dumping more difficult, such as the requirement of substantial price difference and of common and systematic dumping are such as to make the price discrimination test of the 1916 Act fall outside the scope of the definition of Article VI:1. The fact that additional requirements make a finding of dumping more difficult does not affect the applicability of Article VI as long as the test of the 1916 Act requires a price difference between two markets, each located in the territory of a different Member. Members remain free to apply requirements which make the imposition of measures more difficult, but they may not exempt themselves from the rules and disciplines of the WTO Agreement when counteracting dumping as such.

6.122 This said, would there be other elements in the text of the 1916 Act that would lead us to conclude that the transnational price discrimination test in the 1916 Act nevertheless does not meet the definition of dumping in Article VI? We note that the 1916 Act relies not only on the actual market value but also on wholesale price. We consider that the meaning of the terms "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" found in Article VI:1(a) is broad enough to include the phrase "principal markets of the country of [...] production [of the imported merchandise]" or of "other foreign countries to which they are commonly exported". The 1916 Act also refers to sales on the "principal markets" of "other foreign countries to which they are commonly exported". This may not be the "highest comparable price for the like product for export to any third country in the ordinary course of trade" found in Article VI:1(b) but, once again, the criteria of Article VI:1 are sufficiently broad to encompass such sales. Moreover, the criteria used in the 1916 Act do not refer to other concepts that could be differentiated from those found in Article VI:1. Finally, we note that the 1916 Act does not refer to the possibility to use a "constructed" normal value, within the meaning of Article VI:1(b)(ii). However, this only makes the transnational price discrimination test in the 1916 Act "narrower" than the definition of "dumping" in Article VI:1. It does not make it fall outside the scope of that article. We also note that the 1916 Act provides for adjustments. Even though these adjustments are not those found in the last sub-paragraph of Article VI:1, they do not affect the scope of the price discrimination test in the 1916 Act in relation to Article VI. On the contrary, they confirm the similarity of the two texts as far as the identification of the pricing practice at issue is concerned.

6.123 This does not mean that the criteria for establishing price discrimination under the 1916 Act would always be compatible with the requirements of Article VI of the GATT 1994. This means only that we do not find in these criteria anything that would make us consider that the 1916 Act transnational price discrimination test would partly or totally fall outside the definition of dumping found in Article VI:1.

6.124 The United States argues that the Panel's description of the 1916 Act price discrimination test (i.e. "commonly and systematically to import, sell or cause to be imported or sold such articles within

the United States at a price substantially less than the actual market value or wholesale price of such articles") is incomplete. The 1916 Act addresses a particular type of price discrimination, namely, predatory pricing. For this reason, the price discrimination test in the 1916 Act includes not just the language quoted by the Panel, but also the additional language describing the predatory intent that is required to be shown.<sup>497</sup>

6.125 We understand the US argument as meaning that price discrimination for anti-dumping purposes is of a different nature than price discrimination for anti-trust purposes. We noted above that Article VI differentiates between the pricing practice ("dumping") and its effects (material injury). We note that the Anti-Dumping Agreement confirms this differentiation by addressing dumping and injury in two separate provisions (Articles 2 and 3). We also look at the 1916 Act as requiring two separate inquiries, the second one qualifying the results of the first. The first one deals with the identification of a transnational price difference in the form of a lower price on the US market than in the exporting country or a third country of export. The second one deals with the identification of an intent to affect in some ways a US industry or US commerce. However, even if this "intent" were to imply the finding of a certain type of pricing practice on the US market, it would not affect the basic requirement of a price difference between two markets, one located in the United States and one in the exporting country or a third country of export. As noted, this basic requirement is identical to that of Article VI:1.

6.126 Similarly, the United States considers that the prices to be considered under the 1916 Act are not the same as those considered under Article VI and the Anti-Dumping Agreement. The 1916 Act provides that the US import price is the price at which the product at issue is imported or sold *within* the United States. In contrast, the US import price found in the Article VI definition of dumping, as further described in Article 2 of the Anti-Dumping Agreement, is normally the price in the United States that is "made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time" as the price in the exporting country or third country used to establish the *normal value*, with due allowances made for price comparability purposes. The foreign price under the 1916 Act is similar to, but nevertheless different from, the foreign price found in the Article VI definition of dumping, as further described in Article 2 of the Anti-Dumping Agreement.

6.127 We note that the terms of Article VI are sufficiently broad to include the types of prices used in the 1916 Act. We also recall our reasoning in paragraph 6.125 above. There is nothing in the types of prices referred to in the 1916 Act that would be of such a nature that they would be specific to anti-trust, to the exclusion of anti-dumping. On the contrary, the type of prices on which the 1916 Act is based meets the criteria of "normal value" and "export price" within the meaning of Article VI and the Anti-Dumping Agreement. The differences, far from making the 1916 Act fall outside the scope of Article VI, should rather be seen as violations of the requirements of the Anti-Dumping Agreement.

6.128 We therefore conclude that the 1916 Act addresses the same type of price discrimination as Article VI of the GATT 1994.

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<sup>497</sup> We note that this additional language corresponds to what the Panel has described as the "intent" test under the 1916 Act.

- (ii) *Is the type of "effects" targeted by the 1916 Act relevant to determining whether the 1916 Act falls within the scope of Article VI of the GATT 1994?*

6.129 We note that Article VI:1, first sentence, provides that dumping is to be condemned "if it causes or threatens" material injury. Taken in accordance with their ordinary meaning, the terms of the first sentence of Article VI:1 mean that, even though the condition for action against dumping by a Member is the existence of some injury, the prerequisite for such action is the presence of "dumping" as defined in that sentence.

6.130 We recall that the price discrimination addressed by the 1916 Act must be done with the intent of (a) "destroying" or (b) "injuring an industry in the United States", or of (c) "preventing the establishment of an industry in the United States", or of (d) "restraining" or (e) "monopolizing any part of trade and commerce [in the goods concerned] in the United States." We note that the first three tests are very similar to the material injury and retardation tests of Article VI:1, while the two last ones are more of the type used in an anti-trust context<sup>498</sup> and thus clearly different from the requirement of material injury of Article VI:1. However, we found above that the existence of "dumping" within the meaning of Article VI:1 is a condition *sine qua non* for a Member to take action under Article VI. Likewise, it is our understanding from the US case-law that, before identifying any intent under the 1916 Act, US judges would also have to establish that there has been importation or that there has been sales at discriminatory prices of the type required by that law.<sup>499</sup> Moreover, we have been presented with no evidence that transnational price discrimination under the 1916 Act could be presumed when the court had only established the existence of an intent to destroy, injure or prevent the establishment of an industry in the United States, or to restrain or monopolise any part of the trade in the product concerned within the United States. Therefore, we conclude that the existence in the 1916 Act of the additional requirements referred to by the United States, which are not found in Article VI, does not *per se* suffice to make the 1916 Act fall outside the scope of Article VI.

6.131 Moreover, we recall that dumping "is to be condemned if it causes or threatens" to cause certain effects listed in Article VI:1. We consider that Article VI:1 should be interpreted as limiting the use of measures against dumping as such to the situations expressly foreseen in Article VI.<sup>500</sup> The implicit meaning of Article VI:1, first sentence, is that if dumping has none of the injurious effects contemplated by that Article, it is not to be "condemned". We note in this respect that the terms of Article VI:1, first sentence, are quite broad. If, as the United States argues, Article VI:1 had been designed merely as a carve-out to the obligations of Article II of the GATT 1994, applicable only when a Member wishes to impose anti-dumping duties, the term "is to be condemned" would not have

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<sup>498</sup> See the Robinson-Patman Act, which provides that the "effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."

<sup>499</sup> See the statement of the court in *In Re Japanese Electronic Products II* (1983), at p. 324, that:

"The first element necessary to a finding of dumping under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country."

See also *Helmac II* (1993), p. 591, which recognised that "dumping: the pricing of goods on the American market at a price lower than on the home market" was "the key to liability under the [1916] Act".

<sup>500</sup> That such a limitation was clearly envisaged by the drafters of Article VI is confirmed by the Report of the Sub-Committee at the Havana Conference. The Sub-Committee considered the provision which was to replace the original Article VI in the GATT 1947 and noted that "The Article as agreed to by the Sub-Committee condemns *injurious 'price dumping'* as defined therein and does not relate to other types of dumping." (emphasis added) (Havana Reports, p. 74, para. 23, as reported in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), p. 222)

been used. Rather, the term "is to be subject to anti-dumping duties" would have been used. Since we have to regard the text of the treaty as the most achieved expression of the intent of the parties to that treaty,<sup>501</sup> we cannot assume that the terms of the treaty were not carefully selected to meet the intent of the parties. Therefore, we do not read the terms of Article VI:1 in their ordinary meaning and in their context as supporting the view of the United States.

6.132 In our opinion, accepting the allegation of the United States that the disciplines of Article VI are only applicable to the extent a Member wants to address situations of material injury, threat thereof or material retardation of the establishment of a domestic industry would defeat the purpose of Article VI and the Anti-Dumping Agreement. From the terms of Article VI, we deduce that the purpose of that provision is to define the conditions under which the imposition of anti-dumping measures is allowed. This purpose is confirmed by the context of Article VI. Article 1, first sentence, of the Anti-Dumping Agreement provides that:

"An anti-dumping measure shall be applied *only under the circumstances provided for in Article VI of GATT 1994* and pursuant to investigations initiated [footnote 1 omitted] and conducted in accordance with the provisions of this Agreement." (emphasis added)

Article 18.1 of the Anti-Dumping Agreement also confirms this understanding:

"No specific action against dumping of exports from another Member can be taken *except in accordance with the provisions of GATT 1994*, as interpreted by this Agreement. [footnote 24 omitted]"<sup>502</sup> (emphasis added)

This implies that, by adopting Article VI of the GATT 1994 and the Anti-Dumping Agreement, Members have agreed to use only one permissible approach against "dumping" as such. The interpretation suggested by the United States would undermine the useful effect of the provisions of Article VI and of the Anti-Dumping Agreement. In this respect, we do not read footnote 24 to Article 18.1 as undermining our position. Article VI is the only provision of the GATT 1994 addressing specifically the conditions for imposing measures against dumping. Reading footnote 24 as permitting actions other than anti-dumping actions allowed under other provisions, as long as the measure does not address dumping as such, is fully consistent with the principle of useful interpretation.

6.133 For these reasons, we do not consider that the existence of other "effect" tests than those provided for under Article VI would be sufficient to exclude the 1916 Act from the scope of Article VI. The 1916 Act may be targeting particular effects of cross-border price discrimination.

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<sup>501</sup> See Mustafa Kamil Yasseen: *L'Interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, Recueil des Cours de l'Académie de La Haye (1974) p. 1:

"[...] le texte est surtout l'expression authentique de l'intérêt des parties, il est supposé incarner ce que les parties ont voulu".

See also the report of the International Law Commission to the UN General Assembly, Yearbook of the International Law Commission (1966), Vol. II, A/CN.4/SER.A/1966/Add.1, p. 221:

"The second principle [contained in paragraph 1 of Article 31 of the Vienna Convention] is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them."

<sup>502</sup> We did not overlook the terms of footnote 24. Footnote 24, as we understand it, does not affect our conclusion that, when dealing with dumping as such, Members must comply with Article VI of the GATT and the Anti-Dumping Agreement. See our discussion of footnote 24 in section VI:D.2(c) below.

However, to the extent that such price discrimination meets the definition of "dumping" contained in Article VI:1, it is, in our view, subject to the disciplines of Article VI and the Anti-Dumping Agreement.<sup>503</sup>

6.134 Finally, the United States argues that the existence of an anti-trust objective in a law regulating cross-border price discrimination removes it from the scope of Article VI of the GATT 1994. While we agree that Article VI applies when Members have recourse to a given trade policy instrument, i.e. anti-dumping action, we do not agree that the application of Article VI is dependent on the objective pursued by the Member concerned. As we have demonstrated in the previous paragraphs, Article VI is based on an objective premise. If a Member's legislation is based on a test that meets the definition of Article VI:1, Article VI applies. The stated purpose of the law cannot affect this conclusion.<sup>504</sup>

6.135 We therefore conclude that the fact that the 1916 Act may have an anti-trust objective or be categorized in US law as an anti-trust law does not *per se* make it fall outside the scope of Article VI, unless it is demonstrated that this objective and this categorisation have an impact on the operation of the 1916 Act. In light of our findings, this would require that the terms of the transnational price discrimination test of the 1916 Act be understood in such a way that it would not meet the definition of "dumping" of Article VI:1 of the GATT 1994. We further address this question in section VI.C.2.(c) and (d) below.

(iii) *Is the type of measures imposed under the 1916 Act relevant to determining whether the 1916 Act falls within the scope of Article VI of GATT 1994?*

6.136 The United States argues that the 1916 Act does not fall within the scope of Article VI because it does not impose anti-dumping duties. Rather, the 1916 Act sanctions the importer, not imports, through clearly "internal" measures. Article VI, as a carve-out to Article I and Article II of the GATT 1994, only deals with the imposition of duties. Japan claims that the type of measures imposed does not change the nature of the law as an anti-dumping law.

6.137 We noted above that the premise on which Article VI is based is the existence of dumping. We recall that the US argument is based on the premise that the circumstances provided for in Article VI are not the only circumstances in which dumping as such can be counteracted. We concluded above that Article VI provided for the only circumstances in which dumping as such could be targeted by Members. We therefore conclude that the type of measures imposed under the 1916 Act is not relevant to determining whether the 1916 Act falls within the scope of Article VI.<sup>505</sup>

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<sup>503</sup> We understand that the United States did not argue that the tests at issue were less stringent than the material injury/material retardation tests of Article VI. Therefore, we do not address this point.

<sup>504</sup> We note that a similar approach was taken in the report of the panel on *EC – Parts and Components*, *Op. Cit.*, para. 5.6, where the panel examined whether the policy purpose of a charge was relevant to determining whether the charge at issue was imposed "in connection with importation", within the meaning of Article II:1(b) of GATT 1947. The panel noted that:

"the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2."

<sup>505</sup> This does not mean however that Article VI is indifferent to the type of measures applied against dumping. This issue will be addressed in the section dealing with remedies allowed under Article VI:2.

(iv) *Conclusion*

6.138 We find that the 1916 Act, based on an analysis of its terms, objectively addresses a type of transnational price discrimination that meets the definition of "dumping" contained in Article VI:1 of the GATT 1994 and, thus, should be subject to the disciplines of Article VI.

6.139 However, our findings are based on the definition of dumping as in Article VI:1 of the GATT 1994 and on the terms of the 1916 Act in their current meaning. As we recalled above,<sup>506</sup> we must pay due regard to the fact that we are dealing with a text drafted more than eighty years ago. If, by the time it was enacted, the 1916 Act was not designed to address "dumping", in other words if the terms found in the 1916 Act had a different meaning in 1916 than they appear to have today, this should be apparent from the legislative history and the context of its enactment. We therefore proceed with the legislative history of the 1916 Act and the context of its adoption.

6.140 The United States also claims that the true nature of the 1916 Act as an anti-trust statute may be more difficult to discern simply from the text of the 1916 Act, but the case law interpreting the 1916 Act removes any doubt on this point. Having regard to our conclusions in paragraph 6.135 above that this would require that the price discrimination test of the 1916 Act be interpreted in such a way that it would no longer meet the definition of Article VI:1, we must also address this argument, as well as the contention of Japan that, in fact, US courts have applied the 1916 Act as an anti-dumping instrument.

(c) Impact of the historical context and of the legislative history of the 1916 Act

(i) *Approach of the Panel*

6.141 Both parties have referred the Panel to the historical context of the 1916 Act and to its legislative history as it results, *inter alia*, from the Congressional Records. Japan considers that the historical context and legislative history of the 1916 Act show that the US Congress sought to enact an anti-dumping law to address the commercial problem of dumping, i.e. international price discrimination. The United States considers that Japan's description of the 1916 Act's legislative history is incomplete and misleading. The 1916 Act was part of the policy of the second Wilson Administration to reinforce the US anti-trust legislation. The bill proposed by Representative Kitchin, which was to become the 1916 Act, was intended to supplement the existing anti-trust laws. Moreover, the United States is of the view that the Panel's role is not to weigh the legislative history of the 1916 Act itself. The legislative history is cited only as confirmation or to help explain the courts' holdings.

6.142 Our understanding is that the legislative history of an act of the US Congress is an important tool for US courts to identify the "intent of Congress".<sup>507</sup> The legislative history allows US courts to interpret a law in accordance with what they perceive to be the original intent of the US Congress when the text of that law is not clear. US courts may also use legislative history, when necessary, to confirm the clear meaning of a law.<sup>508</sup> Since, as mentioned above,<sup>509</sup> we have to identify how the

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<sup>506</sup> See section B.2. above.

<sup>507</sup> In the *Zenith III* case, p. 1213, the court mentioned that the Supreme Court had

"recently observed that 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it.' *Leo Sheep Co. v. United States*, 440 U.S. 668, 669, 99 S.Ct. 1403, 1405, 59 L.Ed.2d 677 (1979)".

<sup>508</sup> US courts had recourse to the legislative history of the 1916 Act in a number of cases. See, e.g., the *Zenith I* (1975) and *Zenith III* (1980) judgements.

<sup>509</sup> See section B.2. above.

1916 Act is understood within the US legal system, we need to address the arguments of the parties based on the historical context and the legislative history of the 1916 Act. In doing this, we shall take due account of the use that US courts made of those tools of interpretation in practice.

6.143 We have found that the key to the applicability of Article VI:1 of the GATT 1994 to the 1916 Act is whether that law objectively addresses "dumping" within the meaning of that article. We have also found that the terms of the 1916 Act, on their face, showed that the transnational price discrimination test in that law met the definition of "dumping" in Article VI:1 of the GATT 1994. We consider that we now have to determine whether there is evidence in the legislative history or the historical context of the enactment of the 1916 Act that we should understand the price discrimination test of the 1916 Act differently than we have on the basis of the text of the law.

(ii) *Review of the historical context and legislative history*

6.144 In light of the arguments of the parties regarding the scope of the 1916 Act, we consider it useful to determine whether the historical context and the legislative history confirm the following elements: (i) how the term "dumping" was understood at the time of the adoption of the 1916 Act and (ii) whether the fact that the 1916 Act may have been considered at the time as addressing "unfair competition" from foreign producers should have in practice an influence on how we must understand the transnational price discrimination test contained in the 1916 Act. Having reviewed the materials submitted by the parties, we have found no indication that the terms of the price discrimination test found in the 1916 Act were understood differently at the time of its enactment than we understand them today. In its 1919 *Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Anti-Dumping Law*, at p. 9, the United States Tariff Commission included a definition of "dumping" identical in substance to the concept addressed by Article VI:

"Dumping may be comprehensively described as the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production. The definition derives particular importance from a not infrequent tendency to confuse with dumping [...] certain other trade practices which are generally considered unfairly competitive."

This statement of the Tariff Commission shows that dumping was probably not the only price practice which could be considered as "unfairly competitive". However, the Tariff Commission added that:

"The anti-dumping act of Congress of September 8, 1916, [footnote omitted] somewhat modifies the above definition by condemning importation as well as sale, if commonly and systematically resorted to with the purpose specified in the law."

While not part of the legislative history of the 1916 Act as such, this document of the Tariff Commission indicates that the practice addressed by the 1916 Act was already clearly understood to be "dumping" as we define it today. The Tariff Commission definition of "dumping" is, with some exceptions which we found not to affect the applicability of Article VI:1 of the GATT 1994,<sup>510</sup> similar to the definition of transnational price discrimination in the 1916 Act. Therefore, it seems reasonable to conclude that the US Congress, when it passed the 1916 Act, was fully aware of the fact that that law addressed "dumping" and not another form of price discrimination. This fact was acknowledged in the *Zenith II* case, where the court stated that "The practice [of dumping] itself long outdated the passage of the Antidumping Act of 1916 [...], which clearly implies that Congress knew whereof it wrote when it enacted the statute."<sup>511</sup>

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<sup>510</sup> See para. 6.122 above.

<sup>511</sup> See *Zenith II*, *Op. Cit.*, p. 258. See also the comments of Senator Penrose, criticizing the effectiveness of the 1916 Act in comparison with the Canadian anti-dumping legislation, 53 Cong. Rec. S13080 (1916), quoted by Japan at para. 3.173 above.

6.145 Moreover, even though the 1916 Act might pursue anti-trust objectives, we found no *express* indication in the legislative history that, in the 1916 Act, price discrimination as such should be understood in any particular anti-trust context.

6.146 The United States argues that the historical context and the legislative history show that the 1916 Act was intended to *supplement* or *complement* the rules applicable to US products in an anti-trust context. The United States deduces from this that the 1916 Act is an anti-trust law not subject to the disciplines of Article VI of the GATT 1994. The United States refers, *inter alia*, to the statement of Representative Claude Kitchin:

"We believe that the same unfair competition law which now applies to the domestic trader should apply to the foreign import trader."<sup>512</sup>

6.147 We also note that the US Secretary of Commerce William Redfield explained in 1915 that

"Unfair competition is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and abate the evil wherever found. The door, however, is still open to "unfair competition" from abroad which may seriously affect American industry for the worse."<sup>513</sup>

The two statements refer to the extension of "unfair competition" rules applicable to US domestic commerce to imports. We have noted above that the US Congress had used in the 1916 Act a definition of transnational price discrimination which was already at that time understood as "dumping". We have also concluded in paragraph 6.135 above that the fact that the 1916 Act had an anti-trust objective was not relevant and did not make the 1916 Act fall outside the scope of Article VI of the GATT 1994. Likewise, we are not convinced that the fact that the 1916 Act was presented at the time of its enactment as "supplementing" or "complementing" the existing anti-trust laws necessarily requires that the 1916 Act be interpreted as an anti-trust law. In our opinion, the argument of the United States is only valid if the United States can prove that the historical context and the legislative history of the 1916 Act gave indications that anti-trust and anti-dumping were already separate legal concepts. If the two were not clearly identified but, rather, were still part of one single notion of "unfair competition", the US argument should be rejected.

6.148 We note that, at the time of the enactment of the 1916 Act, the current distinction between anti-trust and anti-dumping did not apply in the United States. We reviewed the materials submitted by the parties and the extensive analysis of the legislative history of the 1916 Act in the *Zenith III* case. While it appears, *inter alia* from the quotations above, that the US Administration and US lawmakers of that time considered that the 1916 Act "complemented" or "supplemented" the unfair competition rules applied to domestic products essentially under the Sherman Act and the Clayton Act,<sup>514</sup> it also seems that no clear legal distinction had yet been made in the United States between unfair

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<sup>512</sup> 53 Cong. Rec. App. 1938 (1916), as quoted in *Zenith III*, p. 1222.

<sup>513</sup> *Annual Report of the Secretary of Commerce* 43 (1915), as quoted in *Zenith III*, p. 1219.

<sup>514</sup> See J. Viner, *Dumping: A Problem in International Trade* (1923), *Op. Cit.*; pp. 242-243:

"[The Wilson Administration] therefore recommended that any measure adopted to meet the problem should be divorced from customs legislation [in the sense of imposition of higher tariffs] and should take the form of a further extension to those engaged in the import trade of the restraints against unfair competition which had been imposed on domestic commerce."

See also the excerpt from the letter of Samuel J. Graham, Assistant Attorney General, to the New York Times, 4 July 1916, included in a footnote to the above quotation.

competition resulting from dumping and unfair competition resulting from other practices, as it is made today.<sup>515</sup> Dumping as defined in Article VI:1 of the GATT 1994 was just one specific cause of action under anti-trust law,<sup>516</sup> as noted in 1923 by Jacob Viner:

"This antidumping provision, beyond the fact that it makes the participation of the importer both as to act and intent in predatory dumping *specifically unlawful and not merely unlawful by construction as a practice by which competition can be restrained or monopoly established*, adds nothing to the Sherman Act. Beyond the fact that it makes unnecessary the proof of conspiracy between the importer and others, it adds nothing to the Wilson Act of 1894" (emphasis added).<sup>517</sup>

6.149 Even if we were to agree with the United States that the objective of the law is decisive, the historical context and legislative history do not confirm that the 1916 Act had a purely "anti-trust" purpose, within the meaning of that concept today. Rather, it appears that anti-dumping, as it is known today in international trade law, and anti-trust laws dealing with predatory pricing were part of the same notion of "unfair competition."

(iii) *Conclusion*

6.150 We note that evidence from the historical context of the 1916 Act supports our finding that the 1916 Act transnational price discrimination test corresponds to "dumping" within the meaning of Article VI. We also note that, at the time of the enactment of the 1916 Act, there would have been no need to give any different meaning to that test in order to make it fall within the scope of US anti-trust law because, at that time, "dumping" had not yet been conceptually isolated from the body of US anti-trust laws. In any event, the United States has not submitted evidence from the historical context or the legislative history of the 1916 Act that the terms of the transnational price discrimination test of the 1916 Act were understood differently because of the anti-trust objective of the law or that that objective was such as to make the 1916 Act fall outside the scope of Article VI.

6.151 We therefore conclude that the historical context and the legislative history of the 1916 Act, while showing that there was an intent to parallel the rules applicable to US and foreign companies, do not lead us to conclude any differently than we have on the basis of the terms of the 1916 Act as such. Therefore, we proceed to review the impact of the US case-law relating to the 1916 Act.

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<sup>515</sup> Even though dumping is now subject to specific international disciplines and may have acquired other purposes, the origins of anti-trust and that of anti-dumping were essentially the same, as highlighted by the 1974 report of the *Ad Hoc* Committee on Antitrust and Antidumping of the American Bar Association Section on Antitrust Law, which stated as follows:

"Both U.S. antidumping and antitrust law and policy have historic roots, and both were intended to protect and engender the fundamental U.S. economic policy of free and fair competition.

[...] antidumping policy seeks to accommodate the legitimate need for legislation which protects American competition from unfair price discrimination by foreign concerns."

43 Antitrust L J 653, 691-93 (1974), as reproduced in J. H. Jackson & W. Davey, Legal Problems of International Economic Relations, 2d Ed. (1986). This is an additional reason for not deciding on the applicability of Article VI of the GATT 1994 to the 1916 Act on the basis of the general objective of the law.

<sup>516</sup> In that context, the statement of the court in the *Zenith III* case, at p. 1220, that "the political and legal history of the era supports our conclusion from the statutory text that the 1916 Act was an antitrust based unfair competition law, not a protectionist one" does not support the US position. From the paragraphs preceding that conclusion, we understand it as meaning that the court opposed the use of selective "unfair competition" instruments to the application of higher tariffs as part of a protectionist policy.

<sup>517</sup> J. Viner, Dumping: A Problem in International Trade (1923), *Op. Cit.*; p. 244.

(d) Impact of the US case-law relating to the 1916 Act

(i) *Approach of the Panel*

6.152 We recall our determinations under section VI.B.2 above on how we should consider the various court decisions regarding the 1916 Act and their interrelationship. We note that the United States claims that the case-law is evidence that the 1916 Act was applied as an anti-trust statute. We would like to make two preliminary remarks in relation to what is essentially a defence of the United States.

(a) First, as already mentioned, the categorisation of the 1916 Act as an anti-trust law or an anti-dumping law by the US courts should not be decisive in determining the WTO-compatibility of that law.<sup>518</sup> Since the point of our review of the US case-law is to ascertain the actual meaning of the 1916 Act in order to assess its conformity with the WTO Agreement, the classification of this law by US courts can only be of limited impact for the purpose of the present case. For the Panel, it is the reasoning, if any, behind the classification that matters.

(b) Second, we found that the 1916 Act price discrimination test met, on its face, the definition of Article VI:1 of GATT 1994, and that the other tests of the 1916 Act based on the "intent" of the exporter engaged in "dumping" do not have any bearing on that conclusion. As a result, we are of the view that we need not consider any court interpretation of the 1916 Act relating to any other test than the transnational price discrimination test.

We must therefore identify the instances, if any, where courts, in applying the 1916 Act, have addressed the "dumping" test contained in that law and determine whether US courts have applied/interpreted that test in such a way that it would no longer meet the definition of Article VI:1 of the GATT 1994.

6.153 Since we have already found that the text of the 1916 Act, on its own, supports the conclusion that Article VI is applicable to that law, we consider that, in order for that conclusion to be confirmed, it is not necessary for Japan to demonstrate that there was no court decision that applied the 1916 Act in such a way that it would not fall within the scope of Article VI. If we find that the US court practice is not sufficiently well established, or that there is no prevailing interpretation, or no sufficiently clear reasoning regarding the way the transnational price discrimination test of the 1916 Act should be applied, we shall rely on the text of the law itself. However, for the United States to prevail, it would be sufficient in our view to show that there is one definitive interpretation supporting its position. As a result, we first determine whether there is any relevant Supreme Court decision which would provide us with a definitive authority at the highest level of jurisdiction. If not, we will review the circuit court decisions.

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<sup>518</sup> See *EC – Parts and Components, Op. Cit.*, para. 5.19. In that context, the statement of the court in *Zenith III* (1980) that "the 1916 Act is an antitrust, not a protectionist statute" is for us of limited assistance if this statement is not followed by specific conclusions in terms of interpreting the price discrimination test of the 1916 Act.

(ii) *The Supreme Court and the 1916 Act*

6.154 We first note that the Supreme Court has not yet been called upon to interpret the text of the 1916 Act. However, as highlighted by the United States, in the *Cooper* case,<sup>519</sup> the Supreme Court described the 1916 Act as "supplemental" to the Sherman Act, as part of an illustration that "Congress had in mind the distinction between public and private remedies". The United States concludes from this that the 1916 Act is an anti-trust instrument. However, the Supreme Court also referred to the 1916 Act as "the antidumping provisions of the Revenue Act of 1916". Even if the Supreme Court regarded the 1916 Act as an anti-trust law, the fact that it refers to "anti-dumping provisions" leaves the issue of the interpretation of the price discrimination test of the 1916 Act open, since US courts may well apply the 1916 Act as an anti-trust law when it comes to the "intent" test, while applying the price discrimination test without any additional requirements than those contained in the text of the 1916 Act.

6.155 What the Supreme Court meant by "supplemental" is not clear in the absence of an agreed technical definition under US law. The 1916 Act could be "supplemental" to anti-trust statutes in a number of other ways than that suggested by the United States. For instance, an anti-dumping law could "supplement" a domestic predatory pricing law. The context of the statement in the decision is of limited use.<sup>520</sup>

6.156 Therefore, we are not in a position to draw any definitive conclusion from the US Supreme Court statements in the *Cooper* case. Even if the Supreme Court had expressly stated that the 1916 Act was an anti-trust or an anti-dumping law, this statement would have no relevance for this Panel as long as it was not supported by an explanation of the reasons why the Supreme Court thought that way, or of the implications of that statement on the interpretation of the transnational price discrimination test of the 1916 Act.

6.157 As a result, any conclusion on the basis of the US case-law becomes delicate because there is no unambiguous authority at the highest level of US jurisdiction. This does not mean that we will not find an unanimous interpretation, or even a prevailing interpretation that would be convincing. Indeed, many decisions are final as a practical matter at the level of the circuit court of appeals, *inter alia*, because the possibility to appeal before the US Supreme Court is not automatically granted.

(iii) *The interpretation of the transnational price discrimination test of the 1916 Act at the circuit court level*

"Dumping" as an international trade concept applied in an anti-trust context

6.158 Considering the other cases mentioned by the parties and decided either at the district court level or at the court of appeals level, the Panel notes that the parties discussed at length the decision of the court in *Zenith III* (1980). We first note that the court in *Zenith III* stated that the 1916 Act

"should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Act is a price discrimination law, it

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<sup>519</sup> *Op. Cit.*, p. 308.

<sup>520</sup> The term "supplemental" was also used by US Secretary of Commerce Redfield in his legislative proposal of 1915 (*Annual Report of the Secretary of Commerce* (1915), *Op Cit.*) when he said "I also recommend that legislation supplemental to the Clayton Antitrust Act be enacted..." However, we already expressed the view when we addressed the historical context and the legislative history of the 1916 Act that the borderline between anti-dumping and anti-trust was not so clear at that time, if only because anti-dumping was at an early stage of development and because it was probably not yet perceived in the United States as a trade instrument separate from anti-trust.

should be read in tandem with the price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act of 1936 in 1936."

6.159 The United States relies heavily on this and other similar statements<sup>521</sup> to argue that the 1916 Act addresses anti-competitive pricing practices and should be interpreted similarly to the Robinson-Patman Act. However, as outlined in section VI.C.2(c) above, the fact that the 1916 Act was adopted for anti-trust purposes and the fact that it combines a "dumping" test with other tests which are typical of US anti-trust legislation are, in our view, of no relevance in this case.<sup>522</sup> What matters for us is the way transnational price discrimination has been addressed by US courts.

6.160 The United States considers that the *Zenith III* judgement is the leading lower court case addressing how specific provisions of the 1916 Act should be interpreted. We note, with respect to price discrimination *stricto sensu*, that the court, after having recalled Viner's definition of dumping, stated that "to restate the obvious, the Antidumping Act of 1916 is a prohibition of international price discrimination." This would tend to confirm that the court applied the transnational price discrimination test of the 1916 Act without reading into it additional anti-trust-like requirements which would modify its meaning. The Court also recalled that "as a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business." However, this was before the introduction - implicitly in the *In Re Japanese Electronic Products III* case or explicitly in the *Brooke Group* case - of the predatory pricing/recoupment test. We have no clear evidence that, before those judgements, the price discrimination test of the 1916 Act was applied in a manner different from that suggested by the wording of this Act. More particularly, we have no convincing evidence that any criteria exclusively found in anti-trust practice to establish price discrimination were used by the US courts in that context.<sup>523</sup> On the contrary, we recall that the courts in *Zenith III* and in *In Re Japanese Electronic Products II* confirmed that the phrase "actual market value or wholesale price of such articles" in the 1916 Act was a term of art borrowed from the Tariff Act of 1913 - a customs law - and defined in that Act. The court in *Zenith III* also specified that it would hold that there is no violation of the 1916 Act unless the standards of similarity of the customs appraisal law were met.<sup>524</sup>

6.161 We have not found in the decisions referred to by the United States other elements which would demonstrate that the price discrimination test of the 1916 Act, as such, was affected by attempts to parallel the Robinson-Patman Act. In fact, the court in *Zenith II* (1975) largely used "standard dictionary definitions" to interpret the terms of the 1916 Act that had been challenged by the defendants on grounds of vagueness. This was the case for the terms "commonly and systematically", and "other charges and expenses necessarily incident to the importation and sale". Regarding the term "substantially", the court only referred to the case-law regarding the Clayton Act to conclude that if the term "substantially" in "substantially to lessen competition" in the Clayton Act was not found unconstitutionally vague the term "substantially less" in the 1916 Act cannot be either. Finally, the court also referred to the 1913 Tariff Act to interpret the phrase "actual market value or wholesale price."

6.162 The United States also mentions that the court's analysis in the seminal *Zenith III* case has been supported by other US courts which have considered the nature of the 1916 Act. We note however that a number of these cases were concerned with the issue of *locus standi* in a 1916 civil

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<sup>521</sup> See *Zenith III*, p. 1223. See also paras. 3.225 and 3.331 above, where the United States refers to statements of the courts in the *Zenith II* (1975) and *In Re Japanese Electronic Products II* (1983).

<sup>522</sup> We note in this respect that the *Zenith III* decision shows that even the judgement on which the United States relies to qualify the 1916 Act as an anti-trust law seems to acknowledge that the 1916 Act was a combination of anti-dumping and anti-trust.

<sup>523</sup> See *Zenith III*, Op. Cit., pp. 1197 and 1229-1230.

<sup>524</sup> *Ibid.*, see also *In Re Japanese Electronic Products II*, p. 324.

action<sup>525</sup> or more generally with the problem of establishing a cause of action.<sup>526</sup> If they confirm *Zenith III*, it seems to be essentially by reason of not objecting to its conclusions, which we have found not to affect our initial findings based on the terms of the 1916 Act alone. In fact, it seems that courts have concentrated their efforts on other aspects of the 1916 Act, such as the standing and damages provisions, which were found "essentially the same as those applicable to the antitrust laws under section 4 of the Clayton Act" and the criminal penalty clause which is "virtually identical to, and specifies the same penalties as, the corresponding clauses of the Sherman Antitrust Act as then in force."<sup>527</sup>

6.163 Other elements tend to show that courts approached the transnational price discrimination test found in the 1916 Act as "dumping" within the meaning of Article VI of the GATT 1994. For instance, a number of those decisions, including the cases cited by the United States in support of its position, refer to the definition of dumping by Jacob Viner, i.e. "price discrimination between purchasers in different national markets"<sup>528</sup> and generally address the price discrimination test found in the 1916 Act as "dumping", without any further qualification. In this respect, the court in *Zenith II* did not find it necessary to look any further than that definition and the popular title of the 1916 Act to conclude that:

"An economic regulatory statute could scarcely acquire the designation of an 'antidumping Act' unless the business community to which the statute was addressed knew what 'dumping' was."<sup>529</sup>

6.164 The United States argues that the court used a colloquial definition of "dumping", not one based on examination of "fair value" and "material injury" concepts. Moreover, the district court went on to stress that the 1916 Act contains the additional element of "specific, predatory, anti-competitive intent". We do not contest the assessment of the 1916 Act made by the court. In our opinion however, the "intent" aspect of the 1916 Act is not a determining factor to conclude on the

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<sup>525</sup>See *Schwimmer v. Sony Corp. of America* (1979), *Op. Cit.*; *Schwimmer v. Sony Corp. of America* (1980), *Op. Cit.*; *Western Concrete Structures Co. v. Mitsui & Co.* (1985), to which Japan refers expressly in its submissions.

<sup>526</sup>*Jewel Foliage Co. v. Uniflora Overseas Florida* (1980), *Op. Cit.*; *Outboard Marine Corporation v. Pezetel* (1978), *Op. Cit.*

<sup>527</sup>*Zenith III*, p. 1214.

<sup>528</sup>J. Viner, *Dumping: A Problem in International Trade*, 1966 edition, p. 4. See, e.g., *Zenith II* (1975), *Outboard Marine Corporation v. Pezetel* (1978), p. 408; *Zenith III* (1980); *In re Japanese Electronic Products II* (1983), p. 321

<sup>529</sup>*Zenith II*, p. 258. See also the statement of the court in *Zenith III*, p. 1196:

"We also have occasion to compare the 1916 Act, which creates a private right of action for treble damages and provides criminal penalties for dumping, with the Antidumping Act of 1921"

The terms used by the court and the subsequent developments in the judgement show that "dumping" in the 1916 Act and in the 1921 Act, which was the US anti-dumping law based on administrative investigations applied until the entry into force of the Tokyo Round Anti-Dumping Agreement, were not understood differently. The fact that the understanding of the meaning of "dumping" by US courts corresponds to the definition of that concept in Article VI:1 of the GATT 1994 is confirmed by the following statement of the court in *In Re Japanese Electronic Products II*, at p. 324:

"The first element necessary to a finding of dumping under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country."

See also *Helmac II* (1993), p. 591, which recognised that the key to liability under the 1916 Act was "dumping: the pricing of goods on the American market at a price lower than on the home market".

applicability of Article VI and the Anti-Dumping Agreement to the 1916 Act. As demonstrated in our analysis of Article VI:1, the key to the application of those provisions is the existence of a transnational price discrimination. Once a Member plans to address this type of price discrimination as such, not its causes such as subsidisation or monopolization in the exporting country, or its effects, such as increased sales at the expense of domestic competitors, it can only do it if "injury" within the meaning of Article VI and the Anti-Dumping Agreement is found.

6.165 We are therefore of the view that these examples are evidence that a number of US courts, irrespective of their interpretation of the other parts of the 1916 Act, considered that the transnational price discrimination test had to be interpreted as "dumping", as it is also understood in international trade, and on the basis of US trade law standards.

#### The *Brooke Group* recoupment test

6.166 The United States notes that the 1916 Act is not directed at the simple price difference that constitutes dumping under the anti-dumping rules. Pricing practices under the 1916 Act must be "predatory pricing". In that context, the United States argues that, since the 1986 Third Circuit Court of Appeals decision *In Re Japanese Electronic Products III* and the 1993 Supreme Court decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*,<sup>530</sup> courts have applied the anti-trust predatory pricing/recoupment test developed in those cases.<sup>531</sup>

6.167 We understand the predatory pricing/recoupment test in the *Brooke Group* case to require that (i) the complainant establish that the prices complained of are below an appropriate measure of its rival's costs and that (ii) the complainant demonstrate that the competitor had a reasonable prospect of recouping its investment in below-cost prices.<sup>532</sup> The Supreme Court further held that evidence of below-cost pricing is not on its own sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme challenged by the plaintiff and the structure and conditions of the relevant market.<sup>533</sup>

6.168 It is not clear whether the recoupment test should be analysed as part of the transnational price discrimination test or as part of the "intent" test of the 1916 Act. As a result, in order to consider the applicability of the *Brooke Group* test to the price discrimination test of the 1916 Act, we have to assume that price recoupment is more related to the type/amount of price discrimination that can be achieved by the importer than to its intent to affect the US market. If the *Brooke Group* test relates to the "intent" test of the 1916 Act, it cannot affect the transnational price discrimination test of the 1916 Act, as the Panel has already repeatedly argued.

6.169 This said, regarding the first criterion of the *Brooke Group* test, i.e. below cost prices, we do not consider that the introduction of a below-cost price test would make Article VI of the GATT 1994 no longer applicable to the 1916 Act, essentially because the definition of dumping in Article VI:1 does not incorporate a notion of magnitude of price difference. We are aware that Article 5.8 of the Anti-Dumping Agreement provides that there "shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*", i.e. that it is less than 2 per cent, expressed as a percentage of the export price. We have no evidence that this *de minimis* dumping

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<sup>530</sup> 509 U.S. 209, 118 S.Ct. 2578, hereinafter the "*Brooke Group* case".

<sup>531</sup> Even though the parties have discussed the implication of the court decision *In Re Japanese Electronic Products III*, we do not find it necessary to determine whether the court actually applied in that case the predatory pricing/recoupment test later established by the Supreme Court in the *Brooke Group* case. For the sake of our analysis, we will assume that the court in *In Re Japanese Electronic Products III* actually applied a standard similar to the *Brooke Group* test.

<sup>532</sup> *Brooke Group, Op. Cit.*, pp. 2587-2588.

<sup>533</sup> *Ibid.* p. 2589.

margin bears any link with any kind of below-cost test as applied in the anti-trust context. The application of a below-cost price test in the 1916 Act may make the establishment of a transnational price difference more difficult, but it does not affect the basic requirement that a price difference has to be established under the 1916 Act, which is also the basic requirement of Article VI:1 of the GATT 1994.

6.170 As far as the cost recoupment criterion is concerned, we do not believe either that the introduction of a recoupment requirement under the 1916 Act would make Article VI of the GATT 1994 no longer applicable to the 1916 Act for essentially two reasons. First, the definition of dumping set out in Article VI:1 would still apply. Even if a cost recoupment were to be required in addition to a price difference, a price difference must always be found in the first place. The second reason is more of an economic nature. Since, in transnational price discrimination, an exporter may benefit from an isolated domestic market where it may maximise its profits, recoupment on the *export* market may not always occur in a situation of international predatory pricing. The recoupment requirement, which may be justified in cases of price discrimination within the United States, may be an economically questionable requirement in cases of transnational price discrimination, at least whenever the exporter does not need to recoup its costs on the US market. Indeed, the company exporting at dumped prices may benefit from a simultaneous recoupment of its "dumping" costs through more profitable sales on its domestic market.

6.171 However, this Panel is called on to clarify WTO provisions, not to discuss specific anti-trust issues. Therefore, having expressed the above-mentioned reservations, we proceed to consider if, effectively, the *Brooke Group* test has been actually and consistently applied by US courts in their interpretation of the 1916 Act.

6.172 If the Supreme Court decision in *Brooke Group* is applicable to the 1916 Act, one would expect the other courts which had to consider complaints under the 1916 Act to apply that test as well. We have no clear evidence that this has been the case, even if one assumes that the test was already applicable since *In Re Japanese Electronic Products III* (1986), as it would appear from the reaction of the courts in the *Geneva Steel*<sup>534</sup> and *Wheeling-Pittsburgh* cases.<sup>535</sup>

6.173 In that context, the parties have discussed the content of the *Helmac I* case (1992). We understand that the court in the *Helmac I* case concluded that the complainant did not have to establish recoupment. On the contrary, the court noted the importance of the difference in terminology between the 1916 Act and the US anti-trust statutes. According to the court, the 1916 Act:

"focuses upon intent while the antitrust statutes focus upon effect. Beside injury to competition, the Antidumping Act also provides a cause of action when the defendant attempts to, among other things, injure an industry in the United States."<sup>536</sup>

The court only stated as a possibility that the adoption of the recoupment theory would be appropriate if *Helmac*, the complainant in that case, had claimed that the defendant's conduct injured *competition*. Since *Helmac* alleged an attempt to injure an *industry* in the United States, the court concluded that proving ability to recoup losses was not necessary.<sup>537</sup> In the *Helmac II* decision (1993) the court differentiated between liability, of which a finding of dumping was the key, and the calculation of the harm caused to the domestic industry.<sup>538</sup>

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<sup>534</sup> *Op. Cit.* See para. 6.177 below.

<sup>535</sup> *Op. Cit.* See para. 6.179 below.

<sup>536</sup> *Helmac I, Op. Cit.*, pp. 575-576.

<sup>537</sup> *Ibid.*, p. 575.

<sup>538</sup> *Helmac II, Op. Cit.*, at p. 591.

6.174 Therefore, we consider that we do not have sufficient evidence of the actual application of the *Brooke Group* test to 1916 Act cases in relation to the establishment of the price discrimination required by that law.

The interlocutory decisions relied upon by Japan

6.175 Japan alleges that two interlocutory judgements in the *Geneva Steel* and *Wheeling Pittsburgh* cases support its claims that the 1916 Act addresses dumping within the meaning of Article VI of the GATT 1994. Japan also considers that these decisions show the lack of relevance of the *Zenith III* decision, because it ignored the text of the 1916 Act. The United States argues that these two decisions are neither final nor conclusive under US law. Therefore, they cannot, at the present time, be considered by the Panel as authoritative interpretations of US law.

6.176 We are fully aware of the fact that these decisions are only interlocutory judgements issued in different circuits than the *Zenith* decisions. We consider that our review of the other - final - judgements referred to by the parties already shows that US courts did not interpret the transnational price discrimination test of the 1916 Act in such a way that it would fall outside the scope of Article VI of the GATT 1994. However, we recall that we are required to make an objective assessment of the facts of the case. Since these two interlocutory judgements have, like the *Zenith* cases, actually discussed in detail the origin, objectives and practical operation of the 1916 Act, we found it relevant to consider also those cases. We also note that these two cases are subsequent to the *Zenith* cases and the Supreme Court decision in the *Brooke Group* case. Considering them is appropriate in light of the arguments of the United States based on those decisions. Finally, as mentioned in paragraph 6.152(a) above, we are interested in the *reasoning* followed by the US courts as a clarification of how the transnational price discrimination test of the 1916 Act operates. If this reasoning is convincing, we feel justified in taking it into account in our examination.<sup>539</sup>

6.177 In *Geneva Steel*, the district court addressed the question whether the 1916 Act always requires evidence of antitrust-like predatory pricing. Since the intent of predatory pricing in our opinion does not affect the transnational price discrimination test of the 1916 Act, we do not consider that judgement to be directly relevant to our case. However, we note that the court considered that "By the words it chose, Congress protected United States industry from unfair dumping."<sup>540</sup> Having regard to our conclusions regarding the use of the word "dumping" in other judgements, we assume that the court consciously used the word "dumping" in the same meaning as this word is given in Article VI:1 of the GATT 1994.

6.178 Other reasonings of the court are relevant in so far as they seem to confirm our understanding of the case-law. For instance, the court in *Geneva Steel* considered the conclusion in *Zenith III* that the 1916 Act was "an antitrust, not a protectionist statute". It stated that such conclusion did not appear to be necessary to support the finding of the court in the *Zenith III* case that the term "such articles" in the 1916 Act included also "similar" articles.<sup>541</sup> The reason for this conclusion was, as we understand it, that the relevant text in the 1916 Act had been imported from the 1913 Tariff Act, a customs statute which provided for a "similarity" standard. We also note that the court in *Geneva Steel* found the terms of the 1916 Act unambiguous,<sup>542</sup> as we did – at least with respect to the transnational price

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<sup>539</sup> Since the Panel's second substantive meeting with the parties there have apparently been further developments in the *Wheeling-Pittsburgh* case. According to the United States, the plaintiff in that case, Wheeling-Pittsburgh Steel Corporation, has voluntarily dismissed its claims against the remaining defendants at the trial court level so that all that remains is an appeal of an interlocutory opinion regarding injunctive relief currently pending before the US Court of Appeals for the Sixth Circuit. We do not consider that these recent developments affect our approach to the *Wheeling-Pittsburgh* case.

<sup>540</sup> *Geneva Steel*, p. 1217.

<sup>541</sup> *Geneva Steel*, p. 1218.

<sup>542</sup> *Ibid.*, p. 1222-1223.

discrimination test - when we considered the text of the 1916 Act in isolation from the subsequent case-law.

6.179 The court in the *Wheeling-Pittsburgh* case did not address the price discrimination test of the 1916 Act as such, but the question whether predatory intent had to be demonstrated. Its reasoning is therefore less relevant for this case, except for its discussion of the inclusion of the predatory pricing/price recoupment test in the 1916 Act.<sup>543</sup> In that respect, like in the *Geneva Steel* case, the court in *Wheeling-Pittsburgh* rejected the application of this test with respect to certain circumstances of application of the 1916 Act because it created a double burden of proof for the complainants. Indeed, the court considered that the *Zenith III* decision had added "an antitrust type of predatory pricing, including the reasonable prospect of resultant market control and price recoupment", to the "intent" to injure or destroy or prevent the establishment of a domestic industry contained in the text of the 1916 Act.<sup>544</sup>

6.180 The *Geneva Steel* and *Wheeling-Pittsburgh* cases shed additional light on the interpretation of the pricing/recoupment test because they have addressed quite specifically the question of its application. They also represent additional evidence that some district courts do not find themselves compelled, at least at an early stage of consideration of an issue, to apply the *Brooke Group* predatory pricing/price recoupment test to claims under the 1916 Act.

(iv) *Conclusion*

6.181 We find that that the assessment made by courts of the price discrimination test of the 1916 Act was based essentially on the text of the 1916 Act itself, without any significant additions. We also find that, at best, we have no clear evidence of a consistent application of the cost recoupment test – or any other "anti-trust" standards, such as below-cost prices - in the implementation of the transnational price discrimination test of the 1916 Act. In accordance with our approach,<sup>545</sup> we conclude that the US case-law supports our original conclusion that the 1916 Act addresses "dumping" within the meaning of Article VI:1 of the GATT 1994.

**3. Conclusions on the applicability of Article VI of the GATT 1994 and of the Anti-Dumping Agreement to the 1916 Act**

(a) The 1916 Act falls within the scope of Article VI of the GATT 1994 and of the Anti-Dumping Agreement

6.182 Having interpreted Article VI of the GATT 1994 in accordance with the Vienna Convention, we have reached the conclusion that the rules and disciplines of that article apply to laws that address "dumping" as defined in Article VI:1. Having examined the text of the 1916 Act, we have found that the transnational price discrimination test incorporated in that law falls within the definition of "dumping" of Article VI:1 of GATT 1994. On the basis of our interpretation of Article VI, we have also found that none of the additional conditions or requirements contained in the text of the 1916 Act is such as to make the transnational price discrimination test of the 1916 Act fall outside the scope of the definition of "dumping" in Article VI:1 or otherwise modify our conclusions. We found no convincing evidence in the legislative history that should lead us to understand the terms of the price discrimination test of the 1916 Act differently than we have. Finally, our review of the US court

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<sup>543</sup> The Court in *Wheeling-Pittsburgh* (1999) gave its views as to why the "predatory pricing" part of the *Brooke Group* test could not apply to cases under the 1916 Act. The court stated that "by requiring a plaintiff to prove 'intent to injure a domestic industry' by below-cost-pricing, the Antidumping Act of 1916 does require proof of predatory intent, albeit of a different kind" (p. 601). However, since its reasoning was based only on the "intent" requirement of the 1916 Act, we do not find it necessary to address it.

<sup>544</sup> *Wheeling-Pittsburgh, Op. Cit.*, p. 605.

<sup>545</sup> See paras. 6.152-6.153 above.

decisions submitted by the parties did not show that courts had interpreted the transnational price discrimination test of the 1916 Act in such a way that it would no longer meet the definition of Article VI:1 of the GATT 1994.

6.183 This conclusion also disposes of the argument of the United States that the 1916 Act has been interpreted in such a manner that it would fall outside the scope of Article VI of the GATT 1994.

6.184 Having found that Article VI of the GATT 1994 applies to the 1916 Act, and having regard to the relationship between that Article and the Anti-Dumping Agreement, as highlighted in paragraphs 6.92-6.94 above, we find that the applicability of Article VI to the 1916 Act also implies the applicability of the Anti-Dumping Agreement to the 1916 Act.

(b) The 1916 Act is a mandatory law within the meaning of GATT 1947/WTO practice

6.185 With respect to the discretion enjoyed by the US Department of Justice which would, according to the United States, make the 1916 Act non-mandatory, we recall our reasoning in paragraphs 6.106-6.107 above.

6.186 We note that anti-dumping laws may involve a large degree of discretion for the investigating authorities in terms of deciding on the initiation of an investigation. If one were to apply the "mandatory/discretionary" doctrine suggested by the United States, such a degree of discretion might well be sufficient for a panel to declare that, as far as criminal proceedings are concerned, the 1916 Act does not *mandate* WTO-inconsistent actions. However, we note that Article 18.4 of the Anti-Dumping Agreement, to which Japan referred in the proceedings, reads as follows:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative practices with the provisions of this Agreement, as they may apply to the Member in question."

6.187 Japan also argues that Article 18.4 applies in this case instead of the mandatory/non-mandatory dichotomy suggested by the United States. The United States argues that there is nothing inherent in the anti-dumping context that renders the generally applicable distinction between mandatory and non-mandatory legislation inapplicable.

6.188 We note that Article 18.4 requires that Members ensure that their anti-dumping laws are in conformity with the provisions of the Anti-Dumping Agreement as of the time of the entry into force of that Agreement for the Member concerned. Since we have found that the 1916 Act is subject to Article VI and the Anti-Dumping Agreement, the obligations of Article 18.4 apply to it and the United States should have taken all necessary steps, of a general or particular character, to bring the 1916 Act into conformity with the Anti-Dumping Agreement. We also note that Article 18.4 creates an obligation of conformity of the *laws* of a Member *no later* than the date of entry into force of the Anti-Dumping Agreement for that Member. In other words, Article 18.4 requires (i) the conformity of the law as such, regardless of whether it is applied or not and (ii) this conformity must be achieved as of the entry into force of the WTO Agreement for the Member concerned and *permanently* thereafter. In contrast, the mandatory/non-mandatory doctrine is based on the conformity of the law only in *instances* of application.

6.189 The notion of "mandatory/non-mandatory legislation" is a generally recognised concept of international law, whereas Article 18.4 is a treaty provision. Even if one were to assume that this concept is actually a norm of customary international law, it is well established under general

international law that treaty provisions normally prevail over norms of customary international law.<sup>546</sup> We therefore conclude that, to the extent that Article 18.4 requires the conformity of the 1916 Act with the Anti-Dumping Agreement as of the date of entry into force of the WTO Agreement for the United States, the notion of mandatory/non-mandatory legislation is no longer relevant in determining whether the Panel can or cannot review the conformity of the 1916 Act with the Anti-Dumping Agreement. We note in this respect the approach followed by the panel in the report on *EC – Audio Cassettes*. This report, which was not adopted,<sup>547</sup> considered why the mere fact that the initiation of anti-dumping investigations was discretionary would not make the EC legislation at issue non-mandatory. The panel stated that:

"[it] did not consider in any event that its task in this case was to determine whether the EC's Basic Regulation was non-mandatory in the sense that the initiation of investigations and impositions of duties were not mandatory functions. Should panels accept this approach, they would be precluded from ever reviewing the content of a party's anti-dumping legislation."<sup>548</sup>

The *EC – Audio Cassettes* panel expressly based its reasoning on the fact that this approach would undermine the obligation contained in Article 16.6 of the Tokyo Round Anti-Dumping Agreement. That provision, which contained terms almost identical with Article 18.4 of the WTO Anti-Dumping Agreement, provided that parties had to bring their laws, regulations and administrative procedures into conformity with the provisions of the Tokyo Round Anti-Dumping Agreement.<sup>549</sup>

6.190 Like the panel on *EC – Audio-Cassettes* with respect to Article 16.6(a) of the Tokyo Round Anti-Dumping Agreement, we consider that interpreting the provisions of Article 18.4 differently would undermine the obligations contained in that article and would be contrary to the general principle of effectiveness<sup>550</sup> by making many disciplines of the Anti-Dumping Agreement non-enforceable as soon as a Member would claim that the investigating authority has discretion to initiate or not an anti-dumping investigation.<sup>551</sup>

6.191 We therefore conclude that the discretion enjoyed by the US Department of Justice to initiate a case under the 1916 Act should not be interpreted as exempting the 1916 Act from scrutiny under Article VI of the GATT 1994 and the Anti-Dumping Agreement.

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<sup>546</sup> See, e.g., ICJ judgement *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ Reports 1986, p. 137, which stated at paragraph 274 that:

"In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim".

<sup>547</sup> *Op. Cit.* On the legal value of unadopted panel reports, see footnote 485 above and its reference to the Appellate Body report on *Japan – Taxes on Alcoholic Beverages*.

<sup>548</sup> *Op. Cit.*, para. 362.

<sup>549</sup> Article 16.6(a) ("National Legislation") of the Tokyo Round Anti-Dumping Agreement provided as follows:

"Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure , not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Party in question."

<sup>550</sup> See *United States – Gasoline and Argentina - Safeguards, Op. Cit.*

<sup>551</sup> We also find support for our reasoning in the report of the panel on *United States – Section 301-310 of the Trade Act of 1974*, adopted on 20 January 2000, WT/DS152/R, para. 7.54 and footnote 675.

6.192 As a result, we consider that the United States, as the party having raised this defence, failed to supply convincing evidence that the 1916 Act should be considered as "non-mandatory legislation" within the meaning of GATT 1947/WTO practice.<sup>552</sup> We therefore find that the 1916 Act cannot be considered to be a "non-mandatory" law.<sup>553</sup>

(c) Concluding remarks on the applicability of Article VI of the GATT 1994 and the Anti-Dumping Agreement to the price discrimination test of the 1916 Act

6.193 First, we would like to recall that our findings are based on an objective interpretation of the terms of Article VI and the Anti-Dumping Agreement. Our findings do not contest the fact that the US authorities and US courts may, in good faith, consider that the 1916 Act addresses anti-trust issues. With respect to the interpretations made by the US courts, our findings do not affect certain aspects of the 1916 Act which could be claimed to be of an anti-trust nature, since the interpretations made by US courts did not affect the price discrimination test which we found was similar to the definition of "dumping" in Article VI.

6.194 The United States warned the Panel of the implications of an interpretation of the price discrimination test of Article VI that would be so broad that it could make Article VI of the GATT 1994 applicable to all anti-trust laws, including those of Japan, when such laws address situations of transnational price discrimination.

6.195 We recall that we were requested to review the conformity of the 1916 Act with the provisions of the WTO Agreement, not to address the general issue of the relationship between trade law and anti-trust law. In order to assess the WTO-compatibility of the 1916 Act, we interpreted the provisions of Article VI:1 of the GATT 1994 in conformity with the general principles of interpretation of public international law, as embodied in the Vienna Convention. This exercise led us to conclude that the terms of Article VI, interpreted in their context and in the light of the object and purpose of GATT 1994 and the WTO Agreement, applied to the form of transnational price discrimination addressed by the 1916 Act. The United States did not provide us with any evidence or argument that would demonstrate that we should have read in Article VI:1 a limitation addressing the risk highlighted by the United States in the previous paragraph.<sup>554</sup> As recalled by the Appellate Body, we are not to import into the text of the WTO Agreement conditions that do not appear from its terms

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<sup>552</sup> We recall that we found in paras. 6.101-6.102 above that the burden of proof established by the *US – Tobacco* panel was not applicable in the present case. In application of the rules on burden of proof recalled in paras. 6.24-6.26 above, we consider that it was up to the United States to provide sufficient evidence to establish a *prima facie* case for its defence.

<sup>553</sup> Having found that the 1916 Act cannot be considered as "non-mandatory" legislation within the meaning of that concept under GATT 1947/WTO practice, we do not find it necessary to address the arguments of the parties on the impact of Article XVI:4 of the Agreement Establishing the WTO on the application of that concept.

<sup>554</sup> We note that, in any event, the scope of the WTO Agreement does not exclude *a priori* restrictive business practices. Thus, the fact that the 1916 Act would be an anti-trust law would not *per se* be sufficient to exclude the application of WTO rules to that law. We note that panels under GATT 1947 and the WTO have addressed various aspects of restrictive business practices initiated by governments when such practices had the effect of impeding market access of foreign products or entry of foreign enterprises (see e.g., *Japan – Trade in Semiconductors*, adopted on 4 May 1988, BISD 35S/116; *Japan – Photographic Films*, adopted on 22 April 1998, WT/DS44R and M. Matsushita: *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process in International Trade Law and the GATT/WTO Dispute Settlement System* E.-U. Petersmann Ed. (1997), p. 359. Consequently, we do not consider the dichotomy trade law/anti-trust law, to the extent that it would be based on the assumption that WTO disciplines are not intended to apply to business restrictive practices, to be a limitation to the application of WTO rules and disciplines.

interpreted in accordance with the Vienna Convention.<sup>555</sup> Our conclusion is, therefore, fully consistent with our mandate.

6.196 In any event, we are not convinced that our conclusion, if applied outside the context of this dispute, would generate the effect referred to by the United States.

6.197 First, we note that transnational price discrimination of the type covered by the definition of "dumping" in Article VI:1 of GATT 1994 is only one narrowly defined type of price discrimination. Other types of price discrimination, beginning with primary-line price discrimination under the Robinson-Patman Act, do not fall within the scope of the definition of "dumping" in Article VI:1.<sup>556</sup> In particular, the definition of Article VI:1 does not address price discrimination within the territory of a given jurisdiction.

6.198 Second, under Article VI:1 of the GATT 1994, the identification of "dumping" is the starting-point for any determination of injurious dumping. It is the only possible basis for the initiation of an anti-dumping investigation by a Member and for the imposition of measures. Injury not causally linked to the dumping cannot be addressed through anti-dumping action.<sup>557</sup> Comparatively, under anti-trust law, the causes of a given market disruption can be several. When determining what could be at the origin of certain prices, anti-trust investigators will try to identify specific practices such as price conspiracy or abuse of dominant position. It is the understanding of the Panel that, under anti-trust law, transnational price discrimination of the type covered by the definition of "dumping" in Article VI:1 of GATT 1994 is not sufficient *as such* to form the basis for a claim of violation of anti-trust law, even in the presence of a disruption on the export market based on the prices found on that market. It is necessary to demonstrate other specific practices, such as monopoly, abuse of dominant position, price agreement or concerted practices, of which transnational price discrimination may constitute, at most, only supporting evidence.

6.199 We therefore conclude that the possibility that our findings with respect to Article VI:1 of the GATT 1994 could affect the application of anti-trust laws of Members is very limited, since transnational price discrimination as defined in Article VI:1 of GATT 1994 is only one limited form of price discrimination that may be considered under anti-trust law. Moreover, transnational price discrimination is unlikely to constitute *by itself* a practice which anti-trust law would consider to be a cause for imposition of sanctions.

6.200 Having found that Article VI of the GATT 1994 is applicable to the 1916 Act because the latter addresses "dumping" and Article VI and the Anti-Dumping Agreement are applicable as soon as a Member's measure objectively addresses "dumping" within the meaning of Article VI, we proceed to address the claims of violation of Article VI:2 and the Anti-Dumping Agreement. On the basis of our findings, we will consider whether it is necessary to address the issue of the applicability and violation of Article III:4 of the GATT 1994.

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<sup>555</sup> See, e.g., Appellate Body Report in *India – Patent (US)*, *Op. Cit.*, para. 45, where the Appellate Body stated that the principles of interpretation contained in Article 31 of the Vienna Convention "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

<sup>556</sup> At our request, the United States confirmed that in order for the Robinson-Patman primary-line price discrimination to apply, both commodities involved in the alleged price discrimination must be sold for use, consumption or resale in the United States (see also *Zenith I*, *Op. Cit.*, p. 246).

<sup>557</sup> See Article 3.5 of the Anti-Dumping Agreement, which provides that injuries caused by certain factors must not be attributed to the dumped imports and includes among those factors "trade restrictive practices of and competition between the foreign and domestic producers". This provision would seem to imply that transnational price discrimination of the kind defined in Article VI:1 is not considered to be part of the "competition" practices between the foreign and domestic producers.

D. VIOLATION OF ARTICLE VI:2 OF THE GATT 1994 AND OF ARTICLE 18.1 OF THE ANTI-DUMPING AGREEMENT

1. Approach of the Panel

6.201 Japan claims that the 1916 Act violates Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement because it provides for other sanctions than anti-dumping duties, such as damages, fines or imprisonment. In support of its claim, Japan argues that Article VI:2 of the GATT 1994 authorises only one type of measure in response to dumping: the imposition of anti-dumping duties. Article 18.1 of the Anti-Dumping Agreement reaffirms the understanding that Article VI of the GATT 1994 is the sole GATT-authorized remedy for dumping.

6.202 The United States replies that Article VI and the Anti-Dumping Agreement do not govern all measures directed at dumping, but only laws and measures that attempt to counteract injurious dumping through the imposition of duties. Other measures are allowed as long as they are not inconsistent with other provisions of the GATT 1994.

6.203 In support of their respective positions, the parties refer to the ordinary meaning of the terms of Article VI:2 and of Article 18.1. They also refer to the context of those provisions, such as footnote 24 to Article 18.1 of the Anti-Dumping Agreement and Articles I:1 and II:2(b) of the GATT 1994. They also consider the object and purpose of the GATT 1994 and the Anti-Dumping Agreement and they address the negotiating history of GATT 1947 and the Anti-Dumping Agreement, as well as the Tokyo Round Anti-Dumping Agreement. In application of Article 31 of the Vienna Convention, we find it relevant to consider Article 18.1 as part of the context of Article VI:2

6.204 We note that Japan based its claim on both Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. We recall that, in section VI.B.4.(c) above, we considered the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement to be similar to the relationship between Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures and that between Article XIX of the GATT 1994 and the Agreement on Safeguards, as established by the Panel Report on *Argentina – Safeguards* and confirmed by the Appellate Body in the same case.<sup>558</sup> As a result, we shall ensure that our findings are made "in a way that gives meaning to [both] of them, harmoniously." In this respect, we recall that Article 18.1 provides that "No specific action against dumping of exports from another Member can be taken *except in accordance with the provisions of GATT 1994*, as interpreted by this Agreement" (emphasis added). On the basis of these terms, we are of the view that if we find a violation of Article VI:2 considered in its context (in particular the Anti-Dumping Agreement, including if it adds to the content of Article VI:2),<sup>559</sup> a violation of Article 18.1 will be automatically established.<sup>560</sup> If we do not find that the terms of Article VI:2, interpreted in their context and in the light of the object and purpose of the GATT 1994 and the WTO Agreement, support Japan's claim, we will proceed to review Article 18.1 as we will have done with Article VI:2.

6.205 Therefore, having regard to the arguments raised by the parties, we shall clarify the meaning of Article VI:2 of the GATT 1994 by applying the general principles of interpretation of public

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<sup>558</sup> See Appellate Body Report, *Op. Cit.*, para. 81.

<sup>559</sup> See Panel Report in *Brazil – Dessicated Coconut*, *Op. Cit.*, para. 246 and Appellate Body Report in the same case, p. 17.

<sup>560</sup> We are aware of the content of footnote 24 to Article 18.1. However, this footnote, like the rest of Article 18.1, are part of the context in which Article VI:2 must be interpreted. If we reach the conclusion that Article VI:2 has been violated by the 1916 Act in spite of the terms of footnote 24, there will be no reason for not finding a violation of Article 18.1.

international law as embodied in the Vienna Convention,<sup>561</sup> as we are instructed by Article 3.2 of the DSU and the Appellate Body practice.

6.206 We are aware of the fact that Article 31 of the Vienna Convention provides for one "General Rule of Interpretation", as its title states. For the sake of clarity, we will address one after the other the factors to be reviewed pursuant to that Article. However, each of these steps should be seen as part of one single process. If necessary to confirm the meaning resulting from the application of Article 31, or to determine the meaning if the interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to results manifestly absurd or unreasonable, we may have recourse to the supplementary means of interpretation under Article 32 of the Vienna Convention. On that basis, we will determine whether the 1916 Act, because it provides for other forms of sanctions than anti-dumping duties, violates Article VI:2 and Article 18.1 of the Anti-Dumping Agreement.

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<sup>561</sup> Article 31 (*General Rule of Interpretation*) of the Vienna Convention reads as follows:

- "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32 of the Vienna Convention (*Supplementary Means of Interpretation*) reads as follows:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

The Panel is mindful that other provisions of the Vienna Convention, such as Article 33 (*Interpretation of Treaties Authenticated in Two or More Languages*) are also relevant for the interpretation of international agreements.

## 2. Analysis of the terms of Article VI:2 of the GATT 1994

### (a) Arguments of the parties

6.207 Japan argues that Article VI of the GATT 1994 authorises only one measure in response to dumping: the imposition of an anti-dumping duty. Under Article VI:2, a Member may levy an anti-dumping duty equal to the margin of dumping or less than the margin of dumping, or it may decide to take no action. Any other action would violate Article VI. The text of Article 18.1 and footnote 24 of the Anti-Dumping Agreement reaffirm the understanding that Article VI of the GATT 1994 is the sole GATT-authorized remedy for dumping. A Member may affect imports through actions authorised by other provisions of the GATT 1994. For example, in a situation involving dumping, a Member could impose a safeguard measure after complying with the provisions of Article XIX of the GATT 1994 and the Agreement on Safeguards. However, the objective of the action itself would not be to address the dumping, but rather its effect. Footnote 24 simply avoids the possible conflict between other actions against imports under the WTO and the obligation under Article 18.1 not to take other action against dumping. No provision of the GATT 1994 justifies the procedures and penalties provided by the 1916 Act. The reference of the United States to Article III is irrelevant since this article does not enable a Member to take specific measures against dumping.

6.208 The United States argues that Japan's interpretation that Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement establish that anti-dumping duties are the exclusive remedy for injurious dumping is contradicted by the ordinary meaning of the terms used by the two articles in question. As made clear by footnote 24 to Article 18.1, a Member may take a measure against injurious dumping even when such measures are not explicitly set forth in Article VI of the GATT 1994 or the Anti-Dumping Agreement, as long as the measure is not inconsistent with the other provisions of the GATT 1994. Nothing in Article VI:2 addresses whether anti-dumping duties are the exclusive remedy for dumping. It simply states that a Member "may" levy an anti-dumping duty to offset or prevent dumping, it does not state that a Member "may only" levy anti-dumping duties. If the word "only" had been intended, the text could and would have said so.

6.209 Moreover, according to the United States, Article VI only governs laws and measures that attempt to counteract injurious dumping through the imposition of duties, based on findings of "dumping" and "injury". When Article VI is read in the context of Articles I:1 and II:1 of the GATT 1994, it can be seen that the coverage of Article VI is limited to laws or measures that attempt to counteract injurious dumping through the imposition of anti-dumping duties. Article VI establishes a right to impose duties, it does not prohibit the imposition of other measures. Moreover, Article VI does not address the issue. It is Article 18.1 of the Anti-Dumping Agreement that addresses that issue, and it makes clear that a Member may take whatever other action is consistent with other GATT 1994 provisions. If a law imposes damages on importers, it does not fall within the scope of Article VI, since it does not impose duties, but it would be an internal law subject to Article III:4 of the GATT 1994.

(b) Ordinary meaning of Article VI:2, first sentence, of the GATT 1994

6.210 We note that with respect to Article VI:2 of the GATT 1994, the parties have exclusively referred to the first sentence, which provides as follows:

"In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."

6.211 In that article, the only term the meaning of which is actually debated by the parties is the verb "may". The ordinary meanings of the verb "may" as an auxiliary verb include "have ability or power to, can"<sup>562</sup> Taken on its own, this verb could mean that Members have the possibility only to impose duties or that they have a choice between duties and other types of measures. If the word "may" was used in the first meaning, it could be argued that the term "only" should have been added right after it so as to limit its meaning. However, such an argument disregards the immediate context of the word "may". The terms "in order to offset or prevent dumping" set up the framework in which the term "may" must be understood. By specifying that the purpose of anti-dumping is to "offset" dumping, not to impose punitive measures, Article VI:2, first sentence, limits the meaning of the word "may" to giving the choice between a duty equal to the dumping margin or a lower duty, not between anti-dumping duties and other measures.

6.212 In other words, the thrust of the first sentence of Article VI:2 is to make the *imposition* of duties facultative and to limit in any event that amount to the dumping margin. If, as suggested by the United States, that sentence, and in particular the word "may" had been meant to allow other measures than anti-dumping duties, it is reasonable to expect that this would have been specified. We recall that Article VI was meant to regulate the use of anti-dumping by WTO Members. It would have been logical to list the other possible sanctions, especially if those sanctions could be more severe than the imposition of offsetting duties.<sup>563</sup> We therefore conclude that the ordinary meaning of the terms of the first sentence of Article VI:2 support the view that anti-dumping duties are the only type of remedies allowed under Article VI of the GATT 1994.

(c) Context of Article VI:2 of the GATT 1994

6.213 We note that the immediate context of Article VI:2 within Article VI confirms our understanding of the word "may". The United States stresses the fact that the words "may" was used in Article VI:2, rather than "shall", as in other paragraphs of Article VI. In our opinion, the term "shall", as used in paragraphs 3 to 6 was not necessary in paragraph 2 of Article VI if it was meant to be permissive, not mandatory to *impose* duties, and "shall" was not necessary either to express the idea that only anti-dumping duties could be imposed.

6.214 As noted above, we see Article VI and Article 18.1 as part of the same "package" of rights and obligations, if only because the Anti-Dumping Agreement interprets Article VI of the GATT 1994 (see the terms of Article 18.1, below). As a result, Article 18.1 is particularly relevant as context of Article VI, but we shall also review the other provisions referred to by the parties: Article I and II of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.

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<sup>562</sup> See The New Shorter Oxford English Dictionary (1993), p. 1721. It is evident that while we review the ordinary meaning, our reading of the dictionary is already made selective by the broad context of the term. For instance, we left aside the definition of "may" as "have the possibility, opportunity or suitable conditions to..." or the definition of "may" which, in the interpretation of some statutes means "shall, must".

<sup>563</sup> We note in that respect that Article 7.2 of the Anti-Dumping Agreement, which provides for the types of provisional measures that may be imposed, lists the measures that may be taken, i.e. "provisional duty or, preferably, a security".

6.215 Article 18.1 provides as follows:

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. [footnote 24]"

Footnote 24 to Article 18.1 reads as follows:

"24 This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate."

6.216 We consider that the provisions of Article 18.1 as such limit the *anti-dumping instruments* that may be used by Members to those expressly contained in Article VI and the Anti-Dumping Agreement. Except for provisional measures and price undertakings, the only type of remedies foreseen by the Anti-Dumping Agreement is the imposition of duties. We also note that Article 9.1 of the Anti-Dumping Agreement<sup>564</sup> establishes a clear connection between the calculation of a dumping margin provided for in Article 2 of that agreement and the final measures that may be imposed. We therefore conclude that the context of Article VI confirms the provisional conclusion we had reached on the basis of the ordinary meaning.

6.217 The United States argues that the terms of footnote 24 to Article 18.1 of the Anti-Dumping Agreement, like footnote 16 to Article 16.1 of the Tokyo Round Anti-Dumping Agreement, does not "lock" a Member into levying anti-dumping duties when faced with a factual situation constituting injurious dumping. Footnote 24 leaves the option open for applying other measures that are in accordance with the GATT 1994. According to the United States, if the measure is of a nature that is simply not regulated by the GATT 1994, as is the case for the 1916 Act, the measure is *a fortiori* consistent with GATT 1994.

6.218 We consider that footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement. Such a possibility does not affect our conclusion that, when a law of a Member addresses the type of price discrimination covered by Article VI and makes it the cause for the imposition of anti-dumping measures, that Member has to abide by the requirements of Article VI and the Anti-Dumping Agreement. Whether or not Article VI applies does not depend on whether a Member addresses dumping through the imposition of duties or through the imposition of other remedies, with the implication that Article VI applies only if a Member addresses dumping through the imposition of duties, as opposed to, e.g., fines on importers. In our opinion, the application of Article VI depends on whether the practice that triggers the imposition of the measures is "dumping" within the meaning of Article VI:1 of the GATT 1994. If the interpretation suggested by the United States were to be followed, Members could address "dumping" without having to respect the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Such an interpretation would deprive Article VI of the GATT 1994 and the Anti-Dumping Agreement of their useful effect within the framework of rules and disciplines imposed by the WTO Agreement.

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<sup>564</sup> Article 9.1 provides as follows:

"The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

6.219 The United States argues that the coverage of Article VI, read in the context of Articles I:1 and II:1 of the GATT 1994, is limited to laws or measures that attempt to counteract injurious dumping through the imposition of anti-dumping duties. Article VI is a carve-out to those articles, and merely allows Members to impose anti-dumping duties above the relevant bound rate and on a non most-favoured-nation basis. It does not follow that Article VI (or Article 18.1 of the Anti-Dumping Agreement) would itself act as a prohibition against actions that Members may take. Rather, according to the United States, Article VI is properly viewed as establishing a right that a Member has, that is the right to impose duties to counteract injurious dumping.

6.220 We do not regard the US argument as compelling. The fact that Article VI provides for a carve-out to Articles I and II or, as the panel report on *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* puts it, "an exception to basic principles of the General Agreement",<sup>565</sup> does not support the argument that Article VI only applies to laws that purport to address injurious dumping through anti-dumping duties. It merely confirms that duties may be imposed under Article VI without violating Articles I and II of the GATT 1994. This conclusion does not affect our interpretation of Article VI:2 based on the ordinary meaning of that provision.

6.221 As part of the context of Article VI:2, we find the terms of Article 1 of the Anti-Dumping Agreement more relevant. Article 1 provides as follows:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated [footnote 1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

Footnote 1 to Article 1 reads as follows:

"1 The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."

6.222 In this respect, we requested the parties to provide us with their understanding of the meaning of the term "measure" in Article 1, so as to have a clearer view of the impact of the context of Article VI:2. Both parties referred to the three types of measures allowed under the Anti-Dumping Agreement. In addition, the United States argued that the word "measure" is qualified by the term "anti-dumping", stating that this term limits the scope of Article 1. In our opinion, an anti-dumping measure is a measure aimed at counteracting dumping as such, as defined in Article VI:1 of the GATT 1994. Members may decide to address under other WTO provisions the causes or the effects of dumping. By doing so, they would not adopt "anti-dumping measures" within the meaning of Article VI and the Anti-Dumping Agreement. However, if they objectively address a form of price discrimination that meets the definition of Article VI, this must be in accordance with Article VI and the Anti-Dumping Agreement, which themselves do not refer to any other remedy than duties. We therefore conclude that the context of Article VI:2 of the GATT 1994 confirms our understanding of the meaning of that provision based on its ordinary meaning.

(d) Object and purpose

6.223 We note that the parties have not, in their arguments regarding the meaning of Article VI:2 addressed the object and purpose of the GATT 1994, of the Anti-Dumping Agreement or of the WTO Agreement in general. We recall that the preamble of a treaty may assist in identifying the object and purpose of that treaty. However, as far as dumping is concerned, the preambles of the

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<sup>565</sup> Adopted on 11 July 1991, BISD 38S/30, para. 4.4. We note that the reasoning of the panel in that case related to Article VI:3 of the GATT 1947.

WTO Agreement and the GATT do not provide precise directives. We note however that both preambles refer to the "substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations". We also note that the WTO preamble refers to the development of a "more viable and durable multilateral trading system". We consider that the approach of the United States which would allow Members to take any type of measure against dumping as such outside the framework of Article VI, as long as they are not incompatible with other provisions of the WTO Agreement, does not seem to be commensurate with the objectives highlighted above.

6.224 Moreover, the fact that dumping may only be subject to countermeasures if it causes injury and then only through anti-dumping duties promotes, in our opinion, the durability and viability of the trading system. As a matter of fact, the WTO Agreement does not regulate dumping, but anti-dumping, even though by doing so it also recognises the negative effect of dumping. One should also recall that the developments that took place through the various agreements on anti-dumping have imposed clearer conditions on recourse by Members to anti-dumping instruments. The effect of these efforts would be significantly limited if a Member could be exempted of their obligations by simply choosing to impose any other measure than anti-dumping duties to counteract dumping as such.

6.225 We therefore consider that the object and purpose of the WTO Agreement and the GATT 1994 confirm our interpretation of the terms of Article VI:2 taken in their context.

(e) Preparatory work

6.226 We could conclude our interpretation of Article VI:2 of the GATT 1994 on the basis of the rule of Article 31 of the Vienna Convention. However, since the parties have discussed the meaning of the negotiating history at length, we consider it in order to determine if it confirms the meaning of Article VI:2 we have identified under Article 31.

6.227 The parties have referred to a number of documents relating to the negotiation of the Havana Charter and the GATT.<sup>566</sup> We do not consider it necessary to review all these materials since our analysis under Article 31 of the Vienna Convention does not leave the meaning of Article VI ambiguous or obscure and does not lead to a manifestly absurd or unreasonable result. We recall, however, that the parties have, in particular, discussed the Report of the Working Party on Modifications to the General Agreement, which was adopted by the CONTRACTING PARTIES on 1-2 September 1948 in the context of the revision of Article VI of GATT 1947.<sup>567</sup> This report mentions that:

"endorsing the views expressed by Sub-Committee C of the Third Committee of the Havana Conference, [footnote omitted] [it] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except in so far as such other measures are permitted under other provisions of the General Agreement."<sup>568</sup>

6.228 We consider that the first part of the sentence ("measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization") confirms our understanding of Article VI. The second part of the sentence ("except in so far as such other measures are permitted under other provisions of the General Agreement"), may be understood as allowing Members to counter dumping through other measures than anti-dumping duties.<sup>569</sup> The

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<sup>566</sup> See section III.E.3. above.

<sup>567</sup> See the discussion in section III.F above.

<sup>568</sup> BISD Vol. II, p. 41 (1952), para. 12.

<sup>569</sup> We note in this respect that the United States refers to John H. Jackson, World Trade and the Law of GATT (1968), p. 411, where it is mentioned that:

United States argues that a number of measures could be legally applied against dumping, such as raising unbound tariffs, tariff renegotiation, safeguard measures or countervailing measures. We note, however, that even though those measures may be legally applied to address dumping, the basis for their imposition would not objectively be "dumping", but its causes or effects. Safeguard measures or the increase of unbound tariffs would apply on a most-favoured-nation basis. So would the results of a tariff renegotiation. Unless all Members were dumping, dumping could not be considered as the objective reason for the imposition of the measures or of the renegotiated tariff *vis-à-vis* each Member. Countervailing measures can only be imposed in relation to subsidies. The fact that those subsidies may allow their beneficiaries to dump is not directly relevant to the imposition of the countervailing measures. Therefore, the sentence quoted above can only be understood as having the same meaning as footnote 24 to Article 18.1 of the Anti-Dumping Agreement.<sup>570</sup>

6.229 We conclude that the supplementary means of interpretation of Article 32 of the Vienna Convention confirm our interpretation of Article VI:2 of the GATT 1994 based on the ordinary meaning of its terms taken in their context and in the light of the object and purpose of the WTO Agreement.

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"Although Article VI carves out an exception to GATT obligations for anti-dumping or countervailing duties, nevertheless, measures that do not violate other GATT provisions can also be used to counteract dumping or subsidies. Thus, insofar as tariffs on a particular product are not bound in a GATT schedule, a country that found that the product was being dumped could raise its tariffs without limit to counteract the dumping, and go even further and punish the dumper."

<sup>570</sup> See para. 6.218 above. We also recall the reasons stated in the report of the Working Party established by Sub-Committee C of the Third Committee of the Havana Conference (E/CONF.2/C.3/C/18, 22 January 1948) for the deletion of paragraph 6 of Article 34 of the Geneva Draft Charter of the International Trade Organisation. Paragraph 6 was similar to paragraph 7 of the original Article VI of the GATT 1947 and read as follows:

"No measures other than anti-dumping or countervailing duties shall be applied by any contracting party in respect of any product of the territory of any other contracting party for the purpose of offsetting dumping or subsidization."

The question had been prompted by the issue whether paragraph 6 should be deleted or amended in the event that it could be interpreted so as to limit action permitted under Articles 13 and 14 of the Geneva Draft. The report stated that:

"The Working Party was evenly divided as to whether the terms of paragraph (6) could be construed as limiting the rights of Members under Articles 13 and 14. It was in agreement, however, that paragraph (6) was unnecessary and that its deletion would not effect any change in substance."

These statements confirm the intent to restrict the measures allowed to counteract dumping *as such* to offsetting duties. The fact that Article VI allows only for duties to counteract dumping practices as such is also confirmed by the Report of the Review Working Party on "Other Barriers to Trade", which mentions that:

"With respect to paragraph 3 of Article VI, the Working Party considered a proposal submitted by New Zealand which would have permitted under certain circumstances the use of quantitative restrictions to offset subsidization or dumping. This proposal did not receive the support of the Working Party, and has not been recommended." (BISD 3S/223, as quoted in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), p. 238)

### 3. Conclusion

- (a) Conclusion on the violation of Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement

6.230 We therefore find that Article VI:2 of the GATT 1994 provides that only measures in the form of anti-dumping duties may be applied to counteract dumping as such<sup>571</sup> and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994.

6.231 Having regard to our comments in paragraph 6.204 above and for the reasons mentioned therein, we conclude that the 1916 Act, because it violates Article VI:2 of the GATT 1994 by providing for other remedies than anti-dumping duties, is not "in accordance with the provisions of GATT 1994 as interpreted by [the Anti-Dumping Agreement]", within the meaning of Article 18.1. As a result, the 1916 Act also violates Article 18.1 of the Anti-Dumping Agreement.

6.232 We also recall our conclusion in paragraph 6.183 above. Since we found a violation of Article VI:2 of the GATT 1994 and of Article 18.1 of the Anti-Dumping Agreement, we do not find it necessary to determine what would be the legal consequences of a consistent WTO-compatible interpretation of the 1916 Act by US courts *in the future*.

- (b) Remarks on the burden of proof with respect to the violation of Article VI:2 of the GATT 1994 and of Article 18.1 of the Anti-Dumping Agreement

6.233 The Panel divided its own analysis along lines that did not always correspond to the argumentation followed by each party, since each adopted a different approach to the problem before us.<sup>572</sup> However, we consider that Japan has established a *prima facie* case for each point addressed by the Panel in relation to the applicability of Article VI and the Anti-Dumping Agreement and regarding the violation of Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement.<sup>573</sup> The United States did not sufficiently rebut them. Moreover, we consider that the United States did not establish such a *prima facie* case with respect to the defences it raised, especially regarding the jurisdiction of the Panel under Article VI and the Anti-Dumping Agreement and the non-mandatory nature of the 1916 Act.

#### E. VIOLATION OF ARTICLE VI OF THE GATT 1994 AND OF ARTICLES 1, 2, 3, 4, 5, 9, 11, AND 18.1 OF THE ANTI-DUMPING AGREEMENT

##### 1. Preliminary remarks

6.234 We recall that Japan makes several additional claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement. We already found that the 1916 Act violates Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement by providing for damages, fines or imprisonment, which are not allowed under those provisions. We are of the view that "adapting" the 1916 Act, by amendment or otherwise, to the requirement of Article VI:2 and Article 18.1 may not be

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<sup>571</sup> This is of course without prejudice to the acceptance of price undertakings, as provided for in the Anti-Dumping Agreement.

<sup>572</sup> See para. 6.111 above.

<sup>573</sup> Since Article 18.1 of the Anti-Dumping Agreement specifies that actions must be taken "in accordance with the provisions of GATT 1994 as interpreted by this Agreement" and since we found a violation of Article VI of the GATT 1994, we consider that such a violation automatically leads to a violation of Article 18.1.

sufficient to make the 1916 Act fully WTO-compatible.<sup>574</sup> We also recall that, as mentioned by the Appellate Body in its report on *Australia – Measures Affecting Importation of Salmon*,<sup>575</sup>

"A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of the dispute to the benefit of all Members.'"

We are of the view that additional findings with respect to the other claims of Japan under Article VI and the Anti-Dumping Agreement would assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance by the United States with those recommendations and rulings. We therefore proceed to address those claims to the extent necessary, reserving our right to exercise judicial economy if we consider that certain additional findings are not necessary, within the meaning of the quote from the Appellate Body Report above.

6.235 We also note that Japan, in its request for the establishment of a Panel (WT/DS162/3), did not specify the paragraphs of the provisions of the Anti-Dumping Agreement which it cited in support of its claims. Furthermore, in its claims based on both Article VI and the Anti-Dumping Agreement, Japan did not specify either which paragraph of Article VI it considered to be breached. We note that, in *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, the Appellate Body considered that the complainant in that case should have been more specific in presenting its claims in its request for the establishment of a panel, mostly since the provisions to which it referred had several paragraphs, each containing distinct obligations.<sup>576</sup> In this respect, the situation in the present case is quite similar. However, unlike Korea in the above-mentioned case, the United States did not claim that it had been prejudiced by the lack of precision of Japan's claims under the Anti-Dumping Agreement and Article VI of the GATT 1994. We read the requirements of Article 6.2 of the DSU in the light of the above-mentioned Appellate Body report and in the light of the Appellate Body Report in *European Communities – Bananas* as primarily designed to protect the respondent. We therefore consider that if the respondent does not argue that it has been prejudiced by the lack of specificity of the claims and the Panel is satisfied that it can make an objective assessment of the matter before it, including an objective assessment of the applicability of and conformity of the measure at issue with the relevant covered agreements, there is no reason for the Panel to reject the claims concerned *proprio motu*.

6.236 We note however that the United States does not specifically reply to each of the claims of Japan. It states that the claims raised by Japan under various provisions of the Anti-Dumping Agreement and Article VI rest on the assumption that the Panel has already found the 1916 Act to be in violation of Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. Thus, according to the United States, each of these claims has the same faulty premises.

6.237 Having regard to our findings under Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement, we also take note of the arguments of the United States and do not assimilate its absence of reply to an acknowledgement that Japan's claims are justified.

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<sup>574</sup> While this statement is not made under Article 19.1 of the DSU, we note that, pursuant to that provision, we are entitled to suggest ways in which the Member concerned could implement the Panel's recommendations.

<sup>575</sup> See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, para. 223.

<sup>576</sup> Adopted on 13 January 2000, WT/DS98/AB/R, paras. 129 and 131.

**2. Review of the additional claims of Japan under Article VI of the GATT 1994 and the Anti-Dumping Agreement**

(a) Violation of Article VI:1 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement

6.238 Japan claims that the 1916 Act provides for the application of sanctions outside the circumstances specified in Article VI:1 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement. Specifically, the 1916 Act provides for the imposition of measures in the absence of an investigation initiated and conducted in accordance with the provisions of the Anti-Dumping Agreement, and without establishing facts required by Article 1 thereof.

6.239 We recall that Article 1 of the Anti-Dumping Agreement reads as follows:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

6.240 We note a violation of Article 1 may result, *inter alia*, from the fact that the 1916 Act does not provide for investigations consistent with the Anti-Dumping Agreement. Japan has made other claims under other provisions of the Anti-Dumping Agreement. If we find that any of these claims is justified, we will conclude that Article 1 is violated.

6.241 Likewise, since Japan makes other, more specific claims with regard to Article VI:1, we will suspend our decision regarding a potential violation of that provision until we have addressed them. Indeed, we note that Article VI:1, *inter alia*, mentions circumstances under which an anti-dumping measure may be applied. If we find another cause of violation of Article VI:1, it will not be necessary for us to make a finding of violation of Article VI:1 in relation to a violation of Article 1 of the Anti-Dumping Agreement.

(b) Violation of Article VI:1(a) of the GATT 1994 and Article 2.1 and 2.2 of the Anti-Dumping Agreement

6.242 Japan argues that the 1916 Act prohibits the importation of products at a price "substantially less" than the "actual value or wholesale price of [the products] [...] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported [...]." In contrast, Article VI:1(a) of the GATT 1994 and Article 2.1 and 2.2 of the Anti-Dumping Agreement require that the first benchmark against which the price of the imported product is compared be the actual price of the product for sale in the exporting country. Under Article VI:1(a) and Article 2.1, the primary and preferred benchmark for comparison is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

6.243 We note that the terms of Article VI:1(a) of the GATT 1994 and Article 2 of the Anti-Dumping Agreement are different from those used in the 1916 Act. In order to determine whether this textual difference results in a violation, we need to consider whether those terms have been, or, in the absence of any past interpretation, could be interpreted consistently with the provisions of Article VI:1(a) and Article 2.

6.244 We first note that, contrary to Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, the 1916 Act does not make the comparable *price when destined for consumption in the exporting country* the preferred basis for the establishment of the normal value. In the 1916 Act, actual value or wholesale price of the products "in the principal markets [...] of other foreign countries to which they are commonly exported" seems to be equally applicable, even if an

appropriate comparable price for consumption in the domestic market of the exporting country exists. However, we note that nothing in the terms of the 1916 Act would prevent the introduction in practice of an order of precedence between the "actual value or wholesale price of [the products] [...] in the principal markets of the country of their production" and the actual value or wholesale price of [the products] [...] in the principal markets of other foreign countries to which they are commonly exported" compatible with the requirement of Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement.

6.245 Japan also argues that Article 2.4.1 of the Anti-Dumping Agreement provides that those against whom dumping is alleged can have protection against currency fluctuations. The 1916 Act provides no such protection.

6.246 Article 2.4.1 provides as follows:

"When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange of the date of sale [footnote 8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuation in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation."

Footnote 8 reads as follows:

"Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale."

6.247 We note that the mechanism provided for in Article 2.4.1 of the Anti-Dumping Agreement is not mentioned in the 1916 Act. We also note that nothing in the terms of the 1916 Act would prevent the use of that mechanism in the actual application of the 1916 Act.

6.248 Japan's arguments raise the question whether the mere fact that the 1916 Act does not expressly incorporate a WTO requirement, while at the same time not preventing the implementing authority from reading that requirement into the 1916 Act, can be considered as a violation of Article VI:1 and Article 2 of the Anti-Dumping Agreement.

6.249 We recall that, at our request, the United States explained that, pursuant to the doctrine established by the US Supreme Court in *Murray v. Schooner Charming Betsy*,<sup>577</sup> in the absence of conflict, US judges should, whenever possible, interpret US laws in conformity with the international obligations of the United States. Applied to the present case, this doctrine would imply that any judge before whom claims similar to those of Japan would be raised, would be expected to interpret the 1916 Act in conformity with the US obligations under Article 2 of the Anti-Dumping Agreement, provided there is no conflict between the relevant US legislation and international law. In other words, the fact that the 1916 Act is silent regarding some WTO requirements does not mean *a priori* that, when it comes to applying the 1916 Act to a particular case, those requirements would be disregarded.

6.250 We note that Japan did not give us grounds for believing that we should consider that the 1916 Act violates Article VI and the Anti-Dumping Agreement by the mere fact that it is silent with respect to certain requirements contained in those provisions. We also note that the terms of the

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<sup>577</sup> 6 U.S. (2 cranch) 64, 118 (1804). The United States also refers to *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing *DeBartelo Corp. v. Florida Gulf Coast Building and Trade Council*, 485 U.S. 568 (1988).

1916 Act are, as such, not incompatible with the above-mentioned requirements. Those requirements could be read into the 1916 Act through interpretation. Japan did not refer the Panel to any court decisions relating to the 1916 Act which would have specifically discussed the issue covered by Article 2.4.1 of the Anti-Dumping Agreement and applied an inconsistent decision. Japan did not point either at any other US law which would apply in relation to the 1916 Act (e.g., procedural rules) and would be in conflict with international law, thus preventing the application of the *Charming Betsy* doctrine in the first place. In our opinion, it is not for the Panel to "make the case" of the complainant.<sup>578</sup> As a result, we conclude that Japan did not establish a *prima facie* case that the 1916 Act violates Article VI:1(a) and Article 2.1 and 2.2 of the Anti-Dumping Agreement.

(c) Violation of Article VI.1 and VI:6(a) of the GATT 1994 and Article 3 of the Anti-Dumping Agreement

6.251 Japan claims that Articles VI:1 and VI:6(a) of the GATT 1994, and Article 3 of the Anti-Dumping Agreement, require a Member to find that a given dumping practice causes or threatens to cause material injury to its domestic industry (or retards the establishment of a domestic industry) before applying an anti-dumping measure. These articles also set forth criteria which define and govern the determination of injury. In contrast, the 1916 Act only requires a showing of intent. Moreover, the intent requirement in the 1916 Act is defined as an intent to destroy or injure a United States industry or to prevent its establishment. Thus, the 1916 Act contains no requirement similar to "material injury" within the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement.

6.252 We note that Article VI:1 of the GATT 1994 requires the existence of material injury or a threat thereof to an established industry or material retardation of the establishment of a domestic industry. The 1916 Act does not refer to material injury or threat of material injury or material retardation of the establishment of a domestic industry but to the *intent* of, *inter alia*, "destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States". In certain circumstances, the existence of an intent to injure may be more difficult to prove than the existence of actual injury. The United States executive branch early considered that the requirement of an "intent" made the imposition of remedies under the 1916 Act almost impossible.<sup>579</sup> The Panel also recalls that the Supreme Court in the *Brooke Group* case considered, with respect to a company's planning documents speaking of a desire to slow the growth of a given segment of industry, that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal anti-trust law". Thus, assuming that the *Brooke Group* test applies to the 1916 Act, and assuming further that it relates to the "intent" aspect of the law,<sup>580</sup> evidence of predatory pricing and prospects of recoupment are necessary. A statement of aggressive policy in an internal company document does not seem to be sufficient. However, we are not convinced that such requirements could be interpreted as having substituted an "actual effect" test to the "intent" test found

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<sup>578</sup> We are of the view that we face a situation resembling that addressed in the case on *Japan – Measures Affecting Agricultural Products* Panel and Appellate Body Reports adopted on 19 March 1999, WT/DS76/R and WT/DS76/AB/R (see Appellate Body Report., paras. 125-131). In that case, the complainant had not made a particular argument. The panel then deduced that argument from the experts' answers to its questions. The Appellate Body considered that, even though Article 13 of the DSU and Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures suggested that panels had significant investigative authority, this authority could not be used by a Panel to rule in favour of a complaining party which had not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.

<sup>579</sup> See *Geneva Steel, Op. Cit.*, at p. 1220, quoting a statement recorded in 56 Cong. Rec. 346 (Dec. 9, 1919):

"The Tariff Commission declares that [the 1916 Act] is not workable, for the reason that it is almost impossible to show the intent on the part of the importer to injure or destroy business in the United States by such importation or sale"

<sup>580</sup> See our opinion in this respect in paras. 6.168-170 above.

in the text of the 1916 Act. Even in the circumstances mentioned above, the existence of an "intent" may not always imply the existence of actual injury, actual threat of injury or actual retardation. Interpreting the term "injuring an industry or [...] preventing the establishment of an industry in the United States" in the 1916 Act as meaning "causing material injury or materially retarding the establishment of a domestic industry" as in Article VI of the GATT 1994 might be possible under US law. However, reading the "intent" requirement out of the 1916 Act would, in our view, amount to a *contra legem* interpretation of which we have seen no instance yet in relation to this case.

6.253 For these reasons, we find that the 1916 Act, to the extent that it provides for the identification of an "intent" on the part of the defendant rather than for the actual injury requirements of Article VI, is not compatible with Article VI:1 of the GATT 1994. We note that Article VI:6(a) does not, in substance, contain additional obligations with respect to the existence of material injury, threat of injury or material retardation of the establishment of a domestic industry.<sup>581</sup> However, from the terms of Article VI:6(a), it seems to us that the objective of that paragraph is to require a *determination* by the authorities of the importing Member that dumping is such as to cause material injury, threat thereof or material retardation.<sup>582</sup> Having regard to the evidence before us, we do not consider that Japan has established a *prima facie* case of violation of Article VI:6(a) based on the fact that the 1916 Act would not provide for a *determination* by the US authorities.

6.254 Since we have found above that the 1916 Act violates Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 of the Anti-Dumping Agreement simply addresses in more detail the requirement of "material injury" contained in Article VI:1, we do not find it necessary to make specific findings under Article 3. We therefore exercise judicial economy with respect to the claim made by Japan under Article 3 of the Anti-Dumping Agreement, as we are entitled to do pursuant to GATT 1947 panel practice and WTO panel and Appellate Body practice.<sup>583</sup>

(d) Violation of Articles 4 and 5 of the Anti-Dumping Agreement

6.255 Japan claims that Articles 4 and 5 of the Anti-Dumping Agreement set forth requirements limiting the party or parties that may properly pursue an anti-dumping claim. Article 5.1 requires that a request for initiation of an anti-dumping investigation be made by or on behalf of the domestic industry. Article 4.1 defines "domestic industry" for the purpose of the Anti-Dumping Agreement. Article 5.4 requires the investigating authorities to determine that an application is supported by "those producers which collective output constitutes more than 50 per cent of the total production of the like product" of those producers supporting or opposing the application. Moreover, under no circumstances can an investigation be initiated if those supporting the application account for less than 25 per cent of total domestic production of the like product. In contrast, as evidenced by the most recent cases initiated under the 1916 Act, a complaint under the 1916 Act can be initiated by a single United States producer. Article 5 also requires that applications contain evidence of the three

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<sup>581</sup> Article VI:6(a) provides as follows:

"No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."

<sup>582</sup> See, e.g., Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, 32S/55, para. 4.4.

<sup>583</sup> See, e.g., Panel Report on *Canada – Administration of the Foreign Investment Review Act*, adopted on 7 February 1984, BISD 30S/140, para. 5.16; Panel Report on *Brazil – Desiccated Coconut*, *Op. Cit.*, para. 293; Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, *Op. Cit.*, p. 19.

elements of dumping, injury and causation, and sets a *de minimis* threshold applicable to the dumping element. The 1916 Act contains none of these elements. On the contrary, Japan argues that, under the US Federal Rules of Civil Procedure 8(a)(2), a complainant under the 1916 Act needs only to present a short and plain statement of its claims. Finally, Article 5.10 of the Anti-Dumping Agreement requires Members to complete their investigations and decide whether or not to impose duties within 18 months. The 1916 Act contains no such deadline.

6.256 We note that Japan's claims under Article 4 and 5 of the Anti-Dumping Agreement are closely linked because one of the conditions for the initiation of an investigation under Article 5.1 is that the application be made on behalf of the domestic industry, which is defined in Article 4.1.

6.257 We recall that civil proceedings under the 1916 Act are available to "any person injured in his business or property" by reason of a violation of the 1916 Act. This term is nowhere qualified by a statement that this person should be sufficiently representative of an industry of the United States, within the meaning of Article 4 of the Anti-Dumping Agreement. We note that the 1916 Act refers to the intent of destroying or injuring an *industry* in the United States, or of preventing the establishment of an *industry* in the United States. However, we have no evidence that a minimum representation level for a given industry must be established by the complainant before filing a case before a federal court. On the contrary, we note that all cases so far have, in fact, been initiated by individual companies under their own responsibility. The fact that, in certain cases, these companies may have represented a very large portion of the US industry in the economic sector concerned does not seem to be linked to any legal requirement of representation under the 1916 Act and is most probably fortuitous. We have not been referred to any provisions of the US Federal Rules of Civil Procedure which would qualify the terms of the 1916 Act in line with the terms of Article 4 and 5 of the Anti-Dumping Agreement. In light of the terms of the 1916 Act, especially the term "*any person injured in his business or property*"<sup>584</sup> which is clear, we have no reason to believe that US federal courts will be in a position to interpret that provision – which conflicts with the terms of the Anti-Dumping Agreement – to meet the requirements of Articles 4 and 5 of the Anti-Dumping Agreement in terms of representation of the complainants.

6.258 Regarding the requirement of Article 5.2 that applications contain evidence of the three elements of dumping, injury and causation, we note that Japan referred to the provisions of the US Federal Rules of Civil Procedure to support its argument that no such requirement applies to complainants under the 1916 Act. We note that the United States did not contest, as a matter of fact, the applicability to the 1916 Act of the provisions of the US Federal Rules of Civil Procedure cited by Japan. We also recall that the 1916 Act does not require the establishment of injury within the meaning of Article VI of the GATT 1994. We therefore conclude that there is no obligation for a complainant under the 1916 Act to respect the obligations of Article 5.2 of the Anti-Dumping Agreement in terms of the type of evidence to be included in an application.

6.259 Finally, Japan argues that Article 5.10 of the Anti-Dumping Agreement requires Members to complete their investigations and decide whether or not to impose duties within 18 months. Japan claims that the 1916 Act contains no such deadline.

6.260 As we noted in a similar situation for certain claims of Japan under Article 2 of the Anti-Dumping Agreement, the fact that the 1916 Act does not include a deadline for the completion of proceedings is not as such sufficient to establish a violation. We do not consider it *a priori* impossible that US courts, in the absence of a conflict, read that deadline into the text of the 1916 Act in application of the *Charming Betsy* doctrine.<sup>585</sup> Japan did not submit evidence that the absence in the 1916 Act of an express deadline compatible with the provisions of Article 5.10 of the Anti-Dumping Agreement was a violation of the WTO Agreement. Even though we are not sure that

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<sup>584</sup> Emphasis added.

<sup>585</sup> See para. 6.249 above.

the 18-month deadline could always be imposed by the judge on the parties to a 1916 Act case, we consider that Japan, as a complainant, did not establish a *prima facie* case in that respect and we refrain from making a finding under Article 5.10 on the 1916 Act.

6.261 We therefore find that the 1916 Act, because it does not require a minimum representation of a US industry in applications for the initiation of proceedings under the 1916 Act, violates Article 4.1 and Article 5.1, 5.2 and 5.4 of the Anti-Dumping Agreement.

(e) Violation of Article VI of the GATT 1994 and Articles 9 and 11 of the Anti-Dumping Agreement

6.262 Japan argues that the 1916 Act ignores the regime provided for in Article 9 of the Anti-Dumping Agreement<sup>586</sup> with respect to the imposition and collection of anti-dumping duties by

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<sup>586</sup> Article 9 of the Anti-Dumping Agreement provides as follows:

"9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. [footnote 20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2,

imposing measures incompatible with that Article. Japan also argues that Article 11 of the Anti-Dumping Agreement<sup>587</sup> limits the duration of anti-dumping measures and requires periodic

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authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review."

Footnote 20 reads as follows:

"It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings."

<sup>587</sup> Article 11 provides as follows:

"11.1 An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[footnote 21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if

reviews of the need for continued imposition of anti-dumping duties. The 1916 Act contains no provisions regarding duration of measures or review.

6.263 We found above that, by not imposing anti-dumping duties within the meaning of Article VI and the Anti-Dumping Agreement, but other types of measures such as fines, imprisonment or damages, the 1916 Act violates Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. Since we found that the *type* of measures imposed under the 1916 Act is not compatible with the WTO Agreement, we do not find it necessary to determine whether the way those measures *operate* is compatible with Article VI of the GATT 1994 and the Anti-Dumping Agreement. We therefore exercise judicial economy in respect of these claims.

### 3. Conclusion

6.264 For the reasons mentioned above, we find that the 1916 Act violates Article VI:1 of the GATT 1994 and Articles 4.1, 5.1, 5.2 and 5.4 of the Anti-Dumping Agreement. In light of our findings and for the reasons mentioned in paragraphs 6.239-6.241 above, we also find that the 1916 Act violates Article 1 of the Anti-Dumping Agreement. We also recall that Japan made a claim under Articles 1 and 18.1 based on the violation of other provisions of the Anti-Dumping Agreement. Article 18.1 provides that specific actions against dumping must be taken "in accordance with the provisions of GATT 1994, as interpreted by [the Anti-Dumping Agreement]". Since we found that the 1916 Act violates Article VI of the GATT 1994 and a number of provisions of the Anti-Dumping

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the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[footnote 22] The duty may remain in force pending the outcome of such a review.

11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

11.5 The provisions of this Article shall apply *mutatis mutandis* to price undertakings accepted under Article 8."

Footnote 21 reads as follows:

"A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article."

Footnote 22 reads as follows:

"When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."

Agreement, we reach the same conclusion regarding the violation of Article 18.1 as we did regarding Article 1.

F. VIOLATION OF ARTICLE III:4 OF THE GATT 1994

6.265 We recall that Japan does not request the Panel to make a finding of violation of Article III:4 of the GATT 1994 in the alternative. Rather, Japan considers that, in the present case, the 1916 Act violates Article VI as an anti-dumping law not in conformity therewith; it also violates Article III:4 by regulating imported products under a separate, less favourable regime than is applicable to domestic products.

6.266 Article III:4 provides as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of different internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

6.267 In section VI.C above, we have found that Article VI of the GATT 1994 and the Anti-Dumping Agreement were applicable to the 1916 Act. We have also found in sections VI.D and E above that the 1916 Act violates certain provisions of Article VI and of the Anti-Dumping Agreement. We also recall that it is a well established practice of panels under the GATT 1947 and the GATT 1994 to exercise judicial economy when applicable and that this practice has been confirmed by the Appellate Body.<sup>588</sup>

6.268 When we considered the relationship between Article VI and Article III:4 of the GATT 1994, we noted that Article VI seemed to address the basic feature of the 1916 Act (i.e. transnational price discrimination) more directly than Article III:4. In our findings, we concluded that Article VI applies to a measure whenever that measure objectively addresses a situation of transnational price discrimination, as defined in Article VI:1. Thus, we found that the 1916 Act was *fully* subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not escape the disciplines of Article VI by the mere fact that it had anti-trust objectives, did not address *injurious dumping* as such, included additional requirements of an anti-trust nature or led to the imposition of measures other than anti-dumping duties that were not border adjustment measures.

6.269 However, even though we considered that Article VI deals specifically with the type of price discrimination at issue, we did not address the question whether Article VI applied to the 1916 Act *to the exclusion* of Article III:4. In this regard, we recall that, in its report on *European Communities – Bananas*, the Appellate Body noted that:

"Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994."<sup>589</sup>

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<sup>588</sup> See footnote 583 above.

<sup>589</sup> *Op. Cit.*, para. 204.

We are mindful of the fact that Article X:3(a) of the GATT 1994 deals with the way domestic trade laws in general should be applied, whereas Article 1.3 of the Agreement on Import Licensing Procedures deals with the way rules should be applied in the specific sector of import licensing. In contrast, it may be said that Articles III:4 and VI do not share the same purpose. However, we view the Appellate Body statement as applying the general principle of international law *lex specialis derogat legi generali*. This is particularly clear from its remark that the *Agreement* on Import Licensing Procedures "deals specifically, and in detail, with the administration of import licensing procedures". In our opinion, Article VI and the Anti-Dumping Agreement "deals specifically, and in detail, with the administration of" anti-dumping. In the present case, the question of the applicability of Article III:4 was essentially raised by the type of measures imposed under the 1916 Act. On the basis of the reasoning of the Appellate Body, we conclude that, even assuming that Article III:4 is applicable, in light of our findings under Article VI and the Anti-Dumping Agreement, we do not need to make findings under Article III:4 of the GATT 1994.

6.270 We nevertheless recall that, as stated by the Appellate Body in its report on *Australia – Measures Affecting Importation of Salmon*,<sup>590</sup> our findings must be complete enough to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance "in order to ensure effective resolution of disputes to the benefit of all Members."

6.271 Having regard to our findings under Article VI and the Anti-Dumping Agreement, and keeping in mind that, in our view, Article VI and the Anti-Dumping Agreement deal specifically and in detail with laws addressing dumping as such, we do not consider that making *additional* findings under Article III:4 is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow prompt compliance by the United States in order to ensure an effective resolution of this dispute.

6.272 Therefore, we find that we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article III:4 of the GATT 1994.

#### G. VIOLATION OF ARTICLE XI OF THE GATT 1994

6.273 Japan claims that the 1916 Act violates the obligations of the United States under Article XI:1 of the GATT 1994 because it establishes impermissible import "prohibitions or restrictions other than duties, taxes or other charges", within the meaning of that article. Japan argues that the 1916 Act, being a statute of the United States with binding effects, is unquestionably a "measure". Also, the 1916 Act imposes "restrictions other than duties, taxes or other charges" in the form of treble damages and imprisonment. Finally, the 1916 Act applies to the importation of products into the United States. Japan adds that, in essence, the 1916 Act establishes product-specific minimum price levels to protect US industries similar to the minimum import price system declared inconsistent with Article XI by the panel on *EEC – Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*.<sup>591</sup> The fact that it applies to persons rather than products is in this respect immaterial.<sup>592</sup>

6.274 The United States argues that, in general, Article XI prohibits, with certain exceptions, quantitative restrictions on imports or exports. The 1916 Act contains no provision which would enable a court to impose any sort of prohibition or restriction upon the importation of products. Courts may impose on the defendant in a law suit, and not on any other persons not involved in the

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<sup>590</sup> *Op. Cit.* para. 223.

<sup>591</sup> Adopted on 18 October 1978, BISD 25S/68, para. 4.9, hereinafter "*EEC – Processed Fruits and Vegetables*".

<sup>592</sup> Japan refers to the Panel Report on *United States – Section 337*, *Op. Cit.*, para. 5.10, whereby, under Article III:4 of the GATT, a measure applied to importers by imposing penalties on them also affects imported products.

case, a monetary sanction or a criminal sentence, which obviously does not apply to any particular product. In the opinion of the United States, there is no basis for Japan's assertion that the 1916 Act establishes product-specific minimum price levels. The reports referred to by Japan can be differentiated from the present situation: in *EEC – Processed Fruits and Vegetables*, there was a prohibition to import below a certain price which fell within the ambit of Article XI. The reliance of Japan on the report of the panel on *United States – Section 337* is also misplaced. There is no language in Article XI concerning whether a measure affects the conditions of competition between domestic and imported products.

6.275 Article XI:1 of the GATT 1994 provides as follows:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of another contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

6.276 In section VI.C above, we have found that Article VI of the GATT 1994 and the Anti-Dumping Agreement were applicable to the 1916 Act. We have also found in sections VI.D and E above that the 1916 Act violates certain provisions of Article VI and of the Anti-Dumping Agreement. We recall that it is a well established practice of panels, confirmed by the Appellate Body, to exercise judicial economy where applicable.

6.277 With respect to the necessity to make findings under Article XI of GATT 1994, we are of the view that the same reasoning as with Article III:4 applies. In our opinion, Article VI addresses the basic feature of the 1916 Act (i.e. transnational price discrimination) more directly than Article XI:1. In our findings, we concluded that Article VI applies to a measure whenever that measure objectively targets a situation of transnational price discrimination, as defined in Article VI:1. Thus, we found that the 1916 Act was *fully* subject to the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement and could not escape the disciplines of Article VI by the mere fact that it had anti-trust objectives, did not address *injurious dumping* as such, included additional requirements of an anti-trust nature or led to the imposition of measures other than anti-dumping duties.

6.278 However, the fact that Article VI deals specifically with the type of price discrimination at issue does not mean that it applies to the 1916 Act *to the exclusion* of Article XI. However, we recall that, in its report on *European Communities – Bananas*, the Appellate Body noted that although both Article X:3(a) of the GATT 1994 and Article 1.3 of the Agreement on Import Licensing Procedures applied, the panel should have applied the Agreement on Import Licensing Procedures first, since this agreement dealt specifically, and in detail, with the administration of import licensing procedures. The Appellate Body concluded that, if the panel had done so, there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.<sup>593</sup> We conclude that, even assuming that Article XI:1 is applicable, Article VI deals specifically and in detail with the administration of anti-dumping actions. In light of our findings under Article VI and the Anti-Dumping Agreement, we do not need to make findings under Article XI:1 of the GATT 1994.

6.279 We also recall that, as stated by the Appellate Body in its report on *Australia – Measures Affecting Importation of Salmon*,<sup>594</sup> our findings must be complete enough to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance "in order to ensure effective resolution of disputes to the benefit of all Members."

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<sup>593</sup> *Op. Cit.*, para. 204.

<sup>594</sup> *Op. Cit.* para. 223.

6.280 Having regard to our findings under Article VI and the Anti-Dumping Agreement, and keeping in mind that, in our view, Article VI and the Anti-Dumping Agreement deal specifically and in detail with laws addressing dumping, we do not consider that making *additional* findings under Article XI is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow prompt compliance by the United States in order to ensure an effective resolution of this dispute.

6.281 Therefore, we find that we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article XI.

H. VIOLATION OF ARTICLE XVI:4 OF THE AGREEMENT ESTABLISHING THE WTO AND OF ARTICLE 18.4 OF THE ANTI-DUMPING AGREEMENT

6.282 Japan claims that the United States is in breach of its obligations under Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the Anti-Dumping Agreement because it has failed to conform to its obligations under the WTO Agreement. Article XVI:4 applies to all WTO agreements, including the GATT 1994 and the Anti-Dumping Agreement. Article 18.4 of the Anti-Dumping Agreement is reflective of the general obligation set out in Article XVI:4 as it applies to anti-dumping. Article 18.4 imposes an additional obligation to take all necessary steps, of a general or particular character, to ensure the conformity of laws, regulations and administrative procedures. Under Article 18.4, it is sufficient for a law to provide for WTO-inconsistent actions in order for that law to violate Article 18.4. The fact that there is a possibility of a WTO-consistent action is irrelevant.

6.283 The United States contends that, since the 1916 Act is susceptible to an interpretation that is fully consistent with all US obligations and, in fact, has been so interpreted to date, there is no requirement under Article XVI:4 of the Agreement Establishing the WTO that the United States take action to change that law, just as there is nothing inherent in the anti-dumping context that renders the generally applicable distinction between mandatory and non-mandatory legislation inapplicable. This distinction is consistent with the presumption against conflicts between national and international law. Regarding Article 18.4 of the Anti-Dumping Agreement, the United States considers that, although the language is not identical to Article XVI:4, there were similar provisions in the Tokyo Round agreements on anti-dumping and subsidies which have been generally interpreted as requiring the parties to those agreements to adopt laws, regulations and procedures that permits them to act in conformity with their obligations under those agreements. Article 18.4 of the Anti-Dumping Agreement should be interpreted in the same way.

6.284 Article XVI:4 of the Agreement Establishing the WTO reads as follows:

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

6.285 Article 18.4 of the Anti-Dumping Agreement provides that:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

6.286 Since Article 18.4 specifically applies to the Anti-Dumping Agreement, we shall first determine whether the 1916 Act violates Article 18.4. The meaning of Article 18.4 which immediately comes to mind when reading that article is that when a law, regulation or administrative procedure of a Member has been found incompatible with the provisions of the Anti-Dumping

Agreement, that Member is also in breach of its obligations under Article 18.4.<sup>595</sup> We found that the 1916 Act violates Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement. We conclude that, by violating those provisions, the United States also violates Article 18.4 of the Anti-Dumping Agreement.

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

6.288 We therefore find that, by violating Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement, the United States violates Article 18.4 of the same Agreement. We also find that by violating provisions of Article VI of the GATT 1994, the United States violates Article XVI:4 of the WTO Agreement.<sup>596</sup>

## I. SUMMARY OF FINDINGS

6.289 Our findings may be summarized as follows:<sup>597</sup>

- (a) in order to review the conformity of the 1916 Act with the provisions of the WTO Agreement, we were entitled, consistently with the practice of the Appellate Body and of other international tribunals, to carry out an examination of the US domestic law, including a review of the relevant legislative history and an analysis of the relevant case-law;
- (b) Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement, interpreted in accordance with the Vienna Convention, must be understood as applying to the type of transnational price discrimination defined therein, irrespective of whether it is combined with additional requirements or leads to other measures than anti-dumping duties;
- (c) on the basis of the terms of the 1916 Act, the transnational price discrimination test found in that law meets the definition of Article VI:1 of GATT 1994. The legislative history of the 1916 Act and the subsequent interpretation by US courts do not lead to a different conclusion;
- (d) by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violates Article VI:2 of GATT 1994 and Article 18.1 of the Anti-Dumping Agreement;

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<sup>595</sup>We did not exercise judicial economy with respect to Article 18.4 because, in that context, a violation of Article 18.4 automatically results from the breach of another provision of the Anti-Dumping Agreement.

<sup>596</sup>In that context, we do not find it necessary to determine whether the violation of provisions of the Anti-Dumping Agreement lead to a breach of Article XVI:4 of the Agreement Establishing the WTO. Since we did not identify any conflict within the meaning of Article XVI:3 of the Agreement Establishing the WTO between Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the Agreement on Anti-Dumping, we do not need to address further the relationship between the two provisions.

<sup>597</sup>Having regard to the fact that the articles of the WTO agreements referred to by Japan in its claims have multiple paragraphs, most of which contain at least one distinct obligation, the Panel strictly circumscribed its findings to the paragraphs effectively found to be violated on the basis of the evidence and arguments submitted by the parties.

(e) by not providing for a number of procedural requirements found in Article VI of the GATT 1994 and the Anti-Dumping Agreement, the 1916 Act also violates Article VI:1 of the GATT 1994 and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement;

(f) by violating Article VI:1 and VI:2 of GATT 1994, and Articles 1, 4.1, 5.1, 5.2, 5.4 and 18.1 of the Anti-Dumping Agreement, the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the Anti-Dumping Agreement;

(g) in accordance with Article 3.8 of the DSU, since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to Japan under the WTO Agreement.

J. REQUEST OF JAPAN FOR A SPECIFIC RECOMMENDATION OF THE PANEL

6.290 We recall that Japan requests that we recommend that the United States repeal the 1916 Act in order to bring the 1916 Act into conformity with US obligations under the WTO. We note that Article 19.1 of the DSU provides that:

"When a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned [footnote omitted] bring the measure into conformity with that agreement [footnote omitted]. In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

6.291 From the first sentence of Article 19.1, we conclude that the type of recommendations we are entitled to make are limited to recommend that the Member concerned bring the measure at issue into conformity with the relevant WTO agreements. As a result, we cannot make the recommendation requested by Japan.

6.292 We nevertheless note that, pursuant to Article 19.1 of the DSU, we may suggest ways in which the Member concerned could implement our recommendations. We also recall that we reviewed all the claims on which, in our opinion "a finding [was] necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of the dispute to the benefit of all Members.'"<sup>598</sup> In light of our findings, we are of the view that, in order to bring the 1916 Act as such into conformity with its WTO obligations, the United States would probably have to amend that law to such an extent that it may no longer have a number of its current main features. We also note that the 1916 Act has been seldom applied compared with other anti-dumping or anti-trust instruments of the United States and that, when applied, it has never led to the imposition of any remedies by courts.<sup>599</sup> Finally, we recall that Article 3.7, fourth sentence, of the DSU provides that:

"In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."

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<sup>598</sup> See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, *Op. Cit.*, para. 223.

<sup>599</sup> Our remark only applies to the remedies provided for in the 1916 Act as such. We nevertheless recall that settlements have been reached between the parties in the *Wheeling-Pittsburgh* case. We have no evidence of the extent of the involvement of the US authorities, in particular the US court concerned, in sanctioning the settlements reached between the parties in that case. Moreover, no claim was made by Japan in this respect. We therefore do not have to take position on the WTO-conformity of these settlements.

As a result, we suggest that one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act.

## **VII. CONCLUSIONS AND RECOMMENDATIONS**

7.1 We *conclude* that

- (i) the 1916 Act violates Article VI:1 and VI:2 of GATT 1994;
- (ii) the 1916 Act violates Articles 1, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4 of the Anti-Dumping Agreement;
- (iii) the 1916 Act violates XVI:4 of the Agreement Establishing the WTO; and
- (iv) as a result, benefits accruing to Japan under the WTO Agreement have been nullified or impaired.

7.2 We therefore *recommend* that the DSB request the United States to bring the 1916 Act into conformity with its obligations under the WTO Agreement.

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