WORLD TRADE ORGANIZATION

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UNITED STATES – ANTI-DUMPING ACT OF 1916

AB-2000-5
AB-2000-6

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE

3. The European Communities claimed that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 1, 2.1, 2.2, 3, 4 and 5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). In the alternative, the European Communities claimed that the 1916 Act is inconsistent with Article III:4 of the GATT 1994. Japan claimed that the 1916 Act is inconsistent with Articles III:4, VI and XI of the GATT 1994, Articles 1, 2, 3, 4, 5, 9, 11, 18.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

4. In the EC Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 31 March 2000, the Panel concluded that:

> (i) the 1916 Act violates Article VI:1 and VI:2 of the GATT 1994;
>
> (ii) the 1916 Act violates Articles 1, 4 and 5.5 of the Anti-Dumping Agreement;
>
> (iii) the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO;
>
> (iv) as a result, benefits accruing to the European Communities under the WTO Agreement have been nullified or impaired.[6]

5. In the Japan Panel Report, circulated to Members of the WTO on 29 May 2000, the Panel concluded 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]

[6]EC Panel Report, para. 7.1.

[7]Japan Panel Report, para. 7.1.

6. In both Panel Reports, the Panel recommended that the Dispute Settlement Body (the "DSB") request the United States to bring the 1916 Act into conformity with its obligations under the *WTO Agreement*.[8]

7. On 29 May 2000, the United States notified the DSB of its intention to appeal certain issues of law covered in the EC Panel Report and the Japan Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed two Notices of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). In view of the close similarity of the issues raised in the two appeals, it was decided, after consultation with the parties, that a single Division would hear and decide both appeals. On 8 June 2000, the United States filed one appellant's submission for both appeals.[9] On 13 June 2000, the European Communities and Japan filed a joint other appellants' submission in respect of both appeals.[10] On 23 June 2000, the European Communities and Japan each filed an appellee's/third participant's submission[11], and the United States filed an appellee's submission.[12] On the same day, India and Mexico each filed a third participant's submission.[13]

8. The oral hearing in the two appeals was held on 19 July 2000. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeals.

[8]EC Panel Report, para. 7.2; Japan Panel Report, para. 7.2.

[9]Pursuant to Rule 21 of the *Working Procedures*.

[10]Pursuant to Rule 23(1) of the *Working Procedures*.

[11]Pursuant to Rules 22 and 24 of the *Working Procedures*. The European Communities is an appellee in dispute WT/DS136 and a third participant in dispute WT/DS162. Japan is an appellee in dispute WT/DS162 and a third participant in dispute WT/DS136.

[12]Pursuant to Rule 23(3) of the *Working Procedures*.

[13]Pursuant to Rule 24 of the *Working Procedures*. India is a third participant in both disputes. Mexico is a third participant in dispute WT/DS136, but not in dispute WT/DS162.

(b) Mandatory and Discretionary Legislation

12. The United States requests the Appellate Body to reverse the Panel's analysis and findings regarding the distinction between mandatory and discretionary legislation. If the Panel found, or the Appellate Body finds, that the 1916

2. Applicability of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* to the 1916 Act

15. The United States claims that the principal substantive error made by the Panel was its finding that Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, applies to the 1916 Act.

16. According to the United States, this finding is erroneous because it is based on an erroneous test for determining the applicability of Article VI. The correct analysis, in the view of the United States, is that for a Member's law to fall within the scope of Article VI, it must satisfy two criteria. First, the law must impose a particular type of border adjustment measure, namely, duties on an imported product. Second, the duties imposed by the Member's law must specifically target "dumping" within the meaning of Article VI:1. Consequently, the United States concludes, if the Member's law imposes a type of measure other than duties, or if it does not specifically target dumping, it is not governed by Article VI.

17. The United States submits that, with respect to dumping, Article VI of the GATT 1994 simply

Body accepts this interpretation, it follows that Article VI does not apply to the 1916 Act, the claims made by the European Communities and Japan under the various provisions of Article VI and the *Anti-Dumping Agreement* must fail, and the Panel's findings of violations of those provisions must be reversed. In addition, the United States submits, since the Panel's findings of violation of Article XVI:4 of the *WTO Agreement* are based on its findings of violation of Article VI, the Appellate Body must also reverse the findings of violation of Article XVI:4.

B. *Arguments by the European Communities – Appellee/Third Participant*

1. Claims Against the 1916 Act as Such

(a) Jurisdiction of the Panel to Hear Claims Against the 1916 Act as Such

23. The European Communities requests the Appellate Body to reject the United States' arguments on the issue of jurisdiction on the basis that this ground of appeal is both untimely and unfounded. The United States could have and should have raised this objection before the interim review stage of the panel proceedings in the case brought by the European Communities. Interim review is only intended to allow review of "precise aspects" of the report and not the presentation of new arguments. The European Communities relies in particular on the principle that procedural objections must be raised in a timely manner and in good faith, as confirmed by the Appellate Body in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguards*")[21] and *United States – Tax Treatment for "Foreign Sales Corporations"* ("*United States – FSC* ("

3. Articles VI:1 and VI:2 of the GATT 1994, Certain Provisions of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*

30. Since the European Communities believes that the Panel correctly interpreted the scope of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, the European Communities asks the Appellate Body also to uphold the Panel's related conclusions that the 1916 Act violates Article VI:1 and VI:2 of the GATT 1994 and Articles 1, 4.1, 5.4, 5.5, 18.1 and 18.4 of the *Anti-Dumping Agreement*.

31. The European Communities reasons that when an anti-dumping law, which falls within the scope of application of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, allows the imposition of sanctions other than duties, this is a breach of the discipline established by Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. Likewise, if such a law provides for imposition of measures on the basis of criteria which do not fulfil the substantive requirements of the discipline, or pursuant to procedures which do not respect its procedural requirements, such measures also constitute breaches of the discipline. The European Communities contends that the 1916 Act breaches the discipline in all three respects.

C. *Arguments by Japan – Appellee/Third Participant*

1. Claims Against the 1916 Act as Such

(a) Jurisdiction of the Panel to Hear Claims Against the 1916 Act as Such

32. Japan argues that the Panel correctly concluded that it had jurisdiction. According to Japan,

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1916 Act must be imposed. Japan submits that the Panel also correctly concluded that the burden of proof was properly on the United States to substantiate its claim that the 1916 Act was not mandatory.

2. Applicability of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* to the 1916 Act

34. In Japan's view, the Panel correctly concluded that the proper basis for applicability of Article VI of the GATT 1994 is the type of conduct addressed, not the remedies applied to the conduct. By its terms, the object of Article VI is to counteract "dumping". Japan underscores that anti-dumping duties are the instrument, not the object of Article VI.

35. Japan believes that its interpretation is supported by the plain meaning of Article VI, as well

D. *Claims of Error by the European Communities and Japan – Appellants*

1. Third Party Rights

38. The European Communities and Japan contend that the Panel erred in not granting enhanced third party rights to Japan in the case brought by the European Communities, and in not granting enhanced third party rights to the European Communities in the case brought by Japan. They ask the Appellate Body to reverse the Panel's findings and reasoning in this regard, in particular with respect to the proper interpretation of Article 9.3 of the DSU and the appropriate standard for evaluating whether enhanced third party rights should be granted. The European Communities and Japan stress the similarity between the present cases and *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*").[24]

39. According to the European Communities and Japan, in *European Communities – Hormones* the Appellate Body identified three conditions for the granting of enhanced third party rights to a Member involved in a related dispute: (i) the two proceedings deal with the same matter; (ii) the same panelists serve in both disputes; and (iii) the proceedings are held concurrently. They add that, even if the treatment of the European Communities and Japan as third parties was simply a matter of the Panel's discretion under Article 12.1 of the DSU, such discretion should have been exercised on the basis of the principles reflected in Articles 9 and 10 of the DSU, taking account of the need to Third reverse the Panel's findings and reasoning in this regard, in particular with respect

Article XVI:4 of the *WTO Agreement*. The European Communities and Japan incorporate by reference and to the extent necessary all the arguments that they developed before the Panel in this connection.

E. *Arguments by the United States – Appellee*

1. Third Party Rights

42. The United States urges the Appellate Body to affirm the Panel's decision to deny enhanced third party rights to the European Communities and Japan. As a preliminary matter, the United States contests the claim of the European Communities and Japan that they were "prejudiced" by such denial, given that they prevailed on every substantive argument on which the Panel made findings.

43. The United States contends that the Panel's denial of enhanced third party rights was correct as a matter of law. In the view of the United States, Articles 9.2 and 9.3 of the DSU are of no assistance to the European Communities and Japan. Rather, as the Panel correctly noted and as the Appellate Body found in *European Communities – Hormones*, the question of whether to grant enhanced third party rights is a matter within the sound discretion of a panel. Unlike that case, these proceedings did not involve the consideration of complex facts or scientific evidence or a joint meeting of the parties. There were no "concurrent deliberations" as that term was used in the context of *European Communities – Hormones*. Furthermore, the granting of enhanced third party rights in these proceedings might have prejudiced the United States. In view of these circumstances, the United States considers that the Panel correctly denied enhanced third party rights to the European Communities and Japan.

2. Conditional Appeals

(a) Articles III:4 and XI of the GATT 1994

44. The United States submits that the Appellate Body lacks the authority to consider the claims by the European Communities and Japan under Articles III:4 and XI of the GATT 1994. First, the European Communities cannot request the Appellate Body to make any findings regarding Article XI of the GATT 1994 since that provision was not included in the European Communities' request for a panel. Second, the Panel made no factual or legal findings relating to the claims under Article III:4 and XI of the GATT 1994. As the facts relevant to the assessment of these claims were disputed before the Panel, the United States concludes that the limits on appellate review contained in Article 17 of the DSU prevent the Appellate Body from making any determinations of the claims under Articles III:4 and XI of the GATT 1994.

(b) Article XVI:4 of the *WTO Agreement*

45. Should the Appellate Body reach this issue, the United States requests the Appellate Body to affirm the Panel's conclusion that the 1916 Act only violates Article XVI:4 of the *WTO Agreement* to

2. Mexico

49. Mexico argues that the Panel correctly concluded that the key to the applicability of Article VI of the GATT 1994 to the 1916 Act is whether that law objectively addresses "dumping" within the meaning of that article, that the 1916 Act does address such "dumping", and that anti-dumping duties are the sole remedy authorized under Article VI of the GATT 1994.

III. Issues Raised in these Appeals

50. The following issues are raised in these appeals:

(a) Whether the Panel erred in its assessment of the claims against the 1916 Act as such, in particular:

(i) in concluding that it had jurisdiction to consider 321 0 Tt the 1916

54. We agree with the Panel that the interim review was not an appropriate stage in the Panel's proceedings to raise objections to the Panel's jurisdiction for the first time. An objection to jurisdiction should be raised as early as possible and panels must ensure that the requirements of due process are met. However, we also agree with the Panel's consideration that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time."[30] We do not share the European Communities' view that objections to the jurisdiction of a panel are appropriately regarded as simply "procedural objections". The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings. We, therefore, see no reason to accept the European Communities' argument that we must reject the United States' appeal because the United States did not raise its jurisdictional objection before the Panel in a timely manner.

55. The United States appeals, on the basis of the wording of Article 17.4 of the *Anti-Dumping Agreement* and our Report in *Guatemala – Cement*, the Panel's finding that it had jurisdiction to examine the 1916 Act as such. According to the United States, Members cannot bring a claim of inconsistency with the *Anti-Dumping Agreement* against legislation as such independently from a claim of inconsistency of one of the three anti-dumping measures specified in Article 17.4, i.e., a definitive anti-dumping duty, a price undertaking or, in some circumstances, a provisional measure. The United States contends that:

> [When a Member has] a law which [provides for the imposition of] duties to counteract dumping and, under the *Anti-Dumping Agreement*, if [another Member wishes] to challenge that law, then [the other Member must] wait until one of the three measures [referred to in Article 17.4 of the *Anti-Dumping Agreement*] is in place.[31]

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[30]EC Panel Report, para. 5.17. We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. See, for example, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)* (1933) P.C.I.J. Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case (Preliminary Objection)* (1952) I.C.J. Rep., p. 116; Separate Opinion of Judge Sir H. Lauterpacht in *Case of Certain Norwegian Loans* (1957) I.C.J. Rep., p. 43; and Dissenting Opinion of Judge Sir H. Lauterpacht in the *Interhandel Case (Preliminary Objections)*

56. Since, in the present cases, the European Communities and Japan did not challenge a

independently from the application of that legislation in specific instances. While the text of Article XXIII does not expressly address the matter, panels consistently considered that, under Article XXIII, they had the *jurisdiction* to deal with claims against legislation as such.[34] In *examining* such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations. We consider the application of this distinction to the present cases in section IV(B) below.

61. Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement*, provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm "their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947". We note that, since the entry into force of the *WTO Agreement*, a number of panels have dealt with dispute settlement claims brought against a Member on the basis of its legislation as such, independently from the application of that legislation in specific instances.[35]

62. Turning to the issue of the legal basis for claims brought under the *Anti-Dumping Agreement*, we note that Article 17 of the *Anti-Dumping Agreement* addresses dispute settlement under that Agreement. Just as Articles XXII and XXIII of the GATT 1994 create a legal basis for claims in disputes relating to provisions of the GATT 1994, so also Article 17 establishes the basis for dispute settlement claims relating to provisions of the *Anti-Dumping Agreement*. In the same way that

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[34]See, for example, Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances* ("*United States – Superfund*"), adopted 17 June 1987, BISD 34S/136; Panel Report, *United States – Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*United States – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206; and Panel Report, *United States – Tobacco*, *supra*, footnote 16. See also Panel Report, *United States – Wine and Grape Products*, *supra*, footnote 18, examining this issue in the context of a claim brought under the Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement of Tariffs and Trade*.

[35]See, for example, Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R; Panel Report, *European Communities – Hormones*, WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, *supra*, footnote 24; Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R; Panel Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R; Panel Report, *United States – FSC*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, *supra*, footnote 22; and Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000.

Article XXIII of the GATT 1994 allows a WTO Member to challenge

> … 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.[37] (emphasis added)

such legislation from other types of legislation for purposes of dispute settlement, or that would remove anti-dumping legislation from the ambit of the generally-accepted practice that a panel may examine legislation as such.

76. Our reading of Article 17 as allowing Members to bring claims against anti-dumping legislation as such is supported by Article 18.4 of the *Anti-Dumping Agreement*.

77. Article 18.4 of the *Anti-Dumping Agreement* states:

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

78. Article 18.4 imposes an affirmative obligation on each Member to bring its legislation into conformity with the provisions of the *Anti-Dumping Agreement* not later than the date of entry into force of the *WTO Agreement* for that Member. Nothing in Article 18.4 or elsewhere in the *Anti-Dumping Agreement* excludes the obligation set out in Article 18.4 from the scope of matters that may be submitted to dispute settlement.

79. If a Member could not bring a claim of inconsistency under the *Anti-Dumping Agreement* against legislation as such until one of the three anti-dumping measures specified in Article 17.4 had been adopted and was also challenged, then examination of the consistency with Article 18.4 of anti-dumping legislation as such would be deferred, and the effectiveness of Article 18.4 would be diminished.

80. Furthermore, we note that Article 18.1 of the *Anti-Dumping Agreement* states:

> 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.

81. Article 18.1 contains a prohibition on "specific action against dumping" when such action is not taken in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Specific action against dumping could take a wide variety of forms. If specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, such action will violate Article 18.1.[40] We find nothing, however, in Article 18.1 or elsewhere in the *Anti-Dumping Agreement*, to suggest that the

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consistency of such action with Article 18.1 may only be challenged when one of the three measures specified in Article 17.4 has been adopted. Indeed, such an interpretation must be wrong since it implies that, if a Member's legislation provides for a response to dumping that does *not* consist of one of the three measures listed in Article 17.4, then it would be impossible to test the consistency of that legislation, and of particular responses thereunder, with Article 18.1 of the *Anti-Dumping Agreement*.

82. Therefore, we consider that Articles 18.1 and 18.4 support our conclusion that a Member may challenge the consistency of legislation as such with the provisions of the *Anti-Dumping Agreement*.

83. For all these reasons, we conclude that, pursuant to Article XXIII of the GATT 1994 and Article 17 of the *Anti-Dumping Agreement*, the European Communities and Japan could bring dispute settlement claims of inconsistency with Article VI of the GATT 1994 and the *Anti-Dumping Agreement* against the 1916 Act as such. We, therefore, uphold the Panel's finding that it had jurisdiction to review these claims.

B. *Mandatory and Discretionary Legislation*

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86. As regards the second argument made by the United States, the Panel found:

> … the discretion enjoyed by the US Department of Justice to initiate a case under the 1916 Act should not be interpreted as making the 1916 Act a non-mandatory law.[44]

87. On appeal, the United States asks us to reverse the Panel's interpretation and application of the distinction between mandatory and discretionary legislation.

88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations.[45] The practice of GATT panels was summed up in *United States – Tobacco*[46] as follows:

> … panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.[47] (emphasis added)

89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government.

90. The 1916 Act provides for two types of actions to be brought in a United States federal court: a civil action initiated by private parties, and a criminal action initiated by the United States Department of Justice. Turning first to the civil action, we note that there is no relevant discretion

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[44]EC Panel Report, para. 6.169. See also Japan Panel Report, para. 6.191.

[45]The reason it must be possible to find legislation as such to be inconsistent with a Contracting Party's GATT 1947 obligations was explained as follows:

> [the provisions of the GATT 1947] are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade.

Panel Report, *United States – Superfund*, *supra*, footnote 34, para. 5.2.2.

[46]Panel Report, *supra*, footnote 16.

[47]*Ibid*., para. 118, referring in footnote to: Panel Report, *United States - Superfund*, *supra*, footnote 34, p. 160; Panel Report, *EEC - Parts and Components*, *supra*, footnote 20, pp. 198-199; Panel Report, *Thailand - Cigarettes*, *supra*, footnote 34, pp. 227-228; Panel Report, *United States - Malt Beverages* ., pa45.

accorded to the executive branch of the United States' government with respect to such action.[48] These civil actions are brought by private parties. A judge faced with such proceedings must simply *apply* the 1916 Act. In consequence, so far as the civil actions that may be brought under the 1916 Act are concerned, the 1916 Act is clearly mandatory legislation as that term has been understood for purposes of the distinction between mandatory and discretionary legislation.

91. The Panel, however, examined that part of the 1916 Act that provides for criminal prosecutions, and found that the discretion enjoyed by the United States Department of Justice to initiate or not to initiate criminal proceedings does not mean that the 1916 Act is a discretionary law.[49] In light of the case law developing and applying the distinction between mandatory and discretionary legislation[50], we believe that the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation, as this term has been understood for purposes of distinguishing between mandatory and discretionary legislation. We, therefore, agree with the Panel's finding on this point.

92. In any event, we note that, on appeal, the United States does not directly challenge the Panel's finding that the discretion to enforce the 1916 Act enjoyed by the United States Department of Justice does not mean that the 1916 Act is discretionary legislation, but instead takes issue with several aspects of the reasoning employed by the Panel in reaching this conclusion. First, according to the United States, the Panel erred by "creating" a rule that the mandatory/discretionary distinction can apply only if the challenged legislation has never been "applied". In response to our inquiries at the oral hearing, the United States identified the following statement by the Panel as "creating" such a rule:

> 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.[51]

93. Review of the context in which the above passage appears in the Panel Reports reveals that the Panel did not, as the United States argues, find that the distinction between mandatory and discretionary legislation is only relevant if the challenged legislation has never been applied. Rather,

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[48]The Panel noted that the United States did not allege that any discretion of the executive branch of government in relation to the civil proceedings would make the 1916 Act discretionary. EC Panel Report, footnote 350 to para. 6.82; Japan Panel Report, footnote 482 to para. 6.95.

[49]EC Panel Report, para. 6.169; Japan Panel Report, para. 6.191.

[50]See, in particular the reasoning in the Panel Report, *United States – Malt Beverages*, *supra*, footnote 34, para. 5.60.

[51]EC Panel Report, para. 6.89; Japan Panel Report, para. 6.103.

in response to the United States' argument that the circumstances of the present cases resemble those in *United States – Tobacco*, the Panel noted that these cases are factually different from *United States – Tobacco*, where no implementing measures had been adopted and the law had never been applied, and reasoned that "[t]hese differences have implications for the burden of proof."[United

101. On this point, we agree with the Panel that the question whether the 1916 Act could be or has been interpreted by the United States' courts in a way that would make it fall outside the scope of Article VI of the GATT 1994 is a matter of determining the meaning of the law in order to examine its consistency with the United States' obligations.[61] We review, to the extent that it is relevant in these appeals, the Panel's assessment of the meaning and consistency of the 1916 Act in the following sections of this Report.

102. As a result of the above reasoning, we uphold, to the extent that we have found it necessary to consider the issue, the Panel's interpretation and application of the distinction between mandatory and discretionary legislation.

V. Applicability of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* to the 1916 Act

103. The Panel found that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the 1916 Act. With respect to the applicability of Article VI to the 1916 Act, the Panel concluded:

> 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 the GATT 1994. …[62]

The Panel further concluded that:

> … the applicability of Article VI to the 1916 Act also implies the applicability of the Anti-Dumping Agreement to the 1916 Act.[63]

104. The United States appeals these findings. According to the United States, Article VI of the GATT 1994 applies to a law of a Member only when two criteria are satisfied: first, the law must impose anti-dumping duties and, second, it must "specifically target" dumping within the meaning of Article VI:1. The United States emphasizes that the 1916 Act does not impose anti-dumping duties – it provides for imprisonment, the imposition of fines or an award of treble damages. Moreover, the United States argues that the 1916 Act does not "specifically target" dumping, but rather predatory pricing. The United States, therefore, maintains that Article VI and, by implication, the *Anti-Dumping Agreement*, do not apply to the 1916 Act.

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[61]EC Panel Report, para. 6.84; Japan Panel Report, para. 6.97.

[62]EC Panel Report, para. 6.163; Japan Panel Report, para. 6.182.

[63]Japan Panel Report, para. 6.184. See also EC Panel Report, para. 6.165.

105. Article VI of the GATT 1994 concerns "dumping". "Dumping" is defined in Article VI:1 of the GATT 1994 and further elaborated in Article 2 of the *Anti-Dumping Agreement*. The first sentence of Article VI:1 defines "dumping" as conduct:

> … by which products of one country are introduced into the

> 2. In order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. …

109. Whether Article VI of the GATT 1994 is applicable to the 1916 Act depends, first of all, on whether Article VI regulates all possible measures Members can take in response to dumping. If Article VI regulates *only* the imposition of anti-dumping duties and neither prohibits nor regulates other measures which Members may take to counteract dumping, then, since the 1916 Act does not provide for anti-dumping duties, Article VI would not apply to the 1916 Act.

110. Article VI:1 of the GATT 1994 makes clear that dumping is "to be *condemned* if it causes or threatens material injury". (emphasis added) However, Article VI:1 does not address the remedies that Members may take against dumping.

111. Remedies are addressed in Article VI:2 of the GATT 1994. The only type of measure that Article VI:2 explicitly authorizes Members to impose "in order to offset or prevent dumping" is an anti-dumping duty. However, Article VI:2 does not specify that Members may impose *only* anti-dumping duties in order to offset or prevent dumping.

112. In arguing that Article VI of the GATT 1994 regulates only the imposition of anti-dumping duties and does not apply to other measures taken to counteract dumping, the United States emphasizes that Article VI:2 states that Members "*may* levy on any dumped product an anti-dumping duty …". (emphasis added). For the United States, the verb "may" indicates that while Members "may" choose to impose anti-dumping duties and thereby be bound by the rules of Article VI, Members may also choose to impose other types of anti-dumping measures, in which case they are not bound by the rules of Article VI.

113. We agree with the first part of the United States' argument, namely, that the verb "may" indicates that it is permissive, rather than mandatory, to impose anti-dumping duties. However, it is not obvious to us, based on the wording of Article VI:2 alone, that the verb "may" also implies that a Member is permitted to impose a measure other than an anti-dumping duty.

114. We believe that the meaning of the word "may" in Article VI:2 is clarified by Article 9 of the *Anti-Dumping Agreement* on the "Imposition and Collection of Anti-Dumping Duties". Article VI of the GATT 1994 and the *Anti-Dumping Agreement* are part of the same treaty, the *WTO Agreement*. As its full title indicates, the *Anti-Dumping Agreement* is an "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994". Accordingly, Article VI must be read in conjunction with the provisions of the *Anti-Dumping Agreement*, including Article 9.

115. Article 9 of the *Anti-Dumping Agreement* states in relevant part:

> It is desirable that the imposition [of an anti-dumping duty] 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.

116. In light of this provision, the verb "may" in Article VI:2 of the GATT 1994 is, in our opinion, properly understood as giving Members a choice between imposing an anti-dumping duty *or not*, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty. We find no support in Article VI:2, read in conjunction with Article 9 of the *Anti-Dumping Agreement*, for the United States' argument that the verb "may" indicates that Members, to counteract dumping, are permitted to take measures other than the imposition of anti-dumping duties.

117. As a result of the above reasoning, it appears to us that the text of Article VI is inconclusive as to whether Article VI regulates all possible measures which Members may take to counteract dumping, or whether it regulates only the imposition of anti-dumping duties.

118. As we have stated, Article VI of the GATT 1994 must be read together with the provisions of the *Anti-Dumping Agreement*. Article 1 of that Agreement provides:

> 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 r6ctB thj 248.25 0 he

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seems to encompass all measures taken against dumping. We do not see in the words "an anti-dumping measure" any explicit limitation to particular types of measure.[65]

120. Since "an anti-dumping measure" must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to "an anti-dumping measure", i.e., a measure against dumping.

121. We consider that the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*. Article 18.1 states:

> 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)

122. In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present.[66] Since intent is not a constituent element of "dumping", the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is "specific action against dumping" of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement.*

123. Footnote 24 to Article 18.1 of the *Anti-Dumping Agreement* states:

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

We note that footnote 24 refers generally to "action" and not, as does Article 18.1, to "specific action against dumping" of exports. "Action" within the meaning of footnote 24 is to be distinguished from "specific action against dumping" of exports, which is governed by Article 18.1 itself.

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[65]We consider that the second sentence of Article 1 merely indicates that the *Anti-Dumping Agreement* implements only those provisions of Article VI of the GATT 1994 that concern dumping, as distinguished from the provisions of Article VI of the GATT 1994 that concern countervailing duties imposed to offset subsidies.

[66]We do not find it necessary, in the present cases, to decide whether the concept of "specific action against dumping" may be broader.

124. Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any "specific action against dumping" of exports when such specific action is not "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". Since the only provisions of the GATT 1994 "interpreted" by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any "specific action against dumping" of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT

1916 Act are "specific action against dumping". We find, therefore, that Article VI of the GATT

VI. Articles VI:1 and VI:2 of the GATT 1994, Certain Provisions of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*

134. With regard to the EC Panel Report, the United States argues that the Panel erred in finding that the 1916 Act was inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4 and 5.5 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. With regard to the Japan Panel Report, the United States argues that the Panel erred in finding that the 1916 Act was inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

135. With the exception of the finding of inconsistency with Article VI:2 of the GATT 1994, the United States appeals these findings of inconsistency on the sole basis that the 1916 Act does not fall within the scope of application of Article VI and the *Anti-Dumping Agreement* and that the Panel, therefore, erred in making these findings of inconsistency. These findings of inconsistency, thus, stand or fall along with the Panel's findings regarding the scope of application of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. Since we have upheld the Panel's conclusion that the 1916 Act falls within the scope of application of Article VI and the *Anti-Dumping Agreement*, we also uphold these findings of inconsistency of the Panel.

136. As regards the Panel's finding that the 1916 Act is inconsistent with Article VI:2 of the GATT 1994, the United States argues that Article VI:2 only regulates the imposition of anti-dumping duties, and that other measures to counteract dumping are not addressed by Article VI:2.

137. As we have concluded above, Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to "specific action against dumping". Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the *Anti-Dumping Agreement* to the extent that it provides for "specific action against dumping" in the form of civil and criminal proceedings and penalties.

138. With the caveat that Article VI:2 must be read together with the relevant provisions of the *Anti-Dumping Agreement*, we, therefore, agree with the conclusion of the Panel 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.[72]

[72]EC Panel Report, para. 6.204; Japan Panel Report, para. 6.230.

VII. Third Party Rights

139. The European Communities and Japan contend that the Panel erred in refusing to grant "enhanced" third party rights to Japan in the case brought by the European Communities, and to the European Communities in the case brought by Japan.

140. The rules relating to the participation of third parties in panel proceedings are set out in Article 10 of the DSU, and, in particular, paragraphs 2 and 3 thereof, and in paragraph 6 of Appendix 3 to the DSU.

141. Article 10.2 of the DSU states:

> Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

142. Article 10.3 of the DSU states:

> Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

143. Paragraph 6 of Appendix 3 to the DSU provides:

> All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

144. Although the European Communities and Japan invoke Article 9 of the DSU, and, in particular, Article 9.3, in support of their position, we note that Article 9 of the DSU, which concerns procedures for multiple complaints related to the same matter, does not address the issue of the rights of third parties in such procedures.

145. Under the DSU, as it currently stands, third parties are only entitled to the participatory rights provided for in Articles 10.2 and 10.3 and paragraph 6 of Appendix 3.

146. Article 12.1 of the DSU states:

> Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

Pursuant to Article 12.1, a panel is required to follow the Working Procedures in Appendix 3, unless it decides otherwise after consulting the parties to the dispute.

147. In support of their argument that the Panel should have granted them "enhanced" third party rights, the European Communities and Japan refer to the considerations that led the panel in *European Communities – Hormones* to grant third parties "enhanced" participatory rights, and stress the similarity between *European Communities – Hormones* and the present cases.

148. The Panel in the present cases gave the following reasons for refusing to grant the European Communities and Japan "enhanced" participatory rights in the panel proceedings:

> … We conclude from the reports in the *EC – Hormones* cases that enhanced third party rights were granted primarily because of the specific circumstances in those cases.
>
> We find that no similar circumstances exist in the present matter, which does *not* involve the *consideration of complex facts or scientific evidence*. Moreover, *none* of the parties *requested* that the panels *harmonise their timetables or hold concurrent deliberations* in the two procedures (WT/DS136 and WT/DS162). In fact, the European Communities was not in favour of delaying the proceedings in WT/DS136 and the United States objected to concurrent deliberations. … (emphasis added)[73]

149. In our Report in *European Communities – Hormones*, we stated:

> Although Article 12.1 and Appendix 3 of the DSU do not specifically require the Panel to grant … ["enhanced" third party rights] to the United States, we believe that this decision falls within the sound discretion and authority of the Panel, particularly if the Panel considers it necessary for ensuring to all parties due process of law.[74]

150. A panel's decision whether to grant "enhanced" participatory rights to third parties is thus a matter that falls within the discretionary authority of that panel. Such discretionary authority is, of course, not unlimited and is circumscribed, for example, by the requirements of due process. In the present cases, however, the European Communities and Japan have not shown that the Panel exceeded the limits of its discretionary authority. We, therefore, consider that there is no legal basis for concluding that the Panel erred in refusing to grant "enhanced" third party rights to Japan or the European Communities.

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[73]EC Panel Report, paras. 6.33 - 6.34. See also Japan Panel Report, paras. 6.33 - 6.34.

[74]Appellate Body Report, *supra*, footnote 24, para. 154.

VIII. Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the *WTO Agreement*

151. Before the Panel, the European Communities and Japan submitted that the 1916 Act is inconsistent with Article III:4 of the GATT 1994 and Article XVI:4 of the *WTO Agreement*. Japan also claimed that the 1916 Act is inconsistent with Article XI of the GATT 1994. The Panel found that:

> … we are entitled to exercise judicial economy and decide not to review the claims of [the European Communities and] Japan under Article III:4 of the GATT 1994.[75]
>
> …
>
> … we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article XI.[76]

152. With respect to the alleged violations of Article XVI:4 of the *WTO Agreement*, the Panel held, in the EC Panel Report:

> We therefore find that, by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO.[77]

In the Japan Panel Report the Panel found:

> … that by violating provisions of Article VI of the GATT 1994, the United States violates Article XVI:4 of the WTO Agreement.[78]

153. In their joint other appellant's submission, the European Communities and Japan ask us to rule that the 1916 Act is inconsistent with United States' obligations under Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the *WTO Agreement*. With respect to Articles III:4 and XI of the GATT 1994, their requests are conditioned on our reversal of the Panel's findings that the 1916 Act falls within the scope of Article VI of the GATT 1994 and the

154. For these reasons, we decline to rule on the conditional appeals of the European Communities and Japan relating to Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the *WTO Agreement.*

IX. Findings and Conclusions

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Signed in the original at Geneva this 11th day of August 2000 by:4

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