WORLD TRADE ORGANIZATION

WT/DS60/AB/R
2 November 1998

(98-4190)

Original: English

GUATEMALA – ANTI-DUMPING INVESTIGATION REGARDING PORTLAND CEMENT FROM MEXICO

AB-1998-6

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico

AB-1998-6

Guatemala, *Appellant*
Mexico, *Appellee*

United States, *Third Participant*

made the following recommendations:

> We ... recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.5 of the ADP Agreement.[5]
>
> … we recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.3 of the Agreement.[6]

It also suggested that:

> … Guatemala revoke the existing anti-dumping measure on imports of Mexican cement … .[7]

4. On 4 August 1998, Guatemala notified the DSB[8] of its intention to appeal certain issues of law covered in the Panel Report and 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 a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 14 August 1998, Guatemala filed an appellant's submission drafted in Spanish.[9] On 31 August 1998, Mexico filed an appellee's submission also drafted in Spanish.[10] In order to ensure that the third participant would have time to prepare its submission after receiving an English version of the appellant's submission, the Appellate Body granted the United States additional time to file its third participant's submission. The United States filed that submission on 14 September 1998.[11] By our ruling of 31 August 1998, we declined Mexico's request that its appellee's submission be withheld from Guatemala and the United States until the end of the time-period allowed to the United States to file its third participant's submission. The oral hearing, provided for in Rule 27 of the *Working Procedures*, was held on 2 October 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

---

[5]Panel Report, para. 8.4.

[6]Panel Report, para. 8.5.

[7]Panel Report, para. 8.6.

[8]WT/DS60/9, 4 August 1998.

[9]Pursuant to Rule 21(1) of the *Working Procedures*.

[10]Pursuant to Rule 22 of the *Working Procedures*.

[11]Pursuant to Rule 24 of the *Working Procedures*.

II Arguments of the Participants and Third Participant

A. *Guatemala - Appellant*

1. Whether the Dispute was Properly Before the Panel

5. Guatemala argues that the Panel erred in concluding that it could examine Mexico's claims concerning the initiation of the anti-dumping investigation. In this respect, Guatemala asserts that the Panel incorrectly interpreted the relationship between the dispute settlement procedures of the *Anti-Dumping Agreement* and those of the DSU. It is clear from the wording of Article 1.2 of the DSU and from the opening clause of Article 17.1 of the *Anti-Dumping Agreement* that the provisions of these two covered agreements are to be applied together unless there is a difference between the special or additional rules and procedures contained in Articles 17.4, 17.5, 17.6 and 17.7 of the *Anti-Dumping Agreement* and the provisions of the DSU. Only in that event do the special or additional provisions

impairment of benefits that is not required under Article 6.2 of the DSU. Given that there is no conflict between the two provisions, the panel request must also satisfy the requirements of Article 6.2 of the DSU and must therefore identify the measure at issue and give a summary of the legal basis for the claims made.

8. As regards the measures that may be contested in an anti-dumping dispute, Guatemala contends that Article 17.4 of the *Anti-Dumping Agreement* is more than a "timing provision". Rather, it limits the types of measure that may be

11. In Guatemala's view, the drafting history of the *Anti-Dumping Agreement* also bears out this interpretation of Article 17.4. During the negotiations leading to the conclusion of the Agreement, several countries proposed permitting a challenge to the decision to initiate itself. These proposals were, however, rejected.

12. In addition, Guatemala believes that several Appellate Body Reports substantiate its argument that anti-dumping disputes should be limited to one of the three measures enumerated in Article 17.4. In *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil – Coconut*")[13]

16. As regards the Panel's terms of reference, Guatemala submits that the Panel could not take the view that it had authority to examine claims relating to the final anti-dumping duty. First, as the Panel found, the "matter" referred to the DSB and the "matter" which was the subject of consultations must be the same "matter".[16] In this case, Mexico could not have identified the final measure in its request for consultations since it had not been adopted at that time. The "matter" referred to the DSB could not therefore include that "measure". Furthermore, according to Guatemala, the request for the establishment of the Panel does not, in any event, identify the final anti-dumping duty as the measure.

17. Guatemala observes that the Panel declined to consider whether the provisional anti-dumping duty was properly before it.[17] The Appellate Body should find, therefore, that the Panel did not have jurisdiction to consider any of the claims made concerning the initiation of the investigation or the notification of that initiation. Alternatively, Guatemala refers the Appellate Body to the arguments it made to the Panel concerning "significant impact". It submits that Article 17.4 of the *Anti-Dumping Agreement* requires the provisional measure to have a "significant impact" and this requirement must be met *before* a complaining Member has the right to refer a provisional measure to the DSB. Guatemala contends that Mexico did not claim, still less prove, that the provisional measure had a significant impact on its trade interests or competitive position. The Panel did not therefore have any authority to examine either the provisional measure or claims made in relation to it.

2. Interpretation of Article 19.1 of the DSU

18.

19. Guatemala also argues that the Panel's suggestion concerning the implementation of its recommendation on the violation of Article 5.3 of the *Anti-Dumping Agreement* violates Article 19.1 of the DSU. According to Guatemala, "suggestions" must refer to the *same* measure as the one which is the subject of "recommendations". Since the final anti-dumping measure was outside its terms of reference, the Panel could not, according to Guatemala, make any "recommendations" or "suggestions" regarding it. Guatemala contends that the Panel's reading of Article 19.1 would give panels discretion to refer to measures that bear no relation to the dispute, that have not been contested and that lie outside their terms of reference.

3. Presumption of Nullification or Impairment

20. Guatemala believes that the Panel's reasoning on this issue starts from a mistaken premise. The Panel considers that it is not necessary for the complaining Member to prove that the failure to fulfil an obligation has particular adverse trade effects. This effectively denies Guatemala the possibility of providing evidence to the contrary and converts the *rebuttable* presumption of nullification or impairment that is set down in Article 3.8 of the DSU into an *absolute* one.

21. Guatemala considers that since it led evidence that Mexico's rights of defence were properly safeguarded, despite the late notification under Article 5.5 of the *Anti-Dumping Agreement*, it was for Mexico to prove any specific adverse effects or to show how its rights of defence were in fact prejudiced. Guatemala asserts that a rebuttable presumption does *not* shift the burden of proof, but rather it relieves the claimant of the burden of demonstrating a *prima facie* case in its favour. If the other party leads evidence that casts doubt on what the presumption purports to show, then the complaining party must lead further evidence in order to satisfy the burden of proof. This is the proper interpretation of Article 3.8 of the DSU. The defending party may rebut the presumption by proving that the violation had no adverse impact. Guatemala submits that it did just that in this case.

22. First, the *Anti-Dumping Agreement*, unlike the *Agreement on Subsidies and Countervailing Measures* (the "*Subsidies Agreement*"), does not impose any obligation to seek or hold consultations

and it then gave Cruz Azul[19] a further period of two months to reply to the questionnaires. Fourth, even if Mexico had wished to reach a compromise before initiation, it had neither the power, the right nor the proper procedure for doing so, as anti-dumping cases cannot be the subject of transactions between governments. Fifth, Mexico's "acquiescence" in the initiation of the investigation over a period of six months shows that it did not have any interest in reaching a compromise.

23. Guatemala also asserts that the Panel's references to *United States – Taxes on Petroleum and Certain Imported Substances*[20] and *Japan – Taxes on Alcoholic Beverages*[21] are irrelevant in this context. These cases deal with substantive breaches that might have an effect on the levels of trade of Members, whereas the present case deals with the breach of a procedural obligation that has nothing to do with levels of trade. Guatemala argues that the Panel also erred in referring to *Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*[22] because this case does not concern nullification or impairment, but rather the application of the concept of "harmless error", which is, in any event, consistent with the normal rule on the burden of proof.

24. Guatemala therefore submits that the Panel erred in its interpretation of Article 3.8 of the DSU.

4. Article 5.3 of the Anti-Dumping Agreement

25. As regards the obligations imposed by Article 5.3 of the *Anti-Dumping Agreement*, Guatemala considers that if an investigating authority determines that an application made under Article 5.2 of that Agreement complies with the requirements of that latter provision and if the authority examines the "accuracy and adequacy" of the evidence accompanying the application, then the authority has discretion to determine that there is "sufficient evidence" under Article 5.3. Furthermore, a panel may not review the authority's determination on whether that evidence is sufficient. In terms of Article 5.3, Guatemala believes that all that a panel may review is whether or not the authority actually examined the "accuracy and adequacy" of the evidence.

[19]The Mexican company which is alleged to have dumped portland cement in Guatemala.

[20]Adopted 17 June 1987, BISD 34S/136.

[21]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

[22]Adopted 28 April 1994, BISD 41S/467, paras. 270 and 271.

26. Guatemala supports this interpretation by reference to the wording of Article 5.2 as well as its context. Guatemala makes reference in that regard to Articles 5.6 and 5.8 of the *Anti-Dumping Agreement* and to Article 11.2 of the *Subsidies Agreement*. It considers that its interpretation is also consistent with the object and purpose of Article 5.3, as defined by the Panel.[23] Guatemala also derives support for its view from the drafting history of that provision.

27. Guatemala considers that the Panel erred in concluding that Articles 2 and 3.7 of the *Anti-Dumping Agreement* are applicable at the initiation stage of an investigation. Article 5.2 of that Agreement lists the type of information that must be provided in an application and it does not mention Article 2. If considerations were imported into Article 5.2 from Article 2, then the specific requirements of Article 5.2 would be rendered redundant. Likewise, although Article 5.2(iv) does provide that paragraphs 2 and 4 of Article 3 are relevant at the stage of initiation, it does not mention Article 3.7. Article 5.2 does not therefore oblige authorities to take account of the factors and indices mentioned in Article 3.7.

28. The Panel also erred in imposing an obligation on investigating authorities that is not contained in the *Anti-Dumping Agreement*. According to Guatemala, the Panel found that when authorities formulate a recommendation or issue the notice of initiation, they must recognize: (1) that during the course of the investigation, it will be necessary to make the adjustments provided for in Article 2 in order to make a fair comparison, or (2) that an examination has been carried out that goes beyond the evidence or information contained in the application. Guatemala contends that the Panel has erred in reaching this conclusion because the *Anti-Dumping Agreement* does not oblige the investigating authority either to acknowledge the need to make adjustments or to examine evidence not included in the application. The requirement to make adjustments arises under Article 2 only during the course of an investigation.

29. The fact that Articles 2 and 3.7 are not relevant at the stage of initiation is, in Guatemala's view, borne out by Article 12 of the *Anti-Dumping Agreement*. According to this provision, it is only in the case of preliminary and final determinations that the public notice must include information on the comparison of prices and on the considerations relevant to the determination of injury. The notice of initiation need only provide information concerning the basis of the allegations of dumping and injury.

[23]Referring to the panel report in *United States – Measures Affecting Softwood Lumber from Canada* ("*United States - Softwood Lumber*"), adopted 27 October 1993, BISD 40S/358, the Panel considered that the purpose of Article 5.3 was to establish a balance between the competing interests of the domestic industry in the

30. At footnote 242 of its Report the Panel declined to consider certain "additional evidence" that Guatemala alleged was taken into account by the investigating authority when it decided to initiate the investigation. The reason for the Panel's refusal was that it could find no trace of this evidence in any part of the file relating to the decision to initiate. Guatemala submits that the Panel was wrong to refuse to admit this evidence because the *Anti-Dumping Agreement* does not oblige the authority to reveal what additional evidence it may have taken into consideration before taking the initiation decision.

31. Guatemala submits that the Panel's interpretation of the word "evidence" in Article 5.3 of the *Anti-Dumping Agreement* is also flawed. The Panel was wrong to find that "sufficient evidence" means something whose accuracy and adequacy can be "objectively evaluated".[24] The Panel has, in reality, added an obligation to Article 5.2 since, as well as being all that is "reasonably available", information provided in an application must now also be capable of objective evaluation.

32. Guatemala maintains that this interpretation of Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*, which it argued before the Panel, was "permissible" and that the Panel, therefore, erred in rejecting it because Article 17.6(ii) of the *Anti-Dumping Agreement* mandates that the Panel shall find a measure to be consistent with the Agreement if it is adopted on the basis of one permissible interpretation of a provision.

33. As regards the Panel's review of the facts, Guatemala submits that it erred in its interpretation of Article 17.6(i) of the *Anti-Dumping Agreement*. According to Guatemala, that provision requires a Panel to accept the authority's evaluation of the facts unless there is a finding, based on positive evidence submitted by the defending party, of bias or subjectivity. Since there was no such finding in the present case, the Panel should have accepted the Guatemalan authority's evaluation of the facts.

34. However, even if positive evidence of bias or subjectivity were not required, Guatemala argues that the Panel improperly interpreted Article 17.6(i) as permitting it to carry out a *de novo* evaluation of the facts. Furthermore, the Panel was wrong to rely on the panel report in *United States - Softwood Lumber*[25], since that panel was concerned with the provisions of a different agreement, namely the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII* (the "*Tokyo Round Subsidies Agreement*")[26], which has no provision like Article 17.6(i).

[24]Panel Report, para. 7.71.

[25]Adopted 27 October 1993, BISD 40S/358.

[26]BISD 26S/56.

B. *Mexico - Appellee*

1. Whether the Dispute was Properly Before the Panel

35. Mexico endorses the Panel's finding that the term "measure" is not restricted to final anti-dumping measures, provisional anti-dumping measures and acceptance of price undertakings. Since neither the *Anti-Dumping Agreement* nor the DSU contains a definition or a special meaning for the term "measure", it should be interpreted broadly and in accordance with its ordinary meaning. According to Mexico, that meaning includes "any action or act carried out to achieve a particular end". The text and context of the *Anti-Dumping Agreement* and the DSU show that Article 17 of the *Anti-Dumping Agreement* does not support Guatemala's argument that the only measures which may be contested are those enumerated in Article 17.4.

36. Mexico agrees with the Panel that Article 17.4 itself is simply a "timing provision".[27] The provision does not include language that would limit disputes under the *Anti-Dumping Agreement* to three types of measure. Indeed the English version of the provision does not mention final measures at all, but refers only to whether "final action has been taken … to levy definitive anti-dumping duties or to accept price undertakings … ". Article 17.3 also permits, as the Panel found[28], consultations about any "matter" without limit on the types of measure that may be contested. Likewise, Article 17.5 does not specifically make reference to any of the three measures Guatemala cites. It refers simply to the "matter". Mexico adds that it does not consider that the Panel found that Article 17.3 is a special or additional rule. All the Panel stated was that "if Article 17.3 requires something different from the corresponding Article 4 of the DSU, the provisions of Article 17.3 must prevail, otherwise Article 17.4 would not be given full effect".[29]

37. In Mexico's view, Articles 1 and 18.3 of the *Anti-Dumping Agreement* show, at most, that a "measure" is different from an "investigation". But that does not mean that the only measures that may be contested are those mentioned in Article 17.4. Other provisions of the *Anti-Dumping Agreement* confirm the conclusion that, in that Agreement, the word "measure" means more than final anti-dumping measures, provisional anti-dumping measures and acceptance of price undertakings. Article 10.7 speaks of "such *measures* as the *withholding of appraisement or assessment* as may be necessary to collect anti-dumping duties …" (emphasis added), and Article 13 refers to "*medidas administrativas*" (which in the English text appears as "administrative actions").

[27]Panel Report, para. 7.18.

[28]Panel Report, para. 7.14.

[29]Panel Report, para. 7.13.

Article 17.6(ii) also illustrates clearly that the term "measure" is related to compliance with any of the provisions of the *Anti-Dumping Agreement*. Likewise, according to Mexico, Article 3.8 of the DSU and Article XXIII of the GATT 1994 indicate that the infringement of any obligation constitutes a "measure".

38. Mexico considers that Guatemala's view of the object and purpose of the word "measure" is unrealistic. There is, as the Panel stated[30], no risk of multiple panels examining a single investigative procedure since Article 17.4 of the *Anti-Dumping Agreement* means that a panel can only be established after specific triggering events. Guatemala's position also provides a Member with a strong incentive to initiate investigations in violation of the *Anti-Dumping Agreement* since, even where the initiation of the investigation is manifestly unlawful, a Member must await a final resolution before commencing dispute settlement proceedings. Mexico contends that it is precisely to avoid this that Article 17.4 permits recourse to dispute settlement to challenge a provisional measure. Guatemala's position would mean that it was, in reality, impossible to challenge a provisional measure on the grounds of unlawful initiation, because the time required for a panel to report will always exceed the maximum life of the provisional measure as set down in Article 7.4 of the

Article 5.5 of that Agreement, so as to be able to react in good time according to its best interests. Second, if Guatemala had initiated the investigation immediately after notifying Mexico, the question of adverse impact and the burden of proof would not have arisen. Third, the fact that Mexico had to request an extension of time in itself constitutes an example of the adverse impact caused by the late notification. Fourth, the fact that anti-dumping investigations are not the subject of transactions between governments has nothing to do with whether Mexico suffered adverse effects in this case. The possibility of a settlement between Guatemala and Mexico exists irrespective of when notification takes place. Finally, Mexico did not acquiesce in the late notification. Moreover, Mexico maintains that violation of Article 5.5 of the *Anti-Dumping Agreement* is not a harmless error because the failure to comply with that provision denied Mexico time to defend its interests. Mexico submits that Guatemala is also wrong to assert that the Panel has made the burden of proof impossible to fulfil. Guatemala simply failed to prove what it had to prove.

3. Article 5.3 of the Anti-Dumping Agreement

41.

however, no conflict and the provisions are complementary. Moreover, given the opening words of Article 2.1 ("For the purpose of this Agreement … "), the definition provided in Article 2 of the term "dumping" applies to all provisions of the Agreement and to all stages of an investigation. Mexico maintains that, if this were not so, there would be no other way to define the term "dumping". Mexico argues that the definition provided in Article 3.7 of the *Anti-Dumping Agreement* of "threat of material injury" also applies throughout that Agreement and, therefore, at all stages of an investigation.[31] Moreover, although Article 5.2 refers expressly to paragraphs 2 and 4 of Article 3, it does so purely by way of illustration. Article 5.2 of the *Anti-Dumping Agreement* therefore envisages that other factors, such as those listed in Article 3.7, may also be relevant under Article 5.2. Finally, as regards Guatemala's argument on Article 12 of the *Anti-Dumping Agreement*, Mexico submits that the Panel did not find that this Article required reference to be made in the public notice to the need to make a "fair comparison" or to the factors mentioned in Article 3.7. Rather, the Panel concluded that it could find no trace in the documentary file of the assertions Guatemala made in this respect.

44. With respect to the information referred to in footnote 242 of the Panel Report, Mexico states that the Panel refused to take it into consideration not because, as Guatemala claims, it was not mentioned in the public notice, but because the Panel could find no trace of this information anywhere in the administrative record for the investigation. Guatemala's claim that it is not necessary for an authority to reveal what additional evidence it may have taken into consideration amounts to a flagrant violation of the principles of procedural transparency and legal security. Affected parties would not have the slightest idea of the basis on which decisions were taken, and investigations could be commenced groundlessly in the knowledge that errors and omissions could be rectified subsequently.

45. According to Mexico, Guatemala's argument that information supplied in an application does not need to be capable of objective evaluation is also flawed in several respects. Guatemala confuses the word "evidence" used in the first sentence of Article 5.2 of the *Anti-Dumping Agreement* with the word "information" that is used in the third sentence. In addition, the second sentence of Article 5.2 provides that "[s]imple assertion, unsubstantiated by relevant evidence" does not satisfy the requirements of that paragraph. It would, in any event, be absurd to deny that "evidence" is something whose accuracy and adequacy can be objectively evaluated. In both the exact sciences and in law, a piece of evidence that cannot be objectively evaluated is not "evidence".

[31]See footnote 9 and the chapeau to Article 5.2 of the *Anti-Dumping Agreement*.

46. Mexico does not agree that the Panel misinterpreted Article 17.6(i) in reviewing the Guatemalan authority's evaluation of the evidence. The text of Article 17.6(i) does not require the complaining Member to show bias or subjectivity. Rather, it requires a panel to determine whether the investigating authority acted in an unbiased and objective manner. Mexico asserts that Guatemala's subsidiary argument that the Panel carried out a *de novo* review of the facts questions the impartiality of the Panel and is not substantiated by any evidence. Furthermore, no definition of the expression "*de novo* review" is given by Guatemala, nor does the *Anti-Dumping Agreement* offer any assistance. The Panel has, in any event, clearly explained the way in which Guatemala failed properly to establish the facts and the reasons why an unbiased and objective authority could not have acted as the Guatemalan authority did.

47.

1. Whether the Dispute was Properly Before the Panel

50. The United States submits that the Panel erred in concluding that the provisions of Article 17 of the *Anti-Dumping Agreement* "replace" the provisions of the DSU.[32] According to Article 1.2 of the DSU, it is only in the event of a "difference" that the special or additional rules and procedures in Appendix 2 prevail over the provisions of the DSU. If, as in the case of Articles 4 and 6 of the DSU and Article 17 of the *Anti-Dumping Agreement*, a Member can comply with both the special or additional rules and the provisions of the DSU, there is no "difference" between them and no need for the former provisions to "prevail" over the latter. In such a situation, the special or additional provisions supplement rather than supplant the provisions of the DSU. The United States argues that the Panel also erred in according Article 17.3 of the *Anti-Dumping Agreement* the status of a special or additional rule or procedure because that provision is not identified as such in Appendix 2 of the DSU.

51. According to the United States, if the rules of the *Vienna Convention* are applied to Article 17 of the *Anti-Dumping Agreement* and to the DSU it is clear that the Panel's "replacement doctrine" rests on an impermissible interpretation of the DSU and the *Anti-Dumping Agreement*. First, it is inconsistent with the plain text of those agreements. Second, if applied to other covered agreements (e.g., the *Subsidies Agreement*), it would fundamentally alter the rights and obligations under those agreements. Third, it would frustrate the object and purpose of the dispute settlement provisions of the DSU and the *Anti-Dumping Agreement*, thus undermining the ability of the DSU to serve as a unifying force in WTO dispute settlement.

52. Furthermore, the United States believes that, contrary to the Panel's views, Article 17.4 of the *Anti-Dumping Agreement* imposes a "jurisdictional requirement" on a panel such that one of the three anti-dumping measures mentioned in Article 17.4 must be identified as part of the "matter" in dispute. The United States emphasizes that Panels may, nonetheless, examine claims directed against those measures that relate to the initiation and conduct of an anti-dumping investigation. In the view of the United States, this jurisdictional requirement serves the purpose of ensuring that all the matters which relate to a single anti-dumping measure will be heard by one panel.

[32]Panel Report, para. 7.16.

2. Article 5.3 of the Anti-Dumping Agreement

53. According to the United States, the Panel did not err in rejecting Guatemala's arguments on the interpretation of Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*. The Panel was also correct in finding that the Guatemalan investigating authority did not have before it sufficient evidence of dumping, injury and causal link to justify initiation of the investigation. The United States wishes to stress, however, that the Panel's determination on these points is stated narrowly. In particular, according to the United States, the Panel did not attempt to define either a standard of sufficiency under Article 5.3 or the precise relationship between that provision and Article 5.2 of the *Anti-Dumping Agreement*. The United States maintains that the Appellate Body's findings on this issue should be equally narrow.

54. Finally, with respect to footnote 242 of the Panel Report, the United States submits that the Appellate Body should reject Guatemala's argument that Article 12.1.1 of the *Anti-Dumping Agreement* does not oblige an investigating authority to indicate that a decision to initiate was based on information which was not contained in the application filed pursuant to Article 5.2. Any other reading of Article 12.1.1 would allow investigating authorities to conceal the grounds upon which they decided to initiate an investigation. The Panel's refusal in footnote 242 to consider *post hoc* the additional information offered by Guatemala is also consistent with the findings of the panels in *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*[33] and *United States – Shirts and Blouses*[34], since in both of those disputes, the panels refused to consider evidence that was not available at the time the importing Member made its determination to impose measures.

[33]Adopted 25 February 1997, WT/DS24/R.

[34]Adopted 23 May 1997, WT/DS33/R.

III. Issues Raised in this Appeal

55. The appellant, Guatemala, raises the following preliminary issue in this appeal:

Whether the Panel erred in law in finding that this dispute was properly before it, and, in particular:

(a) whether the Panel erred in finding that Article 17 of the *Anti-Dumping Agreement* "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases … that replaces the more general approach of the DSU"; and

(b) whether the Panel erred in concluding that, in a dispute brought under the *Anti-Dumping Agreement*, it was not limited to examining the consistency with the *Anti-Dumping Agreement* of one of the three specific types of "measure" identified in Article 17.4 of that Agreement (that is, a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure).

56. In the alternative, if we should find that this dispute was properly before the Panel, Guatemala raises the following issues:

(a) whether the Panel erred in making recommendations under Article 19.1 of the DSU that concerned "actions" rather than specific anti-dumping measures;

(b) whether the Panel was entitled to make a suggestion under Article 19.1 of the DSU concerning the final anti-dumping duty if that measure lay outside the Panel's terms of reference, and given that the Panel's recommendation referred to "actions", not "measures";

(c) whether the Panel correctly concluded that Guatemala had not successfully rebutted the presumption of nullification or impairment under Article 3.8 of the DSU arising from the Panel's finding that Guatemala had acted inconsistently with Article 5.5 of the *Anti-Dumping Agreement*; and

(d) whether the Panel correctly interpreted and applied Article 5.3 of the *Anti-Dumping Agreement* in determining that Guatemala had not initiated the anti-dumping investigation consistently with its obligations under that provision.

IV. Whether This Dispute Was Properly Before the Panel

57. With respect to the question whether this dispute was properly before it, the Panel concluded as follows:

> In view of the above, we reject the argument that a panel may only consider a specific identified "measure" in an anti-dumping dispute. Thus, we conclude that a claim that a Member has acted in a manner inconsistent with its obligations under the ADP Agreement may be presented to a Panel for consideration, and therefore that the matters referred to in Mexico's request for establishment of a panel are properly before us.[35]

58. The Panel reached this conclusion on the basis of two alternative lines of reasoning. Under the first line of reasoning, it found the following:

> This interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that *replaces* the more general approach of the DSU. … In anti-dumping cases, the matter in dispute may not be the final measure in and of itself (or the provisional measure or any price undertaking), but may rather be an action taken, or not taken, during the course of the investigation. … [36] (emphasis added)
>
> …
>
> Thus, we read Article 17.4 as a **timing** provision, establishing **when** a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel … [37]

[35]Panel Report, para. 7.27.

[36]Panel Report, para. 7.16.

[37]Panel Report, para. 7.18.

59. In its alternative line of reasoning, the Panel assumed "that the dispute settlement provisions of the ADP Agreement (Articles 17.3, 17.4, and 17.5 in particular) did not represent a coherent dispute settlement scheme which replaces the more general provisions of the DSU".[38] Under this line of reasoning, it found that:

> The terms of the DSU and GATT 1994 itself, as well as past GATT practice and evolving WTO practice, support the conclusion that the DSU does not preclude a panel from examining whether a Member's initiation and conduct of an anti-dumping investigation is consistent with its WTO obligations.[39]
>
> …
>
> The question then is whether the references to the term "measure" in various provisions of the DSU should be interpreted as narrowing the rights and causes of action set forth in Article XXIII by limiting the range of alleged violations of the GATT 1994 (and of other WTO Agreements) that could be subject to dispute settlement to those based on specified "measures". … [I]t seems more likely that the term "measure" should be interpreted broadly in order to give effect to the substantive provisions of the WTO Agreement. To read "measure" narrowly would mean that a variety of violations of obligations which do not involve specified or identifiable measures would be outside the scope of the dispute settlement system. This is not an approach to be taken lightly unless such an intention can be clearly ascertained from the text of the DSU. In our view, no such intention can be drawn from the text of the DSU.[40]
>
> …
>
> It thus seems clear to us that the use of the term "measure" in the DSU should be understood as a shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU.[41]

[38]Panel Report, para. 7.22.

[39]*Ibid*.

[40]Panel Report, para. 7.24.

[41]Panel Report, para. 7.26.

60. We now turn to the provisions of the DSU and the *Anti-Dumping Agreement* which pertain to this issue. Article 1.1 of the DSU reads, in relevant part:

> The rules and procedures of this Understanding shall apply to *disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1* to this Understanding (referred to in this Understanding as the "covered agreements"). (emphasis added)

61. Article 1.2 of the DSU provides, in relevant part:

> The rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements *as are identified in Appendix 2 to this Understanding.* To the extent that there is *a difference* between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 *shall prevail*. (emphasis added)

62. Article 6.2 of the DSU reads, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall … *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. (emphasis added)

63. Article 17 of the *Anti-Dumping Agreement* contains the consultation and dispute settlement provisions of that Agreement. Paragraphs 4 through 7 of Article 17 are listed as special or additional rules and procedures in Appendix 2 of the DSU; paragraphs 1 through 3 of Article 17 are not. Article 17.4 reads as follows:

> 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. (emphasis added)

64. As to the Panel's interpretation of the relationship between Article 17 of the *Anti-Dumping Agreement* and the rules and procedures of the DSU, Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (the "covered agreements"). The DSU is a coherent system of rules and procedures for dispute settlement which applies to "disputes brought pursuant to the consultation and dispute settlement provisions of" the covered agreements.[42] The *Anti-Dumping Agreement* is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement. Under Article 17.3 of the *Anti-Dumping Agreement*, consultations may be requested by a Member, if that 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". Article 17.3 of the *Anti-Dumping Agreement* is not listed in Appendix 2 of the DSU as a special or additional rule and procedure. It is not listed precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement r th

a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.

66. 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.

67. Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. To read Article 17 of the *Anti-Dumping Agreement* as *replacing* the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU. To suggest, as the Panel has[44], that Article 17 of the *Anti-Dumping Agreement* replaces the "more general approach of the DSU" is also to deny the application of the often more detailed provisions of the DSU to anti-dumping disputes. The Panel's conclusion is reminiscent of the fragmented dispute settlement mechanisms that characterized the previous GATT 1947 and Tokyo Round agreements; it does not reflect the *integrated* dispute settlement system established in the WTO.

68. For these reasons, we conclude that the Panel erred in finding that Article 17 of the *Anti-Dumping Agreement* "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases … that replaces the more general approach of the DSU."[45]

---

[44]Panel Report, para. 7.16.

[45]*Ibid*.

69. In its alternative line of reasoning, the Panel gave the term "measure" a broad reading. It found that this term is a "shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled."[46] Given this statement and the reasoning in paragraph 7.24 of the Panel Report, it appears to us that the Panel reads the term "measure" as synonymous with allegations of *violations* of the GATT 1994 and the other covered agreements. As a consequence, the Panel blurs the distinction between a "measure"[47] and "claims" of nullification or impairment of benefits.[48] However, Article 6.2 of the DSU requires that *both* the "measure at issue" and the "legal basis for the complaint" (or the "claims") be identified in a request for the establishment of a panel. As we understand the Panel, it would, in effect, suffice, under Article 6.2 of the DSU, for a panel request to identify only the "legal basis for the complaint", without identifying the "specific measure at issue". This is inconsistent with the plain language of Article 6.2 of the DSU. For these reasons, we do not agree with the Panel's finding in the first sentence of paragraph 7.26 of the Panel Report.

70. In view of the fact that we have reversed both of the Panel's findings that led it to conclude that this dispute was properly before it, we must now address this question ourselves.[49] Article 17.4 of the *Anti-Dumping Agreement* allows a Member to refer a "matter" to the DSB when certain specified conditions are satisfied. The word "matter" also appears in paragraphs 2, 3, 5 and 6 of Article 17. It is the key concept in defining the scope of a dispute that may be referred to the DSB under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a panel's terms of reference in an anti-dumping dispute. According to the rules of interpretation set out in Article 31 of the *Vienna Convention*, the meaning of a term is to be determined by reference to its ordinary meaning, read in light of its context, and the object and purpose of the treaty.

---

[46]Panel Report, para. 7.26.

[47]In the practice established under the GATT 1947, a "measure" may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government (see *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116). A measure can also be an omission or a failure to act on the part of a Member (see, for example, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, complaint by the United States, WT/DS50/R and WT/DS50/AB/R, adopted 16 January 1998, and also *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*

71. The word "matter" has many ordinary meanings, the most appropriate of which in this context is "substance" or "subject-matter".[50] Although the ordinary meaning is rather broad, it indicates that the "matter" is the substance or subject-matter of the dispute.

72. The word "matter" appears in Article 7 of the DSU, which provides the standard terms of reference for panels. Under this provision, the task of a panel is to examine "the matter referred to the DSB". These words closely echo those of Article 17.4 of the *Anti-Dumping Agreement* and, in view of the integrated nature of the dispute settlement system, form part of the context of that provision. Article 7 of the DSU itself does not shed any further light on the meaning of the term "matter". However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term "matter" becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a "matter" to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a "request for the establishment of a panel" (a "panel request"). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out "the matter referred to the DSB". Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint*

the panel found that "the 'matter' consisted of *the specific claims* stated by Norway … with respect to *the imposition of these duties*".[54] (emphasis added) A distinction is therefore to be drawn between the "measure" and the "claims". Taken together, the "measure" and the "claims" made concerning that measure constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference.

74. Having said this, we are aware that the Panel found that Article 17.5 of the *Anti-Dumping Agreement* does not specifically require a panel request in an anti-dumping dispute to "identify the specific measures at issue".[55] The Panel concluded that Article 17.5 of the *Anti-Dumping Agreement* prevails over Article 6.2 of the DSU.[56] We consider, however, that the Panel erred in reaching this conclusion. Certainly, Article 17.5 does not expressly require the complaining Member's request for the establishment of a panel to identify the "specific measures at issue" or "to provide a brief summary of the legal basis of the complaint". Indeed, Article 17.5 contains none of the explicit, detailed procedural requirements that Article 6.2 of the DSU imposes on a request for the establishment of a panel. All that Article 17.5 requires is that a request by a complaining party contain:

> (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and
>
> (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

75. The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the *Anti-Dumping Agreement*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus,

---

[54]*United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 28 April 1994, BISD 41S/576, para. 212, contains an identical phrase.

[55]Panel Report, para. 7.15.

[56]*Ibid*.

when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement*, the panel request must meet the requirements of Articles 17.4 and 17.5 of the *Anti-Dumping Agreement* as well as Article 6.2 of the DSU.

76. The Panel was correct in saying that the term "matter" has the same meaning in paragraphs 3,

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.

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.

V. The Panel's Terms of Reference

81.

82. The second and third paragraphs of Mexico's panel request state the following:

> As the consultations did not produce a satisfactory solution to the matter (as is shown by the fact that the Government of Guatemala not only did not revoke the provisional anti-dumping duties but increased them in the final resolution to a level of 89.54 per cent, well above the amount claimed by the petitioner), and taking into account that the time-period established for conducting consultations under Article 4 of the DSU has been amply exceeded, the Government of Mexico requests that at the next meeting of the Dispute Settlement Body, scheduled for 25 February 1997, a dispute settlement panel be established to examine the consistency of the anti-dumping investigation by the Government of Guatemala into Guatemalan imports of portland cement from Mexico with Guatemala's obligations under the WTO, in particular those contained in the Anti-Dumping Agreement.
>
> The Government of Mexico requests that the Panel examine, find and rule that the anti-dumping investigation in question is incompatible with Guatemala's obligations under the AD. Mexico considers that in the anti-dumping investigation in question actions were taken that are inconsistent with, at least, Articles VI of the General Agreement on Tariffs and Trade 1994, and 2, 3, 5, 6 and 7 of the Anti-Dumping Agreement and Annex I thereto. By way of example, the aspects of the investigation presenting the main inconsistencies with the Anti-Dumping Agreement are highlighted below.

83. The examples Mexico then gives of the "main inconsistencies" are *claims* of alleged violations of certain provisions of the *Anti-Dumping Agreement* relating to the "initiation" of the investigation, the "preliminary resolution", and the "final stage of the proceeding".

84. Although it is clear from its panel request that Mexico made legal claims relating to the three previously-mentioned *actions* in the investigation by the Guatemalan authority, it is not immediately apparent from the language of its panel request whether Mexico properly identified one of the three types of *measure* specified in Article 17.4 of the *Anti-Dumping Agreement* as the specific measure at issue in this dispute. In response to questions posed by us at the oral hearing on 2 October 1998, Mexico stated that, when it referred to the "final resolution" in parenthesis in the second paragraph of its panel request, it had in mind the *final determination*, and not the *final anti-dumping duty*. However, Mexico clarified that it did not intend to *challenge* what was mentioned in that paragraph, but that it was "just providing some information".[61] This is confirmed by the Panel's observation[62]

[61]Response by Mexico to questioning at the oral hearing.

[62]Panel Report, para. 7.19.

that Mexico had indicated that, if it wanted to challenge the final determination, it would have requested consultations and the establishment of a panel to examine that matter.[63]

85. Throughout the proceedings, both before the Panel and before us, Mexico insisted repeatedly that *actions* taken in the course of an investigation could constitute either a *measure* or a *matter* for the purposes of a dispute brought under the *Anti-Dumping Agreement*

view, overcome the fact that Mexico's panel request does *not* specifically *identify* the final anti-dumping duty as the measure at issue.

87. After considering the terms of the panel request, and in light of Mexico's express statements at the oral hearing[68], we also conclude that the provisional measure was not properly identified as the specific measure at issue in Mexico's panel request. Therefore, we find that the provisional measure was not properly before the Panel.

88. Since this case does not involve the acceptance of a price undertaking, we must, therefore, conclude that the Panel erred in finding that it was entitled to examine Mexico's claims concerning Guatemala's three *actions* relating to the initiation and conduct of the anti-dumping investigation. In view of its erroneous interpretation of Article 17.4 of the *Anti-Dumping Agreement* and of Article 6.2 of the DSU, the Panel did not consider whether Mexico had properly identified a relevant anti-dumping measure in its panel request and, therefore, it erred in finding that this dispute was properly before it.

89. Having found that this dispute was not properly before the Panel, we consider that the merits of Mexico's claims in this case are not properly before us. Therefore, we cannot consider any of the substantive issues raised in the alternative by Guatemala in this appeal. Accordingly, we have no choice but to come to no conclusions as to whether the Panel was right or wrong in finding that Guatemala had acted inconsistently with its obligations under Articles 5.3 and 5.5 of the *Anti-Dumping Agreement* or in making its recommendations and suggestion under Article 19.1 of the DSU. Our finding that the Panel was not entitled, under its terms of reference, to examine Mexico's claims in this case in no way precludes Mexico from seeking consultations with Guatemala regarding the latter's imposition of definitive anti-dumping duties on imports of portland cement from Mexico and from pursuing another dispute settlement complaint under the provisions of Article 17 of the *Anti-Dumping Agreement* and of the DSU.

[68]As noted above, Mexico stated, in response to questions at the oral hearing, that it was not challenging what was mentioned in parenthesis in the second paragraph of its panel request.

VI. Findings and Conclusions

90. For the reasons set out in this Report, the Appellate Body:

(a) reverses the Panel's finding in paragraph 7.16 of the Panel Report that Article 17 of the *Anti-Dumping Agreement* "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases … that replaces the more general approach of the DSU";

(b) reverses the Panel's alternative finding in paragraph 7.26 of the Panel Report relating to the term "measure"; and

(c) reverses the Panel's conclusion in paragraph 7.27 of the Panel Report that "the matters referred to in Mexico's request for establishment of a panel" were properly before it.

Signed in the original at Geneva this 15th day of October 1998 by:

_____

Julio Lacarte-Muró
Presiding Member

_____ _____

Christopher Beeby
Member

Said El-Naggar
Member