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European Communities - Measures Affecting the Importation of Certain Poultry Products

Report of the Panel

The report of the Panel on European Communities - Measures Affecting the Importation of Certain Poultry Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 12 March 1998 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

1. On 24 February 1997, Brazil requested consultations with the European Communities ("the Community" or the "EC") pursuant to Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT") and Article 6 of the Agreement on Import Licensing Procedures ("Licensing Agreement"), regarding the EC regime for the importation of certain poultry products (CN codes 0207 41 10, 0207 41 41 and 0207 41 71) and the implementation by the EC of the tariff rate quota in these products agreed in negotiations between Brazil and the EC under Article XXVIII of GATT (WT/DS69/1).

2. Consultations were held on 11 April and 21 May 1997. As they did not result in a mutually satisfactory solution of the matter, Brazil, in a communication dated 12 June 1997, requested the establishment of a panel to examine this matter in light of the GATT, the Licensing Agreement and the Agreement on Agriculture (WT/DS69/2).

3. The Dispute Settlement Body ("DSB"), at its meeting on 30 July 1997, established a panel with standard terms of reference in accordance with Article 6 of the DSU (WT/DS69/3). Thailand and the United States reserved their third party rights to make a submission and to be heard by the Panel in accordance with Article 10 of the DSU.

Terms of reference

4. The following standard terms of reference applied to the work of the Panel:

"To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS69/2, the matter referred to the DSB by Brazil in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

Panel composition

5. The parties to the dispute agreed on 11 August 1997 to the following composition of the Panel:

Chairman: Mr. Wilhelm Meier

Members: Mr. Peter May
Ms. Magda Shahin

6. The Panel met with the parties on 29-30 October and on 18 November 1997 and with third parties on 30 October 1997.

7. The Panel submitted its interim report to the parties of the dispu te on 23 January 1998 and the final report on 12 February 1998.

II. FACTUAL ASPECTS

Background

8. Following the completion of the panel on the *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins* ("Oilseeds panel")[1], the EC was authorized by the GATT CONTRACTING PARTIES on 19 June 1992 to enter into negotiations under Article XXVIII of GATT - Modification of Schedules - with interested contracting parties. Such negotiations were entered into with Brazil as well as with nine other contracting parties.[2] The negotiations with Brazil were terminated in July 1993 and the Agreed Minutes were signed by both parties on 31 January 1994.

9. The Agreement set out in the Agreed Minutes between Brazil and the EC resulting from negotiations pursuant to Article XXVIII, modified concessions in EC's Schedule LXXX concerning oilseeds, adding *inter alia* a new, duty-free, global tariff rate quota (TRQ) of 15,500 tonnes on frozen poultry meat under CN sub-headings 0207 41 10, 0207 41 41 and 0207 41 71. The poultry meat TRQ was also free from variable levies. Tariff quotas were also established for meat of turkey and beef. The tariff rate quotas were opened as from 1 January 1994 by Council Regulation (EC) No 774/94, dated 29 March 1994. Those concerning frozen poultry meat were contained in Article 3 which stated that "... an annual quota of 15,500 tonnes is hereby opened for poultry meat falling within CN codes 0207 41 10, 0207 41 41 and 0207 41 71." Rules for adjustment of the volumes and other conditions of the tariff quotas were also provided for (Article 8). Regulation 774/94 was amended in September 1995 by Regulation 2198/95 to take account of the Agreement on Agriculture resulting from the Uruguay Round negotiations.

Current EC Schedule LXXX

10. The current EC Schedule LXXX (Part I - Most Favoured Nation Tariff, Section I -Agricultural Products, Section I B - Tariff Quotas) provided for a duty-free tariff quota up to 15,500 tonnes of poultry meat[3] while the out-quota base duty rate was 1,600 ECU/tonne, 940 ECU/tonne and 1,575 ECU/tonne, respectively. The new decreasing bound out-of-quota rates replaced the variable levy that constituted the EC commitment under its previous Schedule as modified by the Article XXVIII Oilseeds negotiations. There were no licensing requirements for out-of-quota imports of frozen poultry meat.

Licensing requirements for the poultry TRQ

11. Council Regulation 774/94 opened, *inter alia*, a tariff quota for an annual volume of 15,500 tonnes for the relevant poultry meat products and provided that detailed rules for the application of the Regulation should be adopted in accordance with the procedures in Article 27 of Regulation 805/68 or in the corresponding Articles of other Regulations on the common organization of the markets concerned. Such detailed rules were subsequently set out in Commission Regulation 1431/94, dated 22 June 1994. Article 1 of Regulation 1431/94 provided that all imports under the tariff quotas for the relevant poultry meat products were subject "to the presentation of an import licence." 25 per cent of the quantity of the quota was allocated for each quarter of the year, save for 1994 when 50 per cent was allocated for each half of the year. Applicants for import licences had to be natural or legal persons who, at the time applications were submitted, had imported not less than

[1]Panel Report adopted on 25 January 1990, BISD 37S/86 and DS28/R, dated 31 March 1992.

[2]Argentina, Canada, Hungary, India, Pakistan, Poland, Sweden, the United States and Uruguay.

[3]HS 0207 14 10, 0207 14 50 and 0207 14 70.

100 tonnes (product weight) of products falling within CN codes 0207 14 10, 0207 14 50 and 0207 14 70 in each of the two previous calendar years [4] whether in-quota or out-of-quota product. Licence applications and licences should show the country of origin. Applicants had to lodge a security. Licences were not transferable. [5] If applications exceeded the volume available for the quarter, the Commission fixed "a single percentage of acceptance for the quantities applied for". If this percentage was less than 5 per cent, the Commission was authorized not to award those quantities in which case the security was released (Article 4.4 of Regulation 1431/94).

Special safeguards for out-of-quota volumes of frozen poultry meat

12. The EC Schedule for out-of-quota frozen poultry meat reserved the right to introduce an additional duty (special safeguards) on imports of such meat if the conditions of Article 5 of the Agreement on Agriculture were fulfilled. The EC rules pertaining to special safeguards for out-of-quota poultry meat were contained in Regulation 1484/95, dated 28 June 1995, and provided that, unless the poultry imports were unlikely to disturb the EC internal market, an additional duty would be levied if the import price fell below a specific trigger price [6] set out in Annex II of Regulation 1484/95 for each product. The import price to be taken into account "should be checked against the representative prices on the world market or on the Community import market for the products in question;" (recital 7 of Regulation 1484/95). Such representative prices were to be determined taking into account in particular (i) the prices on third country markets; (ii) free-at-frontier offer prices; and (iii) prices at the various stages of marketing in the EC for imported products. [7] Recital 8 provided that the importer could choose a different basis from the representative price [8] for the calculation of the additional duty. Article 3 allowed for the possibility, at the request of the importer, to establish the additional duty on the basis of the c.i.f. price, if this price was higher than the applicable representative price. If the importer had chosen to use the c.i.f. price, he would have to provide to the competent authorities (i) the purchasing contract (or equivalent document); (ii) the insurance contract; (iii) the invoice; (iv) the certificate of origin; (v) the transport contract; and (vi) the bill of lading (where applicable). [9]

[4]Article 3 of Regulation 1431/94 as amended by Regulation 958/96.

[5]Article 5 of Regulation 1431/94.

[6]ECU 333.5, 235.7 and 316.6, respectively, for CN 0207 41 10, 0207 41 41, 0207 41 71, respectively.

[7]Article 2 of 1484/95.

[8]The representative prices were set out in Annex 1 to Regulation 1484/95. An example of a calculation of the additional duty was supplied to the Panel, by the EC, on a confidential basis. See paragraphs 191 and 192.

[9]Article 3 of Regulation 1484/95.

*III. MAIN ARGUMENTS**

General

13. The complaint examined by the Panel was related to the EC's measures governing the importation of poultry meat falling within CN codes 0207 14 10, 0207 14 50 and 0207 14 70 (formerly 0207 41 10, 0207 41 41 and 0207 41 71).

14. **Brazil** requested the Panel to find

(a) that the EC had failed to implement and administer the compensation TRQ in certain poultry meat products in line with the bilateral agreement reached with Brazil within the context of Article XXVIII:4 of GATT;

(b) that the provisions of Articles I and XIII of GATT did not necessarily apply to compensation TRQs;

(c) in the alternative, that the EC had failed to implement the TRQ in accordance with Article XIII, since the EC did not follow the allocation procedures contained in Article XIII;

(d) that the EC had failed to comply with the provisions of Articles 1 and 3 of the Agreement on Import Licensing in the administration of the import licences;

(e) that the licensing system did not comply with the transparency provisions of Article X and the specific provisions of Articles II and III of GATT;

(f) that the licensing system did not comply with the specific provisions of Articles II and III of GATT;

(g) that the EC had failed to comply with the provisions of Articles 4 and 5 of the Agreement on Agriculture in the implementation of the special safeguards that apply for trade in poultry meat outside the TRQ.

15. In the view of Brazil, such infringements of the covered Agreements implied the nullification or impairment of benefits accruing to Brazil. Accordingly, Brazil asked the Panel to recommend that the EC bring its measures into conformity with its obligations under the GATT, the Agreement on Import Licensing Procedures and the Agreement on Agriculture.

16. The **EC** requested the Panel to dismiss the claims advanced by Brazil either as inadmissible or unfounded. In particular, the Panel should find

(a) that there had been no breach by the EC of Articles XXVIII, XIII, X, II and III of GATT, Articles 4 and 5 of the Agreement on Agriculture and Articles 1 and 3 of the Agreement on Import Licensing Procedures; and

(b) that, consequently, there had been no nullification or impairment of Brazil's rights under the WTO.

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*Note that footnotes in this and the following chapter are those of the parties.

Article XXVIII:4 of GATT

(i) General

17. Quoting paragraph 4(b) of Article XXVIII and its reference to paragraph 3(b), **Brazil** submitted that there was a balance in Article XXVIII between the recognition of the individual needs of Members and the global need to maintain an overall balance of concessions within a multilateral framework. In Brazil's opinion, there was nothing in the Article which prevented two Members from agreeing on a country-specific package of compensatory measures. Nor was there anything which mandated that compensation should be country-specific. Article XXVIII maintained a fine balance between these two possibilities. It allowed certain defined Members to negotiate and agree. Then it provided that other Members which might be dissatisfied with the agreement or which might wish to benefit from the agreement should have the right to ensure that the agreement did not prejudice their own rights and obligations. A time limit was placed on this right so as to promote legal certainty of the bilateral agreement within the multilateral framework. In this particular case, the EC created a series of distinct bilateral agreements, each with a distinct package of country-specific compensatory measures. These agreements were accepted by the other Members and had to stand within the multilateral system as country-specific agreements. No Member notified its intention to the CONTRACTING PARTIES to withdraw equivalent concessions.

18. The **EC** submitted that the purpose of the procedure under Article XXVIII was to ensure that the "security and predictability of GATT tariff bindings, a principle which constituted a central obligation in the system of the General Agreement", was preserved, in accordance with the provisions of Article II. In recognising that the procedure under Article XXVIII had been successfully completed, the CONTRACTING PARTIES accepted that the EC Schedules of concessions had been modified with their agreement and represented the new tariff commitments of the EC for the products concerned. The EC noted that no GATT contracting party objected to the revised Schedule within the three month period set out in the Decision of the CONTRACTING PARTIES of 26 March 1980. On the contrary, they had all agreed by 30 March 1994 to a new EC Schedule of commitments, as a result of the Uruguay Round, which included the outcome of Article XXVIII Oilseeds negotiations with respect to the frozen poultry meat.

19. **Brazil** submitted that the question of the compatibility with the General Agreement of bilateral agreements concluded outside, as opposed to within, the framework of the GATT was considered at the nineteenth Session of the CONTRACTING PARTIES in 1961. Referring to a note by the Executive Secretary [10], and while disagreeing that there were no provisions within the GATT itself for bilateral agreements, Brazil agreed with the view that there was no provision in the GATT for bilateral agreements between contracting parties and non-contracting parties. The Executive Secretary was concerned with the effect of bilateral agreements on other contracting parties. This concern was, in the view of Brazil, addressed in the multilateral aspects of Article XXVIII. However, in relation to the Executive Secretary's concerns, Brazil submitted that the opening of a country-specific frozen chicken TRQ by the Community did not give rise to a negative impact on the trade interests of other Members. There was considerable over-quota trade and this trade continued and would continue whether or not a TRQ had been opened. A country-specific TRQ merely increased a trade opportunity for one Member but did not preclude or diminish continued trading on an MFN basis for all Members.

[10] "The General Agreement contains no provisions dealing specifically with the use of bilateral agreements. If a Contracting Party concludes a bilateral agreement with another contracting party or a government not party to the GATT, what is relevant for the General Agreement is the effect on the trade of other Contracting Parties of any measures affecting trade which that Government takes to make effective the provisions of the bilateral agreement ... it is therefore necessary to know the nature of the quota obligation provided for in the bilateral agreement and details of any measures affecting imports which are taken for the fulfilment of the bilateral obligation."

20. The **EC** submitted that Article XXVIII of GATT was not a substantive provision but provided only the procedural requirements by which a Member could legally modify, change or withdraw, totally or partially, one of its concessions. These changes were justified by commercial considerations or by the creation of a customs union. In the latter case, Article XXIV:6 referred explicitly "to the procedures set forth in Article XXVIII", thus underlining again the procedural nature of that provision. Under Article XXVIII, there was no obligation to *reach* an agreement but there was an obligation to *seek* an agreement, in particular with Members having a particular trade interest. Detailed rules to be respected in order to ensure the participation of those Members were provided in the Understanding on the interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 which was annexed to the GATT 1994. Further guidelines were detailed in the Decision of the GATT CONTRACTING PARTIES adopted on 10 November 1980. The EC argued that Brazil had not complained, either during the consultations or in its request for the establishment of the Panel or, finally, in its written and oral interventions before this Panel, of any violation by the EC of the procedural requirements set out in that provision. It had signed an agreement with the EC on 31 January 1994, thus acknowledging that the procedures had been fully respected to the satisfaction of the two parties concerned. Any subsequent later complaint with respect to the procedure followed in order to reach that agreement was clearly "estopped" by now. Brazil could not therefore claim today, three years after the conclusion of that procedure, that a violation of Article XXVIII had occurred. Moreover, no evidence had been provided to support such a claim by Brazil. The negotiating history of Article XXVIII indicated that the GATT CONTRACTING PARTIES had expressed their views to the effect that no violation of the non-discrimination principle through an Article XXVIII procedure was possible. The EC believed that this was still the case.

21. **Brazil** argued that there was no obligation to conclude an agreement under Article XXVIII but Brazil and the EC did reach an agreement. And this agreement reflected the specification of the general rights and obligations. The EC could withdraw concessions, without the fear of counter withdrawals, on condition that it opened up other concessions. Brazil had agreed to forego its right to counter withdraw. These rights and obligations were directly applicable by reason of Article XXVIII. The CONTRACTING PARTIES authorized these specifications of the Article XXVIII rights and no contracting party had objected to the agreements reached within Article XXVIII. Under the terms of Article XXVIII:3(b), contracting parties which were not party to the negotiations were free within six months of the conclusion of negotiations, to withdraw substantially equivalent concessions if they were not satisfied with the bilateral country-specific agreements between the Members principally concerned. No contracting party took such action so therefore it could be concluded that all the contracting parties were satisfied. Brazil submitted, moreover, that in order to determine the nature of the EC's current commitments to Brazil within the WTO, this Panel had to look at the Oilseeds Agreement. The dispute between Brazil and the EC did not relate to whether the EC was complying with its Schedule but whether the EC's Schedule reflected the commitments made by the EC to Brazil following the Oilseeds negotiations.[11] Brazil maintained that a commitment had been made, within the terms of Article XXVIII of GATT, to open a *country-specific* TRQ of 15,500 tonnes of frozen chicken. The EC maintained, Brazil argued, that a commitment had been made to open such a TRQ but on an MFN basis. Brazil believed that the difference between the parties could only be resolved by the Panel by reference to the Oilseeds Agreement itself and by reference to the implementation of the other TRQs opened as part of that agreement.

[11]These commitments were contained in the Oilseeds Agreement.

(ii) Modifications of schedules

22. The **EC** submitted that the purpose of the procedure under Article XXVIII was to ensure that the "security and predictability of GATT tariff bindings, a principle which constituted a central obligation in the system of the General Agreement" [12], was preserved, in accordance with the provisions of Article II. In recognizing that the procedure under Article XXVIII had been successfully completed, the CONTRACTING PARTIES accepted that the EC Schedules of concessions had been modified with their agreement and represented the new tariff commitments of the EC for the products concerned. The EC explained that the EC Schedule [13] provided, as a result of the Uruguay Round negotiations with respect to the three products at issue in this dispute [14] for a duty-free tariff quota up to 15,500 tonnes for the frozen poultry meat [15] while the out-quota base duty rate was 1,600 ECU/tonne, 940 ECU/tonne and 1,575 ECU/tonne, respectively. The duty -free in-quota rate after the Uruguay Round negotiations corresponded exactly to the results of the Article XXVIII Oilseeds negotiations. However, market access for the frozen poultry meat was the subject of further negotiation as a result of the tariffication exercise that consisted in the introduction of out-quota decreasing bound rates. The new decreasing bound rates had replaced the variable levy that constituted the EC commitment under its previous Schedule as modified by the Article XXVIII Oilseeds negotiations. Thus, there was a series of modifications to the EC GATT Schedule of commitments with respect to the frozen poultry meat all of which were effected with the active support and agreement of all the other Members (GATT contracting parties at the time), including Brazil. In summary, first, the EC Schedule was modified as a result of the conclusion of the Article XXVIII Oilseeds Agreement. Secondly, it was then re -negotiated and modified as a result of the Uruguay Round.

23. **Brazil** replied that during the time in which the Oilseeds Agreement determined the EC's obligations to Brazil, the EC had commitments under Article XXVIII of GATT which were not reflected in its Schedule. If the EC had not changed its Schedule so as to reflect the opening of a 15,500 TRQ (whatever its nature) could a Member not have asked a dispute settlement panel to ensure that the EC's Schedule did reflect the commitments it had made? Thus, a closer examination of the EC's two agreements argument, giving rise to "successive modifications", revealed, according to Brazil that (i) the EC did not twice modify its country schedule; (ii) the EC had commitments under Article XXVIII that were not reflected in its Schedule; and (iii) whatever those commitments were, the EC did not offer security and predictability to WTO Members.

24. The **EC,** recalling a passage in the recent *Banana III* panel report[16], submitted that it seemed indisputable that the tariff rates specified in the EC's Uruguay Round Schedule, including the TRQs, were the valid EC tariff bindings in respect of frozen poultry meat. No declaration which would amount to a reservation or any belated after thought could affect the validity and the effects of the voluntary acceptance by Brazil of the results of the Uruguay Round negotiation.

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[12]Panel Report on *Newsprint*, adopted 20 November 1984, BISD 31S/114, 131 -133, paragraph 52.

[13]LXXX, Part I - Most Favoured Nation Tariff, Section I - Agricultural Products, Section I B - Tariff Quotas.

[14]Which had been indicated under the tariff number 0207 41 10, 0207 41 41 and 0207 41 71 and were presently indicated under the tariff lines 0207 14 10, 0207 14 50 and 0207 14 70.

[15]Schedule CXL after the Article XXIV:6 negotiations following the most recent EC enlargement will not entail any modification of the concessions of the EC in this respect.

[16]"it was for all prospective members of the WTO to decide whether they would accept the new agreements [resulting from the Uruguay Round], including the new bindings proposed by other participants. Under Article XVI:5 of the WTO Agreement, reservations are not permitted, except to the extent provided for in a WTO agreement; there is no such provision in GATT 1994. In this regard, we recognize the importance of not undermining the stability and predictability of tariff bindings" (paragraph 7.139 of WT/DS27R/GTM).

25. As concerns the question of entering a reservation because the country-specific nature of a TRQ was not apparent from the Schedule, **Brazil** observed that no reservations were permissible to the Marrakesh Agreement which established the WTO. [17] Secondly, as had been established by the Appellate Body [18], the presence of a reservation was not a prerequisite for the challenge by a Member of another Member's schedule.

(iii) The Vienna Convention on the Law of Treaties

(a) Article 59(1)[1]

"1. A treaty shall be considered as terminated if all the parties to i t conclude a later treaty relating to the same subject matter and

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; (...)

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties." of the Vienna Convention

26. The **EC** submitted its analysis was confirmed by the application to this case of the customary rules of interpretation of public international law. In applying Article 3.2 of the DSU, a number of recent WTO dispute settlement decisions [20] had indicated that certain provisions of the Vienna Convention on the Law of Treaties (Vienna Convention) had attained the status of rules of customary or general international law. This had been specifically indicated for Article 31 and 32 of the Vienna Convention. The EC was of the view that that was also the case for Articles 59(1) and 30(3). These provisions were the expression of the general international law principle concerning the succession of legal acts having an identical binding force between the same parties. [21] Citing Article 59(1) of the Vienna Convention [22], the EC submitted that in the case in dispute, the two parties, EC and Brazil, were not only parties to the bilateral agreement concluding the Article XXVIII Oilseeds negotiations under the GATT but also to the later Marrakesh agreement encompassing the results of the Uruguay Round. Both agreements related, *inter alia*, to the tariff levels for frozen poultry products at issue in this dispute. Both Brazil and the EC ratified the Marrakesh Agreement which contained the agreed new set of rules with respect, *inter alia*, to the tariff treatment of the frozen poultry meat. The rule under Article 59(1) solved the issue of the coexistence of the two agreements in this case by considering that the Article XXVIII Oilseeds Agreement was no longer applicable. The EC was therefore of the view that the modified EC Schedule which resulted from the Uruguay Round negotiations had replaced the earlier Article XXVIII Oilseeds Agreement. It was no longer possible for Brazil to allege a violation by the EC of the Article XXVIII Oilseeds Agreement and there was no violation by the EC of the existing commitments under the EC Schedule LXXX. As a subsidiary

[17] Article 19 of the Vienna Convention specifically recognized that a reservation was only allowable if it was not prohibited by the Treaty.

[18] Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R.

[19] Article 59(1) (entitled "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty") provided that:

[20] Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R; Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R; Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/R, para.7.272.

[21] The same principle was reflected also in Article 39, 40(2) and 54(b) of the Vienna Convention.

[22] For text of Article 59(1), see footnote above.

argument, the EC recalled briefly that in any event, Article 30(3) of the Vienna Convention would *not* allow any different conclusion: "When all the parties to the earlier treaty are parties also to a later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty".

27. **Brazil** submitted that the EC had not shown that the conditions of Article 59(1)(a) and (b) had been fulfilled in relation to the Article XXVIII negotiations. Brazil considered, however, that Brazil had shown that there was no incompatibility between Part I of the Uruguay Round schedules, and in particular the EC schedule, with country-specific TRQs. It was clear from the EC schedule that country-specific TRQs were provided for. Secondly, the EC accepted that country-specific provisions were compatible with the WTO Agreements. Thus, incompatibility could not be the ground for the automatic termination of the commitments agreed to under Article XXVIII. Nor had the EC shown that it was the clear intention of the parties that the matter of compensation be governed by the later treaty and not by the terms of the earlier agreement. The EC had itself observed that the earlier agreement had been "incorporated" into the later agreement. The ordinary meaning of the word "incorporation" did not include the idea of "modification". Incorporation meant, according to Brazil, that the terms of the first agreement were incorporated as they stood into the second agreement. Thus, the EC's Article XXVIII commitment was incorporated into the Uruguay Round agreement. Brazil concluded therefore that, if Article 59 was found to be declaratory of customary international law, the EC had not shown that the earlier agreement had been terminated or suspended by operation of Article 59.

28. The EC replied that Article 59(1)(a) of the Vienna Convention was fully relevant to this case. Brazil had disregarded that Article 59(1) provided, under (a) and (b), for two hypotheses which were separate and alternative. Contrary to what Brazil seemed to suggest, the EC was of the opinion that the text of Article 59(1) did not require cumulation of these two hypotheses.

(b) Article 30(3) of the Vienna Convention

29. Citing Article 30(3) of the Vienna Convention[23], the **EC** submitted that the Article XXVIII Oilseeds Agreement between the EC and Brazil modified the EC Schedule as of 1 January 1994. The Uruguay Round agreement then entered into force on 1 January 1995 and became applicable for agricultural products on 1 July 1995. This treaty covered *inter alia* the same subject matter (the EC concessions on the frozen poultry meat) among the same contracting parties as the earlier treaty (Brazil and the EC). EC believed that there was no disagreement between Brazil and the EC on the content of the current concessions by the EC with respect to the frozen poultry meat. Neither party contested that a duty-free tariff quota had been established, there was no disagreement on the decreasing duties applicable to the out-quota imports bound as a result of the Uruguay Round negotiations, neither was there disagreement on the size of the TRQ. The revised EC Schedule which incorporated the Article XXVIII Oilseeds Agreement with respect to frozen poultry meat, the EC said, had been replaced, as from 1 January 1995, by the EC Schedule of commitments resulting from the Uruguay Round consistently with Article 59(1) of the Vienna Convention. Reference to the earlier Article XXVIII Oilseeds Agreement was therefore no longer relevant. In any event, in application of Article 30(3) of the Vienna Convention, should the Panel reach any different conclusion (contrary to the EC's submissions) and in particular that the Article XXVIII Oilseeds Agreement was not applicable on a MFN basis and was still relevant, then it could be applicable only to the extent it was compatible with the EC's later Schedule resulting from the Uruguay Round which was a MFN TRQ. Both these lines of argument led to the inevitable conclusion that the EC frozen poultry meat TRQ was applicable on a MFN basis.

[23]See paragraph 26.

30. Referring to Article 30(3) of the Vienna Convention and to paragraph 1(b) of GATT 1994 [24], **Brazil** submitted that the EC agreed that a tariff concession had been given, and had entered into force, prior to the entry into force of the WTO agreements and that this concession was based on the Article XXVIII of GATT negotiations with Brazil. By the terms of the WTO Agreement itself, that prior concession was incorporated into the EC's GATT 1994 Article II Schedule. The specific concession had to be incorporated and not modified. If the EC had failed to incorporate the TRQ agreed with Brazil and opened on the basis of an Article XXVIII Agreement, it could not use that failure to claim that the TRQ included in the Schedule was a modification of the original concession. This Panel should uphold Brazil's claim in respect of the EC's failure to incorporate the agreed concession. Secondly, Brazil reiterated, the provision of a country-specific concession to Brazil was not incompatible, as required by the terms of Article 30(3) of the Vienna Convention cited above by the EC, with the terms of the Uruguay Round Agreement. Brazil argued that the EC's and other Members' schedules provided a significant number of examples of country-specific TRQs. In any event, the EC itself accepted that Article XXIV of GATT and Article IX of WTO gave rise to such commitments so that they therefore were not incompatible with the terms of the second treaty. Brazil concluded, therefore, that the EC had not demonstrated incompatibility of the provisions of the earlier treaty with the terms of the later treaty within the terms of Article 30(3) of the Vienna Convention.

(c) Article 31 of the Vienna Convention

31. Referring to the general rule of interpretation laid down in Article 31 of the Vienna Convention[25], the **EC** submitted that, together with the context, the interpreter should also take into account "any subsequent agreement between the parties regarding the ... application of its provisions" and "any relevant rules of international law applicable in the relations between the parties" (Article 31(3)(c)). Thus, the EC considered that the term "global" should be given its ordinary meaning in its context and in the light of its object and purpose. Irrespective of the philological meaning of the term "global", Brazil could not disregard the fact that the Article XXVIII Oilseeds negotiations were undertaken in the framework of the GATT. The object and purpose of the negotiations was to re-establish the balance of rights and obligations, following the Oilseeds panel report, within the scope of the GATT and in particular its Articles I and II. The EC found it difficult to conceive of a violation of Articles I and II of GATT that would be more obvious and indefensible than a discrimination on the duty applied upon importation of (like) products based on the origin of those products.[26] The EC noted that during the discussions of the provisions which became the present Article XXVIII, in the Tariff Agreement Committee at Geneva in 1947, the Chairman in summing up the discussions concerning the possibility of withdrawing concessions, stated: "... Therefore, the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation clause".[27] The EC also noted that this statement was made in the context of retaliatory trade measures against a unilateral modification or reduction by a Member of its own concessions. The same considerations must apply *a fortiori* to the *agreed* modification of a Member's Schedule as a result of *authorized* Article XXVIII:4 negotiations.

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[24]"(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

(i) protocols and certifications relating to tariff concessions; ..."

[25]"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[26]The recent Appellate Body Report in the *Banana III* dispute stated in paragraph 190 "the essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin".

[27]Analytical Index of the GATT, Article XXVIII - Modification of the Schedules, Volume 2, 1995 ed., page 947.

32. **Brazil** observed that the principle of good faith was a fundamental element in interpreting, understanding and implementing agreements. Interpreting agreements in good faith meant that all parties had to interpret the clear intention of the parties to the agreement and not read the agreement in a way that would lead to an unreasonable or absurd interpretation. In the opinion of Brazil, the ordinary meaning of the Brazil/EC Oilseeds Agreement was clear. Within the context of Article XXVIII of GATT, Brazil had agreed that it would not object to the EC withdrawing certain concessions on the condition that, in return, the EC would open a new compensatory concession specifically for Brazil. The agreement was made within the framework of Article XXVIII which ensured that all Members which had an interest would not be prejudiced. In the opinion of Brazil, no other Member was so prejudiced. Brazil claimed that the EC had agreed in writing, and within the multilateral GATT framework, a country-specific compensation package with Brazil. It was Brazil's opinion that the EC had not respected this package. Moreover, Brazil said, Article 26 of the Vienna Convention set out one of the fundamental principles of law, of whatever nature, namely " *pacta sunt servanda*", providing that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". In the opinion of Brazil, the EC had not implemented in good faith the agreement with Brazil.

33. The **EC** replied that Articles I and XIII of GATT were *also* clear provisions of a treaty that was binding upon Brazil: did Brazil suggest that the principle " *pacta servanda sunt*" authorized Brazil to breach those other clear international obligations? It was the EC's view that this theory was deprived of any legal and logical foundation in international law and in the WTO system. The EC had fully complied with its international obligations under both the general provisions of the GATT and the specific commitments of the Article XXVIII Oilseeds Agreement: the EC opened as from 1 January 1994 an MFN frozen poultry meat TRQ and Brazil obtained immediate access to a share of that tariff quota which corresponded to its share of the overall EC imports.

(iv) Incorporation

34. **Brazil** argued that the Community did not administer the TRQ as a country-specific TRQ in the period from January 1994 to July 1995. Moreover, the frozen chicken TRQ had been agreed within the terms of bilateral Article XXVIII negotiations and the multilateral checks and balances that were provided for in that Article. It was distinct from agreements reached within the context of multilateral negotiations. The bilateral Oilseeds Agreement made no mention of the Uruguay Round. Nor did it leave the Community the unilateral right to amend the agreement and change the nature of the concession in line with other bilateral Oilseeds agreements. [28] Brazil did not agree that the Article XXVIII country-specific commitments were changed by reason of their incorporation into the Uruguay Round. The fact that the incorporation was unilaterally made under the heading "minimum access" did not act so as to modify the commitment. Nor did the inclusion of the TRQ within the schedule act so as to diminish the commitment. If the commitments were country-specific before the Uruguay Round, they remained country-specific after the Uruguay Round.

35. The **EC** submitted that Brazil had not contested the legal analysis made by the EC. The legal issue here was not whether the Article XXVIII Oilseeds Agreement had been "incorporated" in the Uruguay Round but, more fundamentally, what the current obligations of the EC under the GATT were with respect to frozen poultry meat. The Vienna Convention gave a clear and convincing answer to this problem: the Uruguay Round EC Schedule was the only relevant obligation of the EC in this respect. This obligation had been undertaken in full respect of Articles I and XIII of GATT. Brazil had not advanced any argument to the contrary. The EC insisted that, in accordance with Article 3.2 of the DSU, Article 59(1) or, in the alternative, Article 30(3) in connection with Article 31 of the Vienna Convention, should be used by the Panel to solve this dispute.

[28] Argentina, Poland and Sweden.

36. **Brazil** replied that the rights and obligations of Members of the WTO should be determined on the basis of the clear and precise terms of the WTO Agreements and, where necessary, the dispute settlement mechanism, in clarifying the provisions of those rights and obligations, should do so in accordance with customary rules of interpretation of public international law. [29] In interpreting the scope of Article 3.2 of the DSU, the Appellate Body [30] had found that parts of the Vienna Convention, in particular Articles 31 and 32, had attained the status of customary international law.

(v) MFN and Article XXVIII

37. **Brazil** noted that the structure of Article XXVIII was such that it both distinguished between Members and allowed them a certain flexibility in reaching bilateral agreements, subject to the review of all Members. The object of the negotiations was to ensure that the general level of trade was maintained but there was no requirement in Article XXVIII that the trade to be maintained by means of compensation in other products had to be on an MFN basis. Brazil argued that Article XXVIII could be an exception to the MFN rule contained in Article I if the parties negotiating the agreement so chose and the other Members did not object. It was Brazil's view that the EC and Brazil had chosen to make the TRQs country-specific and chosen that the MFN principle should not apply. Nor was there anything, in Brazil's opinion, in the nature or text of Article I of GATT which made it automatically applicable to compensation agreements. Citing Article I of GATT, Brazil submitted that a measure given in compensation was based on the granting of restitution, not on the giving of an advantage, favour or privilege. Nor was compensation an immunity. For these reasons, Article I did not apply to compensation TRQs agreed within the framework of Article XXVIII:4. In conclusion, Brazil argued, Article XXVIII was a *lex specialis* in that it provided for bilateral solutions within a multilateral framework. Article XXVIII:4 negotiations were initially conducted with those specific Members who were primarily concerned. It was only when a bilateral agreement was reached that a limited number of Members who had a substantial interest gained rights. The rights of these parties were limited in time. Finally, all contracting parties under Article XXVIII had the right to intervene to ensure the reasonableness of the parties, in the absence of agreement.

38. The **EC** submitted that Brazil's claims concerning the MFN nature of the EC frozen poultry meat TRQ could not be considered in the context of a violation of Article XXVIII since that provision only contained procedural obligations. This was a rather belated complaint concerning the content of a Schedule that was negotiated during the Uruguay Round and not about the procedures followed in order to revise the EC Schedule that was applicable before the current Uruguay Round Schedule was negotiated. Brazil had ratified the Uruguay Round agreements and was an original Member of the WTO within the terms of Article XI of the WTO Agreement. It could not request now the re-opening of the tariff negotiations with the EC through a dispute settlement procedure. Brazil could not request either, in the opinion of the EC, that the Panel re-do the Article XXVIII negotiations which were concluded in 1993. This would be clearly outside the terms of reference of this Panel. Moreover, it would amount, in practice, to requesting the Panel to substitute itself for the GATT CONTRACTING PARTIES by replacing their judgement on whether offers and counter-offers were "adequate" and in considering the "value" of the different elements of the Oilseeds package which went far beyond the frozen poultry meat. The EC considered that this action by the Panel would clearly breach Article 3.2 of the DSU and would not assist the DSB in discharging its responsibilities in accordance with Article 11 of the DSU. The EC submitted that Brazil confused the legal nature of a particular tariff treatment granted through the procedures foreseen in Article XXVIII - which was based on the MFN clause - with the economic effects of that particular tariff treatment.

[29] See Article 3.2 of the DSU.

[30] Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R and Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R.

39. **Brazil** submitted that the parties agreed that there were exceptions to the MFN principle within the terms of the GATT Articles. It could also be seen from the practice of the Members that exceptions to the MFN principle were common and that these exceptions were included in the schedules under the parts dealing with MFN commitments. Members' schedules were public documents and formed an integral part of the GATT (and were thus within the standard terms of reference). The schedules did not show, however, from where the country-specific commitments flowed. In practice, they flowed, in the opinion of Brazil, from Articles XXIV and XXVIII of GATT and from other bilateral agreements. It was, therefore, perfectly reasonable for Brazil to consider, on the basis of the provisions of GATT and of Members practice, that the EC had committed itself to opening a country-specific TRQ in Brazil's favour. Brazil claimed that the EC's principal arguments did not address the issue of country-specific commitments but were based on fundamental GATT/WTO principles and the succession of international agreements within the terms of the Vienna Convention. The first question to be addressed, according to Brazil, was the extent to which MFN was an overriding principle in the GATT and the extent to which exceptions were allowable. Brazil considered that it had shown that the procedure to be followed in Article XXIV was the same as in Article XXVIII. Brazil had also shown that the object of both Articles was the same, namely the need to compensate contracting parties for changes to the schedules. Under Article XXIV the change to the schedule came about by reason of the formation of a customs union while the changes under Article XXVIII were made for other reasons. In both situations, the changes were unilateral by the Member making the change, which in turn gave rights to other Members either to agree to the changes and accept compensation or to counter-withdraw equivalent concessions.

(vi) Principle of non-discrimination

40. **Brazil** claimed that the EC had unilaterally decided that instead of a TRQ as compensation of 15,500 tonnes, it should be 7,100 tonnes. The arbitrariness of this decision and its consequences were inconsistent with the principle of non-discrimination. This general principle of law underlay the GATT/WTO Agreements. It was also a fundamental principle of international law and thus should be applied by the Panel under Article 3.2 of the DSU. The MFN principle was not to be confused with the concept of discrimination. According to Brazil, these two concepts were distinct in their meaning. Within the global balance of the GATT, including Articles I and XXVIII, Brazil and the EC had sought to achieve a non-discriminatory balance. The balance was between the withdrawal of an advantage and the offering of compensation in another product. If the EC failed to respect the agreement which fixed that balance, it was discriminating against Brazil so as to deny Brazil its rights within the multilateral system. In the opinion of Brazil, Regulation 1431/94 [31] discriminated to the extent that it allocated the frozen chicken TRQ among other Members that were not entitled to compensation under Article XXVIII and consequently had not concluded bilateral agreements with the EC or were not even contracting parties to the GATT or Members of the WTO.

41. The **EC** replied that the purpose and object of the negotiations under Article XXVIII could *not* have been, as Brazil claimed, to achieve a result that would constitute a fundamental violation of the basic principle of non-discrimination among Members, which was one of the founding elements of the entire GATT (and now WTO) system. As to Brazil's assertion that a difference existed between the principle of non-discrimination and the MFN principle, the EC could theoretically accept that the general principle of non-discrimination could encompass situations going beyond the mere application of the MFN principle. The EC could nevertheless not accept the consequence implied in Brazil's approach that the implementation of the MFN principle could correspond to a violation of the principle of non-discrimination. This was absurd and should be clearly rejected by the Panel. (See also paragraphs 62 and 60.)

[31]Commission Regulation 1431/94 of 22 June 1994. O.J. L 156/9 of 23.6.1994.

(vii) The EC's Uruguay Round Schedule - minimum access

42. **Brazil** submitted that if the TRQ in the EC's Schedule was a minimum access TRQ, then the Community had failed to include the Brazilian Article XXVIII TRQ in its Schedule. The Community subsequently amended its schedule in line with the commitments it had undertaken within the context of the Uruguay Round but these changes were the result of a different series of commitments and were distinct in law. The Community Schedule appeared therefore to be inconsistent with its obligations under Article XXVIII. It was understood between the parties that the EC would submit to the GATT the changes to its Schedule at the same time as it would submit its Uruguay Round changes. When the EC submitted a Schedule with a frozen chicken TRQ of 15,500 tonnes, Brazil presumed that this TRQ referred to the TRQ agreed to be specifically for Brazil.

43. At the same time as the Article XXVIII procedures were being completed, the **EC** replied, the Uruguay Round was also coming to an end. In a letter signed by Ambassador Tran Van Thinh on 14 December 1993, the EC requested Mr. P. Sutherland, Director-General of the GATT, to distribute a revised version of the EC draft lists of commitments together with supporting tables, in order to establish final commitments. In that letter, an "Information Note Concerning the EC Offer on Agriculture" was included. That Information Note indicated the content of the tables attached thereto. For Table 3 - Minimum Access - the following was specifically indicated:

- *"the agreement on oilseeds negotiated under Article XXVIII has been incorporated*

- *tariff quotas, including in-quota tariff rates, agreed in bilateral negotiations have been incorporated."*

Finally, the table "Agricultural Negotiations: List of Commitments - Market access: EC - Lists Relating to Minimum Access" provided for a zero per cent TRQ for tariff items 0207 41 10, 0207 41 41 and 0207 41 71 up to 15,500 tonnes. The letter was distributed to all GATT CONTRACTING PARTIES. In the meantime, the revised Schedule was applied by the EC as from 1 January 1994. Within the three-month period set out in the Decision of the CONTRACTING PARTIES of 26 March 1980, no GATT CONTRACTING PARTY object ed to the revised Schedule. On the contrary, they had all agreed by 30 March 1994 to a new EC Schedule of commitments, as a result of the Uruguay Round, which included the Article XXVIII Oilseeds Agreement results with respect to the frozen poultry meat.

44. Thus, the EC claimed, the formal notification to the GATT of a separate revised Schedule LXXX of the EC had been carried out: *all* GATT contracting parties were thus aware of the results of the Article XXVIII Oilseeds negotiations and of the intentions of the EC. The results of the Article XXVIII Oilseeds negotiations were therefore an *integral* part of the Uruguay Round formal negotiations. This procedure was considered correct and accepted by *all* the interested Members. It was therefore not correct to affirm, that the complainant was not aware of the interpretation to be given to the Article XXVIII Oilseeds Agreement with respect to the poultry meat TRQ, or of the content of the Oilseeds agreements entered into with the other primarily concerned and substantially interested GATT contracting parties and that no notification had been provided to the GATT. The EC claimed that Brazil was fully informed on all these matters.

45. **Brazil** considered that it had no reason to understand from the text of the Community's Schedule and from the fact that the changes to the Schedule would be included in the Uruguay Round changes and that the Article XXVIII negotiations were taking place against the background of the Uruguay Round negotiations, that the country-specific chicken TRQ was a minimum access TRQ. It was settled GATT and WTO law, Brazil argued, that a schedule could not take precedence over

underlying GATT/WTO obligations. The *Sugar* panel and the *Banana III* report[32] (as confirmed by the Appellate Body) provided that inclusion or exclusion of a measure in a schedule could not justify inconsistencies in that schedule with requirements of generally applicable GATT/WTO rules. The fact that the EC excluded from (or failed to include in) its Schedule a TRQ agreed for Brazil, meant that the EC was in clear breach of the basic compensatory rule in Article XXVIII:4. The EC did not compensate Brazil as it was obliged to do, and had agreed to do. Brazil submitted that the key to determining the EC's current commitments to Brazil was not restricted to an examination of the EC's Schedule. A Member could and did have commitments beyond the strict terms of its schedule.

(viii) Protection of legitimate expectations

46. **Brazil** submitted that the benefits accruing to Brazil under the GATT included the protection of the expectation that prevailed in July 1993, when the new concessions were agreed, that Brazil would be fully compensated. Brazil had had a reasonable expectation that the value of the concession agreed would not be nullified or impaired by the subsequent introduction of a lesser TRQ for the products concerned.[33] Brazil also had a legitimate expectation that the EC would not attempt to change the country-specific nature of the TRQ when Brazil agreed that the changes would be made at the time the EC submitted its Uruguay Round schedule. Brazil was entitled to expect that the EC would implement the Oilseeds Agreement TRQ in a manner compatible with the terms and objectives of the Agreed Minutes. Brazil signed the bilateral agreement because the compensation package addressed its specific concerns.

47. The **EC** replied that this Panel was not concerned with a non-violation case under Article XXIII:1(b) of GATT. The notion of "legitimate expectations" was developed only in the framework of such cases and, therefore, it was not relevant here. The EC considered also that Article II:5 was irrelevant in the present context: that provision was, like Article XX VIII, a procedural one since it provided for the possibility to enter negotiations. It was evident, the EC believed, that none of the conditions set out in that provision were fulfilled here and Article II:5 should not be considered relevant for the resolution of the issues raised in this case.

(ix) The implementation of the frozen chicken TRQ

48. **Brazil** submitted that since the EC had ratified the Oilseeds Agreement in Council Decision 87/94 of 20 December 1993, it considered the agreement to be distinct from other agreements (and not part of the Uruguay Round agreement). The frozen chicken TRQ was opened by Council Regulation 774/94 and allocated among supplying countries by Commission Regulation 1431/94. According to the recitals to 774/94 the purpose of opening the frozen chicken TRQ (as well as the other TRQs provided for in the Regulation) was to comply with the Article XXVIII commitments which required that the TRQ be opened by 1 January 1994. There was no reference to any other GATT commitments to be met. It was clear therefore, in the opinion of Brazil, that the EC considered that it was fulfilling its commitments under Article XXVIII only.

49. The **EC** replied that the negotiations between Brazil and the EC further to the Article XXVIII:4 procedure resulted in an agreement in the form of Agreed Minutes in July 1993, formally concluded by the EC institutions on 20 December 1993 and formally signed by both parties on 31 January 1994. The Agreement was published in the Official Journal of the EC on 18 February 1994. On the same date, a number of parallel agreements signed with other primarily concerned and

[32]Panel Report on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, BISD 36S/331, paragraph 58. Panel Report on *Banana III, op. cit.*, (WT/DS27/R/USA), page 360. Appellate Body Report on *Banana III, op. cit.*

[33]*Ibid*.

substantially interested GATT contracting parties [34] was published. Whilst the content of those agreements varied, they were identical to the extent that they stated that an agreement had been reached in negotiations under Article XXVIII:4 of GATT concerning the elimination of the impairment of the tariff concessions as recommended by the panel report on *EEC - Payments and Subsidies paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*. By 17 February 1994 at the latest, therefore, the EC argued, *all* the primarily concerned and substantially interested GATT contracting parties had acknowledged that the procedure under Article XXVIII:4 which had been authorized on 19 June 1992, had been successfully completed.

50. With respect to the question of whether the rights of other Members could be diminished by a finding that a schedule submitted as part of a multilateral negotiating process did not reflect the full range of that Member's commitments, **Brazil** was of the view that this question should be examined in respect of the conclusion of the Article XXVIII negotiations. The EC had stated that it had notified the CONTRACTING PARTIES of the conclusion of the Article XXVIII negotiations at the latest on 17 February 1994. Under the terms of Article XXVIII, contracting parties who were not parties to the negotiations were free (under the terms of Article XXVIII:3(b)), within six months of the conclusion of negotiations, to withdraw substantially equivalent concessions if they were not satisfied with the bilateral country-specific agreements between the Members principally concerned. No contracting party took such action. Therefore, Brazil concluded that all contracting parties were satisfied.

(x) Compensation

51. **Brazil** submitted that the importance of compensation as an element of the multilateral system was apparent from the ranking of GATT/WTO remedies in the case of nullification or impairment. The preferred remedy in the case of a finding of nullification or impairment was the changing of the GATT/WTO inconsistent provisions. The second remedy was the granting of compensatory concessions and the third was the withdrawal of concessions. According to Brazil, "compensation" was a broad concept not specifically defined in the GATT/WTO. Its objective was to ensure that the same level of reciprocal trade was maintained in favour of the Member with a principal supplying interest. Brazil was of the view that compensation had an element of specificity about it. It was not, therefore, something to which the MFN principle necessarily applied. The drafters of Article XXVIII did not consider it to be so as they allowed for bilateral negotiations within its framework. Brazil argued that compensation was usually in the form of a concession to increase market access (or trade) in another product. Where the compensation was in the form of a lower tariff, the intention of the Member was clearly to grant it on an MFN basis. Where the concession was granted in the form of a TRQ, in the opinion of Brazil, the intention of the Member was to ensure the same level of reciprocal trade between the two negotiating parties. The question of the allocation of the TRQ was a separate issue to be agreed between the parties.

52. Brazil submitted that the compensation package was not built upon an exact compensation figure. The value had never been clearly defined by the parties and was not deemed necessary for the purpose of concluding the bilateral negotiations. In the case of the Article XXVIII:4 negotiations between Brazil and the EC, a choice was made to avoid the difficulties created by the calculation of an exact amount of total compensation. Therefore, Brazil accepted the EC's proposal to conduct the negotiations by working from a list of offers which included the frozen chicken TRQ, and not from an exact or fixed compensation value. Negotiation resulted in the agreed final offers. Brazil submitted that the Panel should only take into consideration that there was now an agreed compensation package made up of different elements, that the 15,500 tonnes TRQ in frozen chicken was part of that package and that it should have been allocated to Brazil.

[34] Argentina, Canada, Poland, Sweden and Uruguay.

53. The **EC** recalled that the EC and Brazil reached an agreement in accordance with Article XXVIII, which was accepted by both parties. Whether each of the parties negotiated and obtained certain concessions on the basis of a specific value which they attributed to such concessions was not only irrelevant once the negotiating process was completed, but was also not necessarily capable of being reduced to a straightforward calculation. The agreement reached was the consequence of a GATT panel's finding that the EC's support system for oilseeds had the effect of reducing the value of the tariff concessions granted by the Community in 1962 and the agreed outcome of the negotiations not only comprised new tariff concessions on certain products including frozen poultry meat products (to which the EC did not at the time apply fixed tariffs, but variable levies), but also modifications to the EC's internal regime on oilseeds. As concerns the frozen poultry meat TRQ, the Brazilian allocation of the TRQ (7,100 tonnes) corresponded to Brazil's share of the overall imports of those frozen poultry meat products at the time of the negotiations.

54. Referring to Article XIX:3 and Article XXIII:2 of GATT which, according to Brazil, both authorized country-specific compensation, **Brazil** argued that there was very little guidance in the reports of previous panels or of the Appellate Body on which to base the justification that agreements within the terms of Article XXIV:6 were an exception to the general MFN rule. It had been accepted that, by nature, these compensatory agreements had to be country-specific as the rights of specific Members had been diminished by the creation of custom unions. No distinction could be made either in procedure or in intention between the compensation agreements under Articles XXIV and those of XXVIII. In practice, Brazil continued, there were examples of both country-specific and MFN TRQs offered and implemented by the EC as compensation under Article XXIV:6 of GATT. Those considered to be *erga omnes* or MFN were usually stated to be so by means of the letters "MFN" or the words "*erga omnes*" in brackets after the TRQ.[35] There were also examples of country-specific TRQs.[36] The GATT therefore recognized a number of exceptions to the MFN rule. These exceptions were provided for in both the text of the GATT and practised by the Members. They were also well recognized by academic writers.[37]

55. The **EC** indicated that, in its view, the agreement resulting from the Article XXVIII Oilseeds negotiations and the Uruguay Round agreement had the same objective albeit a (partially) different purpose. They both pursued the objective of ensuring a particular (reduced) tariff rate for frozen poultry meat as compared to the normal bound duty rate applicable to imports into the EC. They both also pursued the objective of ensuring that tariff treatment was bound in the EC Schedule of commitments. In the EC's view, since they both were undertaken in the framework of the GATT, they both had also the objective of complying with the general principles of non-discrimination as set out in Articles I and XIII of GATT. Otherwise, they would have violated the general principle of customary public international law *pacta servanda sunt*. However, the EC continued, the two negotiations were initiated for partially different reasons: the earlier Article XXVIII negotiations were justified by the limited purpose of ensuring compensation after the Oilseeds panel while the later Uruguay Round agreements had a much wider purpose of ensuring an overall balance of concessions between Members where tariff concessions in certain products could balance (or "compensate") tariff concessions for other products.[38] Thus, in order to create a new level of reciprocal commitments, the

[35]See for example Agreement between the United States and the EC published in O.J. L 098 of 10 April 1987 as well as Council Decision 95/592 of 22 December 1995.

[36]See for example Council Decision 95/592 of 22.12.95 and published in O.J. L 334 of 30.12.95.

[37]Merciai (Patricio Merciai, Safeguard Measures in GATT, 15 Journal of World Trade Law (1981)) stated that it was standard practice that country-specific trade benefits were the result of negotiations to avoid retaliatory action under Article XIX:3 or XXIII:2. Bronckers (Marco Bronckers, Selective Safeguard Measures in Multilateral Trade Relations, TM Asser Instituut, (1995)) stated that this compensation needed not be administered on an MFN basis.

[38]This was clearly expressed for instance in paragraph 4 of the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994. It was apparent from that provision that the EC could have been theoretically entitled to withhold or

later negotiations incorporated the results of the earlier more limited negotiation which had been reflected in the revised EC Schedule.[39] However, the EC Schedule resulting from the Uruguay Round negotiations maintained unaltered the level of tariff treatment agreed in the Article XXVIII Oilseeds negotiations with respect to the frozen poultry meat TRQ. "Compensation" could therefore not change the legal reality under the WTO covered agreements: the EC was bound, on a MFN basis, by its current Schedule of commitments for the tariff treatment of frozen poultry meat which was the result of the Uruguay Round. The application of the principles of the Vienna Convention, and in particular Articles 59(1), 30(3) and 31, fully supported this view. (See also paragraphs 146 and 150).

(xi) Interpretation of "global"

56. **Brazil** submitted that there was one word in the Agreed Minutes, i.e. "global", which required special consideration as the Community had placed great emphasis on this word in bilateral consultations prior to the commencement of the dispute settlement procedure. In the view of Brazil, the word "global" had no fixed or established meaning in GATT law or practice. It was not equivalent to the words "*erga omnes*" or to "MFN". These words had distinct meanings and were available for use should the parties to an agreement wish to use them in the sense that they had. The parties to the Agreed Minutes did not wish to use these words, according to Brazil, and therefore did not do so. The word global, Brazil continued, had been used in relation to all the TRQs which were opened by the Community in all the Oilseeds agreements, except the maize TRQ opened for Argentina. The maize TRQ was the only one encompassing only one tariff line, so there was no need to use the word "global" to cover a variety of tariff lines. In relation to the Brazil-EC Agreement the word "global" was used in respect of all three TRQs. When the EC opened the quotas by means of Council Regulation 774/94, it accumulated the three Hilton beef TRQs provided for in three of the agreements, and allocated the quota among those countries, but did not accumulate the three frozen chicken TRQs in a like manner. Both TRQs were described as being "global". "Global" was not therefore equivalent to the MFN principle. Brazil observed that the use of the word "global" in the Agreed Minutes did not prevent the Community from interpreting the Agreed Minutes in such a way so as not to open the TRQ on an "*erga omnes*" basis. The TRQ was allocated, albeit incorrectly and inconsistently with the Oilseeds Agreement, among certain supplying countries by Commission Regulation 1431/94. "Global" was not therefore to be read as meaning *erga omnes*.

57. The only element of disagreement, the **EC** said, resided in the claim by Brazil that the 15,500 tonnes TRQ should be reserved only for Brazil. Brazil's claims in this respect rested on a reading of the word "global"[40] of the Article XXVIII Oilseeds Agreement which was different from the normal meaning, understood by the EC to be equivalent to "general", "universal", "comprehensive", "catch-all" or, in WTO terms, MFN or *erga omnes*. According to Brazil's interpretation, that word meant that the EC was committing itself only vis-à-vis Brazil for a quantity that globally encompassed the frozen poultry meat. The EC was firmly of the view that this interpretation had no value for the following reasons. An interpretation in good faith of the word "global" in the light of the object and purpose of a negotiation under Article XXVIII *could not* mean, EC argued, anything else than "*erga omnes*" or "MFN". This was indeed the manner in which the EC

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withdraw the frozen poultry meat concession in the event that Brazil's Schedule had not yet become a schedule to GATT 1994. However, paragraph 4 of the Marrakesh protocol was further evidence of the fact that the CONTRACTING PARTIES to the Uruguay Round considered the new agreements as a new set of rules and commitments replacing earlier concessions (such as the ones resulting from Article XXVIII Oilseeds negotiation), which was fully in accordance with Article 59.1 of the Vienna Convention.

[39]As indicated expressly in Ambassador Tran Van Thinh's letter on 14 December 1993, annexed to the EC's first written submission.

[40]To be found in the text of the Agreed Minutes of Article XXVIII Oilseeds Agreement between the EC and Brazil, in particular in the Annex, part D - new concessions, footnote No. 2.

had immediately and consistently implemented its agreement with Brazil, together with all the other parallel agreements concluded with other GATT contracting parties in the context of the Oilseeds case settlement.[41] Moreover, Brazil could not have disregarded the interpretation of the word "global" as meaning "MFN" that resulted from the practice of the management of the TRQ and from the EC Schedule as they were formally used in the context of the Uruguay Round final negotiations and verification process. The fact that Brazil and the EC (together with all the other WTO Members), by ratifying the Marrakesh Agreement, agreed to the EC Schedule with respect to the *MFN* TRQ concerning the frozen poultry meat could certainly be defined as a "subsequent agreement between the parties regarding the ... application of its provisions". The EC did not admit, even for the sake of argument, that an ambiguity existed with regard to the interpretation of the word "global" at the moment of the signature of the Article XXVIII Agreement in January 1994. In any event, the alleged ambiguity could not reasonably persist after the *agreed* conclusions of the Uruguay Round negotiations. Should the Panel consider, *quod non*, that the word "global" in the earlier treaty meant country-specific, then the EC submitted that there would be a clear conflict between the provisions in the earlier treaty and the EC MFN Schedule in the later treaty. In application of Article 30(3) of the Vienna Convention, the former could therefore continue to apply *only* "to the extent of their compatibility with the later treaty". This necessarily meant that the duty -free poultry TRQ, which continued to exist, necessarily had to be applied on an *erga omnes* basis.

58. **Brazil** further submitted that it was obvious from references to the word "global" in the GATT academic literature that the word did not mean MFN or *erga omnes*. In the Handbook of GATT[42], reference was made to the establishment of a global quota in the head note to the *Chilean Apples* case[43] but in the text of the commentary reference was being made to the "total amount of permitted imports". Furthermore, in the Analytical Index of the GATT [44] reference was made to "global quotas for leather".[45] It was clear from this case that reference was being made to the total amount of imports under all the quotas which were, in practice, country-specific. Brazil argued that in the present context the word "global" should be read in its ordinary sense in light of its objective and purpose and in good faith. A global annual tariff quota of 15,500 tonnes made up of three product classifications was referring to the fact that three different products were bundled within the same global TRQ volume. Thus, within the "global" TRQ of 15,500 tonnes there was to be no subdivision between the different products. In conclusion, therefore, the text of the Brazil-EC Oilseeds Agreement was clear and precise. There was no special meaning to be given to any terms used in the Agreement. Not to interpret the Agreement in its ordinary sense would lead to results that were manifestly absurd or unreasonable.

Article XIII of GATT

59. In the view of **Brazil**, Article XIII did not apply to compensatory, country-specific TRQs which had their origins in Article XXVIII, unless the parties agreed that the TRQ should be MFN. Brazil argued that the reason Article XIII did not apply to the allocation of the frozen chicken TRQ was that it was a TRQ agreed within the context of a bilateral agreement negotiated between Brazil

[41]Brazil indicated in this respect that the EC had created some country-specific TRQs for other products. The EC denied this allegation with force. All products negotiated under Article XXVIII, including those mentioned by Brazil, were provided duty treatment on an MFN basis.

[42]Handbook of WTO/GATT Dispute Settlement, ed. Pierre Pescatore, William Davey and Andreas Lowenfeld, New York, Transnational Publishers, Inc., 1995, at CS 43/2 and CS 43/3.

[43]Panel Report on *EEC - Restrictions on Imports of Dessert Apples*, adopted on 10 November 1980, BISD 275/98.

[44]GATT, Analytical Index: Guide to GATT Law and Practice, updated 6th edition (1995) page 298.

[45]Panel Report on *Japanese Measures on Imports of Leather*, adopted on 6 November 1979, BISD 26S/320.

and the EC under Article XXVIII with the specific purpose of compensating Brazil for the modification or withdrawal of a concession. Referring to the observation of a previous panel that Article XIII was "basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions - the general ban on quotas and other non-tariff restrictions contained in Article XI" [46], Brazil argued that the frozen chicken TRQ was not a restriction on trade prohibited by Article XI of GATT. There was considerable trade in poultry products into the Community over and above the volume of the TRQ. The TRQ was compensation for the withdrawal of a concession. It provided for market access at a tariff rate lower than that generally applicable with the purpose of compensating one Member for a loss elsewhere. Brazil noted that the Appellate Body had recently ruled that Article XIII applied to TRQs.[47] In the view of Brazil, this did not mean that Article XIII applied automatically to all TRQs. It did not necessarily apply to country-specific TRQs.

60. The **EC** argued that it had demonstrated that any country-specific tariff advantage (like a country-specific, reduced-rate or duty-free TRQ), bound as a result of a re-scheduling negotiation under Article XXVIII would be contrary to Article I:1 of GATT and could not be justified either by reference to Article XXIV of GATT or by any decision under Article IX of the WTO Agreement. The EC failed therefore to see how, in the absence of any legal justification under those Articles the "basic principle of non-discrimination" would not apply to the allocation of any TRQ established as a result of an Article XXVIII negotiation. The quoted paragraph of the *Banana III* Appellate Body report, albeit limited to the particular issue of Members not having a substantial interest that was specific to that case, clearly indicated, in the view of the EC, that this was indeed the case.

61. **Brazil** submitted that, to the extent that country-specific quotas existed in Members' schedules, Article XIII did not apply. It would be illogical, in the view of Brazil, to apply Article XIII in such a situation. The EC Schedule provided for a series of country-specific agricultural TRQs, all of which were included in "Part I Most-Favoured-Nation Tariff, Section I - B Tariff Quotas". Brazil considered that the EC was not consistent in its arguments in relation to Article XIII as evidenced by its practice in relation to other TRQs in its Schedule. Article XIII was not applied by Members to country-specific TRQs, and as the frozen chicken TRQ was specific to Brazil, Article XIII did not apply. However, if this Panel was to consider that Article XIII did apply to the frozen chicken TRQ, as an alternate plea Brazil claimed the EC had not complied with the terms of Article XIII.

62. The **EC** replied that the recent Appellate Body report in the *Banana III* dispute[48] addressed the issue of the applicability of the "basic principle of non-discrimination" to Members not having a substantial interest. The Appellate Body stated in particular "when this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1".

63. Referring to paragraph 1 and paragraph 2(d) of Article XIII, **Brazil** noted that Article XIII provided that a TRQ could be allocated among supplying countries in one of two, mutually exclusive, ways, i.e. (i) by agreement; or, in the absence of agreement, (ii) by allocation on the basis of past supply performance during a specific reference period, due account being taken of special factors. Brazil considered that there was a clear prioritization between these two options. The first option was

[46]The Panel Report on *Banana III*, *op. cit.*, page 344.

[47]The Appellate Body Report on *Banana III*, *op. cit.*

[48]*Ibid*, paragraph 159 to 163.

to reach agreement with Members having a substantial interest. Only in the absence of agreement could a Member allot the shares on the basis of past performance.

(i) by agreement

64. **Brazil** held the view that the EC had reached an agreement with Brazil in 1993 on the allocation of the full TRQ to Brazil. There had been no change to that agreement and Brazil had made its views known to the Community prior to the country allocation of the TRQ in June 1994. No other Member did seek an agreement with the EC on the allocation of the TRQ. Frozen chickens were the subject of agreement with other Members negotiating with the EC on Oilseeds compensation. However, Brazil was of the view that neither Argentina nor Poland had a real interest in supplying frozen chicken to the Community. Brazil had consistently maintained that there was an agreement on the full allocation of the frozen chicken TRQ exclusively to Brazil. The EC had failed to respect this agreement.

65. The **EC** replied that the EC and Brazil had agreed, *inter alia* - firstly in January 1994 and later at the end of the Uruguay Round negotiations - on the principle of an *erga omnes* TRQ up to 15,500 tonnes for the three poultry products concerned with this dispute. They had also agreed on the level of duties that should be applied within that TRQ (duty -free tariff treatment). By contrast, they did not agree - either in January 1994 or at the conclusion of the Uruguay Round negotiation or at any later moment - on the allocation of the TRQ. Therefore, the EC had decided autonomously, in accordance with the rules of Article XIII:2(d), to assign to the Members having a substantial interest in supplying the product concerned a share of the TRQ with the aim to achieving "a distribution of trade in such product[s] approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restriction". [49]

(ii) by allocation on the basis of past performance

66. **Brazil** argued that the EC appeared to have applied the second method for the allocation of a TRQ set out in Article XIII. Brazil noted that the past performance method required that the TRQ be allocated among supplying countries based on their past supply performance during a specific reference period, due account being taken of special trade factors. It was understood that the EC chose the period 1991-1993 as the reference period. On that basis, three categories of origins were created: Brazil, Thailand and others. The size of the "others" category reflected, according to Brazil, the percentage of EC imports of frozen chicken from China. It was designed to facilitate the continuation of this trade (until imports were stopped because of phytosanitary problems). China filled most of the "others" category. By this method the Community granted a non-Member access to a TRQ which was designed to compensate GATT Members only.

67. Brazil's assumption was incorrect, **EC** replied: Article XIII:2(d), first sentence, clearly referred to "supplying countries" in general. It used the expression "contracting parties" only with respect to "contracting parties having a substantial interest in supplying the product concerned" with which an agreement could be sought or to which a share could be autonomously allotted by the importing Member. The EC had complied to the letter with these requirements. The total amount of the TRQ, the EC submitted, was allocated in accordance with the quantities shown in Annex 1 of Regulation 1431/94 and in compliance with the provisions of Article XIII of GATT. The quantities allocated to Groups 1 (Brazil) and 2 (Thailand) were specific to those countries since licences carried with them an obligation to import from those countries (Article 1 of Commission Regulation 997/97). Licences for Group 3 countries were not country-specific but they could not be used in respect of products originating in Brazil or Thailand (Commission Regulation 1514/97). Licences for all groups

[49] Article XIII:2, first sentence.

of countries were allocated on a quarterly basis in accordance with the procedures set out in Article 4 of Regulation 1431/94 which provided for the fixing of a single percentage of acceptance of the quantities applied for. There was no allocation on a "first-come, first-served" basis.

68. **Brazil** submitted that the *Banana III* panel examined the concept of an "others" category in the allocation of TRQs. The panel considered that this type of category had a value in allowing new trade patterns to develop. It also considered that country allocations of TRQs needed to be reviewed on the accession of new Members to the WTO. However, Brazil argued, the EC could not unilaterally grant to non-WTO members the right to participate in a compensatory TRQ. Nor could the EC operate a TRQ allocation system which allowed a non-WTO member to participate by default. The WTO was a system for the benefit of Members who had chosen to be bound by its obligations. In addition, Brazil continued, the EC allowed Members with other privileged market access to partake of the TRQ. This practice was declared to be inconsistent with the GATT in the *Newsprint* panel.[50] The East European countries which had association agreements with the EC had all been allocated privileged access to the EC market in chicken products. By allowing these countries to participate in the TRQ, the EC was reducing the benefit to other Members. In conclusion, Brazil said, the EC had used Article XIII to avoid its commitments under the Article XXVIII Oilseeds Agreement with Brazil. Secondly, the Community had misinterpreted the terms of Article XIII and, finally, the EC had denied Brazil compensation within the global balance of benefits that had existed prior to the Article XXVIII negotiations.

69. The **EC** noted that the allocation of a share of a TRQ had been considered an advantage by the recent Appellate Body report in the *Banana III* dispute[51] to such an extent that the "basic principle of non-discrimination" applied strictly when allocating shares of a TRQ, including for Members *not* having a substantial interest. By assigning a share of the TRQ to all substantially interested Members, including Brazil, the EC had therefore provided the complainant with the best possible (and legally sound) situation in the trade of the poultry products within the TRQ. The EC had made use of the most recent statistics available at the time of the negotiations (1991 -1993) to elaborate the "previous representative period" required under Article XIII:2(d) and had followed a criterion [52] that was considered correct by the recent *Banana III* panel.[53] That panel had also accepted (and the point was not overturned by the Appellate Body) the creation of a residual category "others" "for *all suppliers* other than Members with a substantial interest in supplying the product". [54] (emphasis added)

70. **Brazil** considered that if the TRQ was given in compensation to Members, the EC could not justify the administration of the TRQ in such a way that non-Members benefited whether that administration was justified under Article XIII or not. The proper question was not only whether non-Members came within the terms of Article XIII, which they clearly did not, but the extent to which non-Members could benefit from compensation at all. It was within the context of the examination of the nature of compensation that the Panel should examine the administration of the TRQ. If the EC was permitted to offer WTO-specific compensation to non-WTO members, Brazil continued, it had diminished that compensation whether it was "MFN" compensation or not. Even if

[50]Panel Report on *Newsprint, op. cit.*; paragraph 55 of the findings and conclusions: "Imports which are already duty -free, due to a preferential agreement, cannot by their very nature participate in an MFN duty -free quota".

[51]Appellate Body Report on *Banana III, op. cit*., paragraphs 161 and 162.

[52]The average of the last three full years of trade in the product concerned for which reliable official statistics are available at the time of the negotiation.

[53]Paragraph 7.83.

[54]Paragraph 7.75.

it was MFN (which Brazil denied), it remained compensation to WTO Members. It was not a TRQ which could be administered so that non-WTO members benefited. Finally, the EC had erred in applying Article XIII by allowing Members with privileged access in the same products to benefit from the compensation TRQ.

71. The **EC** considered that the text of Article XIII:2(d) was clear: when proceeding to the allocation of a TRQ, there was an obligation to allocate a share to *Members* having a substantial interest and this was what the EC did, *inter alia*, with Brazil. By contrast, there was *no* obligation to discriminate against non-Members of the WTO in their access to the TRQ in the residual category under "others". The EC maintained that while there was a general principle to treat on an MFN basis any Member with respect to advantages granted even to a non-Member, there was no provision in the WTO forbidding the Members from providing market access to non-Members on an MFN basis. Moreover, Brazil's claim that the EC should exclude any non-Member-supplying country from the allocation of the TRQ would inevitably entail an increase of its share of the tariff quota. This was, in the view of the EC, an unjustified request in the light of the *chapeau* of Article XIII:2: Brazil would then obtain a significantly higher share of imports than it "might be expected to obtain in the absence of such restriction", thus violating the provision it allegedly wished to see applied by the EC. The EC also noted that what market access to the residual part of a TRQ and to whom it was given by the importing country following the allocation amongst the substantially interested Members, was a matter that could not harm in any manner the trade interests of Members having a substantial interest, if their shares had been correctly allocated in accordance with the relevant provisions of Article XIII. This was certainly the case for Brazil with respect to the allocation of the duty-free TRQ concerning the frozen poultry meat.

The Agreement on Import Licensing Procedures[55]

72. **Brazil** submitted that there had been some debate on the extent to which the Licensing Agreement applied to TRQs. This debate had been to a large measure resolved in the findings of the *Banana III* panel according to which the Licensing Agreement did apply to TRQs. The Community had chosen to operate a non-automatic licensing system within the terms of Article 3 of the Licensing Agreement. The EC poultry licensing system was therefore subject to the disciplines set out in Articles 1 and 3 of the Licensing Agreement and to the principles of transparency and certainty which underlay the Agreement. Article 1.3 of the Licensing Agreement provided that Members had to ensure that the administrative procedures used to implement licensing regimes were not operated inappropriately so as to give rise to trade distortions. This general prohibition, Brazil argued, was repeated and amplified in Article 3.2 which provided that non-automatic licensing should not have trade restrictive or distortive effects on imports additional to those caused by the imposition of the restriction. The licensing procedures set out in Commission Regulation 1431/94, as amended, for administering the frozen chicken TRQ did not, in the opinion of Brazil, meet the strict requirements of the Licensing Agreement and in fact distorted trade within the TRQ. As will also be seen below, the licensing system operated as to distort non-quota trade.

73. The **EC** replied that in its *Banana III* report[56], the Appellate Body had clarified the nature of the obligations imposed on the Members by the Licensing Agreement. In particular, the Appellate Body had stated that the Licensing Agreement pertained to the *application* and *administration* of import licensing procedures, and required that this application and administration be "neutral ... fair and equitable".[57] The Appellate Body continued: "As a matter of fact, none of the provisions of the

[55]Hereafter the Licensing Agreement.

[56]Appellate Body Report on *Banana III, op. cit.*

[57]*Ibid*, paragraph 197.

Licensing Agreement concerns import licensing *rules*, per se. As is made clear by the title of the Licensing Agreement, it concerns import licensing *procedures*. The preamble of the Licensing Agreement indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the Licensing Agreement defines its scope as the administrative procedures used for the operation of import licensing regimes". [58] In the light of this clarification, it was clear to the EC that the only issue before the Panel in this case was whether the EC's licensing regime for the TRQ complied with the administrative procedures set out in the Licensing Agreement.

74. **Brazil** submitted that the Appellate Body report on *Banana III*[59] made clear that the Licensing Agreement required that the "application and administration (of licensing rules) be neutral ... fair and equitable". The Appellate Body found that this terminology was equivalent to the terms of Article X:3(a) of GATT which provided that rules be "neutral in application and administered in a fair and equitable manner". These were substantive obligations which had to be respected by Members. Secondly, the Appellate Body had ruled that subsequent panels should examine the context in which particular findings of previous panels or the Appellate Body were made. [60] The object of the Appellate Body in *Banana III* was to determine the extent to which the EC was entitled to design different licensing rules for the same product from different origins. The Appellate Body found that different rules could apply to the same product from different origins. On the reasoning of the Appellate Body in *Shirts and Blouses* it was open to this Panel, in the view of Brazil, to find that the provisions of the Licensing Agreement, mentioned in paragraph 75 below, were mandatory and that the EC had failed to comply with these provisions.

75. Brazil submitted further that the Licensing Agreement had extensive provisions to guide panels in the interpretation of what was neutral, fair and equitable in the administration of licensing procedures. These included the requirements: not to distort trade (Article 1.3); that licences be allocated on the basis of import performance (Article 3.5(j)); that traders and their governments should be able to become familiar with the licensing procedures (Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d)); that nothing should hinder the full utilization of licences (Article 3.5(j)); that licences be issued in economic quantities (Article 3.5(i)); and that provision be made for newcomers (Article 3.5(j)). If these provisions of the Licensing Agreement were not mandatory then, it appeared to Brazil, they should still be taken into consideration by panels when determining what was the nature of the obligation of neutrality, fairness, equality, impartiality and uniformity in the administration of the licensing procedures. Brazil maintained that the EC had not complied with the Licensing Agreement whether or not it was considered that the substantive provisions contained therein were mandatory or were instances of uniformity, fairness and neutrality.

(i) Notification

76. **Brazil** submitted that Article 1.4 of the Licensing Agreement provided that all the rules and regulations had to be published and the place of publication notified to the WTO Committee on Import Licensing in such a manner that governments and traders could become familiar with them. Articles 1.4, 3.3, 3.5(b), 3.5(c), 3.5(d) made repeated reference to the need for traders to become

[58] *Ibid*.

[59] *Ibid*, paragraphs 192 to 198.

[60] As the Appellate Body stated in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (Shirts and Blouses): "Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."

acquainted with the terms and conditions of licensing procedures. The EC appeared to have failed to comply with the terms of the Licensing Agreement and had not notified to the Committee on Import Licensing the sources in which EC licensing provisions were published and the specific import licensing rules for frozen chicken products. The Community had, however, published the licensing procedures in the Official Journal of the EC and thus, it could be said, had allowed governments and traders to become familiar with them. Brazil maintained, however, that the constant and contradictory amending of the regulations was such as to nullify the requirements of transparency set out in Article 3.3 of the Licensing Agreement.

77. The **EC** submitted that in the *Banana III* report, the Appellate Body had confirmed that import licensing procedures for tariff quotas fell within the scope of application of the Licensing Agreement.[61] The EC observed in this respect that notification was a procedural, rather than a substantive, requirement and since the question of whether the Licensing Agreement applied to TRQs had only been clear as from the date of the Appellate Body's decision in the *Banana III* case, the mere fact of non-notification of the licensing regime at issue in this case could not be considered to render this regime illegal in any way. All details relating to the licensing system had been published in the Official Journal of the European Communities in all official languages, including Portuguese, thus ensuring transparency and that both governments and traders were aware of the requirements of the regime.

78. **Brazil** submitted that the object of notification was that governments and traders should become familiar with the rules and procedures governing imports. Non-notification invalidated the underlying objective of transparency in the Licensing Agreement. Notification in the Official Journal or Gazette did not satisfy the transparency requirement. Governments and traders of a Member could not be expected to read, on a regular basis, the official publications of all Members just in case a new provision in relation to trade was published. Notification to the WTO removed this need and ensured that governments and their traders did become familiar with the import rules and procedures. Notification was a substantive obligation which the EC had failed to satisfy.

79. The **EC** replied that Brazil had fully utilized its allocation under the frozen poultry meat TRQ during its period of application. The licensing procedures at issue in this Panel related only to the management of the TRQ. There was no evidence whatsoever that a distortion or reduction of trade in the products at issue had been caused by operation of the import licensing system. The evidence was rather to the contrary: the licensing system had never prevented the Brazilian poultry products from fully exploiting the tariff reduction under the TRQ. Moreover, even if the market (in- and out -quota) was taken as a whole, volumes of Brazilian imports in frozen poultry meat had steadily increased during the period of application of the TRQ. Brazil's submissions appeared to be based on a misunderstanding of the transparency provision of the Licensing Agreement. What was important, EC said, and as was clear from the text of Article 1.4, was that licensing procedures were *published*. Moreover, the EC had notified to the WTO the administration of all its agricultural tariff quotas including the frozen poultry meat TRQ. [62]

(ii) Changes to the licensing rules

80. **Brazil** submitted that the EC had changed the licensing rules and procedures at least seven times, making it difficult for governments and traders to become familiar with the rules. The changes themselves were evidence of a lack of certainty and transparency in the EC's licensing procedures. In addition, the changing rules only acted to confuse traders. Brazil observed that not all the changes had been for the purpose of the elimination of speculation. Those changes that had addressed the

[61] Appellate Body Report on *Banana III*, *op. cit.*, paragraph 195.

[62] See documents G/AG/N/EEC/1, G/AG/N/EEC/3 and G/AG/N/EEC/3/Corr.1.

issue of speculation had not resulted in its elimination. The combination of these two considerations was that the changes in the licensing rules did not allow traders and their governments to become familiar with them as required by the Licensing Agreement.

81. The **EC** replied that if the EC were to have changed the system and *not* published the changes effected, this would have led to lack of transparency in the system. But that the changes, of themselves, created lack of transparency, the EC had difficulties in understanding. Moreover, there was nothing in the Licensing Agreement which said that import licensing procedures could not be changed. Brazil would have been the first to complain if the system had remained identical during the entire period of the TRQ and the Community could have been accused of not taking account of the realities of the commercial situation. The Community noted, furthermore, that the "100 tonnes rule" had in fact not been changed since 1 June 1996. The changes in market access conditions effected by the Commission were designed to ensure a reasonable distribution of licences amongst an ever increasing number of applicants. The changes made to these criteria were necessary to ensure the proper functioning of the licensing system and, as was clear from the motivation given in the various Regulations, were necessary to take account of experience gained in the operation of the regime.

(iii) Distortion of trade

82. **Brazil** asserted that its percentage share in the EC market had been falling since the introduction of the TRQ in 1994.[63] Prior to the opening of the TRQ, Brazil had a fairly constant market share of 45 per cent to 47 per cent. In 1993, Brazil's percentage market share was 45.6 per cent. After the opening of the TRQ, in 1994, Brazil's total market share (made up of both quota and non-quota trade) fell to 42.5 per cent; in 1995 it fell further to 36.2 per cent and in 1996 to 33.2 per cent. Brazil considered that the fall in overall market share, made up of both in-quota and out-quota product, was evidence of the distortion of trade resulting from the introduction of the TRQ contrary to the provision of Article 1.2 of the Licensing Agreement. In normal trading circumstances, Brazil would have been expected to increase market share as a result of the introduction of the TRQ. This did not occur. Brazil considered that the principal cause of the fall in market share was the disturbance in trading relations which had been built up over time. Brazil was not arguing that only traditional importers should be entitled to benefit, nor was Brazil suggesting what the appropriate number of importers should be. Brazil argued that the administration of the TRQ had resulted in speculation and in a sharp decline in its market share. The cause in the decline in market share was not competition from competing supplying countries. The statistics showed that, in 1993, despite the marked increase in exports from China, Brazil maintained its market share. The statistics also showed that there was no correlation between the fall in Brazil's market share and an increase in market share of any one other source.

83. The **EC** replied that Brazil had not contested the EC's evidence that there had been full utilization of the TRQ. Despite the decrease in market share of Brazil, the overall volumes of imports from Brazil had increased (from 21,493 to 28,701 tonnes). Brazil had not explained how it considered that the overall market share was relevant to trade within the TRQ. It appeared itself to concede that factors such as the competitivity of Brazilian exports vis -à-vis other exporters were relevant to overall market share. The EC had noted that another relevant factor was the harmonization of veterinary standards within the Community which had contributed to the opening up of the Community market to imported products (imports had almost doubled over the period 1992-1997). The EC submitted that Brazil had not demonstrated a *prima facie* case. Its allegations regarding distortions of trade were vague and unsubstantiated. There had been full use of the TRQ and volumes of trade had increased.

[63]Brazil confirms the Panel's understanding that the statistics provided refer both to TRQ and non -TRQ trade in the products under consideration.

84. **Brazil** submitted that Members were required, under Article 1.2 of the Licensing Agreement, to ensure that the administrative procedures were in conformity with the relevant provisions of GATT 1994 so that trade distortions, arising from the inappropriate operation of the import licensing procedures, did not occur. This appeared to be a mandatory requirement that distortions to trade be avoided. The requirement not to distort trade was not limited to trade within the TRQ. It applied to all trade, whether within the TRQ or outside it. Article 3.2 provided that non-automatic licensing "shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction". The word "shall" was not "should" or "might" or "best efforts". By means of the word "shall", the Agreement set out an obligation which had to be respected.

85. The **EC** submitted that during the period of application of the TRQ, Brazil's exports of poultry products into the EC had increased substantially. In the EC's view, Brazil had failed to discharge the burden of proof incumbent on it to show that the procedures used in the application of the TRQ had caused distortions of trade. The statistics which Brazil claimed constituted *prima facie* evidence appeared to relate to its overall market share rather than to imports within the TRQ. The EC considered that these statistics could not constitute probative evidence in demonstrating that the licensing procedures for the TRQ had been responsible for what Brazil alleged were distortions in trade. The TRQ had been fully utilized, hence the licensing procedures had not affected the possibility for Brazilian traders to benefit completely from the advantageous conditions provided under the TRQ. Trade outside the TRQ was not subject to any licensing procedures. During the period of application of the TRQ, the overall volume of imports from Brazil into the Community had increased. As Brazil itself appeared to concede, increases in market share could be due to other factors unrelated to the TRQ. Thus, decreases in market share could also be attributable to other factors including the overall competitivity of Brazilian imports and harmonization of veterinary standards within the EC which had contributed to the opening up of the Community market to imports from third countries.

(iv) Licence entitlement based on export performance

86. Article 1.3 of the Licensing Agreement provided that the procedures should be administered in a neutral, fair and equitable manner. It could not be said, **Brazil** argued, that the EC's allocation of import licences on the basis of export performance was neutral and fair. It automatically biased the licensing system in favour of Community traders and producers who were exporters. The terms of Article 3.5(j) and the underlying intent of the Licensing Agreement were that licence entitlement should be based on import performance and not on export performance. The very inclusion of exports as a criteria for licence entitlement was a *de facto* and *de jure* breach of the provisions of the Licensing Agreement.

87. The **EC** recalled that the Licensing Agreement applied only in respect of the procedures and not the *rules* applied to licensing systems. The EC argued that the question of whether a licensing system functioned through import or export licences constituted a rule relating to the operation of the system and not a procedure relating to its administration. Hence, this issue was not regulated by the Licensing Agreement, which contained no provisions detailing the criteria to be applied to the operation and functioning of licensing systems. The EC would note, in any event, that as a matter of fact, export performance was only taken into account for the period from 26 June 1994 to 1 June 1995.[64] In consequence, the EC argued, this claim should be dismissed as inadmissible, firstly because it fell outside the scope of application of the Licensing Agreement, and secondly because it related to a situation which as a matter of fact no longer existed and therefore there could be no nullification or impairment of any of Brazil's rights under the WTO. There were, according to the

[64]As from the adoption of Regulation No. 1244/95 on 1 June 1995, the criterion of export performance no longer applied.

EC, no continuing effects of the previous use of export performance. Eligibility was based only on import performance.

88. In the event that the Panel were to consider, contrary to the primary submission of the EC on this point, that Brazil's claim was admissible, in the view of the EC, Article 1.3 of the Licensing Agreement stated no more than that rules for import licensing should be neutral in application and administered in a fair and equitable manner. It was not possible, as Brazil asserted, to discern from the plain wording of Article 1.3, read in the light of the objective and purpose of the Licensing Agreement, that *any* inclusion of criteria relating to export automatically biased the system in favour of importers. The only relevant provision in the Licensing Agreement, in the view of the EC, was Article 3.5(j) which stipulated that Members should "consider the import performance of the applicant" and "in this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilized". Hence, the requirement to take account of import performance was linked to the need to ensure full utilization of licences issued. The EC had adapted its administration of the licensing system on a number of occasions in order to fulfil this requirement. Furthermore, Article 3.5(j) did not stipulate that licence entitlement should be based only on import performance and that any criterion relating to export was precluded. That provision simply required that Members should "*consider* the import performance of the applicant". Article 3 of Commission Regulation 1431/94 fulfilled this requirement in that it stipulated that import performance should be taken into account.

89. **Brazil** maintained that during the time that rules in relation to exports were in force there was distortion and because licences were allocated on the basis of past performance, those distortions carried forward into the present (see also paragraph 153).

90. The **EC** replied that there were no continuing effects of the previous use of export performance. Eligibility was based only on import performance and so the EC failed to see how the previous inclusion of export performance could have any continuing effects.

(v) Speculation in licences

91. **Brazil** noted that the third subparagraph of Article 5 of Commission Regulation 1431/94 provided that licences should not be transferable. This requirement was to ensure that licences were only used by those to whom licences were allocated and to avoid speculation. Article 3.5(j) of the Licensing Agreement required that licences issued be fully utilized. According to Brazil, speculation in licences discouraged their full utilization in contradiction of the requirement in Article 3.5(h) of the Licensing Agreement. When licences became the object of trade in themselves, it was not certain that they would be used to effect import. A speculative market gave rise to its own rules and logic and in these circumstances licences could be used to disrupt the behaviour of competitor importers or could be bought up by EC exporters who produced on the domestic market so as to protect the market. Most importantly, Brazil argued, the rapid movement of licences among importers and non-importers (i.e. EC exporters who had never imported from Brazil) made it impossible for Brazilian exporters to make contact with, and effect sales to, importers, so as to effect trade and ensure that there was full utilization of the licences. Finally, Article 3.5(j) provided that in allocating licences, Members should consider the import performance of the applicants. This obligation did not only refer to making licence entitlements dependant on past import performance but also to ensuring that licences issued in the past to applicants had been fully utilized. The EC had not shown that all licences had in fact been used.

92. The **EC** submitted that the above-mentioned provisions were exhortatory in nature and did *not* impose mandatory requirements: Article 3.5(h) said Members " *shall not discourage* full utilization of quotas" and Article 3.5(j) that Members should " *give consideration*" to whether licences issued in the past have been *fully utilized* during a representative period". As a matter of *commercial* reality, it

would be impossible for a Member to control the behaviour of economic operators so as to *ensure* full utilization of licences granted. Moreover, as mentioned above, the legal reality was, the EC asserted, that commitments exchanged under the WTO agreements related to conditions of competition for trade and to market access opportunities and *not* to volumes of trade. The EC stressed that Article 5 of Regulation 1431/94 stipulated that licences were not transferable with a view to avoiding speculation in licences. The EC had done nothing to discourage the full utilization of licences; indeed Brazil's claims as regards utilization of the quota appeared to be entirely unfounded since according to the statistics available to the Commission, the TRQ had in fact been fully utilized (see Annex II). Brazil had been informed of this during the consultations. Regulation 1431/94 had been modified on a number of occasions to take account of experience gained in the operation of the licensing system. This demonstrated that the system was subject to constant monitoring and adaptation, if necessary, to ensure that it operated in a fair and equitable manner and to fulfil the obligations imposed under Article 3.5(h) and (j) of the Licensing Agreement. Moreover, the EC submitted, no responsibility of the EC could be incurred as a result of the alleged action of private companies or bodies that had no direct or indirect relation or connection with the EC authorities. The EC confirmed, and this was not contested by the complainant, that there were no legal requirements imposing charges or duties additional to those which were bound in the EC Schedule of commitments.

93. **Brazil** submitted that the EC had not shown that the quota had been filled in all of 1994 and in the first quarter of 1996. The EC did not provide this information during consultations. Speculation in licences distorted patterns of trade. Established trading relationships could not be maintained. Furthermore, exporters would not know whether or not they had trading relations with serious or non-serious importers.

94. The **EC** replied that the Community's information gathering and processing of statistics had been improved during the operation of the TRQ. However, in 1994, Member States did not supply a breakdown of utilization of the quota by country of origin. For the first quarter of 1996, the data was lost because of internal data bank problems.

95. **Brazil** submitted that there was speculation in licences and that the value of a licence was between 2.30 and 3 DM per kilo. The speculation in licences had not stopped even with the changes to the rules. More and more operators were applying for licences. This both decreased the licence volume and increased the speculation. Brazil had set out the average number of importers in each quarter in 1997. Similar analysis revealed that the average number of importers in 1996 was 181, and for 1995 was 187. It was clear that the number of importers was increasing and thus the rate of speculation.

96. The **EC** replied that because there had been an increase in the number of importers this did not mean, *ipso facto*, that speculation had increased. There had been an across-the-board increase in the number of importers in the frozen poultry meat market. This was due to the Community's enlargement and the fact that importers had established legally separate subsidiary companies.

(vi) Economic quantities

97. Referring to Article 3.5(h) which provided that Members should not discourage the full utilization of quotas, and in particular to Article 3.5(i) which stated that Members had to take into account the desirability of issuing licences in economic quantities, **Brazil** considered that the allocation of licences such that each applicant received a licence allowing imports of about 5 tonnes could not be considered to be an economic quantity. Article 3.5(i) did not mandate that licences always had to be issued in economic quantities but it recognized the desirability that they should be so. Article 3.5(i) should be read within the context of the requirement that the licensing system should not distort trade. If a licence was for an uneconomic quantity it became difficult and

uneconomic for exporters to make sales especially from distant supplier countries. Moreover, the economic consequences for an importer not to utilize the licence were not severe. [65]

98. The **EC** replied, as mentioned above, that the licensing system had been constantly modified in order to ensure that licences were allocated on the basis of economic quantities amongst what had been an ever increasing number of importers. Amongst the 200 "serious" importers, the Commission had made efforts to ensure that there was a minimum distribution of 5 per cent of the quantity requested. The EC submitted that the reality that the quota had been fully utilized provided corroboration of the fact that the level of security required (ECU 500 per tonne, or 38 per cent of the duty payable) was sufficient to ensure full use of the licences granted. The quarterly average licence quantity for imports from Brazil under the TRQ in 1997 was 5.6 tonnes. This resulted from the fact that the maximum quantity an operator could apply for in accordance with Article 3 of Regulation 1431/94 was 10 per cent of the quarterly volume (1,775 tonnes) and the average attribution percentage as published every quarter was 3.17 per cent. On the basis of these figures 315 importers applied for licences in 1997. As could be seen from the table in ANNEX II the licence quantity for 1997 was not representative of the licence quantities for the period of application of the TRQ. Two hundred was the number of importers in the Community when the TRQ was established. The Community had already observed above that the number of importers over the period of the TRQ had increased.

99. **Brazil** replied that importers did not get a minimum of 5 per cent of the quantity requested. Commission Regulation EC No 2120/97 [66] of 28 October 1997, set the percentage figure for the acceptance of licence applications for the fourth quarter of 1997, the Annex of which provided that only 3.24 per cent of the licence applications for Brazil had been accepted, a figure which did not amount "a minimum distribution of 5 per cent of the quantity requested". (The figure for the third quarter 1997 was 3.13 per cent, 3.13 per cent for the second quarter and 3.19 per cent for the first quarter.) Brazil maintained that the licence volume of 5,751 tonnes was uneconomic. Trade in frozen chickens between Brazil and the EC was by container ship. Containers were either 20 or 40 foot which held 16-18 tonnes or 26-28 tonnes, respectively. The cost of shipping 5.5 tonnes per tonne alone in a container was US$320 while the cost per tonne of shipping a full container was US$115. It was therefore uneconomic to ship at US$320 a tonne. In addition, an importer had to show imports of 100 tonnes in a previous two year representative period for eligibility for licences. An importer who wished to import from Brazil only was not in a position to obtain entitlement on the basis of TRQ imports alone but had to import from other sources or over the quota. In each quarter there were, on average, 315 licences issued to, on average, 315 importers. Thus, if the EC considered that there were 200 "serious" importers, there were, on average, 115 non-"serious" importers. Brazil did not understand what the EC meant by the word "serious" in relation to the importers. Did this mean that the EC accepted that, on average, 115 importers were applying for licences for the purposes of trade in licences as opposed to imports from Brazil?

100. The **EC** submitted that the quarterly average licence quantity for imports from Brazil under the TRQ in 1997 was 5.6 tonnes. This resulted from the fact that the maximum quantity an operator could apply for in accordance with Article 3 of Regulation 1431/94 was 10 per cent of the quarterly volume (1,775 tonnes), and the average attribution percentage as published every quarter was 3.17 per cent. On the basis of these figures 315 importers applied for licences in 1997. Moreover, the Community considered that since the quota had been fully utilized there was no evidence to suggest that the licence quantities were uneconomic or that importers had, as a result of the licence quantity, been deterred from making use of the advantages in trading conditions offered under the TRQ.

[65] ECU 50 per 100 kg.

[66] L 295/21, published in the Official Journal of 29 October 1997.

Article 3.5 (i) of the Licensing Agreement stated that Members "should *take into account* the desirability of issuing licences for products in economic quantities" (emphasis added). This was, however, merely one factor to be taken into account in ensuring that the licensing procedure was administered, in accordance with Article 1.3, in a neutral, fair and equitable manner. Consideration should also be given to the factors enumerated in Article 3.5(j), in particular, the need to "give consideration" to ensuring a reasonable distribution of licences to new importers. The EC was, furthermore, of the view that the size of consignments of poultry was irrelevant. There was nothing in the Licensing Agreement which supported Brazil's suggestion that the volume of a licence should be determined by reference to the method of transportation of a product. Moreover, since a licence could be used for part of a consignment and needed not cover the consignment in its entirety, average consignment size was of no relevance when considering the use made of the TRQ. The EC understood that the companies of Brazilian origin which had, in Brazil's words, "a traditional presence on the EC market" were in fact the most important exporters of poultry meat products. As already explained elsewhere, the number of importers in the Community had increased mainly because of the enlargement of the Community and the establishment by traditional importers of legally separate subsidiary companies.

(vii) Newcomers

101. **Brazil** submitted that there were no provisions in the EC rules in relation to newcomers. Article 3.5(j) of the Licensing Agreement provided, however, that consideration should be given to ensuring that there was a reasonable distribution of licences to newcomers. The absence of the newcomer provision meant that Brazilian exporters could not begin importing by establishing themselves in the Community and qualifying as new importers.

102. The **EC** replied that the TRQ was not restricted only to traditional importers who had imported from Brazil. The requirements imposed relating to quantities imported over a two calendar year period were designed to ensure a balance between access to the TRQ for all importers and the need to issue licences in economic quantities. The EC argued that there was no incompatibility with the provisions of Article 3.5(j) of the Licensing Agreement. The number of importers had increased over the period of application of the TRQ. Furthermore, according to evidence available to the Commission, contrary to the assertion made by Brazil, most of the important Brazilian exporters had, in fact, established sales offices in the EC from which they too applied for import licences.

103. **Brazil** responded that not many Brazilian exporters had become EC importers, contrary to the EC assertions. Only two companies of Brazilian origin had, in association with EC companies, a traditional presence in the EC market. The allocation of import licences on the basis of past performance meant that it was not economic for Brazilian exporters to establish themselves in the EC for the purposes of importing and applying for licences.

104. The **EC** retorted that it was a matter of mathematical impossibility, to expect that the licence quantities could be increased without reducing the number of importers who had access to the TRQ. The requirements imposed in respect of access to the TRQ were designed to ensure a balance between access to the TRQ for all importers and the need to issue licences in economic quantities. If the rules were to be adjusted so that the licence quantity were to be the size of a container as Brazil asserted (16-18 tonnes or 26-28 tonnes) this would have the effect of rendering it impossi ble to ensure "a reasonable distribution of licences to new importers" as required by Article 3(5)(j) of the Licensing Agreement.

(viii) Transparency

105. **Brazil** argued that underlying the Licensing Agreement was the principle of transparency. The publication provisions in Articles 1.4 and 3.2 along with the consultation and information provisions in Articles 1.4 and 3.5 were specific instances of this right of transparency. Under the licensing and trade monitoring system in place for frozen chicken, it had not been possible for the EC, let alone Brazil, to determine definitively whether or not there were distortions of trade due to the operation of the licensing system. However, there was *prima facie* evidence of such distortion and the EC had done nothing to address the issues raised by Brazil in this regard. The inability to determine which consignments were being imported within or outside the TRQ and the failure of the EC to confirm to Brazil that that part of the TRQ which had been allocated to Brazil had in fact been fulfilled meant, in the opinion of Brazil, that the EC was not administering the licensing system in a transparent manner.

106. The **EC** replied that the claim that there was "*prima facie* evidence" of trade distortion was entirely unsubstantiated and failed to meet the standards of evidence determined by the Appellate Body as set out below. This claim should therefore be rejected as inadmissible by the Panel. With respect to Brazil's claims that the EC had not complied with the Licensing Agreement's provisions on transparency in respect of the changes made to the criteria relating to licence entitlement, the EC submitted that the changes in market access conditions effected by the Commission were designed to ensure a reasonable distribution of licences amongst a number of applicants who had serious intentions of importing poultry products into the EC. As Brazil itself noted, full details of the licensing procedures, including the criteria used in their application, had been published in the Official Journal of the European Communities. In consequence, transparency in the criteria applied for the allocation of licences had been assured. The changes made to these criteria were necessary to ensure the proper functioning of the system and as was clear from the motivation given in the various Regulations were necessary to take account of experience gained in the operation of the regime.

107. **Brazil** submitted that the EC was obliged under Article 3.5(a)(iii) and (iv) of the Licensing Agreement to provide complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. In the view of Brazil, the EC had failed to do so. In addition, the transparency provisions underlying the Licensing Agreement were not respected by the EC. Exporters did not know what trade measures were applicable in respect of any one consignment of frozen chicken sent to the EC. For exports within the TRQ, no duties or additional duties were payable. For exports outside the TRQ full bound duties were payable and in addition the imports were subject to price safeguards. Price safeguards could result in additional duties if the exporter did not maintain a c.i.f. price at the Community frontier. The licensing system was administered in such a way that the exporter did not know what trade rules applied in breach of the fundamental objective of the Licensing Agreement. [67] It was imperative that the licensing system be administered in a transparent manner such that exporters were not inhibited in achieving full market access and prices.

108. The **EC** replied that the requirement to supply statistics was subject to a request from a WTO Member. The EC had produced the relevant information when requested to do so. Moreover, the EC's system was by its very nature transparent. The figures relating both to the allocation of the quota

[67]The Licensing Agreement provided in its Preamble:

> "Convinced that import licensing, particularly non -automatic import licensing, should be implemented in a transparent and predictable manner;
>
> "Desiring to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices;"

and the percentage of the licence applications granted had been published. In consequence, as Brazil's submissions to the panel had amply demonstrated, it was very well able to determine the distribution of licences and their volumes.

(ix) Compensation

109. **Brazil** submitted that compensation should serve to re-establish the original overall balance of concessions. It did so by providing for an improvement in the conditions of competition under which the product in question could be sold on the importing market. This could be achieved either through improved price concession[68] or - in the case of a TRQ - through the concession of a financial benefit to the exporters. If there was no improvement in the conditions of competition and the financial benefits failed to materialize, then it could be considered that no compensation had in fact been provided. Moreover, Brazil considered that it was in the nature of a zero tariff compensatory-TRQ, that the Member entitled to benefit from the TRQ should be allowed to compete on an equal footing with local producers in the importing market. This meant that the exporters had to be able to benefit from the competitive conditions prevailing on the import market. The price obtainable on the import market was one such benefit. So the exporter had to be able to obtain that price. Lack of transparency of the TRQ had, however, the effect that the exporter could not obtain that price. If the cost of production on the exporting market was less than the average cost of production in the importing market, this was a benefit that should be available to the exporter. Any administration of the TRQ which attempted to prevent the exporter from benefiting from the cost advantages that he had was, in the opinion of Brazil, a denial of the compensation which the TRQ was designed to create.

110. The **EC** replied that without any clear reference to a relevant provision of the Licensing Agreement or indeed any other WTO provision, the EC found it difficult to reply to a vague assertion concerning "no compensation" and therefore simply recalled that the provisions of the General Agreement had been consistently interpreted as provisions establishing conditions of competition. Consequently, the commitments exchanged in such negotiations were "commitments on conditions of competition" for trade, not on volumes of trade.[69] Brazil's assertions were, in the opinion of the EC, contrary to this basic principle to the extent that they required that the exporter had to be able to obtain a particular price on the market of the importing country.

111. In conclusion, **Brazil** argued, the combination of all these elements had the effect of undermining the objectives of the Licensing Agreement, in particular the requirements as to transparency, non-distortion of trade and that the licensing system be the least burdensome possible. It was this combination of inconsistencies alongside the individual inconsistencies which had a negative effect on trade both within and outside the TRQ and which impeded the achievements of the principles underlying the Agreement on Agriculture.

(x) Burden of proof

112. The **EC** underlined the need for Brazil, in making its various allegations, to demonstrate at least a *prima facie* infringement of the cited provisions of the Licensing Agreement. As the Appellate Body stated in its report on *Shirts and Blouses*, "a party claiming a violation of a provision of the WTO Agreement must assert *and prove* its claim" (emphasis added).[70] It was thus for the party

[68]Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, adopted on 25 January 1990, BISD 37S/86, paragraph 148.

[69]See, for example, *Ibid*, paragraphs 150-151.

[70]See page 16, section IV of the Appellate Body Report on *Shirts and Blouses, op. cit.*

asserting a violation of a WTO obligation to put forward evidence and legal arguments sufficient to demonstrate its claim. In respect of a number of the claims made in relation to the operation of the licensing regime at issue in this case, the EC was of the view that Brazil had failed to adduce any, or at least any sufficient evidence, that there had been a violation of the obligations of the EC under the Licensing Agreement. Some of Brazil's claims amounted to little more than unsubstantiated assertions.

113. Recalling Article 3.8 of the DSU[71], **Brazil** replied that the Appellate Body report on the *Shirts and Blouses* had stated that "In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision and case to case." Brazil considered that it had met the standard of proof that was necessary to sustain its claims. The EC had not addressed the facts that had been put before this Panel and had not indicated how Brazil had failed to meet the burden of proof standard. Quoting the findings of the Appellate Body in *Shirts and Blouses*[72], Brazil was of the opinion that it had adduced evidence of fact and of law that the EC had not complied with its obligations under the WTO Agreement. Brazil considered that it had established a *prima facie* case. Brazil believed that the weight of the evidence adduced was such that it had passed the threshold at which the burden of proof shifted to the EC. It was now up to the EC to rebut this evidence. Brazil was not in a position to adduce all the factual evidence in this case and, in particular, in relation to licence usage, the methods used to determine the representative price or the representative price itself. These were facts which only the EC could provide and the EC had, in the opinion of Brazil, failed to provide them. Brazil considered that, by not addressing the issues of fact established by Brazil, and by not presenting, to Brazil or to the Panel, those issues of fact which only the EC could provide, the EC was not fulfilling its role in establishing the facts of this dispute.

114. In the **EC**'s view Brazil had failed to discharge the burden of proof incumbent on it to show that the procedures used in the application of the TRQ had caused distortions of trade. Brazil was not able to submit sufficient factual evidence because that evidence did not exist.

[71]"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

[72]"Also, it is a generally accepted canon of evidence in civil law, common law and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." The Appellate Body further stated that "We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim."

The Agreement on Agriculture

(i) Article 4

115. **Brazil** submitted that the Agreement on Agriculture constrained WTO Members to binding commitments in agricultural products for market access, domestic support and export competition, as well as to agreeing on sanitary and phytosanitary issues. Referring to the market access provisions contained in Article 4.2[73] and its footnote[74], Brazil argued that Article 4 was a comprehensive prohibition against the maintenance of any type of border protection measures other than tariffs. It was the embodiment of the principle of tariffication and was one of the pillars of the Agreement. However, the text of Article 4 provided for two exceptions to the general prohibition, i.e. the "special treatment clause" (Annex 5) and "the special safeguard clause" (Article 5). As exceptions to the general rule, Brazil pointed out, both "clauses" had to be interpreted strictly. Brazil made two distinct claims in relation to price safeguards. Firstly, that the terms of Article 5.1(b) of the Agreement on Agriculture required an examination of the price at which the product entered the EC's customs territory; and secondly, that the representative price was incompatible with Article 5.

(ii) Article 5: safeguards

116. **Brazil** was of the view that special safeguards could not be used in all cases. The EC had, however, retained the possibility of introducing special safeguards for poultry and in particular for the three specific frozen chicken products which were the subject of this complaint. Brazil noted that the EC had invoked the special price safeguards for frozen chickens as of the date of its implementation of the Uruguay Round agricultural provisions on 1 July 1995. In the opinion of Brazil, it had done so in breach of the strict provisions of Article 5 of the Agreement on Agriculture. The maintenance of this variable additional duty for frozen chicken by the Community was therefore a breach of the obligation to remove all variable levies in compliance with Article 4.

117. The **EC** replied that Article 5 was a *special safeguard provision* applying to agricultural products. Citing Article 21.1 of the Agreement of Agriculture [75], the EC recalled that the Appellate Body in applying that Article in the *Banana III* report stated that: "the provisions of GATT 1994 apply to market access commitments concerning agricultural products, except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same subject matter".[76] The EC was of the view that there could be no doubt that Article 5 could be considered to constitute a "specific provision" dealing specifically with safeguards in the agricultural sector. In consequence, it formed a complete, self-contained code for the rules to be followed for special agricultural safeguards which might be necessary as a result of tariffication. The EC was of the view that it had applied correctly the special safeguards provisions under Article 5. Brazil's claims in this respect, related, in particular, to the definition of the c.i.f. price and the alleged obligation of showing injury prior to the implementation of the SSG, amounted in substance to a re-writing of that Agreement which was clearly beyond the powers and the terms of reference of this Panel.

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[73]"Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5."

[74]"These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations form the provisions of GATT 1947 ..."

[75]"The provisions of GATT 1994 and of other Multilateral Trade Agreements ... shall apply subject to the provisions of this Agreement."

[76]Appellate Body Report on *Banana III, op. cit.*, paragraph 204.

118. **Brazil** submitted that Article 5 allowed for the imposition of an additional customs duty, over and above the bound customs duty (or tariffied duty), when a "trigger" price or a "trigger" volume was reached for the product in question.[77] The use of the special safeguards required two preconditions which were set out in the first part of subparagraph 1, i.e. "tariffication" (or the conversion into ordinary customs duties of non-tariff border measures) of the products to which the special safeguard was to apply; and the designation of the product in question with the symbol "SSG" in the Member's schedule.
If these two preconditions were met, Brazil said, a Member could invoke the special safeguard clause. Brazil noted that the EC had notified to the Committee on Agriculture that it maintained a price safeguard in respect of frozen chicken parts.

(a) The price safeguard

119. Referring to subparagraphs (a) and (b) of paragraph 5 of Article 5 [78] of the Agreement on Agriculture, **Brazil** argued that it was clear from the structure of Article 5(1) that the provisions of paragraph 5 could only be invoked if the conditions set out in paragraph 1 and, in addition, the conditions of subparagraph 1(b), were met. To satisfy the conditions for the application of subparagraph 1(b), it was necessary to determine the price at which the product entered the customs territory of the Member invoking the safeguard. However, Brazil claimed that the Community had not introduced a system for measuring the price at which the product entered the Community market. It merely measured the c.i.f. price and should that price fall below the trigger price it imposed an additional duty.

120. The **EC** replied that Brazil's assertion that Article 5 of the Agreement on Agriculture stipulated that the price of a product had to be measured "after" the product had entered the market was clearly contradicted by the text of Article 5.1(b) which referred to the price at which imports "*may* enter" the customs territory. The EC submitted that the figures presented by Brazil, and which were intended to show a decline in the volume of imports into the EC, were not representative of the entire period over which the special safeguard was applied. The special safeguard had been applied since 1 July 1995. In 1995 the total volume of imports was 53,067 tonnes and this figure increased t o 86,501 tonnes in 1996. These statistics showed that there had been an upward trend in imports.

(b) C.i.f. prices

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[77] (a) "the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in paragraph 4; or, but not concurrently:

(b) the price at which imports of that products may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 -1988 reference price for the product concerned."

[78] "The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

(a) if the difference between the c.i f. import price of the shipment in expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 per cent of the trigger price, no additional duty shall be imposed;

(b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 per cent but less than or equal to 40 per cent of the trigger price, the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent;"

121. **Brazil** submitted that the whole phrase "determined on the basis of the c.i.f. import price" in Article 5 needed to be examined by the Panel, not only the letters c.i.f. This price was not the c.i.f. price itself; it was something more than the c.i.f. price, it was "the price at which imports of that product may enter the customs territory of the Member granting the concession". The c.i.f. price was the price at the frontier prior to entry or otherwise the free at frontier price which the EC referred to in Article 2 of Regulation 1484/95.[79] The price (as determined on the basis of the c.i.f. price but not the c.i.f. price itself) at which the product could enter the customs territory was the c.i.f. price plus the bound duty. This was, according to Brazil, the clear meaning of the text. Brazil did not share the view that as the trigger price was based on the c.i.f. unit value of the product concerned the comparative price for the purposes of Article 5(1)(b) had to be the c.i.f. price. A market entry price determined on the basis of the c.i.f. price allowed for fair comparison if the non-c.i.f. element was the fixed and bound tariff in the Schedule.

122. The **EC** replied that Brazil's claim as regards the interpretation to be given to "on the basis of the c.i.f. price" was not supported by the text which in the Community's view clearly and unambiguously stated precisely the opposite of what Brazil asserted. The EC considered that Brazil's assertion undermined entirely the plain meaning of the words used by the authors of the Agreement. There was nothing in the Agreement on Agriculture to suggest that the parties intended that the "c.i.f. import price" should have any special meaning in this context. Therefore, the EC submitted, the Panel should give the phrase "on the basis of the c.i.f. import price" its normal meaning, i.e. cost of the product plus insurance and freight charges. Further support could be drawn from the manner in which Article 5(1)(b) was structured and the fact that it envisaged that the calculation would take place prior to the entry of the product onto the Community market. The EC argued that "on the basis of" meant "founded on"[80] and in consequence the purpose of the authors of the Agreement in using this terminology was that the c.i.f. price should be the principal reference point. The EC had not deviated from this standard. Brazil's suggestion of the market entry price on the contrary bore no relation to, and indeed constituted a substantial deviation from, the standard set in Article 5. Brazil appeared to be advocating a re-writing by the Panel of the Agreement on Agriculture.

123. Moreover, the EC indicated that Article 5.1(b) of the Agreement on Agriculture referred to the price at which imports "may enter" the customs territory. This wording confirmed that the price at issue was that which was calculated at the moment a shipment arrived prior to its entry on to the Community market, at which point taxes and duties become payable. Moreover, footnote 2 to Article 5.1(b) stated that the reference price to be used to invoke the provision of that subparagraph "shall, in general be the average c.i.f. unit value of the product concerned". This confirmed the Community's interpretation of the wording of Article 5.1(b). Any other interpretation rendered nonsensical the comparison between the import price and the trigger price since the comparison would not be one of like with like.

124. **Brazil** submitted that the negotiating history of the special safeguard mechanism in Article 5 showed that it was to be used when the tariffied duty under the tariffication principles was insufficient to protect the domestic market. If, in exceptional circumstances, this new tariff was insufficient to protect markets that were once protected by variable levies, then price safeguards were applicable. The protection of the market was not an abstract concept.

125. The **EC** replied that Brazil had put before the Panel extracts from the negotiating history of the Agriculture Agreement. Since, however, the plain wording of the Agreement was clear, the

[79]Official Journal L 145/47 of 29 June 1995.

[80]The Oxford English Dictionary entry for "basis" reads: "foundation, main or determining principle or ingredient; starting-point for discussion".

negotiating history was, in the opinion of the EC, of little relevance to the Panel's deliberations on this issue.[81]

(c) Injury requirement

126. **Brazil** submitted that the text of Article 5(1)(b) gave no exact measure of what the market entry price was. It provided that it was to be determined "on the basis of the c.i.f. import price". In the opinion of Brazil, it was clearly not the c.i.f. price itself. Nor was it the customs value of the product in question. It was something more. The whole purpose of the special safeguard provisions was to protect Members' markets. However, there had to be a measure of injury before any safeguard measure could be taken. The Community not only did not measure a market entry price but also it had no mechanisms for examining the effects on the Community market. The Community had thus failed to show one of the essential preconditions for the application of the special safeguard measure. It applied, in the view of Brazil, the additional duty in the absence of an examination of possible harm to the Community market.

127. The **EC** replied that a safeguard element was already encompassed in the trigger price mechanism under Article 5 of the Agreement on Agriculture and that there was therefore no need for a separate demonstration of injury. In other words, once the c.i.f. price fell below the trigger price there was *ipso facto* a disruptive effect on domestic production. In the opinion of the EC, this was clear from Article 5.1 which provided that the designation "SSG" could be used *either* where "the volume of products ... exceeds a trigger level" *or* where "the price at which imports of that product may enter the customs territory of the member granting the concession ... falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned". There was no provision in Article 5 which introduced a *further* requirement that the country imposing the SSG demonstrate the nature and extent of the disruptive effect on its domestic market.[82] The EC recalled that, as mentioned above, the "*special* safeguard provision" dealt specifically with agricultural products. If the authors of the agreement had intended that the additional hurdle of a demonstration of further injury should be included, they would surely have inserted this in the text of the Agreement. The EC underlined that under Article 3.2 of the DSU, the objective of a dispute settlement proc edure was to clarify the existing provisions of the covered agreements and not to add to existing obligations provided for in those agreements. Brazil's claim infringed this basic principle.

128. **Brazil** did not agree with the EC's view that there was no need to demonstrate injury to trigger the price safeguard mechanism. Nor that, if the c.i.f. price fell below the trigger price, there was "*ipso facto*" a disruptive effect on domestic production. In the opinion of Brazil, injury or damage to the market had to be shown. The EC had not done so. The drafters of the text of Article 5.1(b), Brazil submitted, did not consider it necessary to define the price at which the product entered the customs territory other than to state that it should be "determined on the basis of the c.i.f. price". Entry to the customs territory of a Member required the payment of all taxes and the completion of all administrative requirements. The market entry price was therefore the c.i.f. price plus the bound tariff provided for in the Member's schedule. The failure to measure this market entry price or to make this price the determinant for triggering the application of an additional duty was, in the opinion of Brazil, a fundamental breach of Article 5. It meant that the additional duty was not a "safeguard" in the

[81]Article 31 of the Vienna Convention which set out fundamental canons of treaty interpretation and which had now been referred to in several Appellate Body reports above, provided that the words of the treaty form the foundation of the interpretative process.

[82]It could be said that an "additional" requirement flowed from Article 5(7) which stated that Members undertook not to invoke Article 5(1)(b) when imports were declining but the EC noted that Members only undertook to do this "as far as practicable" and that in any event no evidence had been put forward to suggest that imports were doing anything else than increasing or remaining constant.

ordinary meaning of that word. It was a c.i.f. price maintenance system and was independent of any safeguard element. The additional duties which the EC applied to frozen chicken products were therefore outside the scope of the exception to the basic prohibition on variable levies. There was no other exception to the prohibition on variable levies to which the EC could have recourse. Thus, the additional levies were, in the opinion of Brazil, a clear breach of Article 4.

129. Brazil submitted that there was nothing in the negotiating history of the special safeguard provisions to justify the imposition of additional duties based on the need to maintain a c.i.f. entry price. The special safeguard provisions were designed to protect markets against possible disturbances as a result of tariffication. The volume safeguards were not designed to protect the Community market from volume surges in deliveries to the Community frontier but only from volume surges of imports onto the market. In the same way, the price safeguards were not designed to maintain the world market price or even the c.i.f. price but to keep the price on the Community market from falling below a certain level. Brazil believed that this understanding of the terms of Article 5 was in line with the overall scope of the Agreement on Agriculture and the history of the negotiation of the Agreement. Brazil submitted that the concern of the negotiators of the Agreement on Agriculture had been to find a mechanism that would deal with the problem of possible import surges or excessive world price movements once tariffication had been completed and gradual tariff reductions had commenced. It was considered that tariff increases might be allowable in these special circumstances (thus the term special safeguard clause) and "would remain in force only as long as the conditions which led to their implementation remained in place". [83]

130. The intent of the negotiators, according to Brazil, was to "sweeten the pill" of tariffication. Should the price safeguard be triggered, the additional duty would be based on differences between the c.i.f. import price and the trigger price. However, Brazil believed that this additional duty was only to be triggered if there was a danger to domestic production or the domestic market. The negotiators agreed that the price at which the whole mechanism would be triggered was the price at which the product "entered the customs territory" (and not "arrived at the port of entry"). In the opinion of Brazil the negotiators of the special safeguard clauses were concerned with safeguarding markets, not merely maintaining c.i.f. prices. The EC appeared to have misunderstood this fundamental objective of the clause which should only come into play when the tariffs resulting from tariffication proved insufficient to safeguard a market in the case of exchange rate or world market price fluctuations.

131. The **EC** replied that it was not necessary for the Panel to consider the negotiating history of Article 5. Even if this were to be taken into account, it provided no support for Brazil's arguments since it confirmed that the text of Article 5 reflected fully the intentions of the authors of the treaty.

(d) The representative price

132. **Brazil** submitted that the Community had not complied with its own interpretation of the price safeguard mechanism. The Community had introduced a mechanism for measuring the c.i.f. price so as to verify whether an additional duty was payable. This mechanism, known as the representative price, was set out in Article 2(1) of Commission Regulation 1484/95. For the purposes of the application or not of an additional levy, an importer could choose to establish the actual c.i.f. price of the consignment in question or, in the alternative, could pay an additional duty based on the representative price. If the importer had chosen to establish the actual c.i.f. price, then a bond equal to the additional duty was payable just as if the consignment price was the representative price. In practice, Brazil understood that all traders had chosen not to establish the actual consignment c.i.f. price as the requirements and timing made it practically impossible to establish.

[83] MTN/GNG/NG5/W/194.

133. The **EC** stressed that the representative price was an average price which provided a facility to operators, should they decide to avail themselves of it. The figures which were taken into account in determining the representative price were average c.i.f. prices. There was no requirement, either in law or in fact, that the representative price mechanism had to be used and operators were free to opt for the actual c.i.f.import price. The documents which had to be supplied by importers as evidence of the actual c.i.f. price were documents which were normally available. The importer had a period of one month from the date of sale of the products in question, subject to a limit of four months from the date of acceptance of the declaration of release for free circulation, to supply the relevant documentation. This time limit could be extended on the basis of a duly substantiated request of the importer (Article 3 of Regulation 1484/95).

134. **Brazil** submitted that the representative price was calculated on the basis of three elements set out in Article 2(1) of Commission Regulation 1484/95, namely external market prices, internal market prices and prices adjusted for quality. Brazil was, however, of the opinion that the method of calculation of the additional duty was not transparent. This, in itself, was a breach of the underlying GATT/WTO principle of transparency. In addition, the Community could not take an internal market price as the determinant for the external c.i.f. price. There was nothing in Article 5 or elsewhere in the Agreement on Agriculture which justified the use of internal market prices to determine external c.i.f. prices. Finally, the Community had failed to indicate how the quality element provided for in its examination of the internal market price was to be factored. Brazil concluded therefore that the EC had implemented the special price safeguard in a manner such that it functioned as a variable levy in breach of Article 4 and in a way that did not bring it within the exception to Article 4 of the Agreement on Agriculture provided for in Article 5.1(b). There was nothing in the text of Article 5, or in the object or purpose of the special safeguard provisions, or in the negotiating history of the provision, that could justify the measures that the EC had introduced on the basis of Article 5.

135. The **EC** replied that the representative price was based on prices on the world market and on the Community market, i.e. both were taken into account in the calculation according to Article 2 of Regulation 1484/95. The representative price was published in the Official Journal and was therefore known to traders. Article 2 of Regulation 1484/95 required Member States to supply regularly statistics relating to Article 5 of Regulation 1484/95 so that the representative price could be adjusted, if necessary. This representative price was an average c.i.f. price which excluded taxes and duties and was therefore a valid comparative price. This mechanism constituted an opportunity afforded to importers, should they choose to avail themselves of it, to reduce the formalities to be completed by them by avoiding a shipment by shipment approach which was more burdensome and was thus more favourable than the shipment by shipment approach advocated by Article 5 of the Agreement on Agriculture.

136. **Brazil** submitted that if no importer could comply with the procedures necessary to prove the shipment by shipment c.i.f. price, then it was clear that the EC had not met its obligations under Article 5 to measure c.i.f. prices on a shipment by shipment basis. One of the reasons why importers did not use the shipment by shipment approach was that if they failed to satisfy the Community as to the actual c.i.f. price, the bond payable on import was forfeited. In addition to the bond, the importer had to pay interest. The importer was, therefore, penalized for trying to establish the shipment by shipment c.i.f. price. Article 5 of the Agreement on Agriculture did not provide for a c.i.f. price "policing" mechanism. Therefore, this mechanism of itself was not compatible with the provisions of Article 5. This was particularly the case as a duty was payable on the basis of the representative price either in the form of a bond or in the form of the duty itself. Moreover, the representative price was not the c.i.f. price. Article 2 of Regulation 1484/95 provided that the representative price be based on three elements, one of which was the domestic price. This was not the c.i.f. price and no provision was made in the regulations for extrapolating the c.i.f. price from the domestic price. The result of these inconsistencies, Brazil said, was that the additional duty was always, as a matter of fact and

practice, payable and that traders were not given a reasonable opportunity to maintain their prices and thus avoid the imposition of the penalty duty. This was, in the opinion of Brazil, a clear breach both of the terms of Article 5 of the Agreement on Agriculture itself and Article X:3(a) of the GATT. Finally, Brazil observed, at the time the price safeguard was introduced by the EC, in July 1995, the volume of imports was declining. Article 5.7 of the Agreement on Agriculture provided that Members undertook, as far as practicable, not to take recourse to price safeguards when the volume of imports was declining.

137. As Brazil noted in its submission, the **EC** submitted, importers were not prevented from adopting a shipment by shipment approach. Under Article 3 of Regulation 1484/95 they could request that the additional duty be established on the basis of the c.i.f. import price if this price was higher than the applicable representative price. Hence, if importers so desired they were free to establish the individual c.i.f. price of their consignment and to request that the additional duty be determined on that basis. In either case, all the elements to be taken into account were specified and the calculation was clear and fully transparent. The EC also observed that Brazil advanced no evidence of any reduction in the competitive opportunities open to Brazilian products as a consequence of the administration of the additional duties pursuant to the SSG.

138. **Brazil** submitted that if an importer chose to use the shipment by shipment approach under Community law, that importer was required to pay a bond equal to the amount of the additional duty. This bond was redeemable if certain conditions were met. Article 3 of Regulation 1484/95 set out what those conditions were. It was Brazil's understanding that no importers made use of this facility as the procedure was too burdensome. Brazil was not in a position to prove this assertion as the information was not available to Brazil. However, the EC had recognized, according to Brazil, that the procedure could be burdensome and therefore it had provided importers with the opportunity of using the representative price.

139. The **EC** replied that in accordance with the provisions of Article 2 of Regulation 1484/95, representative prices were determined at regular intervals taking account of c.i.f prices on third country markets, c.i.f. prices within the Community and prices at the various stages of marketing in the Community for imported products. Member States were requested to supply information on a monthly basis. Prices recorded referred to average quality. The Commission also made use of special price recordings from the processing industry which provided rapid access to up -to-date prices. Such price recordings were carried out in those Member States which imported significant quantities of boneless chicken meat (Germany, Netherlands, Austria and Belgium). There was no predetermined formula to determine the relative weight to be afforded to the factors to be taken into account in accordance with Article 2 of Regulation 1484/95. As mentioned above, representative prices were calculated on the basis of an average of c.i.f. prices communicated by the Member States which included imports under the TRQ which tended to result in a higher representative price than that which would arise if only imports outside the TRQ were taken into account. The EC noted that importers had a free choice between the shipment by shipment approach and the representative price. The latter was a simplified version of the former and by using it, importers could avoid the need to show every time, by appropriate documentation, the exact value of the imports concerned when that value equalled or was lower than the representative price. However, the shipment by shipment approach was always available and according to the statistics available to the Community, approximately five per cent of traders used this approach. The Community did not see how importers found it impossible to supply purchasing, transport and insurance contracts, the relevant invoice, origin certificates and, where appropriate, the bill of lading especially when they had a period of up to four months to do so. These were normally available documents which were required for the shipment of the products. There was nothing "uncertain" about the nature of the proof required.

Article X

140. **Brazil** submitted that to be able to benefit from the requirements, or constraints, of exporting either within or outside the TRQ, the traders needed to know which trade regime was applicable to any one consignment. This was a right which the traders enjoyed under the WTO transparency provisions and which was not, in Brazil's view, respected by the Community regime. Brazil claimed that Community traders used the lack of transparency in the licensing system to drive down prices for all consignments, whether within or outside the TRQ, to the disadvantage of Brazilian traders. Because of speculation in licences and the sale of those licences to traders other than those first entitled to them, all traders claimed that they were not importing under licence and within the TRQ and the Brazilian exporter had then to quote prices for over-quota trade, i.e. as if all sales were subject to duties. In practice, individual consignments were customs cleared partly within the TRQ and partly outside. This common in-TRQ and out-TRQ price was then used to determine the representative price driving this artificial price down even further. The lack of transparency in the EC trade regime for the importation of frozen chicken parts was not consistent with the underlying object and purpose of Article X of GATT. Article X addressed the publication and notification of measures affecting trade. The purpose of such publication and notification was to enable "governments and traders" to become acquainted with them. Traders, in particular, needed to become acquainted with the rules governing trade so that they could comply with, and benefit from, those measures. Brazil considered, however, that the mere publication of measures, or their notification to the WTO, was not sufficient to satisfy the requirement of ensuring that traders become familiar with them. Article X implied, and had to be interpreted so as to mean, that traders had to know, not only the rules themselves, but to which products or consignments these rules applied. If this were not so then the object of publication and notification would not be served.

141. Referring to Brazil's claims that trade in frozen poultry meat products subject to the TRQ was not transparent, the **EC** replied that the exact nature of Brazil's claim in this respect was unclear since it did not state specifically which aspects of either the administration of the TRQ or of the special safeguard provision it considered were contrary to Article X. Brazil referred to the fact that Article X of GATT "addresses the publication and notification of measures affecting trade" of which the purpose was "to enable governments and traders to become acquainted with them". However, Brazil did not indicate clearly which provision of Article X it intended to invoke. Moreover, the EC argued, the question of publication and transparency of licensing procedures was dealt with specifically in the Licensing Agreement, in particular in respect of non-automatic licensing procedures in Article 3 of that Agreement. The inter-relationship between the general transparency provisions of Article X and the specific provisions of the Licensing Agreement was recently considered by the Appellate Body in the *Banana III* report. In that report, the Appellate Body confirmed that the Licensing Agreement took precedence over Article X of the General Agreement since it dealt "specifically, and in detail, with the administration of licensing procedures". [84] In consequence, the Community considered that the Panel should dismiss Brazil's claim as inadmissible. Should the Panel consider it necessary to address the issues raised by Brazil in respect of Article X in the light of the provisions of the Licensing Agreement, there had been no breach of the obligations under that Agreement. In summary, the administration of the poultry meat TRQ did not, in the opinion of the EC, create a discrimination, either *de jure* or *de facto*, between imported products and domestic products. The allegations by Brazil should therefore be dismissed.

142. **Brazil** submitted that the EC had misunderstood the nature of the claim under Article X. Brazil's claim under Article X was related to the administration of all the trade in frozen chickens, both within and outside the TRQ. Referring to the Appellate Body's finding concerning the Licensing Agreement in *Banana III*[85], Brazil claimed that the Appellate Body did not state that Article X was

[84] Appellate Body Report on *Banana III, op. cit.*, paragraph 204.

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

redundant when examining a Member's obligations. It stated that if a licensing system was found to be inconsistent with the Licensing Agreement there was no need to compare these practices with the terms of Article X. The finding of the Appellate Body in *Banana III* was in relation to an EC regime for the importation of bananas where there was no over quota trade. The main concern of the Appellate Body was, therefore, the examination of the TRQ licensing regime. This was, however, not the situation with respect to frozen chickens. There was over quota trade. There were, therefore, two distinct sets of rules applicable on the importation of frozen chickens from Brazil and both sets of measures were within the terms of reference of this Panel. Citing parts of Article X[86], Brazil submitted that the objective of Article X was clear: trade regulations had to be published so that traders (as well as governments) could become acquainted with them and rely on them. Once they were published, they should be administered in a reasonable manner so that traders were not subject to arbitrary behaviour. Mere publication was not, therefore, the only requirement. The underlying requirement was that publication had to be done in such a way that traders could know and be certain which trade rules applied. The applicable trade rules should not be applied in an arbitrary manner. In the opinion of Brazil, the EC regime for the importation of frozen chicken did not meet the requirements of reasonableness and certainty for traders set out in some detail in Articles X:1 and X:3(a) of GATT. An exporter of frozen chickens to the EC did not know what trade rules applied to any one particular consignment of product exported. There was no certainty.

143. Brazil further argued that the obligation of uniformity, impartiality and reasonableness was not confined to ensuring, when more than one set of rules was applicable to imports of the same product, that each different set of rules was administered reasonably. There was nothing in the text of Article X to justify such a restrictive interpretation. The requirement of reasonableness applied as between the sets of applicable rules. The arbitrary nature of the administration of the frozen chicken trade rules and the lack of knowledge on the part of the trader as to which rules applied was particularly acute when price safeguards were applied. Under the of set rules applicable to imports within the TRQ, the trader did not have to be concerned with the price at which the product was exported or sold on the EC market, whereas under those applicable to the non-quota trade, the trader was obliged to ensure that a particular price was maintained both at the border and on the EC market. If the exporter did not maintain that price under one set of rules, the exporter was penalized by an additional duty while under the other set of rules the exporter was not. Brazil concluded, therefore, that the inability of the exporter to know which trade rules applied to a particular consignment of the same goods imported into the EC was a breach of the terms of Article X. A finding that the TRQ licensing rules were inconsistent with the terms of the Licensing Agreement would not address this inconsistency. Brazil's claim under Article X was separate from, and in addition to, its claims under the Licensing Agreement. There was nothing in the finding of the Appellate Body in *Banana III* which precluded the examination of the EC's frozen chicken import rules under this Article.

144. **EC** replied that imports outside the TRQ were not subject to any licensing procedure, although certain of them were subject to the special safeguard provisions. Brazil made claims for a provision which was concerned principally with transparency. The EC submitted that it had complied fully with the requirements of Article X as far as the special safeguard regime was concerned and underlined that Brazil did not allege that any specific aspects of this regime, the entirety of which had been published in the Official Journal, was contrary to the transparency requirements of Article X.

Article II of GATT

[86]Article X:1 provided in part that "Laws, regulations (etc.) ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them."

Article X:3(a) provided that: "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

145. **Brazil** noted that schedules were provided for in Article II of GATT and were designed to reflect the commitments that Members made in respect of each other. If a schedule did not reflect the commitments made under a covered agreement (in Brazil's case Article XXVIII of GATT), the question to be addressed by this Panel was the extent to which a Member could be required to honour its commitments. The Appellate Body in *Banana III*[87] examined the extent to which the EC's Schedule in respect of bananas was consistent with Article XIII of GATT. The Appellate Body recalled the *Sugar Headnote* case[88] and quoted that panel as saying "... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement". The Appellate Body then quoted paragraph 3 of the Marrakesh Protocol[89] and found that Members could not diminish rights in their schedules. Schedules had to reflect the commitments made by Members and, to the extent that they did not, the schedules were subject to multilateral review by the Members. Brazil claimed that the EC had not reflected in its Schedule the commitments made with Brazil within the terms of Article XXVIII of GATT.

146. The **EC** replied that except for preferential treatment justified under Article XXIV of GATT or Article IX of the WTO Agreement[90], the concessions that were contained in each Member's schedule, established pursuant to Article II of GATT, were the only commitments with respect to the level of duties and other charges imposed on or in connection with importation by which that Member was bound under the WTO. The text of Article II of GATT, and in particular its paragraph 1, was the expression of this basic principle which had far -reaching implications for the entire WTO system of agreements. The mere idea, suggested by Brazil's complaint, of the existence of additional obligations in relation to the duties and other charges imposed on or in connection with importation of a specific set of products, which did not flow from any preferential agreement justified under Article XXIV of GATT or Article IX of the WTO Agreement and not inserted in the schedules, ran counter to the clear provisions of Article II of GATT. More importantly, such a suggestion would introduce in the WTO system the unpredictability and instability which that provision was designed to prevent.

147. **Brazil** argued that the issuance of licences in uneconomic quantities, and the trade in these licences for value, meant that a payment had to be made to obtain licences in economic quantities prior to import. This payment or charge was in addition to that provided for in the EC's Schedule which set out that within the poultry TRQ no duty should be payable. According to Brazil, in practice, a duty of between two and three German Marks per kilo was payable prior to imports being effected. It was, therefore, in all respects, a charge payable in association with import and was a clear breach of the requirement in Article II that no charges in addition to those provided for in the schedule be payable.

148. The **EC** submitted that the GATT (and other WTO agreements) were international agreements concluded between sovereign states and organizations which were binding between those parties. International responsibility for the violation of these agreements could only be engaged, except where otherwise explicitly provided, when the violation could be attributed directly to a Member as a result of a governmental measure. This was clearly the case for Article II:1(b) of GATT where a reference was made to other duties and charges " *imposed* at the date of this Agreement or

[87]Appellate Body Report on *Banana III, op. cit.*

[88]Panel Report on *Sugar, op. cit.*

[89]"The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement."

[90]See the Panel Report on *Newsprint*.

those *directly and mandatorily required* to be imposed thereafter by *legislation* in force in the importing territory on that date." (emphasis added) This was confirmed by Article 19 of the DSU which indicated that "where a panel or the Appellate Body concludes that a *measure* is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the *measure* into conformity with that agreement." (emphasis added) The EC stressed that there was no legislation or any legislative requirement whatsoever within the EC legal system which imposed extra charges on top of the ordinary duties and other duties and charges which were bound in its Schedule. Any payment or charge in relation to economic transactions concerning those import licences were strictly private and responsibility for such charges could not be attributed to the EC. Moreover, Article 5, paragraph 3 of Regulation 1431/94, stated expressly that import licences to be used for the Community poultry meat TRQ were not transferable. The EC urged the Panel, therefore, to reject the claims from Brazil in this respect as totally unfounded and unjustified (see also paragraphs 146 and 150).

149. **Brazil** agreed that GATT (and other WTO agreements) were international agreements as between sovereign States. They gave rise to international obligations as between States. Brazil did not agree, however, that because the GATT was an international agreement and as the speculative charges for licences were not imposed by law, that the EC had no responsibility or obligations in respect of the extra charges that were in fact payable. Brazil was of the view that the EC's obligations in relation to Article II were not only in connection to mandatory legislation but also to "all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of the Agreement". The scope and object of the Article was not, in the view of Brazil, therefore restricted to mandatory legislation. Brazil noted that the number of licence holders was increasing as well as the incidence of speculation. The EC had accepted the need to prevent speculation. However, in Brazil's opinion, the legislative attempts to prevent speculation had not been successful.

150. Citing Article II:1(a) and (b)[91] of GATT, the **EC** submitted, Article I:1 of GATT applied equally to bound and unbound rates.[92] This wording matched the explicit reference in Article I:1 of GATT.[93] It flowed from this, the EC argued, that the *current* bound rates in the EC Schedule, including in-quota tariff rates, were the only obligations of the Community with respect to the level of duties to be applied to imported products, with the exceptions already mentioned above. The EC was obliged to apply to the results of an Article XXVIII negotiation the MFN principle which benefited *all* the other Members.

Article III

151. **Brazil** submitted that the EC regime for the administration of the TRQ had the effect of imported products being treated in a manner that was less favourable than that accorded to like domestic products. Domestic products did not require a licence for the sale on the domestic market whereas products imported within the TRQ did so require. On the assumption that licences were a valid mechanism for the administration of TRQs, Members were still obliged to ensure that the

[91]Article II:1(a): "Each contracting party shall accord to the commerce of *the other contracting parties* treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." Article II:1(b): "the products described in Part I of the Schedule relating to *any* contracting party, ... , shall, ... , be exempt from ordinary custom duties in excess of those set forth and provided therein".

[92]Panel Report on *Spain - Tariff Treatment of Unroasted Coffee*, adopted 11 June 1982, BISD 28S/102, paragraph 4.3.

[93]"*With respect to custom duties and charges* of any kind imposed on or in connection with importation or exportation ... *any* advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for *any other country* shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of *all other contracting parties*". (emphasis added).

administration of licensing systems were such that they did not act as *de facto* measures giving rise to less favourable treatment. In the opinion of Brazil, the EC had failed to ensure that this obligation was respected. The issuing of licences in uneconomic amounts, the tolerance of illegal speculation in licences, the failure to ensure that exporters knew which importers were in possession of licences, and lack of knowledge of which trade regime was applicable to any one import consignment had, in combination, the effect that the imported products were competing on less favourable terms with domestic products. In addition, Brazil said, the granting of import licences to exporters which were domestic producers accorded a benefit to domestic production which imported products did not enjoy. Each of these elements by themselves, and in combination, had the effect, in the view of Brazil, of placing the imported product in a less favourable position than the domestic product in clear breach of the terms of Article III of GATT.

152. The **EC** replied that the administration of a TRQ was effected through border measures, to which some provisions of the GATT were applicable [94], and not by internal measures to which *other* provisions applied, in particular Article III. This clear distinction corresponded, according to a long tradition in the interpretation of the General Agreement, to the acknowledged common will and understanding of the CONTRACTING PARTIES to the GATT and, by virtue of the Marrakesh protocol to the WTO Agreement, of all Members of the WTO, as confirmed in the panel report on *Italian Discrimination against Imported Agricultural Machinery*.[95] A similar approach had already been suggested by the panel report on *Belgian Family Allowances (Allocations familiales)*. The import licensing rules managing the frozen poultry meat TRQ, the EC stressed, were border measures "par excellence" and could not violate Article III of GATT, concerned only with internal measures, i.e. measures applicable after the products concerned had cleared through customs. The EC denied that any link whatsoever could be made, in substance or in the formalities, between this case and the so-called *Banana III* case in regard to Article III. The EC recalled that that panel and the Appellate Body had confirmed the value of the long-standing interpretation of the GATT which distinguished border measures and internal measures.

153. **Brazil** submitted that the payments charged by importers on the speculative sale of import licences was similar in nature to a special fee payable on imports only. Moreover, to the extent that EC legislation did provide that EC traders who exported domestic product were entitled to import licences, there was a breach of the terms of Article III. In the opinion of Brazil, it was no defence for the EC to claim that the export qualification for licence entitlement had been removed. Licence entitlement was based on past imports. Illegality in the past allocation of import rights carried forward into the present. 1997 licences were allocated on the basis of past performance in the two previous years for which statistics were available, namely 1995 and 1996. The export criteria for the allocation of import licences resulted in a current inconsistency with Article III.

154. The **EC** replied that apart from some unsubstantiated allegations concerning practices relating to the administration of the poultry meat TRQ, Brazil did not indicate any reason that could justify the claim that EC legislation applicable to the poultry products subject to this dispute *after* those products had cleared customs, treated imported poultry products in a less favourable way than domestic products. Moreover, the claim that granting import licences for the poultry meat TRQ to exporters was in breach of Article III was not only totally unsupported by motivation but showed a poor reading of the EC legislation. Whilst Article 3(a) of Regulation 1431/94 indicated that "Applicants for import licences must be natural or legal persons who, ... can prove ... that they have imported or exported not less than ... of products within the scope of Regulation (EEC) No. 2775/75 ...", Commission

[94]Like Article I:1, Article II, XIII and the Licensing Agreement.

[95]"It was considered, moreover, that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they have cleared through customs. Otherwise, indirect protection could be given". BISD 7/S 60, adopted on 23 October 1958.

Regulation 1244/95 amended that provision, eliminating any reference to exporters who were no longer entitled to apply for import licences. Thus, EC said, Brazil's claim related to a situation which as a matter of fact no longer existed and which in consequence could not entail any nullification and/or impairment of Brazil's rights under the WTO. In summary, Article III of GATT was, in the opinion of the EC, not applicable to the issue raised by Brazil. The allegations by Brazil should therefore be dismissed.

IV. ARGUMENTS PRESENTED BY THIRD PARTIES

Terms of Reference

155. Referring to the Panel's terms of reference (see paragraph 4 above), the **United States** submitted that the "covered agreements" were defined in Article 1.1 of the DSU as "the agreements listed in Appendix 1 to this Understanding". The list of such agreements in Appendix 1 was a closed list, which did not include the Brazil-EC bilateral agreement. The Brazil-EC bilateral agreement was also not one of the instruments included within GATT 1994, according to the GATT 1994 incorporation clause. The terms of that agreement, and the issue of whether EC actions had violated those terms, were therefore, in the opinion of the United States, not within the terms of reference of this Panel. The United States submitted that under Article 31(3)(c) of the Vienna Convention, the Panel should take into account "any relevant rules of international law applicable in the relations between the parties"; those "rules of international law" may include the bilateral agreement that was reached under Article XXVIII:4. The bilateral agreement could thus serve as a means of clarifying the concessions if the concessions were ambiguous.

156. **Brazil** contested the view expressed by the United States, concerning the terms of reference. This Panel had standard terms of reference under Article 7 of the DSU which made specific mention of Articles XXVIII, X, III and II of GATT, the Agreement on Agriculture and the Licensing Agreement. It was clear to both parties that this Panel had to consider the nature of the EC's commitment under Article XXVIII, as reflected in the Oilseeds Agreement. Referring to the section related to Terms of Reference in the Handbook of GATT [96], Brazil submitted that the terms of reference were defined by the complaining party which unilaterally defined the subject matter of the dispute. It was not a bilateral system. Brazil had clearly stated that it wished this Panel to consider the EC's commitments under the Article XXVIII Oilseeds Agreement and the extent to which they were not reflected in the EC's Schedule under Article II. Brazil had not only cited Articles XXVIII and II in its complaint but had also made reference to the issues which this Panel should consider so as to be able to determine the EC's obligations and Brazil's rights. Panels should examine the complaint in the light of the relevant GATT provisions. This forestalled objections as to *ultra vires* in a case where a panel chose to base its findings on provisions not specifically relied on by the parties. Thus, the Panel had discretion as to what to take into consideration when examining a complaint.

157. The reference to provisions of the GATT had always, according to the author of the Handbook, been interpreted to mean not only the covered agreements but also the whole WTO legal system including secondary and supplementary GATT law. [97] Brazil maintained that the agreement agreed within the framework of Article XXVIII and submitted by the EC to the CONTRACTING PARTIES was supplementary GATT law within the terms of the standard terms of reference. In the view of Brazil, Article 7.2 of the DSU confirmed the broad scope of the standard terms of reference by providing that "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". Thus, panels had to look to covered agreements and "agreements cited by the parties". Brazil had cited Article XXVIII of GATT and the Oilseeds Agreement adopted within the framework of that Article. Article 3.2 of the DSU provided that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements". Brazil's claim was that the EC had not complied with its obligations under Article XXVIII of a covered agreement. Those obligations were set out in the Oilseeds agreements. To know what those obligations were, the Panel had to consider the Oilseeds Agreement.

[96] Handbook of WTO/GATT Dispute Settlement, *op.cit.*, p. 12.

[97] *Ibid*, p.13.

158. Brazil submitted further that there was nothing in the terms of Articles 7 and 10 of the DSU, in the Working Procedures contained in Annex 3 to the DSU, or in the standard terms of reference themselves, which gave interested third parties the right to question the terms of reference of a panel. Interested third parties may be heard by Panels within the terms of Article 10 of the DSU and Article 6 of the Working Procedures. Article 10 did not limit the issues which could be raised by interested third parties. However, more importantly, it did not give third parties the right to override the terms of reference of the Panel or to determine the proper interpretation of those terms when they had been accepted by the parties. The object of the WTO dispute settlement procedures as set out in Article 3 of the DSU, was to secure a positive solution to a dispute.

159. The **EC** submitted that the Panel was certainly entitled, in accordance with Article 10.2 of the DSU to take into consideration any relevant element that a third party submitted to its appreciation as long as this element was within the terms of reference of the Panel as adopted by the DSB. The EC considered that it was within the terms of reference of the Panel to take account of the arguments advanced in the US statement; however, the EC was not convinced that the Panel needed to address this issue prior to dealing with the questions raised by the EC concerning the application of Article 59(1) or, in the alternative, of Article 30(3) and 31 of the Vienna Convention. The EC considered that both these lines of argument would lead the Panel to the inevitable conclusion that what was applicable and applied was the current Uruguay Round EC Schedule of commitments which provided for a MFN frozen poultry meat TRQ. Consequently, the Article XXVIII Oilseeds Agreement as such was simply not relevant.

Article XXVIII of GATT

160. The **United States** submitted that Article XXVIII was a conditional provision which permitted a Member to legally renegotiate (modify or withdraw) its concessions at certain times on the condition that certain procedures were complied with in which case it was released from its obligations under Article II with respect to that concession. However, if there was no agreemen t, the modifying Member could go ahead and change its applied tariff, and the initial negotiating right holders, principal suppliers and substantial suppliers then were free to make counter-withdrawals on a timely basis. The only provision in Article XXVIII that spoke to the *level* of compensation was Article XXVIII:2, which was merely precatory in nature. Consequently, the United States did not see the possibility that a Member could be found to have "violated" Article XXVIII except if it had refused to negotiate with a party having rights, such as an initial negotiating right holder. The United States further submitted that nothing in the text of Article XXVIII provided any exception to Articles I or XIII. The negotiating history also confirmed that Article XXVIII concerned the unwinding or substitution on an MFN basis of concessions that were negotiated on an MFN basis. [98] Tariff compensation provided under Article XXVIII had consistently been provided on an MFN basis, as it was required to by Article I:1. Parallel conclusions had to be drawn for tariff rate quotas and the requirements of Article XIII.

161. Brazil had not even shown, the United States argued, that it had a reasonable expectation that the entire TRQ for frozen poultry was assigned exclusively to Brazil. The bilateral agreement between Brazil and the EC referred to a "global quota" for poultry meat equal to 15,500 tonnes. Nothing in the language of the bilateral agreement committed the EC to a specific quota of 15,500

[98] "It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed "Modification of Schedules". It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference in the Article to Article I, which is the Most-Favoured-Nation clause. ... the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation clause." (Chairman's summing up in the Tariff Agreement Committee, 1948, EPCT/TAC/PV/18, p. 46, cited at p. 947, *Analytical Index/Guide to GATT Law and Practice* (1995 ed.))

tonnes exclusively to Brazil. Indeed, the contemporaneous excerpts from various EC publications that Brazil had appended to its initial Panel submission supported the view that the tariff quota was intended to be available on a non-discriminatory basis. In addition, the General Agreement and the WTO provided no legal support for any expectation that concessions pursuant to Article XXVIII proceedings could be provided other than on a non-discriminatory basis. In the appellate proceedings in *Banana III*, the United States continued, the Community had argued that its market access concessions made pursuant to the Agreement on Agriculture permitted it to act inconsistently with Article XIII of the GATT 1994. The Appellate Body observed that with respect to concessions, a Member could yield rights and grant benefits, but could not diminish its obligations. The Appellate Body explained that this interpretation was confirmed by paragraph 3 of the Marrakesh Protocol. [99]

Article XIII of GATT

162. **Thailand** was of the view that any Member's agricultural tariff schedule under the Uruguay Round negotiations was part and parcel of that Member's schedule in accordance with paragraph 1 of the Marrakesh Protocol. [100] In this respect, the allocation of tariff quotas was governed by, and had to be consistent with, the provisions of Article XIII of the GATT 1994, especially Article XIII:2. Nothing in the GATT, or any other WTO Agreement, provided any special treatment to the tariff quotas derived from a negotiation under Article XXVIII of GATT. Referring to Article XIII:2(d), Thailand submitted that the interest of Thailand as a Member with a substantial interest in supplying poultry to the EC market had to be taken into account, and the allocation of the annual tariff quota of 5,100 tonnes to Thailand by the EC, if done in accordance with the provisions of Article XIII:2(d) would be consistent with the GATT. Once a quota had been established, Thailand said, the manner in which the applying country administered the quota was also very important and subject to the provision of Article XIII:2(d). The Member applying the restriction, in this case the EC, was obligated to administer those quotas in such a way that they were fully utilized. Thailand submitted that it had experienced difficulties in utilizing fully its quota due to, in Thailand's view, the excessive formalities and measures imposed by the EC, such as the fragmentation of the import quantity allotted to importers and the imposition of safeguard measures based upon its own representative price. Thailand believed that these formalities and measures were not consistent with the EC's obligations under the last sentence of Article XIII:2(d), and should be so held by this Panel. Thailand submitted further that the Agreement on Agriculture did not change the rules regarding the allocation of tariff quotas as contained in Article XIII, especially Article XIII:2(d) of GATT as set out in the *Banana III* panel report. [101] The Appellate Body's decision in the same *Banana III* case confirmed that Article XIII, in particular Article XIII:2(d), governed the allocation of tariff quotas.

163. The **United States** submitted that no evidence had been presented to suggest that the non-discrimination provision in Article XIII was superseded by concessions negotiated pursuant to Article XXVIII. The report of the Appellate Body in *Banana III* provided, in the view of the United States, useful guidance on the nature of the non-discrimination obligation under Article XIII. There, the Appellate Body found that Article XIII required the non-discriminatory administration of quantitative restrictions and that paragraph 5 of Article XIII also applied to tariff quotas (paragraph 160). As most, if not virtually all, tariff quotas were the result of negotiated concessions,

[99]"The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under the Agreements in Annex 1A of the WTO Agreement"*. (emphasis added)

[100]Paragraph 1 of the Marrakesh Protocol to the GATT 1994 stated that "... (t)he schedule annexed to this Protocol relating to a Member shall become a Schedule to GATT 1994 relating to that Member on the day on which the WTO Agreement enters into force for that Member ...".

[101]The Panel Report on *Banana III, op. cit.*, paragraphs 7.124, 7.125, and 7.126.

it was implicit in the legal conclusion of the Appellate Body that the origin of a particular tariff quota had no effect on the applicability of the non-discrimination obligation. A review of the bilateral agreement between the EC and Brazil incorporating their resolution of the Oilseeds dispute reflected that the parties did not agree to a method of allocating the tariff rate quota. The text of Article XIII:2(d) was clear - there was an obligation to allocate a share to Members having a substantial interest. Brazil had not identified any provision of the WTO Agreements that would permit the entire TRQ to be assigned to Brazil. In fact, the Appellate Body in *Banana III* found that Article XIII could not be construed to permit such a result.

The Licensing Agreement

164. **Thailand** submitted that a tariff quota of 5,100 tonnes of poultry meat was allocated to Thailand by the EC in 1994. This amount was also confirmed during the Uruguay Round negotiations. Therefore, Thailand's production and export plan for frozen poultry meat had been adjusted accordingly. Thailand was, however, of the view that there were uncertainty in utilizing the tariff quota and no flexibility in the quota arrangement due to (i) the lack of information concerning which importers were granted a quota and the amount of quota granted to each importer; and (ii) the allocation of import licence to each applicant in each quarter was fragmented. According to Regulations 774/94, 1431/94, 641/95 and 997/97, as last amended by Regulation 1514/97, import licences of no more than 10 per cent of the quarterly quota would be allocated to each applicant. If the quantities for which licences had been applied exceeded the quarterly quota, a reduction coefficient was applied to the quantities requested. For example, in the second quarter of 1997, the tariff quota allocated to Thailand was 1,275 tonnes. The amount of import licences was 127.5 tonnes per applicant. In the case where import applications exceeded the quarterly quota, a reduction coefficient was applied, at 4.9 per cent, and each importer would be granted import licences for 6.25 tonnes. This amount was, in the opinion of Thailand, not commercially meaningful. Referring to the administration of import licences, Thailand was of the view that the provisions of the Licensing Agreement should apply. Those provisions included, *inter alia*, Article 3.2, 3.3 and 3.5(h). In view of these provisions, Thailand considered that the EC import licensing procedures concerning the frozen poultry meat quota administration were inconsistent.

165. The **United States** submitted that the Appellate Body found in *Banana III*[102] that import licensing procedures for the administration of tariff quotas were subject to the Licensing Agreement. The EC did not dispute these conclusions. The EC licensing system for frozen poultry meat was thus subject to the requirement of Article 1.3 of the Licensing Agreement, which provided that Members had to ensure that the administrative procedures used to implement licensing regimes were not operated inappropriately so as to give rise to trade distortions. This general prohibition was repeated in Article 3.2 which provided that non-automatic licensing should not have trade restrictive or distortive effects on imports additional to those caused by the imposition of the restriction. If the EC's administration of the licensing regime for frozen poultry discouraged imports of poultry meat from Brazil by virtue of the alleged eligibility restrictions on licence applicants, the volume limitations imposed in individual licences, and a general lack of procedural transparency, it would seem that the Community's licensing regime then was in contravention of Articles 1.3 and 3.2 of the Licensing Agreement. If indeed the Community had conditioned access to its *import* TRQ on performance as an *exporter*, as asserted by Brazil, in the view of the United States, the Community's administration of the TRQ did introduce trade distortions which would contravene Articles 1.3 and 3.2 of the Licensing Agreement. Similarly, if licences were granted only for small, "uneconomic quantities", the licensing system was likely to have restricted trade inappropriately in contravention of paragraphs 3.2, 3.5(i) and 3.5(j) of Article 3 of the Licensing Agreement.

[102]Paragraphs 193-194.

The Agreement on Agriculture

166. **Thailand** submitted that the Appellate Body had confirmed the decision and reasoning of the panel in *Banana III* that the Agreement on Agriculture did not change the rules regarding the allocation of tariff quotas as contained in Article XIII of the GATT[103], concluding that "For these reasons, we agree with the Panel's conclusion that the Agreement on Agriculture does not permit the European Communities to act inconsistently with the requirements of Article XIII of the GATT 1994". In light of the above, Thailand requested the Panel to find that all of the tariff quota allocations was governed by and had to be consistent with Article XIII of GATT and that the EC's administration system of the tariff quota was not consistent with the provisions of Article XIII:2(d) last sentences, and the Licensing Agreement, especially its Article 3.

167. In the view of the **United States**, the language of the Agreement on Agriculture did not provide support for either of the conditions claimed by Brazil to be prerequisites to the exercise of the safeguard provisions pursuant to Article 5 of the Agreement. First, Article 5, which incorporated all of the pertinent language with respect to the safeguard measures applicable under that Agreement, contained no reference to any injury criteria. Clearly, if the negotiators had intended for such a precondition to apply, it would have been expressly specified in the Agreement. Second, Article 5.1(b) stated that the relevant import price for purposes of activation of the special safeguard should be determined on the basis of the c.i.f. import price of the imports in question. There was no suggestion in the language of Article 5 that any price other than the c.i.f. price was to be used f or comparison with the applicable "trigger" or reference price. The more troublesome question posed by the EC's implementation of special safeguard provisions, in the view of the United States, was the possibility that the Community was using some amalgam of internal prices and external prices in establishing the "entry price" that was subject to comparison with the so-called "trigger" or reference price. If this was the prevailing situation, then the EC could be imposing special safeguard duties based on a methodology that was inconsistent with that expressly prescribed in Article 5 of the Agreement on Agriculture.

168. In conclusion, the United States submitted, this Panel should find that Brazil had failed to provide evidence that the bilateral agreement between Brazil and the EC justified any expectation that the EC would issue a tariff rate quota relating to frozen poultry meat that would be for the exclusive benefit of Brazil. In addition, it was clear that the EC could not have granted a tariff rate quota exclusively to Brazil with respect to frozen poultry meat without violating the obligations of Articles I, II, and XIII of GATT. The Panel should also give serious consideration to whether the licensing regime established by the EC to administer the pertinent tariff rate quota had served inappropriately to distort or restrict trade, thereby violating the Licensing Agreement. Finally, in the view of the United States, the EC might have violated the special safeguard provision of Article 5 of the Agreement on Agriculture by adopting a mechanism for establishing the applicable "c.i.f. entry" price that was inconsistent with the express language of Article 5.1(b).

Article II

169. In answer to a question by Brazil, the **United States** submitted that the protection of legitimate expectations in respect of tariff treatment of a bound item was one of the most important functions of Article II. Indeed, the importance of legitimate expectations in interpretation of tariff commitments could be confirmed by the text of Article II itself, specifically the references to "treatment contemplated" in Article II:5. This conclusion was also supported by the object and purpose of the WTO Agreement and those of GATT 1994. The security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and

[103]The Appellate Body's reasons with respect to this matter appear in paragraphs 157 and 158 of its report.

other barriers to trade" (an expression common to the preambles of the two agreements) cannot be maintained without protection of such legitimate expectations. This was consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention. It might be the case that in nearly all instances, the ordinary meaning of the terms of the actual description in a tariff schedule accurately reflected and exhausted the content of the legitimate expectations. But it should remain possible, at least in principle, that parties had legitimately formed expectations based on other particular supplementary factors. However, in this case, the concession on frozen poultry in Schedule LXXX clearly did not assign the entire TRQ exclusively to Brazil. Indeed, the contemporaneous excerpts from various EC publications that Brazil had appended to its initial Panel submission supported the view that the tariff quota was intended to be available on a non-discriminatory basis. The GATT Agreement and the WTO Agreement provided no legal support for any expectation that concessions pursuant to Article XXVIII proceedings could be provided other than on a non-discriminatory basis. Indeed, a reading of those provisions would dispel any unfounded illusions that concessions could be implemented to the exclusive benefit of a single Member.

170. The **EC** did not agree with the United States' views concerning the interpretation of Article II of GATT and the alleged existence of so-called "legitimate expectations" under that provision. This Panel was not concerned with a non-violation case under Article XXIII:1(b) of GATT. The notion of "legitimate expectations" was developed only in the framework of such cases and, therefore, it was not relevant here. The EC considered also that Article II:5 was irrelevant in the present context: that provision was, like Article XXVIII, a procedural one since it provided for the possibility to enter negotiations. It was evident, the EC believed, that none of the conditions set out in that provision were fulfilled here and Article II:5 should not be considered relevant for the resolution of the issues raised in this case.

Nullification or Impairment

171. Thailand submitted that since the EC's import licensing regime violated the provisions of the GATT and the Licensing Agreement, it constituted a *prima facie* case of nullification and impairment to the benefits of Thailand. Thailand noted that Article 3.8 of the DSU, as its predecessor the 1979 Understanding, did not refer to the adverse impact of the measures concerned. Consequently, when the *prima facie* case had been established, the actual volume of trade in the product concerned was immaterial. The past GATT/WTO jurisprudence testified to this.

V. INTERIM REVIEW

172. On 30 January 1998, Brazil requested the Panel to review, in accordance with Article 15.2 of the DSU, the interim report that had been issued to the parties on 23 January 1998. Brazil also requested the Panel to hold a further meeting with the parties to discuss the points raised in its written comments. The EC did not request a review, but indicated that it would address an issue of confidentiality in the context of the interim review. The Panel met with the parties on 3 February 1998, reviewed the entire range of arguments presented by Brazil and the EC, and finalized its report, taking into account the specific aspects of these arguments it considered to be relevant.

173. Regarding what are now paragraphs 210 and 211 of the final report, Brazil commented that the Panel had not considered the full ordinary meaning of the terms of the Oilseeds Agreement and appeared to have restricted its analysis to the meaning of the words "global tariff quota". According to Brazil, the ordinary meaning of the agreement was clear: it was an agreement which allowed the EC to withdraw concessions under certain conditions. Brazil's arguments as to the meaning of the word "global" had been only to show that this word did not alter the ordinary meaning of the terms of the agreement.

174. The Panel reviewed the relevant parts of the interim report in light of the comments by Brazil, but found no reason to change its original language. Accordingly, the Panel maintained paragraphs 210 and 211.

175. Regarding what are now paragraphs 212 to 218 of the final report, Brazil made the following comments. First, in paragraph 212, the Panel appeared to misinterpret Brazil's arguments. Brazil did not argue that Articles I and XIII of GATT never applied to compensation TRQs agreed within the terms of Article XXVIII negotiations. Brazil had argued that they did not automatically apply if the parties to the negotiations agreed that the TRQ was country-specific and the other Members did not object. Second, regarding paragraph 214, Brazil considered that it had been GATT - and was WTO - practice to create country-specific TRQs on the basis of Article XXVIII negotiations and that the Panel did not examine this practice. Third, regarding paragraph 216, Brazil recalled its argument to the effect that the oilseeds compensation package was made up of a series of elements some of which were clearly intended to be MFN and some not. Brazil claimed that this point was not addressed by the Panel. Nor did the Panel, according to Brazil, address the fact that the EC negotiated separately with the different Members having a substantial interest and that the compensatory elements of these agreements was different in each agreement. This was in Brazil's view clearly an issue which must be considered under the Vienna Convention in the interpretation of the Oilseeds Agreement. Brazil questioned why the contents of the compensation package should be different in each bilateral agreement if they had been intended to be MFN. Fourth and finally, regarding paragraph 215, Brazil recalled that it was the right and obligation of the Members themselves to monitor the results of bilateral agreements made under Article XXVIII. That was why, according to Brazil, Members which were not parties to the negotiations were given the right to object to any agreement reached within six months. Brazil noted that no Members objected to the compensation package contained in the Oilseeds Agreement.

176. With respect to the first point raised by Brazil, the Panel considered that it had fully understood Brazil's argument. In order to avoid any impression of misinterpretation by the Panel, however, the Panel decided to insert the word "necessarily" in paragraph 212 as well as in paragraph 218, as requested by Brazil. Regarding the second point on paragraph 214, the Panel acknowledged that it was Brazil's position that such a practice existed. However, the Panel considered that its view on this point was clearly expressed in paragraph 213. Regarding the third point on paragraph 216, the Panel was of the view that Brazil was confusing the overall oilseeds package with the Oilseeds Agreement. As referred to in Chapter VI (findings) of this report, the Oilseeds Agreement is the bilateral agreement between Brazil and the EC. To clarify this point, the Panel modified paragraph

194 slightly. In the Panel's view, what had been agreed between the EC and its trading partners other than Brazil was not relevant to the present dispute. Under the Vienna Convention, such agreements could be regarded as a supplementary means of interpretation under Article 32 because they might indicate the circumstances of the conclusion of the Oilseeds Agreement between Brazil and the EC. However, in view of the conclusion reached in paragraph 216, the Panel considered that it was unnecessary to have recourse to such a supplementary source. Regarding the fourth and final point presented by Brazil, the Panel noted that in paragraph 215 it was not addressing the issue of whether the procedure for safeguarding the rights of third parties was correctly followed. Rather, it was addressing a more fundamental, systemic issue that would negatively affect all Members of the WTO, including Brazil in this case. For these reasons, the Panel did not alter its findings, except the modifications in paragraphs 194, 212 and 218 mentioned above.

177. Regarding what is now paragraph 227 of the final report, Brazil noted that on the basis of an interpretation of the text of diplomatic letters sent by the Brazilian Ambassador in Brussels to various officials in the EC Commission, the Panel found that there was no evidence of agreement between the parties on the allocation of the TRQ. Brazil commented that the Panel could not substitute interpretation of the ordinary meaning of the terms of the Oilseeds Agreement with the interpretation of diplomatic correspondence which had been cited by Brazil as evidence of the breach of the agreement.

178. The Panel noted that in the relevant section of the interim report the Panel was not interpreting the terms of the Oilseeds Agreement between Brazil and the EC. In the Panel's view, this diplomatic correspondence, contrary to Brazil's assertion, did not demonstrate the existence of an explicit agreement regarding the allocation of the TRQs. Accordingly, the Panel maintained its conclusion reached in paragraph 227.

179. Regarding what is now paragraph 239 of the final report, Brazil pointed out that it had argued in its submission that "the past performance requirement method requires that the TRQ is allocated among supplying countries based on their past supply performance during a specific reference period due account being taken of special trade factors".

180. The Panel was aware of Brazil's reference to special factors in its submission. However, what was lacking, in the Panel's view, was identification and elaboration of those special factors which might have existed in relation to the beneficiaries of the Interim Agreements. The Panel therefore did not change its conclusion in paragraph 249.

181. Regarding what is now paragraph 249 of the final report, Brazil contested the Panel's reading of Articles 1.2 and 3.2 of the Licensing Agreement, which in Brazil's view obligated Members to ensure that the licensing arrangements did not distort trade additional to the restriction, without making distinction between trade within or outside the TRQ. Brazil recalled that it had argued that a falling market share in a growing market was in fact evidence of distortion of trade outside the TRQ since the fall in the market share began after the introduction of the TRQ licensing system. According to Brazil, it had a constant market share of around 46 per cent until 1994. It then fell off radically from 1994 onwards to reach 33 per cent in 1996.

182. The Panel noted these comments, but was not convinced that these were sufficient grounds to change the Panel's conclusion in paragraph 249 because, in the Panel's view, Brazil failed to establish the existence of trade distortion in any measurable way. As stated in paragraph 249, decline in the percentage share alone, in the Panel's view, did not constitute adequate evidence of trade distortion. Accordingly, the Panel did not alter its findings in paragraph 249.

183. Regarding what is now paragraph 257 of the final report, Brazil requested that reference be made to the fact that Brazil provided proof of speculation, which was not contested by the EC. The

Panel noted that Brazil had submitted two letters (in German) in this regard. However, in the Panel's view, they did not add more information than what was already contained in paragraph 95 above.

184. Paragraph 107 of the interim report, as well as what are now parag raphs 264 and 265 of the final report, had referred to Article 3.4 of the Licensing Agreement. However, Brazil stated that its reference to Article 3.4 was due to a typographical error and requested that any reference to Article 3.4 be deleted from the final report, which the Panel accepted.

185. Regarding what are now paragraphs 267 to 270 of the final report, Brazil commented that the Panel made a restrictive reading of Brazil's arguments concerning the breach of Article X. Brazil essentially claimed that the alleged violations of the Licensing Agreement and the Agreement on Agriculture *ipso facto* constituted a violation of Article X of GATT because they were "unreasonable". The Panel considered that this was a new argument that went beyond the review of "precise aspects of the interim report" as called for in Article 15.2 of the DSU.

186. Brazil further reiterated that the very inability of traders to be able to distinguish between the two sets of measures (i.e., those relating to in-quota trade and over-quota trade) was an unreasonable administration of all measures applicable to the import of frozen poultry to the EC under Article X:3(a) of GATT and a breach of Article X:1. However, as stated in paragraph 269 of the final report, in the Panel's view, Brazil's claim pertained to specific measures outside the scope of Article X. Consequently, the Panel maintained the original language in paragraphs 267 to 270.

187. In the interim report, what are now paragraphs 285 and 286 had a subheading entitle d "reference price" and one sentence in what is now paragraph 285 referred to "reference price (trigger price)". Brazil pointed out that it did not raise any claims in relation to the reference or trigger prices regarding the specific issue of "representative price". Rather, Brazil had argued that the "representative price", which was an internal EC mechanism for the verifying or "policing" the c.i.f. price of imports of frozen poultry, was not consistent with Article 5 of the Agreement on Agriculture.

188. The Panel accordingly corrected the relevant parts of the interim report. These changes, however, did not alter the Panel's conclusions.

189. Brazil also made other drafting suggestions concerning the descriptive part of the interim report, some of which the Panel accepted and introduced in its final report. These changes are reflected in paragraphs 79 and 99 of the final report.

190. At the interim review meeting, the EC commented that it did not agree with the amendments or corrections suggested by Brazil, except those regarding paragraphs 79 and 285.

191. The interim report contained Annex III, entitled "Comparison of Additional Duties for Boneless Broilermeat (0207 14 10) Imported from Brazil in November 1997", based on information submitted by the EC. In several communications addressed to the Panel, the EC had maintained that the data included in Annex III should not be made public. At the interim review meeting, the EC stated as follows. The unfortunate breach of confidentiality which had occurred during this Panel procedure as well as other past experiences convinced the EC that there was no other way to secure an appropriate level of confidentiality after the issuance of the report than by eliminating the confidential data from the text. They should therefore be replaced by a blank page with the indication of the existence of a restricted document. In the event that a Member requested a non-confidential summary of the restricted information, the EC would provide such information in compliance with the last sentence of Article 18.2 of the DSU.

192. In light of the foregoing, the Panel deleted Annex III and references thereto in the final report.

VI. FINDINGS

A. CLAIMS OF THE PARTIES

193. This dispute concerns a tariff rate quota (TRQ) for frozen poultry meat under CN headings 0207 41 10, 0207 41 41 and 0207 41 71 maintained by the European Communities (EC). Under the EC's Uruguay Round Schedule (Schedule LXXX) [104], the quantity of the TRQ is set at 15,500 tonnes with an in-quota duty rate bound at zero per cent. Out of this total quantity, the EC has, through a regulation[105], allocated 7,100 tonnes annually to products originating in Brazil.

194. Brazil claims that the EC has failed to implement and administer the TRQ in line with a bilateral agreement between Brazil and the EC ("the Oilseeds Agreement") reached within the context of negotiations under Article XXVIII of the General Agreement on Tariffs and Trade (GATT) resulting from the EC's modification of concessions on oilseeds products because, in Brazil's view, under the bilateral agreement the tariff quota was intended to be country-specific, with Brazil being the sole beneficiary. In support of this claim, Brazil argues that Articles I and XIII of GATT do not necessarily apply to TRQs given as compensation under Article XXVIII. Brazil claims in the alternative that the EC has failed to implement the TRQ in accordance with Article XIII of GATT. Brazil further claims that in the administration of import licences, the EC has failed to comply with the provisions of Articles 1 and 3 of the Agreement on Import Licensing Procedures (Licensing Agreement), and Articles X, II and III of GATT. Moreover, according to Brazil, the EC has failed to comply with the provisions of Articles 4 and 5 of the Agreement on Agriculture in the implementation of the special safeguards that apply to imports of poultry products outside the TRQ. Finally, Brazil claims that these measures nullify or impair the benefits accruing to Brazil under the cited agreements.

195. The EC rejects these claims.

B. THE OILSEEDS AGREEMENT

(i) Relevance of the Oilseeds Agreement to this dispute

196. Brazil refers in its panel request to the Oilseeds Agreement and the alleged breach of it by the EC.[106] However, a question arises whether the agreement itself is covered by the terms of reference of this Panel because it is not a "covered agreement" within the meaning of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). [107] We therefore take up the issue of the relevance of the Oilseeds Agreement to this case as a preliminary question that has to be addressed before the examination of substantive claims.

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[104]The current EC Schedule (Schedule CXL), which was negotiated as the result of the EC's enlargement to include Austria, Finland and Sweden, has not yet been certified by the Director-General. In any event, since the treatment of the poultry products in question is identical in both Schedule LXXX and Schedule CXL, we regard Schedule LXXX as the EC tariff schedule currently in force for the purposes of this dispute. See paragraph 22.

[105]Commission Regulation (EC) No 1431/94 of 22 June 1994.

[106]Brazil's panel request (WT/DS69/2) contains the following sentence: "The Government of Brazil considers that the EC has failed ... to implement and administer a compensation tariff rate quota in line with the bilateral agreement reached between Brazil and the EC within the context of GATT Article XXVIII:4 negotiations."

[107]Article 1.1 of the DSU defines covered agreements as "the agreements listed in Appendix 1 to this Understanding".

197. First, we note that, although the United States in its third-party submission argues that the agreement is not covered by the terms of reference [108], the EC has not explicitly objected to the examination of the Oilseeds Agreement by this Panel.

198. Second, there are precedents where a bilateral agreement was examined in a GATT/WTO dispute in order to determine the scope of rights and obligations in the multilateral context.

199. We recall in this regard that in the *Banana III* case, in order to interpret a WTO waiver, the panel and the Appellate Body had to examine the Lomé Convention, which is referred to in that waiver. The following statement by the panel in that case was affirmed by the Appellate Body:

> "We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver."[109]

200. Also, we recall that the arbitrator in the 1990 *Canada/EC Wheat* case, which involved a bilateral agreement establishing the time-periods for exercising Article XXVIII rights, stated as follows:

> "In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT. An exception is warranted in this case given the close connection of this particular bilateral agreement with the GATT, the fact that the Agreement is consistent with the objectives of the GATT, and that both parties joined in requesting recourse to the GATT Arbitration procedures." [110]

201. Third, in the present case, the Oilseeds Agreement was negotiated within the f ramework of Article XXVIII of GATT. [111] Insofar as the content of the Oilseeds Agreement is incorporated into Schedule LXXX - a point not disputed by the parties - there is a close connection between the two.

202. For these reasons, we proceed to the examination of the Oilseeds Agreement to the extent relevant to the determination of the EC's obligations under the WTO agreements vis-à-vis Brazil.

(ii) Relationship between the Oilseeds Agreement and Schedule LXXX

203. Since the TRQ in question is provided for in the EC's current tariff schedule (Schedule LXXX), we start with an examination of the relationship between the Oilseeds Agreement - which gave rise to the opening of the TRQ - and Schedule LXXX.

204. As noted above, the Oilseeds Agreement was concluded within the context of Article XXVIII negotiations. Under ordinary circumstances, the resulting modification of the EC tariff schedule would have been certified by the Director-General pursuant to the 1980 procedure for modification and rectification of schedules. [112] However, as the conclusion of the Oilseeds Agreement coincided

[108] Paragraph 155.

[109] Panel Reports on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/R, para. 7.98, cited in the Appellate Body Report (WT/DS27/AB/R) at para. 167.

[110] Award by the Arbitrator on *Canada/European Communities Article XXVIII Rights*, BISD 37S/80, at 84.

[111] See paragraph 8.

[112] *Procedure for Modification and Rectification of Schedules of Tariff Concessions*, Decision of the CONTRACTING PARTIES on 26 March 1980, BISD 27S/25.

with the substantive conclusion of tariff negotiations in the Uruguay Round, this procedure was not strictly followed. The EC directly incorporated the substance of the Oilseeds Agreement into its then-current tariff schedule, effective 1 January 1994, and also into Schedule LXXX at the conclusion of the Uruguay Round negotiations. [113] This procedural anomaly, in our view, does not affect the legal characterization of the Oilseeds Agreement as a bilateral agreement concluded within the context of Article XXVIII negotiations, as is evidenced by the fact that the negotiations leading to its conclusion were authorized by the CONTRACTING PARTIES. It is sufficient to note at this juncture that the EC "multilateralized" the result of the oilseeds compensation negotiations (including the Oilseeds Agreement between Brazil and the EC) through a communication to the TNC Chairman and that no GATT contracting party or other participant of the Uruguay Round raised an objection to this communication at that time. [114] In any event, the EC explains that its own tariff regulations on poultry products were first modified as a result of the conclusion of the Oilseeds Agreement and that these modifications were maintained in principle in the regulations adopted in order to implement the results of the Uruguay Round. [115]

205. The EC claims that whatever had been agreed in the Oilseeds Agreement was superseded by Schedule LXXX under the rules of Articles 59(1) or, alternatively, Article 30(3) of the Vienna Convention on the Law of Treaties (Vienna Convention). Article 59(1) of the Vienna Convention reads as follows:

> "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."

Article 30(3) of the Vienna Convention further reads as follows:

> "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

206. Although we note that these provisions of the Vienna Convention (which generally pertain to the legal maxim *lex posterior derogat prior*) are codification of the customary rules of interpretation of public international law within the meaning of Article 3.2 of the DSU [116], we also note that past panels have been careful about the application of the *lex posterior* rule on tariff schedules. Indeed, in the 1990 *EEC - Oilseeds* case, which gave rise to the Oilseeds Agreement in the present case, the panel stated as follows:

> "In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change

[113] Paragraph 43.

[114] *Ibid.*

[115] Paragraph 22.

[116] See paragraph 209.

> the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstitution of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962."[117]

The *Oilseeds* panel did not rule that by application of the *lex posterior* rule, the Community was bound only by the newest of tariff schedules, being released from all the previous commitments. On the contrary, the panel found that the balance of concessions negotiated in 1962 in respect of oilseeds was not altered in the successive tariff negotiations.

207. In our view, a similar situation exists in the present case. The fact that the *Oilseeds* panel dealt with a non-violation complaint does not alter the validity of this analysis. If an importing Member must respect all of its commitments in the previous rounds in respect of reasonable expectations in a non-violation case, by logical extension, such expectations would also be relevant to the interpretation of a tariff commitment in a violation case. In other words, we cannot summarily dismiss the significance of the Oilseeds Agreement in the interpretation of Schedule LXXX by recourse to the public international law principles embodied in the Vienna Convention.

(iii) The Oilseeds Agreement as compensatory adjustment under Article XXVIII:2

208. Now we turn to an examination of the substance of the Oilseeds Agreement. Under the terms of the Agreement, it was agreed that:

> "Duty exemption shall be applicable for cuts falling within subheadings 0207.41.10, 0207.41.41 and 0207.41.71 within the limits of a global annual tariff quota of 15,500 tonnes to be granted by the competent Community authorities". [118]

The substance of this agreement is incorporated into the relevant part of Schedule LXXX (Part I, Most-favoured-nation Tariff; Section I, Agricultural Products; Section I - B, Tariff Quotas; Minimum Access Quotas) corresponding to the same tariff item numbers. Therefore, the analysis of the Oilseeds Agreement is equally relevant in the interpretation of Schedule LXXX.

209. Under Article 3.2 of the DSU, we are required to examine the relevant part of the Oilseeds Agreement "in accordance with customary rules of interpretation of public international law". As has been noted by many previous panels and the Appellate Body, Article 31(1) of the Vienna Convention describes such customary rules as follows:

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[117]Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, adopted on 25 January 1990, BISD 37S/86, para. 146.

[118]Annex 1 to Brazil's first written submission. The same language can be found, e.g. in the agreed minutes between the EC and Poland, published in the Official Journal of the European Communities No L 47/22, dated 18 February 1994.

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Accordingly, we follow these rules in the analysis of the Oilseeds Agreement.

(a) Ordinary meaning of the terms

210. Brazil claims that the total TRQ under the Oilseeds Agreement should be reserved exclusively for products originating in Brazil. The ordinary meaning of the terms used in this particular provision, on its face, does not appear to support the Brazilian claim. There is nothing in this provision that suggests that this TRQ is a country-specific tariff quota with Brazil being the sole beneficiary. According to Brazil, however, the term "global" means "covering a variety of tariff lines", in this case encompassing the three listed subheadings. [119] The EC claims that the term "global" as used in this provision means "general", "universal", "comprehensive", "catch-all" or in WTO terms, most-favoured-nation (MFN) or *erga omnes*.[120]

211. Various arguments made by Brazil in paragraph 58 indicate that the term "global quota" could mean something other than MFN, but do not constitute conclusive evidence to the effect that the particular terms used in the Oilseeds Agreement must be read the way claimed by Brazil. We note, however, that the term "a global annual tariff quota" is a loosely defined, non-legal term. Pursuant to Article 31(1) of the Vienna Convention, we need to take into account the context and the object and purpose of the Oilseeds Agreement in order to determine the precise meaning of the terms used therein. Since the context of the term "global annual tariff quota" does not give us any additional guidance, we turn to the object and purpose of the Oilseeds Agreement.

(b) Object and purpose of the Oilseeds Agreement

212. Brazil's claim that the total TRQ should be reserved exclusively for its products derives from its understanding on the object and purpose of the Oilseeds Agreement as compensatory adjustment within the meaning of Article XXVIII:2 of GATT, which reads as follows:

> "In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, Members concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations."

Brazil argues that the MFN principle under Articles I and XIII of GATT does not necessarily apply to TRQs opened as a result of the compensation negotiations under Article XXVIII of GATT. [121] According to Brazil, since the purpose of the Oilseeds Agreement was to compensate Brazil for the modification of EC concessions on oilseeds, Brazil is entitled to an exclusive benefit in the modified tariff schedule. The EC responds that the nature of compensation cannot change the legal reality under the GATT/WTO agreements: i.e. the EC was bound, on an MFN basis, by its tariff commitments.[122]

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[119]Paragraph 56.

[120]Paragraph 57.

[121]Paragraphs 37 and 59.

[122]Paragraph 55.

213. First, we examine whether Brazil's argument is supported by specific provisions in the WTO agreements, decisions of the Ministerial Conference/General Council or "the decisions, procedures and customary practices followed by the CONTRACTING PARTIES". [123] We note that, despite Brazil's assertions that there are examples of country-specific TRQs in practice and that those TRQs are well recognized by academic writers, [124] there is no provision in the WTO agreements that allows departure from the MFN principle in the case of TRQs resulting from Article XXVIII negotiations. [125] Nor is there any decision of the CONTRACTING PARTIES or of the Ministerial Conference/General Council, or any adopted panel or Appellate Body report that permits such departure.

214. In our view, past GATT practice supports the applicability of the MFN principle in these situations. For instance, in response to a complaint of the Benelux countries regarding the failure by Germany to bring down to the level of the Benelux rates the German duties on cereal starch and potato flour as well as on some derivatives, a panel in 1955 made the following observation:

> "The Panel took note of the agreement reached between the delegations concerned on the basis of the offer which, in the opinion of both parties, represents a first step toward the fulfilment of the promise contained in the letter of 31 March 1951, and noted also the assurance given by the German delegation that the global custom quotas envisaged for potato starch would be administered in accordance with the provisions of Article XIII of the General Agreement." [126]

Although not technically a result of Article XXVIII negotiations, the TRQ opened by Germany in this case could be characterized as a form of compensation for not fulfilling its tariff commitments in the previous round. In the application of the TRQ, Germany followed the MFN principle contained in Article XIII and the panel (and the CONTRACTING PARTIES) accepted it as a positive move toward the solution of the dispute. Thus, we find that Brazil's argument is not supported either by the text of the WTO Agreement or past GATT practices.

215. Second, and more importantly, we note that the concessions modified as the result of the Oilseeds Agreement regarding soya beans and other oilseeds were MFN commitments to bind the tariff rates on those products as duty-free. In view of the EC's obligations under Article XXVIII:2 to "maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for" in its previous tariff schedule, compensation for the withdrawal or modification of MFN commitments should be given in an MFN manner also. If a preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext of "compensatory adjustment" under Article XXVIII:2, it would create a serious loophole in the multilateral trading system. Such a result would fundamentally alter the overall balance of concessions Article XXVIII is designed to achieve.

216. Brazil argues that by failing to respect the balance between the withdrawal of a concession and the offering of compensation in another product, the EC has denied Brazil's rights within the

[123] Article XVI:1 of the Agreement Establishing the World Trade Organization.

[124] Paragraph 54.

[125] We do not consider Brazil's reference to GATT Articles XIX:3 and XXIII:2 (paragraph 54) to be relevant to this case. Those provisions address withdrawal of concessions in specific situations involving safeguard measures or dispute settlement.

[126] Panel Report on *German Import Duties on Starch and Potato Flour*, noted by the CONTRACTING PARTIES on 16 February, BISD 3S/77, para. 7.

multilateral system.[127] In our view, however, the balance must be sought not only bilaterally but also within the multilateral context, as required under Article XXVIII:2 of GATT. Indeed, most tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis. The fact that the poultry TRQ was opened as a result of bilateral negotiations between the EC and Brazil does not mean that the EC was obligated to accord the benefit exclusively to Brazil. In conclusion, we find that the object and purpose of the Oilseeds Agreement does not support Brazil's argument that the total TRQ should be reserved exclusively for its products.

(c) Preparatory work of Article XXVIII

217. The conclusion that the EC is bound, on an MFN basis, by its tariff commitments for frozen poultry meat under the Oilseeds Agreement is confirmed by the preparatory work of Article XXVIII of GATT.[128] Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947 concluded as follows:

> "It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed 'Modification of Schedules'. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference in the Article to Article I, which is the Most-Favoured-Nation clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation clause." [129]

(iv) Summary

218. To sum up our findings in this section, we find no proof (either in the text or in the object and purpose of the Oilseeds Agreement) in support of the Brazilian claim that the poultry TRQ opened as the result of the Oilseeds Agreement was intended to be a country-specific tariff quota with Brazil being the sole beneficiary. In other words, we find that the EC is bound, on an MFN basis, by its tariff commitments for frozen poultry meat. We also reject Brazil's argument that Articles I and XIII of GATT do not necessarily apply to TRQs given as compensation under Article XXVIII.

C. LEGITIMATE EXPECTATIONS

219. Before moving on to the examination of Brazil's alternative claim on Article XIII of GATT, we address Brazil's supplementary claim regarding legitimate expectations by Brazil concerning the tariff treatment of the poultry products by the EC. [130] Brazil does not invoke particular provisions of the WTO agreements to support its claim. In this regard, we note that the Appellate Body in a recent report emphasized the importance of distinguishing between (a) the concept of protecting the expectations of Members as to the competitive relationship between their products and the products of other Members and (b) the concept of the protection of the reasonable expectations of Members relating to market access conditions. According to the Appellate Body, the former was developed in

[127]Paragraph 40.

[128]Article 32 of the Vienna Convention provides: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31...".

[129]EPCT/TAC/PV/18, p. 46, reproduced in the Analytical Index (1995) at p. 947.

[130]Paragraph 46.

the context of violation complaints involving Articles III and XI of GATT, while the latter was developed in the context of non-violation complaints. [131]

220. In the present case, because Brazil does not invoke specific provisions and makes no distinction between "expectations as to the competitive relationship" and "reasonable expectations relating to market access conditions", in the absence of any further elaboration, we are not able to reach a finding on this point.

D. ARTICLE XIII OF GATT

221. We now turn to the examination of Brazil's alternative claim under Article XIII of GATT. The main argument presented by Brazil involves Article XIII:2, which reads in relevant part as follows:

> "In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions: ... ; (d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate."

222. Article XIII of GATT generally requires the non-discriminatory administration of quantitative restrictions. Article XIII also applies to tariff quotas, as provided in paragraph 5, which reads:

> "The provisions of this Article shal l apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

These points were affirmed by the Appellate Body in the *Banana III* case[132], and are not contested by the parties. However, the parties have divergent views on the application of Article XIII to the actual operation of the TRQ in this particular case.

(i) Agreement on the allocation of the TRQ

223. Brazil claims that the EC reached an agreement with Brazil in 1993 on the allocation of the total TRQ to Brazil within the meaning of Article XIII:2(d). [133] The EC rejects this claim. [134]

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[131] Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, para. 36.

[132] Appellate Body Report on *Banana III*, *op. cit.*, para. 160.

[133] Paragraph 64.

[134] Paragraph 65.

224. Consistent with the views on the burden of proof put forward by the Appellate Body in the *Shirts and Blouses* case[135], we first examine evidence produced by Brazil to determine whether it has successfully raised a presumption that an agreement regarding the allocation of tariff quotas exists.

225. Brazil has demonstrated that it compla ined about the operation of the TRQ as early as 28 March 1994.[136] The first letter of complaint - from the Brazilian Ambassador in Brussels to a senior EC official - reads as follows (emphasis added):

> "I have just received information that the Council is supposedly about to decide on the allocation of the 15,500 tonnes of chicken and 2,500 tonnes of turkey resulting from the oilseeds compensation agreement. The proposal to be submitted would divide the tonnage equally into three groups (a: Brazil; b: Thailand; c: China, USA and the remaining countries), each receiving one third of the contingent. ... *[T]his distribution*, in my opinion, definitely is not compatible with the *spirit* of the oilseeds compensations agreement signed with Brazil. I would, therefore, appreciate your looking into this matter with the utmost urgency."

Another letter of 20 May 1994 from the Ambassador to another EC official reads in part as follows (emphasis added):

> "We have been informally advised that it would be the intention of the Commission to propose the division of that amount [15,500 tonnes for poultry meat and 2,500 tonnes for turkey meat] allocating only 45 per cent of the poultry meat quota and 71 per cent of the turkey meat quota to Brazil. It is the view of the Brazilian Government that *such quota allocation* would be a breach of the *intent and spirit* of the agreement, since it would not ensure that Brazil is duly compensated for the losses it suffered ... ."

Finally, on 15 April 1997, the Ambassador wrote to the Vice-President of the European Commission, stating (emphasis added):

> "... [W]e have *never willingly concurred with* the terms dictated by the Commission in 1994 for the distribution and management of said quotas. ... The first two letters [cited above] clearly state that, in our view, their proposed *distribution* would be in breach of the *intent and spirit* of the agreement reached in Geneva to compensate Brazil for the losses incurred as a result of the changes in the EU oilseeds regime."

226. It is also worth noting here that Brazil at this point had not explicitly claimed that the total TRQ was to be reserved exclusively for Brazil. Rather, Brazil refers to the "intent and spirit" of the Oilseeds Agreement and appears to protest against the way in which the tariff quota is distributed or allocated.

227. It appears from these letters that there was no explicit ag reement regarding the allocation of tariff quotas between Brazil and the EC.

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[135] Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 14. The report also states: "... a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim" (p. 16).

[136] Letters of complaint attached to Brazil's first written submission. We note that the EC did not respond to any of these letters in writing.

(ii) Participation of non-Members and East European countries in the TRQ

228. Brazil additionally claims that the EC has failed to follow the rules of Article XIII:2(d) by granting China, which is a non-Member, access to the TRQ [137] and also by allocating licences to products from Members in East Europe, which have privileged access to the EC market. [138] We address these two issues separately.

(a) Non-Members

229. We first examine the issue of non-Members. Brazil claims that the EC cannot unilaterally grant to non-Members the right to participate in a compensatory TRQ. The EC claims that there is no obligation to discriminate against non-Members under Article XIII:2(d). According to the EC, if the EC were to exclude non-Members from the scope of the allotment, the resulting share of Brazil would be higher than "the shares which the various Members might be expected to obtain in the absence of such restrictions" under the opening sentence ("chapeau") of Article XIII:2. [139]

230. We note that Article XIII carefully distinguishes between Members ("contracting parties" in the original text of GATT 1947) and "supplying countries" or "source". There is nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from Members only.[140] If the purpose of using past trade performance is to approximate the shares in the absence of the restrictions as required under the chapeau of Article XIII:2, exclusion of a non-Member, particularly if it is an efficient supplier, would not serve that purpose.

231. This interpretation is also confirmed by the use in Article XIII:2(d) of the term "of the total quantity or value of imports of the product" without limiting the total quantity to imports from Members.

232. The conclusion above is not affected by the fact that the TRQ in question was opened as compensatory adjustment under Article XXVIII because Article XIII is a general provision regarding the non-discriminatory administration of import restrictions applicable to any TRQs regardless of their origin.

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[137]Paragraph 66.

[138]Paragraphs 68 and 70.

[139]Paragraph 71. We note that if the EC were to exclude non-Members from the basis of the calculation of tariff quota shares, such an exclusion in itself would not constitute a violation of Article XIII:2. The question we need to address here is whether the EC is *required* to exclude non-Members from the basis of the calculation of tariff quota shares.

[140]We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): "The consequence of the foregoing analysis is that Members may be effectively required to use a general 'others' category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". See panel reports on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, *op. cit.*, para. 7.75. The quoted passage, particularly the use of the phrase "*all suppliers* other than Members with a substantial interest in supplying the product" (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.

233. For these reasons, we find that the EC has not acted inconsistently with Article XIII of GATT by calculating Brazil's tariff quota share based on the total quantity of imports, including those from non-Members.

(b) Members in East Europe

234. Now we move on to the issue of Members in East Europe. According to the evidence submitted by the EC, licences in the "others" category are allocated to poultry products originating in East Europe, notably Hungary and Poland. We note in this regard that the EC and the then Czech and Slovak Republic, Hungary and Poland in 1992 jointly notified the CONTRACTING PARTIES that the Interim Agreements aimed at the establishment of free trade areas under Article XXIV of GATT came into force as of 1 March 1992. [141] Brazil claims that the allocation of licences to imports of poultry products from East European countries is inconsistent with Article XIII of GATT because the EC has reduced the benefit to other Members by allowing these countries to participate in the TRQ.

235. In addressing this issue, we first note that the calculation of tariff quota shares and the participation of supplying countries in the tariff quota are two distinct issues. As noted above, it is clear from the chapeau of Article XIII:2 that the share calculation must approximate the shares which the exporting Members might be expected to obtain in the absence of the restrictions. However, such calculated shares do not necessarily determine which Members are permitted to participate in the actual allocation of licences, particularly in an "others" category.

236. In the present case, the total TRQ quantity of 15,500 tonnes is a given figure for the purposes of Article XIII, not contested by the parties. Brazil has not taken a position on the EC assertion that the annual figure of 7,100 tonnes allocated for imports from Brazil corresponds to Brazil's share among the total imports into the EC during the representative period. [142] In this context, Brazil does not specifically address the calculation of tariff quota shares. Rather, it claims that the participation of East European countries in the "others" category is inconsistent with Article XIII:2.

237. We note that Brazil cites the *Newsprint* panel as a precedent. [143] The factual basis of the *Newsprint* case was as follows. The European Economic Community (EEC) opened a duty-free tariff quota of 500,000 tonnes for newsprint for the year 1984 whereas the commitment of the EEC in its tariff schedule provided for an annual duty-free tariff quota of 1.5 million tonnes. The reason for the reduction in the scope of the tariff quota was to take account of the free access to the EEC market of suppliers from the European Free Trade Association (EFTA), which was agreed upon subsequent to the tariff schedule. In response to a complaint by Canada, the EEC noted that if it were required to respect the 1.5 million-tonne level, it might count EFTA exports against that level. In respect of this course of suggested action by the EEC, the panel made the following statement:

> "It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an m.f.n. duty-free quota. The situation in this respect could only change if the free-trade agreements with the EFTA countries were to be discontinued; in this case these countries would be entitled to fall back on their GATT rights vis-à-vis the EC, which rights continue to exist." [144]

[141] L/6992, 3 April 1992.

[142] Paragraph 53.

[143] *Panel on Newsprint*, adopted on 20 November 1984, BISD 31S/114.

[144] *Ibid*, para. 55.

238. There is some similarity between the *Newsprint* case and the present case regarding this specific issue. As in the *Newsprint* case, the purpose of the poultry TRQ is to allow specified quantities (15,500 tonnes) of imports into the EC duty-free which would otherwise be dutiable. However, there are three important factual differences. First, in the *Newsprint* case, EFTA suppliers were accorded duty-free access to the EEC market without restriction. In the present case, imports from Hungary and Poland under the Interim Agreements are still dutiable. [145] Second, in the *Newsprint* case, the level of the MFN duty-free quota was reduced in order to make room for preferential access while in the present case no such reduction has occurred. Third, in the *Newsprint* case, the EFTA agreement was concluded after the opening of the MFN quota whereas in this case the Interim Agreements preceded the opening of the poultry TRQ.

239. Thus, the present case lacks the basis that led to the conclusion by the *Newsprint* panel. We also note that before making the statement cited in paragraph 237 above, the *Newsprint* panel stated that "the Panel could find no GATT specific provision forbidding such action". [146] If Brazil had intended to claim a violation of Article XIII:2 on this specific issue, at a minimum, it should have elaborated on the nature of preferences accorded to poultry products imported from East Europe and should have tied it to *inter alia* "any special factors which may have or may be affecting the trade in the product" referred to in Article XIII:2(d). It has not done so.

240. Accordingly, we do not find that the EC has acted inconsistently with Article XIII with respect to the tariff quota allocation for imports from Members in East Europe.

E. LICENSING AGREEMENT

241. Brazil's claim regarding the Licensing Agreement can be sub-divided into issues involving (i) notification; (ii) changes to the licensing rules; (iii) distortion of trade; (iv) licence entitlement based on export performance; (v) speculation in licences; (vi) issuance of licences in economic quantities and newcomers; and (vii) transparency. [147] We examine these issues in turn.

(i) Notification

242. Brazil claims that the EC has failed to notify the necessary information regarding the poultry TRQ to the WTO Committee on Import Licensing under Article 1.4(a) of the Licensing Agreement. [148] The EC responds that it did not make a notification because it was unclear whether the Licensing Agreement applied to TRQs before the Appellate Body report on the *Banana III* case. The EC further claims that the mere fact of non-notification cannot be considered to render the whole regime illegal. [149]

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[145] According to the annexes attached to the notification referred to in paragraph 234, one category of poultry meat (0207 41 10) originating in Hungary and Poland benefit from certain special non-MFN quotas under the Interim Agreements. However, imports under these quotas are dutiable at reduced rates. See Official Journal No L 348/1. Since Brazil has submitted no evidence regarding the nature of preferences on poultry products from East Europe, we are not in a position to know what kind of preferential treatment, if any, is given to other categories (0207 41 41 and 0207 41 71).

[146] Panel Report on *Newsprint, op. cit*., para. 55.

[147] In addition to these seven issues, Brazil refers to the nature of compensation in the context of the Licensing Agreement also. See paragraph 109. However, since we have already addressed this issue in our analysis of the Oilseeds Agreement, we do not consider it necessary to repeat the discussion.

[148] Paragraph 76. We note that Brazil does not refer to Article 5 of the Licensing Agreement, which is a more general provision about notification. Article 1.4(a) only deals with the sources of publication.

[149] Paragraph 77.

243. Article 1.4(a) of the Licensing Agreement reads as follows:

> "The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments [150] and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat."

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

(ii) Changes to the licensing rules

245. Brazil claims that frequent changes to the licensing rules and procedures regarding the poultry TRQ have made it difficult for governments and traders to become familiar with the rules, contrary to the provisions of Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d). Brazil further notes that not all the changes have been for the purpose of the elimination of speculation in licences and that those changes that addressed the issue of speculation have not resulted in the elimination of speculation. [151] The EC responds that there is nothing in the Agreement that prohibits changes in licensing procedures. [152]

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

(iii) Distortion of trade

247. Brazil claims that its percentage share in the EC poultry market has been falling since the introduction of the TRQ in 1994, contrary to Brazil's expectations. In Brazil's view, this is attributable to the distortions of trade caused by the operation of the TRQ. [153] In particular, Brazil claims that the EC has violated the provisions of Articles 1.2 and 3.2 of the Licensing Agreement.

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[150] Footnote 3 to this subparagraph reads as follows: "For the purpose of this Agreement, the term 'governments' is deemed to include the competent authorities of the European Communities."

[151] Paragraph 80. See also paragraph 76.

[152] Paragraph 81.

[153] Paragraphs 82 and 84.

248. Article 1.2 of the Licensing Agreement provides as follows (emphasis added):

> "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, *with a view to preventing trade distortions* that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members."

Article 3.2 of the Licensing Agreement further provides:

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

249. In examining these claims, we first not e that Brazil's reference to the percentage share relates to its total exports of poultry products to the EC market, the majority of which consists of over-quota (duty paid) trade. The Licensing Agreement, as applied to this particular case, only relates to in-quota trade. Second, the licences issued to imports from Brazil are fully utilized, which strongly suggests that any trade-distortive effects of the operation of the licensing rules have been overcome by exporters. Third, the total volume of poultry exports from Brazil has generally been increasing (see Annex I). Therefore, we fail to understand the relevance of the decline in the percentage share in total trade to a violation of the Licensing Agreement. Thus, based on the evidence presented by Brazil regarding its percentage share of the EC poultry market, we do not find that the EC has acted inconsistently with Articles 1.2 and 3.2 of the Licensing Agreement.

(iv) Licence entitlement based on export performance

250. Brazil claims that the EC's allocation of import licences on the basis of export performance is inconsistent with Articles 1.3 and 3.5(j) of the Licensing Agreement. [154] The EC responds that nothing in the Licensing Agreement prohibits the use of a criterion relating to exports and that in any event the alleged measure is no longer in place (export performance was only taken into account for the period from 26 June 1994 to 1 June 1995). [155]

251. Article 1.3 of the Licensing Agreement provides:

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

Article 3.5(j) in relevant part provides:

> "in allocating licences, the Member should consider the import performance of the applicant ... ."

252. Although the measure is no longer in place, Brazil claims that there are certain lingering effects. [156] Therefore, we do not reject this claim on the grounds of mootness.

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[154] Paragraph 86.

[155] Paragraphs 87 and 88.

[156] Paragraph 89.

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

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

> "By its very terms, Article 1.3 of the Licensing Agreement clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be 'neutral ... fair and equitable'. Article 1.3 of the Licensing Agreement does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 - including the preamble, Article 1.1 and, in particular, Article 1.2 of the Licensing Agreement - supports the conclusion that Article 1.3 does not apply to import licensing *rules*."[157]

In our view, the issue of licence entitlement based on export performance is clearly that of rules, not that of application or administration of import licensing procedures. Thus, Article 1.3 is not applicable on this specific issue.

255. Furthermore, the provision of Article 3.5(j) in this regard is hortatory and does not necessarily prohibit the consideration of other factors than import performance.

256. For these reasons, we do not find that the EC has acted inconsistently with Article 1.3 or Article 3.5(j) of the Licensing Agreement in this regard.

(v) Speculation in licences

257. Brazil claims that speculation in licences discourages the full utilization of the poultry TRQ and that this constitutes a violation of Articles 3.5(h) and 3.5(j) [158]. The EC claims that these provisions do not impose a mandatory requirement. Furthermore, the EC points out that the relevant EC regulation stipulates that licences are not transferable with a view to avoiding speculation. Finally, the EC notes that the poultry TRQ has in fact been fully utilized. [159]

258. Article 3.5(h) provides:

> "when administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilization of quotas ... ."

Article 3.5(j) in relevant part provides:

> "... consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period. In cases where licences have not been fully utilized, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences ... ."

259. While it may be true that Brazilian exporters have had additional difficulties in exporting to the EC market due to the speculation in licences, we note that the licences allocated to imports from

[157] Appellate Body Report on the *Banana III*, *op. cit.*, para. 197.

[158] Paragraph 91.

[159] Paragraph 92.

Brazil have been fully utilized. In other words, the speculation in licences has not discouraged the full utilization of the TRQ. Thus, we do not find that the EC has acted inconsistently with Articles 3.5(h) or 3.5(j) of the Licensing Agreement in t his regard.

(vi) Issuance of licences in economic quantities and newcomers

260. Brazil claims that the allocation of licences where each applicant receives a licence allowing imports of about 5 tonnes cannot be considered to be in conformity with the provisions of Article 3.5(i) regarding issuance of licences in economic quantities. [160] As a related matter, Brazil claims that the absence of a newcomer provision in the regulation regarding the operation of the poultry TRQ is inconsistent with Article 3.5(j) of the Licensing Agreement. [161] The EC claims that the licences are indeed issued to newcomers [162] and that the allocation of the licences in small quantities was made in response to an ever increasing number of importers. [163]

261. Article 3.5(i) provides as follows:

> "when issuing licences, Members shall take into account the desirability of issuing licences for products in economic quantities ... ."

Article 3.5(j) further provides in relevant part:

> "in allocating licences, the Member should consider the import performance of the applicant... Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members ... ."

262. We note Brazil's argument that its export ers are facing difficulties in dealing with licences for small quantities, which is echoed in Thailand's third-party submission also. [164] While the decline in the average quantity per licence may cause problems for traders, we note at the same time that the total TRQ has been fully utilized. The very fact that the licences have been fully utilized suggests to us that the quantities involved are still "economic", particularly in combination with the significant amount of the over-quota trade.

263. Thus, we do not find that the EC has acted inconsistently with Articles 3.5(i) or 3.5(j) of the Licensing Agreement in this regard.

(vii) Transparency

264. Brazil claims that there is a lack of transparency in the operation of the poultry TRQ. According to Brazil, the inability of traders to determine which consignments are being imported

[160] Paragraphs 97 and 99. Brazil also refers to Article 3.5(h), which we have discussed in relation to speculation in licences. We note here again that the licences in question have fully been utilized.

[161] Paragraph 101.

[162] Paragraph 102.

[163] Paragraph 98.

[164] Paragraph 164.

within or outside the TRQ means that EC is not administering the licensing system in a transparent manner.[165] Brazil specifically claims a violation by the EC of Article 3.5(a)(iii) and (iv) regarding the provision of information.[166] The EC responds that it has produced the relevant information when requested.[167]

265. Article 3.5(a) in relevant part reads as follows:

> "Members shall provide, upon request of any Member having an int erest in trade in the product concerned, all relevant information concerning: ... (iii) the distribution of such licences among supplying countries; (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. Developing country Members would not be expected to take additional administrative or financial burdens on this account; ... ."

We note that Article 3.5(a) addresses specific situations in the operation of an import licensing scheme, subject to requests from Members. It is clear that Article 3.5(a) does not obligate Members to provide voluntarily complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. Brazil has not demonstrated that there has been a case where the EC has failed to provide the required information despite a request by Brazil. Thus, we do not find that the EC has acted inconsistently with Article 3.5(a) of the Licensing Agreement in this regard.

(viii) Summary

266. To sum up our findings in this section, we find that Brazil has not demonstrated a violation of the Licensing Agreement by the EC, except for the failure to notify the necessary information regarding the poultry TRQ to the WTO Committee on Import Licensing under Article 1.4(a) of the Licensing Agreement.

F. ARTICLE X OF GATT

267. Brazil claims that to be able to benefit from the requirements or constraints of exporting either within or outside the TRQ, traders need to know which trade regime (i.e. duty-free or dutiable) is applicable to any one consignment. Brazil argues that this interpretation is implied in Article X of GATT. If this were not the case, according to Brazil, the object of publication and notification would not be served.[168] Brazil argues that this is a requirement under Article X of GATT as well as under the Licensing Agreement. In response, the EC refers the Appellate Body report in the *Banana III* case[169] and argues that this claim should be rejected because the Licensing Agreement takes precedence over Article X of GATT.[170]

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[165]Paragraph 105. Since this issue involves both in-quota and over-quota trade, we address it in Section F below when we discuss Article X of GATT.

[166]Paragraph 107.

[167]Paragraph 108.

[168]Paragraph 140.

[169]Appellate Body Report on *Banana III*, *op. cit.*, para. 204.

[170]Paragraph 141.

268. In our view, however, the factual situation is different in the present case from that in the *Banana III* case. As Brazil correctly points out, this finding of the Appellate Body was made in relation to an EC regime for the importation of bananas where there was no over-quota trade. [171] In the present case, there is significant over-quota trade, and Brazil's complaint focuses on the difficulty of differentiating between in-quota and over-quota trade. Therefore, in our view, the examination of Article X of GATT as well as the Licensing Agreement is warranted since, in the present case, the Licensing Agreement is relevant to in-quota trade and Article X of GATT is relevant to the total trade.

269. Brazil argues that the EC is obligated to establish a system that enables exporters to know in advance whether each consignment is going to be treated as in-quota imports or as over-quota imports under Article X, particularly Article X:3(a), which requires the administration of trade rules "in a uniform, impartial and reasonable manner". We note, however, that Article X is applicable only to laws, regulations, judicial decisions and administrative rulings "of general application". In this regard, we recall that the panel in the *Underwear* case stated as follows:

> "The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application." [172]

Conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure "of general application". In the present case, the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT.

270. In view of the fact that the EC has demonstrated that it has complied with the obligation of publication of the regulations under Article X regarding the licensing rules of general application [173], without further evidence and argument in support of Brazil's position regarding how Article X is violated, we dismiss Brazil's claim on this point.

G. ARTICLE II OF GATT

271. Brazil claims that the issuance of licences for the poultry TRQ in uneconomic quantities and the trade in these licences is a breach of the requirement under Article II:1(b) of GATT. [174] Article II:1(b) provides:

> "The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind

[171] Paragraph 142.

[172] Panel Report on *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear from Costa Rica*, adopted on 25 February 1997, WT/DS24/R, para. 7.65.

[173] Paragraph 144.

[174] Paragraph 147.

> imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

The EC rejects this claim by asserting that there is no legislation or any legislative requirement in the EC that imposes extra charges on top of the ordinary duties and other duties and charges which are bound in its tariff schedule and that the alleged payment is not a governmental measure. On the contrary, the relevant EC regulation explicitly prohibits transfer of licences. [175]

272. We note that the WTO Agreement is an inter-governmental agreement concluded among States or separate customs territories. In order to prevail in its argument, Brazil has to demonstrate that the alleged payment is a governmental measure, and it has failed to do so. We therefore reject Brazil's claim on a violation of Article II:1(b) of GATT.

H. ARTICLE III OF GATT

273. Brazil claims that the EC's administration of the TRQ has the effect of imported products being treated in a manner that is less favourable than that accorded to like domestic products in violation of Article III of GATT. [176] The EC responds that the TRQ is a border measure to be strictly distinguished from internal measures that are subject to the disciplines of Article III. [177]

274. We note that discrimination between imported and domestic products is prohibited under Article III of GATT, which is a rule applicable to internal measures. Conversely, certain differential treatment between imported and domestic products are permitted at the border so long as they are in conformity with the other GATT provisions that regulate measures at the border. Indeed, this has been a well-established practice followed by the CONTRACTING PARTIES. As early as 1958, the *Italian Agricultural Machinery* panel characterized the object and purpose of Article III as follows:

> "It was considered, moreover, that the intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs." [178]

275. Brazil has not demonstrated the existence of any discriminatory measure once the poultry products have been cleared through customs. Therefore, Brazil's claim regarding Article III of GATT is rejected.

I. AGREEMENT ON AGRICULTURE

276. Brazil claims that the EC has, in its application of price-based special safeguard on the imports of frozen poultry meat, violated Articles 4.2 and 5.1 of the Agreement on Agriculture. Article 4.2 provides as follows:

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[175]Paragraph 148.

[176]Paragraph 151.

[177]Paragraph 152.

[178]Panel Report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, para.11.

> "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [179], except as otherwise provided for in Article 5 and Annex 5."

Article 5.1 in relevant part provides as follows:

> "Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked, if: ... (b) the price at which imports may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price [180] for the product concerned.

(i) Article 5.1

(a) Market entry price and the c.i.f. price

277. We address the issue of Article 5.1 first. Brazil claims that the market entry price under Article 5.1(b) of the Agreement on Agriculture should be the c.i.f. price plus the bound duty. Therefore, according to Brazil, the EC has violated this provision because it merely measures the c.i.f. price and should that price fall below the trigger price it imposes an additional duty. [181] The EC responds that the term "on the basis of the c.i.f. import price" in Article 5.1(b) means the c.i.f. price itself.[182]

278. Generally speaking, Article 5.1(b) permits the use of a special safeguard if the price of imports of the product concerned is below a defined trigger price. The relevant price of the imports concerned is referred to in Article 5.1(b) in two ways: i.e. the text of Article 5.1(b) refers to both "the price at which imports may enter the customs territory of the Member granting the concession" and "the c.i.f. import price". The ordinary meaning of the phrase "the price at which imports may enter the customs territory of the Member granting the concession" would include the payment of applicable duties since those duties must be paid prior to entry and therefore are part of "the price". The term "the c.i.f. import price" in Article 5.1(b) is qualified by the phrase "determined on the basis of", which indicates that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters. If the drafters of this provision had intended to make the invocation of special safeguards contingent solely upon the c.i.f. price, they would have simply stated "if the c.i.f.

[179]Footnote 1 to this paragraph reads: "These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

[180]Footnote 2 to this paragraph reads: "The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied."

[181]Paragraphs 119, 121 and 124.

[182]Paragraph 122.

price of that product imported into the customs territory of the Member granting the concession, expressed in terms of its domestic currency, falls below a trigger price...". They could have entirely disposed of the notion of the market entry price. Thus, the ordinary meaning of the terms used in Article 5.1(b) would appear to support the interpretation advanced by Brazil, i.e. that the market entry price must include duties paid.

279. To clarify the interpretation of the terms of Article 5.1(b) further, it is also appropriate to examine the context, object and purpose of the provision.

280. The context of Article 5.1(b) is clear. It is a specific derogation from the principles contained in Article 4.2. As such, the terms of Article 5.1(b) must be construed narrowly, so as not to frustrate the attainment of the security and predictability in trade through the tariffs-only regime under Article 4.2.

281. The object and purpose of Article 5.1(b) is to provide additional protection against significant decline in import prices during the implementation period of the Agreement on Agriculture after all agricultural products have been "tariffied" under Article 4.2. By its nature, it has to address a situation that has occurred after the tariffication process. If the market entry price is equated with the c.i.f. import price, and then compared with the trigger price calculated using the c.i.f. price only, it would disregard the effect of protection granted by high duties resulting from tariffication. Thus, although the drafting of Article 5.1(b) is not a model of clarity, in light of the object and purpose of that subparagraph, it would be appropriate to interpret the market entry price under Article 5.1(b) to include duties paid.

282. We therefore find that the EC has not invoked the special safeguard provision with respect to the poultry products in question in accordance with Article 5.1(b). [183]

(b) Injury requirement

283. Brazil further claims that the EC has violated the provisions of Article 5.1(b) because it applies the special safeguards without examining injury or damage to the EC market. [184] The EC rejects this claim.[185]

284. We find that Brazil's claim on this point is not supported by the text of Article 5.1(b), which does not require a finding of injury or damage unlike in the case of ordinary safeguards under Article XIX of GATT and the Agreement on Safeguards or the transitional safeguards under the Agreement on Textiles and Clothing.

[183]One member of the Panel does not endorse this conclusion. See paragraphs 289 to 292.

[184]Paragraphs 126, 128, 129 and 130.

[185]Paragraphs 127 and 131.

(c) Representative price

285. Finally, Brazil argues that the mechanism for determining the representative price is not transparent and that the EC should not take an internal market price as the determinant for the external c.i.f. price. Furthermore, Brazil claims that the EC has failed to indicate how the quality element provided for in its examination of the internal market price is to be factored. [186] In response, the EC claims that the representative price is published in the Official Journal and is therefore known to traders.[187] Furthermore, the EC has submitted on a confidential basis [188] a demonstration of the way in which the additional duty is actually calculated.

286. We note that Brazil's argument on this point appears to address the issue of whether the EC has followed its own regulations concerning the operation of special safeguards. To the extent that Brazil's claim is directed to the appropriateness of the special safeguard mechanism within the EC, we are unable to find any violation of the WTO rules. Although Brazil refers to Article 5 of the Agreement on Agriculture and Article X:3 of GATT, it has not specified in what manner the EC has violated these provisions. In any event, since we have already found a violation of Article 5.1(b) by the EC, for the sake of judicial economy, we do not examine this claim any further.

(ii) Article 4.2

287. Brazil claims that the EC has violated Article 4.2 because the special safeguard measure on poultry products is maintained in violation of the provisions of Article 5 and therefore cannot be justified.[189] The EC claims that Article 5 is a complete, self-contained code of rules for the application of special safeguards and that it has applied those rules correctly. [190]

288. Since we have already found a violation of Article 5.1(b) by the EC, it is not necessary for us to reach a separate finding on Article 4.2.

(iii) Opinion by a member of the Panel

289. Regrettably, I am not able to endorse the conclusion reached by the Panel in paragraph 282.

290. While one possible view of the ordinary meaning of the term "the price at whi ch imports may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency" (hereinafter referred to as "the relevant import price") in Article 5.1(b) could be that it means the c.i.f. price plus the duties paid, such a reading, in my opinion, is not a convincing one. The relevant import price could in principle be equal to the c.i.f. import price itself if one considers, for instance, that the expression "the price at which imports may enter the customs territory of the Member granting the concession" is a requirement so as to avoid price constructions deviating arbitrarily from the c.i.f. import price. If the drafters of this provision had intended to include customs duty, they could have referred to the "duty paid c.i.f. import price", a notion that appeared in preliminary discussion papers of the negotiators. The Panel's interpretation, in my opinion, is inappropriate in light of the context of

[186]Paragraph 134.

[187]Paragraph 135.

[188]See paragraphs 191 and 192.

[189]Paragraph 116.

[190]Paragraph 117.

Article 5.1(b), including its footnote 2 and Article 5.5, which unambiguously refer to "the average c.i.f. unit value" and "the c.i.f. import price" respectively. Article 5.1(b), footnote 2 and Article 5.5 must be interpreted in a consistent and coherent manner in order to have a meaningful functioning of the special safeguard provisions within the framework of tariffication process while avoiding undue restraint on the possible recourse to those provisions. I note that Article 5 does not qualify whether the safeguard should be used sparingly or not. However, when including the ordinary customs duties in the relevant import price, anomalies with the functioning of the safeguard occur.

291. The inclusion of the ordinary customs duty in the relevant import price under Article 5.1(b) creates a particular problem when the ordinary customs duty is levied as a specific duty. If the level of the specific duty is higher than the level of trigger price defined in footnote 2, the price-based special safeguard can never be invoked regardless of the extent of the drop in prices because, under the Panel's interpretation, the relevant import price never falls below the trigger price. In the case of *ad valorem* duty, while with high duties the recourse to Article 5.5 is also strongly limited, this singularity does not arise. Here however, as well as in the case of specific duty, when higher duties are applied, significant price distortions can occur for different shipments due to the application of the additional duty calculated under Article 5.5. These price distortions are most prominent when c.i.f. prices are close to the c.i.f. price that triggers the special safeguard provision. In other words, a shipment having at the border a lower c.i.f. import price, compared to another shipment with a slightly higher c.i.f. price that however does not trigger the special safeguard, could have, after clearing the customs, a significantly higher price than the latter. This situation could only be corrected if one includes the duties paid in the "c.i.f. import price" under Article 5.5 in disregard of its clear wording.

292. For these reasons, I am of the view that Article 5 of the Agreement on Agriculture requires an importing Member to calculate the relevant import price within the meaning of Article 5.1(b) on the basis of the c.i.f. import price only.

J. NULLIFICATION OR IMPAIRMENT

293. Brazil claims that the measures discussed above nullify or impair t he benefits accruing to Brazil under the cited agreements. [191] Although it may be possible to interpret the nullification or impairment claim as a non-violation complaint within the meaning of Article XXIII:1(b) of GATT, Brazil has not substantiated this claim any further. Brazil has not attempted to establish nullification or impairment of the value of concessions accruing to it in respect of poultry products, except through its claim on the violation of the various WTO rules by the EC. We thus find that Brazil has failed to establish a separate non-violation complaint.

[191] Paragraph 15.

VII. CONCLUSIONS AND RECOMMENDATIONS

294. In light of our findings in Section B and C above, we conclude that Brazil has not demonstrated that the EC has failed to implement and administer the poultry TRQ in line with its obligations under the WTO agreements.

295. In light of our findings in Section D above, we conclude that Brazil has not demonstrated that the EC has failed to implement the TRQ in accordance with Article XIII of GATT.

296. In light of our findings in Section E above, we conclude that Brazil has not demonstrated that the EC has failed to implement the TRQ in accordance with Articles 1 and 3 of the Licensing Agreement, except on the point that the EC has failed to notify the necessary information regarding the poultry TRQ to the WTO Committee on Import Licensing under Article 1.4(a) of the Licensing Agreement.

297. In light of our findings in Section F, G and H above, we conclude that Brazil has not demonstrated that the EC has failed to comply with the provisions of Articles X, II and III of GATT in respect of the implementation and administration of the poultry TRQ.

298. In light of our findings in Section I above, we conclude that the EC has failed to comply with the provisions of Article 5.1(b) of the Agreement on Agriculture regarding the imports of the poultry products outside the TRQ.

299. We recommend that the Dispute Settlement Body request the EC to bring the measures found in this report to be inconsistent with the Licensing Agreement and the Agreement on Agriculture into conformity with its obligations under those agreements.

ANNEX I

Total EC Imports of Poultry Meat (0207 14 10, 0207 14 50 and 0207 14 70)[192]

(tonnes)

TOTAL	**1988**	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997p**
extra-ec 12/15	**15,073**	**21,252**	**34,032**	**32,672**	**44,746**	**47,171**	**60,731**	**53,067**	**86,501**	**37,169**
Brazil	7,115	9,809	12,990	14,377	21,203	21,493	25,798	19,196	28,701	17,394
China	*	*	79	639	2,639	9,015	16,684	14,541	22,958	1,419
Thailand	1,609	4,675	13,998	12,413	16,123	12,064	13,400	9,184	15,022	10,383
Hungary	3,630	4,121	3,802	3,192	3,295	3,393	3,652	7,649	5,983	2,267
Poland	122	153	990	199			56	242	1,730	1,746
Czech Republic	*	*	*	*	*	191	2	66	144	294
Slovenia	*	*	*	*	64	46	18	*	53	60
Croatia	*	*	*	*	114	157	234	228	36	*
Romania	583	344	33	161	172	423	570	182	23	114
Bulgaria	*	*	4	5	88	1	24	6	5	*
Czecho-slovakia	1,612	1,822	1,834	961	314	*	*	*	*	*
Yugoslavia	307	61	*	282	329	*	*	*	*	*
extra-ec not det.	*	*	*	*	*	15	*	1,070	11,112	2,978
OTHERS	95	268	303	444	405	373	294	702	733	514

(percentages)

TOTAL %	**1988**	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997p**
extra-ec 12/15	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**
Brazil	47.2	46.2	38.2	44.0	47.4	45.6	42.5	36.2	33.2	46.8
China	*	*	0.2	2.0	5.9	19.1	27.5	27.4	26.5	3.8
Thailand	10.7	22.0	41.1	38.0	36.0	25.6	22.1	17.3	17.4	27.9
Hungary	24.1	19.4	11.2	9.8	7.4	7.2	6.0	14.4	6.9	6.1
Poland	0.8	0.7	2.9	0.6	0.0	0.0	0.1	0.5	2.0	4.7
Czech Republic	*	*	*	*	*	0.4	0.0	0.1	0.2	0.8
Slovenia	*	*	*	*	0.1	0.1	0.0	*	0.1	0.2
Croatia	*	*	*	*	0.3	0.3	0.4	0.4	0.0	*
Romania	3.9	1.6	0.1	0.5	0.4	0.9	0.9	0.3	0.0	0.3
Bulgaria	*	*	0.0	0.0	0.2	0.0	0.0	0.0	0.0	*
Czecho-slovakia	10.7	8.6	5.4	2.9	0.7	*	*	*	*	*
Yugoslavia	2.0	0.3	*	0.9	0.7	*	*	*	*	*
extra-ec not det.	*	*	*	*	*	0.0	*	2.0	12.8	8.0
OTHERS	0.6	1.3	0.9	1.4	0.9	0.8	0.5	1.3	0.8	1.4

ANNEX II

[192]Submitted by Brazil.

TRQ-licences issued under Regulation 1431/94[193]

			Quantity issued Tonnes		No of licences		Average quantity per licence
			Annual	Quarterly	Annual	Quarterly	Kg.
Group 1	**BRAZIL**	1994	7.100	3.550	322	161	22.050
		1995	7.100	1.775	751	188	9.454
		1996	7.100	1.775	728	182	9.753
		1997	7.100	1.775	1.260	315	5.635
Group 2	**THAILAND**	1994	5.100	2.550	298	149	17.114
		1995	5.100	1.275	750	188	6.800
		1996	5.100	1.275	730	183	6.986
		1997	5.100	1.275	1.256	314	4.061
Group 3	**OTHER**	1994	3.300	1.650	331	166	9.970
		1995	3.300	825	754	189	4.377
		1996	3.300	825	737	184	4.478
		1997	3.300	825	1.204	301	2.741

Note: In 1994, licences only issued in 2 quarters.

[193]Information submitted by the European Communities.