

UNITED STATES – ANTI-DUMPING ACT OF 1916

**AB-2000-5
AB-2000-6**

Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Anti-Dumping Act of 1916

United States, *Appellant/Appellee*

European Communities, *Appellant/Appellee/Third Participant*

Japan, *Appellant/Appellee/Third Participant*

India, *Third Participant*

Mexico, *Third Participant*

AB-2000-5 and AB-2000-6

Present:

Lacarte-Muró, Presiding Member

Ehlermann, Member

Feliciano, Member

I. Introduction

1. The United States, the European Communities and Japan appeal from certain issues of law and legal interpretations in the Panel Reports, *United States – Anti-Dumping Act of 1916*, complaint by the European Communities (the "EC Panel Report")¹ and *United States – Anti-Dumping Act of 1916*, complaint by Japan (the "Japan Panel Report").² These Panel Reports were rendered by two Panels composed of the same three persons.³ The two Panel Reports, while not identical, are alike in all major respects.

2. The Panel was established to consider claims by the European Communities and Japan that Title VIII of the United States Revenue Act of 1916 (the "1916 Act")⁴ is inconsistent with United States' obligations under the covered agreements. The 1916 Act allows, under certain conditions, civil actions and criminal proceedings to be brought against importers who have sold foreign-produced goods in the United States at prices which are "substantially less" than the prices at which the same products are sold in a relevant foreign market.⁵

¹WT/DS136/R, 31 March 2000.

²WT/DS162/R, 29 May 2000.

³As the composition of both Panels was identical, we will refer to the Panels as "the Panel".

⁴Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72.

⁵Relevant factual aspects of the 1916 Act are set out at paras. 2.1 - 2.5 and 2.13 - 2.16 of the EC Panel Report, and at paras. 2.1 - 2.5 and 2.14 - 2.16 of the Japan Panel Report. Relevant portions of the 1916 Act are also reproduced in this Report, *infra*, para. 129.

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

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

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

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

- (i) the 1916 Act violates Article VI:1 and VI:2 of GATT 1994;
- (ii) the 1916 Act violates Articles 1, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4 of the Anti-Dumping Agreement;
- (iii) the 1916 Act violates XVI:4 of the Agreement Establishing the WTO; and
- (iv) as a result, benefits accruing to Japan under the WTO Agreement have been nullified or impaired.⁷

⁶EC Panel Report, para. 7.1.

⁷Japan Panel Report, para. 7.1.

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

7. On 29 May 2000, the United States notified the DSB of its intention to appeal certain issues of law covered in the EC Panel Report and the Japan Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed two Notices of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). In view of the close similarity of the issues raised in the two appeals, it was decided, after consultation with the parties, that a single Division would hear and decide both appeals. On 8 June 2000, the United States filed one appellant's submission for both appeals.⁹ On 13 June 2000, the European Communities and Japan filed a joint other appellants' submission in respect of both appeals.¹⁰ On 23 June 2000, the European Communities and Japan each filed an appellee's/third participant's submission¹¹, and the United States filed an appellee's submission.¹² On the same day, India and Mexico each filed a third participant's submission.¹³

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

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

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

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

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

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

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

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Claims Against the 1916 Act as Such

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

9. The United States argues that the Panel erred in failing to dismiss the claims raised by the European Communities and Japan under Article VI of the GATT 1994 and the *Anti-Dumping Agreement* for lack of jurisdiction. In each dispute, the complaining party invoked the jurisdiction of the Panel pursuant to Article 17 of the *Anti-Dumping Agreement*. However, when Article 17 of the *Anti-Dumping Agreement* is invoked as a basis for a panel's jurisdiction to determine claims made under that Agreement, it is necessary for the complaining party to challenge one of the three types of measure set forth in Article 17.4 of that Agreement, i.e., a definitive anti-dumping duty, a provisional measure or a price undertaking. In the view of the United States, a Member wishing to challenge another Member's anti-dumping law as such must wait until one of the three measures referred to in Article 17.4 is also challenged.

10. The United States considers that this rule is clearly established by the text and context of Article 17.4 of the *Anti-Dumping Agreement*, as well as by the Appellate Body Report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement*").¹⁴ In the present cases, the complainants only challenged the 1916 Act as such, and did not challenge any measure of the type identified in Article 17.4. For this reason alone, according to the United States, the Panel's findings must be vacated for lack of jurisdiction.

11. The United States also contends that the Panel erred in finding that it had jurisdiction to consider claims under Article VI of the GATT 1994. The United States considers that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* form part of an inseparable package of rights and obligations and that, based on the reasoning of the Appellate Body in *Brazil – Measures Affecting Desiccated Coconut*¹⁵, one part of such a package cannot be invoked independently of the other. The United States thus concludes that, since the Panel did not possess jurisdiction to consider the *Anti-Dumping Agreement* claims, and since Article VI cannot be invoked independently of the *Anti-Dumping Agreement*, it follows that the Panel also lacked jurisdiction to consider claims under Article VI of the GATT 1994.

¹⁴Appellate Body Report, WT/DS60/AB/R, adopted 25 November 1998.

¹⁵Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997.

(b) Mandatory and Discretionary Legislation

12. The United States requests the Appellate Body to reverse the Panel's analysis and findings regarding the distinction between mandatory and discretionary legislation. If the Panel found, or the Appellate Body finds, that the 1916 Act is ambiguous, then, the United States submits, the Panel should have asked, and the Appellate Body should ask, whether there is an interpretation of the 1916 Act that would permit the United States to act in conformity with its WTO obligations. Instead, according to the United States, the Panel interpreted and applied the distinction between mandatory and discretionary legislation in a way that has no basis in existing WTO/GATT jurisprudence, erred in treating the distinction as a "defence", and erred in its treatment of United States' municipal law relevant to this issue.

13. As regards the nature of the mandatory and discretionary legislation distinction, the United States considers that the Panel based its approach on a "gross misreading" of the panel report in *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco* ("*United States - Tobacco*").¹⁶ Contrary to the Panel's finding, whether or not a law has been applied in the past does not determine the applicability of the distinction between mandatory and discretionary legislation. The United States also asks the Appellate Body to reject the Panel's finding in the Japan Panel Report that Article 18.4 of the *Anti-Dumping Agreement* renders the distinction between mandatory and discretionary legislation "irrelevant". The cases cited by the Panel, *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan* ("*European Communities - Audio Cassettes*")¹⁷ and *United States - Definition of Industry Concerning Wine and Grape Products* ("*United States - Wine and Grape Products*")¹⁸, do not support such a conclusion. Furthermore, the United States contends, the ordinary meaning and context of Article 18.4 demonstrate that this provision does not modify or otherwise limit the distinction between mandatory and discretionary legislation.

14. The United States also underlines that there is no legal basis for the Panel's finding that the distinction between discretionary and mandatory legislation is a "defence" which the United States bore the burden of proving. The burden of proving that a measure is inconsistent with a WTO provision rests with the complaining party, which must demonstrate that the law in question *mandates* a violation of the relevant provision. Since the European Communities and Japan have not met the burden of proof, properly applied, the United States asks the Appellate Body to reverse the Panel's findings that the 1916 Act violates the provisions at issue in this dispute.

¹⁶Panel Report, adopted 4 October 1994, BISD 41S/131.

¹⁷Panel Report (unadopted), ADP/136, circulated 28 April 1995.

¹⁸Panel Report, adopted 28 April 1992, BISD 39S/436.

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

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

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

17. The United States submits that, with respect to dumping, Article VI of the GATT 1994 simply provides Members with a right to use anti-dumping duties, and then sets forth rules regulating the manner in which Members may exercise this right. Article VI does not attempt to regulate other types of measure that a Member may want to take in order to counteract dumping, as that task is left to other GATT provisions, including Article III:4 of the GATT 1994. The United States considers that the ordinary meaning of the terms used in Article VI – and, in particular, Article VI:2 – as well as the limited role of Article VI within the GATT framework, Articles 1 and 18.1 of the *Anti-Dumping Agreement*, the panel reports in *Japan – Trade in Semi-Conductors* ("*Japan – Semi-Conductors*")¹⁹ and *EEC – Regulation on Imports of Parts and Components* ("*EEC – Parts and Components*")²⁰ and the negotiating history of Article VI, confirm such an interpretation of the scope of Article VI.

18. According to the United States, the word "may" in Article VI:2 of the GATT 1994 confirms that Article VI provides a right that Members would not otherwise have – the right to impose duties – but does not contain any prohibition on the use of other types of measure. Article 1 of the *Anti-Dumping Agreement* means that a Member's actions are governed by Article VI and the *Anti-Dumping Agreement* if a Member is applying one of the specified measures to counteract dumping, i.e., anti-dumping duties, provisional measures or price undertakings. Article 18.1 of the *Anti-Dumping Agreement* and its footnote 24 also make clear that when specific action taken against dumping is in the form of anti-dumping duties, provisional measures or price undertakings, such

¹⁹Panel Report, adopted 4 May 1988, BISD 35S/116.

²⁰Panel Report, adopted 16 May 1990, BISD 37S/132.

action must comply with Article VI, as interpreted by the *Anti-Dumping Agreement*, but that when specific action against dumping takes another form, such action is governed by the provisions of the GATT 1994 *other than* Article VI.

19. The United States claims that the Panel engaged in a flawed analysis of the scope of Article VI and, as a result, erroneously concluded that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to *all* anti-dumping measures. The United States reasons that, when the correct test is applied, it is clear that Article VI does not apply to the 1916 Act. The United States underscores that the 1916 Act does not impose any type of border adjustment, much less duties, on imported products: it is an internal law.

20. The United States adds that the 1916 Act is also not subject to Article VI because it does not specifically target "dumping" within the meaning of Article VI:1. Although one element of a 1916 Act claim is the existence of a price difference between two national markets, the United States argues that this element alone is not sufficient under the 1916 Act. Rather, the United States contends, such a price difference is simply one indicator, or supporting evidence, of the possible existence of the activity which the 1916 Act does target, i.e., predatory pricing by the importer in the United States' market, which consists of sales at predatorily low price levels with the intent to destroy, injure, or prevent the establishment of an American industry or to restrain trade in or monopolize a particular market. According to the United States, the existence of such predatory intent is the primary indicator of the anti-competitive conduct which is targeted by the 1916 Act, as the United States' courts have held.

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

21. The United States observes that the Panel found that the 1916 Act violates various substantive and procedural requirements of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. The United States requests the Appellate Body to reverse these findings as they were all based on the Panel's erroneous view of the scope of Article VI and the *Anti-Dumping Agreement*.

22. The United States reiterates that the Panel found support for its broad view of the scope of Article VI in Article VI:1 even though the actual text of this provision does not address the issue of whether Article VI regulates all actions against dumping, or only the imposition of anti-dumping duties. The United States recalls that, on its interpretation of Article VI:2 of the GATT 1994 and Articles 1 and 18.1 of the *Anti-Dumping Agreement*, a Member may take specific action against dumping – other than the imposition of anti-dumping duties – so long as such action is in accordance with, or consistent with, the provisions of the GATT 1994 other than Article VI. If the Appellate

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

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

1. Claims Against the 1916 Act as Such

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

23. The European Communities requests the Appellate Body to reject the United States' arguments on the issue of jurisdiction on the basis that this ground of appeal is both untimely and unfounded. The United States could have and should have raised this objection before the interim review stage of the panel proceedings in the case brought by the European Communities. Interim review is only intended to allow review of "precise aspects" of the report and not the presentation of new arguments. The European Communities relies in particular on the principle that procedural objections must be raised in a timely manner and in good faith, as confirmed by the Appellate Body in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguards*")²¹ and *United States – Tax Treatment for "Foreign Sales Corporations"* ("*United States – FSC*").²²

24. The European Communities also argues that the jurisdictional arguments of the United States are misconceived since Article 17.4 of the *Anti-Dumping Agreement* only applies to proceedings involving the imposition of the measures identified in that provision and does not generally shelter anti-dumping legislation from scrutiny under the dispute settlement mechanism. Even if it did, the legislation would still have to comply with Article XVI:4 of the *WTO Agreement*, which has also been invoked in this proceeding and is properly before the Appellate Body.

(b) Mandatory and Discretionary Legislation

25. In relation to the issue of the relevance and meaning of the alleged distinction between mandatory and discretionary legislation in WTO law, the European Communities contests that any

²¹Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000.

²²Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000.

such general principle exists and refers the Appellate Body to the report of the panel in *United States – Sections 301-310 of the Trade Act of 1974* ("*United States – Section 301*").²³

26. The European Communities also considers that the existing GATT and WTO case law clearly demonstrates that the alleged distinction between mandatory and discretionary legislation would in any event not protect the 1916 Act from review in dispute settlement proceedings.

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

27. On the central question of the scope of application of Article VI of the GATT 1994, the European Communities supports the view of the Panel that Article VI recognizes the existence of a specific problem in international trade – dumping – and establishes a specific discipline which must be followed by WTO Members in dealing with it. This discipline applies to rules and measures taken thereunder, which, viewed objectively, deal with dumping. The discipline is not limited to rules which provide for the imposition of duties at the frontier.

28. The European Communities bases its interpretation of the scope of Article VI of the GATT 1994 on the text of Article VI itself, as well as on Articles 1 and 18.1 of the *Anti-Dumping Agreement*. In particular, Article VI:1 establishes that Article VI applies to measures which: (i) are targeted at imports; and (ii) provide a remedy against trading practices defined by reference to price discrimination in the form of lower prices in the importing country than those in the country of export. When Article VI:2, on which the United States relies, is read in the context of Article VI:1, it is clear that the word "may" simply means that the imposition of duties is optional, and that the amount of any such duty may not be greater than the margin of dumping. Furthermore, according to the European Communities, Article 18.1 of the *Anti-Dumping Agreement* and footnote 24 make clear that "specific action" against dumping may only be taken in accordance with Article VI, but this does not prevent the application of safeguard measures or countervailing duties (pursuant to and in conformity with Articles XIX and VI of the GATT 1994, respectively) to conduct which may also involve dumping.

29. The European Communities considers that the arguments made by the United States on appeal mischaracterize the Panel's findings, and find no support in the text or context of Article VI, Articles 1 or 18.1 of the *Anti-Dumping Agreement*, or the panel reports in *Japan – Semi-Conductors* or *EEC – Parts and Components*. The European Communities cautions that the arguments of the United States as regards the scope of Article VI of the GATT 1994 would eviscerate the disciplines of Article VI and allow Members easily to circumvent their WTO obligations by modifying their legislation to provide for fines instead of anti-dumping duties.

²³Panel Report, WT/DS152/R, adopted 27 January 2000.

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

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

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

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

1. Claims Against the 1916 Act as Such

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

32. Japan argues that the Panel correctly concluded that it had jurisdiction. According to Japan, nothing in the text of Article 17 of the *Anti-Dumping Agreement* or its context takes away the well-established GATT/WTO right to challenge facially inconsistent legislation. Article 17.4 is a special and additional rule listed in Appendix 2 to the DSU. According to Japan, Article 17.4 is an exception to the general rule contained in Article 17.1 of the *Anti-Dumping Agreement* and, by its terms, Article 17.4 establishes special rules that apply only to challenges of actions taken by anti-dumping authorities.

(b) Mandatory and Discretionary Legislation

33. According to Japan the Panel correctly concluded that, in light of Article 18.4 of the *Anti-Dumping Agreement*, the distinction between mandatory and discretionary legislation is not relevant in this dispute. In any event, Japan contends, the 1916 Act is mandatory in character. When its substantive elements are established, the remedies (fines and/or imprisonment) prescribed by the

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

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

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

35. Japan believes that its interpretation is supported by the plain meaning of Article VI, as well as Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Japan also expresses concern that Members could easily circumvent WTO obligations if a Member could escape Article VI simply by enacting legislation providing for fines and/or imprisonment rather than anti-dumping duties.

36. Japan agrees with the Panel that the 1916 Act falls within the scope of Article VI of the GATT 1994. On its face, the 1916 Act addresses the same type of price discrimination as Article VI. The existence in the 1916 Act of certain additional requirements, which make the imposition of measures to counteract dumping more difficult than required by Article VI, do not make the Act fall outside the scope of Article VI. According to Japan, the historical context, legislative history and United States' case law regarding the 1916 Act all support this conclusion.

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

37. Japan argues that since the Panel correctly determined that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* were applicable to the 1916 Act, its findings and conclusions regarding violations of the GATT 1994 and *Anti-Dumping Agreement* provisions also were correct. In particular, the Panel correctly concluded that anti-dumping duties are the only permissible remedy to counteract dumping. The text of Article VI:2 of the GATT 1994 explicitly and unambiguously establishes that anti-dumping duties are the only authorized remedy for dumping, and Article 18.1 and footnote 24 of the *Anti-Dumping Agreement* confirm this conclusion. Japan adds that this conclusion is further supported by the object and purpose of Article VI:2, as well as by the negotiating history.

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

1. Third Party Rights

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

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

2. Conditional Appeals

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

40. If the Appellate Body finds the United States' arguments on the scope of Article VI of the GATT 1994 admissible and well-founded, then the European Communities and Japan request the Appellate Body to find that the 1916 Act violates Articles III:4 and XI of the GATT 1994. The European Communities and Japan incorporate by reference and to the extent necessary the arguments that they developed before the Panel in this regard.

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

41. Should the Appellate Body find the United States' arguments regarding the Panel's jurisdiction and the "non-mandatory" character of the 1916 Act to be admissible and well-founded, the European Communities and Japan ask the Appellate Body to find that the 1916 Act violates

²⁴Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

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

E. *Arguments by the United States – Appellee*

1. Third Party Rights

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

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

2. Conditional Appeals

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

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

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

45. Should the Appellate Body reach this issue, the United States requests the Appellate Body to affirm the Panel's conclusion that the 1916 Act only violates Article XVI:4 of the *WTO Agreement* to the extent that the 1916 Act violates Article VI of the GATT 1994.

F. *Arguments by India and Mexico - Third Participants*

1. India

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

46. India argues that the Panel correctly assumed jurisdiction in these disputes. The United States' argument amounts to a contention that a Member's anti-dumping law *as such* may not be challenged. If accepted, this position would deprive Article 18.4 of the *Anti-Dumping Agreement* of any meaning or legal effect, and allow a Member to maintain a WTO-incompatible law with impunity as long as none of the measures referred to in Article 17.4 of the *Anti-Dumping Agreement* were adopted. India considers that the Panel correctly held that the Appellate Body ruling in *Guatemala – Cement* applies only if the dispute is related to the initiation and conduct of an anti-dumping investigation, and does *not* exclude review of anti-dumping laws *as such*.

47. India also considers that the reasoning in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*²⁵ is sufficient to dispose of the United States' argument that it is the interpretation by the United States' courts of the 1916 Act that is dispositive of the nature of the Act and whether it is mandatory or discretionary.

(b) Applicability of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* to the 1916 Act

48. India does not accept the United States' contention that the 1916 Act is an anti-trust rather than an anti-dumping law. The 1916 Act clearly addresses transnational price discrimination and targets imported products sold in the United States. This is entirely consonant with the definition of dumping in Article VI of the GATT 1994. India underlines that Article VI applies whether the dumping is limited, sporadic, frequent or systemic. Accordingly, the 1916 Act cannot escape the disciplines of Article VI simply because it requires the prohibited conduct to be "common and systematic". India therefore agrees with the Panel that Article VI establishes that anti-dumping duties are the sole means authorized to deal with dumped imports.

²⁵Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, paras. 65 - 66.

2. Mexico

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

III. Issues Raised in these Appeals

50. The following issues are raised in these appeals:

- (a) Whether the Panel erred in its assessment of the claims against the 1916 Act as such, in particular:
 - (i) in concluding that it had jurisdiction to consider claims that the 1916 Act as such is inconsistent with United States' obligations under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*; and
 - (ii) in its interpretation and application of the distinction between mandatory and discretionary legislation;
- (b) Whether the Panel erred in concluding that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the 1916 Act;
- (c) Whether the Panel erred in concluding:
 - (i) in the EC Panel Report, that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4 and 5.5 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*; and
 - (ii) in the Japan Panel Report, that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*;
- (d) Whether the Panel erred in refusing to grant "enhanced" third party rights to Japan in the case brought by the European Communities, and to the European Communities in the case brought by Japan; and
- (e) If the Appellate Body were to reverse the Panel's findings that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the 1916 Act, whether the

Appellate Body can or should find that the 1916 Act is inconsistent with Articles III:4 and XI of the GATT 1994; and, if the Appellate Body were to reverse the Panel's findings on jurisdiction or on the distinction between mandatory and discretionary legislation, whether the Appellate Body can or should find that the 1916 Act is inconsistent with Article XVI:4 of the *WTO Agreement*.

IV. Claims Against the 1916 Act as Such

A. Jurisdiction of the Panel to Hear Claims Against the 1916 Act as Such

51. With respect to its jurisdiction to examine the claims of the European Communities and Japan, the Panel found that:

... Article 17 of the Anti-Dumping Agreement does not prevent us from reviewing the conformity of laws as such under the Anti-Dumping Agreement. The same applies, *a fortiori*, with respect to Article VI of the GATT 1994. ...²⁶

52. The United States appeals the Panel's finding that it had jurisdiction to consider the claims that the 1916 Act as such is inconsistent with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.

53. In its appellee's submission, the European Communities argues that the United States' appeal relating to the Panel's finding on jurisdiction should be rejected because the United States' objection to the Panel's jurisdiction was both not timely raised before the Panel and not well founded. In the case brought by the European Communities, the United States did not raise this objection to the jurisdiction of the Panel until the stage of interim review. The Panel stated that "there would be a number of reasons to reject the US argument as untimely."²⁷ The European Communities agrees and argues before us that the jurisdictional objection by the United States could have and should have been raised before the interim review stage of the proceedings before the Panel. The European Communities invokes the principle that procedural objections must be made in a timely manner and in good faith and refers in this respect to the Appellate Body Reports in *Korea – Dairy Safeguards*²⁸ and *United States – FSC*.²⁹

²⁶EC Panel Report, para. 5.27. See also Japan Panel Report, para. 6.91.

²⁷EC Panel Report, para. 5.19.

²⁸Appellate Body Report, *supra*, footnote 21, paras. 127 - 131.

²⁹Appellate Body Report, *supra*, footnote 22, para. 166.

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

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

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

³⁰EC Panel Report, para. 5.17. We note that it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it. See, for example, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)* (1933) P.C.I.J. Ser. A/B, No. 52, p. 15; Individual Opinion of President Sir A. McNair, *Anglo-Iranian Oil Co. Case (Preliminary Objection)* (1952) I.C.J. Rep., p. 116; Separate Opinion of Judge Sir H. Lauterpacht in *Case of Certain Norwegian Loans* (1957) I.C.J. Rep., p. 43; and Dissenting Opinion of Judge Sir H. Lauterpacht in the *Interhandel Case (Preliminary Objections)* (1959) I.C.J. Rep., p. 104. See also M.O. Hudson, *The Permanent Court of International Justice 1920-1942* (MacMillan, 1943), pp. 418-419; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 2 (Grotius Publications, 1986), pp. 530, 755-758; S. Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff, 1985), pp. 467-468; L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 438; M. Diez de Velasco Vallejo, *Instituciones de Derecho Internacional Público* (Tecnos, 1997), p. 759. See also the award of the Iran-United States Claims Tribunal in *Marks & Umman v. Iran*, 8 Iran-United States C.T.R., pp. 296-97 (1985) (Award No. 53-458-3); J.J. van Hof, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-U.S. Claims Tribunal* (Kluwer, 1991), pp. 149-150; and Rule 41(2) of the rules applicable to ICSID Arbitration Tribunals: International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

³¹United States' response to questioning at the oral hearing.

56. Since, in the present cases, the European Communities and Japan did not challenge a definitive anti-dumping duty, a price undertaking or a provisional measure, the United States concludes that the Panel did not have jurisdiction to examine the 1916 Act as such. Moreover, the United States contends that if the 1916 Act as such cannot be challenged under the *Anti-Dumping Agreement*, it cannot be challenged under Article VI of the GATT 1994 because Article VI and the *Anti-Dumping Agreement* are an inseparable package of rights and obligations.

57. In examining the legal basis for the Panel's jurisdiction to consider the claims of inconsistency made in respect of the 1916 Act as such, we begin with Article 1.1 of the DSU, which states, in relevant part:

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

For the DSU to apply to claims that the 1916 Act as such is inconsistent with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, a legal basis to bring the claims must be found in the GATT 1994 and the *Anti-Dumping Agreement*, respectively.

58. We note that in the present cases, the European Communities and Japan both brought their claims of inconsistency with Article VI of the GATT 1994 and the *Anti-Dumping Agreement* pursuant to Article XXIII of the GATT 1994 and Article 17 of the *Anti-Dumping Agreement*.³²

59. Articles XXII and XXIII of the GATT 1994 serve as the basis for consultations and dispute settlement under the GATT 1994 and, through incorporation by reference, under most of the other agreements in Annex 1A to the *WTO Agreement*.³³ According to Article XXIII:1(a) of the GATT 1994, a Member can bring a dispute settlement claim against another Member when it considers that a benefit accruing to it under the GATT 1994 is being nullified or impaired, or that the achievement of any objective of the GATT 1994 is being impeded, as a result of the failure of that other Member to carry out its obligations under that Agreement.

60. Prior to the entry into force of the *WTO Agreement*, it was firmly established that Article XXIII:1(a) of the GATT 1947 allowed a Contracting Party to challenge legislation as such,

³²WT/DS/136/2, 12 November 1998; WT/DS162/3, 4 June 1999; and WT/DS162/3/Corr.1, 10 February 2000.

³³We note, however, that, as discussed in our Report in *Guatemala – Cement*, the *Anti-Dumping Agreement* does not incorporate by reference Articles XXII and XXIII of the GATT 1994: Appellate Body Report, *supra*, footnote 14, para. 64 and footnote 43.

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

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

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

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

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

Article XXIII of the GATT 1994 allows a WTO Member to challenge *legislation* as such, Article 17 of the *Anti-Dumping Agreement* is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such *express* exclusion is found in Article 17 or elsewhere in the *Anti-Dumping Agreement*.

63. In considering whether Article 17 contains an *implicit* restriction on challenges to anti-dumping legislation as such, we first note that Article 17.1 states:

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

64. Article 17.1 refers, without qualification, to "the settlement of disputes" under the *Anti-Dumping Agreement*. Article 17.1 does not distinguish between disputes relating to anti-dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. Article 17.1 therefore implies that Members can challenge the consistency of legislation as such with the *Anti-Dumping Agreement* unless this action is excluded by Article 17.

65. Similarly, Article 17.2 of the *Anti-Dumping Agreement* does not distinguish between disputes relating to anti-dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. On the contrary, it refers to consultations with respect to "any matter affecting the operation of this Agreement".

66. Article 17.3 of the *Anti-Dumping Agreement* states, in wording that mirrors Article XXIII of the GATT 1994:

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

67. In our Report in *Guatemala – Cement*, we described Article 17.3 as:

... the equivalent provision in the *Anti-Dumping Agreement* to Articles XXII and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994 ...³⁶

³⁶Appellate Body Report, *supra*, footnote 14, para. 64.

68. Article 17.3 does not explicitly address challenges to legislation as such. As we have seen above, Articles XXII and XXIII allow challenges to be brought under the GATT 1994 against legislation as such. Since Article 17.3 is the "equivalent provision" to Articles XXII and XXIII of the GATT 1994, Article 17.3 provides further support for our view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such, unless such challenges are otherwise excluded.

69. As indicated above, the United States bases its objection to the Panel's jurisdiction on Article 17.4 of the *Anti-Dumping Agreement* and our Report in *Guatemala – Cement*.

70. Article 17.4 of the *Anti-Dumping Agreement* provides:

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

We note that, unlike Articles 17.1 to 17.3, Article 17.4 is a special or additional dispute settlement rule listed in Appendix 2 to the DSU.

71. In *Guatemala – Cement*, Mexico had challenged Guatemala's *initiation* of anti-dumping proceedings, and its *conduct* of the investigation, without identifying any of the measures listed in Article 17.4. We stated that:

... Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. ... (original emphasis)

... We find that in disputes under the *Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations*, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU.³⁷ (emphasis added)

72. Nothing in our Report in *Guatemala – Cement* suggests that Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala's initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction.

73. Important considerations underlie the restriction contained in Article 17.4. In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.³⁸ In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation to cases in which a Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure³⁹, Article 17.4 strikes a balance between these competing considerations.

74. Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such.

75. Moreover, as we have seen above, the GATT and WTO case law firmly establishes that dispute settlement proceedings may be brought based on the alleged inconsistency of a Member's legislation as such with that Member's obligations. We find nothing, and the United States has identified nothing, inherent in the nature of anti-dumping legislation that would rationally distinguish

³⁷Appellate Body Report, *supra*, footnote 14, paras. 79 - 80.

³⁸An unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation.

³⁹Once one of the three types of measure listed in Article 17.4 is identified in the request for establishment of a panel, a Member may challenge the consistency of any preceding action taken by an investigating authority in the course of an anti-dumping investigation.

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

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

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

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

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

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

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

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

81. Article 18.1 contains a prohibition on "specific action against dumping" when such action is not taken in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Specific action against dumping could take a wide variety of forms. If specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, such action will violate Article 18.1.⁴⁰ We find nothing, however, in Article 18.1 or elsewhere in the *Anti-Dumping Agreement*, to suggest that the

⁴⁰See *infra*, paras. 122-126.

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

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

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

B. *Mandatory and Discretionary Legislation*

84. In the proceedings before the Panel, the United States invoked the distinction between mandatory and discretionary legislation⁴¹ to make two types of argument:

... the 1916 Act is non-mandatory legislation within the meaning of the GATT/WTO practice essentially because (i) with respect to both civil and criminal proceedings, US courts have interpreted in the past and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the US Department of Justice has discretion to initiate or not criminal proceedings under the 1916 Act.⁴²

85. With respect to the first of these arguments, the Panel concluded:

The question whether the 1916 Act could be or has been interpreted in a way that would make it fall outside the scope of Article VI is ... simply a question of assessing the current meaning of the law.⁴³

⁴¹While the Panel used the phrase "non-mandatory legislation" to describe legislation that does not mandate a violation of a relevant obligation, we prefer the phrase "discretionary legislation".

⁴²EC Panel Report, para. 6.82. See also Japan Panel Report, para. 6.95.

⁴³EC Panel Report, para. 6.84. See also Japan Panel Report, para. 6.97.

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

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

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

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

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

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

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

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

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

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

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

⁴⁶Panel Report, *supra*, footnote 16.

⁴⁷*Ibid.*, para. 118, referring in footnote to: Panel Report, *United States – Superfund*, *supra*, footnote 34, p. 160; Panel Report, *EEC – Parts and Components*, *supra*, footnote 20, pp. 198-199; Panel Report, *Thailand – Cigarettes*, *supra*, footnote 34, pp. 227-228; Panel Report, *United States – Malt Beverages*, *supra*, footnote 34, pp. 281-282 and 289-290; Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128, p. 152.

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

91. The Panel, however, examined that part of the 1916 Act that provides for criminal prosecutions, and found that the discretion enjoyed by the United States Department of Justice to initiate or not to initiate criminal proceedings does not mean that the 1916 Act is a discretionary law.⁴⁹ In light of the case law developing and applying the distinction between mandatory and discretionary legislation⁵⁰, we believe that the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation, as this term has been understood for purposes of distinguishing between mandatory and discretionary legislation. We, therefore, agree with the Panel's finding on this point.

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

The question whether there could be a possibility to interpret the 1916 Act in the future so that it would fall outside the scope of Article VI would be relevant, according to the *United States – Tobacco* case, only if the 1916 Act had not yet been applied.⁵¹

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

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

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

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

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

in response to the United States' argument that the circumstances of the present cases resemble those in *United States – Tobacco*, the Panel noted that these cases are factually different from *United States – Tobacco*, where no implementing measures had been adopted and the law had never been applied, and reasoned that "[t]hese differences have implications for the burden of proof."⁵² We see no *finding* by the Panel that the distinction between mandatory and discretionary legislation is relevant only if the challenged legislation has never been applied.

94. The United States also takes issue with the Panel's identification and application of the burden of proof, in particular the Panel's statement that:

... the United States, as the party having raised this *defence*, failed to supply convincing evidence that the 1916 Act should be considered as "non-mandatory legislation" within the meaning of GATT 1947/WTO practice.⁵³ (emphasis added)

95. According to the United States, the Panel erred in characterizing the distinction between discretionary and mandatory legislation as a "defence" which the United States bore the burden of proving.

96. In our Reports in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*⁵⁴ and *European Communities – Hormones*⁵⁵, we found that a complaining Member bears the burden of bringing forth sufficient evidence and legal argument to demonstrate that, *prima facie*, another Member's measure is inconsistent with a relevant obligation of that other Member under the covered agreements. Once the complaining Member has done so, the burden shifts to the defending Member to introduce evidence and legal argument sufficient to rebut the *prima facie* case.

97. Our examination of the Panel Reports shows that the Panel correctly articulated⁵⁶ and applied⁵⁷ the burden of proof in the cases before it. The Panel, in its analysis, found that the European Communities and Japan had satisfied their respective burdens of proof by establishing a *prima facie* case that the 1916 Act is, on its face, inconsistent with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. Having so found, the Panel went on to examine the arguments and evidence presented by the United States to rebut this *prima facie* case. One such argument made by

⁵²EC Panel Report, paras. 6.86 - 6.87; Japan Panel Report, paras. 6.100 - 6.101.

⁵³Japan Panel Report, para. 6.192. See also EC Panel Report, para. 6.170.

⁵⁴Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, pp. 14 - 17.

⁵⁵Appellate Body Report, *supra*, footnote 24, para. 109.

⁵⁶EC Panel Report, paras. 6.37 - 6.38; Japan Panel Report, paras. 6.24 - 6.25.

⁵⁷EC Panel Report, paras. 6.86 - 6.90; Japan Panel Report, paras. 6.100 - 6.104.

the United States was that the 1916 Act is discretionary legislation. The Panel found that the United States did not supply persuasive evidence in support of this argument. We are satisfied that, in these cases, the Panel correctly identified and applied the burden of proof.

98. The United States further claims that, in the Japan Panel Report, the Panel wrongly concluded, based on the reasoning of the panel in the unadopted *European Communities – Audio Cassettes* panel report, that:

... to the extent that Article 18.4 requires the conformity of the 1916 Act with the Anti-Dumping Agreement as of the date of entry into force of the WTO Agreement for the United States, *the notion of mandatory/non-mandatory legislation is no longer relevant* in determining whether the Panel can or cannot review the conformity of the 1916 Act with the Anti-Dumping Agreement.⁵⁸ (emphasis added)

99. We note that answering the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement* would have no impact upon the outcome of these appeals, because the 1916 Act is clearly not discretionary legislation, as that term has been understood for purposes of distinguishing between mandatory and discretionary legislation. Therefore, we do not find it necessary to consider, in these cases, whether Article 18.4, or any other provision of the *Anti-Dumping Agreement*, has supplanted or modified the distinction between mandatory and discretionary legislation.⁵⁹ For the same reasons, the Panel did not, in the Japan Panel Report, need to opine on this issue.⁶⁰

100. Lastly, we note that, before the Panel and before us, the United States invoked the distinction between mandatory and discretionary legislation to argue that the 1916 Act cannot be mandatory legislation because United States' courts have interpreted or may interpret the 1916 Act in ways that would make it consistent with the WTO obligations of the United States. As we have seen, in the case law developed under the GATT 1947, the distinction between mandatory and discretionary legislation turns on whether there is relevant discretion vested in the *executive branch* of government. The United States, however, does not rely upon the discretion of the executive branch of the United States' government, but on the interpretation of the 1916 Act by the United States' courts. In our view, this argument does not relate to the distinction between mandatory and discretionary legislation.

⁵⁸Japan Panel Report, para. 6.189.

⁵⁹We note that in a recent case, a panel found that even discretionary legislation may violate certain WTO obligations. See Panel Report, *United States – Section 301, supra*, footnote 23, paras. 7.53 - 7.54.

⁶⁰We note that, in the EC Panel Report, the Panel reached the same results as in the Japan Panel Report without making any finding that the notion of mandatory/discretionary legislation "is no longer relevant".

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

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

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

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

Having interpreted Article VI of the GATT 1994 in accordance with the Vienna Convention, we have reached the conclusion that the rules and disciplines of that article apply to laws that address "dumping" as defined in Article VI:1. Having examined the text of the 1916 Act, we have found that the transnational price discrimination test incorporated in that law falls within the definition of "dumping" of Article VI:1 of the GATT 1994. ...⁶²

The Panel further concluded that:

... the applicability of Article VI to the 1916 Act also implies the applicability of the *Anti-Dumping Agreement* to the 1916 Act.⁶³

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

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

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

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

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

... by which products of one country are introduced into the commerce of another country at less than the normal value of the products ...

106. The second and third sentences of Article VI:1 state:

For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

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

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

Article 2 of the *Anti-Dumping Agreement* further elaborates the definition of "dumping" in Article VI:1 by setting out detailed rules for the determination of dumping.

107. We note that, under Article VI:1 of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*, neither the intent of the persons engaging in "dumping" nor the injurious effects that "dumping" may have on a Member's domestic industry are constituent elements of "dumping".

108. With regard to "dumping", Article VI of the GATT 1994 states, in relevant part:

1. The Members recognize that dumping ... is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry. ...

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

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

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

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

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

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

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

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

It is desirable that the imposition [of an anti-dumping duty] be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

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

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

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

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

119. The first sentence of Article 1 states that "an anti-dumping measure" must be consistent with Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*. However, as the United States concedes, the meaning of an "anti-dumping measure" in this sentence is "not immediately clear".⁶⁴ The United States argues, on the basis of the history of this provision, that the phrase "anti-dumping measure" refers *only* to definitive anti-dumping duties, price undertakings and provisional measures. However, the ordinary meaning of the phrase "an anti-dumping measure"

⁶⁴United States' appellant's submission, para. 85.

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

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

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

No *specific action against dumping* of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. (emphasis added)

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

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

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

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

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

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

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

125. We recall that footnote 24 to Article 18.1 refers to "*other* relevant provisions of GATT 1994" (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the "provisions of GATT 1994" referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.

126. We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any "specific action against dumping" be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any "specific action against dumping" of exports, i.e., action that is taken in response to situations presenting the constituent elements of "dumping".

127. We now turn to the question whether the 1916 Act provides for "specific action against dumping" of exports from another Member and, thus, falls within the scope of application of Article VI of the GATT 1994.

128. As mentioned above, the United States contends that the 1916 Act does not fall within the scope of application of Article VI of the GATT 1994 because it does not "specifically target" dumping. According to the United States, the activity targeted by the 1916 Act is "predatory pricing; that is, sales at predatorily low price levels with the intent to destroy, injure, or prevent the establishment of an American industry, or to restrain trade in or monopolize a particular market."⁶⁷ Although one element of liability under the 1916 Act is the existence of price differences between national markets, this element is, according to the United States, "simply one indicia of whether the U.S. importers pricing practices are predatory in nature."⁶⁸

⁶⁷United States' appellant's submission, para. 133.

⁶⁸*Ibid.*

129. The 1916 Act states in relevant part:

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

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

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.⁶⁹

130. On the basis of the wording of the 1916 Act, it is clear that the 1916 Act provides for civil and criminal proceedings and penalties when persons import products from another country into the territory of the United States, and sell or offer such products for sale at a price less than the price for which the like products are sold or offered for sale in the country of export or, in certain cases, a third country market. In other words, in the light of the definition of "dumping" set out in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the *Anti-Dumping Agreement*, the civil and criminal proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of "dumping". The constituent elements of "dumping" are built into the essential elements of civil and criminal liability under the 1916 Act. The wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of "dumping". It follows that the civil and criminal proceedings and penalties provided for in the

⁶⁹*Supra*, footnote 4.

1916 Act are "specific action against dumping". We find, therefore, that Article VI of the GATT 1994 applies to the 1916 Act.

131. We note that the United States places much emphasis on the "intent" requirement of the 1916 Act, i.e., the stipulation that dumping is "unlawful" when it is:

... done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such Articles in the United States.⁷⁰

132. This requirement of intent to destroy, injure, or prevent the establishment of an American industry, or to restrain or monopolize any part of trade, does not affect the applicability of Article VI of the GATT 1994 to the 1916 Act. As already noted, action may be taken under the 1916 Act only when the constituent elements of dumping are present. The fact that an importer can only be found to have violated the 1916 Act when the sales of dumped products in the United States were carried out with a certain intent does not mean that the actions under the 1916 Act are not "specific action against dumping". Proof of a requisite intent under the 1916 Act only constitutes an additional requirement for the imposition of the civil and criminal penalties set out in that Act. Even if the 1916 Act allowed the imposition of penalties *only* if the intent proven were an intent to monopolize or an intent to restrain trade (i.e., an "antitrust"-type intent), this would not transform the 1916 Act into a statute which does not provide for "specific action against dumping", and, thus, would not remove the 1916 Act from the scope of application of Article VI.

133. For all these reasons, we agree with the Panel's conclusion that Article VI of the GATT 1994 applies to the 1916 Act. We also agree with the Panel that, having regard to the relationship between Article VI and the *Anti-Dumping Agreement*, "the applicability of Article VI to the 1916 Act also implies the applicability of the *Anti-Dumping Agreement*" to the 1916 Act.⁷¹

⁷⁰*Supra*, footnote 4.

⁷¹EC Panel Report, para. 6.165. See also Japan Panel Report, para. 6.184. We note that the Panel frequently referred to the concept of "transnational price discrimination". It should be stressed that "transnational price discrimination", i.e., a difference in price between two markets, is a broader concept than "dumping" as defined in Article VI:1 of the GATT 1994. Unlike transnational discrimination, "dumping" requires *importation*, and a lower price in the *import market* than in the export market or relevant third country market. Dumping is always transnational price discrimination, but transnational price discrimination is not always dumping. We are, therefore, of the opinion that the Panel's use of the term "transnational price discrimination" in its findings is problematic, and deserves specific mention.

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

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

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

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

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

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

... by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994.⁷²

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

VII. Third Party Rights

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

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

141. Article 10.2 of the DSU states:

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

142. Article 10.3 of the DSU states:

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

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

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

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

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

146. Article 12.1 of the DSU states:

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

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

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

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

... We conclude from the reports in the *EC – Hormones* cases that enhanced third party rights were granted primarily because of the specific circumstances in those cases.

We find that no similar circumstances exist in the present matter, which does *not* involve the *consideration of complex facts or scientific evidence*. Moreover, *none* of the parties requested that the panels *harmonise their timetables or hold concurrent deliberations* in the two procedures (WT/DS136 and WT/DS162). In fact, the European Communities was not in favour of delaying the proceedings in WT/DS136 and the United States objected to concurrent deliberations. ... (emphasis added)⁷³

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

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

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

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

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

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

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

... we are entitled to exercise judicial economy and decide not to review the claims of [the European Communities and] Japan under Article III:4 of the GATT 1994.⁷⁵

...

... we are entitled to exercise judicial economy and decide not to review the claims of Japan under Article XI.⁷⁶

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

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

In the Japan Panel Report the Panel found:

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

153. In their joint other appellant's submission, the European Communities and Japan ask us to rule that the 1916 Act is inconsistent with United States' obligations under Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the *WTO Agreement*. With respect to Articles III:4 and XI of the GATT 1994, their requests are conditioned on our reversal of the Panel's findings that the 1916 Act falls within the scope of Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. With respect to Article XVI:4 of the *WTO Agreement*, their requests are conditioned on our reversal of the Panel's findings with respect to jurisdiction and the distinction between mandatory and discretionary legislation. Since, however, the conditions on which these requests are predicated have not been fulfilled, there is no need for us to examine the conditional appeals of the European Communities and Japan.

⁷⁵Japan Panel Report, para. 6.272. See also EC Panel Report, para. 6.220.

⁷⁶Japan Panel Report, para. 6.281.

⁷⁷EC Panel Report, para. 6.225.

⁷⁸Japan Panel Report, para. 6.288.

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

IX. Findings and Conclusions

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

- (a) upholds the Panel's conclusion that it had jurisdiction to consider claims that the 1916 Act as such is inconsistent with United States' obligations under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*;
- (b) upholds, to the extent it found it necessary to consider the issue, the Panel's interpretation and application of the distinction between mandatory and discretionary legislation;
- (c) upholds the Panel's findings that Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the 1916 Act;
- (d) upholds the Panel's findings in the EC Panel Report that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4 and 5.5 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*;
- (e) upholds the Panel's findings in the Japan Panel Report that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 4.1, 5.1, 5.2, 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*;
- (f) upholds the Panel's refusal to grant "enhanced" third party rights to Japan in the case brought by the European Communities, and to the European Communities in the case brought by Japan; and
- (g) declines to rule on the conditional appeals of the European Communities and Japan relating to Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the *WTO Agreement*.

156. The Appellate Body *recommends* that the DSB request the United States to bring the 1916 Act into conformity with its obligations under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.

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

Julio Lacarte-Muró
Presiding Member

Claus-Dieter Ehlermann
Member

Florentino Feliciano
Member