

**Appellate Body**

**BRAZIL - MEASURES AFFECTING DESICCATED COCONUT**

**AB-1996-4**

*Report of the Appellate Body*

WORLD TRADE ORGANIZATION  
APPELLATE BODY

<i>Brazil - Measures Affecting Desiccated Coconut</i>	AB-1996-4
Philippines, Appellant/Appellee Brazil, Appellant/Appellee	Present:
European Communities, Third Participant United States, Third Participant	El-Naggar, Presiding Member Ehlermann, Member Lacarte-Muró, Member

**I. Introduction**

The Philippines and Brazil appeal from certain issues of law and legal interpretations in the Panel Report, *Brazil - Measures Affecting Desiccated Coconut*<sup>1</sup> (the "Panel Report"). That Panel was established to consider a complaint by the Philippines against Brazil relating to the countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines pursuant to Interministerial Ordinance No. 11 (the "Ordinance") on 18 August 1995.

The application for initiation of the countervailing duty investigation was filed with the Brazilian authorities on 17 January 1994. The investigation was initiated on 21 June 1994, provisional countervailing duties were imposed on 23 March 1995, and definitive countervailing duties were imposed on 18 August 1995. The *Marrakesh Agreement Establishing the World Trade Organization*<sup>2</sup> (the "WTO Agreement") entered into force for both parties to this dispute, Brazil and the Philippines, on 1 January 1995, that is, after the application for, and the initiation of, the investigation and prior to the imposition of the provisional and definitive countervailing duties.

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<sup>1</sup>WT/DS22/R, 17 October 1996.

<sup>2</sup>Done at Marrakesh, Morocco, 15 April 1994.

The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 17 October 1996. It contains the following conclusions:

- a. Article VI of GATT 1994 does not constitute applicable law for the purposes of this dispute. As a result, the substance of the Philippines' claims under that Article, and of its claims under Articles I and II of GATT 1994 which derive from their claims of inconsistency with Article VI of GATT 1994, cannot be considered by this Panel.
- b. The Agreement on Agriculture does not constitute applicable law for the purposes of this dispute. As a result, the substance of the Philippines' claims under that Agreement cannot be considered by this Panel.
- c. The Philippines' claim regarding Brazil's failure to consult is not within the terms of reference of this Panel and therefore its substance cannot be considered.<sup>3</sup>

The Panel made the following recommendation:

The Panel, having concluded that the substance of the Philippines' claims are not properly before it, recommends that the Dispute Settlement Body make such a ruling.<sup>4</sup>

On 16 December 1996, the Philippines notified the Dispute Settlement Body<sup>5</sup> (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

On 9 January 1997, the Philippines filed an appellant's submission.<sup>6</sup> On 14 January 1997, Brazil filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. On 24 January

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<sup>3</sup>Panel Report, para. 294.

<sup>4</sup>Panel Report, para. 295.

<sup>5</sup>WT/DS22/8, 18 December 1996.

<sup>6</sup>Pursuant to Rule 21(1) of the *Working Procedures*.

1997, Brazil filed an appellee's submission pursuant to Rule 22 of the *Working Procedures* and the Philippines filed an appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. That same day, the European Communities and the United States submitted third participants' submissions pursuant to Rule 24 of the *Working Procedures*.

The oral hearing provided for in Rule 27 of the *Working Procedures* was held on 30 January 1997. The participants and third participants presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

## **II. Arguments of Participants and Third Participants**

### **A. *The Philippines***

The Philippines appeals from certain of the Panel's legal findings and conclusions, as well as from certain legal interpretations developed by the Panel. The Philippines submits that the Panel erred in concluding that Article VI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") cannot be independently applied in transitional situations where the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") is not applicable pursuant to Article 32.3 of the *SCM Agreement*, and that the inapplicability of Article VI of the GATT 1994 renders Articles I and II of the GATT 1994 inapplicable. In the Philippines' view, the Panel erroneously treated the Philippines' reliance on Articles I and II of the GATT 1994 as one that "derive[s] from" the Philippines' invocation of Article VI of the GATT 1994.

According to the Philippines, the Panel's analysis is flawed by its failure to address this dispute in accordance with the proper relationship between Articles I, II and VI of the GATT 1994 and Article 32.3 of the *SCM Agreement*. The Panel erred in starting and focusing its analysis on Article 32.3 of the *SCM Agreement*, which the Philippines did not invoke. The Panel should have first evaluated whether the disputed measure is inconsistent with Articles I and II of the GATT 1994, and if it was found to be inconsistent, then the Panel should have examined whether the measure could be justified under Article VI of the GATT 1994. Moreover, because Brazil's defence is predicated on an exception (Article 32.3 of the *SCM Agreement*) to yet another exception (Article VI of the GATT 1994) to the general rule (Articles I and II of the GATT 1994), the Panel should have interpreted Article 32.3 of the *SCM Agreement* narrowly.

The Philippines argues that, when the *WTO Agreement* entered into force for both Brazil and the Philippines on 1 January 1995, the Philippines became entitled to invoke its rights under Articles I and II of the GATT 1994, and its rights arising under Article VI of the GATT 1994, in regard to any countervailing measure imposed against the Philippines by any WTO Member, including Brazil, after the *WTO Agreement's* entry into force. Article 32.3 of the *SCM Agreement*, at most, precludes the application of the *SCM Agreement* to WTO-era measures applied for before the entry into force of the *WTO Agreement* due to the differences between the *SCM Agreement* and the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the "*Tokyo Round SCM Code*"), but such a transitional rule does not affect the applicability of Articles I, II and VI of the GATT 1994, whose texts are exactly identical to their counterpart provisions in the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947").

The Philippines asserts that international law principles as codified in the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")<sup>7</sup> ensure the non-retroactive application of treaties. Article 28 of the *Vienna Convention* insulates an act that took place before the new treaty's entry into force from the obligations of that treaty. As the substance and conclusion of the investigation leading to the imposition by Brazil of the countervailing measure at issue in this dispute occurred after the entry into force of the *WTO Agreement*, Articles I, II and VI of the GATT 1994 constitute the law applicable to the measure in dispute, and such applicability does not involve retroactivity. The Philippines challenges the Panel's finding that the application of Article VI of the GATT 1994 to the countervailing duty measure in dispute leads to a "manifestly absurd or unreasonable" result. In the Philippines' view, application of Article VI of the GATT 1994 to a definitive countervailing duty is no less fair than applying WTO norms to other pre-WTO measures, such as occurred in *United States - Standards for Reformulated and Conventional Gasoline*<sup>8</sup> ("*United States - Gasoline*").

In the Philippines' view, the Panel improperly disregarded the Philippines' argument that the transitional decisions<sup>9</sup> recognize the right of WTO Members to invoke WTO norms even in situations

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<sup>7</sup>23 May 1969, 1155 *U.N.T.S.* 331; 8 *International Legal Materials* 679.

<sup>8</sup>WT/DS2/9, adopted 20 May 1996.

<sup>9</sup>By "transitional decisions", we refer to the Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement, PC/12-L/7583, 13 December 1994; the Decision on Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization (the "Decision on Transitional Co-existence of the Tokyo Round SCM Code and the WTO Agreement"), SCM/186, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the "Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code"), SCM/187, 16 December 1994.

involving elements that occurred prior to the entry into force of the *WTO Agreement*. The Decision on Transitional Co-Existence of the Tokyo Round SCM Code and the WTO Agreement expressly recognizes the availability of WTO dispute resolution not only as an option, but as an immediate pre-emptive choice in matters also covered by the *Tokyo Round SCM Code*. The Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code is permissive, expressly recognizing the right of a signatory to the *Tokyo Round SCM Code*, that is also a WTO Member, to choose under which regime it will vindicate its rights. The Philippines contends that it has the procedural right to resort to the *DSU* to enforce its substantive WTO rights.

While Article 28 of the *Vienna Convention* recognizes that its limitations on non-retroactivity may be qualified where "a different intention appears from the treaty or is otherwise established", the Philippines argues that no such intention is indisputably established by Article 32.3 of the *SCM Agreement* and the other provisions upon which the Panel relied. It was wrong for the Panel Report to vary the plain meaning of the term, "this Agreement", in Article 32.3 of the *SCM Agreement* so as to refer also to the GATT 1994.

In the Philippines' view, the context of Article 32.3 of the *SCM Agreement* does not warrant inferring a reference to Article VI of the GATT 1994. Article 32.1 of the *SCM Agreement* confirms that the reference in Article 32.3 of the *SCM Agreement* to "this Agreement" means only the *SCM Agreement*. The omission in the *SCM Agreement* of note 2 to the preamble of the *Tokyo Round SCM Code* does not support, and in fact undercuts, the Panel's non-separability finding. The presence of cross-references from Articles 10 and 32.1 of the *SCM Agreement* to Article VI of the GATT 1994 does not make Article VI of the GATT 1994 so inseparable from the *SCM Agreement* as to negate the rights of WTO Members to invoke Article VI of the GATT 1994 independently. Such a right to choose existed under the pre-WTO regime despite similar cross-references in the *Tokyo Round SCM Code* to Article VI of the GATT 1947. Furthermore, it was improper for the Panel to support its non-separability finding with the broad argument that Article 7.1 of the *DSU* fosters an "integrated" dispute settlement framework that "allows a panel to interpret provisions of covered agreements in the light of the WTO Agreement as a whole".<sup>10</sup>

According to the Philippines, the object and purpose of Article 32.3 of the *SCM Agreement* and the *WTO Agreement* also do not warrant interpreting the phrase "this Agreement" in Article 32.3 of the *SCM Agreement* to include Article VI of the GATT 1994.

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<sup>10</sup>Panel Report, para. 242.

In the Philippines' view, the panel report in *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*<sup>11</sup> ("*United States - Pork*") offers persuasive guidance on the separate applicability of Article VI of the GATT 1994. The panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*<sup>12</sup> ("*EEC - Oilseeds*") in effect addressed the separability issue and resolved it in favour of applying GATT 1947 separately from the *Tokyo Round SCM Code*. In addition, the Panel Report failed to give due weight to the *United States - Gasoline* case as evidence that a complaining WTO Member is not required to invoke all agreements that are potentially relevant to a dispute.

In the view of the Philippines, the unavailability of the *SCM Agreement's* definitions, or the possibility of interpretations inconsistent therewith, when Article VI of the GATT 1994 is interpreted independently, do not negate the right of WTO Members to invoke Article VI of the GATT 1994 independently in transitional situations where the *SCM Agreement* is inapplicable. In addition, when independently applied, Article VI of the GATT 1994 can be properly interpreted in light of practice under Article VI of the GATT 1947 that antedated, and/or was not dependent on, the *Tokyo Round SCM Code*.

The Philippines further argues that it was not the intent of the original WTO Members to allow prospective new WTO Members to use applications for investigations filed prior to their accession to the *WTO Agreement* as a basis for insulating from the GATT 1994 any countervailing measures that such prospective WTO Members may impose after their admission into the WTO. In addition, the Panel's ruling could leave some WTO Members without any remedy for at least five years, until such time as the "sunset" review provision in Article 21.3 of the *SCM Agreement* becomes effective.

If the Appellate Body reverses the Panel's conclusions that Articles I, II and VI of the GATT 1994 are inapplicable to this dispute, the Philippines requests that the Appellate Body adopt a procedure for this appeal under Rule 16(1) of the *Working Procedures* for the resolution of the substantive merits of the Philippines' claims. The Philippines incorporates its arguments made before the Panel and submits that the subsidy and injury determinations of the Ordinance, and the countervailing measure based thereon, are inconsistent with Articles I and II of the GATT 1994, and not justified by Articles VI:3 and VI:6(a) of the GATT 1994.

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<sup>11</sup>BISD 38S/30, adopted 11 July 1991.

<sup>12</sup>BISD 37S/86, adopted 25 January 1990.

With respect to the point of appeal raised in Brazil's appellant's submission, the Philippines argues that Brazil did not ask the Panel to refrain from considering whether or not Articles I and II of the GATT 1994 are applicable to this dispute. On the contrary, Brazil requested the Panel to consider the issue of the applicability or inapplicability of the GATT 1994. In any event, Articles I and II of the GATT 1994 are covered by the terms of reference because they are "relevant provisions" within the agreement "cited" by the Philippines.

B. *Brazil*

Brazil generally agrees with the Panel's findings and conclusions concerning the law applicable to this dispute, but nevertheless appeals on one issue. Brazil claims that the issue of the applicability of Articles I and II of the GATT 1994 was not within the terms of reference of the Panel in this dispute and should not have been addressed by the Panel.

With respect to the points of appeal raised in the Philippines' appellant's submission, Brazil considers it appropriate, and in accordance with principles of international law, that the Panel first determined whether it had jurisdiction to consider the dispute before considering the substantive merits of the Philippines' claims. The question of whether the *WTO Agreement* applies to the substance of the dispute is not merely a "defence" as claimed by the Philippines, but a fundamental jurisdictional issue. While Brazil does not contest that the Philippines has the procedural right to resort to the *DSU* to enforce its substantive WTO rights, Brazil asserts that the Panel properly found that this dispute did not involve any substantive WTO rights. The Panel's conclusion that it did not have jurisdiction is correct, and the *Tokyo Round SCM Code* constitutes the law applicable to this dispute.

In Brazil's view, the Panel properly applied the customary rules of interpretation of public international law as set out in Articles 31 and 32 of the *Vienna Convention* to conclude that the *WTO Agreement* did not apply to this dispute. The plain language of Article 32.3 of the *SCM Agreement* prohibits the application of at least the *SCM Agreement* to this dispute, and the context of the *WTO Agreement* indicates that Article 32.3 of the *SCM Agreement* prevents the application of any portion of the *WTO Agreement* to this dispute. There are numerous indicia that the *WTO Agreement* and its Multilateral Trade Agreements were intended to apply as a whole. Article II:2 of the *WTO Agreement* states that the agreements and associated legal instruments included in Annexes 1, 2 and 3 -- encompassing both the GATT 1994 and the *SCM Agreement* -- are "integral parts" of the Agreement.

There is a unified dispute settlement mechanism that applies to disputes raised under the *WTO Agreement*, the GATT 1994 and the other covered agreements. The general interpretative note to Annex 1A of the *WTO Agreement* indicates that the GATT 1994 and the other agreements are to be considered together. Article 10 of the *SCM Agreement* indicates that countervailing duties may only be imposed in accordance with the provisions of Article VI of the GATT 1994 and the terms of the *SCM Agreement*. As the Panel noted, several of the provisions of the *SCM Agreement* seek to interpret or provide guidance on terms used in Article VI. As the Panel further observed, applying Article VI of the GATT 1994 separately from Article VI of the GATT 1994 and the *SCM Agreement* could lead to differing interpretations of the benefits and obligations conferred by Article VI of the GATT 1994 as between the same Members.

In Brazil's view, *United States - Gasoline* does not support the application of Article VI of the GATT 1994 without reference to the *SCM Agreement*. The *Agreement on Technical Barriers to Trade*, invoked in *United States - Gasoline*, does not purport to interpret any articles of GATT 1994, nor does it contain any language similar to that of Article 10 of the *SCM Agreement* linking it to specific articles of the GATT 1994.

Brazil asserts that the Panel's consideration of the Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code was consistent with the reference to a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*. To the extent that "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention* has developed, it supports the Panel's conclusion that Article VI of the GATT 1994 does not apply to this dispute. Brazil further asserts that Article 28 of the *Vienna Convention*, as a "relevant rule of international law applicable in the relations between the parties" referred to in Article 31(3)(c) of the *Vienna Convention*, supports the Panel's conclusions on the law applicable to this dispute.

Brazil contends that the panel reports in *United States - Pork* and *EEC - Oilseeds*, invoked by the Philippines, provide no guidance for this dispute. As the issue of applicable law was never raised in *United States - Pork*, it therefore gives no indication of past practice on this issue. Moreover, because the structure of the various agreements in this case differs from the structure of the agreements in *EEC - Oilseeds*, that panel report provides no guidance on the interpretation of the *WTO Agreement*.

Should the Appellate Body find that the *WTO Agreement* applies, Brazil argues that it is not appropriate for the Appellate Body to rule on the substantive issues in this dispute. The Appellate

Body's authority is limited by paragraphs 6 and 13 of Article 17 of the *DSU*. Brazil further argues that *United States - Gasoline* does not support the examination by the Appellate Body of these issues. If, however, the Appellate Body considers it appropriate to address the substantive issues, Brazil incorporates by reference all its submissions, both oral and written, to the Panel concerning those issues. If the Appellate Body decides that Article VI of the GATT 1994 applies, it must be interpreted on its own without reference to the *Tokyo Round SCM Code* or the *SCM Agreement*.

C. *European Communities*

The European Communities supports the legal findings and conclusions of the Panel. The European Communities asserts that the Panel correctly concluded that Article VI of the GATT 1994 is inapplicable to the measure in dispute and that the inapplicability of Article VI of the GATT 1994 also renders Articles I and II of the GATT 1994 inapplicable.

In the European Communities' view, the Panel's findings are in conformity with the principles of customary international law regarding the temporal application of treaty obligations, contained in Article 28 of the *Vienna Convention*, which apply "[u]nless a different intention appears from the treaty or is otherwise established". The Panel correctly considered the text of the relevant provisions in the light of their context, and of the object and purpose of the *WTO Agreement*, to reach its legal conclusion that Article VI of the GATT 1994 cannot be applied independently. It was, therefore, no longer necessary for the Panel to resort to the subsidiary rule contained in Article 28 of the *Vienna Convention*. In any case, the application of this subsidiary rule would also lead to the conclusion that Article VI of the GATT 1994 does not apply in the present dispute.

According to the European Communities, the *United States - Pork* and *EEC - Oilseeds* panel reports invoked by the Philippines are not relevant to this dispute, as the relationship of the GATT 1947 to the *Tokyo Round SCM Code* is different from the relationship of the *SCM Agreement* to the GATT 1994. The transitional decisions do not support the independent application of Article VI of the GATT 1994. Moreover, the independent application of Article III:4 of the GATT 1994 in *United States - Gasoline* does not support the independent application of Article VI of the GATT 1994, as the relationship between Article III of the GATT 1994 and the *Agreement on Technical Barriers to Trade* is different from the relationship between Article VI of the GATT 1994 and the *SCM Agreement*.

D. *United States*

The United States disagrees with certain of the legal findings and conclusions of the Panel, and requests that the Appellate Body take into consideration its arguments before the Panel as described in paragraphs 211-224 of the Panel Report. The United States asserts that Article VI of the GATT 1994 is applicable to Brazil's countervailing duty measure and that, as of 1 January 1995, Brazil was bound to levy countervailing duties consistently with the provisions of the GATT 1994. If the Appellate Body considers the substantive merits of this dispute, it must do so under Article VI of the GATT 1994 alone, without reference to the *Tokyo Round SCM Code*. The United States submits that the panel report in *EEC - Oilseeds* is instructive in this regard.

**III. Issues Raised in this Appeal**

The Philippines appeals from two legal findings and conclusions of the Panel. First, the Philippines submits that the Panel erred in concluding that Article VI of the GATT 1994 cannot be applied independently in transitional situations where the *SCM Agreement* is not applicable pursuant to Article 32.3 of the *SCM Agreement*. Second, the Philippines claims that the Panel erred in finding that the inapplicability of Article VI of the GATT 1994 also renders Articles I and II of the GATT 1994 inapplicable. Brazil appeals from the Panel's legal findings and conclusions concerning Articles I and II of the GATT 1994. Brazil argues that the issue of the consistency of Brazil's countervailing duty measure with its obligations under Articles I and II of the GATT 1994 was not within the terms of reference of the Panel.

On the basis of the written submissions and oral statements made by the participants and third participants, this appeal raises the following issues:

1. Whether Article VI of the GATT 1994 applies, independently of the *SCM Agreement*, to a countervailing duty measure imposed as a result of an investigation initiated pursuant to an application made before the entry into force of the *WTO Agreement*;
2. Whether a finding with respect to the applicability of Article VI of the GATT 1994 determines the applicability of Articles I and II of the GATT 1994; and

3. Whether the Philippines' claims under Articles I and II of the GATT 1994 were within the terms of reference of the Panel.

#### **IV. Applicability of Article VI of the GATT 1994**

##### *A. Background*

This appeal deals with a countervailing duty investigation which was initiated pursuant to an application filed with the Brazilian authorities on 17 January 1994. The investigation was initiated on 21 June 1994, provisional countervailing duties were imposed on 23 March 1995, and definitive countervailing duties were imposed on imports of desiccated coconut from the Philippines on 18 August 1995. The *WTO Agreement* entered into force for both parties to this dispute, Brazil and the Philippines, on 1 January 1995.

With respect to the measure at issue in this appeal, we see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary determination and a final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports.

##### *B. WTO Agreement: An Integrated System*

The *WTO Agreement* is fundamentally different from the GATT system which preceded it. The previous system was made up of several agreements, understandings and legal instruments, the most significant of which were the GATT 1947 and the nine Tokyo Round Agreements, including the *Tokyo Round SCM Code*. Each of these major agreements was a treaty with different membership, an independent governing body and a separate dispute settlement mechanism.<sup>13</sup> The GATT 1947 was

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<sup>13</sup>*Agreement on Technical Barriers to Trade*, BISD 26S/8; *Agreement on Implementation of Article VII of the GATT - Protocol to the Agreement on Implementation of Article VII of the GATT*, BISD 26S/116, 151; *Agreement on Implementation of Article VI of the GATT* (the "Tokyo Round Anti-dumping Code"), BISD 26S/171; *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the "Tokyo Round SCM Code"), BISD 26S/56; *Agreement on Import Licensing Procedures*, BISD 26S/154; *Agreement on Government Procurement*, BISD 26S/33; *Agreement on Trade in Civil Aircraft*, BISD 26S/162; *Arrangement Regarding Bovine Meat*, BISD 26S/84; and *International Dairy Arrangement*, BISD 26S/91. The *Agreement on Import Licensing Procedures* and the *Agreement on Trade in Civil Aircraft* made reference to Articles XXII and XXIII of the GATT 1947 for dispute settlement. The *Arrangement Regarding Bovine Meat* and the *International Dairy Arrangement* did not explicitly provide for dispute settlement.

administered by the CONTRACTING PARTIES, whereas the *Tokyo Round SCM Code* was administered by the Tokyo Round Committee on Subsidies and Countervailing Duty Measures comprised of the signatories to that *Code*.<sup>14</sup> With respect to disputes brought under Article XXIII of the GATT 1947, the CONTRACTING PARTIES were responsible for dispute settlement, including establishment of panels, adoption of panel reports, surveillance of implementation of rulings and recommendations, and authorization of suspension of concessions or other obligations. The Tokyo Round Committee on Subsidies and Countervailing Measures was responsible for administering and monitoring dispute settlement under Articles 12, 13, 17 and 18 of the *Tokyo Round SCM Code*.

As a result of the separate legal identity of the GATT 1947 and the *Tokyo Round SCM Code*, a complaining party either had to bring a dispute under Article VI of the GATT 1947, in which case it would invoke the dispute settlement provisions of Article XXIII of the GATT 1947, or alternatively, under the provisions of the *Tokyo Round SCM Code*, in which case it would commence consultations under that *Code*. Most disputes involving countervailing duty measures between 1979 and 1994 were brought under the *Tokyo Round SCM Code*.<sup>15</sup> In the *United States - Pork* case, notwithstanding that both Canada and the United States were signatories to the *Tokyo Round SCM Code*, Canada chose to bring the matter under the dispute settlement provisions of Article XXIII of the GATT 1947, relying solely on its claims under Article VI of the GATT 1947.

Unlike the previous GATT system, the *WTO Agreement* is a single treaty instrument which was accepted by the WTO Members as a "single undertaking". Article II:2 of the *WTO Agreement* provides that the Multilateral Trade Agreements in Annexes 1, 2 and 3 are "integral parts" of the *WTO Agreement*, binding on all Members. Annex 1A contains thirteen multilateral agreements relating to trade in goods, including the GATT 1994 which was incorporated by reference into that Annex. A general interpretative note was included in Annex 1A in order to clarify the legal relationship of the GATT 1994 with the other agreements in Annex 1A. It provides that in the event of a conflict between

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<sup>14</sup>By the end of 1994, the GATT 1947 had 128 contracting parties, whereas the *Tokyo Round SCM Code* had 24 signatories.

<sup>15</sup>*Canadian Countervailing Duties on Grain Corn from the United States*, BISD 39S/411, adopted 26 March 1992; *United States - Definition of Industry Concerning Wine and Grape Products*, BISD 39S/436, adopted 28 April 1992; *United States - Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, adopted 27 October 1993; *Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*, SCM/179, adopted 28 April 1994; *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway*, SCM/153, adopted 28 April 1994; *United States - Countervailing Duties on Non-Rubber Footwear from Brazil*, SCM/94, adopted 13 June 1995; *EEC - Subsidies on Exports of Wheat Flour*, SCM/42, 21 March 1983, unadopted; *EEC - Subsidies on Exports of Pasta Products*, SCM/43, 19 May 1983, unadopted; *Canada - Imposition of Countervailing Duties on Imports of Boneless Manufacturing Beef from the EEC*, SCM/85, 13 October 1987, unadopted; *German Exchange Rate Scheme for Deutsche Airbus*, SCM/142, 4 March 1992, unadopted; *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994, unadopted.

a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the latter shall prevail to the extent of the conflict. Article II:4 of the *WTO Agreement* provides that the GATT 1994 "as specified in Annex 1A ... is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947 ...".

The single undertaking is further reflected in the provisions of the *WTO Agreement* dealing with original membership, accession, non-application of the Multilateral Trade Agreements between particular Members, acceptance of the *WTO Agreement*, and withdrawal from it.<sup>16</sup> Within this framework, all WTO Members are bound by all the rights and obligations in the *WTO Agreement* and its Annexes 1, 2 and 3.

The *DSU* provides an integrated dispute settlement mechanism applicable to disputes arising under any of the "covered agreements". Article 2 of the *DSU* provides that the DSB has the "authority to establish panels, adopt panel and Appellate Body Reports, maintain surveillance and implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements". The "covered agreements" include the *WTO Agreement*, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decision to apply the *DSU*.<sup>17</sup> In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding.<sup>18</sup>

C. *GATT 1994 within the WTO Agreement*

The *WTO Agreement* is a successor treaty to the GATT 1947, the *Tokyo Round SCM Code* and the other agreements and understandings which formed the previous GATT system. Although it is a new treaty which the WTO Members accepted definitively, Article XVI:1 of the *WTO Agreement* provides as follows:

Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

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<sup>16</sup>*WTO Agreement*, Articles XI, XII, XIII, XIV and XV, respectively.

<sup>17</sup>*DSU*, Article 1 and Appendix 1.

<sup>18</sup>*DSU*, Article 7.

The GATT 1994 was incorporated by reference into Annex 1A of the *WTO Agreement*. The reference language includes the provisions of the GATT 1947, as rectified, amended or modified before the entry into force of the *WTO Agreement*; the provisions of legal instruments that entered into force under the GATT 1947 prior to the entry into force of the *WTO Agreement*, such as protocols and certifications relating to tariff concessions, protocols of accession (excluding the provisions concerning provisional application and "grandfather rights"), decisions on waivers granted under Article XXV of the GATT 1947 and other decisions of the CONTRACTING PARTIES to the GATT 1947; as well as the Understandings which amended specific articles of the GATT 1947 as a result of the Uruguay Round Multilateral Trade Negotiations. In many ways, therefore, the provisions of the GATT 1994 differ from the provisions of the GATT 1947.

The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994. As the Panel has said:

... the question for consideration is not whether the *SCM Agreement* supersedes Article VI of GATT 1994. Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that *Agreement*, or whether Article VI of GATT 1994 and the *SCM Agreement* represent an inseparable package of rights and disciplines that must be considered in conjunction.<sup>19</sup>

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<sup>19</sup>Panel Report, para. 227.

D. *Principle of Non-Retroactivity of Treaties*

The fundamental question in this case is one of the temporal application of one set of international legal norms, or the successor set of norms, to a particular measure taken during the period of co-existence of the GATT 1947 and the *Tokyo Round SCM Code* with the *WTO Agreement*. Article 28 of the *Vienna Convention* contains a general principle of international law concerning the non-retroactivity of treaties. It provides as follows:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 28 states the general principle that a treaty shall not be applied retroactively "unless a different intention appears from the treaty or is otherwise established". Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force. Article 32.3 of the *SCM Agreement* is an express statement of intention which we will now examine.

E. *Interpretation of Article 32.3 of the SCM Agreement*

1. Text

Article 32.3 of the *SCM Agreement* reads as follows:

... the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

Examination of the ordinary meaning of this provision alone could lead us to the conclusion that the term, "this Agreement", in Article 32.3 means the *SCM Agreement*. However, it is necessary also to consider this provision in its context and in light of the object and purpose of the *WTO Agreement*.

2. Context

The relationship between the *SCM Agreement* and Article VI of the GATT 1994 is set out in Articles 10 and 32.1 of the *SCM Agreement*. Article 10 reads as follows:

*Application of Article VI of GATT 1994*

Members shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>36</sup> on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

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<sup>36</sup>The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

Article 32.1 reads as follows:

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>56</sup>

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<sup>56</sup>This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together. If there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A.

We turn to the omission of note 2 to the preamble of the *Tokyo Round SCM Code* from the *SCM Agreement*. That note reads:

Wherever in this Agreement there is reference to "the terms of this Agreement" or the "articles" or "provisions of this Agreement" it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement.

This note related to a provision in the preamble to the *Tokyo Round SCM Code* which demonstrated the Tokyo Round signatories' desire "to apply fully and to interpret the provisions of Articles VI, XVI and XXIII" of the GATT 1947. The preamble was not retained in the new text of the *SCM Agreement*. Consequently, the note also disappeared. The *SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947. The title to the *SCM Agreement* was also modified in this respect. Like the Panel, "we do not consider that the exclusion of this provision from the SCM Agreement sheds much light on the question before us".<sup>20</sup>

If Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term "this Agreement" in Article 32.3 means "this Agreement and Article VI of the GATT 1994". We agree with the Panel that:

Article VI of GATT 1947 and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.<sup>21</sup>

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<sup>20</sup>Panel Report, para. 236, note 62.

<sup>21</sup>Panel Report, para. 246; we understand the Panel's reference to "*SCM Agreements*" in this paragraph to mean the *SCM Agreement* and the *Tokyo Round SCM Code*.

3. Object and Purpose of the WTO Agreement

The fact that Article VI of the GATT 1947 could be invoked independently of the *Tokyo Round SCM Code* under the previous GATT system<sup>22</sup> does not mean that Article VI of GATT 1994 can be applied independently of the *SCM Agreement* in the context of the WTO. The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system. This can be seen from the preamble to the *WTO Agreement* which states, in pertinent part:

*Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.

Article II:2 of the *WTO Agreement* also provides that the Multilateral Trade Agreements are "integral parts" of the *WTO Agreement*, "binding on all Members". The single undertaking is further reflected in the articles of the *WTO Agreement* on original membership, accession, non-application, acceptance and withdrawal. Furthermore, the *DSU* establishes an integrated dispute settlement system which applies to all the "covered agreements", allowing all the provisions of the *WTO Agreement* relevant to a particular dispute to be examined in one proceeding.

The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. Article 32.3 has limited application only in specific circumstances where a countervailing duty proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*. This does not mean that the *WTO Agreement* does not apply as of 1 January 1995 to all other acts, facts and situations which come within the provisions of the *SCM Agreement* and Article VI of the GATT 1994. However, the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews<sup>23</sup> at a different point in time from that for other general measures.<sup>24</sup> Because a countervailing duty is imposed only as a result of

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<sup>22</sup>As demonstrated by the *United States - Pork* panel.

<sup>23</sup>There is an identical provision to Article 32.3 of the *SCM Agreement* contained in Article 18.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-dumping Agreement"). Similarly, there are mirror transitional decisions approved by the Tokyo Round Committee on Anti-dumping Measures, in the Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization, ADP/131, 16 December 1994; and the Decision on Consequences of Withdrawal from or Termination of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, ADP/132, 16 December 1994.

<sup>24</sup>In its appellant's submission dated 9 January 1997, at p. 37, para. 59, the Philippines argues that in *United States - Gasoline*,

a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.

We agree with the Philippines that the transitional decisions approved by the Tokyo Round Subsidies and Countervailing Measures Committee and the CONTRACTING PARTIES<sup>25</sup> do not modify the scope of rights and obligations under the *WTO Agreement*. We believe, however, that they contribute to understanding the significance of Article 32.3 of the *SCM Agreement* as a transitional rule. The Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement and the Decision on Transitional Co-Existence of the Tokyo Round SCM Code and the WTO Agreement provide for the legal termination of the GATT 1947 and the *Tokyo Round SCM Code* one year after the date of entry into force of the *WTO Agreement*, i.e. by 31 December 1995. They also permit WTO Members, during the period of co-existence of the GATT 1947 and the *Tokyo Round SCM Code* with the *WTO Agreement*, to bring their disputes under the *DSU* where the measure in issue is one to which the *WTO Agreement* applies.

The Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code, adopted by the Tokyo Round Subsidies and Countervailing Measures Committee, extended dispute settlement under the *Tokyo Round SCM Code* for two years, one year beyond the legal termination of the *Tokyo Round SCM Code*. The Tokyo Round Committee on Subsidies and Countervailing Measures was to remain in operation by agreement of the signatories to the *Tokyo Round SCM Code* until 31 December 1996, to deal with disputes arising out of countervailing duty investigations or reviews initiated pursuant to applications made prior to 1 January 1995. Signatories to the *Tokyo Round SCM Code* agreed to make their best efforts to expedite domestic investigations and dispute settlement procedures to permit the Tokyo Round Subsidies and Countervailing Measures

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both the panel and the Appellate Body assessed the pre-WTO domestic regulatory process that led to the imposition of the United States' environmental measure at issue in that dispute. We note that, in that case, there was no issue with respect to the temporal application of the measure in dispute, nor did the panel or the Appellate Body examine the applicability of the *Agreement on Technical Barriers to Trade*.

<sup>25</sup>The Decision on Transitional Co-Existence of the GATT 1947 and the WTO Agreement (PC/12-L/7583, 13 December 1994) was adopted by the CONTRACTING PARTIES to the GATT 1947 (6SS/SR/1); the Decision on Transitional Co-Existence of the Tokyo Round SCM Code and the WTO Agreement (SCM/186, 16 December 1994) was adopted by the Tokyo Round Committee on Subsidies and Countervailing Measures and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Subsidies and Countervailing Measures (G/SCM/M/1). The Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code (SCM/187, 16 December 1994) was adopted by the Tokyo Round Committee on Subsidies and Countervailing Measures and noted by the CONTRACTING PARTIES (6SS/SR/1) and the WTO Committee on Subsidies and Countervailing Measures (G/SCM/M/1).

Committee to consider covered disputes within this two-year period. This Decision avoided the application of Article 70 of the *Vienna Convention*, which provides that the termination of a treaty releases the parties from any obligation further to perform the treaty.

Like the Panel, "we are hesitant, in interpreting the WTO Agreement, to give great weight to the effect of decisions that had not yet been taken at the time the WTO Agreement was signed".<sup>26</sup> We agree with the Panel's statement that:

The availability of Article VI of GATT 1994 as applicable law in this dispute is a matter to be determined on the basis of the WTO Agreement, rather than on the basis of a subsequent decision by the signatories of the Tokyo Round SCM Code taken at the invitation of the Preparatory Committee.<sup>27</sup>

While we agree with the Panel that these transitional decisions are of limited relevance in determining whether Article VI of the GATT 1994 can be applied independently of the *SCM Agreement*, they reflect the intention of the *Tokyo Round SCM Code* signatories to provide a forum for dispute settlement arising out of disputes under the *Tokyo Round SCM Code* for one year after its legal termination date. At the time the *Tokyo Round SCM Code* signatories agreed to these decisions, they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement*.

We agree with the Panel that the complaining party in this dispute, the Philippines, had legal options available to it, and, therefore, was not left without a right of action as a result of the operation of Article 32.3 of the *SCM Agreement*. Until 31 December 1995, the GATT 1947 continued to co-exist with the *WTO Agreement*, and dispute settlement was available to the Philippines pursuant to Articles VI and XXIII of the GATT 1947. Until 31 December 1996, as a result of the Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code approved by the signatories to the *Tokyo Round SCM Code*, dispute settlement was available under the provisions of the *Tokyo Round SCM Code*. Within a reasonable period of time after the definitive countervailing duty was imposed, the Philippines had the right to request a review pursuant to Article 21.2 of the *SCM Agreement* -- a right which remains available to the Philippines today.

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<sup>26</sup>Panel Report, para. 270.

<sup>27</sup>Panel Report, para. 272.

Any WTO Member, which was not a signatory to the *Tokyo Round SCM Code*, had a right of action under Articles VI and XXIII of the GATT 1947 until 31 December 1995, and, like the Philippines, has a continuing right to request a review under Article 21.2 of the *SCM Agreement*.

We believe that the situation of a prospective Member of the WTO, which accedes under the provisions of Article XII of the *WTO Agreement*, is different from that of former contracting parties to the GATT 1947 or signatories to the *Tokyo Round SCM Code* because those agreements did not apply previously to its trading relations with other states. Article XII:1 of the *WTO Agreement* provides, furthermore, that a state may accede "on terms to be agreed between it and the WTO".

In light of the above, we believe that it is not necessary to determine whether applying Article VI of the GATT 1994 independently of the *SCM Agreement* would be more onerous than applying them together.

#### **V. Applicability of Articles I and II of the GATT 1994**

We have concluded that, as a result of the integrated nature of the *WTO Agreement* and the specific language in Articles 10 and 32.1 of the *SCM Agreement*, the provisions of the *SCM Agreement* relating to countervailing duty investigations are not separable from the rights and obligations of the GATT 1994 or the *WTO Agreement* taken as a whole. We find, therefore, that the Panel did not err in concluding at paragraphs 280 and 281 of the Panel Report that the applicability of Article VI of the GATT 1994 to the countervailing duty investigation which is the subject of this dispute, also determines the applicability of Articles I and II of the GATT 1994 to that investigation. In the same manner as the Panel found that "the measures are neither \_consistent' nor \_inconsistent' with Article VI of GATT 1994; rather, they are simply not subject to that Article",<sup>28</sup> we believe that the measures here are neither "consistent" nor "inconsistent" with Articles I and II of the GATT 1994, because those Articles are also not applicable law for the purposes of this dispute.

#### **VI. Terms of Reference**

Brazil argues in its appellant's submission that the issue of consistency of its countervailing duty measures with Articles I and II of the GATT 1994 is not within the terms of reference of the Panel, and,

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<sup>28</sup>Panel Report, para. 280, note 71.

therefore, should not have been addressed by the Panel.<sup>29</sup> In this appeal, the parties to the dispute, the Philippines and Brazil, agreed on the following special terms of reference pursuant to Article 7.3 of the *DSU*:

To examine, in the light of the relevant provisions in GATT 1994 and the Agreement on Agriculture, the matter referred to the DSB by the Philippines in document WT/DS22/5, taking into account the submission made by Brazil in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>30</sup>

A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.

We agree, furthermore, with the conclusions expressed by previous panels under the GATT 1947, as well as under the *Tokyo Round SCM Code* and the *Tokyo Round Anti-dumping Code*, that the "matter" referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference.<sup>31</sup> We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.

In the present case, because we agree with the conclusions of the Panel concerning applicable law, we believe it is not necessary to determine whether the Philippines' claims under Articles I and II of the GATT 1994 were within the Panel's terms of reference.

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<sup>29</sup>Brazil's appellant's submission, dated 14 January 1997, p. 1, para. 2.

<sup>30</sup>WT/DS22/6, 18 April 1996.

<sup>31</sup>*United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, BISD 39S/128, adopted 19 June 1992, para. 6.2; *EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, adopted 30 October 1995, para. 456; *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, para. 212; *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 26-27 April 1994, para. 336.

## **VII. Findings and Conclusions**

For the reasons set out in this Report, the Appellate Body upholds the legal findings and conclusions of the Panel.

The Appellate Body *recommends* that the Dispute Settlement Body make a ruling consistent with the legal findings and conclusions in the Panel Report and this Report.

Signed in the original at Geneva this 14th day of February 1997 by:

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Said El-Naggar  
Presiding Member

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Claus-Dieter Ehlermann  
Member

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Julio Lacarte-Muró  
Member