

**BRAZIL - MEASURES AFFECTING DESICCATED COCONUT**

*Report of the Panel*

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## I. INTRODUCTION

1. On 27 November 1995, the Philippines requested consultations with Brazil under Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") concerning the countervailing duty imposed by Brazil on imports of desiccated coconut from the Philippines. (WT/DS22/1/Rev.1).
2. On 8 December 1995, Brazil replied that it was prepared to enter into consultations with the Philippines as long as it was mutually understood that those consultations would be undertaken exclusively under the 1979 Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("Tokyo Round SCM Code"), under the auspices of which Brazil conducted the coconut subsidies investigations and imposed the countervailing duties.
3. On 13 December 1995, the Philippines replied that Brazil's response constituted a refusal of the request for consultations under Article XXIII:1.
4. Taking the view that Brazil had failed to enter into consultations within the period provided for in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the Philippines, on 17 January 1996, requested the establishment of a Panel with standard terms of reference, pursuant to Article XXIII:2 of GATT 1994 and Articles 4.3 and 6 of the DSU. (WT/DS22/2).
5. At Brazil's request, a copy of document SCM/193, on the issue of the countervailing duties in question, was circulated to the Dispute Settlement Body ("DSB"). In that document, Brazil stated its view that the Tokyo Round SCM Code was the only legal framework applicable to the dispute. Brazil also indicated its understanding that the DSB was not the appropriate forum for the discussion on the dispute with the Philippines, and that document SCM/193 was circulated for information purposes only and without prejudice to its rights under the Tokyo Round SCM Code and to its position on the applicable law. (WT/DS22/3, attached as Annex 1).
6. At the 31 January 1996 meeting of the DSB, the Philippines stated that, for reasons mutually agreed to, the Philippines had not objected to postponing consideration of its request for establishment of a panel, but would make a statement at the next meeting of the DSB when this request would be considered. Brazil noted that its arguments concerning the dispute were explained in document WT/DS22/3, and that it invited the Philippines for consultations on the question of the applicable law before any further steps were taken toward establishment of a panel. The DSB agreed to revert to the matter at its next meeting. (WT/DSB/M/10).
7. Continuing to take the view that Brazil had failed to enter into consultations within the period provided for in the DSU, the Philippines, on 5 February 1996, again requested the establishment of a Panel with standard terms of reference, pursuant to Article XXIII:2 of GATT 1994 and Articles 4.3 and 6 of the DSU. (WT/DS22/5, attached as Annex 2).
8. At its meeting of 21 February 1996, the DSB considered the Philippines' request for establishment of a panel. Both the Philippines and Brazil stated their views on the matter of the countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines, and the question of the law applicable to the dispute. The representatives of Indonesia, speaking on behalf of ASEAN countries, and Sri Lanka, supported the Philippines' request for establishment of a panel. Brazil considered it premature to establish a panel at that meeting, and the DSB agreed to revert to the matter at its next meeting. (WT/DSB/M/11, attached as Annex 3).
9. At its meeting of 5 March 1996, pursuant to the Philippines' request and with Brazil's acceptance, the DSB established a Panel to examine the matter. The Philippines requested that the Panel be established with standard terms of reference. Brazil requested consultations on the terms of reference. The DSB authorized the Chairman to draw up terms of reference in consultation with the parties, in

accordance with Article 7.3 of the DSU.

10. On 22 March 1996 the parties agreed that the Panel would have the following terms of reference:

"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". (WT/DS22/6).

11. On 16 April 1996, the Panel was constituted with the following composition:

Chairman: Mr. Maamoun Abdel-Fattah  
Members: Mr. Zdenek Jung  
Mr. Joseph Weiler

12. Canada, the European Community, Indonesia, Malaysia, Sri Lanka and the United States reserved their rights as third parties to the dispute. Malaysia later withdrew as a third party.

## II. FACTUAL ASPECTS

13. This dispute concerns countervailing duties imposed by Brazil on imports of desiccated coconut from the Philippines. On 21 June 1994, based on a request for an investigation by the domestic industry filed on 17 January 1994, Brazil initiated an investigation regarding allegedly subsidized imports of desiccated coconut and coconut milk from the Philippines, Côte d'Ivoire, Indonesia, Malaysia, and Sri Lanka. On 23 March 1995, Brazil imposed provisional duties on imports of desiccated coconut from the Philippines, Côte d'Ivoire, Indonesia, and Sri Lanka, and on imports of coconut milk from Sri Lanka.<sup>1</sup> On 18 August 1995, Brazil issued Interministerial Ordinance No. 11 (the "Ordinance"), pursuant to which it imposed a countervailing duty in the amount of 121.5 per cent on imports of desiccated coconut from the Philippines.<sup>2</sup>

14. Brazil investigated eight Philippine programmes which allegedly conferred subsidies on coconut fruit.<sup>3</sup> However, Brazil considered that it was unable, based on the information obtained from the

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<sup>1</sup>Interministerial Decree No. 113 (23 March 1995).

<sup>2</sup>Interministerial Ordinance No. 11 (18 August 1995). Imports of desiccated coconut from the other countries under investigation were also found to be subsidized, as well as imports of coconut milk from Sri Lanka. Those aspects of the determination are not before the Panel.

<sup>3</sup>The eight programmes investigated were:

- 1) the Programme under Presidential Decree No. 582/74,
- 2) the National Coconut Productivity Programme, and its successors, the Expanded National Coconut Intercropping Programme and the Farm Assistance and Livelihood project,
- 3) the Small Coconut Farm Development Project,
- 4) the Agrarian Reform Programme,
- 5) the Country Economic Development Programme,
- 6) the Small Coconut Farmer Organizations,
- 7) Income Tax Exemptions and Credits, Deductions, and other Tax Benefits, and
- 8) The Coconut Replanting Programme and Programme of Additional Incentives to Accelerate the Coconut Production Programme.

Philippines, to determine the amount of the subsidy conferred on coconut fruit by each programme. Brazil also concluded that desiccated coconut indirectly benefitted from the subsidy provided to coconut fruit. Brazil determined the amount of the subsidy conferred on desiccated coconut by comparing the price of subsidized desiccated coconut, based on the price actually paid for coconut fruit, and a constructed unsubsidized price, based on what it considered to be the constructed unsubsidized price for coconut fruit. Brazil considered that the difference between the prices equalled the subsidy amount that affected the price of desiccated coconut.

15. Brazil further found that the subsidized imports, on a cumulated basis, caused material injury to the Brazilian industry.

### III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

16. The Philippines requests the Panel to make the following rulings, findings, and recommendations:

- "(a) That the Panel find that the Ordinance imposing a countervailing duty of 121.5 per cent on desiccated coconut from the Philippines for a period of five years from 18 August 1995 is inconsistent with Brazil's obligations under Articles I and II, and is not justified by Article VI:3 and VI:6(a) of GATT 1994.
- "(b) That the Panel find that Brazil's failure to revoke the Ordinance and to reimburse any duties paid under it, notwithstanding the representations of the Philippines, was inconsistent with its obligations under Article VI:3 and 6(a) of GATT 1994.
- "(c) That the Panel recommend that Brazil bring the above measure into conformity with its obligations under GATT 1994.
- "(d) That Brazil's refusal to hold consultations under Article XXIII:1 of GATT 1994 on its measures affecting desiccated coconuts was inconsistent with Brazil's obligation under that Article and Article 4:1, 2 and 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.
- "(e) In the event the Panel were to find that the countervailing duty imposed by Brazil was consistent with Articles I and II of GATT 1994 or justified by Article VI of GATT 1994, the Philippines requests that the Panel find that the imposition of the countervailing duty and its subsequent non-revocation were inconsistent with Article 13 of the Agreement on Agriculture, and recommend that Brazil bring the measure referred to above into conformity with its obligations under the Agreement on Agriculture".

17. Brazil asks the Panel to make the following findings:

- (a) That the only obligations applicable to this dispute are those in the Tokyo Round SCM Code, and that potential violations of that Code cannot be addressed by this Panel.
- (b) That Brazil's injury finding, its obligations under Articles I and II of GATT 1994, its obligations under the Agreement on Agriculture, and its alleged failure to consult are not within the terms of reference of the Panel, and arguments concerning those matters should be excluded from the proceeding.
- (c) That the Philippines failed to demonstrate that the requirements for the exemption it claims under the Agreement on Agriculture were met.

- (d) In the event the Panel reaches the substance of Brazil's determination, that Brazil's actions were fully consistent with its obligations under Article VI of GATT 1994.

**[Parties' arguments in Sections IV and V deleted from this version]**

## VI. FINDINGS

### A. Applicable Law

225. The first issue confronting this Panel is to determine whether the legal obligations cited by the Philippines are applicable to the disputed measure. The Philippines alleges that the imposition by Brazil of a countervailing duty on desiccated coconut from the Philippines was inconsistent with Articles I, II and VI of GATT 1994 and Article 13 of the Agreement on Agriculture. Brazil contends that under customary principles of international law and the terms of the WTO Agreement itself, neither GATT 1994 nor the Agreement on Agriculture apply to this dispute, as the investigation leading to the imposition of the measure was initiated pursuant to an application received prior to the date of entry into force of the WTO Agreement. Accordingly, this Panel is required to address, as a threshold matter, whether Articles I, II, and VI of GATT 1994 and Article 13 of the Agreement on Agriculture are applicable to this dispute. It should be emphasized that because this issue relates to the entry into force of the new WTO regime, the question of applicable law facing this Panel will cease to be relevant as this type of dispute becomes rarer and eventually disappears altogether.

#### 1. Applicability of GATT 1994

226. Within the WTO system, the use of countervailing measures is governed principally by GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"). Although the Philippines does not invoke the SCM Agreement in this case and, of course, is not required to do so, its applicability or otherwise to this dispute is highly relevant to the broader issue of applicable law. If we were to conclude that the SCM Agreement did not constitute applicable law in this dispute, in the sense that neither the parties nor this Panel could invoke it in construing the rights and obligations in dispute, we would be presented with the issue whether Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture could apply on their own, independently of the SCM Agreement. If, in turn, we were to find that Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture could not apply on their own, then the non-applicability of the SCM Agreement would render Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture inapplicable as well. In this case, the Philippines' claims under these provisions could not succeed.

227. This Panel should make clear that if we were to find that, because of the non-applicability of the SCM Agreement, Article VI of GATT 1994 and Article 13 of the Agreement on Agriculture do not apply to this dispute, this would not mean that the SCM Agreement supersedes Article VI of GATT 1994 as the basis for the regulation by the WTO Agreement of countervailing measures. It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect, and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods ("MTN Agreements") is demonstrated by a general interpretive note to Annex 1A of the WTO Agreement.<sup>59</sup> The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point.<sup>60</sup> Thus, the question

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<sup>59</sup>The general interpretive note to Annex 1A provides that, "[i]n the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A of the Agreement Establishing the World Trade Organization ... the provision of the other agreement shall prevail to the extent of the conflict". Such an interpretive note would be unnecessary if the MTN agreements superseded GATT 1994.

<sup>60</sup>For example, the SCM Agreement does not replicate or elaborate on Article VI:5 of GATT 1994, which proscribes the imposition of both an anti-dumping and a countervailing duty to compensate for the same situation of dumping and export subsidization, nor does it address the issue of countervailing action on behalf of a third country as provided for in Article VI:6(b) and (c) of GATT 1994. If the SCM Agreement were considered to supersede Article VI of GATT 1994 altogether with respect to countervailing measures, these provisions would lose all force and effect. Such a result could not have been intended.

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.

**(a) Applicability of the SCM Agreement**

228. Article 32.3 is a transition rule which defines with precision the temporal application of the SCM Agreement. Article 32:3 provides that:

"Subject to paragraph 4, 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".

The WTO Agreement entered into force for Brazil on 1 January 1995. Although the definitive countervailing duty on desiccated coconut from the Philippines was imposed on 18 August 1995, the investigation leading to the imposition of the duty was initiated on 21 June 1994 pursuant to an application made on 17 January 1994, prior to the date of entry into force of the WTO Agreement for Brazil. Thus, in accordance with the ordinary meaning of Article 32.3, the SCM Agreement does not constitute applicable law for the purpose of the dispute before us.

229. We do not find persuasive arguments that Article 32.3 of the SCM Agreement, by referring to "investigations," limits the application of that Agreement only with respect to the "procedural" aspects of investigations. The text of Article 32.3 itself does not indicate that that provision applies only to "procedural" as opposed to "substantive" aspects of an investigation. Rather, it provides that an investigation initiated pursuant to an application made on or after the date of entry into force shall be conducted in accordance with the provisions of the SCM Agreement in its entirety -- procedural and substantive. Moreover, any effort to distinguish between the "substantive" and "procedural" obligations of the SCM Agreement would generate considerable confusion and dispute, as the distinction between the two types of obligations in practice could prove extremely difficult. We share the view of the Philippines that one object and purpose of Article 32.3 is to prevent WTO Members from having to redo investigations begun before the entry into force of the WTO Agreement in accordance with the new and more detailed procedural provisions of the SCM Agreement. In our view, however, this consideration is equally applicable to the substantive provisions of the SCM Agreement, which differ in significant respects from those of the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade ("the Tokyo Round SCM Code"). Throughout the course of an investigation, both procedural and substantive decisions must be made, and if an investigation were to become subject to new and different rules at some point during the investigation the investigating authorities would be required to return to the beginning and to re-examine decisions already taken.<sup>61</sup> Accordingly, we consider that the concept of "investigation" as expressed in Article 32.3 includes both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto.

230. We find equally unpersuasive the argument that, while Article 32.3 might preclude application of the SCM Agreement to the imposition of a countervailing duty resulting from an investigation initiated pursuant to an application made before the date of entry into force of the WTO Agreement, it does not preclude the application of the SCM Agreement to the continued collection of duties after that

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<sup>61</sup>As an example, the determination of the domestic industry must be made at an early stage as a prerequisite to subsequent steps in the investigation. The SCM Agreement contains provisions relating to this definition that are not part of the Tokyo Round SCM Code. If the SCM Agreement applied to ongoing investigations, a WTO Member would be required to re-examine its domestic industry determination in light of these new provisions.

date. Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply. If, as the Philippines argues, a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if, as the Philippines argues, that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply -- and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist -- at the time the determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity.

231. In conclusion, we find that the SCM Agreement does not constitute applicable law for the purposes of this dispute.

**(b) Separability of Article VI of GATT 1994 and the SCM Agreement**

232. Having concluded that the SCM Agreement does not constitute applicable law for the purposes of this dispute, we next examine the implications of this conclusion for the Philippines' claims under GATT 1994. The question presented is whether Article VI of GATT 1994 can apply to a dispute in circumstances where, pursuant to Article 32.3, the SCM Agreement does not apply. In other words, we are confronted with the issue whether the provisions of Article VI of GATT 1994 relating to countervailing duties are susceptible of application and interpretation independently of the SCM Agreement. If the answer to this question is yes, then Article VI of GATT 1994 represents the law applicable to this dispute. If, by contrast, we conclude that, in relation to disputes concerning countervailing measures, Article VI of GATT 1994 is inseparable from the SCM Agreement and cannot be interpreted and applied independently of that Agreement then, pursuant to Article 32.3, the SCM Agreement, and any other provisions that depend on it, do not apply, and we cannot consider the Philippines' claims under Article VI of GATT 1994 in this dispute.

233. As a first step, we will review whether the textual provisions defining the relationship between Article VI of GATT 1994 and the SCM Agreement, in their ordinary meaning, shed light on this issue. We will thereafter consider whether an interpretation whereby Article VI of GATT 1994 applies independently in situations where the SCM Agreement does not apply would be supported by a consideration of the object and purpose of the relevant provisions. After examining precedents under GATT 1947 potentially relevant to the issue of the independent application of Article VI of GATT 1994, we will consider whether there are any consequences of a conclusion that Article VI of GATT 1994 cannot apply independent of the SCM Agreement which would cast doubt on this interpretation.

(i) Textual analysis

234. The reference in Article 32.3 of the SCM Agreement to "this Agreement" in its ordinary meaning would appear to be a reference to the SCM Agreement, thereby suggesting that while the SCM Agreement does not apply to investigations and reviews initiated pursuant to applications made before the date of entry into force of the Agreement for a Member, Article VI of GATT 1994 would nevertheless continue to be applicable in these circumstances. However, a strict application of the term "this Agreement" as used elsewhere in the SCM Agreement could produce manifestly unreasonable results. For example, Article 1.1 of the SCM Agreement contains a definition of "subsidy" and Article 16.1 of the SCM Agreement contains a definition of "domestic industry" both of which are "for the purposes of this Agreement". However, the terms "subsidy" and "domestic industry" are used both in Article VI of GATT 1994 and the SCM Agreement. If the term "this Agreement" were interpreted *strictu sensu* to mean the SCM Agreement, then the definitions of these key terms in the SCM Agreement would be inapplicable to the same terms as used in Article VI of GATT 1994. Such a result could not have been intended.

235. In any event, while Article 32.3 of the SCM Agreement might, taken on its own, most naturally be construed to govern the temporal application of the SCM Agreement and not Article VI of GATT 1994, it might have another meaning when taken in its context. If, for example, it were understood from other provisions of the WTO Agreement that Article VI of GATT 1994 could not be applied independently of the SCM Agreement, the mere fact that Article 32.3 of the SCM Agreement refers only to "this Agreement" could not, in and of itself, sever that linkage. If it were established, by reference to other language elsewhere in the WTO Agreement, that there is an inseparable link between Article VI of GATT 1994 and the SCM Agreement, then the ordinary meaning of Article 32.3, read in conjunction with other relevant provisions, would be that the SCM Agreement, and any other provision of the WTO Agreement that depended on it, would not apply if the terms of Article 32.3 were not met. Under this construction, the term "this Agreement" in Article 32.3 of the SCM Agreement would beg the question rather than answer it.

236. In light of these considerations, we consider that the use by the drafters of the term "this Agreement" does not provide decisive guidance regarding the implications of Article 32.3 for the applicability of Article VI of GATT 1994 to this dispute.<sup>62</sup>

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<sup>62</sup> Interestingly, the Tokyo Round SCM Code contains a note that, if reproduced in the SCM Agreement, might well have been decisive on this point. Note 2 to the Preamble of the Code states that:

"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".

The Panel is uncertain why this provision was not reproduced in the SCM Agreement. However, one possible explanation is that such a provision was considered unnecessary in the light of the integrated nature of the WTO Agreement, and the provisions regulating the relationship of GATT 1994 and the MTN agreements. In any event, we do not consider that the exclusion of this provision from the SCM Agreement sheds much light on the question before us.

237. Another provision relevant to the relationship between Article VI of GATT 1994 and the SCM Agreement is Article 10 of the SCM Agreement, which provides as follows:

*"Application of Article VI of GATT 1994"*<sup>35</sup>

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<sup>37</sup> and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

<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". (footnotes 35 and 37 omitted).

In our view, Article 10 means that, in cases where the SCM Agreement applies, both Article VI of GATT 1994 and the SCM Agreement are applicable and any countervailing measure must comply with both. This is clear from the language stating that countervailing duties must be imposed in accordance with the provisions of Article VI and the SCM Agreement. Article 10 further requires that, in cases where the SCM Agreement applies, countervailing duty investigations must be conducted in accordance with that Agreement. It could be argued that Article 10 only applies in cases where the SCM Agreement applies, and therefore does not expressly address the applicability of Article VI of GATT 1994 in situations where, pursuant to Article 32.3, the SCM Agreement does not apply. On this reading, Article 10 would be neutral, providing little guidance on the issue of separability. However, the title of Article 10 indicates that that Article informs regarding how Article VI of GATT 1994 is to be applied. Article 10 thus suggests that Article VI and the SCM Agreement represent an inter-related package of rights and obligations relating to countervailing measures.

238. Another provision relevant to the relationship of Article VI of GATT 1994 and the SCM Agreement is Article 32.1 of the SCM Agreement, which provides that:

"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>  
(footnote 56 omitted).

Article 32.1, like Article 10, makes it very clear that in cases where the SCM Agreement applies, Article VI of GATT 1994 cannot be invoked as the basis for the imposition of a countervailing duty without reference to the SCM Agreement. As with respect to Article 10, it could be argued that Article 32.1 only applies where the SCM Agreement applies pursuant to Article 32.3, and that it therefore does not instruct as to whether Article VI of GATT 1994 applies where the SCM Agreement does not. It is significant, however, that Article 32.1 refers to the SCM Agreement as interpreting Article VI of GATT 1994. Article VI of GATT 1994 sets forth a series of core concepts central to WTO regulation of countervailing measures (e.g., subsidy, material injury, domestic industry). These concepts are, however, expressed in only the most general terms, and are thus susceptible of a wide range of interpretations. In our view, the Tokyo Round SCM Code and its successor the SCM Agreement were developed in part to lend greater precision and predictability to the rights and obligations under Article VI. Article 32.1 makes clear that where the SCM Agreement applies the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement. It is apparent from Article 32.1 that Article VI of GATT 1994 might have a different meaning if read in isolation than if read in conjunction with the SCM Agreement. The drafters clearly foresaw the possibility of conflict between GATT 1994 and the MTN agreements, as evidenced by the general interpretive note to Annex 1A. If there could be conflicts between GATT 1994 and the MTN

agreements, there could also be conflicts between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an MTN agreement.

239. We considered whether the potential for two different meanings of Article VI of GATT 1994 could be eliminated by insisting that it should always be interpreted in the light of the SCM Agreement or another such interpretive device. We rejected such a possibility.

240. The clear non-applicability of the SCM to this dispute means that if we were to conclude that Article VI of GATT 1994 may apply on its own, we would be obliged to interpret it as if the SCM Agreement did not exist. In the words of one third party, it would be our duty to take a "clean-slate" approach to the interpretation of Article VI of GATT 1994, avoiding concepts which could not fairly be deemed to flow directly from a proper, self-contained Article VI analysis. It would be legally improper to seek to reconcile any emergent differences between Article VI applied on its own and Article VI as it would be understood in conjunction with the SCM Agreement by reverting to the SCM Agreement, not as applicable law but as an interpretive aid -- even though the latter Agreement by its own terms does not apply to this dispute. Such an approach would be contrary to the ordinary meaning of Article 32.3 of the SCM Agreement. It would not be appropriate for this Panel to incorporate the requirements of the SCM Agreement indirectly where the SCM Agreement does not apply directly. If, then, we interpret the relevant provisions of the WTO Agreement as permitting the application of Article VI of GATT 1994 on its own, there would be a real and altogether serious possibility that Article VI of GATT 1994 would be imbued with one meaning where applied independently, and with a different, and potentially conflicting, meaning where applied in conjunction with the SCM Agreement as required by Article 32.1.<sup>63</sup>

#### (ii) Object and Purpose

241. What is the relevance of this possibility to the question of interpretation before us? An interpretation which allows this possibility strikes us as contrary to one of the central objects and purposes of the WTO Agreement. This adds considerable weight to the interpretation which regards the provisions concerning countervailing measures in Article VI of GATT 1994 and the SCM Agreement as an inseparable whole.

242. In our view, one of the central objects and purposes of the WTO Agreement, as reflected in the Preamble to that Agreement, is to "develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations...". This is one of the reasons that the WTO Agreement is a single undertaking, accepted by all Members. Unlike the pre-WTO regime, where contracting parties to GATT 1947 could elect whether or not to adhere to the Tokyo Round SCM Code, such option has been removed in the present regime. The integrated nature of the WTO system is reflected in Article II.2, which states that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all Members". Essential to this integration is the creation of a single Dispute Settlement Body governed by a single Understanding on Rules and Procedures Concerning the Settlement of Disputes ("the DSU"). A panel established pursuant to the DSU may under Article 7.1 examine any covered agreement(s) cited by the parties to the dispute. This integrated dispute settlement system avoids the problem of legal and procedural fragmentation that characterized the pre-WTO dispute settlement system, and allows a panel to interpret provisions of covered agreements in the light of the WTO Agreement as a whole. To revert to a situation where Article VI of GATT 1994 could have different meanings depending upon whether or not it was applied in conjunction with the SCM Agreement would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid.

243. To repeat, this consideration regarding the object and purpose of the WTO Agreement argues

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<sup>63</sup>Specific examples are discussed in the context of a related argument in paragraphs 248-252.

strongly in favour of the conclusion that Article VI of GATT 1994 cannot be applied to a dispute regarding countervailing measures where the SCM Agreement is not applicable.

244. This conclusion is further strengthened by additional consequences which would result from an interpretation that Article VI of GATT 1994 could apply in disputes such as this one where the SCM Agreement does not. As explained below, a signatory to the Tokyo Round SCM Code could find itself subject to obligations under Article VI of GATT 1994 applied alone which are more onerous than those to which it was subject pursuant to Article VI of GATT 1947 applied in conjunction with the Tokyo Round SCM Code and which are also more onerous than those to which it will be subject at such time as the SCM Agreement applies. This would represent a result which is both manifestly absurd and unreasonable.

245. The Philippines and certain third parties appear to assume that Article VI of GATT 1994 and its predecessor in GATT 1947 represent a set of core obligations relating to countervailing measures, and that the SCM Agreement and Tokyo Round SCM Code merely add further substantive and procedural obligations in addition to these core obligations. It follows from this assumption that, since Brazil is required under Article VI of GATT 1947 and the Tokyo Round SCM Code to comply with the relevant provisions of Article VI of GATT 1947, and since the text of Article VI of GATT 1994 is identical to that of Article VI of GATT 1947, Brazil's material obligations under the two Articles are identical. In addition, if this assumption is correct, application of Article VI of GATT 1994 in circumstances where the SCM Agreement does not apply would not place any obligations on Brazil beyond those with which it will eventually have to comply at such time as Article VI of GATT 1994 in conjunction with the SCM Agreement applies. Thus, while the need for a transition rule regulating the application of the new and different provisions of the SCM Agreement is clear, there was no reason for the drafters of the WTO Agreement to apply that transition rule to Article VI of GATT 1994.

246. This Panel considers, however, that this view of the relationship between Article VI and the respective SCM Agreements is erroneous. 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.

247. It is therefore not correct to view Article VI of GATT 1947 and Article VI of GATT 1994 as representing a core of identical rights and obligations. To the contrary, Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code, Article VI of GATT 1994 in isolation, and Article VI of GATT 1994 in conjunction with the SCM Agreement, each represent a potentially differing set of rights and obligations. Further, it is by no means clear that a measure imposed consistently with Article VI and the Tokyo Round SCM Code or the SCM Agreement would be found to be consistent with Article VI of GATT 1994 in isolation. Thus, if we were to find that Article VI of GATT 1994 applies in cases where neither the Tokyo Round SCM Code nor the SCM Agreement apply, a Member's actions could potentially be found to be inconsistent with Article VI of GATT 1994 even though those actions were consistent with Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code and/or would have been consistent with Article VI of GATT 1994 in conjunction with the SCM Agreement, had the latter agreement applied.

248. A few examples may assist to demonstrate this point. In the dispute under consideration, Brazil in its determination stated that the Philippine government had submitted insufficient data regarding the

existence and amount of subsidies to coconut fruit and their pass-through to desiccated coconut producers, and that it had therefore arrived at a level of subsidization for desiccated coconut producers on the basis of the data available. The report by Brazil's investigating authority recommending the imposition of the duties explicitly referred to Article 2.9 of the Tokyo Round SCM Code as its justification for resort to the data available. Article 2.9 states that:

"In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary or final findings<sup>12</sup>, affirmative or negative, may be made on the basis of the facts available". (footnote 12 omitted).

In its submissions to the Panel, Brazil relies on its right to use of best information available in justifying its determination. In support of the proposition that the use of best information available is permitted by Article VI of GATT 1994, Brazil cites to language in the Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties<sup>64</sup>, and (contrary to assertions elsewhere that the Tokyo Round SCM Code cannot be used to interpret Article VI of GATT 1994) to Article 2.9 of the Tokyo Round SCM Code. While the Philippines does not challenge the practice of resorting to best information available *per se*, it does contend, relying in part on panel reports decided under Article 2.9 of the Tokyo Round SCM Code, that the use of best information available in this case was improper.

249. Article VI of GATT 1947 does not specifically provide for the use of best information available. By contrast, Article 2.9 of the Tokyo Round SCM Code authorizes the use of best information available, and a number of panel reports pursuant to the Tokyo Round SCM Code have applied that provision. Article 12.7 of the SCM Agreement contains language which is virtually identical to Article 2.9. This Panel does not express any view as to whether and to what extent, had it reached the issue, it would have found that the use of best information available is implicitly authorized by Article VI of GATT 1994. It is clear, however, that the Panel could in principle have reached a different conclusion on that question from that which it would have reached had it applied either the Tokyo Round SCM Code or the SCM Agreement. Under these circumstances, Brazil could have been in the situation where its actions were found to be inconsistent with Article VI of GATT 1994 in isolation, even though those actions were consistent with Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code and would have been consistent with Article VI of GATT 1994 in conjunction with the SCM Agreement had the latter agreement applied. The Panel considers that an interpretation of the WTO Agreement that could lead to such a result would be manifestly unreasonable.

250. A second example relates to the nature of the examination of causation of injury. Article VI:6(a) of GATT 1994 provides (as did its GATT 1947 predecessor) that:

"No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".

Article 6.1 of the Tokyo Round SCM Code provides that "a determination of injury<sup>17</sup> for the purposes of Article VI of the General Agreement" (footnote 17 omitted) shall involve an objective examination of the volume and price effects of imports. Article 6.4 of the Tokyo Round SCM Code further provides that "[i]t must be demonstrated that the subsidized imports are, through the effects<sup>19</sup> of the subsidy, causing injury within the meaning of this Agreement". Note 19 defines those effects to be "[a]s set forth in paragraphs 2 and 3 of this Article"; paragraphs 2 and 3, in turn, refer to the volume and price effects of "subsidized imports". The SCM Agreement contains language virtually identical to that of the Tokyo

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<sup>64</sup>L/1141 (adopted 27 May 1960), BISD 9S/1994.

Round SCM Code. On the basis of note 19, a Tokyo Round Panel determined that the analysis of causation required by Article VI in conjunction with the Tokyo Round SCM Code relates to injury caused by "subsidized imports" rather than by "subsidization" itself. United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153 (adopted 24 April 1994), paras. 328-337.

251. The question whether an assessment of causation of injury should relate to injury caused by subsidization or to injury caused by subsidized imports is a methodological issue with significant implications. The issue is not before us and we therefore are not expressing any view as to how this question would properly be resolved under Article VI of GATT 1994 in isolation, Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code, or Article VI of GATT 1994 in conjunction with the SCM Agreement. However, the conclusions of the Salmon Panel are based on language in the Tokyo Round SCM Code which does not appear in Article VI itself. Thus, it is evident to the Panel that Article VI of GATT 1994 in isolation could be interpreted differently from Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement. Further, the application of Article VI of GATT 1994 in isolation with respect to this issue could result in obligations on an investigating country which are more stringent than those imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement.

252. There are numerous additional examples of provisions of the Tokyo Round SCM Code and/or the SCM Agreement which define or clarify, and potentially modify, the meaning of Article VI. In many such cases, it is by no means inevitable that the obligations imposed by Article VI in isolation would be less than those imposed by Article VI in conjunction with either the Tokyo Round SCM Code or the SCM Agreement. For example, both the Tokyo Round SCM Code and the SCM Agreement authorize an investigating authority to exclude from the domestic industry when assessing material injury domestic producers which are also importers or which are related to importers. No such explicit authorization exists in Article VI of GATT 1994. Similarly, the SCM Agreement explicitly authorizes the cumulative assessment of the effects of subsidized imports from more than one country where certain criteria are satisfied. By contrast, neither Article VI of GATT 1947, Article VI of GATT 1994 nor the Tokyo Round SCM Code explicitly authorize cumulation. Indeed, the issue of cumulation under GATT 1947 and the Tokyo Round SCM Code was a matter of controversy among signatories to that Code.

253. In light of the foregoing analysis, it is clear that the application of Article VI of GATT 1994 in isolation could impose on a WTO Member for a certain period of time obligations which in some respects might be more onerous than those to which it would be subject once the SCM Agreement became applicable. This aggravates the problem of differing and inconsistent interpretations identified in paragraphs 238 to 240 above. However, the implications of this analysis extend further. When Brazil initiated its countervailing duty investigation in this case, the WTO Agreement had not yet entered into force and Brazil could legitimately have expected to be able to proceed, and to have its actions adjudicated, on the basis of Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code. Brazil would further have been aware that the SCM Agreement would not apply to the investigation pursuant to Article 32.3 of that Agreement. If the Panel were to determine that Article VI of GATT 1994 was independently applicable to disputes initiated under the Tokyo Round SCM Code, the Panel would not only be opening a risk of conflicting interpretations of Article VI of GATT 1994 but would be holding WTO Members to a package of rights and obligations that were potentially more onerous than those to which they were subject under Article VI in conjunction with the Tokyo Round SCM Code when they initiated the investigation.

254. We note the Philippines' apparent view that Article VI of GATT 1994 can be interpreted in light of the Tokyo Round SCM Code and practice thereunder. It could be argued that, if this were the case, there would be no risk that Article VI of GATT 1994, in isolation, would be found to impose obligations beyond those imposed by Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code. We do not accept this view. First, this would require stretching the concept of "interpretation in light of the Tokyo Round SCM Code" too far. Even if Article VI of GATT 1994 could be interpreted in light of

the Tokyo Round SCM Code, there could still be differences between Article VI of GATT 1994 by itself and the package of rights and obligations contained in Article VI of GATT 1994 and the Tokyo Round SCM Code taken in conjunction that no interpretation of Article VI of GATT 1994 could gloss over.

255. In any event, we do not consider that it would be appropriate to interpret Article VI of GATT 1994 in light of the Tokyo Round SCM Code. Article 31:3(a) of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which is generally held to reflect customary principles of international law regarding treaty interpretation, provides that "any subsequent agreement between the parties to a treaty regarding its interpretation or the application of its provisions" may be taken into account when interpreting a treaty. The Tokyo Round SCM Code may constitute such a subsequent agreement among Tokyo Round SCM Code signatories regarding the interpretation of Article VI of GATT 1947. However, Article II:4 of the WTO Agreement provides that the GATT 1994 is "legally distinct" from the GATT 1947. While GATT 1994 consists of, *inter alia*, "decisions of the CONTRACTING PARTIES to GATT 1947," the Tokyo Round SCM Code is not a "decision" of the CONTRACTING PARTIES. Thus, the Tokyo Round SCM Code does not represent a subsequent agreement regarding interpretation of Article VI of GATT 1994. For the Panel to conclude to the contrary would in effect convert that Code into a "covered agreement" under Appendix 1 of the DSU. If such an approach were followed, WTO Members that were Tokyo Round Code signatories would find that their Code obligations were now enforceable under the WTO dispute settlement system.

256. Article XVI:1 of the WTO Agreement provides that, "[e]xcept 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". We recognize that the Pork Panel had indicated, in passing, that the Tokyo Round SCM Code represents "practice" under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Article 31.3 clearly distinguishes between the use of subsequent agreements and of subsequent practice as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent "customary practice" of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994 itself; rather, only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994.

257. In conclusion, consideration of the relevant textual provisions of the SCM Agreement in their context and in the light of both their own object and purpose, and one of the central objects and purposes of the WTO Agreement as a whole, strongly supports the conclusion that the proper interpretation of the SCM Agreement would not allow Article VI of GATT 1994 to apply independently in situations in which the SCM Agreement does not apply.

(iii) GATT precedents

258. It was argued before us that the Pork Panel<sup>65</sup> constitutes precedent for resolving one of the key questions regarding applicable law -- the separability or otherwise of Article VI of GATT 1994 and the SCM Agreement. That Panel concerned a dispute between two signatories to the Tokyo Round SCM Code. Nevertheless, the Panel was established pursuant to Article XXIII of GATT 1947 and seemed to proceed on the basis of Article VI of GATT 1947 as the law applicable to the dispute in question. It could thus be argued on this basis that past practice indicated that Article VI of GATT 1947 could be applied independently of the Tokyo Round SCM Code. Given that several of the relevant provisions of the Tokyo Round SCM Code are similar to those in the SCM Agreement,<sup>66</sup> it could be further argued that a similar result should be reached in a dispute in the WTO under GATT 1994. Here too we are mindful of Article XVI:1 of the WTO Agreement, which provides that, "[e]xcept 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". Moreover, whilst panel reports do not constitute formal precedent that subsequent panels must follow, where relevant they constitute useful and persuasive guidance. After careful consideration, however, we have concluded that the circumstances of the Pork Panel are of very limited relevance to the issue of applicable law before us.

259. In the Pork Panel the complainant chose as the forum in which to pursue dispute settlement a panel established pursuant to Article XXIII of GATT 1947 rather than pursuant to Article 18 of the Tokyo Round SCM Code. Article 18.1 of the Tokyo Round SCM Code provides that a panel established thereunder "shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this Agreement". Thus, the dispute in Pork could have been referred to a panel under the Tokyo Round SCM Code. However, the propriety of Article XXIII dispute settlement as a forum for that dispute was not raised by the parties, perhaps because the issues in question focused on concepts in Article VI which were not further elaborated in the Tokyo Round SCM Code. In other words, the central contentious issue before us was neither argued before the Pork Panel nor formed part of its deliberations and findings. Little weight can be given to the Panel's failure to consider the issue

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<sup>65</sup>United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada (adopted 11 July 1991), BISD 38S/30.

<sup>66</sup>Article 1 of the Tokyo Round SCM Code is virtually identical to the first sentence of Article 10 of the SCM Agreement (quoted in para. 237 above), providing as follows:

*"Application of Article VI of the General Agreement"*<sup>3</sup>

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>4</sup> on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

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<sup>4</sup> The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of the General Agreement". (footnote 3 omitted).

Similarly, Article 19.1 of the Tokyo Round SCM Code is virtually identical to Article 32.1 of the SCM Agreement (quoted in para. 238 above), providing as follows:

"No specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."<sup>38</sup> (footnote 38 omitted).

*sua sponte*. In any event, it is doubtful whether, given the fragmented nature of dispute settlement in the GATT system, a panel established under Article XXIII of GATT 1947 would have had the authority under its terms of reference to determine, in the light of provisions of the Tokyo Round SCM Code, that GATT Article XXIII was not the proper basis on which to pursue an application.<sup>67</sup>

260. Even if the issue of the choice of GATT Article XXIII dispute settlement had been argued, and if a panel established pursuant to Article XXIII had considered and decided that Article VI of GATT 1947 could be invoked independently of the Tokyo Round SCM Code, this decision would be of limited precedential effect for a panel established under the WTO. It is obvious that under the GATT system, Article VI of GATT 1947 would perforce apply on its own with respect to relations, and potential disputes, between Contracting Parties where one or both of those Contracting Parties was not a signatory to the Tokyo Round SCM Code. The pre-WTO system was, after all, characterized by a fragmentation both as regards applicable law and dispute resolution fora and procedure. We have, as noted, taken the view that one of the central objects and purposes of the WTO Agreement is to eliminate, as far as possible, that fragmentation through the creation of an integrated WTO system. Thus, the relevant provisions of the SCM Agreement being examined by this Panel must be interpreted in an altogether new and different legal context than the comparable provisions of the Tokyo Round SCM Code.

261. Consequently, the decision of the Pork Panel, made in different circumstances under a different regime of obligations, does not persuade us that we should reach a different interpretation of the relevant textual provisions of the WTO Agreement to the one we have reached.

**(iv) Transition to the WTO System and the consequences of a finding of non-separability**

262. We wish now to examine some of the alleged consequences of an interpretation of the WTO Agreement under which we would find that Article VI of GATT 1994 does not constitute applicable law in the circumstances of this dispute and the contention that such consequences must cast doubt on such an interpretation. One consequence, it is argued, would be to deny access to WTO dispute settlement with respect to a duty imposed as a result of a determination made after the entry into force of the WTO Agreement if that determination was the result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement. Surely, it is argued, if the act of determination took place after the date of entry into force of the WTO Agreement it should be subject to the WTO regime. The other consequence, it is claimed, would be that some WTO Members could be left without a forum to pursue their rights under either the GATT or WTO systems with respect to countervailing measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement.

263. In examining these alleged consequences and their possible significance it is important to recall that the issue of applicable law arises because of the particular temporal aspects of this dispute. The WTO Agreement entered into force for Brazil on 1 January 1995. The investigation resulting in the imposition of the duty was initiated on 21 June 1994, pursuant to an application made on 17 January 1994, prior to the date of entry into force of the WTO Agreement for Brazil. The definitive countervailing duty on desiccated coconut from the Philippines was imposed, however, on 18 August 1995 after the Agreement entered into force for Brazil.

264. The transition into a new legal regime, especially in relation to disputes such as this one which straddle the date of entry into force, frequently raises delicate legal issues. Transitional provisions typically try to balance the objective of a swift entry into force of the new agreement with the objective

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<sup>67</sup>As provided in the Montreal Improvements to the GATT Dispute Settlement Rules and Procedures, L/6489, dated 13 April 1989, the terms of reference of the Pork Panel were to examine the matter "in the light of the relevant GATT provisions".

of safeguarding pre-existing and legitimate expectations surviving from its predecessor. In selecting a transitional regime States will balance these oft conflicting objectives. They may, at one extreme, apply the new regime fully to all measures existing at the date of entry into force of the new agreement. They may, at the other extreme, “grandfather” all measures existing at the date of entry into force of the new agreement. They may choose some “in-between” regime. The practice of States varies from agreement to agreement and, often, even within the same agreement, parties may agree on multiple transitional regimes for different subject matters. Delicate and difficult as these legal issues are, their importance abates since in time, as the new Agreement comes fully into force the transitional problems disappear.

265. The transition into the WTO system is clearly characterized by a multiple approach to the problem. In some areas of the Agreement, WTO substantive requirements became operative and dispute resolution became available from the date of its entry into force even in relation to pre-existing measures. E.g., United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/R (29 January 1996), WT/DS2/AB/R (22 April 1996) (both adopted 20 May 1996). With respect to countervailing measures, immediate and full applicability of the WTO Agreement would mean that all existing measures, even those based on investigations and determinations completed before the WTO Agreement entered into force, could be immediately open to challenge in WTO dispute settlement proceedings, without the importing Member even having had an opportunity to assess the consistency of such existing measures with the new regime. At the other end of the spectrum, full grandfathering would permanently immunize existing measures from scrutiny under the new regime, even with respect to reviews of those measures. It is, however, abundantly clear that in relation to countervailing measures neither of these two extremes was adopted. The Members of the WTO constructed a more differentiated and gradual transitional regime for its entry into force. Perhaps this was because, unlike a measure whose consistency with the new regime can be evaluated without consideration of the process leading to its adoption, in the case of countervailing duties, procedural and substantive requirements are inextricably intertwined, and in assessing the consistency of a countervailing duty with the new regime, the process leading to its imposition must also be considered. The contours of this regime result from both the temporal provisions of the SCM Agreement and various instruments concerning the termination of GATT 1947 and the Tokyo Round SCM Code.

266. We now return to the two alleged consequences of a finding that Article VI of GATT 1994 does not constitute applicable law to this type of dispute. One result, it is argued, would be to deny access to WTO dispute settlement with respect to a duty imposed pursuant to a determination made after the entry into force of the WTO Agreement if that determination was the end stage of an investigation following an application made before the entry into force of the WTO. Surely, it is argued, if the act of determination took place after the entry into force of the WTO it should be subject to that regime. The other result, it is claimed, would be that some WTO Members could be left without a forum to pursue their rights under either the GATT or WTO systems with respect to countervailing measures imposed pursuant to investigations initiated in response to applications made before the date of entry into force of the WTO Agreement. These results, it could be argued, are so manifestly absurd and unreasonable as to undermine the plausibility of an interpretation which would hold that Article VI of GATT 1994 does not constitute applicable law to a dispute such as the one before us.

267. After careful consideration this Panel does not accept this proposition for the following principal reasons, which are elaborated further below.

268. In the first place it rests on a simple misconception of the true effect of a finding that Article VI of GATT 1994, standing alone, does not constitute applicable law to a dispute of the type before us. The WTO substantive provisions and dispute resolution procedure are not, in fact, fully denied in either situation. They are, instead, phased in by the transitional provisions in the WTO. Under the WTO countervailing regime (Article VI of GATT 1994 and the SCM Agreement) Members may seek a review of duties imposed pursuant to a determination made after the entry into force of the WTO Agreement. Such a review, if conducted, must comply with the WTO regime even if the duties resulted from an investigation initiated pursuant to an application made before the date of entry into force of the WTO

Agreement. Further, under a “sunset” provision, all measures are to be brought under the WTO regime, automatically, no later than five years after the entry into force of the WTO Agreement or the date of imposition of the measure, whichever is later.<sup>68</sup> Likewise, no WTO Members could be left totally without a forum to vindicate their rights with respect to countervailing measures imposed pursuant to investigations initiated as a result of applications made before the date of entry into force of the WTO Agreement. They too would have similar WTO rights through these reviews.

269. We readily acknowledge that the rights and remedies under this phase-in regime are in several respects less extensive and less effective than would be the case had the Agreement provided for a more accelerated transitional regime (say two years instead of five years), or no transitional regime at all, in the field of countervailing measures. But it is surely not for us to comment on the choices made by the framers of the WTO in this regard except as it bears on our interpretation of the WTO Agreement in relation to the non-applicability of Article VI and the SCM Agreement to disputes of the type before us. Even if an interpretation which excluded Article VI would mean, *quod non*, that some measures would be totally immunized from the new regime, this would not constitute in our view, given the wide variety in State practice regarding transitional regimes, a result so manifestly absurd or unreasonable as to throw doubt on such an interpretation, if it were otherwise strongly supported, as is the case here, by the text itself in its context and in the light of the object and purpose of the Agreement. That no measure or Member is, in fact, totally deprived of WTO rights and remedies clearly removes any doubt in this respect.

270. This is further confirmed if one examines the alleged consequences in the context of the overall transition regime to the WTO, which also comprises remedies under special arrangements made in relation to the previous regime. This could not have a direct bearing on the matter of interpretation before us. But, as will emerge, the sequence of negotiating and concluding these special arrangements lends some indirect support to this conclusion. It will also emerge that in some respects any shortcomings that Members may have in relation to measures resulting from investigations initiated pursuant to applications made under GATT 1947 and the Tokyo Round SCM Code, do not arise as a result of the transition rules governing the application of WTO rules to countervailing measures as such. Rather, any loss of existing rights arises out of the termination of GATT 1947 and the Tokyo Round SCM Code. At the time the WTO Agreement was signed, no understanding had been reached regarding if and when GATT 1947 and the Tokyo Round SCM Code would be terminated. Thus, 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.

271. Transitional issues, including how and when to terminate the GATT 1947 and the Tokyo Round Codes, were the subject of decisions taken by the Preparatory Committee for the World Trade Organization (“the Preparatory Committee”), the CONTRACTING PARTIES to GATT 1947 and the Tokyo Round SCM Committee after the WTO Agreement was signed but before its date of entry into force. One such decision, adopted by the Tokyo Round SCM Committee at the invitation of the Preparatory Committee, recognizes that, if signatories withdrew from the Tokyo Round Code or the Code were terminated immediately, certain countervailing measures might be subject neither to the Tokyo Round SCM Code nor to the SCM Agreement. In order to resolve this situation, the Decision provides that, in the event of withdrawal from or termination of the Tokyo Round Subsidies Code, the Code nevertheless will continue to apply with respect to any countervailing duty investigation or review which is not subject to application of the SCM Agreement pursuant to the terms of Article 32.3 of that Agreement. The Decision, which is to remain in effect for two years from the date of entry into force of

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<sup>68</sup>In many cases, the WTO will become effective for existing measures through a sunset review less than five years after the date of entry into force of the WTO Agreement. Specifically, for Members which maintained a sunset provision before the date of entry into force of the WTO Agreement, Article 32.4 of the SCM Agreement provides that a sunset review pursuant to WTO norms must be conducted not later than five years after the date of imposition of the measure, even if the measure was imposed before the date of entry into force of the WTO Agreement.

the WTO Agreement, also provides that the Tokyo Round SCM Committee will remain in operation for the purpose of dealing with any dispute arising out of such an investigation or review. Finally, signatories undertake to make best efforts to expedite to the extent possible such investigations and reviews and procedures for the settlement of disputes so as to permit Committee consideration of any such dispute within the period of validity of the Decision.<sup>69</sup> Article 2.14 of the Tokyo Round SCM Code provides that investigations shall, except in exceptional circumstances, be concluded within one year of initiation. Thus, it appears that, even where the initiation of an investigation occurred after the date of entry into force of the WTO Agreement, pursuant to an application filed before that date, this Decision generally would allow a signatory an adequate opportunity to pursue dispute settlement under the Tokyo Round SCM Code with respect to any investigation or review not covered by the SCM Agreement.

272. The Philippines and Brazil are both signatories of the Tokyo Round SCM Code, and the Philippines could thus have invoked the dispute settlement provisions of that Code. We do not mean to suggest by this observation that this Decision in itself forecloses the Philippines from pursuing a claim under Article VI of GATT 1994. 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. However, the invitation by the Preparatory Committee to the Tokyo Round SCM Committee to take this decision appears to represent an acknowledgement that Article 32.3 might leave WTO Members without a remedy with respect to certain countervailing measures, and provides at least a partial resolution to that situation.

273. The Philippines argues, and we acknowledge, that the foregoing Decision does not apply to all countervailing measures not subject to the SCM Agreement pursuant to Article 32.3 of the Agreement. Specifically, where one of the parties to a dispute involving countervailing measures is not a signatory to the Tokyo Round SCM Code, relations between the parties are governed only by GATT 1947. These parties cannot of course rely on the transition mechanism created by the Tokyo Round SCM Committee. We note, however, that a transitional decision of the CONTRACTING PARTIES to GATT 1947 resolved in part the dilemma confronting these parties. Pursuant to the Decision on the Transitional Co-Existence of the GATT 1947 and the WTO Agreement, L/7583 (adopted 8 December 1994), the GATT 1947 continued in force for one year after the date of entry into force of the WTO Agreement. The Decision further provided that, in the light of unforeseen circumstances, the CONTRACTING PARTIES could decide to postpone the date of termination of GATT 1947 by no more than one additional year. As a result, Contracting Parties to GATT 1947 which desired to pursue dispute settlement with respect to a countervailing measure to which neither the Tokyo Round SCM Code nor Article VI of GATT 1994 in conjunction with the SCM Agreement applied had an additional year in which to invoke GATT 1947 dispute settlement.

274. The Panel is aware that Article 32.3 of the SCM Agreement, in conjunction with the transition decisions discussed above, does not create a seamless transition from the GATT 1947 to the WTO system. Under Article 32.3 of the SCM Agreement, countervailing duty investigations that were ongoing or with respect to which an initiation decision had not yet been made as of the date of entry into force of the WTO Agreement are not subject to Article VI of GATT 1994 in conjunction with the SCM Agreement. We are aware of several such countervailing duty investigations, as well as of a number of anti-dumping investigations that are similarly situated as a result of Article 18.3 of the WTO Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement), which is the counterpart in that Agreement to Article 32.3 of the SCM Agreement. However, the Sub-Committee on Institutional, Procedural and Legal Matters of the Preparatory Committee for the World Trade Organization considered a two-year period of co-existence between the GATT 1947 and the WTO

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<sup>69</sup> See 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, SCM/187 (adopted 8 December 1994).

Agreement. Had the Preparatory Committee ultimately recommended such a decision to the CONTRACTING PARTIES to the GATT 1947, this potential gap in coverage would not exist. Thus, the gap in coverage identified by the Philippines results from the terms on which the GATT 1947 was terminated, rather than from Article 32.3 of the SCM Agreement. Therefore, little interpretive emphasis can be placed on the existence of such a gap when interpreting the WTO Agreement.

275. In any event, the SCM Agreement by its own terms enters into effect with respect to existing measures over time. In this respect, we note that reviews of existing measures initiated pursuant to requests made after the date of entry into force of the WTO Agreement are subject to the SCM Agreement. Article 21.2 of the Agreement provides that:

"The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately".

276. We further note that there is an outer limit to the non-applicability of Article VI of GATT 1994 in conjunction with the SCM Agreement in the form of a sunset clause. Article 21.3 of the SCM Agreement provides that:

"any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.<sup>52</sup>" (footnote 52 omitted).

Article 32.4 of the SCM Agreement specifies the manner in which this provision will enter into force under the Agreement's transitional regime:

"For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph".

277. We recognize that these provisions regarding review are not comparable in effect to the immediate application of the WTO Agreement to all countervailing measures. The effect of reviews regarding the continued need for imposition of countervailing measures will likely be prospective and, depending on the date of imposition of the measure and the circumstances subsequent to its imposition, the exporting country Member may or may not be entitled to an immediate review. Nevertheless, it is clear from this provision that measures to which the WTO Agreement is not immediately applicable will nevertheless be brought under WTO disciplines over time pursuant to reviews under Article 21.2 of the SCM Agreement. Further, even measures maintained and imposed under the pre-WTO regime, and not subject to a review under Article 21.2 of the SCM Agreement, will ultimately be brought under WTO disciplines under this sunset provision.<sup>70</sup>

278. From the foregoing analysis, it is apparent that the WTO Agreement, in conjunction with the arrangements for the termination of GATT 1947 and the Tokyo Round SCM Code, create a transitional regime under which WTO disciplines and WTO dispute resolution become applicable to countervailing measures in a determined, phased-in manner. In other words, measures that are not immediately subject to the WTO regime are, for a limited period of time, insulated from scrutiny under that regime, although they may be subject to scrutiny under the old regime. The principal features of the transition to the WTO regime are as follows:

- Any countervailing measure imposed as a result of an application made on or after the date of entry into force of the WTO Agreement for a Member is immediately subject to WTO rules, and WTO dispute settlement, as is any review of a measure initiated as a result of an application made on or after the date of entry into force of the WTO Agreement for a Member.
- With respect to measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement:
  - Between Members which were signatories to the Tokyo Round SCM Code access to dispute settlement under that Code remains available for two years after the entry into force of the WTO Agreement. If dispute resolution under the Code is not sought, or in the unusual case where the two-year period is insufficient, WTO dispute resolution will become available following reviews initiated pursuant to applications made on or after the entry into force of the WTO Agreement. At the outer limits, obligatory sunset reviews will bring measures under WTO disciplines and WTO dispute resolution will become available.
  - For disputes among Members one or both of which were not signatories to the Tokyo Round SCM Code, dispute resolution under GATT 1947 was available for one year after the entry into force of the WTO Agreement. Otherwise, the WTO regime becomes effective for such disputes through reviews, the operation of the sunset clause, and the eventual availability of WTO dispute resolution in the same manner as for Tokyo Round SCM Code signatories.

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<sup>70</sup>We note that there are virtually identical provisions in the Anti-Dumping Agreement governing reviews of the need for continued imposition of duties and sunset. We further note that Article 9 of the Anti-Dumping Agreement requires that Members have either a prospective or retrospective duty assessment system. At least one Member with a retrospective duty assessment system applies WTO norms to such retrospective duty assessments. In such cases, the provisions of the Anti-Dumping Agreement would apply to the collections of all duties for the period covered by the retrospective duty assessment, which may include duties for periods prior to the entry into force of the WTO Agreement. Because the issue is not before us, this Panel expresses no opinion as to whether this is a requirement of the Anti-Dumping Agreement, nor as to whether a duty assessment system is required by the SCM Agreement.

It is not for us to comment on the choices made by the parties in setting up the regime for transition to the WTO regime in the field of countervailing measures -- save to mention that any transitional regime involves compromises. There is, in our view, nothing in this construction that is so unreasonable as to undermine this Panel's conclusion, based on our interpretation of the relevant textual provisions, that Article VI of GATT 1994 is not independently applicable to a dispute to which the SCM Agreement is not applicable.

279. It has been argued that it would be inconsistent with the object and purpose of the WTO Agreement to interpret that Agreement in a manner that denies a Member access to WTO dispute settlement with respect to a countervailing duty imposed after the entry into force of the WTO Agreement. The imposition of that duty, it is argued, constitutes an independent act which, since it takes place after the entry into force of the WTO Agreement, should be subject to its strictures. The problem in this case is that the circumstances underlying Brazil's imposition of a countervailing duty on imports of desiccated coconut are part of a process which straddled the date of entry into force of the WTO Agreement. It is an accepted principle of customary international law, reflected in Article 28 of the Vienna Convention, that rights and obligations under a new treaty do not apply retroactively. How to apply that principle to the particular case of a countervailing measure based on a process begun before, but completed after, the date of entry into force of the WTO Agreement, is a matter of great legal delicacy. We note that the parties to the dispute and certain third parties presented extensive arguments regarding the application in this case of the principle reflected in Article 28 of the Vienna Convention. But it should be noted that the principle set forth in Article 28 applies "[u]nless a different intention appears from the treaty or is otherwise established...". In this case, the Panel has reached its conclusions on the basis of the intention of the drafters as evidenced in the text of the WTO Agreement itself. Accordingly, we have not addressed the parties' arguments regarding customary principles of international law, nor do we express any view regarding the application of such principles in other contexts under the WTO Agreement. In our view, the SCM Agreement recognizes the principle of non-retroactivity, and taking into account the complexities of applying this general principle in the context of countervailing duties, resolves the difficult question of the operation of the general principle in this specific context through transition rules which spell out the precise temporal application of the SCM Agreement, as described above. By virtue of our conclusion that Article VI of GATT 1994 does not apply where the SCM Agreement does not apply, the same resolution of this problem would apply to Article VI of GATT 1994. In our view, this result is neither manifestly absurd nor unreasonable. Indeed, we consider it to be fully consistent with the purpose identified in the Preamble of the WTO Agreement to develop an integrated multilateral trading system. Even if the text allowed any interpretive leeway on this issue, which in our view it does not, any possible advantages of an interpretation which allowed immediate recourse to WTO dispute resolution under Article VI alone with respect to any countervailing duty imposed after the date of entry into force of the WTO Agreement is far outweighed by all the problems and difficulties flowing from such an interpretation, which, as discussed above, would lead to manifestly absurd and unreasonable results.

280. We recognize that Articles I, II and VI of GATT 1994 are interrelated, and that Article VI allows measures which might otherwise be inconsistent with Articles I and II of GATT 1994.<sup>71</sup> Clearly, the fact that the WTO Agreement creates a transition regime in which Article VI of GATT 1994 and the SCM Agreement become effective in a phased manner with respect to certain countervailing measures does not mean that, until those provisions become effective, such measures are inconsistent with

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<sup>71</sup>Reflective of this relationship is Article II:2(b), which provides that "[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product ... any anti-dumping or countervailing duty applied consistently with the provisions of Article VI\*" (note omitted). We note that the application of this provision requires a judgement regarding whether a countervailing duty is "applied consistently with Article VI". Here the measures are neither "consistent" nor "inconsistent" with Article VI of GATT 1994; rather, they are simply not subject to that Article, and any assessment of their consistency should be performed by reference to Article VI of GATT 1947 and, with respect to Tokyo Round SCM Code signatories, also with reference to that Code.

Articles I and II of GATT 1994. It could not have been the intention of the drafters in creating a gradual, phased-in entry into force of Article VI and the SCM Agreement to render all measures subject to the phase-in immediately invalid. To the contrary, as explained above, this Panel concluded that the effect of this transition regime is to insulate countervailing measures imposed as a result of an investigation initiated pursuant to an application made before the date of entry into force of the WTO Agreement for a Member until such time as the measures are subject to a review to which Article VI of GATT 1994 and the SCM Agreement apply. Needless to say, this result has no bearing on the force and effect of Articles I and II of GATT 1994 with respect to measures other than those countervailing measures subject to the transition rule set forth in Article 32.3 of the SCM Agreement.

281. In light of the provisions of the WTO Agreement, interpreted in their context and in light of their object and purpose, as discussed above, this Panel concludes that Article VI of GATT 1994 does not constitute applicable law for the purposes of this dispute. As a result, the Philippines' claims under Articles I and II, which derive from their claims of inconsistency with Article VI of GATT 1994, cannot succeed.

## 2. Applicability of the Agreement on Agriculture

282. This Panel now turns to the question of the applicability of the Agreement on Agriculture to disputes such as this one, which involve countervailing measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement for a Member. The Philippines claimed that, even if the programmes at issue in Brazil's investigation constitute subsidies on coconut fruit, the programmes fully comply with the developing country and *de minimis* exemptions from domestic support commitments under Article 6 of the Agreement on Agriculture. Thus under Article 13(b)(i) of that Agreement the programmes are exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the SCM Agreement. Brazil contends that Article 13 of the Agreement on Agriculture only applies to countervailing duties subject both to the Article VI of GATT 1994 and the SCM Agreement, and that this is not the case here.

283. Article 13 of the Agreement on Agriculture provides that:

"During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

...

- (b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:
  - (i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations...".

Note 4 to Article 13 provides that:

"Countervailing duties' where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures".

284. We have previously concluded that neither Article VI of GATT 1994 in isolation, nor Article VI of GATT 1994 in conjunction with the SCM Agreement, apply to the measures at issue in this dispute. Countervailing duties are subject to Article 13 of the Agreement on Agriculture only if they are "covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures". Thus, we conclude that Article 13 of the Agreement on Agriculture does not apply to this dispute.

285. We further note that Article 13 of the Agreement on Agriculture reinforces our conclusions regarding the non-applicability of Article VI of GATT 1994 to this dispute. First, it appears from the text of Article 13 (specifically, to the consistent references to Article VI of GATT 1994 **and** the SCM Agreement) that the drafters expected that Article VI of GATT 1994 and the SCM Agreement would operate only in conjunction. Thus, Article 13 demonstrates that the WTO Agreement establishes an integrated package of rights and obligations relating to the use of countervailing measures. These rights and obligations are found in Article VI of GATT 1994, the SCM Agreement, and the Agreement on Agriculture. We do not consider that this package of rights and obligations would operate as intended if portions of the package were found to apply to a countervailing measure when other portions did not.

## **B. Failure to Consult**

286. The Philippines requests a finding that Brazil's refusal to hold consultations under Article XXIII:1 of GATT 1994 in this matter is inconsistent with its obligations under that Article and Articles 4.1, 4.2 and 4.3 of the DSU. Brazil in response argues that the Philippines has failed to state a claim in this regard, and that therefore this issue is not within the Panel's terms of reference.

287. The Philippine's request concerns a matter which this Panel views with the utmost seriousness. Compliance with the fundamental obligation of WTO Members to enter into consultations where a request is made under the DSU is vital to the operation of the dispute settlement system. Article 4.2 of the DSU provides that "Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former<sup>3</sup>". Moreover, pursuant to Article 4.6 of the DSU, consultations are "without prejudice to the rights of any Member in any further proceedings". In our view, these provisions make clear that Members' duty to consult is absolute, and is not susceptible to the prior imposition of any terms and conditions by a Member.

288. This Panel is bound to examine only those claims which fall within the scope of our terms of reference. In this case, the parties agreed to special terms of reference, directing the Panel to examine the "matter" referred to the DSB for settlement by the Philippines in the request for establishment of a panel, taking into account Brazil's submission in document WT/DS22/3 and the record of discussions at the meeting of the DSB on 21 February 1996.

289. The parties disagreed concerning the standard by which a panel should evaluate whether a claim is within the terms of reference of a panel under the provisions of the DSU. Article 6.2 of the DSU requires that a request for establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In our view, at a minimum, it should have been possible, based on a reasonable reading of the documents determining the scope of the terms of reference, to conclude that this Panel would be asked to make findings regarding Brazil's failure to consult.

290. We examined the Philippines' request for establishment of a panel, and the additional documents the Panel was directed to take into account, in order to determine whether the Philippines had stated a claim regarding Brazil's failure to consult sufficiently to bring it within the scope of the Panel's terms of reference. The Philippines' request for establishment of a panel clearly fulfils the first requirement of Article 6.2, by indicating the Philippines' view that consultations were not held because Brazil refused to

consult. It also identifies the countervailing measures imposed by Brazil, the Philippines' assertions of various violations with regard to those measures, and requested findings with respect to those measures. However, there is nothing in the request for establishment of a panel that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. We consider it self-evident that Brazil's submission in document WT/DS22/3 does not state a claim on behalf of the Philippines. Finally, while the record of the discussions in the DSB meeting of 21 February 1996 repeats the Philippines' view that consultations were not held because Brazil refused to consult, there is again nothing in that record that would lead to the conclusion that the requested panel would be asked to make any finding regarding Brazil's failure to consult. In our view, it would not have been possible, based on a reasonable reading of the documents determining the scope of the Panel's terms of reference in this dispute, to conclude that the Panel would be asked to make any finding regarding Brazil's failure to consult. We therefore conclude that the Philippines' claim regarding Brazil's failure to consult is not within our terms of reference.

### **C. Translation of DTIC Opinion 006/95**

291. On 12 June 1996, the second day of the Panel's first meeting with the parties, Brazil submitted a two-page document setting forth corrections to its translations of Interministerial Ordinance No. 11 and DTIC Opinion 006/95, indicating that the initial translation did not properly reflect the original Portuguese-language determinations. The Philippines objected to consideration of the corrected translations of the two texts, asserting that there were substantive differences between the initial and corrected translations. The Philippines subsequently submitted a letter objecting to the "acceptance" of the corrected translations, objecting to Brazil's failure to provide advance warning of the pending corrections, and inferring that the corrections were made in response to arguments made during the oral presentations of the Philippines and third parties and/or to address some of the concerns expressed in our questions to Brazil. The Philippines indicated three instances in which it considered that Brazil had gone beyond translation corrections to change the substance of the documents.

292. On 17 July 1996, at the Panel's second meeting with the parties, we issued the following ruling concerning this issue:

"The Panel takes note of the Philippine's request that the Panel 'not accept' the corrected translation, and in particular of the objections of the Philippines regarding corrections 1, 7 and 9 to Interministerial Directive no. 11.

"The Panel considers that it would have been preferable had Brazil confirmed the accuracy of its translations prior to submitting them to the Panel. However, for the Panel to decline to accept any linguistic corrections on the grounds they differed from the initial translation would prevent the Panel from reviewing should it become necessary the countervailing duty in light of the actual determination made by Brazil.

"The Panel has before it the original Portuguese-language text of Interministerial Directive no. 11 and translations prepared by both parties. The Panel will refer to both the Philippine and corrected Brazilian translations should it be required to consider the language of that Directive. Should there be any material difference between the two translations with respect to relevant language in the Directive, the Panel will if and as required resolve any such difference by reference to the original Portuguese-language Directive.

"The Panel has before it the original Portuguese-language text of DTIC Notice 06/95. Should the Panel be required to refer to DTIC Notice no. 06/95, and if the language considered was subject to correction by Brazil, the Panel will confirm the accuracy of the corrected translation by reference to the Portuguese-language text of the Notice. The Philippines may inform the Panel if it considers that any of the corrections

inaccurately reflects the original Portuguese-language Notice.

"Should the Philippines consider that any modification to the Panel's procedures is required to accommodate these circumstances, the Panel is prepared to entertain any request for such a modification".

## **VII. CONCLUDING REMARKS**

293. The substantive questions raised by the Parties to this dispute are a matter of major concern and would merit serious consideration. However, because the issue of applicable law was dispositive in this dispute, this Panel did not reach any conclusion with respect to those substantive questions.

## **VIII. CONCLUSIONS**

294. In light of the findings above, the Panel makes 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.

295. 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.