

*European Communities - Measures Affecting the  
Importation of Certain Poultry Products*

*Report of the Panel*

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

## ***I. INTRODUCTION***

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

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

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

### ***Terms of reference***

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

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

### ***Panel composition***

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

Chairman: Mr. Wilhelm Meier

Members: Mr. Peter May  
Ms. Magda Shahin

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

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

## II. FACTUAL ASPECTS

### **Background**

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

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

### **Current EC Schedule LXXX**

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

### **Licensing requirements for the poultry TRQ**

11. Council Regulation 774/94 opened, *inter alia*, a tariff quota for an annual volume of 15,500 tonnes for the relevant poultry meat products and provided that detailed rules for the application of the Regulation should be adopted in accordance with the procedures in Article 27 of Regulation 805/68 or in the corresponding Articles of other Regulations on the common organization of the markets concerned. Such detailed rules were subsequently set out in Commission Regulation 1431/94, dated 22 June 1994. Article 1 of Regulation 1431/94 provided that all imports under the tariff quotas for the relevant poultry meat products were subject "to the presentation of an import licence." 25 per cent of the quantity of the quota was allocated for each quarter of the year, save for 1994 when 50 per cent was allocated for each half of the year. Applicants for import licences had to be natural or legal persons who, at the time applications were submitted, had imported not less than 100 tonnes (product weight) of products falling within CN codes 0207 14 10, 0207 14 50 and 0207 14 70 in each of

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

<sup>2</sup>Argentina, Canada, Hungary, India, Pakistan, Poland, Sweden, the United States and Uruguay.

<sup>3</sup>HS 0207 14 10, 0207 14 50 and 0207 14 70.

the two previous calendar years<sup>4</sup> whether in-quota or out-of-quota product. Licence applications and licences should show the country of origin. Applicants had to lodge a security. Licences were not transferable.<sup>5</sup> If applications exceeded the volume available for the quarter, the Commission fixed "a single percentage of acceptance for the quantities applied for". If this percentage was less than 5 per cent, the Commission was authorized not to award those quantities in which case the security was released (Article 4.4 of Regulation 1431/94).

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

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

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

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<sup>4</sup>Article 3 of Regulation 1431/94 as amended by Regulation 958/96.

<sup>5</sup>Article 5 of Regulation 1431/94.

<sup>6</sup>ECU 333.5, 235.7 and 316.6, respectively, for CN 0207 41 10, 0207 41 41, 0207 41 71, respectively.

<sup>7</sup>Article 2 of 1484/95.

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

<sup>9</sup>Article 3 of Regulation 1484/95.

## V. *INTERIM REVIEW*

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

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

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

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

176. With respect to the first point raised by Brazil, the Panel considered that it had fully understood Brazil's argument. In order to avoid any impression of misinterpretation by the Panel, however, the Panel decided to insert the word "necessarily" in paragraph 212 as well as in paragraph 218, as requested by Brazil. Regarding the second point on paragraph 214, the Panel acknowledged that it was Brazil's position that such a practice existed. However, the Panel considered that its view on this point was clearly expressed in paragraph 213. Regarding the third point on paragraph 216, the Panel was of the view that Brazil was confusing the overall oilseeds package with the Oilseeds Agreement. As referred to in Chapter VI (findings) of this report, the Oilseeds Agreement is the bilateral agreement between Brazil and the EC. To clarify this point, the Panel modified paragraph 194 slightly. In the Panel's view, what had been agreed between the EC and its trading partners other than Brazil was not relevant to the present dispute. Under the Vienna Convention, such agreements could be regarded as a supplementary means of

interpretation under Article 32 because they might indicate the circumstances of the conclusion of the Oilseeds Agreement between Brazil and the EC. However, in view of the conclusion reached in paragraph 216, the Panel considered that it was unnecessary to have recourse to such a supplementary source. Regarding the fourth and final point presented by Brazil, the Panel noted that in paragraph 215 it was not addressing the issue of whether the procedure for safeguarding the rights of third parties was correctly followed. Rather, it was addressing a more fundamental, systemic issue that would negatively affect all Members of the WTO, including Brazil in this case. For these reasons, the Panel did not alter its findings, except the modifications in paragraphs 194, 212 and 218 mentioned above.

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

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

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

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

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

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

183. Regarding what is now paragraph 257 of the final report, Brazil requested that reference be made to the fact that Brazil provided proof of speculation, which was not contested by the EC. The Panel noted that Brazil had submitted two letters (in German) in this regard. However, in the Panel's view, they did not add more information than what was already contained in paragraph 95 above.

184. Paragraph 107 of the interim report, as well as what are now paragraphs 264 and 265 of the final

report, had referred to Article 3.4 of the Licensing Agreement. However, Brazil stated that its reference to Article 3.4 was due to a typographical error and requested that any reference to Article 3.4 be deleted from the final report, which the Panel accepted.

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

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

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

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

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

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

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

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

## **VI. FINDINGS**

### **A. CLAIMS OF THE PARTIES**

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

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

195. The EC rejects these claims.

### **B. THE OILSEEDS AGREEMENT**

#### **(i) Relevance of the Oilseeds Agreement to this dispute**

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

197. First, we note that, although the United States in its third-party submission argues that the

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

<sup>105</sup>Commission Regulation (EC) No 1431/94 of 22 June 1994.

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

<sup>107</sup>Article 1.1 of the DSU defines covered agreements as "the agreements listed in Appendix 1 to this Understanding".

agreement is not covered by the terms of reference<sup>108</sup>, the EC has not explicitly objected to the examination of the Oilseeds Agreement by this Panel.

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

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

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

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

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

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

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

**(ii) Relationship between the Oilseeds Agreement and Schedule LXXX**

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

204. As noted above, the Oilseeds Agreement was concluded within the context of Article XXVIII negotiations. Under ordinary circumstances, the resulting modification of the EC tariff schedule would have been certified by the Director-General pursuant to the 1980 procedure for modification and rectification of schedules.<sup>112</sup> However, as the conclusion of the Oilseeds Agreement coincided with the substantive conclusion of tariff negotiations in the Uruguay Round, this procedure was not strictly

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<sup>108</sup>Paragraph 155.

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

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

<sup>111</sup>See paragraph 8.

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

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

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

"A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."

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

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

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

"In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the

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<sup>113</sup>Paragraph 43.

<sup>114</sup>*Ibid.*

<sup>115</sup>Paragraph 22.

<sup>116</sup>See paragraph 209.

withdrawal and reinstatement of the tariff concessions for oilseeds as part of the withdrawal of the whole of the Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962."<sup>117</sup>

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

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

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

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

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

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

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

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

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

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

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

**(a) Ordinary meaning of the terms**

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

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

**(b) Object and purpose of the Oilseeds Agreement**

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

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

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

213. First, we examine whether Brazil's argument is supported by specific provisions in the WTO agreements, decisions of the Ministerial Conference/General Council or "the decisions, procedures and customary practices followed by the CONTRACTING PARTIES".<sup>123</sup> We note that, despite Brazil's

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<sup>119</sup>Paragraph 56.

<sup>120</sup>Paragraph 57.

<sup>121</sup>Paragraphs 37 and 59.

<sup>122</sup>Paragraph 55.

<sup>123</sup>Article XVI:1 of the Agreement Establishing the World Trade Organization.

assertions that there are examples of country-specific TRQs in practice and that those TRQs are well recognized by academic writers,<sup>124</sup> there is no provision in the WTO agreements that allows departure from the MFN principle in the case of TRQs resulting from Article XXVIII negotiations.<sup>125</sup> Nor is there any decision of the CONTRACTING PARTIES or of the Ministerial Conference/General Council, or any adopted panel or Appellate Body report that permits such departure.

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

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

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

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

216. Brazil argues that by failing to respect the balance between the withdrawal of a concession and the offering of compensation in another product, the EC has denied Brazil's rights within the multilateral system.<sup>127</sup> In our view, however, the balance must be sought not only bilaterally but also within the multilateral context, as required under Article XXVIII:2 of GATT. Indeed, most tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis. The fact that the poultry TRQ was opened as a result of bilateral negotiations between the EC and Brazil does not mean that the EC was obligated to accord the benefit exclusively to Brazil. In conclusion, we find that the object and purpose of the Oilseeds Agreement does not support Brazil's argument that the total TRQ should be reserved exclusively for its products.

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<sup>124</sup>Paragraph 54.

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

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

<sup>127</sup>Paragraph 40.

(c) *Preparatory work of Article XXVIII*

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

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

(iv) *Summary*

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

**C. LEGITIMATE EXPECTATIONS**

219. Before moving on to the examination of Brazil's alternative claim on Article XIII of GATT, we address Brazil's supplementary claim regarding legitimate expectations by Brazil concerning the tariff treatment of the poultry products by the EC.<sup>130</sup> Brazil does not invoke particular provisions of the WTO agreements to support its claim. In this regard, we note that the Appellate Body in a recent report emphasized the importance of distinguishing between (a) the concept of protecting the expectations of Members as to the competitive relationship between their products and the products of other Members and (b) the concept of the protection of the reasonable expectations of Members relating to market access conditions. According to the Appellate Body, the former was developed in the context of violation complaints involving Articles III and XI of GATT, while the latter was developed in the context of non-violation complaints.<sup>131</sup>

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

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

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

<sup>130</sup>Paragraph 46.

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

**D. ARTICLE XIII OF GATT**

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

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

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

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

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

**(i) Agreement on the allocation of the TRQ**

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

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

225. Brazil has demonstrated that it complained about the operation of the TRQ as early as 28 March 1994.<sup>136</sup> The first letter of complaint - from the Brazilian Ambassador in Brussels to a senior

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<sup>132</sup>Appellate Body Report on *Banana III*, *op. cit.*, para. 160.

<sup>133</sup>Paragraph 64.

<sup>134</sup>Paragraph 65.

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

<sup>136</sup>Letters of complaint attached to Brazil's first written submission. We note that the EC did not respond to any of these

EC official - reads as follows (emphasis added):

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

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

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

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

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

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

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

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

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

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letters in writing.

<sup>137</sup>Paragraph 66.

<sup>138</sup>Paragraphs 68 and 70.

(a) *Non-Members*

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

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

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

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

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

(b) *Members in East Europe*

234. Now we move on to the issue of Members in East Europe. According to the evidence submitted by the EC, licences in the "others" category are allocated to poultry products originating in East Europe, notably Hungary and Poland. We note in this regard that the EC and the then Czech and Slovak Republic, Hungary and Poland in 1992 jointly notified the CONTRACTING PARTIES that the Interim Agreements aimed at the establishment of free trade areas under Article XXIV of GATT came into force as of 1 March 1992.<sup>141</sup> Brazil claims that the allocation of licences to imports of poultry products from

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

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

<sup>141</sup>L/6992, 3 April 1992.

East European countries is inconsistent with Article XIII of GATT because the EC has reduced the benefit to other Members by allowing these countries to participate in the TRQ.

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

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

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

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

238. There is some similarity between the *Newsprint* case and the present case regarding this specific issue. As in the *Newsprint* case, the purpose of the poultry TRQ is to allow specified quantities (15,500 tonnes) of imports into the EC duty-free which would otherwise be dutiable. However, there are three important factual differences. First, in the *Newsprint* case, EFTA suppliers were accorded duty-free access to the EEC market without restriction. In the present case, imports from Hungary and Poland under the Interim Agreements are still dutiable.<sup>145</sup> Second, in the *Newsprint* case, the level of the MFN

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<sup>142</sup>Paragraph 53.

<sup>143</sup>*Panel on Newsprint*, adopted on 20 November 1984, BISD 31S/114.

<sup>144</sup>*Ibid.*, para. 55.

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

duty-free quota was reduced in order to make room for preferential access while in the present case no such reduction has occurred. Third, in the *Newsprint* case, the EFTA agreement was concluded after the opening of the MFN quota whereas in this case the Interim Agreements preceded the opening of the poultry TRQ.

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

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

#### ***E. LICENSING AGREEMENT***

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

##### ***(i) Notification***

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

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<sup>146</sup>Panel Report on *Newsprint*, *op. cit.*, para. 55.

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

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

<sup>149</sup>Paragraph 77.

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

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

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

**(ii) Changes to the licensing rules**

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

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

**(iii) Distortion of trade**

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

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

<sup>151</sup>Paragraph 80. See also paragraph 76.

<sup>152</sup>Paragraph 81.

<sup>153</sup>Paragraphs 82 and 84.

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

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

Article 3.2 of the Licensing Agreement further provides:

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

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

*(iv) Licence entitlement based on export performance*

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

251. Article 1.3 of the Licensing Agreement provides:

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

Article 3.5(j) in relevant part provides:

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

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

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<sup>154</sup>Paragraph 86.

<sup>155</sup>Paragraphs 87 and 88.

<sup>156</sup>Paragraph 89.

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

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

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

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

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

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

(v) *Speculation in licences*

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

258. Article 3.5(h) provides:

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

Article 3.5(j) in relevant part provides:

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

259. While it may be true that Brazilian exporters have had additional difficulties in exporting to the EC market due to the speculation in licences, we note that the licences allocated to imports from Brazil have been fully utilized. In other words, the speculation in licences has not discouraged the full

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<sup>157</sup>Appellate Body Report on the *Banana III*, *op. cit.*, para. 197.

<sup>158</sup>Paragraph 91.

<sup>159</sup>Paragraph 92.

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

**(vi) Issuance of licences in economic quantities and newcomers**

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

261. Article 3.5(i) provides as follows:

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

Article 3.5(j) further provides in relevant part:

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

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

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

**(vii) Transparency**

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

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

<sup>161</sup>Paragraph 101.

<sup>162</sup>Paragraph 102.

<sup>163</sup>Paragraph 98.

<sup>164</sup>Paragraph 164.

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

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

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

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

(viii) *Summary*

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

**F. ARTICLE X OF GATT**

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

268. In our view, however, the factual situation is different in the present case from that in the *Banana III* case. As Brazil correctly points out, this finding of the Appellate Body was made in relation

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

<sup>166</sup>Paragraph 107.

<sup>167</sup>Paragraph 108.

<sup>168</sup>Paragraph 140.

<sup>169</sup>Appellate Body Report on *Banana III*, *op. cit.*, para. 204.

<sup>170</sup>Paragraph 141.

to an EC regime for the importation of bananas where there was no over-quota trade.<sup>171</sup> In the present case, there is significant over-quota trade, and Brazil's complaint focuses on the difficulty of differentiating between in-quota and over-quota trade. Therefore, in our view, the examination of Article X of GATT as well as the Licensing Agreement is warranted since, in the present case, the Licensing Agreement is relevant to in-quota trade and Article X of GATT is relevant to the total trade.

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

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

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

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

#### **G. ARTICLE II OF GATT**

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

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

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<sup>171</sup>Paragraph 142.

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

<sup>173</sup>Paragraph 144.

<sup>174</sup>Paragraph 147.

force in the importing territory on that date."

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

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

#### **H. ARTICLE III OF GATT**

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

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

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

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

#### **I. AGREEMENT ON AGRICULTURE**

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

"Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties<sup>179</sup>, except as otherwise provided for in

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<sup>175</sup>Paragraph 148.

<sup>176</sup>Paragraph 151.

<sup>177</sup>Paragraph 152.

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

<sup>179</sup>Footnote 1 to this paragraph reads: "These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises,

Article 5 and Annex 5."

Article 5.1 in relevant part provides as follows:

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

(i) *Article 5.1*

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

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

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

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voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

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

<sup>181</sup>Paragraphs 119, 121 and 124.

<sup>182</sup>Paragraph 122.

advanced by Brazil, i.e. that the market entry price must include duties paid.

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

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

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

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

**(b) Injury requirement**

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

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

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<sup>183</sup>One member of the Panel does not endorse this conclusion. See paragraphs 289 to 292.

<sup>184</sup>Paragraphs 126, 128, 129 and 130.

<sup>185</sup>Paragraphs 127 and 131.

(c) *Representative price*

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

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

(ii) *Article 4.2*

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

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

(iii) *Opinion by a member of the Panel*

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

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

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<sup>186</sup>Paragraph 134.

<sup>187</sup>Paragraph 135.

<sup>188</sup>See paragraphs 191 and 192.

<sup>189</sup>Paragraph 116.

<sup>190</sup>Paragraph 117.

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

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

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

#### **J. NULLIFICATION OR IMPAIRMENT**

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

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<sup>191</sup>Paragraph 15.

**VII. CONCLUSIONS AND RECOMMENDATIONS**

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

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

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

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

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

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