

UNITED STATES – ANTI-DUMPING ACT OF 1916

Complaint by the European Communities

Report of the Panel

The report of the Panel on United States – Anti-Dumping Act of 1916 is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 31 March 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

I. INTRODUCTION

1.1 On 4 June 1998, the European Communities requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 (hereinafter the "GATT 1994") and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the "Anti-Dumping Agreement") regarding failure on the part of the United States to repeal Title VIII of the US Revenue Act of 1916, also known as the US Antidumping Act of 1916 (hereinafter the "1916 Act").¹

1.2 Consultations were held in Geneva on 29 July 1998, but did not lead to a mutually satisfactory resolution of the matter.

1.3 On 11 November 1998, the European Communities requested the Dispute Settlement Body (hereinafter the "DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.² The European Communities claimed that the 1916 Act was inconsistent with Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "Agreement Establishing the WTO" - the Marrakesh Agreement Establishing the World Trade Organization including its annexes being referred to as the "WTO Agreement"); Articles VI:1 and VI:2 of the GATT 1994; and Articles 1, 2.1, 2.2, 3, 4 and 5 of the Anti-Dumping Agreement.³ In the alternative, the European Communities claimed that the 1916 Act was in breach of Article III:4 of the GATT 1994.

1.4 On 1 February 1999, the DSB established a panel pursuant to the request made by the European Communities, in accordance with Article 6 of the DSU. In document WT/DS136/3, the Secretariat reported that the parties had agreed that the panel would have the standard terms of reference. The terms of reference are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS136/2, the matter referred to the DSB by the European Communities 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."

1.5 Document WT/DS136/3 also reported that, on 1 April 1999, the Panel was constituted as follows:

Chairman: Mr. Johann Human

Members: Mr. Dimitrij Grčar

Professor Eugeniusz Piontek

1.6 India, Japan and Mexico reserved their rights to participate in the Panel proceedings as third parties. All of them presented arguments to the Panel.

¹ See WT/DS136/1.

² See WT/DS/136/2.

³ The provisions listed by the European Communities in WT/DS/136/2 as being infringed by the 1916 Act are, in the view of the European Communities, not necessarily the only violations of the mentioned Agreements. See WT/DS/136/2.

1.7 The Panel met with the parties on 13 - 14 July 1999 as well as 14 - 15 September 1999. It met with third parties on 14 July 1999. The Panel issued its interim report to the parties on 20 December 1999. The Panel issued its final report to the parties on 14 February 2000.

II. FACTUAL ASPECTS

A. DESCRIPTION OF THE US 1916 ACT

2.1 The 1916 Act at issue in the present dispute was enacted by the US Congress under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.⁴ It provides as follows:

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

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

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

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."⁵

2.2 Thus, the business activity which the 1916 Act prohibits is a form of international price discrimination, which has two basic components:

- (a) An importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the country of the foreign producer.
- (b) The importer must have undertaken this price discrimination "commonly and systematically."

⁴ Act of 8 September 1916. The Revenue Act of 1916 can be found at 39 Stat. 756 (1916).

⁵ 15 U.S.C. § 72.

2.3 It is a condition for criminal or civil liability under the 1916 Act that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

2.4 Another characteristic of the 1916 Act is that it provides for a private right of action in federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.

2.5 The 1916 Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade".⁶

B. DESCRIPTION OF OTHER RELEVANT US ACTS

1. Antidumping Act of 1921 and Tariff Act of 1930

2.6 In 1921, the United States enacted the "Antidumping Act of 1921."⁷ It empowered the Secretary of the Treasury to impose duties on dumped goods without regard to the dumper's intent. Whereas the Antidumping Act of 1921 was later repealed, it is on this Act that the United States' Tariff Act of 1930, as amended (hereinafter the "Tariff Act of 1930"),⁸ is built. The Tariff Act of 1930 is implemented through proceedings governed by regulations promulgated by the US Department of Commerce⁹ and the US International Trade Commission¹⁰.

2.7 The 1921 Antidumping Act was, and the 1930 Tariff Act, as amended, is, codified in Title 19 of the United States Code, entitled "Customs Duties".

2.8 The United States has notified Title VII of the Tariff Act of 1930, as amended, and its implementing regulations to the WTO's Committee on Anti-Dumping Practices in accordance with Articles 18.4 and 18.5 of the Anti-Dumping Agreement.

2. Robinson-Patman Act

2.9 Section 2 of the Clayton Act, as amended by the Robinson-Patman Act in 1936, provides in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States [...] and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."¹¹

⁶ See 15 U.S.C. §§ 71-74.

⁷ The Antidumping Act of 1921 was codified at 19 U.S.C. §§ 160-71 (repealed).

⁸ The Tariff Act of 1930 is codified at 19 U.S.C. §§ 1671 et seq.

⁹ See 19 C.F.R. Part 351.

¹⁰ See 19 C.F.R. Part 200.

¹¹ 15 U.S.C. 13(a).

2.10 Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, applies the same principles to the conduct of a buyer, by making it unlawful for a buyer "knowingly to induce or receive discrimination in price" prohibited by other parts of the Act.¹² A violation of this provision is subject to criminal penalties and also is actionable in a private right of action, where treble damages and injunctive relief are available.

2.11 To establish price discrimination in an action under the Robinson-Patman Act, there first must be evidence of two actual sales at different prices, with both sales occurring in US commerce.¹³ Thus, the Robinson-Patman Act does not apply to cross-border price discrimination.¹⁴ In addition, a successful price discrimination claim requires a showing of an anti-competitive effect. Case law has established that, if the claim is directed at so-called "primary line injury," meaning injury to the price discriminator's rivals, which corresponds to the situation addressed by the 1916 Act, the requisite anti-competitive effect can be demonstrated through a showing of (i) pricing below an appropriate measure of cost and (ii) the likelihood that the predator will recoup its losses in the future.¹⁵

2.12 The Robinson-Patman Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade."¹⁶

C. INSTANCES OF APPLICATION OF THE US 1916 ACT

2.13 The 1916 Act has been invoked infrequently. Before the 1970s, there was only one reported 1916 Act court case, *H. Wagner and Adler Co. v. Mali*^{17, 18}.

2.14 In line with the infrequent invocation of the 1916 Act, there is a limited number of judicial interpretations of its specific provisions.¹⁹ In this regard, it should be noted that, under the US legal

¹² See 15 U.S.C. 13(f).

¹³ See *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, 417, citing E. Kinter, *A Robinson-Patman Primer*, 3rd ed. (1979), p. 35.

¹⁴ In answering a question of the Panel regarding, *inter alia*, whether the Robinson-Patman Act applies to imported products, the United States notes, however, that imported goods that have become a part of domestic commerce may be subject to the Robinson-Patman Act.

¹⁵ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (hereinafter "*Brooke Group*").

¹⁶ Also located in Title 15 are the Sherman Act (15 U.S.C. §§ 1-7, to be found at 26 Stat. 209 (1890)), the Clayton Act (15 U.S.C. §§ 12-27, to be found at 38 Stat. 730 (1914)) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58, to be found at 38 Stat. 717 (1914)).

¹⁷ F.2d 666 (2d Cir. 1935).

¹⁸ In response to a question of the Panel regarding whether the 1916 Act was applied before the 1970s, the United States confirmed its understanding that there was only one reported 1916 Act case before the 1970s. The United States also notes, however, that not all filed cases lead to reported decisions.

¹⁹ Those interpretations can be found in the following - final or interlocutory - court decisions: *H. Wagner and Adler Co. v. Mali*, Op. Cit.; *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese Electronic Products I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2nd Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re*

system, the judicial branch of the government is the final authority regarding the meaning of federal laws, such as statutes passed by the legislative branch, i.e. the US Congress. It should also be noted, however, that no claims under the 1916 Act have ever been reviewed by the US Supreme Court, which is the highest federal court in the United States.²⁰ All court decisions so far have been rendered by US circuit courts of appeals or US district courts.²¹

2.15 All of the court decisions addressing the meaning of the 1916 Act and its various provisions to date also have involved private civil complaints rather than criminal prosecutions. Yet no complainant in a civil suit has so far recovered treble damages and the cost of the suit. However, in one recent civil case involving a 1916 Act claim, *Wheeling-Pittsburgh*²², some defendants have elected to settle rather than proceed to trial.

2.16 The US Department of Justice, the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the 1916 Act.²³ Accordingly, no criminal sanctions have ever been imposed pursuant to the 1916 Act.

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

Japanese Electronic Products III) *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*"); *Wheeling-Pittsburgh Steel Corporation v. Mitsui Co.*, 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

²⁰ The only reported case in which the US Supreme Court has considered the 1916 Act was *United States v. Cooper Corp.*, 312 U.S. 600 (1941), although the issue in that case was whether the United States is a "person" within the meaning of Section 7 of the US Sherman Act entitled to sue for treble damages thereunder.

²¹ In the United States, the federal judicial branch is established on three levels. Generally, the lowest level is the trial court level, consisting of the various US district courts. At least one district court can be found in each of the 50 States. The next level consists of the US circuit courts of appeals, which are intermediate appellate courts responsible for reviewing district court decisions. There are 12 federal court circuits. At the highest level of the federal court system is the US Supreme Court, which, at its discretion, hears appeals from decisions of the circuit courts.

²² The case is still pending while the remaining litigants conduct discovery.

²³ In response to a question of the Panel regarding the number of cases considered for prosecution by the US Department of Justice, the United States notes that, so far as it can determine, the US Department of Justice has never prosecuted nor seriously considered prosecuting a criminal case under the 1916 Act. In *Zenith III*, Op. Cit., p. 1212, the following is stated regarding enforcement of the 1916 Act's criminal provisions until the early 1970s:

"Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws – A Government Overview* 43 Antitrust L.J. 580, 581 (1974)."

V. INTERIM REVIEW²⁷⁵

A. INTRODUCTION

5.1 The interim report of the Panel was issued to the parties on 20 December 1999, in application of Article 15.2 of the DSU. On 7 January 2000, the European Communities and the United States submitted written requests to the Panel to review some aspects of the interim report. Neither the European Communities nor the United States requested that the Panel hold a further meeting with the parties.

5.2 As we were reviewing the comments of the parties, we noted that the United States raised an argument relating to the competence of the Panel to make some of the findings it had made under Article VI of the GATT 1994 and the Anti-Dumping Agreement. Without prejudice to the question whether the argument of the United States was procedurally or substantively justified, we considered that there were reasons to give further consideration to the issue raised by the US argument and to consult the parties on this matter. Since the issue was very specific and none of the parties had actually requested a hearing, we were of the view that such a consultation would be better carried out in writing. We therefore asked questions to both parties regarding the admissibility of the US argument. We also requested the United States to elaborate on its statement and asked the European Communities to comment on it.

B. COMMENTS BY THE EUROPEAN COMMUNITIES

5.3 The EC has made comments regarding the clarity of certain paragraphs. Whenever appropriate, we have clarified what we meant.

5.4 In that context, we have modified paragraph 6.60 by specifying that we considered the historical context and legislative history of the 1916 Act like US courts would do.

5.5 The EC also refers to our review of the statements of the US executive branch regarding "grandfathering" of the 1916 Act and our conclusion in paragraph 6.65 that we should use such statements only to the extent that they confirm established practice. The EC claims that we appear to have omitted to do so when we examined the historical context and legislative history of the 1916 Act. We did not refer to these confirmatory elements in the section on historical context and legislative history because that section related to how the notion of dumping in the 1916 Act was understood at the time of its enactment. The confirmatory elements to which the EC refers relate more, in our opinion, to the question whether, as of 1947, the United States considered that the 1916 Act was inconsistent with its obligations under GATT 1947.

5.6 We addressed the arguments of the parties regarding the above-mentioned statements of the US executive branch because the parties discussed extensively the validity of those statements. We found that they were of limited use. The reason why we did not refer to them later was that, in our opinion, there was no related evidence to which they could be attached.

5.7 With respect to the comments of the EC on paragraphs 6.89 and 6.161 (now 6.164), we redrafted these two paragraphs to differentiate the present issue from that in the *United States* –

²⁷⁵ According to Article 15.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"), "the findings of the final report shall include a discussion of the arguments made at the interim review stage". The following section entitled "Interim Review" is therefore part of the findings of our report.

Tobacco case. Since the 1916 Act had been applied in specific cases, there was no need to determine whether there was a possibility to interpret it in the future in a WTO-compatible manner. It was only necessary to determine whether the 1916 Act fell within the scope of Article VI or not.

5.8 In paragraph 6.106 (now 6.109), the EC suggested that the Panel replaces, in its comparison of the definitions of price discrimination in the 1916 Act and Article VI of the GATT 1994, the words "sufficiently different" by "qualitatively different". We agree that the question related to the nature of the requirements contained in the price discrimination test of the 1916 Act and we clarified the concept wherever appropriate.

5.9 The EC also requested the Panel to avoid using the term "affirmative defences" in paragraph 6.204 (now 6.206) and to modify paragraph 6.167 (now 6.170) and footnote 400 (now 424) because "affirmative defence" has a specific meaning and relates to a legal issue, in particular an exception, not to the initial question of fact. According to the EC, the US arguments on the mandatory/non-mandatory nature of the 1916 Act are factual arguments designed to rebut the EC's factual arguments.

5.10 We agree that the meaning to be given to the terms of the 1916 Act is of course a question of fact. However, in our opinion, the issue whether the 1916 Act as interpreted by US courts mandates or not a violation of the WTO Agreement is an issue of law. The Panel also considers the reference of the United States to the non-mandatory nature of the 1916 Act to be a legal defence advanced by the United States against the claims of violation made by the EC. As a result, we did not modify the related paragraphs which the EC requested us to amend.

5.11 With respect to our consideration of judicial economy in paragraph 6.205 (now 6.207), we made it clear that, in our opinion, findings under Article VI:1 and VI:2 addressed the essential features of the 1916 Act. We consider that our findings under the Anti-Dumping Agreement address secondary aspects of the 1916 Act. We nonetheless considered that it was useful to make such findings given the various ways in which the United States may decide to implement this report.

5.12 Finally, the EC requested the Panel to redraft paragraph 6.226(a) (now 6.228(a)) because the Panel did not need to make and, actually, had not made findings about the future developments of US case-law. We note that the United States also requested the Panel to delete that sub-paragraph as unnecessary to the Panel's finding and susceptible to foster misunderstanding of the role of panels in reviewing the domestic laws of Members.

5.13 As mentioned above, we do not intend to make findings on the potential or future evolution of the US case-law regarding the 1916 Act. On the contrary, since we found at present a violation of the WTO Agreement by the 1916 Act, we do not need to determine whether the 1916 Act could be found to be WTO consistent in the future. In addition, the question of the context in which the text of the 1916 Act should be addressed constitutes one of the issues on which the Panel expressly took position. We consequently decided to keep paragraph 6.228(a) in the final report, but we redrafted it to clarify it and address the concerns expressed by the parties, essentially with respect to the actual scope of our findings on this issue.

5.14 We also clarified paragraph 6.93 and 6.94, which related to arguments of the EC, and paragraph 6.167, regarding the finding of the panel on *United States – Definition of the Wine Industry*. However, we did not agree with the EC that that report actually stated what the EC said in its comments. The phrase "and [the panel] did not consider it necessary to examine whether the legislation was mandatory or discretionary" suggested by the EC seems to be more like an interpretation of the panel report. Moreover, we did not find it necessary to modify Article 6.134(a) since it seems clear to us that US court decisions in relation to the 1916 Act so far have only had legal effects within the US legal order.

C. COMMENTS BY THE UNITED STATES

5.15 The United States raised two main categories of comments. The first one addresses the alleged absence of "jurisdiction" of the Panel to make any findings with respect to any claim under the Anti-Dumping Agreement and, consequently, under Article VI of the GATT 1994. In support of its position, the United States relies on the findings of the Appellate Body in the case of *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*²⁷⁶ and on those of the panel and of the Appellate Body in the case of *Brazil – Measures Affecting Desiccated Coconut*.²⁷⁷ The second category of arguments relates to alleged misrepresentations of the United States' arguments by the Panel.

5.16 With respect to the first category, the United States contends that it continuously throughout the proceeding pointed out the failure of the EC to challenge any particular measure taken under the 1916 Act and that it argued on other grounds that the Panel had no right to address the 1916 Act under Article VI or the Anti-Dumping Agreement. We nevertheless note that, in practice, the United States framed its defence in the context of claims addressing the WTO-compatibility of the 1916 Act as such, by arguing that the 1916 Act was a non-mandatory law within the meaning of GATT 1947/WTO practice. Moreover, the preliminary issue it raised in its first submission related to the possibility of the EC to refer to Articles 1 and 18.1 of the Anti-Dumping Agreement as claims or as arguments in support of its claims. Such arguments are of a totally different nature than and totally unrelated to the argument raised by the United States at the interim review stage.

5.17 The United States also claims that its new argument is of a jurisdictional nature and had to be raised at this stage of the proceedings. We agree that some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time. However, we consider that a distinction must be made between (i) issues of jurisdiction which occur exclusively as a result of the content of the interim report and could not be legitimately foreseen earlier in the process and (ii) jurisdictional issues that were already evident at the beginning of the proceedings. The fact that the EC challenged the 1916 Act as such and not one of the measures referred to in *Guatemala – Cement* was clear from the request of the EC for the establishment of a panel and was noted by the United States.²⁷⁸ Consequently, we would have expected the United States to raise it at an early stage of the proceedings.

5.18 We agree that Article 15 of the DSU does not seem to prohibit a party from raising new arguments at the interim review stage, provided they are made in the context of a request for review of precise aspects of the interim report. However, we note that the DSU, in particular Appendix 3, provides for well defined steps in the proceedings, during which parties may raise arguments in support of their positions. The fact that the interim review takes place at the very end of those proceedings, once all submissions have been made, hearings have taken place and a draft report has been issued to the parties is evidence that this stage of the proceedings is not meant to address issues which could have been better addressed in the written and oral proceedings conducted by the Panel.²⁷⁹

²⁷⁶ Adopted on 25 November 1998, WT/DS60/AB/R, hereinafter "*Guatemala – Cement*".

²⁷⁷ Adopted on 20 March 1997, WT/DS22/R and DS22AB/R, hereinafter "*Brazil – Desiccated Coconut*".

²⁷⁸ See para. 3.27 above.

²⁷⁹ The limited function of the interim review stage is confirmed by the existence of an appeal procedure, where parties may address issues of law covered in the panel report and challenge legal interpretations developed by the panel (Article 17.6 of the DSU). On the role of the interim review stage in panel proceedings, see, e.g., the views expressed by the panel on *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, adopted on 22 September 1999, WT/DS90/R, para. 4.2. The Panel notes in this respect that the parties have not contested any of the factual findings made in the course of these proceedings, in particular those relating to the meaning of the 1916 Act, the context of its enactment and the

Moreover, Article 3.10 provides that parties must engage in dispute settlement in good faith. This implies that they should not withhold until the interim review stage arguments that they could be legitimately expected to have raised at a much earlier stage of the proceedings, in light of the claims developed in the first submissions. In this respect, we see no reasons why the United States could not have made the argument at issue at the very beginning of the proceedings, since it dealt with the admissibility of all the claims raised by the EC under Article VI of the GATT 1994 and the Anti-Dumping Agreement.

5.19 As a result, we consider that there would be a number of reasons to reject the US argument as untimely. However, since Article 15.3 of the DSU provides that the final report shall include a discussion of the arguments made at the interim review stage, and since our decision to address the EC claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement may be subject to appeal, we consider that it is justifiable to explain why, in our view, the competence of the Panel to address a violation of Article VI and the Anti-Dumping Agreement is not affected by the findings of the Appellate Body in *Guatemala – Cement* and of the panel and Appellate Body in *Brazil – Desiccated Coconut*.

5.20 We first consider the provisions of the Anti-dumping Agreement on consultation and dispute settlement. Paragraphs 1 to 4 provide as follows:

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

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

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

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

5.21 We first note that Article 17 of the Anti-Dumping Agreement does not replace the DSU as a coherent system of dispute settlement for that Agreement.²⁸⁰ In this respect, the Appellate Body in

interpretations made by the US courts, which would be the type of questions that a party may wish to raise at the interim review stage.

²⁸⁰ *Guatemala - Cement*, Op. Cit., para. 67.

Guatemala – Cement explained that "the rules and procedures of the DSU [...] apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17".²⁸¹

5.22 We also note that nothing in the terms of either Article 17.2 or Article 17.3 limits the scope of possible consultations under the Anti-Dumping Agreement. Article 17.3 was not listed in Appendix 2 of the DSU because "it provides the legal basis for consultations to be requested by a complaining member under the *Anti-Dumping Agreement*. Indeed, it is the equivalent provision in the Anti-Dumping Agreement to Articles XXII and XXIII of the GATT 1994, which serves as the basis for consultation and dispute settlement under the GATT 1994 [and] under most of the other agreements in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*".²⁸²

5.23 In contrast, Article 17.4 deals with a particular situation under the Anti-Dumping Agreement, hence its status of special or additional provision under the DSU. As stated by the Appellate Body in *Guatemala – Cement*:

"We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. The special or additional provisions listed in Appendix 2 of the DSU are designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU."²⁸³

5.24 Paragraph 66 of the Appellate Body report in *Guatemala – Cement* illustrates the function of Article 17.4. Article 17.4 deals with the particular issue of challenging *actions taken by anti-dumping authorities*. There is nothing in the provisions of Article 17.4 limiting the scope of application of the dispute settlement provisions applicable to anti-dumping, except in relation to the specific issue of Members' anti-dumping actions.²⁸⁴

5.25 Our reading of Article 17.4 is not only confirmed by the immediate context of that provision, i.e. Article 17.1, 17.2 and 17.3, but also by other provisions of the Anti-Dumping Agreement. Article 18.4 provides that:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

We understand Article 18.4 of the Anti-Dumping Agreement as requiring the conformity of Members' anti-dumping laws as of the date of entry into force of the WTO Agreement for those Members. In other words, a Member's anti-dumping legislation must be compatible with the WTO Agreement

²⁸¹ Ibid., para. 64.

²⁸² Ibid.

²⁸³ Ibid., para. 66.

²⁸⁴ If the position of the United States that only the three types of measures referred to by the Appellate Body in *Guatemala – Cement* could be challenged under the DSU were correct, then any Member could escape the application of the disciplines of Article VI and the Anti-Dumping Agreement merely by taking other types of measures than those provided for in the Anti-Dumping Agreement.

continuously, whether that legislation is applied or not. If dispute settlement could be initiated in relation to anti-dumping *actions* only, i.e. if the conformity of a domestic anti-dumping law could only be reviewed when that law is applied, the provisions of Article 18.4 would be deprived of their meaning and useful effect, since a Member could maintain a WTO-incompatible law in total impunity as long as none of the measures referred to in Article 17.4 is adopted. Even if, on the occasion of the review of a particular action, the law on which the measure was based were found to be WTO-incompatible, the interpretation advocated by the United States would fail to give meaning and legal effect to the terms "no later than the date of entry into force of the WTO Agreement for [that Member]" in Article 18.4 and would be contrary to the principle of effectiveness.²⁸⁵ Moreover, Article 18.4 requires that *all necessary steps*, of a general or particular nature, be taken. Those terms would be redundant if the anti-dumping laws of Members only had to be WTO-consistent when actually applied to a particular situation.

5.26 As could already be noticed from the previous paragraphs, the interpretation of Article 17 of the Anti-Dumping Agreement by the Appellate Body confirms our view. The argument of the United States is essentially based on an interpretation of paragraph 79 of the Appellate Body Report in *Guatemala – Cement* taken out of its context.²⁸⁶ The facts at issue in the *Guatemala – Cement* case were different from those before us. In that case, Mexico contested a specific investigation carried out by Guatemala against imports of Portland cement from Mexico. If one reads the reasoning of the Appellate Body in the factual context to which it pertains, it is not possible to draw the extensive conclusion suggested by the United States. The specific scope of the findings in that case is confirmed by the Appellate Body itself in the paragraph following the one quoted by the United States:

"80. For all of these reasons, we conclude that the Panel erred in finding that Mexico did not need to identify "specific measures at issue" in this dispute. We find that in disputes under the *Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations*, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part

²⁸⁵ *Ut res magis valeat quam pereat*. See, e.g., Appellate Body Report on *Argentina – Safeguard Measures on Import of Footwear*, adopted on 12 January 2000, WT/DS121/AB/R, para. 88 and Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, page 23.

²⁸⁶ Paragraph 79 of the Appellate Body report in the *Guatemala – Cement* case referred to by the United States reads as follows:

"79. Furthermore, Article 17.4 of the *Anti-Dumping Agreement* specifies the types of "measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measures at issue -- in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 -- and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement."

of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU." (emphasis added)

Thus, the findings of the Appellate Body in *Guatemala-Cement* were limited to the taking of action in situations contemplated in Article 17.4. They could not be – and actually were not - intended to limit the scope of application of dispute settlement under the Anti-Dumping Agreement.

5.27 We therefore conclude that Article 17 of the Anti-Dumping Agreement does not prevent us from reviewing the conformity of laws as such under the Anti-Dumping Agreement. The same applies, *a fortiori*, with respect to Article VI of the GATT 1994. In that respect, we consider that the findings of the panel and the Appellate Body in *Brazil – Desiccated Coconut* referred to by the United States are not applicable to this case, since those findings referred to the non-applicability of the Agreement on Subsidies and Countervailing Measures to existing measures or investigations initiated pursuant to applications made before the entry into force of that Agreement.²⁸⁷

5.28 The second category of comments by the United States relates to allegedly factually misleading statements of the Panel or to alleged misrepresentations of the arguments of the United States in the findings.

5.29 Regarding the statement of the Panel in paragraph 6.42 concerning the fact that criminal prosecutions may have been initiated under the 1916 Act, the United States argues that, to its knowledge, no criminal prosecutions have ever been brought under the 1916 Act. In fact, we relied on a remark of the United States District Court, E.D. Pennsylvania, in its 1980 judgement in *Zenith Radio Corp. v. Matsushita Electric Industrial Co. Ltd.*, where the court stated that:

"apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws – A Government Overview* 43 Antitrust L.J. 580, 581 (1974)"²⁸⁸

We note, however, that the statement contested is not essential to our findings. Since the comment of the United States would tend to confirm that records are not clear on this point, we redrafted paragraph 6.42 in line with the general thrust of the paragraph, which was to specify in what context (criminal or civil proceedings) US courts had interpreted the 1916 Act.

5.30 Regarding the comments of the United States on paragraph 6.77, we clarified that the phrase in the fifth sentence of that paragraph quoted by the United States was the opinion of the Panel, not that of the United States. Moreover, the United States asserts that its position was actually different from that summarised by the Panel. However, it is our understanding that, in the view of the United States, anti-dumping duties were not the exclusive remedy against injurious dumping allowed under Article VI. This is the only point that the Panel wishes to make in the sentence at issue. Consequently, we have added footnote 346 which refers to the arguments of the United States regarding the interpretation of Article VI:2 of the GATT 1994 in section III.E.2 of this report.

5.31 At the request of the United States, we also clarified paragraph 6.85, even though the terms contested were included in the opinion of the Panel, not in a summary of the position of the United States. What we meant was that, once a law has been found not to mandate a WTO-illegal action, any review of that law under the DSU must stop and it cannot be challenged as such. Since the EC does not contest specific instances of applications of the law, this appeared to the Panel to be the essence of the US argumentation.

²⁸⁷ See Article 32.3 of the Agreement on Subsidies and Countervailing Measures.

²⁸⁸ 494 F. Supp. 1190, at p. 1212.

5.32 The United States also argues that the Panel has misrepresented the US position in paragraph 6.195 (now 6.197) by stating that "the United States does not seem to contest the fact that Article 18.1 of the Anti-Dumping Agreement in the least states that duties are the only remedies allowed to counter certain forms of dumping under Article VI of the GATT 1994 and the Anti-Dumping Agreement". We do not see any contradiction between the interpretation of the US argument made by the Panel and the position of the United States as expressed in its comments. The United States alleges that a Member could counteract dumping with measures which are not explicitly set forth in Article VI or the Anti-Dumping Agreement. In the view of the Panel, this does not exclude that, *under Article VI and the Anti-Dumping Agreement*, the only remedy be anti-dumping duties. This is different from saying that anti-dumping duties are the only remedies allowed against injurious dumping *under the WTO Agreement*. Our understanding of the US arguments is also consistent with the position of the United States in this case that "Article 18.1 of the Anti-Dumping Agreement uses carefully crafted language to express the intended limitation regarding other remedies than duties."²⁸⁹ We nevertheless redrafted paragraph 6.197 to make the elements of our deduction clearer.

5.33 Finally, we also clarified paragraph 6.112 (now 6.115) to make clear that the term "'effect' tests" originated in the Panel, not the United States.

5.34 In the light of the comments of the parties, the Panel considered that some aspects of its reasoning had to be further clarified. In this respect, the Panel found it useful to add paragraph 6.97 on the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement. In addition, it reorganised its presentation of section C.2(b)(i) and (ii). The Panel also added footnote 293 to paragraph 6.1, footnote 310 to paragraph 6.32, footnote 313 to paragraph 6.34, footnote 352 to paragraph 6.84. We also modified footnote 344 to paragraph 6.76, as well as paragraph 6.79. These new or modified paragraphs or footnotes merely qualify or elaborate on statements already contained in the text. They neither change the reasoning of the Panel nor affect its findings.

VI. FINDINGS

A. FACTS AT THE ORIGIN OF THE DISPUTE AND ISSUES TO BE ADDRESSED BY THE PANEL

1. Facts at the origin of the dispute

6.1 The law, the WTO-consistency of which is contested by the European Communities,²⁹⁰ is a United States legislative text enacted under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.²⁹¹ It has been known since as the "Antidumping Act of 1916."²⁹² The 1916 Act,

²⁸⁹ See para. 3.245 above.

²⁹⁰ Throughout these findings, the European Communities as a WTO Member will be indifferently referred to as the "European Communities" or the "EC".

²⁹¹ Act of 8 September 1916. The Revenue Act can be found at 39 Stat. 756 (1916). Title VIII of the Revenue Act is codified at 15 U.S.C. §§ 71-74.

²⁹² A number of official documents published by the US authorities and a number of US court decisions refer to Title VIII of the Revenue Act of 1916 as the "Antidumping Act of 1916". Authors have also called it the "1916 Antidumping Act" or qualified it as an act dealing with certain forms of dumping, irrespective of whether they considered it to be an "anti-dumping" law or an "anti-trust" law. See, e.g., A. Paul Victor: *The Interface of Trade/Competition Law and Policy: An Overview*, 56 Antitrust L.J. 397, p. 401; John H. Jackson, *World Trade and the Law of GATT* (1968), p. 403, footnote 4. However, we note that the word "anti-dumping" does not appear as such in the text of the law. Since the question whether this law is an anti-dumping law within the meaning of Article VI of GATT 1994 is one of the issues that this Panel has to address, we find it more appropriate to refer to it in our discussion as the "1916 Act".

which provides for civil and criminal penalties by US federal courts for a certain form of transnational price discrimination²⁹³ when conducted with specific intent,²⁹⁴ reads as follows:

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

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

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

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."

6.2 Two significant features of the 1916 Act are that:

- (a) it provides for a review of the practices concerned by the judiciary branch of government²⁹⁵ at the federal level, not by the executive branch of government; and

²⁹³ Even though the word "discrimination" may have specific meanings in certain circumstances, it is used throughout the findings as meaning a differentiation, a distinguishing mark (see, e.g., The New Shorter Oxford English Dictionary (1993), p. 689). As a result, the term "transnational price discrimination" in these findings refers only to the existence of a difference in price between two markets located in different countries, irrespective of the intent of the exporter behind that price difference or the effects thereof. See also Jacob Viner's definition of "dumping" as a "price-discrimination between national markets" (Dumping, A Problem in International Trade (1923), p. 3).

²⁹⁴ The 1916 Act was part of a legislative effort of the United States to address a number of practices perceived at that time as "unfair competition". A number of major anti-trust and trade laws of the United States still applicable today were adopted by the Congress of the United States (hereinafter the "US Congress") between the end of the 19th century and the 1930's. The Sherman Act (15 U.S.C. 1-7) dates back to 1890 and the Clayton Act to 1914 (15 U.S.C. 12, 13, 14-19, 20, 21, 22-27; 29 U.S.C. 52, 53). Subsequent to the 1916 Act came the 1921 Anti-Dumping Act, the 1930 Tariff Act (which has become since the basis of the current US anti-dumping legislation) and the 1936 Robinson-Patman Act, amending Section 2 of the Clayton Act of 1914.

²⁹⁵ The terms "judiciary branch of government", "executive branch of government" and "legislative branch of government" are, throughout this report, used within the meaning given to them in US constitutional law.

- (b) it provides for two "tracks" of litigation before US federal courts: (i) civil proceedings through which a person may seek to recover damages, and (ii) criminal proceedings whereby the US Department of Justice may seek the imposition of a fine or imprisonment.

2. Issues to be addressed by the Panel

6.3 The understanding of the Panel as to the claims and defences of the parties is, in a summarised form, as follows.²⁹⁶

6.4 The EC challenges the 1916 Act as such, not a particular instance of application. It claims that the 1916 Act violates Articles III:4, VI:1 and VI:2 of the GATT 1994, Articles 1, 2.1, 2.2, 3, 4, 5.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994²⁹⁷ and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.²⁹⁸

6.5 The EC claims that the 1916 Act falls within the scope of Article VI of the GATT 1994 because the 1916 Act targets certain practices defined as "dumping" in that Article. According to the EC, the 1916 Act applies (i) when imported products are sold on the United States market at a lower price than they are sold on the domestic market of the exporting country or of a third country and (ii) by reason of their importation. This corresponds to the definition of dumping under Article VI:1. The EC argues that recent court decisions and, in general, US case-law on the 1916 Act should be used by the Panel as factual guidance that the 1916 Act has been applied as an anti-dumping statute. Moreover, since the 1916 Act does not respect other requirements of Article VI:1 of the GATT 1994, the 1916 Act violates Article VI:1.

6.6 The EC also claims that, by providing for treble damages, fines or imprisonment, the 1916 Act violates Article VI:2 of the GATT 1994, which provides that the imposition of duties is the only remedy allowed to counteract dumping under the WTO Agreement.

6.7 Furthermore, the EC claims that the 1916 Act violates a number of requirements of the Anti-Dumping Agreement, *inter alia* by not respecting procedural requirements as to the determination of material injury and the initiation and conduct of the investigation leading to the imposition of measures.

6.8 The EC claims that since the 1916 Act is an anti-dumping statute covered by the disciplines of Article VI of the GATT 1994 and the Anti-Dumping Agreement, it should have been brought into conformity with the rules set forth in Article VI of the GATT 1994 and with the Anti-Dumping Agreement, pursuant to Article XVI:4 of the Agreement Establishing the WTO.

6.9 Finally, the EC claims, in the alternative or if the Panel were to find that the 1916 Act complies fully or in part with Article VI of the GATT 1994, that the 1916 Act violates Article III:4 of the GATT 1994 to the extent that it provides less favourable treatment to imported goods than is

²⁹⁶ The claims and arguments of the parties are reported in greater detail in Sections II and III of this Report.

²⁹⁷ Referred to hereafter as the "Anti-Dumping Agreement".

²⁹⁸ Throughout these findings, the Marrakesh Agreement Establishing the World Trade Organization, including its annexes, will be referred to as the "WTO Agreement". The Marrakesh Agreement Establishing the World Trade Organization, without its annexes, will be referred to as the "Agreement Establishing the WTO". In that context, Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization will be referred to as "Article XVI:4 of the Agreement Establishing the WTO". The agreements annexed to the Agreement Establishing the WTO will be referred to as the "WTO agreements".

granted to US goods under the Robinson-Patman Act²⁹⁹ in terms of the difference in (i) injury/predation standards, (ii) measurement of price discrimination, (iii) sales requirements and thresholds requirements for complaints and (iv) the statutory defences available under the Robinson-Patman Act and not expressly provided for in the 1916 Act.

6.10 The United States argues that the 1916 Act is an anti-trust statute.³⁰⁰ It is not subject to the disciplines of Article VI since it does not address injurious dumping within the meaning of Article VI but a much narrower form of international price discrimination with an anti-trust objective, as demonstrated by the legislative history and the subsequent case-law relating to it. In this respect, the United States stresses that it is not the role of the Panel to interpret US law and case-law. It should consider it as facts to be proved. On that basis, the Panel should find that the 1916 Act, as an anti-trust statute, does not violate Article VI:1 of the GATT 1994. If one were to follow the EC interpretation of Article VI:1, all anti-trust laws of Members, including the EC competition rules under Article 82 of the Treaty of Amsterdam, would be subject to Article VI of the GATT 1994 to the extent that they rely on transnational price discrimination.

6.11 The United States further claims that Article VI:2 as such does not provide that duties are the sole remedy allowed to counteract dumping and that a Member is bound to respect the provisions of the Anti-Dumping Agreement only to the extent it intends to impose duties.

6.12 The United States argues that in any event the 1916 Act, to the extent that the US Department of Justice enjoys discretion to file - or not - a suit with a federal court, is a "non-mandatory" law within the meaning given to that concept by GATT 1947 panels and by panels and the Appellate Body under the WTO. The United States further argues that the 1916 Act is susceptible, and indeed has been interpreted in a WTO-compatible manner. In application of past GATT 1947 panel practice, this also makes the 1916 Act "non-mandatory" legislation. It is therefore for the EC to prove that the 1916 Act is not capable of a WTO-compatible interpretation.

6.13 The United States further argues that Article XVI:4 of the Agreement Establishing the WTO does not require Members to pre-empt any possible WTO-inconsistent interpretation of their domestic laws. It is the opinion of the United States that the 1916 Act is in conformity with its WTO obligations until it is ruled by the WTO that it is not.

6.14 Finally, the United States claims that the 1916 Act does not violate Article III:4 of the GATT 1994. Compared with the Robinson-Patman Act, the 1916 Act actually grants more favourable treatment to imported goods than to US goods. The 1916 Act requires an *intent* to destroy or injure an industry in the United States, or to prevent the establishment of an industry in the United States, or to restrain or monopolize any part of trade and commerce in the articles concerned in the United States. According to the United States, this requirement that an "intent" be demonstrated by the plaintiff has been considered to be the main reason for the very rare and generally unsuccessful application of the 1916 Act compared with the Robinson-Patman Act. Apart from this, the procedural requirements under the two statutes are either similar or more favourable to defendants under the 1916 Act.

²⁹⁹ See footnote 294 above.

³⁰⁰ The Panel notes that the parties have used the terms "competition" and "anti-trust" to refer to the same rules and policies. We are aware of the fact that the term "anti-trust" is more frequently used in the United States. We also note that the term "competition" is used not only in EC law but also by certain international organizations, such as the OECD (see, e.g., Competition and Trade Policy, Their Interaction (1984)). However, since our examination of the matter requires us to deal with US statutes and case-law, it was found appropriate to use the term "anti-trust" when describing the practice that the parties consider to fall within the scope of "anti-trust" or "competition" law in general.

6.15 From the above, it appears to the Panel that the two parties address the WTO-compatibility of the 1916 Act through approaches that are diametrically opposed. The European Communities, basing itself on the definition of "dumping" found in Article VI:1 of the GATT 1994 and the absence of express limitation of the scope of that article, seems to be of the view that any law which targets "dumping" within the meaning of Article VI is a "trade" law and is therefore subject to the relevant WTO disciplines. The approach of the United States, on the contrary, seems to be that the disciplines of Article VI of the GATT 1994 apply only to the extent that a law purports to address dumping as an international trade practice. If what the law targets is not "injurious dumping" within the meaning of Article VI of the GATT 1994, but the anti-trust effects (e.g., restraining or monopolising trade within the territory of a Member) of a narrower form of transnational price discrimination, WTO disciplines on anti-dumping do not apply to it.

6.16 On the basis of the arguments developed by the parties, the Panel considers that it needs to approach the matter before it as follows.

6.17 First, since we are called to determine the compatibility of a law of the United States with the WTO obligations of that Member, we should determine how to consider that law and its "surrounding", i.e. the circumstances of its enactment (including the legislative history)³⁰¹ and the subsequent interpretation(s). This is in our view important since both parties have substantially discussed those aspects, including the relevance of certain court decisions. Judicial interpretation, as evidence of the meaning given to the terms of a legal text, may affect the way we should understand the terms of the 1916 Act.

6.18 Second, we should proceed to address the issue whether we review the 1916 Act under Article VI or under Article III:4 of the GATT 1994 first, or if we review it under either provision at all. The reason for this is that, while the 1916 Act addresses transnational price discrimination, it imposes internal measures. Article VI relates to actions by Members *vis-à-vis* a particular practice whereas Article III:4 ensures that foreign products, once imported, are not subject to less favourable treatment than domestic products. We believe that it falls within our competence and duty to determine the applicability of Articles III:4 and VI as part of our review of the compatibility of the 1916 Act under the provision(s) found applicable, without prejudice to judicial economy.

6.19 On the basis of our conclusions on the application of Articles III:4 and VI to the 1916 Act, we shall address the compatibility of the 1916 Act under Article III:4 and/or Article VI of the GATT 1994 and the Anti-Dumping Agreement to the extent necessary to assist the WTO Dispute Settlement Body³⁰² in making its recommendations. We should do this having regard to the defence of the United States based on the alleged "mandatory/non-mandatory" nature of the 1916 Act.

6.20 Once this is done, we may also consider the claims of the EC under Article XVI:4 of the Agreement Establishing the WTO.

6.21 However, before reviewing the substantive issues of the case, we need to address the procedural issues raised by the parties in the course of the proceedings.

³⁰¹ Since the term "legislative history" is used throughout this report in relation to the preparation of US pieces of legislation, it will be given the meaning it has under US practice, i.e. "The background and events, including committee reports, hearings, and floor debates, leading up to the enactment of a law." Black's Law Dictionary, 6th Ed. (1990), p. 900.

³⁰² Hereinafter also referred to as the "DSB".

B. PROCEDURAL ISSUES

1. Request for a preliminary ruling by the United States

6.22 The United States, in its first written submission, requested the Panel to issue a preliminary ruling on two claims allegedly made by the EC in its first written submission. According to the United States, the EC claimed that the 1916 Act violates Articles 1 and 18.1 of the Anti-Dumping Agreement for the first time in its first submission. In the opinion of the United States, Articles 6.2 and 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes³⁰³ and Article 17.4 and 17.5 of the Anti-Dumping Agreement preclude the Panel from considering these two claims because they were not included in the EC's request for the establishment of a panel.

6.23 At the request of the Panel, the European Communities addressed the request of the United States. The EC stated that the United States asked the Panel to exclude claims that the European Communities had not made. The EC claimed a violation of Article VI:2 of the GATT 1994, but it made no separate claims that the 1916 Act violates Articles 1 and 18.1 of the Anti-Dumping Agreement. These provisions were merely arguments in support of the EC claims.

6.24 The Panel recalls that in its report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body mentioned that

"Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party to know the legal basis of the complaint."³⁰⁴

In light of the reply of the EC that Articles 1 and 18.1 of the Anti-Dumping Agreement "were only mentioned as arguments in support of [its] claims", the Panel considered that it was not necessary to address the issue any further.

6.25 However, the United States stressed, during the first meeting of the Panel with the parties, that the Panel should reject the EC's attempt to circumvent the requirements of the DSU by describing its references to Articles 1 and 18.1 of the Anti-Dumping Agreement as "mere arguments". Indeed, if the Panel were to analyse whether these newly invoked articles support the EC's other claims, the Panel would be required to determine whether those provisions provide an exclusive remedy for dumping.

6.26 We understand these arguments of the United States as an elaboration of its original request for a preliminary ruling, even though they were also made in relation to the EC claim of a violation of Article VI:2 of the GATT 1994. At this stage, we address them to the extent necessary to reply to the procedural aspect of the arguments of the United States. We note that panels in the past have faced similar situations where a complainant relied on a given provision to support a claim based on another provision. In *India – Quantitative Restrictions on Imports of Agricultural Textile and Industrial products*, the United States discussed the applicability of both Article XVIII:B of the GATT 1994 and of the Understanding on Balance-of-Payments Provisions of the GATT 1994. The panel found that, while the United States had made a claim under Article XVIII:11 of the GATT 1994, it had not made any claim under other provisions of Article XVIII:B of the GATT 1994 or under the Understanding on Balance-of-Payments Provisions of GATT 1994. The panel concluded that it would not "address any claim of the United States based on the [Understanding on Balance-of-Payments Provisions of

³⁰³ Hereinafter the "DSU".

³⁰⁴ Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R (hereinafter "*European Communities – Bananas*"), para. 143 (emphasis in the original).

GATT 1994] or on other provisions of Article XVIII:B other than Article XVIII:11". The panel nonetheless held that these provisions were "part of the context of those provisions alleged by the United States to have been violated".³⁰⁵

6.27 We also recall that Article 31 of the Vienna Convention on the Law of Treaties (1969)³⁰⁶ provides that the interpretation of a provision of a treaty should be made in its context, and that "context", for the purpose of the interpretation of a treaty, shall comprise, *inter alia*, the "text [of the treaty], including its preamble and annexes".³⁰⁷ As a result, there are grounds to consider that other provisions of the WTO agreements than those referred to in the terms of reference can be considered by the Panel under certain conditions.

6.28 However, we limit ourselves at this stage to taking note of the fact that the EC does not make any separate claim under Article 18.1 of the Anti-Dumping Agreement. In light of the clarification by the EC, we also conclude that the EC claim under Article 1 of the Anti-Dumping Agreement³⁰⁸ does not relate to its claim under Article VI:2 of the GATT 1994, but addresses a different aspect of the matter.

2. Request for enhanced third party rights by Japan

6.29 On 2 September 1999, Japan requested to be granted enhanced third party rights in this case. In particular, Japan requested to receive all the necessary documents, including submissions and written versions of statements of the parties and to attend all the sessions of the second substantive meeting of the Panel. At the request of the Panel, the EC and the United States commented on this request. The EC agreed to the request of Japan, provided that the EC's request of a similar nature in the case initiated by Japan concerning the same matter (WT/DS162) would also be accepted.

6.30 The United States strongly objected to the request of Japan. In the opinion of the United States, enhanced third party rights were not necessary in order to obtain access to the submissions of the parties. In *European Communities – Measures Concerning Meat and Meat Products ("Hormones")*,³⁰⁹ the panel had granted enhanced third party rights essentially because the panel had informed the parties that concurrent deliberations would be conducted in the case initiated by the United States and in the case initiated by Canada. The United States mentioned that it would not support concurrent deliberations in this case and that it could not agree to a request of which the apparent purpose was to provide the third parties with an opportunity to make an additional submission in their own panel process.

6.31 On 13 September 1999, the Panel, through its Chairman, informed the parties and Japan that it could not accede to the request of Japan. The Panel reserved its right to reconsider the issue in light of subsequent events and informed the parties and Japan that it would address the matter in detail in its findings.

³⁰⁵ Adopted on 22 September 1999, WT/DS90/R (hereinafter "*India – Quantitative Restrictions*"), paras. 5.18-5.19. These findings were not modified by the Appellate Body.

³⁰⁶ Hereinafter the "Vienna Convention". Article 3.2 of the DSU instructs us to clarify the existing provisions of the WTO Agreement "in accordance with customary rules of interpretation of public international law". From its very first decision and repeatedly thereafter, the Appellate Body has considered that these customary rules were embodied *inter alia* in Articles 31 and 32 of the Vienna Convention.

³⁰⁷ Article 31.2 of the Vienna Convention.

³⁰⁸ See WT/DS136/2.

³⁰⁹ Adopted on 13 February 1998, WT/DS48/R/CAN (complaint by Canada), hereinafter the "*EC – Hormones*" case. See also WT/DS26/R/USA (complaint by the United States).

6.32 The Panel carefully considered the arguments raised by the parties. It notes that, while the DSU does not provide for enhanced third party rights, neither Article 10 of the DSU nor any other provision of the DSU prohibits panels from granting third party rights beyond those expressly mentioned in Article 10.³¹⁰ The Appellate Body in the *EC – Hormones* case confirmed that granting enhanced third party rights was part of the discretion of panels under Article 12.1 of the DSU.³¹¹

6.33 The Panel notes, however, that the DSU differentiates in terms of rights between main parties and third parties and that this principle should be respected in order to keep with the spirit of the DSU in that respect. Enhanced third party rights have so far been granted for specific reasons only. In the *EC - Hormones* case, like in this case and the case initiated by Japan (WT/DS162), the two panels were composed of the same panelists and dealt with the same matter. While these elements appeared to play a significant role in the decisions taken by the panels and in their confirmation by the Appellate Body, we consider that they could not be decisive. Otherwise, enhanced third party rights would have to be granted in almost all cases where the same matter is subject to two or more complaints with the same panel composition.³¹² We note that particular circumstances existed in the *EC – Hormones* case which certainly contributed to the decisions of the panels to review the two cases concurrently, such as their highly technical and factually intensive nature, as well as the fact that the panels had decided to hold one single meeting with the parties and the experts consulted pursuant to Article 11.2 of the Agreement on Sanitary and Phytosanitary Measures. These decisions were largely based on practical reasons and due process had to be preserved. We conclude from the reports in the *EC – Hormones* case that enhanced third party rights were granted primarily because of the specific circumstances.

6.34 We find that no similar circumstances exist in the present matter, which does not involve the consideration of complex facts or scientific evidence. Moreover, none of the parties requested that the panels harmonise their timetables or hold concurrent deliberations in the two procedures (WT/DS136 and WT/DS162). In fact, the European Communities was not in favour of delaying the proceedings in WT/DS136 and the United States objected to concurrent deliberations. We are of the view that, in such a context, we ought to conduct this case independently from the case initiated by Japan both in terms of procedure and of analysis of the substantive issues before us.³¹³

6.35 We are of the view that respecting due process *vis-à-vis* Japan did not require the participation of Japan in the second substantive meeting of the Panel. This said, having regard to Article 18.2 of the DSU, we urged the EC and the United States, in the course of the proceedings, to communicate to Japan in due course meaningful non-confidential summaries of their submissions to the Panel, if requested to do so by Japan.

6.36 We therefore find that there was no reason to grant enhanced third party rights to Japan in these proceedings.

³¹⁰ The Panel considers that the provisions of Article 9 of the DSU, in particular Article 9.3 which addresses the situation of this Panel and the panel requested by Japan on the same matter (WT/DS162) are of limited assistance in the present issue.

³¹¹ Adopted on 13 February 1998, WT/DS26/DS48/AB/R, para. 154.

³¹² Our remark is based on our understanding of the current state of the WTO practice. It is without prejudice to the question whether enhanced third party rights would be advisable or not in general.

³¹³ Accordingly, while we assume that the United States may further elaborate on its argumentation or submit new arguments in the case initiated by Japan, this Panel shall consider only the arguments of the United States submitted in the course of the present case and exclusively as they were developed in the present case.

3. Burden of proof

6.37 We recall the Appellate Body Report on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*,³¹⁴ which stated that:

"the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

6.38 Applying this rule to the factual evidence submitted in the present case, the European Communities, as the complainant, should normally adduce sufficient evidence to raise a *prima facie* case that each of its claims has merit. If it were to do so, it would then be for the United States to adduce sufficient evidence to rebut that *prima facie* case. If the United States were to assert the affirmative of a particular defence, it would bear the burden of proving it. This rule however is only applicable to determine whether and when a party bears the burden of proof. Once both parties have submitted evidence meeting those requirements, it is up to the Panel to weigh the evidence as a whole. In cases where the evidence as a whole regarding a particular claim or defence remains in equipoise, the issue must be decided against the party bearing the burden of proof on that claim or defence.

6.39 With respect to the interpretation of the covered agreements, the Panel will be aided by the arguments of the parties but will not be bound by them. Pursuant to Article 3.2 of the DSU, our decision on such matters must be in accord with the rules of treaty interpretation applicable to the WTO Agreement.

C. PRELIMINARY ISSUES

1. Context in which the 1916 Act should be examined by the Panel

(a) Issue before the Panel

6.40 We note that the EC contests the compatibility of the 1916 Act as such – not of particular instances of application – with certain provisions of the WTO Agreement. While it is clear from the terms of Article 3.2 of the DSU that it falls within the competence of the Panel to "clarify the existing provisions of [the covered agreements] in accordance with customary rules of interpretation of public international law", the DSU does not expressly provide how panels should address domestic legislation. Article 11 of the DSU only specifies that panels "should make [...] an objective assessment of the facts of the case". However, both Article 3.2 of the DSU and the practice of the Appellate Body make it clear that we have, whenever appropriate, to develop our approach on the basis of that of international courts in similar circumstances. We will consequently take into consideration the practice of international tribunals in this respect.

6.41 This case has an additional dimension. Although panels often have to address domestic laws, in the present case we are called upon to review the consistency of a law which was enacted more than eighty years ago, and the historical, cultural, legal and economic context of the time undoubtedly influenced its terms. We also note that the parties seem to have diverging views regarding how the Panel should consider the court decisions relating to that law.

6.42 The 1916 Act was seldom applied since its enactment and no court judgement based on that law has so far imposed sanctions on the defendant. It is the understanding of the Panel, based on the

³¹⁴ Adopted on 23 May 1997, WT/DS33/AB/R, p. 14.

information provided by the parties, that there was never any court decision based on criminal proceedings under the 1916 Act. Until the early 1970's, there was only one reported court decision addressing the civil procedure provided for in the 1916 Act.³¹⁵ Since 1975, there has been only a limited number of judicial interpretations of the provisions of the 1916 Act. All these interpretations come from US circuit courts of appeals or US district courts.³¹⁶ No claim under the 1916 Act was ever expressly reviewed by the Supreme Court of the United States.³¹⁷

6.43 Therefore, we find it appropriate to clarify from the outset how we shall take into consideration the text of the 1916 Act itself, the historical context of its enactment (including the legislative history) and its subsequent interpretation as it results from the US case-law and any other relevant element of information.

(b) How should the Panel consider the text of the 1916 Act, the context of its enactment, the case-law relating to it and other relevant pieces of information

(i) *Arguments of the parties and approach of the Panel*

6.44 The European Communities claims that the 1916 Act is clear on its face. In its view, the Panel should not be influenced by the terms used by US courts when it characterises the 1916 Act under the WTO Agreement. The EC considers that judgements of national courts are relevant insofar as they offer guidance on the meaning or interpretation of national laws and it is appropriate for the Panel to take them into account for that purpose. The Panel should follow the reasoning of the Appellate Body in its report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*³¹⁸ and carry out an examination of the relevant aspects of US municipal law. The interpretation of the 1916 Act, i.e. determining what it means, including what must be pleaded and proved in order to establish a claim under it, is a matter of US law and therefore of fact before the Panel.

6.45 The EC also refers to letters or statements of US officials before the US Congress that the 1916 Act was "grandfathered" under GATT 1947 as "existing legislation" within the meaning of the Protocol of Provisional Application. For the EC, this is an admission by the United States of the GATT/WTO-incompatibility of the 1916 Act.

6.46 The United States argues that the role of the Panel is to assess the facts and then determine their conformity with the relevant WTO agreements, which generally entails interpreting the scope and applicability of those agreements to the facts. The proper interpretation of the 1916 Act is a question of fact to be established, as it is an accepted principle of international law that municipal law is a fact to be proven before international tribunals.

6.47 The United States also considers that the Congressional Record and other documents such as the 1915 *Annual Report of the [US] Secretary of Commerce* are evidence that the 1916 Act addresses unfair competition. Regarding the statements of US officials referred to by the EC, the United States considers that the Panel should attach no weight to them in light of the official US notifications to the

³¹⁵ *H. Wagner and Adler Co. v. Mali*, F.2d 666 (2d Cir. 1935).

³¹⁶ Federal courts (district courts and circuit courts of appeals) are competent to review cases brought under the 1916 Act, under the supervision of the Supreme Court of the United States.

³¹⁷ In *United States v. Cooper Corporation* (312 U.S. 600, 1941), hereinafter the "*Cooper case*", at p. 745, the Supreme Court of the United States made a reference to the 1916 Act as "supplemental" to the Sherman Act. This decision is discussed further in section VI.D.2.(d)(ii) below.

³¹⁸ Adopted on 16 January 1998, WT/DS50/AB/R (hereinafter "*India - Patent (US)*").

GATT of its "grandfathered" laws, which did not include the 1916 Act.³¹⁹ Thus, those statements are mistaken as a matter of fact.

6.48 The understanding of a law the WTO-compatibility of which has to be assessed begins with an analysis of the terms of that law. However, we consider that we should not limit ourselves to an analysis of the text of the 1916 Act in isolation from its interpretation by US courts or other US authorities, even if we were to find that text to be clear on its face. If we were to do so, we might develop an understanding of that law different from the way it is actually understood and applied by the US authorities. This would be contrary to our obligation to make an objective assessment of the facts of the case, pursuant to Article 11 of the DSU. Therefore, we must look at all the aspects of the domestic legislation of the United States that are relevant for our understanding of the 1916 Act. However, looking at all the relevant aspects of the domestic law of a Member may raise some methodological difficulties, such as how much deference must be paid to that Member's characterisation of its legislation. In that context, we will determine first how to deal with that aspect of the examination of a domestic law and how we should consider the case-law related to it, since courts are, *inter alia*, responsible for interpreting the law. Moreover, in light of the fact that the law at issue was enacted more than eighty years ago and not regularly invoked, and since the parties have referred to other elements such as the historical context, the legislative history and subsequent declarations of US authorities made in relation to the 1916 Act, we shall also explain how we will consider them.

(ii) *Consideration by panels of domestic law in general*

6.49 We note that in *India – Patent(US)*, the Appellate Body addressed in some detail the issue of how panels should consider municipal law. The Appellate Body stated that:

"In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of fact and may provide evidence of State practice."³²⁰

"It is clear that the examination of the relevant aspects of Indian municipal law [...] is essential to determining whether India has complied with its obligations under Article 70.8(a) [of the TRIPS Agreement]. [...] To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This, clearly, cannot be so."³²¹

6.50 The extent to which panels may examine the laws of Members was illustrated by the Appellate Body in the same report. Having to determine whether India provided for legal protection commensurate with the requirements of Article 70.8 of the TRIPS Agreement, the Appellate Body asked itself the question of "what constitutes [...] a sound legal basis in Indian law".³²² Moreover, it agreed with the conclusion of the panel that "the current administrative practice [of India, based on so-called "administrative instructions" from the government] creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patent Act."³²³ The Appellate Body also agreed that "it was necessary for the Panel in this case to seek a detailed understanding of the *operation* of the Patent Act as it relates to the 'administrative

³¹⁹ The United States refers to GATT document L/2375/Add.1 (19 March 1965).

³²⁰ Op. Cit., para. 65. See also M.N. Shaw, *International Law* (1995), p. 106, mentioning that domestic law "can be utilised as evidence of compliance or non-compliance with international obligations".

³²¹ Ibid., para. 66.

³²² Ibid., para. 59.

³²³ Ibid., para. 63, Panel Report, para. 7.35.

instructions' in order to assess whether India had complied with Article 70.8(a) [of the TRIPS Agreement.]"³²⁴

6.51 Thus, our understanding of the term "examination" as used by the Appellate Body is that panels need not accept at face value the characterisation that the respondent attaches to its law. A panel may analyse the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.³²⁵

(iii) *Consideration of the case-law relating to the 1916 Act*

6.52 In the present case, unlike India in the *India – Patent (US)* case, the United States does not claim that some administrative interpretations determine the meaning of the 1916 Act. The situation is different to the extent that both parties rely, in order to support their claims, on a number of judgements by US courts which have applied and interpreted the 1916 Act since the 1970's.³²⁶ In many Members, final judicial decisions regarding the interpretation of a given law may not be contested any further, whereas administrative interpretations of a law may generally be overruled by a domestic judge called upon to review that law. However, an administrative interpretation will normally provide one single interpretation. In contrast, depending on the judicial structure of a Member, judicial interpretations may emanate from several courts positioned at different levels in the judicial order. The diversity of the sources of the case-law may make it more difficult to assess the respective value of the judgements of which that case-law is composed.

³²⁴ Ibid., para. 68 (emphasis added).

³²⁵ This is evidenced by the examples used by the Appellate Body (Ibid., para. 67):

"Previous GATT/WTO panels also have conducted a detailed examination of the domestic law of a Member in assessing the conformity of that domestic law with the relevant GATT/WTO obligations. For example, in *United States – Section 337 of the Tariff Act of 1930* [footnote omitted], the panel conducted a detailed examination of the relevant United States' legislation and practice, including the remedies available under Section 337 as well as the difference between patent-based Section 337 proceedings and federal district court proceedings, in order to determine whether Section 337 was inconsistent with Article III:4 of the GATT 1947."

³²⁶ The following – final or interlocutory - court decisions relate to claims made under the 1916 Act: *H. Wagner and Adler Co. v. Mali*, Op. Cit.; *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese Electronic Products I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2nd Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re Japanese Electronic Products III*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*"); *Wheeling-Pittsburgh Steel Corporation v. Mitsui Co.*, 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

6.53 We recall that the International Court of Justice, in the *Elettronica Sicula S.p.A (ELSI)* case, referred to the judgement of the Permanent Court of International Justice³²⁷ in the *Brazilian Loans* case – to which the United States also refers in its submissions - and noted that:

"Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)." ³²⁸

We are fully aware that our role is to clarify the existing provisions of the covered agreements so as to determine the compatibility of a domestic law with those agreements. We are also aware that, in the *Brazilian Loans* case, the PCIJ was asked to apply domestic legislation to a given case. We are nevertheless of the view that there is nothing in the text of the DSU, nor in the practice of the Appellate Body, that prevents us from "weigh[ing] the jurisprudence of municipal [US] courts" if it is "uncertain or divided". This would not require us to develop our own independent interpretation of US law, but simply to select among the relevant judgements the interpretation most in conformity with the US law, as necessary in order to resolve the matter before us.³²⁹

6.54 We note that the 1916 Act is applied by US federal courts. Interpretations by the Supreme Court of the United States (hereinafter the "Supreme Court") prevail over interpretations made by the courts of appeals of the various circuits. Interpretations by courts of appeals, in turn, prevail over interpretations by district courts, but only within the same circuit.³³⁰

6.55 We understand from the submissions of the parties that the Supreme Court has yet to address the interpretation of specific provisions of the 1916 Act. It mentioned the 1916 Act in only one of its judgements.³³¹ Thus, the case-law submitted by the parties that would allow us to understand the actual meaning of the 1916 Act today essentially comes from district courts and courts of appeals of various circuits of the US federal judicial system. We also note that the parties in their submissions have relied on different judgments, which they claim support their interpretations of the 1916 Act.

6.56 We shall respect the formal hierarchy of court decisions in the US federal system to the extent that it is applicable. In that context, we shall allow a circuit court of appeals decision to prevail over a district court decision. However, applying such a formal approach may prove insufficient in some instances, for example when the decisions to be compared come from different circuits.³³² Therefore,

³²⁷ Hereinafter "PCIJ".

³²⁸ ICJ, *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), ICJ Reports 1989, p. 15, at p.47, para. 62.

³²⁹ We do not consider that this would be engaging into *interpreting* US law, with the risks highlighted by the United States in its submissions. Our approach is in line with the reasoning of the PCIJ in the *Brazilian Loans* case, which, even though it had to apply domestic law, was prudent in its approach of the domestic case-law:

"It follows that the Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case" (PCIJ, Series A, Nos. 20/21, p. 124)

³³⁰ A description of the organization of the US federal judicial system is found in para. 2.14 and footnote 21 above.

³³¹ *Cooper*, Op. cit.

³³² From the replies of the United States to our questions, we understand that the *stare decisis* effect which can be attached to precedents in common law does not apply between court decisions handed down in different circuits.

in all instances, we shall first ascertain whether the judgements subject to our comparison address (i) the same issue, and (ii) at the same level of detail. In other words, we should always make sure that a comparison can reasonably be made, both in terms of fact and in terms of the legal issues addressed, before giving preference to the interpretation contained in one judgement compared with the interpretation contained in another judgement of a court belonging to another circuit.

6.57 Moreover, we should normally, with respect to a given issue, allocate more weight to a final judgement than to an interim or "interlocutory" decision, since the latter does not definitively determine a cause of action, but only "decides some intervening matter pertaining to the cause."³³³ However, we should also determine which argumentation is more convincing. Again, we will not substitute our judgement for that of US courts. Our analysis should be based not only on the quality of the reasoning, but also on what we would perceive to be in line with the dominant interpretation, "paying utmost regard to the decision of the municipal courts". This is consistent with the US court practice that if a precedent is not binding, the weight afforded to it will depend on the persuasive value of the reasoning in the decision.

6.58 If, after having applied the above methodology, we could not reach certainty as to the most appropriate court interpretation, i.e. if the evidence remains in equipoise, we shall follow the interpretation that favours the party against which the claim has been made, considering that the claimant did not convincingly support its claim.

6.59 Finally, we also consider that we should not accept at face value the use of certain terms such as "dumping", "antidumping", "antitrust", "protectionism" or "predatory pricing" in court decisions, in other administrative documents or in academic works, when those terms are not further substantiated. We recall that the mere description or categorisation of a measure by a Member should not be considered as a decisive factor for the application of the WTO Agreement to that measure.³³⁴ In the present case, such descriptions or categorisations may be valid under US law but not necessarily in the WTO context. Likewise, having regard to the importance of the legislative history in the interpretation of statutes by the US judiciary branch, terms used in 1916 will have to be understood within the meaning they had at the time, not in light of the meaning they have today, unless we have evidence that US courts have done so.

(iv) *Consideration of the historical context and other evidence of the meaning of the 1916 Act*

6.60 The historical context of the 1916 Act encompasses several elements. The first one, to which US courts also extensively refer in order to determine "the intent of Congress", is the legislative history as it appears, *inter alia*, from the Congressional Records. Since we have to examine the 1916 Act and understand its actual scope and operation, we should, as US courts do, pay attention to the legislative history of that statute, as appropriate. The political and economic context as it emerges from public declarations of the time or studies of the period may also be relevant. When considering this evidence, we should not lose sight of the degree of development of anti-trust and trade law concepts at the time of the enactment of the 1916 Act.

³³³ See *Black's Law Dictionary*, 6th Ed. (1990), p. 815.

³³⁴ See, Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132 (hereinafter "*EC – Parts and Components*"), paras 5.6 and 5.7. In that report, the panel stated that:

"if the description or categorization of a charge under the domestic law of a contracting party were to provide the required "connection with importation", contracting parties could determine themselves which of these provisions would apply to their charges."

6.61 Regarding the statements of US officials referred to by the EC,³³⁵ we note that the EC considers them as showing that, in the past, US Government bodies not only held the view that the 1916 Act concerns dumping practices, but also that, without "grandfathering", it would have been GATT illegal. For the European Communities, the US authorities admitted that the 1916 Act was "grandfathered" under the GATT 1947, even though the United States had not included the 1916 Act in its notification of "grandfathered" laws to the GATT 1947. We also note that the United States considers that the 1916 Act was not included in the survey of existing mandatory legislation not in conformity with part II of the GATT 1947³³⁶ because the 1916 Act was GATT-legal and therefore did not require "grandfathering".

6.62 The consequences that the European Communities would like the Panel to draw from the above-mentioned statements are not clear. We are not supposed to "make the case for [the] complaining party".³³⁷ However, we find it relevant to determine at this stage what consequences could, from a legal point of view, be drawn from these statements.

6.63 First, we should determine whether they could actually generate legal obligations for the United States under international law. For instance, since they are subsequent to the notification by the United States of its "grandfathered" legislation under the GATT 1947, it might be argued that they implicitly modified that notification by stating that the 1916 Act was "grandfathered". We recall that the International Court of Justice has developed, *inter alia* in its judgement in the *Nuclear tests* case,³³⁸ criteria on when a statement by a representative of a State could generate international obligations for that State. In the present case, we are reluctant to consider the statements made by senior US officials in testimonies or letters to the US Congress or to members thereof³³⁹ as generating international obligations for the United States. First, we recall that the constitution of the United States provides for a strict separation of the judicial and executive branches. With the exception of criminal prosecutions, the application of the 1916 Act falls within the exclusive responsibility of the federal courts. Under those circumstances, a statement by the executive branch of government in a domestic forum can only be of limited value. Second, with the possible exception of the statement of US Trade Representative Clayton Yeutter, they were not made at a sufficiently high level compared with the statements considered by the International Court of Justice in the *Nuclear Tests* case, where essentially declarations by a head of State and of members of the French government were at issue. Moreover, the statements referred to in the present case were not directly addressed to the general public. Finally, they were not made on behalf of the United States, but – at best – on behalf of the executive branch of government. This aspect would not be essential if the statements had been made in an international forum, where the executive branch represents the State.³⁴⁰ However, in the present case, the statements were addressed to the US legislative branch. Therefore, we cannot consider them as creating obligations for the United States under international law.

6.64 A related issue is whether these statements should be treated as admissions of facts or of the legal nature of the 1916 Act under the WTO. We note that the factual accuracy of the statements mentioned in this case has been put in doubt by the United States before the Panel. While this is not

³³⁵ The arguments of the parties on this issue are reported in section III:D.2.(c) above.

³³⁶ See GATT Doc. L/2375/Add.1 of 19 March 1965.

³³⁷ See Appellate Body Report in *Japan – Measures Affecting Agricultural Products*, hereinafter "*Japan – Agricultural Products*", adopted on 19 March 1999, WT/DS76/AB/R, para. 129.

³³⁸ ICJ, *Nuclear Tests case*, judgements of 20 December 1974, ICJ Reports 1974, p. 253 (Australia v. France), p. 457 (New Zealand v. France). See, e.g., Patrick Daillier & Alain Pellet, *Droit International Public*, 5th edition (1994), p. 354-358.

³³⁹ The statements or letters to which the EC refers are listed in para. 3.126 and footnotes 105 and 106 above.

³⁴⁰ See also Article 7 of the Vienna Convention.

sufficient to reject those statements out of hand, we are reluctant to consider them as "admissions" of the United States without prior verification of the context in which they were made.

6.65 For these reasons, we consider that these statements should be used only to the extent that they confirm other established evidence.

6.66 The United States has also referred to the codification system of its federal legislation and to a compilation made for the use of the Committee on the Judiciary of the US House of Representatives as evidence of the anti-trust nature of the 1916 Act. These documents are informative regarding the opinions of the authorities of the United States as to the classification of the 1916 Act as an anti-trust or as an anti-dumping statute. However, as such, the codification of the 1916 Act or its inclusion in a compilation for a committee of the US Congress cannot affect our determination of the compatibility of the 1916 Act with the WTO provisions.³⁴¹ With regard to the 1995 *Antitrust Enforcement Guidelines for International Operations* issued by the US Department of Justice and the US Federal Trade Commission referred to by the European Communities, we note their role as "antitrust guidance to business engaged in international operations". We therefore consider that they are indicative of the position of a particular department of the executive branch of the US government. Moreover, to the extent that these guidelines do not substantiate the reasons why the 1916 Act should be considered as a trade statute and, in fact, mention that "its subject-matter is closely related to the anti-trust rules regarding predation", we consider that we should refer to those guidelines only as a confirmation of other established evidence, if necessary.

6.67 Having clarified how we shall consider the materials before us in assessing the WTO-compatibility of the 1916 Act, we now proceed to discuss the preliminary issue of the applicability of Articles III:4 and VI of the GATT 1994

2. Relationship between Article III and Article VI of the GATT 1994

(a) Issue before the Panel

6.68 The European Communities primarily claims that the 1916 Act violates Article VI of the GATT 1994 and certain provisions of the Anti-Dumping Agreement. It also claims that the 1916 Act violates Article III:4 of the GATT 1994 *in the alternative* or "if [...] all or any portion of the 1916 Act is consistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement". The United States claims that the 1916 Act is not subject to the disciplines of Article VI essentially because it is not aimed at dumping.

6.69 Article III:4 of the GATT 1994 provides in relevant parts as follows:

"The products of the territory of any contracting party imported into the territory of another contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use..."

6.70 Article VI provides in relevant parts as follows:

³⁴¹ See Panel Report on *EC – Parts and Components*, Op. Cit., para. 5.7. That panel addressed the description or categorisation of a charge under domestic law and concluded that if the description or categorisation of a charge under the domestic law of a contracting party were to provide the required "connection with importation", contracting parties could determine themselves which of these provisions would apply to their charges. With such an interpretation the basic objective underlying Articles II and III could not be achieved. We consider that the same reasoning applies with respect to the application of Article VI.

"1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the product, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. [...]

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty no greater in amount than the margin of dumping in respect of such product. [...]"

6.71 The arguments of the parties raise the question whether the 1916 Act could, by its nature, fall within the scope of Article VI only, of Article III:4 only, or partly or wholly within the scope of both. This question is prompted by two considerations:

- (a) from the arguments of the parties, it does not seem that the same provision of the 1916 Act could, at the same time, infringe Article III:4 and Article VI of the GATT 1994; and
- (b) these articles seem to be based on different premises: Article III (entitled "National Treatment") operates on the basis of a comparison between the treatment granted to domestic and imported products respectively, once the latter have been cleared through customs. Thus Article III:4 applies to measures imposed by Members internally, irrespective of the objective of the measures. In contrast, Article VI does not compare the treatment of domestic and imported products. The basis for the applicability of Article VI to the law of a Member does not seem to be the type of *measures* which is imposed by that Member, since other reasons than dumping may lead to the imposition of duties, but the type of trade practice *at the origin* of the measure.

6.72 The Panel thus believes that the *nature* of the 1916 Act might be such as to affect the relevance of the EC claims under Article III:4 or Article VI. Irrespective of the question of judicial economy, the Panel considers that it has the "competence of its competence", i.e. that it may determine whether a given claim can be addressed, irrespective of the positions expressed by the parties on the issue.³⁴² The fact that the European Communities formulates its claims primarily under Article VI does not require the Panel to address the EC claims under Article VI if it were to find that that provision is not applicable because the *qualification juridique* made by the EC is not correct.³⁴³ On the other hand, the Panel may not have to address the EC claims under Article III:4 if it were to find that the 1916 Act falls exclusively within the scope of Article VI.

6.73 Therefore, it would be relevant to consider whether Article III:4 or Article VI of the GATT 1994 - or both - are *applicable* to the 1916 Act, irrespective of whether the 1916 Act is *compatible* with those provisions or not.

³⁴² This is different from exercising judicial economy, which is based on the necessity to address a claim in light of findings made on another claim. It is also different from determining whether a claim is properly before the Panel on the basis of the request for establishment of a panel. It is a question of knowing whether the Panel can rule on two claims which, on the basis of a first consideration of the facts and arguments before it, might be mutually exclusive.

³⁴³ For instance, if a complainant were to claim a violation of Article XI of GATT 1994 in relation to a small tariff increase, the panel called upon to address the issue may be entitled to reject the claim on the ground that the measure at issue is not a quantitative restriction within the meaning of Article XI, without addressing any further the claim and the related arguments.

(b) Approach to be followed by the Panel

6.74 Having regard to paragraph 6.71(b) above, we note that the issue whether the 1916 Act should be addressed under Article III:4 only, Article VI only, or both, is not obvious from the outset. In our opinion, reaching conclusions on this matter requires that we address the substance of the case, since one of the issues before us is whether the 1916 Act can be subject to the disciplines of Article VI and the Anti-Dumping Agreement. It is therefore appropriate to address this question as part of the substantive issues of this case, but separately from the actual WTO-compatibility of the 1916 Act. Based on our findings regarding the applicability of Articles III:4 and VI to the 1916 Act, we shall proceed to review the compatibility of that law with either provision or both.

6.75 However, even though we do not reach yet any conclusion on the applicability of either provision, we need to decide at this stage whether to begin our analysis with Article VI or Article III:4.

6.76 It is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it.³⁴⁴ As a result, one way to reply to the question above is to determine which article more specifically addresses the 1916 Act. We agree that this will require us to touch upon the substance of the case, but we recall that this test is used here for purely procedural reasons, that is to determine the order of our review. Such a *prima facie* analysis is, of course, without prejudice to the final findings on the issue of the applicability of Articles III:4 and VI, to be reached after a more detailed review of the scope of each provision, as necessary.

6.77 As mentioned above, our understanding is that Article III:4 and Article VI are based on two different premises. The applicability of Article III:4 seems to depend primarily on whether the measure applied pursuant to the law at issue is an internal measure or not.³⁴⁵ In contrast, the applicability of Article VI seems to be based on the nature of the trade practice which is addressed. Under Article VI, the type of sanction eventually applied does not seem to be relevant for a measure to be considered as an anti-dumping measure, or not. We note in this respect that, for the EC, the fact that the 1916 Act imposes other sanctions than duties is insufficient to make that law fall outside the scope of Article VI and, for the United States, under Article VI, dumping does not have to be counteracted exclusively with duties.³⁴⁶ Consequently, it seems to us that the fact that a law imposes measures that can be qualified as "internal measures", such as fines, damages or imprisonment, does not appear to be sufficient to conclude that Article VI is not applicable to that law.

³⁴⁴ See Appellate Body Report on *European Communities – Bananas*, Op. cit., para. 204, and the judgement of the Permanent Court of International Justice in the *Serbian Loans* case (1929), where the PCIJ stated that "the special words, according to elementary principles of interpretation, control the general expression" (PCIJ, Series A, No. 20/21, at p. 30). See also György Haraszti, Some Fundamental Problems of the Law of Treaties (1973), p. 191.

³⁴⁵ See Panel Report on *United States – Restrictions on Imports of Tuna* (not adopted), DS21/R, 3 September 1991, para 5.12:

"Another panel had found that the words "treatment no less favourable" in Article III:4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of products[...]. It was apparent to the Panel that the comparison implied was necessarily one between the measures applied to imported products and the measures applied to like domestic products."

³⁴⁶ See the arguments of the United States regarding the ordinary meaning of Article VI:2 of the GATT 1994, in section III.E.2 above.

6.78 We also note that the parties agree that the 1916 Act deals with transnational price discrimination. Furthermore, the United States argues that it does not merely address dumping, and that other requirements under the 1916 Act make that law fall outside the scope of Article VI. We note that Article III:4 states that imported products

"shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

Determining that damages, fines or imprisonment, which are imposed on persons, may accord less favourable treatment to imported products with respect to their internal sale, offering for sale, purchase, transportation, distribution or use, is not *a priori* impossible and has actually been done by previous panels.³⁴⁷ However, a preliminary examination of the scope of application of Article III:4 (i.e. internal sale, offering for sale, purchase, transportation, distribution or use) would tend to show that the terms of Article III:4 are less specific than those of Article VI when it comes to the notion of transnational price discrimination.

6.79 In application of the principle recalled by the Appellate Body in *European Communities – Bananas* and by the Permanent Court of International Justice in the *Serbian Loans* case,³⁴⁸ there would be reasons to reach the preliminary conclusion that we should review the applicability of Article VI to the 1916 Act in priority, as that article apparently applies to the facts at issue more specifically. This preliminary conclusion is based on our understanding of the arguments of the parties and on a preliminary review of the terms of Articles III:4 and VI. Since the fact that the 1916 Act provides for the imposition of internal measures does not seem to be sufficient as such to differentiate the scope of application of Article III:4 and that of Article VI, we had to consider the other terms of these articles.

6.80 Our preliminary conclusion does not address the question whether the 1916 Act could fall within the scope of both provisions. If we determine that the 1916 Act actually falls within the scope of Article VI, we will continue with the EC claims of violation of Article VI:1, VI:2 and the Anti-Dumping Agreement, as necessary to enable the DSB to make sufficiently precise recommendations and rulings. Once this part of our terms of reference has been addressed, we shall also decide whether pursuing our review with an analysis of the applicability of Article III:4 would be necessary to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance "in order to ensure effective resolution of disputes to the benefit of all Members."³⁴⁹ If we do not find that the 1916 Act falls within the scope of Article VI of the GATT 1994, we will proceed to consider the applicability of Article III:4 to the 1916 Act and, if applicable, the compatibility of the 1916 Act with that provision.

6.81 Consequently, we proceed with a review of the applicability of Article VI to the 1916 Act.

³⁴⁷ See, e.g., Panel Report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36/345, para. 5.10. See also Panel Report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, which mentioned at para. 12 that:

"The selection of the word "affecting" [in Article III:4] would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market."

³⁴⁸ See footnote 344 above.

³⁴⁹ See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, para. 223.

D. APPLICABILITY OF ARTICLE VI OF THE GATT 1994 TO THE 1916 ACT

1. Preliminary remarks on the possibility of interpreting the 1916 Act in a WTO-compatible manner and on its "mandatory/non-mandatory" nature

(a) Issue before the Panel

6.82 We recall that the United States has argued in the course of these proceedings that the 1916 Act is non-mandatory legislation within the meaning of the GATT/WTO practice essentially because (i) with respect to both civil and criminal proceedings, US courts have interpreted in the past and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States and (ii) the US Department of Justice has discretion to initiate or not criminal proceedings under the 1916 Act.³⁵⁰ The EC considers that the mandatory/non-mandatory doctrine applies only to the executive branch of government. Judges have no discretion in applying a law. Finally, pursuant to the panel practice under the Tokyo Round agreements on anti-dumping and on subsidies and countervailing measures, the discretion of the US Department of Justice to initiate criminal proceedings is insufficient to make the 1916 Act a non-mandatory law.

6.83 We could treat these arguments as a question of admissibility of the EC claims. However, for the reasons presented below, we shall address them as part of our review of the EC claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement and, if necessary, Article III:4 of the GATT 1994.³⁵¹

6.84 As a preliminary remark, it should be noted that, even though the parties used the terms "mandatory/non-mandatory" or "discretionary" legislation in their arguments with respect to different aspects of the 1916 Act, we consider that we should differentiate the issues before us. We consider that the question whether the US Department of Justice has discretion to initiate or not criminal proceedings under the 1916 Act is indeed a question of application of the doctrine on mandatory/non-mandatory legislation within the meaning usually given to it in the GATT and in public international law.³⁵² The question whether the 1916 Act could be or has been interpreted in a way that would make it fall outside the scope of Article VI is, however, simply a question of assessing the current meaning of the law.

³⁵⁰ The United States does not seem to allege that a similar discretion exists in relation to the civil proceedings which would make the 1916 Act non-mandatory.

³⁵¹ Such an approach is also consistent with the practice of other panels, which addressed this issue in the course of their review of the conformity of measures with GATT provisions. See *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, BISD 41S/131, para. 118. That report refers to the report of the panel on *United States – Taxes on Petroleum and certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, p. 160; the report of the panel on *EEC – Regulation on Imports of Parts and Components*, Op. cit., pp. 198-199; the report of the panel on *Thailand, Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200 pp. 227-228; the report of the panel on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, pp. 281-282, 289-290; and the report of the panel on *United States – Denial of MFN Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, p. 152. See also Panel Report on *Canada – Measures Affecting the Export of Civilian Aircraft*, adopted on 20 August 1999, WT/DS70/R, para. 9.124.

³⁵² The Panel is mindful of the of the findings of the panel in *United States – Section 301-310 of the Trade Act of 1974*, adopted on 27 January 2000, WT/DS152/R, which was adopted after the issuance of the interim report in the present case. However, we do not consider that the reasoning of the panel in that case affects our reasoning in the present case.

(b) The possibility of interpreting the 1916 Act in a WTO-compatible manner

6.85 Concerning the argument according to which US courts have interpreted in the past and/or could in the future interpret the 1916 Act in a manner consistent with the WTO obligations of the United States, the United States relies to a large extent on the panel report on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*.³⁵³ In our opinion, the United States refers to that case for essentially two reasons. First, the United States relies on the *United States - Tobacco* case to argue that a law which can be interpreted in a WTO-consistent manner is a law that does not mandate a WTO-illegal action. Second, the United States claims that, in accordance with that report, the EC bears the burden to prove that there is no possibility to interpret the 1916 Act in a WTO-consistent manner.

6.86 The issue here is primarily, like in the *United States – Tobacco* case, a question of interpretation of an ambiguous text. However, in our opinion, similarities are limited to that aspect. In the *United States – Tobacco* case, the panel had to deal with the question whether the ambiguous term at issue mandated a violation of Article VIII of the GATT 1947. In the present case, what is at issue is whether the terms of the 1916 Act are such as to make Article VI *applicable* to that law. We are consequently at an earlier stage of our analysis than the panel in the *United States – Tobacco* case. Moreover, in the *United States – Tobacco* case, the United States had as yet neither changed the fee structure nor promulgated rules implementing the law at issue. In the present case, the 1916 Act did not require any implementing measures from the US government and, contrary to the law at issue in the *United States – Tobacco* case, it has been applied in a number of instances by US courts. Consequently, the situations faced by this Panel and the panel in the *United States – Tobacco* case are factually different.

6.87 These differences have implications for the burden of proof. In the *United States – Tobacco* case, the extensive burden of proof imposed on the complainants was obviously related to the absence of any application of the ambiguous term by the executive branch of the US government at the time of the findings. Since the United States had so far applied its law in conformity with Article VIII of the GATT 1947 and since there was no evidence that the United States intended to apply the law in a GATT-incompatible manner, the principle *in dubio mitius* logically applied.³⁵⁴

6.88 In contrast, several courts have interpreted and applied the 1916 Act. In fact, reaching a decision on the US argument requires the Panel to determine whether the interpretation of the 1916 Act by US courts has been such as to actually make the 1916 Act WTO-compatible by making it fall outside the scope of Article VI of the GATT 1994. In such a context, the EC only needs to prove that the 1916 Act, as it has been interpreted and applied so far by US courts, meets the conditions to fall within the scope of Article VI. If the EC succeeds in proving it, we will proceed with a review of the compatibility of the 1916 Act with Article VI.

6.89 The question whether there could be a possibility to interpret the 1916 Act in the future so that it would fall outside the scope of Article VI would be relevant, according to the *United States – Tobacco* case, only if the 1916 Act had not yet been applied. Since the 1916 Act has actually been applied and has been subject to interpretation by US courts, the issue before us is (i) whether Article VI is found to be applicable to the 1916 Act on the basis of the current court interpretation and (ii) whether a violation of Article VI by the 1916 Act as currently applied is identified.

6.90 Even if we were to consider that the factual circumstances in the present case and in the *United States – Tobacco* case are comparable, we recall that, in *United States – Tobacco*, an important

³⁵³ Op. Cit., hereinafter "*United States – Tobacco*".

³⁵⁴ See Appellate Body Report in *EC – Hormones*, Op. Cit., footnote 154, where the Appellate Body held that this principle is widely recognised in international law as a "supplementary means of interpretation".

element in the finding of the panel had been the presence of an *ambiguity* in the text of the law under review. The term "comparable" could be interpreted in GATT-compatible as well as in GATT-incompatible ways. Assuming that the reasoning of the panel in the *United States – Tobacco* case could be extended to the present situation in spite of the differences highlighted above, if we find that no such ambiguity exists regarding the applicability of Article VI to the text of the 1916 Act itself or as interpreted by the US courts, (i) we will not have to apply the burden of proof which the United States alleges was applied in the *US - Tobacco* case and (ii) we will conclude that the 1916 Act falls within the scope of Article VI and will address it as any other legislation.³⁵⁵

(c) Mandatory/non-mandatory nature of the 1916 Act

6.91 Concerning the discretion enjoyed by the US Department of Justice to initiate or not criminal proceedings under the 1916 Act, we recall that the European Communities have claimed that the discretion to initiate an investigation was found insufficient under the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade³⁵⁶ and the Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade³⁵⁷ to consider as "non-mandatory" a law reviewed under those agreements.

6.92 We have undertaken a preliminary review of the panel reports referred to by the EC.³⁵⁸ We note that the issue of the "mandatory/non-mandatory" nature of a law has apparently been addressed differently under Article VI of the GATT and the Tokyo Round subsidies and anti-dumping agreements than under Article III of the GATT. In order to avoid making unnecessary findings, we find it appropriate to address this issue once we have determined whether the 1916 Act falls within the scope of Article VI or not, a determination to be made in any event for the reasons mentioned in the previous paragraphs.

2. Does the 1916 Act fall within the scope of Article VI of the GATT 1994?

(a) Issue before the Panel

6.93 The European Communities claims that the 1916 Act is an anti-dumping law subject to the disciplines of Article VI of the GATT 1994 because Article VI refers (i) to rules targeted at imports and by the fact of their importation; and (ii) to practices defined by reference to price discrimination in the form of lower prices in the market of the importing country than those practiced on the market of the country of export. It is only dumping meeting the definition in Article VI that is to be condemned, and then only in the stated circumstances of injury, threat of injury or material retardation of the establishment of a domestic industry.

³⁵⁵ If we conclude that the 1916 Act falls within the scope of Article VI, we will not need to take position on the issue whether the reasoning in the *United States – Tobacco* report, which was adopted under the GATT 1947, would still be valid after the entry into force of the WTO Agreement, in light of Article XVI:4 of the Agreement Establishing the WTO.

³⁵⁶ Hereinafter the "Tokyo Round Subsidies Agreement".

³⁵⁷ Hereinafter the "Tokyo Round Anti-Dumping Agreement".

³⁵⁸ See *Panel on United States Definition of Industry Concerning Wine And Grape Products*, adopted on 28 April 1992, BISD 39S/436 (hereinafter "*United States – Definition of Wine Industry*") and the report of the panel on *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP 136, 28 April 1995 (hereinafter "*EC – Audio Cassettes*"). The latter was not adopted. However, we recall that in its report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8; 10; 11/AB/R, p. 15, the Appellate Body confirmed that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."

6.94 The United States claims that Article VI does not state that its disciplines govern any law based upon the concept of price discrimination regardless of any other elements required to be proven under the law. Article VI only addresses actions taken for the purpose of offsetting or preventing injurious dumping, not actions that are not designed to offset or prevent injurious dumping, as is the case with the 1916 Act. According to the United States, the EC seems to read in Article VI the limitation that all laws with any type of international price discrimination component must conform to the anti-dumping rules. If it were to be the case, this would extend these rules into the realm of anti-trust and, therefore, Member's other anti-trust laws prohibiting various forms of discriminatory or low pricing would be WTO-inconsistent to the extent that those laws address attempted monopolization or an abuse of dominance undertaken through predatory, cross-border pricing practices. The negotiating history and subsequent practice under the GATT 1947 support the contention that Article VI of the GATT 1994 is not intended as a remedy for "predatory pricing".

6.95 The EC contends that one of the clearest targets of Article VI of the GATT 1994 is precisely "predatory" dumping. The EC does not argue that Article VI and the Anti-Dumping Agreement govern any international price discrimination regardless of the other elements of the law. The approach in Article VI is confirmed by the basic theory of anti-dumping which recognises a particular problem posed by price discrimination of this type, requiring an analysis distinct from that applying to price discrimination within the same market.

6.96 The United States contests that the distinction between anti-trust and anti-dumping should be based upon whether price discrimination occurs within a single market or across markets. Moreover, the United States considers that Article VI and the Anti-Dumping Agreement do not govern competition laws simply because those laws incorporate the element of price discrimination. The existence of an anti-trust objective in a law regulating cross-border price discrimination should remove it from the scope of Article VI of the GATT 1994.

6.97 Since the EC made claims of violation of Article VI and, separately, of the Anti-Dumping Agreement, we would like to clarify how we see the relationship between these provisions. Just as the panel in the *India - Quantitative Restrictions*³⁵⁹ case did not analyse Article XVIII:B in isolation from the Understanding on Balance-of-payments Provisions of the General Agreement on Tariffs and Trade 1994, this Panel has no intention to address Article VI in isolation from the Anti-Dumping Agreement. In our opinion, Article VI and the Anti-Dumping Agreement are part of the same treaty or, as the panel and the Appellate Body put it in *Argentina – Safeguard Measures on Import of Footwear* with respect to Article XIX and the Agreement on Safeguards, an "inseparable package of rights and disciplines".³⁶⁰ In application of the customary rules of interpretation of international law, we are bound to *interpret* Article VI of the GATT 1994 as part of the WTO Agreement and the Anti-Dumping Agreement is part of the context of Article VI.³⁶¹ This implies that Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning. Rather, we should give meaning and legal effect to all the relevant provisions.³⁶² However, the requirement does not prevent us from making *findings* in relation to Article VI only, or in relation to specific provisions of the Anti-Dumping Agreement, as required by our terms of reference.

6.98 The Panel also considers that its role, pursuant to Article 3.2 of the DSU, is to clarify the meaning of Article VI in order to determine whether it applies, as claimed by the European

³⁵⁹ Op. Cit., footnote 305 above.

³⁶⁰ Adopted on 12 January 2000, WT/DS/121/AB/R, para. 81.

³⁶¹ See, in this respect, our reasoning in para. 6.195 below.

³⁶² See, e.g., the reports of the Appellate Body on *Argentina – Safeguard Measures on Import of Footwear*, Op. cit., para. 81, *Korea – Definitive Safeguard Measures on Import of Certain Dairy Products*, adopted on 12 January 2000, WT/DS98/AB/R, para. 81 and *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R, p. 23.

Communities, to the type of measures addressed by the 1916 Act. For the sake of clarity, we will first address the applicability of Article VI to the terms of the 1916 Act as such, in isolation from subsequent interpretation(s). We will then review the circumstances of the enactment of the 1916 Act (including the legislative history) as well as the relevant US court case-law and determine to what extent they affect the conclusions that we will have reached on the basis of the text only.

(b) Does the 1916 Act, on the basis of its terms only, fall within the scope of Article VI of the GATT 1994?

(i) *Approach of the Panel*

6.99 We note that the views of the parties diverge as to the criteria that should be used to determine the applicability of Article VI of the GATT 1994 to the 1916 Act. For the EC, the 1916 Act should be subject to the norms of Article VI because Article VI applies to imports by the reason of their importation and addresses practices defined by reference to discrimination between the prices of the imported products and domestic prices in the country of export or, in the absence of such prices, export prices to a third country or cost of production. The United States considers that Article VI only addresses actions taken for the purpose of offsetting or preventing injurious dumping, not actions that are *not* designed to offset or prevent injurious dumping, as is the case with the 1916 Act.

6.100 We consider that, in order to determine whether the 1916 Act falls within the scope of Article VI of the GATT 1994, we need to define that scope by interpreting Article VI:1 on the basis of the relevant provisions of the Vienna Convention and then compare those requirements to those of the 1916 Act. However, we note that we are called upon to consider the compatibility of a specific law with Article VI of the GATT 1994, not to make an interpretation of the scope of that article in absolute terms. Thus, any assessment we may make of the scope of Article VI will be circumscribed to the specific issues raised by the terms of the 1916 Act.

6.101 Finally, as recalled in paragraph 6.59 above, the mere description or categorization of a measure under the domestic law as well as the policy purpose behind the measure cannot be a decisive factor in the categorization of that measure under the WTO Agreement. We therefore do not consider as decisive the classification of the 1916 Act under the US Code or the fact that it is generally called the "Antidumping Act of 1916". We consider that we should exclusively rely at this stage on what the text of the law expressly says. This does not mean that we should disregard the objective of the 1916 Act. However, for now we will consider it only to the extent that it results from the terms of the law itself, to the exclusion of the legislative history or the subsequent court practice, which we will address later.³⁶³

(ii) *Scope of Article VI of the GATT 1994*

6.102 Article VI:1 provides, in relevant parts, as follows:

"The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purpose of this article, a product is to

³⁶³ This also seems to be consistent with US court practice. In *Zenith I* (1975), Op. Cit., p. 246, Judge Higginbotham stated that "as always, when a court is called to construe a statute, it is wise to begin by reading the statute itself."

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

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." [notes *Ad Article VI:1* omitted]

6.103 Considering the terms of Article VI in their ordinary meaning, we note that Article VI does not regulate the practice of dumping itself, but the anti-dumping activities of Members. In other words, Article VI concentrates on what Members may do in order to counteract dumping. However, Article VI is based on a definition of dumping, found at the beginning of Article VI:1:

" dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products"³⁶⁴

The normal value is either the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or, in the absence of such domestic price, the highest comparable price for the like product for export to any third country in the ordinary course of trade, or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

6.104 Therefore, the conditions for "dumping" to exist are the following:

(i) there must be products imported and cleared through customs ("introduction into the commerce"); and

(ii) those imported products must be priced at a price lower than their normal value, i.e. their price in a foreign country, be it the country of production or another country of export, or a constructed value based on a calculation of cost and profits.

In other words, there must be a price difference between like products sold in two markets, one of which is not within the jurisdiction of the same Member, their price in the country of exportation being lower than their price in the country of production or in a third country to which they are exported.³⁶⁵

³⁶⁴ We note that this definition is close to the definition of dumping given by Jacob Viner in Dumping, A Problem in International Trade, Op. Cit., p. 3, i.e. "price-discrimination between national markets." The court in *Zenith III*, Op. cit., p. 1213, refers to the 1966 edition which includes, at p. 4, a slightly revised definition: "price discrimination between purchasers in different national markets."

³⁶⁵ The existence of a price difference between two markets *located in two different Members*, together with a *lower price in the importing country* than in the country of production are essential features to

6.105 It is this practice that "is to be condemned", provided certain conditions are met. Thereafter follow certain substantive (i.e. material injury³⁶⁶ and causality) and procedural requirements; but they do not qualify the original definition of "dumping".³⁶⁷ While "dumping" can be subject to sanctions only if it causes material injury, this does not affect the fact that, on the basis of the structure of Article VI, "dumping" within the meaning of the definition of Article VI:1 has to be found in the first place.

6.106 Neither the context of Article VI, nor the object and purpose of the GATT 1994 or the WTO Agreement contradicts this assessment. On the contrary, Article VI:1(a) and (b) confirm that there is no requirement that the export price be above or below fixed or variable costs or that price undercutting, price suppression or price depression be identified for "dumping" to exist, even though they may be considered for injury purposes. Article VI:2 supports the view that Article VI is about what Members are entitled to do when they counteract dumping within the meaning of Article VI. So does Article 1 of the Anti-Dumping Agreement, by referring to "anti-dumping *measure[s]*" which may be applied by Members.³⁶⁸ The supplementary means of interpretation of Article 32 of the Vienna Convention, in particular the *travaux préparatoires*, confirm that Article VI of the GATT was about what category of dumping could be subject to counteracting measures.³⁶⁹

6.107 We therefore reach the conclusion that a law that would counteract "dumping" as defined in Article VI:1 would fall within the scope of Article VI. However, as mentioned in paragraph 6.100 above, we are not called upon to make findings in the absolute. We therefore proceed to review more specifically the 1916 Act on the basis of the scope of Article VI as defined above.

(iii) *Examination of the 1916 Act on the basis of the scope of Article VI*

Similarities

6.108 We note that the 1916 Act contains a transnational price discrimination test:

"It shall be unlawful for any person *importing or assisting in importing* any articles from any foreign country into the United States, commonly and systematically to

differentiate dumping from other forms of price discrimination and pricing practices. In this respect, see also Viner, *Op. Cit.*, pp. 2-3.

³⁶⁶ Throughout these findings, the term "material injury" shall be taken to refer to "material injury to an established industry in the territory of" a Member, threat thereof or material retardation of the establishment of a domestic industry, within the meaning of Article VI:1 of the GATT 1994.

³⁶⁷ We do not read the language "For the purpose of this article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another..." as qualifying anything but the term "normal value". Additional conditions have been introduced in the Anti-Dumping Agreement, such as the *de minimis* requirement for the margin of dumping (Article 5.8 of the Anti-Dumping Agreement) but they do not affect the original definition to such an extent that they would change our conclusions.

³⁶⁸ Article 1, first sentence, of the Anti-Dumping Agreement provides that:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this agreement."

³⁶⁹ See U.N. Doc. EPCT/C.II/48 (1946), p. 1, "the discussion had shown that there were four types of dumping: price, service, exchange and social. Article 11 permitted measures to counteract the first type. It would obligate members not to impose anti-dumping duties with respect to the other three types". See also Jackson: World Trade and the Law of GATT, p. 402 and 404.

import, sell or cause to be imported or sold such articles within the United States *at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States...*" (emphasis added)

This test includes requirements similar to the introduction of the dumped product into the commerce of one Member since it refers to "import or sell or cause to be imported or sold [...] within the United States". We further note that the 1916 Act is premised on a comparison between two prices, one in the United States, the other one in the country of production of the product or in a third country where the product is also sold. There is consequently a very strong similarity between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act.

6.109 This said, would there be elements in the text of the 1916 Act that would lead us to conclude that the transnational price discrimination test in the 1916 Act nevertheless does not meet the definition of dumping in Article VI? We note that the 1916 Act relies not only on the actual market value but also on wholesale price. It also refers to the "principal markets of the country of [...] production [of the imported merchandise]" or of "other foreign countries to which they are commonly exported". We do not find the nature of these requirements to be different from those of Article VI:1 to such a degree as to make them fall outside the concept of "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" found in Article VI:1(a). The 1916 Act also refers to sales on the "principal markets" of "other foreign countries to which they are commonly exported". This may not be the "highest comparable price for the like product for export to any third country in the ordinary course of trade" found in Article VI:1(b) but, once again, its nature does not, in our view, depart to a significant degree from the criteria of Article VI:1 and it does not relate to other concepts which, by their nature, could be differentiated from those found in Article VI:1. Finally, we note that the 1916 Act does not provide for the possibility to use a "constructed" normal value, within the meaning of Article VI:1(b)(ii). However, this only makes the transnational price discrimination test in the 1916 Act "narrower" than the definition of "dumping" in Article VI:1, without making it fall outside its scope. We also note that the 1916 Act provides for adjustments. Even though these adjustments are not those found in the last sub-paragraph of Article VI:1, they do not affect the scope of the price discrimination test in the 1916 Act in relation to Article VI. On the contrary, they confirm the similarity of the two texts as far as the criteria for the identification of the practice at issue is concerned.

6.110 This does not mean that the criteria for establishing price discrimination under the 1916 Act would always be compatible with the requirements of Article VI of the GATT 1994. This means only that we do not find in these criteria anything that would make us consider that the 1916 transnational price discrimination test would partly or totally fall outside the definition of "dumping" found in Article VI:1.

Specific arguments of the United States

6.111 The United States argues that the 1916 Act is not merely about dumping and has additional requirements compared with Article VI. In the first place, the 1916 Act requires the price difference to be "substantial" and the importation and sales to be done "commonly and systematically". Secondly, the 1916 Act includes additional requirements that are not found in Article VI, which make of it an instrument targeting specific forms of price discrimination in an anti-trust context.

6.112 We do not consider that conditions which make the establishment of dumping more difficult, such as the requirement of substantial price difference and of common and systematic dumping are such as to make the price discrimination test of the 1916 Act fall outside the scope of the definition of Article VI:1. As long as the test of the 1916 Act requires a price difference between two markets, each located in the territory of a different Member, the fact that additional requirements make a finding of dumping more difficult does not affect the applicability of Article VI. Members may not exempt themselves from the rules and disciplines of the WTO Agreement when counteracting dumping, but they remain free to apply requirements which make the imposition of measures more difficult.

6.113 With respect to the other requirements of the 1916 Act, we recall that the price discrimination addressed by the 1916 Act must be applied with the intent of (a) "destroying" or (b) "injuring an industry in the United States", or of (c) "preventing the establishment of an industry in the United States", or of (d) "restraining" or (e) "monopolizing any part of trade and commerce [in the goods concerned] in the United States." We note that the first three tests are quite similar to the material injury and retardation tests of Article VI:1, while the two last ones are more of the type used in an anti-trust context.³⁷⁰ However, we found above that the existence of "dumping" within the meaning of Article VI:1 is a condition *sine qua non* for a Member to take action under Article VI. We note that, before identifying any intent under the 1916 Act, US judges would also have to establish that there has been importation or sales at discriminatory prices of the type required by that law.³⁷¹ We have been presented with no evidence that transnational price discrimination under the 1916 Act could be presumed when the court had only established the existence of an intent to destroy, injure or prevent the establishment of an industry in the United States, or to restrain or monopolise any part of the trade in the product concerned within the United States. Therefore, we conclude that the existence in the 1916 Act of additional requirements which are not found in Article VI does not *per se* suffice to make the 1916 Act fall outside the scope of Article VI.

6.114 Moreover, we recall that dumping "is to be condemned if it causes or threatens" to cause certain effects listed in Article VI:1. Even though Article VI:1 does not read "dumping is to be condemned *only* if" it causes those effects, we consider that it should be interpreted as limiting the use of anti-dumping measures to the situations expressly foreseen in Article VI.³⁷² In other words, whenever a Member addresses a practice that meets the definition of Article VI:1, it has to abide by the WTO rules governing anti-dumping.³⁷³ If, as the United States seems to argue, a Member could

³⁷⁰ See Robinson-Patman Act, which provides that the "effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."

³⁷¹ See the statement of the court in *In Re Japanese Electronic Products II* (1983), p. 324, that:

"The first element necessary to a finding of dumping under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country."

See also *Helmac II* (1993), p. 591, which recognised that "dumping: the pricing of goods on the American market at a price lower than on the home market" was "the key to liability under the [1916] Act".

³⁷² Such a limitation was clearly envisaged by the drafters of Article VI. The Report of the Sub-Committee at the Havana Conference which considered the provision which was to replace the original Article VI in the GATT 1947 noted that "The Article as agreed to by the Sub-Committee condemns *injurious 'price dumping'* as defined therein and does not relate to other types of dumping." (emphasis added) (Havana Reports, p. 74, para. 23, as reported in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995), p. 222).

³⁷³ This is without prejudice to a Member choosing to address the effects of dumping, e.g. increased imports, or its causes (e.g., subsidisation) through other legitimate means under the WTO Agreement, such as

decide to apply other tests or other sanctions to counteract "dumping" practices within the meaning of Article VI, this would be contrary to the terms of Article VI. Also, alleging that the disciplines of Article VI are only applicable to the extent a Member wants to address situations of material injury, threat thereof or material retardation of the establishment of a domestic industry would undermine the whole purpose of Article VI and the Anti-Dumping Agreement. From the terms of Article VI, we deduce that the purpose of that provision is to define the conditions under which counteracting dumping *as such* is allowed. This purpose is confirmed by Article 1, first sentence, of the Anti-Dumping Agreement, which provides that:

"An anti-dumping measure shall be applied *only under the circumstances provided for in Article VI of GATT 1994* and pursuant to investigations initiated [footnote 1 omitted] and conducted in accordance with the provisions of this Agreement." (emphasis added)

Article 18.1 of the Anti-Dumping Agreement also confirms this understanding:

"No specific action against dumping of exports from another Member can be taken *except in accordance with the provisions of GATT 1994*, as interpreted by this Agreement. [footnote 24 omitted]³⁷⁴" (emphasis added)

This implies that, by adopting Article VI and the Anti-Dumping Agreement, Members have agreed to use only one approach against "dumping" as such. The interpretation suggested by the United States would undermine the useful effect of the provisions of Article VI and of the Anti-Dumping Agreement.

6.115 For these reasons, we cannot consider that the existence of other "effect" tests than those provided for under Article VI should be sufficient to exclude the 1916 Act from the scope of Article VI. The 1916 Act may be targeting particular effects of cross-border price discrimination, but to the extent that such price discrimination meets the definition of "dumping" contained in Article VI:1, it has to be subject to the disciplines of Article VI and the Anti-Dumping Agreement.³⁷⁵

6.116 Finally, the United States argues that the existence of an anti-trust objective in a law regulating cross-border price discrimination removes it from the scope of Article VI of the GATT 1994. While we agree that Article VI applies when Members have recourse to a given trade policy instrument, i.e. anti-dumping action, we do not agree that the application of Article VI is dependent on the objective pursued by the Member concerned. As we have demonstrated in the previous paragraphs, Article VI is based on an objective premise. If a Member's legislation is based on a test that meets the definition of Article VI:1, Article VI applies. The stated purpose of the law cannot affect this conclusion.³⁷⁶

countervailing or safeguard measures. However, it cannot choose to address "dumping" as such with instruments or in ways that are different from those allowed in the WTO Agreement for that purpose. This is, in our view, the meaning of footnote 24 to Article 18.1 of the Anti-Dumping Agreement, which provides that "This is not intended to preclude actions under other relevant provisions of GATT 1994, as appropriate."

³⁷⁴ We did not overlook the terms of footnote 24. Footnote 24, as we understand it, does not affect our conclusion that, when dealing with dumping as such, Members must comply with Article VI of the GATT 1994 and the Anti-Dumping Agreement.

³⁷⁵ We understand that the United States did not argue that the tests at issue were less stringent than the material injury/material retardation tests of Article VI. Therefore, we do not address this point.

³⁷⁶ See Panel Report on *EC – Parts and Components*, Op. cit., at para. 5.6, where the panel examined whether the policy purpose of a charge was relevant to determining the issue of whether the charge was imposed "in connection with importation", within the meaning of Article II:1(b) of GATT 1947. The panel noted that:

6.117 We therefore conclude that the fact that the 1916 Act may have an anti-trust objective or be categorized in US law as an anti-trust law does not *per se* make it fall outside the scope of Article VI, unless it is demonstrated that this objective and this categorisation have an impact on the operation of the 1916 Act. In light of our reasoning, this would require that the terms of the transnational price discrimination test of the 1916 Act be understood in such a way that it would not meet the definition of "dumping" of Article VI:1 of the GATT 1994.

(iv) *Conclusion*

6.118 We find that the 1916 Act, based on an analysis of its terms, objectively addresses a type of transnational price discrimination that meets the definition of "dumping" contained in Article VI:1 of the GATT 1994 and, thus, should be subject to the disciplines of Article VI.

6.119 However, our findings are based on the definition of dumping as found in Article VI:1 of the GATT 1994 and on the terms of the 1916 Act in their current ordinary meaning. As we recalled above,³⁷⁷ we must pay due regard to the fact that we are dealing with a text drafted more than eighty years ago. If, by the time it was enacted, the 1916 Act was not designed to address "dumping", in other words if the terms found in the 1916 Act had a different meaning in 1916 than they appear to have today, this should be apparent from the legislative history and the context of its enactment. Since the United States refers to the legislative history of the 1916 Act as well as to the context of its enactment, this aspect needs to be addressed. The United States also claims that US courts have interpreted the 1916 Act consistently with its anti-trust purpose, and in such a way that it is removed from the scope of application of Article VI. Having regard to our conclusions in paragraph 6.117 above that this would require that the price discrimination test of the 1916 Act be interpreted in such a way that it would no longer meet the definition of Article VI:1, we must also address this argument, as well as the EC argument that, in fact, US courts have applied the 1916 Act as an anti-dumping instrument.

(c) Impact of the historical context and of the legislative history of the 1916 Act

(i) *Approach of the Panel*

6.120 The United States and, to a lesser extent, the European Communities have referred the Panel to the historical context of the law in general and its legislative history in particular, as it results, *inter alia*, from the Congressional Records. Our understanding is that the legislative history of an act of the US Congress is an important tool for US courts to identify the "intent of Congress".³⁷⁸ The legislative history allows US courts to interpret a law in accordance with what they perceive to be the original intent of the US Congress when the text of that law is not clear. US courts may also use legislative history, when necessary, to confirm the clear meaning of a law.³⁷⁹ Since, as mentioned above,³⁸⁰ we

"the policy purpose of charges is frequently difficult to determine objectively. Many charges could be regarded as serving both internal purposes and purposes related to the importation of goods. Only at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2."

³⁷⁷ See section C.1. above.

³⁷⁸ In the *Zenith III* case, p. 1213, the court mentioned that the US Supreme Court had "recently observed that 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it.' *Leo Sheep Co. v. United States*, 440 U.S. 668, 669, 99 S.Ct. 1403, 1405, 59 L.Ed.2d 677 (1979)".

³⁷⁹ US courts had recourse to the legislative history of the 1916 Act in a number of cases. See, e.g., the *Zenith I* (1975) and *Zenith III* (1980) judgements.

³⁸⁰ See section C.1. above.

have to identify how the 1916 Act is understood within the US legal system, we need to address the arguments of the parties based on the historical context and the legislative history of the 1916 Act, taking into account the use that US courts made of those interpretation tools in practice.

6.121 We have found that the key to the applicability of Article VI of the GATT 1994 to the 1916 Act is whether that law objectively addresses "dumping" within the meaning of that article. We have also found that the terms of the 1916 Act, on their face, showed that the transnational price discrimination test in that law met the definition of "dumping" in Article VI:1 of the GATT 1994. We consider that we now have to determine whether there is evidence in the legislative history or the historical context of the enactment of the 1916 Act that we should understand the price discrimination test of the 1916 Act differently than we have on the basis of the text of the law.

(ii) *Review of the historical context and legislative history*

6.122 Having reviewed the materials submitted by the parties, we have found no indication that the terms of the price discrimination test found in the 1916 Act were understood differently at the time of its enactment than we understand them today. In its 1919 *Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Anti-Dumping Law*, at p. 9, the United States Tariff Commission included a definition of "dumping" identical in substance to the concept addressed by Article VI:

"Dumping may be comprehensively described as the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production. The definition derives particular importance from a not infrequent tendency to confuse with dumping [...] certain other trade practices which are generally considered unfairly competitive."

This statement of the Tariff Commission shows that dumping was probably not the only price practice which could be considered as unfairly competitive. However, the Tariff Commission added that

"The anti-dumping act of Congress of September 8, 1916, [footnote omitted] somewhat modifies the above definition by condemning importation as well as sale, if commonly and systematically resorted to with the purpose specified in the law."

While not part of the legislative history of the 1916 Act as such, this document of the Tariff Commission indicates that the practice addressed by the 1916 Act was already clearly understood to be "dumping" as we define it today. The Tariff Commission definition of "dumping" is, with some exceptions which we found not to affect the applicability of Article VI:1 of the GATT 1994,³⁸¹ similar to the definition of transnational price discrimination in the 1916 Act. Therefore, it seems reasonable to conclude that the US Congress, when it passed the 1916 Act, was fully aware of the fact that that law addressed "dumping" and not another form of price discrimination.³⁸²

6.123 Moreover, even though the 1916 Act might pursue anti-trust objectives, we found no *express* indication in the legislative history that price discrimination in the 1916 Act should be understood in any particular anti-trust context.

6.124 The United States argues that the district court in *Zenith III* (1980) held that, to give rise to a violation of the 1916 Act, the products sold in the United States and the products sold in the foreign

³⁸¹ See para. 6.112 above.

³⁸² In *Zenith II* (1975), p. 258, the court stated that "The practice [of dumping] itself long outdated the passage of the Antidumping Act of 1916 [...], which clearly implies that Congress knew whereof it wrote when it enacted the statute."

country had to be of "like grade and quality" as that phrase is used in Section 2 of the Clayton Act as amended by the Robinson-Patman Act. As a result, litigants under the 1916 Act were not "clothed with the same discretion as the US Treasury Department under the 1921 Antidumping Act"³⁸³ in terms of the definition of the products to be compared.

6.125 First, in our opinion, the comparison with the 1921 Antidumping Act in *Zenith III* was not intended to differentiate the 1916 Act in terms of product comparison, since the range of products that can be compared under the 1916 Act as interpreted in *Zenith III* includes not only "identical" products, but also "similar" products. The comparison was meant to specify that the 1916 Act did not leave as much discretion as the 1921 Act in this respect.

6.126 Second, we also note that the conclusion in the *Zenith III* case to which the United States refers is only indirectly based on the legislative history of the 1916 Act. It is the result of the interpretation by the court of the intent of the US Congress that the purpose of the 1916 Act was to complement the existing anti-trust laws. It is from this "intent", not from specific statements relating to the meaning of the words "such articles" in the 1916 Act or in any anti-trust law that the court apparently deduced the application of the Clayton Act standard of "like grade and quality". A further examination of the court decision³⁸⁴ shows that the court also relied on terms of the 1916 Act directly imported from the Tariff Act of 1913 to reject the narrow interpretation of "such articles" advocated by the defendants.

6.127 The court in the *Zenith III* case apparently used both justifications without any distinction as to their respective weight, even though it specified that it would hold that "there is no violation of the 1916 Act unless the standards of similarity of the customs appraisal law are met".³⁸⁵ In any case, we note that neither affects the scope of the price discrimination test to such an extent that it would be removed from the scope of the definition of "dumping" in Article VI:1 of the GATT 1994. By accepting a comparison not only between "identical" products, but also between "similar" products, the court interpretation in the *Zenith III* case is probably broader than the Article VI comparison based on "like" products. However, whether broader or narrower in terms of product comparison, the transnational price discrimination test in the 1916 Act still meets the definition of Article VI:1 of the GATT 1994.

6.128 The United States also argues that the historical context and the legislative history show that the 1916 Act was intended to *supplement* or *complement* the rules applicable to US products in an anti-trust context. The United States deduces from this that the 1916 Act is an anti-trust law not subject to the disciplines of Article VI of the GATT 1994. The United States refers, *inter alia*, to the statement of Representative Claude Kitchin:

"We believe that the same unfair competition law which now applies to the domestic trader should apply to the foreign import trader."³⁸⁶

6.129 We also note that the US Secretary of Commerce William Redfield explained in 1915 that

"Unfair competition is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and abate the evil wherever found. The

³⁸³ Op. Cit., p. 1197.

³⁸⁴ See pp. 1229-1230.

³⁸⁵ Ibid. p. 1197. See also *In re Japanese Electronic Products II* (1983), p. 324.

³⁸⁶ 53 Cong. Rec. App. 1938 (1916), as quoted in *Zenith III*, p. 1222.

door, however, is still open to "unfair competition" from abroad which may seriously affect American industry for the worse."³⁸⁷

The two statements refer to the extension of "unfair competition" rules applicable to US domestic commerce to imports. We have noted above that the US Congress had used in the 1916 Act a definition of transnational price discrimination which was already at that time understood as "dumping". We have also concluded in paragraph 6.116 above that the fact that the 1916 Act had an anti-trust objective was not relevant and did not make the 1916 Act fall outside the scope of Article VI of the GATT 1994. Likewise, we are not convinced that the fact that the 1916 Act was presented at the time of its enactment as "supplementing" or "complementing" the existing anti-trust laws necessarily requires that the 1916 Act be interpreted as an anti-trust law. In our opinion, the argument of the United States is only valid if the United States can prove that the historical context and the legislative history of the 1916 Act give indications that anti-trust and anti-dumping were already separate legal concepts. If the two were not clearly identified but, rather, were still part of one single notion of "unfair competition", the US argument should be rejected.

6.130 We note that, at the time of the enactment of the 1916 Act, the current distinction between anti-trust and anti-dumping did not apply in the United States. We reviewed the materials submitted by the parties and the extensive analysis of the legislative history of the 1916 Act in the *Zenith III* case. While it appears, *inter alia* from the quotations above, that the US Administration and US lawmakers of that time considered that the 1916 Act "complemented" or "supplemented" the unfair competition rules applied to domestic products essentially under the Sherman Act and the Clayton Act,³⁸⁸ it also seems that no clear legal distinction had yet been made in the United States between unfair competition resulting from dumping and unfair competition resulting from other practices, as it is made today.³⁸⁹ Dumping as defined in Article VI:1 of the GATT 1994 was just one specific cause of action under anti-trust law,³⁹⁰ as noted in 1923 by Jacob Viner:

³⁸⁷ *Annual Report of the Secretary of Commerce* 43 (1915), as quoted in *Zenith III*, p. 1219.

³⁸⁸ See J. Viner, *Dumping: A Problem in International Trade* (1923), Op. Cit.; pp. 242-243:

"[The Wilson Administration] therefore recommended that any measure adopted to meet the problem should be divorced from customs legislation [in the sense of imposition of higher tariffs] and should take the form of a further extension to those engaged in the import trade of the restraints against unfair competition which had been imposed on domestic commerce."

See also the excerpt from the letter of Samuel J. Graham, Assistant Attorney General, to the New York Times, 4 July 1916, included in a footnote to the above quotation.

³⁸⁹ Even though dumping is now subject to specific international disciplines and may have acquired other purposes, the origins of anti-trust and that of anti-dumping were essentially the same, as highlighted by the 1974 report of the *Ad Hoc* Committee on Antitrust and Antidumping of the American Bar Association Section on Antitrust Law, which stated as follows:

"Both U.S. antidumping and antitrust law and policy have historic roots, and both were intended to protect and engender the fundamental U.S. economic policy of free and fair competition.

[...] antidumping policy seeks to accommodate the legitimate need for legislation which protects American competition from unfair price discrimination by foreign concerns."

43 Antitrust L.J. 653, 691-93 (1974), as reproduced in J. H. Jackson & W. Davey, *Legal Problems of International Economic Relations*, 2d Ed. (1986). This is an additional reason for not deciding on the applicability of Article VI of the GATT 1994 to the 1916 Act on the basis of the general objective of the law.

³⁹⁰ In that context, the statement of the court in the *Zenith III* case, at p. 1220, that "the political and legal history of the era supports our conclusion from the statutory text that the 1916 Act was an antitrust based

"This antidumping provision, beyond the fact that it makes the participation of the importer both as to act and intent in predatory dumping *specifically unlawful and not merely unlawful by construction as a practice by which competition can be restrained or monopoly established*, adds nothing to the Sherman Act. Beyond the fact that it makes unnecessary the proof of conspiracy between the importer and others, it adds nothing to the Wilson Act of 1894" (emphasis added).³⁹¹

6.131 Even if we were to agree with the United States that the objective of the law is decisive, the historical context and legislative history do not confirm that the 1916 Act had a purely "anti-trust" purpose, within the meaning of that concept today. Rather, it appears that anti-dumping as it is known today in international trade law and anti-trust laws dealing with predatory pricing were part of the same notion of "unfair competition."

(iii) *Conclusion*

6.132 We note that evidence from the historical context of the 1916 Act supports our finding that the 1916 Act transnational price discrimination test corresponds to "dumping" within the meaning of Article VI. We also note that, at the time of the enactment of the 1916 Act, there would have been no need to give any different meaning to that test in order to make it fall within the scope of US anti-trust law because, at that time, "dumping" had not yet been conceptually isolated from the body of US anti-trust laws. In any event, the United States has not submitted evidence from the historical context or the legislative history of the 1916 Act that the terms of the transnational price discrimination test of the 1916 Act were understood differently because of the anti-trust objective of the law or that that objective was such as to make the 1916 Act fall outside the scope of Article VI.

6.133 We therefore conclude that the historical context and the legislative history of the 1916 Act, while showing that there was an intent to parallel the rules applicable to US and foreign companies, do not lead us to conclude any differently than we have on the basis of the terms of the 1916 Act as such. Therefore, we proceed to review the impact of the US case-law relating to the 1916 Act.

(d) Impact of the US case-law relating to the 1916 Act

(i) *Approach of the Panel*

6.134 We recall our findings under Section C.1 above on how we should consider the various court decisions regarding the 1916 Act and their interrelationship. We note that the United States claims that the case-law is evidence that the 1916 Act has been applied as an anti-trust statute. We would like to make two preliminary remarks in relation to this argumentation of the United States.

- (a) First, as already mentioned, the categorisation of the 1916 Act as an anti-trust law or an anti-dumping law by the US courts should not be decisive in determining the WTO-compatibility of that law.³⁹² Since the point of our review of the US case-law is to ascertain the actual meaning of the 1916 Act in order to assess its conformity with the WTO Agreement, the classification of this law by US courts can only be of

unfair competition law, not a protectionist one" does not support the US position. From the paragraphs preceding that conclusion, we understand it as meaning that the court opposed the use of selective "unfair competition" instruments to the application of higher tariffs as part of a protectionist policy.

³⁹¹ J. Viner, *Dumping: A Problem in International Trade* (1923), Op. Cit.; p. 244.

³⁹² See *EC – Parts and Components*, Op. Cit., para. 5.19. In that context, the statement of the court in *Zenith III* (1980) that the 1916 Act is an anti-trust, not a protectionist statute is for us of limited assistance if this statement is not followed by specific conclusions in terms of interpreting the price discrimination test of the 1916 Act.

limited impact for the purpose of the present case. For the Panel, it is the reasoning, if any, behind the classification that matters.

- (b) Second, we found that the 1916 Act price discrimination test met, on its face, the definition of Article VI:1 of the GATT 1994, and that the other tests of the 1916 Act based on the "intent" of the exporter engaged in "dumping" do not have any bearing on that conclusion. As a result, we are of the view that we need not consider any court interpretation of the 1916 Act relating to any other test than the transnational price discrimination test.

We must therefore identify the instances, if any, where US courts, in applying the 1916 Act, have addressed the "dumping" test contained in that law and determine whether those courts have applied/interpreted that test in such a way that it would no longer meet the definition of Article VI:1 of the GATT 1994.

6.135 Since we have already found that the text of the 1916 Act, on its own, supports the conclusion that Article VI is applicable to that law, we consider that, in order for that conclusion to be confirmed, it is not necessary for the EC to demonstrate that there was no court decision that applied the 1916 Act in a WTO-consistent manner. If we find that the US court practice is not sufficiently well established, or that there is no prevailing interpretation, or no sufficiently clear reasoning regarding the way the transnational price discrimination test of the 1916 Act should be applied, we shall rely on the text of the law itself. However, for the United States to prevail, it would be sufficient in our view to show that there is one definitive interpretation supporting its position. As a result, we first determine whether there is any relevant Supreme Court decision which would provide us with a definitive authority at the highest level of jurisdiction. If not, we will review the circuit court decisions.

(ii) *The US Supreme Court and the 1916 Act*

6.136 We first note that the US Supreme Court has not yet been called upon to interpret the text of the 1916 Act. However, as highlighted by the United States, in the *Cooper* case,³⁹³ the Supreme Court described the 1916 Act as "supplemental" to the Sherman Act, as part of an illustration that "Congress had in mind the distinction between public and private remedies". The United States concludes from this that the 1916 Act is an anti-trust instrument. However, the Supreme Court also referred to the 1916 Act as "the antidumping provisions of the Revenue Act of 1916". Even if the Supreme Court regarded the 1916 Act as an anti-trust law, the fact that it refers to "anti-dumping provisions" leaves the issue of the interpretation of the price discrimination test of the 1916 Act open, since US courts may well apply the 1916 Act as an anti-trust law when it comes to the "intent" test, while applying the price discrimination test without any additional requirements than those contained in the text of the 1916 Act.

6.137 What the Supreme Court meant by "supplemental" is not clear in the absence of an agreed technical definition under US law. The 1916 Act could be "supplemental" to anti-trust statutes in a number of other ways than that suggested by the United States. For instance, an anti-dumping law could "supplement" a domestic predatory pricing law. The context of the statement in the decision is of limited use.³⁹⁴

³⁹³ Op. Cit., p. 308.

³⁹⁴ The term "supplemental" was also used by US Secretary of Commerce Redfield in his legislative proposal of 1915 (*Annual Report of the Secretary of Commerce* (1915), Op Cit.) when he said "I also recommend that legislation supplemental to the Clayton Antitrust Act be enacted..." However, we already expressed the view when we addressed the historical context and the legislative history of the 1916 Act that the borderline between anti-dumping and anti-trust was not so clear at that time, if only because anti-dumping was

6.138 Therefore, we are not in a position to draw any definitive conclusion from the US Supreme Court statements in the *Cooper* case. Even if the Supreme Court had expressly stated that the 1916 Act was an anti-trust or an anti-dumping law, this statement would have no relevance for this Panel as long as it was not supported by an explanation of the reasons why the Supreme Court thought that way, or of the implications of that statement on the interpretation of the transnational price discrimination test of the 1916 Act.

6.139 As a result, any conclusion on the basis of the US case-law becomes delicate because there is no unambiguous authority at the highest level of US jurisdiction. This does not mean that we will not find an unanimous interpretation, or even a prevailing interpretation that would be convincing. Indeed, many judgements are final as a practical matter at the level of the circuit court of appeals, *inter alia*, because the possibility to appeal before the Supreme Court is not automatically granted.

(iii) *The interpretation of the transnational price discrimination test of the 1916 Act at the circuit court level*

"Dumping" as an international trade concept applied in an anti-trust context

6.140 Considering the other cases mentioned by the parties and decided either at the district court level or at the court of appeals level, the Panel notes that the court in *Zenith III* (1980) stated that the 1916 Act

"should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Act is a price discrimination law, it should be read in tandem with the price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act of 1936 in 1936."

6.141 The United States relies heavily on this and other similar statements³⁹⁵ to argue that the 1916 Act should be interpreted similarly to the Robinson-Patman Act. However, as outlined above, the fact that the 1916 Act was adopted for anti-trust purposes and the fact that it mixes "dumping" with other tests which are typical of US anti-trust legislation are of no relevance in this case. What matters for us is the way transnational price discrimination has been addressed by US courts. At the district court level, the United States relied substantially on the 1980 *Zenith III* judgement. We note, with respect to price discrimination *stricto sensu*, that the court, after having recalled Viner's definition of dumping, stated that "to restate the obvious, the Antidumping Act of 1916 is a prohibition of international price discrimination." This would tend to confirm that the court applied the transnational price discrimination test of the 1916 Act without reading into it additional anti-trust-like requirements which would modify its meaning. The Court also recalled that "as a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business." However, this was before the introduction - implicitly in the *In Re Japanese Electronic Products III* case or explicitly in the *Brooke Group* case - of the predatory pricing/recoupment test. We have no clear evidence that, before those judgements, the price discrimination test of the 1916 Act was applied differently from what is mentioned in the Act itself.

6.142 When examining the historical context and the legislative history, we addressed the conclusion of the court in *Zenith III* regarding product comparison to the effect that the products sold in the United States and the products sold in the foreign country had to be of "like grade and quality" as that phrase is used in Section 2 of the Clayton Act as amended by the Robinson-Patman Act. We note that the Court of Appeals in *In Re Japanese Electronic Products II* (1983) confirmed that the

at an early stage of development and because it was probably not yet perceived in the United States as a trade instrument separate from anti-trust.

³⁹⁵ See *Zenith III*, p. 1223.

phrase "actual market value or wholesale price of such articles" was a term of art borrowed from the Tariff Act of 1913 and defined in that Act.³⁹⁶ The conclusions we drew from the historical context when we addressed the product comparison aspect of the transnational price discrimination test of the 1916 Act³⁹⁷ are not affected by the court decisions which subsequently addressed it.

6.143 We have not found in the decisions referred to by the United States other elements which would demonstrate that the price discrimination test of the 1916 Act, as such, was affected by attempts to parallel the Robinson-Patman Act. In fact, the court in *Zenith II* (1975) largely used "standard dictionary definitions" to interpret the terms of the 1916 Act that had been challenged by the defendants on grounds of vagueness. This was the case for the terms "commonly and systematically", and "other charges and expenses necessarily incident to the importation and sale". Regarding the term "substantially", the court only referred to the case-law regarding the Clayton Act to conclude that if the term "substantially" in "substantially to lessen competition" in the Clayton Act was not found unconstitutionally vague the term "substantially less" in the 1916 Act cannot be either. Finally, the court also referred to the 1913 Tariff Act to interpret the phrase "actual market value or wholesale price."

6.144 The United States also mentions that every final and conclusive US court decision has supported the *Zenith III* analysis. We note however that a number of these cases were concerned with the issue of *locus standi* in a 1916 civil action³⁹⁸ or more generally with the problem of establishing a cause of action.³⁹⁹ If they confirm *Zenith III*, it seems to be essentially by reason of not expressly objecting to its conclusions, which we have found not to affect our provisional findings based on the terms of the 1916 Act alone. In fact, it seems that courts have concentrated their efforts on other aspects of the 1916 Act, such as the standing and damages provisions, which were found "essentially the same as those applicable to the antitrust laws under section 4 of the Clayton Act" and the criminal penalty clause which is "virtually identical to, and specifies the same penalties as, the corresponding clauses of the Sherman Antitrust Act as then in force."⁴⁰⁰

6.145 Other elements tend to show that courts approached the transnational price discrimination test found in the 1916 Act as "dumping" within the meaning of Article VI of the GATT 1994. For instance, a number of those decisions, including the cases cited by the United States in support of its position, refer to the definition of dumping by Jacob Viner, i.e. "price discrimination between purchasers in different national markets"⁴⁰¹ and generally address the price discrimination test found in the 1916 Act as "dumping", without any further qualification. In this respect, the court in *Zenith II* did not find it necessary to look any further than that definition and the popular title of the 1916 Act to conclude that:

"An economic regulatory statute could scarcely acquire the designation of an 'antidumping Act' unless the business community to which the statute was addressed knew what 'dumping' was."⁴⁰²

³⁹⁶ See *In Re Japanese Electronic Products II*, p. 324.

³⁹⁷ See paras. 6.124-6.126 above.

³⁹⁸ See *Schwimmer v. Sony Corp. of America* (1979), Op. Cit.; *Schwimmer v. Sony Corp. of America* (1980), Op. Cit.; *Western Concrete Structures Co. v. Mitsui & Co.* (1985).

³⁹⁹ *Jewel Foliage Co. v. Uniflora Overseas Florida* (1980), Op. cit.; *Outboard Marine Corporation v. Pezetel* (1978), Op. Cit.

⁴⁰⁰ *Zenith III*, p. 1214.

⁴⁰¹ J. Viner, *Dumping: A Problem in International Trade*, 1966 edition, p. 4. See, e.g., *Zenith II* (1975), *Outboard Marine Corporation v. Pezetel* (1978), p. 408; *Zenith III* (1980); *In re Japanese Electronic Products II* (1983), p. 321

⁴⁰² *Zenith II*, p. 258. See also the statement of the court in *Zenith III*, p. 1196:

6.146 These examples are evidence that some US courts, irrespective of their interpretation of the other parts of the 1916 Act, considered that the transnational price discrimination test had to be interpreted as "dumping", as it is also understood in international trade, and on the basis of US trade law standards.

The *Brooke Group* recoupment test

6.147 The United States claims that, since the 1986 Third Circuit Court of Appeals decision *In Re Japanese Electronic Products III* and the 1993 Supreme Court decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*,⁴⁰³ courts have applied to the 1916 Act the anti-trust predatory pricing/recoupment test developed in those cases.⁴⁰⁴

6.148 We understand the predatory pricing/recoupment test in the *Brooke Group* case to require that (i) the complainant establish that the prices complained of are below an appropriate measure of its rival's costs and that (ii) the complainant demonstrate that the competitor had a reasonable prospect of recouping its investment in below-cost prices.⁴⁰⁵ The Supreme Court further held that evidence of below-cost pricing is not on its own sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.⁴⁰⁶

6.149 It is not clear whether the recoupment test should be analysed as part of the transnational price discrimination test or as part of the "intent" test of the 1916 Act. As a result, in order to consider the applicability of the *Brooke Group* test to the price discrimination test of the 1916 Act, we have to assume that price recoupment is more related to the type/amount of price discrimination that can be achieved by the importer than to its intent to affect the US market. If the *Brooke Group* test relates to the "intent" test of the 1916 Act, it cannot affect the transnational price discrimination test of the 1916 Act.

6.150 This said, regarding the first criterion of the *Brooke Group* test, i.e. below cost prices, we do not consider that the introduction of a below-cost price test would make Article VI of the GATT 1994

"We also have occasion to compare the 1916 Act, which creates a private right of action for treble damages and provides criminal penalties for dumping, with the Antidumping Act of 1921"

The terms used by the court and the subsequent developments in the judgement show that "dumping" in the 1916 Act and in the 1921 Act, which was the US anti-dumping law based on administrative investigations applied until the implementation of the Tokyo Round, were not understood differently. The fact that the understanding of the meaning of "dumping" by US courts corresponds to the definition of that concept in Article VI:1 of the GATT 1994 is confirmed by the following statement of the court in *In Re Japanese Electronic Products II*, at p. 324:

"The first element necessary to a finding of dumping under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the United States and the other of which is sold in the exporting country."

See also *Helmac II* (1993), p. 591, which recognised that the key to liability under the 1916 Act was "dumping: the pricing of goods on the American Market at a price lower than on the home market".

⁴⁰³ 509 U.S. 209, 118 S.Ct. 2578, hereinafter the "*Brooke Group* case".

⁴⁰⁴ Even though the parties have discussed the implication of the court decision *In Re Japanese Electronic Products III*, we do not find it necessary to determine whether the court actually applied in that case the predatory pricing/recoupment test later established by the Supreme Court in the *Brooke Group* case. For the sake of our analysis, we will assume that the court in *In Re Japanese Electronic Products III* actually applied a standard similar to the *Brooke Group* test.

⁴⁰⁵ Op. cit., pp. 2587-2588.

⁴⁰⁶ Ibid., p. 2589.

no longer applicable to the 1916 Act, essentially because the definition of dumping in Article VI:1 does not incorporate a notion of magnitude of price difference. We are aware that Article 5.8 of the Anti-Dumping Agreement provides that there "shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*", i.e. that it is less than 2 per cent, expressed as a percentage of the export price. We have no evidence that this *de minimis* dumping margin bears any link with any kind of below-cost test as applied in anti-trust. The application of a below-cost price test in the 1916 Act may make the establishment of a transnational price difference more difficult, but it does not affect the basic requirement that a price difference has to be established under the 1916 Act, which is also the basic requirement of Article VI:1 of the GATT 1994.

6.151 As far as the cost recoupment criterion is concerned, we do not believe either that the introduction of a recoupment requirement under the 1916 Act would make Article VI of the GATT 1994 no longer applicable to the 1916 Act for essentially two reasons. First, the definition of dumping set out in Article VI:1 would still apply. Even if a cost recoupment were to be required in addition to a price difference, a price difference must always be found in the first place. The second reason is more of an economic nature. Since, in transnational price discrimination, an exporter may benefit from an isolated domestic market, which is often considered to be one of the reasons why dumping is possible in the first place, recoupment on the *export* market may not always occur in a situation of international predatory pricing. The recoupment requirement, which may be justified in cases of price discrimination within the United States, may be an economically questionable requirement in cases of transnational price discrimination, at least whenever the exporter does not need to recoup its costs on the US market.⁴⁰⁷ Indeed, the company exporting at dumping prices may benefit from a simultaneous recoupment of its "dumping" costs through its sales on its domestic market.

6.152 However, this Panel is called on to clarify WTO provisions, not to discuss specific anti-trust issues. Therefore, having expressed the above-mentioned reservations, we proceed to consider if, effectively, the *Brooke Group* test has been actually and consistently applied by US courts in their interpretation of the 1916 Act.

6.153 If the Supreme Court decision in *Brooke Group* is applicable to the 1916 Act, one would expect the other courts which had to consider complaints under the 1916 Act to apply that test. We have no clear evidence that this has been the case, even if one assumes that the test was already applicable since *In Re Japanese Electronic Products III* (1986), as it would appear from the reaction of the courts in the *Geneva Steel*⁴⁰⁸ and *Wheeling-Pittsburgh* cases.⁴⁰⁹

6.154 In that context, the parties have discussed the content of the *Helmac I* case (1992). We understand that the court in the *Helmac I* case concluded that the complainant did not have to establish recoupment. On the contrary, the court noted the importance of the difference in terminology between the 1916 Act and the US anti-trust statutes. According to the court, the 1916 Act

"focuses upon intent while the antitrust statutes focus upon effect. Beside injury to competition, the Antidumping Act also provides a cause of action when the defendant attempts to, among other things, injure an industry in the United States."⁴¹⁰

⁴⁰⁷ We find relevant the view expressed in *Note, Rethinking the 1916 Anti-Dumping Act*, Harvard Law Review, Vol. 110, No. 7, May 1997, p. 1555, at p. 1566, submitted by the EC.

⁴⁰⁸ Op. Cit. See para. 6.158 below.

⁴⁰⁹ Op. Cit. See para. 6.160 below.

⁴¹⁰ *Helmac I*, Op. Cit., pp. 575-576.

The court only stated as a possibility that the adoption of the recoupment theory would be appropriate if Helmac, the complainant in that case, had claimed that the defendant's conduct injured *competition*. Since Helmac alleged an attempt to injure an *industry* in the United States, the court concluded that proving ability to recoup losses was not necessary.⁴¹¹ In the *Helmac II* decision (1993) the court differentiated between liability, of which a finding of dumping was the key, and the calculation of the harm caused to the domestic industry.⁴¹²

6.155 Therefore, we consider that we do not have sufficient evidence of the actual application of the *Brooke Group* test to 1916 Act cases in relation to the establishment of the price discrimination required by that law.

The interlocutory decisions relied upon by the European Communities

6.156 The EC alleges that two interlocutory judgements in the *Geneva Steel* and the *Wheeling Pittsburgh* cases support its claims that the 1916 Act addresses dumping within the meaning of Article VI of the GATT 1994. The United States argues that these two decisions are neither final nor conclusive under US law. Therefore, they cannot, at the present time, be considered by the Panel as authoritative interpretations of US law.

6.157 We are fully aware of the fact that these decisions are only interlocutory judgements. We consider that our review of the other - final - judgements referred to by the parties already shows that US courts did not interpret the transnational price discrimination test of the 1916 Act in such a way that it would fall outside the scope of Article VI of the GATT 1994. However, we recall that we are required to make an objective assessment of the facts of the case. Since these two interlocutory judgements have, like the *Zenith* cases, actually discussed in detail the origin, objectives and practical operation of the 1916 Act, we found it relevant to consider also those cases. We also note that these two cases are subsequent to the *Zenith* cases and the Supreme Court decision in the *Brooke Group* case. Considering them is appropriate in light of the arguments of the United States based on those decisions. Finally, as mentioned in paragraph 6.134(a) above, we are interested in the *reasoning* followed by the US courts as a clarification of how the transnational price discrimination test of the 1916 Act operates. If this reasoning is convincing, we feel justified in taking it into account in our examination.

6.158 In *Geneva Steel*, the district court addressed the question whether the 1916 Act always requires evidence of antitrust-like predatory pricing. Since the intent of predatory pricing in our opinion does not affect the transnational price discrimination test of the 1916 Act, we do not consider that judgement to be directly relevant to our case. However, we note that the court considered that "By the words it chose, Congress protected United States industry from unfair dumping."⁴¹³ Having regard to our conclusions regarding the use of the word "dumping" in other judgements, we assume that the court consciously used the word "dumping" in the same meaning as this word is given in Article VI:1 of the GATT 1994.

6.159 Other reasonings of the court are relevant in so far as they seem to confirm our understanding of the case-law. For instance, the court in *Geneva Steel* considered the conclusion in *Zenith III* that the 1916 Act was "an antitrust, not a protectionist statute" and stated that such conclusion did not appear to be necessary for the finding of the court in the *Zenith III* case that the term "such articles" included also "similar" articles.⁴¹⁴ This view is close to that of this Panel that the finding of applicability of the Clayton Act "like-grade and quality" standard in *Zenith III* was not necessary when it had already

⁴¹¹ Ibid., p. 575.

⁴¹² *Helmac II*, Op. Cit., at p. 591.

⁴¹³ *Geneva Steel*, Op. cit. p. 1217.

⁴¹⁴ Ibid., p. 1218.

been established that the relevant text in the 1916 Act had been imported from the 1913 Tariff Act, which provided for a "similarity" standard. We also note that the court in *Geneva Steel* found the terms of the 1916 Act unambiguous,⁴¹⁵ as we did when we considered the text of the 1916 Act in isolation.

6.160 The court in the *Wheeling-Pittsburgh* case did not address the price discrimination test of the 1916 Act as such, but the question whether predatory intent had to be demonstrated. Its reasoning is therefore less relevant for this case, except for its discussion of the inclusion of the predatory pricing/price recoupment test in the 1916 Act.⁴¹⁶ In that respect, like in the *Geneva Steel* case, the court in *Wheeling-Pittsburgh* rejected the application of this test with respect to certain circumstances of application of the 1916 Act because it created a double burden of proof for the complainants. Indeed, the court considered that, to the "intent" to injure or destroy or prevent the establishment of a domestic industry contained in the text of the 1916 Act, the court in *Zenith III* had added "an antitrust type of predatory pricing, including the reasonable prospect of resultant market control and price recoupment."⁴¹⁷

6.161 The *Geneva Steel* and *Wheeling-Pittsburgh* cases shed additional light on the interpretation of the pricing/recoupment test because they have addressed quite specifically the question of its application. They also represent additional evidence that some district courts do not find themselves compelled, at least at an early stage of consideration of an issue, to apply the *Brooke Group* predatory pricing/price recoupment test to claims under the 1916 Act.

(iv) *Conclusion*

6.162 We conclude that the assessment made by courts of the price discrimination test of the 1916 Act was based essentially on the text of the 1916 Act itself, without any significant additions. We also conclude that, at best, we have no clear evidence of the relevance and of a consistent application of the cost recoupment test – or any other "anti-trust" standards, such as below-cost prices - in the implementation of the transnational price discrimination test of the 1916 Act. In accordance with our approach,⁴¹⁸ we find that the US case-law supports our original conclusion that the 1916 Act addresses "dumping" within the meaning of Article VI:1 of the GATT 1994.

3. Conclusions on the applicability of Article VI of the GATT 1994 to the 1916 Act

(a) The 1916 Act falls within the scope of Article VI of the GATT 1994

6.163 Having interpreted Article VI of the GATT 1994 in accordance with the Vienna Convention, we have reached the conclusion that the rules and disciplines of that article apply to laws that address "dumping" as defined in Article VI:1. Having examined the text of the 1916 Act, we have found that the transnational price discrimination test incorporated in that law falls within the definition of "dumping" of Article VI:1 of the GATT 1994. On the basis of our interpretation of Article VI, we have also found that none of the additional conditions or requirements contained in the text of the 1916 Act is such as to make the transnational price discrimination test of the 1916 Act fall outside the scope of the definition of "dumping" in Article VI:1 or otherwise modify our conclusions. We found

⁴¹⁵ *Ibid.*, p. 1222-1223.

⁴¹⁶ The Court in *Wheeling-Pittsburgh* (1999) gave its views as to why the "predatory pricing" part of the *Brooke Group* test could not apply to cases under the 1916 Act. The court stated that "by requiring a plaintiff to prove 'intent to injure a domestic industry' by below-cost-pricing, the Antidumping Act of 1916 does require proof of predatory intent, albeit of a different kind." However, since its reasoning was based only on the "intent" requirement of the 1916 Act, we do not find it necessary to address it.

⁴¹⁷ *Wheeling-Pittsburgh*, Op. cit., p. 605.

⁴¹⁸ See paras. 6.134-6.135 above.

no convincing evidence in the legislative history that should lead us to understand the terms of the price discrimination test of the 1916 Act differently than we have. Finally, our review of the US court decisions submitted by the parties did not show that courts interpreted the transnational price discrimination test of the 1916 Act in such a way that it would no longer meet the definition of Article VI:1 of the GATT 1994.

6.164 This conclusion also disposes of the argument of the United States that the 1916 Act has been interpreted in such a manner that it falls outside the scope of Article VI of the GATT 1994.

6.165 Having found that Article VI of the GATT 1994 applies to the 1916 Act, we note that Article 1 of the Anti-Dumping Agreement provides that an anti-dumping measure shall be applied only pursuant to investigations initiated and conducted in accordance with the provisions of that Agreement. Article 1, second sentence, also provides that

"the [provisions of the Anti-Dumping Agreement] govern the application of Article VI of GATT in so far as action is taken under anti-dumping legislation or regulations."

Given the link between Article VI of the GATT 1994 and the Anti-Dumping Agreement, we find that the applicability of Article VI to the 1916 Act also implies the applicability of the Anti-Dumping Agreement.

(b) The 1916 Act is a mandatory law within the meaning of GATT 1947/WTO practice

6.166 With respect to the discretion enjoyed by the US Department of Justice which would, according to the United States, make the 1916 Act non-mandatory, we recall our reasoning in paragraph 6.92 above.

6.167 The EC claims that we should rely on the panel report on *United States – Definition of Wine Industry* and conclude that "trade remedy legislation" is not "non-mandatory" merely because the administration enjoys a discretion to initiate an investigation or not. We consider that, in *United States – Definition of Wine Industry*, the panel did not address the mandatory/non-mandatory nature of the United States countervailing duty legislation. However, it stated that its mandate instructed it to review the conformity of the legislation at issue with the provisions of the Tokyo Round Subsidies Agreement, "as required by its Article 19:5(a)."⁴²⁰ On that basis, the panel proceeded to review Section 612(a)(1) of the Trade and Tariff Act of 1984 as such.

6.168 The EC also refers to the panel report in *EC – Audio Cassettes*, which was not adopted.⁴²¹ This report stated why the mere fact that the initiation of anti-dumping investigations was discretionary would not make the EC legislation non-mandatory. The panel stated that:

"[it] did not consider in any event that its task in this case was to determine whether the EC's Basic Regulation was non-mandatory in the sense that the initiation of investigations and impositions of duties were not mandatory functions. Should

⁴²⁰ *Op. Cit.*, para. 4.1. Article 19.5(a) of the Tokyo Round Subsidies Agreement was the equivalent of Article 16.6(a) of the Tokyo Round Anti-Dumping Agreement (see footnote 423 below).

⁴²¹ *Op. Cit.* On the legal value of unadopted panel reports, see footnote 358 above and its reference to the Appellate Body report on *Japan – Taxes on Alcoholic Beverages*.

panels accept this approach, they would be precluded from ever reviewing the content of a party's anti-dumping legislation."⁴²²

The *EC – Audio Cassettes* panel based its reasoning on the fact that this would undermine the obligation contained in Article 16.6 of the Tokyo Round Anti-Dumping Agreement. That provision provided that parties had to bring their laws, regulations and administrative procedures into conformity with the provisions of the Tokyo Round Anti-Dumping Agreement.⁴²³ We note that almost identical terms are found in Article 18.4 of the WTO Anti-Dumping Agreement, which reads as follows:

"Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative practices with the provisions of this Agreement, as they may apply to the Member in question."

Since we found that Article VI and the WTO Anti-Dumping Agreement are applicable to the 1916 Act, we consider that the reasoning of the panel in the *EC – Audio Cassettes* case should apply in the present case. Interpreting the provisions of Article 18.4 differently would undermine the obligations contained in that article and would be contrary to the general principle of useful effect by making all the disciplines of the Anti-Dumping Agreement non-enforceable as soon as a Member would claim that the investigating authority has discretion to initiate or not an anti-dumping investigation.

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

6.170 As a result, we consider that the United States, as the party having raised this defence, failed to supply convincing evidence that the 1916 Act should be considered as a "non-mandatory legislation" within the meaning of GATT 1947/WTO practice.⁴²⁴ We therefore find that the 1916 Act cannot be considered to be a "non-mandatory law" which would have the effect that we would not be entitled to review its conformity as such with the relevant provisions of the WTO Agreement, but only to review its conformity in particular instances of application.⁴²⁵

(c) Concluding remarks on the applicability of Article VI to the price discrimination test of the 1916 Act

6.171 The United States warned the Panel of the implications of an interpretation of the price discrimination test of Article VI that would be so broad that it could make Article VI applicable to all

⁴²² Op. Cit., para. 362.

⁴²³ Article 16.6(a) ("National Legislation") of the Tokyo Round Anti-Dumping Agreement provided as follows:

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

⁴²⁴ We recall that we found in para. 6.87 above that the burden of proof established by the *United States – Tobacco* panel was not applicable in the present case. We also note that, even though the issue originated in a question of the Panel, the United States developed it as a defence in its second submission and thereafter. In application of the rules on burden of proof recalled in paras. 6.37-6.39 above, we consider that it was up to the United States to provide sufficient evidence to establish a *prima facie* case of defence.

⁴²⁵ Having found that the 1916 Act cannot be considered as "non-mandatory" legislation within the meaning of that concept under GATT1947/WTO practice, we do not find it necessary to address the arguments of the parties on the impact of Article XVI:4 of the Agreement Establishing the WTO on the application of that concept.

anti-trust laws when such laws address situations of transnational price discrimination. The EC considered that no such risk existed as long as the law did not apply only to imports and did not use a definition that copied that of Article VI of the GATT 1994.

6.172 We recall that we were requested to review the conformity of the 1916 Act with the provisions of the WTO Agreement, not to address the general issue of the relationship between trade law and anti-trust law. In order to assess the WTO-compatibility of the 1916 Act, we interpreted the provisions of Article VI:1 of the GATT 1994 in conformity with the general principles of interpretation of public international law, as embodied in the Vienna Convention. This exercise led us to conclude that the terms of Article VI, interpreted in their context and in the light of the object and purpose of the GATT 1994 and the WTO Agreement, applied to the form of transnational price discrimination targeted by the 1916 Act. The United States did not provide us with any evidence or argument that would demonstrate that we should have read in Article VI:1 a limitation addressing the risk highlighted by the United States in the previous paragraph.⁴²⁶ As recalled by the Appellate Body, we are not to import into the text of the WTO Agreement conditions that do not appear from its terms interpreted in accordance with the Vienna Convention.⁴²⁷ Our conclusion is, therefore, fully consistent with our mandate.

6.173 Furthermore, we are not convinced that our conclusion, if applied outside the context of this dispute, would generate the effect referred to by the United States.

6.174 First, we note that transnational price discrimination of the type covered by the definition of "dumping" in Article VI:1 of the GATT 1994 is only one narrowly defined type of price discrimination. Other types of price discrimination, beginning with primary-line price discrimination under the Robinson-Patman Act, do not fall within the scope of the definition of "dumping" in Article VI:1.⁴²⁸ In particular, the definition of Article VI:1 does not address price discrimination within the territory of a given jurisdiction.

6.175 Second, under Article VI:1 of the GATT 1994, the identification of "dumping" is the starting-point of any determination of injurious dumping. It is the only possible basis for the initiation of an anti-dumping investigation by a Member. Injury not causally linked to the dumping cannot be addressed through anti-dumping.⁴²⁹ Comparatively, under anti-trust law, the causes of a given market

⁴²⁶ We note that, in any event, the scope of the WTO Agreement does not exclude *a priori* restrictive business practices. Thus, the fact that the 1916 Act would be an anti-trust law would not *per se* be sufficient to exclude the application of WTO rules to that law. We note that panels under GATT 1947 and the WTO have addressed various aspects of restrictive business practices initiated by governments when such practices had the effect of impeding market access of foreign products or entry of foreign enterprises (see e.g., *Japan – Trade in Semiconductors*, adopted on 4 May 1988, BISD 35S/116; *Japan – Photographic Films*, adopted on 22 April 1998, WT/DS44R and M. Matsushita: *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process in International Trade Law and the GATT/WTO Dispute Settlement System*, E.-U. Petersmann Ed. (1997), p. 359. Consequently, we do not consider the dichotomy trade law/anti-trust law, to the extent that it would be based on the assumption that WTO disciplines are not intended to apply to business restrictive practices, to be a limitation to the application of WTO rules and disciplines.

⁴²⁷ See, e.g., Appellate Body Report in *India – Patent (US)*, Op. Cit., para. 45, where the Appellate Body stated that the principles of interpretation contained in Article 31 of the Vienna Convention "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

⁴²⁸ At our request, the United States confirmed that in order for the Robinson-Patman primary-line price discrimination to apply, both commodities involved in the alleged price discrimination must be sold for use, consumption or resale in the United States (see also *Zenith I*, Op. Cit., p. 246).

⁴²⁹ See Article 3.5 of the Anti-Dumping Agreement, which provides that injuries caused by certain factors must not be attributed to the dumped imports and includes among those factors "trade restrictive practices of and competition between the foreign and domestic producers". This provision would seem to imply

disruption can be several. When determining what could be at the origin of certain prices, anti-trust investigators will try to identify specific practices such as price conspiracy or abuse of dominant position. It is the understanding of the Panel that, under anti-trust law, transnational price discrimination of the type covered by the definition of "dumping" in Article VI:1 of the GATT 1994 is not sufficient as such to form the basis for a claim of violation of anti-trust law, even in the presence of a price-based disruption on the export market. It is necessary to demonstrate other specific practices, such as monopoly, abuse of dominant position, price agreement or concerted practices, of which international price discrimination may at most constitute supporting evidence.

6.176 We therefore conclude that the likelihood that our findings with respect to Article VI:1 of the GATT 1994 could affect the application of anti-trust laws of Members is very limited, since transnational price discrimination as defined in Article VI :1 of the GATT 1994 is only one limited form of price discrimination and it is unlikely to constitute by itself one of the practices which anti-trust law would consider to be a cause for imposition of sanctions.

6.177 Having found that Article VI is applicable to the 1916 Act, we proceed to address the EC claims of violation of Article VI:1 and VI:2 and the Anti-Dumping Agreement. On the basis of our findings, we will consider whether it is necessary to address the issue of the applicability and violation of Article III:4 of the GATT 1994.

E. VIOLATION OF ARTICLE VI:1 AND VI:2 OF THE GATT 1994

1. Violation of Article VI:1 of the GATT 1994

(a) Issue before the Panel

6.178 The EC claims that the 1916 Act violates Article VI:1 because that Article provides that dumping is to be condemned if it causes or threatens to cause injury to a domestic industry. We note in that context that the EC makes a similar claim under Article 3 of the Anti-Dumping Agreement. The EC argues that Article 3 of the Anti-Dumping Agreement lays down a detailed definition of the notion of injury under that Agreement and how injury may be established and that there is nothing in the 1916 Act which ensures that the injury shown must correspond to the "material injury" standard of Article VI.1 of the GATT 1994 and Article 3 of the Anti-Dumping Agreement. The EC also argues that because other intents are relevant under the 1916 Act, in certain circumstances measures will be authorized under the 1916 Act without any inquiry into the effects on the domestic industry.

(b) Analysis

6.179 We note that Article VI:1 of the GATT 1994 requires the establishment of material injury or a threat thereof. We also note that Article 3 of the Anti-Dumping Agreement is part of the context of Article VI:1⁴³⁰ which we are instructed to consider under Article 31 of the Vienna Convention when interpreting Article VI:1.

that transnational price discrimination of the kind defined in Article VI:1 of the GATT 1994 is not considered to be part of the "competition" practices between the foreign and domestic producers.

⁴³⁰ Footnote 9 to Article 3 provides that:

"Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."

6.180 We note that Article VI:1 of the GATT 1994 requires the establishment of material injury or a threat thereof. The 1916 Act does not expressly refer to material injury or threat of material injury or material retardation of the establishment of a domestic industry but to "the *intent* of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States".⁴³¹ In certain circumstances, an intent may be more difficult to prove than actual injury. The United States executive branch early considered that the requirement of an "intent" made the imposition of remedies under the 1916 Act almost impossible.⁴³² However, identifying an "intent" may not always *require* a finding of actual injury or actual threat of injury. The Panel recalls that the Supreme Court in *Brooke Group* considered, with respect to corporate planning documents speaking of a desire to slow the growth of a given segment of industry, that "even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal anti-trust law". Thus, assuming that the *Brooke Group* test applies to the 1916 Act, and assuming further that it relates to the "intent" aspect of the law,⁴³³ evidence of predatory pricing and prospects of recoupment are necessary, in addition to a statement of aggressive policy in an internal corporate document. However, we are not convinced that such requirements could be interpreted as having replaced the "intent" test by an "actual effect" test in the 1916 Act. Interpreting the term "injuring an industry or [...] preventing the establishment of an industry in the United States" as meaning "causing material injury" might be possible under US law. However, reading the "intent" requirement out of the 1916 Act would be a *contra legem* interpretation of which we have seen no instance yet in relation to this case.

(c) Conclusion

6.181 For that reason we find that the 1916 Act, to the extent that it provides for the identification of an "intent" by the defendant rather than for the injury requirements of Article VI is not compatible with Article VI:1 of the GATT 1994.

6.182 We now proceed to determine whether anti-dumping duties are the only remedies allowed under Article VI.

2. Anti-dumping duties as sole remedy under Article VI

(a) Issues before the Panel

6.183 The European Communities argues that duties are the only remedies allowed against dumping and that the United States reads Article VI:2 of the GATT 1994 out of context and contrary to its clear purpose. The only reason why the word "may" in Article VI:2 was used, is because it was not intended that WTO Members should be obliged to impose anti-dumping duties. For the EC, the negotiating history confirms that remedies under Article VI were intentionally limited to anti-dumping duties. The introduction of Article 16.1 in the Tokyo Round Anti-Dumping Agreement cannot be argued to have changed the meaning of Article VI. Indeed, it confirms it. The reason for this was that the Tokyo Round Anti-Dumping Agreement and the GATT 1947 were distinct sets of rules, with different membership and separate means of enforcement.

⁴³¹ Emphasis added.

⁴³² See *Geneva Steel*, Op. Cit., p. 1220, quoting a statement recorded in 56 Cong. Rec. 346 (Dec. 9, 1919):

"The Tariff Commission declares that [the 1916 Act] is not workable, for the reason that it is almost impossible to show the intent on the part of the importer to injure or destroy business in the United States by such importation or sale"

⁴³³ See our opinion in this respect in paras. 6.147-6.155 above.

6.184 According to the EC, the adoption of the WTO Anti-Dumping Agreement has not changed the context of Article VI. Article 18.1 of the Anti-Dumping Agreement confirms the limitation of remedies under Article VI to duties. It is sufficient to rely on Article VI to claim that the 1916 Act violates WTO rules by providing for remedies other than duties in order to counter dumping. The EC only mentions Articles 1 and 18.1 of the Anti-Dumping Agreement as arguments. As held by the Appellate Body in *European Communities - Bananas*, claims, not arguments, need to be mentioned in a request for establishment of a panel. The Appellate Body statement in *Brazil – Measures Affecting Desiccated Coconut*⁴³⁴ referred to by the United States rather supports the EC view that a separate citation of the Anti-Dumping Agreement together with Article VI is not necessary. Indeed, in that case the Appellate Body held that Article VI cannot be read independently from the Agreement on Subsidies and Countervailing Measures.

6.185 The United States argues that the terms of Article VI:2 do not support the claim of the EC that duties are the only remedies allowed to counteract dumping. Article VI:2 only states that a Member "may" levy an anti-dumping duty to offset or prevent dumping. The directive in Article VI:2 is permissive and unqualified. In other paragraphs of Article VI, such as paragraph 5 and 6(a), where express prohibitions are stated, the word "shall" is used. For the United States, the negotiating history is evidence that recourse to other remedies was allowed. It also notes that a paragraph similar to paragraph 7 of Article VI, which had been removed at the early stage of the GATT 1947, was reintroduced in Article 16.1 of the Tokyo Round agreement on anti-dumping. This inclusion and that of Article 18.1 in the WTO Anti-Dumping Agreement is evidence that Article VI:2 does not mean what the EC claims it says. The EC interpretation makes those provisions superfluous. Moreover, in application of the Appellate Body report in *Brazil - Desiccated Coconut*, any claim of violation must now include an invocation of a particular provision of the Anti-Dumping Agreement. For the United States, the EC should not be allowed to bootstrap what are in reality new claims under Articles 1 and 18.1 to cure a defective panel request. In accordance with the Appellate Body report in *India – Patent (US)*, the EC should have identified its claims under Articles 1 and 18.1 of the Anti-Dumping Agreement. In any event, the plain language of Articles 1 and 18.1 shows that these provisions do not merely interpret Article VI, but, rather, go beyond it by imposing a limitation on anti-dumping measures where Article VI:2 has none.

6.186 We note that, as instructed by Article 3.2 of the DSU, we shall endeavour to clarify the meaning of the relevant provisions by applying the general principles of interpretation of public international law as embodied in the Vienna Convention.

6.187 We are aware of the fact that Article 31 of the Vienna Convention provides for one "General Rule of Interpretation", as its title states. We will nevertheless, for the sake of clarity, address one after the other the factors to be reviewed pursuant to that Article. If necessary to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to results manifestly absurd or unreasonable, we may have recourse to the supplementary means of interpretation under Article 32 of the Vienna Convention. However, in spite of the extensive reference of the parties to the negotiating history of Article VI, we do not find it appropriate to take it into account at this stage.

(b) Ordinary meaning of the terms of Article VI:2 of the GATT 1994

6.188 The first sentence of Article VI:2 of the GATT 1994 provides as follows:

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

⁴³⁴ Adopted on 20 March 1997, WT/DS22/AB/R (hereinafter "*Brazil – Desiccated Coconut*").

6.189 In Article VI:2, the only term the meaning of which is actually debated by the parties is the verb "may". The ordinary meanings of the verb "may" as an auxiliary verb include "have ability or power to, can"⁴³⁵ Taken on its own, this verb could mean that Members have the possibility only to impose duties or that they have a choice between duties and other types of measures. If the word "may" was used in the first meaning, it could be argued that the term "only" should have been added right after it so as to limit its meaning. However, such an argument disregards the immediate context of the word "may". The terms "in order to offset or prevent dumping" set up the framework in which the term "may" must be understood. By specifying that the purpose of anti-dumping measures is to "offset" dumping, not to impose punitive measures, Article VI:2, first sentence, limits the meaning of the word "may" to giving Members the choice between a duty equal to the dumping margin and a lower duty, not between anti-dumping duties and other measures.

6.190 In other words, the thrust of Article VI:2, first sentence, is to make the *imposition* of duties facultative and to limit in any event that amount to the dumping margin. If, as suggested by the United States, the sentence had been meant to allow other measures than anti-dumping duties, it is reasonable to expect that it would have been specified. As mentioned in paragraph 6.103 above, Article VI was meant to regulate the use of anti-dumping by WTO Members. It would have been logical to list the other possible sanctions, especially if those sanctions could be more severe than the imposition of offsetting duties.⁴³⁶ We therefore conclude that the ordinary meaning of the terms of the first sentence of Article VI:2 support the view that anti-dumping duties are the only type of remedies allowed under Article VI.

(c) Context

6.191 The immediate context of Article VI:2 confirms our understanding of the word "may". The term "shall", as used in paragraphs 3 to 6 was not necessary in paragraph 2 if it was meant to be permissive, not mandatory to *impose* duties, and "shall" was not necessary either to express the idea that only anti-dumping duties could be imposed.

6.192 The parties argued at length on the possibility for the Panel to consider Articles 1 and 18.1 of the Anti-Dumping Agreement, since those provisions were not listed as claims in the request for establishment of the Panel. Article 1 provides as follows:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated [footnote 1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

Footnote 1 to Article 1 reads as follows:

"1 The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."

6.193 Article 18.1 provides as follows:

⁴³⁵ See The New Shorter Oxford English Dictionary (1993), p. 1721. It is evident that while we review the ordinary meaning, our reading of the dictionary is already made selective by the broad context of the term. For instance, we left aside the definition of "may" as "have the possibility, opportunity or suitable conditions to..." or the definition of "may" which, in the interpretation of some statutes means "shall, must".

⁴³⁶ We note in that respect that Article 7.2 of the Anti-Dumping Agreement, which provides for the types of provisional measures that may be imposed, lists the measures that may be taken, i.e. "provisional duty or, preferably, a security".

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. [footnote 24]"

Footnote 24 to Article 18.1 reads as follows:

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

6.194 We consider that it is our duty under Article 3.2 of the DSU and Article 31 of the Vienna Convention to look at any relevant context of Article VI:2. Indeed, our analysis would be incomplete if we were to stop at the ordinary meaning of the word "may" or if we were to disregard the context of the terms to address immediately the negotiating history of Article VI:2. As recalled in paragraph 6.26 above, other panels have found it appropriate to rely on provisions mentioned by the parties as arguments in their analysis of the context of a given provision.⁴³⁷ By following this approach, we do not think that we assist the EC in "curing a defective claim" under Article VI:2. A clear distinction must be made between a situation where a provision does not support at all the claim made in relation to it and the situation where, like in the present case, the ordinary meaning of the terms of the provision at issue could, on its own, already be interpreted as supporting the claim. In this case, we have reasonable grounds to believe that the terms of Article VI:2 could support the interpretation that duties are the only remedies allowed against dumping considered as such. We therefore find it relevant to review other provisions of the other covered agreements, in particular the Anti-Dumping Agreement, as context of Article VI:2.

6.195 The official title of the Anti-Dumping Agreement is "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994". This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconuts* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that "the context for the purpose of the interpretation of a treaty shall comprise, [...] the text [of the treaty], including its preamble and annexes...". We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law.⁴³⁸

6.196 In substance, we consider that the provisions of Articles 1 and 18.1 limit the anti-dumping instruments that may be used by Members to those expressly contained in Article VI and the Anti-Dumping Agreement. Except for provisional measures and price undertakings, the only type of measures foreseen by the Anti-Dumping Agreement is the imposition of duties. We also note that Article 9.1 of the Anti-Dumping Agreement⁴³⁹ establishes an intimate link between the calculation of

⁴³⁷ See *India – Quantitative Restrictions*, Op. Cit.

⁴³⁸ Like the panel in *India – Quantitative Restrictions*, our intention is not to make findings under Articles 1 and 18.1 of the Anti-Dumping Agreement in this context. As a result, the requirements of Article 6.2 and 7 of the DSU are not relevant in that situation.

⁴³⁹ Article 9.1 provides as follows:

"The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be

a dumping margin provided for in Article 2 of the Agreement and the final measures that may be imposed. We therefore conclude that the context of Article VI confirms the provisional conclusion we had reached on the basis of the ordinary meaning of that provision.

6.197 In our view, the argument of the United States does not seem to be incompatible with the fact that Article 18.1 of the Anti-Dumping Agreement in the least states that duties are the only remedies allowed to counter certain forms of dumping *under Article VI of the GATT 1994 and the Anti-Dumping Agreement*. Moreover, we understand that, in another dispute, the United States took the view that the Article VI remedies had been limited to offsetting duties.⁴⁴⁰ Therefore, we take the US argumentation to be based on the premise that, if one looks at Article VI:2 exclusively, one cannot conclude that only duties are allowed to counteract injurious dumping. This may explain the opposition of the United States to the Panel even considering Articles 1 and 18.1 in its review of Article VI:2 of the GATT 1994. However, as mentioned above, the WTO Agreement is a single Agreement. Following the United States argument would not only have led to an unjustified interpretation of the function of a panel mandate, it would also have required us to disregard essential elements of interpretation of Article VI. It would have been contrary to the rule of interpretation of the Vienna Convention to make a finding based on Article VI:2 only, in isolation from its context.

6.198 The United States argues that footnote 24 to Article 18.1 of the Anti-Dumping Agreement, like footnote 16 to Article 16.1 of the Tokyo Round Anti-Dumping Agreement, does not lock a Member into levying anti-dumping duties when faced with a factual situation constituting injurious dumping. Footnote 24 leaves the option of taking other measures that are in accordance with the GATT 1994. According to the United States, if the measure is of a nature that is simply not regulated by the GATT 1994, as is the case for the 1916 Act, the measure is *a fortiori* consistent with the GATT 1994.

6.199 We consider that footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement. Such a possibility does not affect our conclusion that, when a law of a Member addresses the type of price discrimination covered by Article VI and makes it the cause for the imposition of measures, that Member has to abide by the requirements of Article VI and the Anti-Dumping Agreement. In our opinion, the reason for the application of Article VI is not whether a Member wants to counteract *injurious* dumping or another effect of dumping. Nor is it whether a Member addresses dumping through the imposition of duties or another type of remedies, with the implication that Article VI applies only if a Member addresses dumping *through* the imposition of duties. It is whether the practice that triggers the imposition of the measures is "dumping" within the meaning of Article VI:1 of the GATT 1994. If the interpretation suggested by the United States were to be followed, Members could address "dumping" without having to respect the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Such an interpretation would deprive Article VI of the GATT 1994 and the Anti-Dumping Agreement of their useful effect within the framework of rules and disciplines imposed by the WTO Agreement.

(d) Preparatory work

6.200 We could conclude our analysis based on the rule of Article 31 of the Vienna Convention. However, since the parties have discussed the meaning of the negotiating history at length, we

permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."

⁴⁴⁰ See, e.g., *Panel Report on United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted on 28 April 1994, ADP/87, para. 75.

consider it in order to determine if it confirms the meaning of Article VI:2 of the GATT 1994 we identified under Article 31.

6.201 The parties have referred to a number of documents relating to the negotiation of the Havana Charter and the GATT.⁴⁴¹ We do not consider it necessary to review all these materials since our analysis under Article 31 of the Vienna Convention has not left the meaning of Article VI ambiguous or obscure and has not led to a manifestly absurd or unreasonable result. We recall, however, that the parties have more particularly discussed the Report of the Working Party on Modifications to the General Agreement, which was adopted by the CONTRACTING PARTIES on 1-2 September 1948. This report mentions at paragraph 12 that:

"endorsing the views expressed by Sub-Committee C of the Third Committee of the Havana Conference, [footnote omitted] [it] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except in so far as such other measures are permitted under other provisions of the General Agreement."⁴⁴²

6.202 We consider that the first part of the sentence ("measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization") confirms our understanding of Article VI. The second part of the sentence ("except in so far as such other measures are permitted under other provisions of the General Agreement"), may be understood as allowing members to counteract dumping through other measures than anti-dumping duties.⁴⁴³ The United States argues that a number of measures could be legally applied against dumping, such as raising unbound tariffs, tariff renegotiation, safeguard measures or countervailing measures. We note, however, that even though those measures may be legally applied to address dumping, the basis for their imposition would not objectively be "dumping". Safeguard measures or the increase of unbound tariffs would apply on a most favoured nation basis. So would the results of a tariff renegotiation. Unless all Members were dumping, dumping could not be considered as the objective reason for the imposition of the measures or of the renegotiated tariff *vis-à-vis* each Member. Countervailing measures can only be imposed in relation to subsidies. The fact that those subsidies may allow their beneficiaries to dump is not as essential for the imposition of the countervailing measures as the existence of the subsidy itself. Therefore, this sentence can only be understood as having the same meaning as footnote 24 to Article 18.1 of the Anti-Dumping Agreement.⁴⁴⁴

⁴⁴¹ See section III.E.3. above.

⁴⁴² BISD Vol. II, p. 41 (1952).

⁴⁴³ This seems to be the understanding of John H. Jackson in World Trade and the Law of GATT (1968), p. 411, where it is mentioned that:

"Although Article VI carves out an exception to GATT obligations for anti-dumping or countervailing duties, nevertheless, measures that do not violate other GATT provisions can also be used to counteract dumping or subsidies. Thus, insofar as tariffs on a particular product are not bound in a GATT schedule, a country that found that the product was being dumped could raise its tariffs without limit to counteract the dumping, and go even further and punish the dumper."

⁴⁴⁴ See para. 6.199 above. We also recall the reasons stated in the report of the Working Party established by Sub-Committee C of the Third Committee of the Havana Conference (E/CONF.2/C.3/C/18, 22 January 1948) for the deletion of paragraph 6 of Article 34 of the Geneva Draft Charter of the International Trade Organisation. Paragraph 6 was similar to paragraph 7 of the original Article VI of the GATT 1947 and read as follows:

6.203 We conclude that the supplementary means of interpretation of Article 32 of the Vienna Convention confirm our interpretation of Article VI:2 of the GATT 1994 based on the ordinary meaning of its terms taken in their context.

(e) Conclusion on the violation of Article VI:2 of the GATT 1994

6.204 We therefore find that Article VI:2 provides that only measures in the form of anti-dumping duties may be applied to counteract dumping as such and that, by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994.

6.205 We also recall our remark in paragraphs 6.89 and 6.164 above. Since we found a violation of Article VI, paragraph 1 and paragraph 2, we do not find it necessary to determine what would be the legal consequences of a consistent WTO-compatible interpretation of the 1916 Act by US courts *in the future*.

3. Concluding remarks on burden of proof with respect to the violation of Article VI of the GATT 1994

6.206 In paragraph 6.99 above, we noted the difference of approach of the parties regarding the applicability of Article VI of the GATT 1994. Because of this difference, each party has concentrated its efforts in terms of submission of evidence on different aspects, which sometimes did not correspond to the Panel's division of its analysis. However, we consider that the EC has established a *prima facie* case for each point addressed by the Panel in relation to the violation of Article VI. The United States did not sufficiently rebut them. Moreover, we consider that the United States did not establish such a *prima facie* case with respect to its defences, especially regarding its argumentation based on the possibility to interpret the 1916 Act in a WTO-compatible manner and on the non-mandatory nature of the 1916 Act.

"No measures other than anti-dumping or countervailing duties shall be applied by any contracting party in respect of any product of the territory of any other contracting party for the purpose of offsetting dumping or subsidization."

The question had been prompted by the issue whether paragraph 6 should be deleted or amended in the event that it could be interpreted so as to limit action permitted under Articles 13 and 14 of the Geneva Draft. The report stated that:

"The Working Party was evenly divided as to whether the terms of paragraph (6) could be construed as limiting the rights of Members under Articles 13 and 14. It was in agreement, however, that paragraph (6) was unnecessary and that its deletion would not effect any change in substance."

These statements confirm the intent to restrict the measures allowed to counteract dumping *as such* to offsetting duties. The fact that Article VI allows only for duties to counteract dumping practices as such is also confirmed by the Report of the Review Working Party on "Other Barriers to Trade", which mentions that:

"With respect to paragraph 3 of Article VI, the Working Party considered a proposal submitted by New Zealand which would have permitted under certain circumstances the use of quantitative restrictions to offset subsidization or dumping. This proposal did not receive the support of the Working Party, and has not been recommended." (BISD 3S/223, as quoted in GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995), p. 238.)

F. VIOLATION OF PROVISIONS OF THE ANTI-DUMPING AGREEMENT

1. Preliminary remarks

6.207 We have found a violation of Article VI:1 because the 1916 Act does not provide for an "injury" test. Moreover, we have found a violation of Article VI:2 because the 1916 Act imposes other remedies than anti-dumping duties. These findings address essential features of the 1916 Act. We could therefore consider exercising judicial economy at this stage. We are however of the view that findings under the Anti-Dumping Agreement would probably further assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance by the United States with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."⁴⁴⁵ Indeed, we are of the view that "adapting" the 1916 Act to the injury requirements of Article VI and replacing the sanctions currently provided for in that law with duties at the border may not be totally sufficient to make the 1916 Act WTO-compatible,⁴⁴⁶ as will be seen from our findings below.

2. Review of the EC claims under the Anti-Dumping Agreement

(a) General comments regarding the EC claims under Article 1 and Article 2.1 and 2.2 of the Anti-Dumping Agreement

6.208 The EC argues that the 1916 Act prohibits dumping under different conditions than those laid down in Article VI of the GATT 1994 and the Anti-Dumping Agreement and applies different procedures and remedies than provided therein. The EC claims the violation of Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement. As far as Article 1 is concerned, we note that if we find a violation of other provisions of the Anti-Dumping Agreement, it will be demonstrated that an anti-dumping investigation under the 1916 Act is not "initiated or conducted in accordance with the provisions of this Agreement" and a breach of Article 1 will be established.

6.209 Regarding the violation of Article 2.1 and 2.2 of the Anti-Dumping Agreement, we note that the European Communities simply states that "Articles 2.1 and 2.2 set forth amplified rules on the substantive definition of dumping." The EC did identify its claims under Article 2.1 and 2.2 in its request for the establishment of a panel. However, we do not consider that it precisely set out and progressively clarified its arguments on Article 2.1 and 2.2 during the proceedings. In particular, it did not submit any argument or evidence as to which specific aspects of Article 2.1 and 2.2 were violated, and why. We are of the view that we face a situation similar to that addressed by the Appellate Body in *Japan – Agricultural Products*.⁴⁴⁷ In the present case, the EC did not establish a *prima facie* case of violation of Article 2.1 and 2.2. The fact that we found a violation of Article VI:1 of the GATT 1994 is not as such sufficient to conclude that Articles 2.1 and 2.2 of the Anti-Dumping Agreement have been breached, in the absence of more specific arguments and evidence. Indeed,

⁴⁴⁵ See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS/18/AB/R, para. 223.

⁴⁴⁶ While this statement is not made under Article 19.1 of the DSU, we note that, pursuant to that provision, we are entitled to suggest ways in which the Member concerned could implement the Panel's recommendations.

⁴⁴⁷ *Op. Cit.*, para. 129. In that case, the complainant had not made a specific argument. The panel had actually deduced it from the experts' answers to its questions. The Appellate Body considered that, even though Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have significant investigative authority, this authority cannot be used by a Panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.

there could be several reasons to claim a violation of Article 2.1 and 2.2 which would be totally independent from those we relied upon with respect to Article VI.⁴⁴⁸

6.210 We therefore conclude that we are not in a position to address the claims of the EC under Articles 2.1 and 2.2 of the Anti-Dumping Agreement.

(b) Violation of Article 3

6.211 Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of "material injury" contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice.⁴⁴⁹

(c) Violation of Article 4

6.212 The EC also claims that the 1916 Act fails to respect a number of procedural and due process requirements set forth in Article 4⁴⁵⁰ of the Anti-Dumping Agreement, in particular the requirement

⁴⁴⁸ For instance, the fact that the 1916 Act would not provide for the treatment of sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs (Article 2.2.1).

⁴⁴⁹ See, e.g., Panel Report on *Canada – Administration of the Foreign Investment Review Act*, adopted on 7 February 1984, BISD 30S/140, para. 5.16; Panel Report on *Brazil – Desiccated Coconut*, Op. cit., para. 293; Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Op. Cit., p. 19.

⁴⁵⁰ Article 4 provides as follows:

"4.1 For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

(i) when producers are related [footnote omitted] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied⁴⁵⁰ only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti-dumping duties on such a basis, the importing Member may levy the anti-dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

that a complaint be made on behalf of the domestic industry and be supported by a minimum proportion of the domestic industry.

6.213 We note that civil proceedings under the 1916 Act are available to "any person injured in his business or property" by reason of a violation of the 1916 Act. This term is nowhere qualified by a statement that this person should be sufficiently representative of the industry of the United States, within the meaning of Article 4 of the Anti-Dumping Agreement. We note that the 1916 Act refers to the intent of destroying or injuring an *industry* in the United States, or of preventing the establishment of an *industry* in the United States. However, we have no evidence that a minimum representation level for a given industry must be established by the complainant before filing a case before a federal court. On the contrary, we note that all cases so far have in fact been initiated by individual companies under their own responsibility. In light of the terms of the 1916 Act and, in particular, the term "any person injured in his business or property", which is particularly clear, we have no reason to believe that US federal courts will be in a position to interpret that provision consistently with Article 4 of the Anti-Dumping Agreement.

6.214 For that reason, we find that the 1916 Act, because it does not require a minimum representation of a US industry, violates Article 4 of the Anti-Dumping Agreement.

(d) Violation of Article 5.5

6.215 The EC also claims that the 1916 Act fails to respect a number of procedural and due process requirements set forth in Article 5.5⁴⁵¹ of the Anti-Dumping Agreement, essentially because it fails to require that notice be given to the government of the exporting country before an anti-dumping case is launched under the 1916 Act.

6.216 We note that the text of the 1916 Act as such does not provide for the notification required by Article 5.5, neither under the "civil track", nor under the "criminal track". The Panel was not made aware of any other text or administrative practice which would imply a notification to the governments concerned, either by the courts or by the executive branch of the US government. We therefore conclude that the 1916 Act violates Article 5.5 of the Anti-Dumping Agreement.

3. Conclusion

6.217 For the reasons mentioned above, we find that the 1916 Act violates Articles 4 and 5.5 of the Anti-Dumping Agreement. In light of our findings and for the reasons mentioned in paragraphs 6.208 above, we also find that the 1916 Act violates Article 1 of the Anti-Dumping Agreement.

4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.

4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article."

⁴⁵¹ Article 5.5 provides as follows:

"The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned."

G. VIOLATION OF ARTICLE III:4 OF THE GATT 1994

6.218 We recall that the EC requested us to make a finding of violation of Article III:4 of the GATT 1994 in the alternative or "if the Panel considers that all or any portion of the Act is consistent with GATT Article VI and the *Anti-Dumping Agreement*". Such finding would apply to the "portion of the Act found to be consistent with GATT Article VI and the *Anti-Dumping Agreement*."⁴⁵²

6.219 We recall that we decided to proceed first with a review of whether Article VI applied to the 1916 Act because Article VI seemed to address more specifically the terms of the 1916 Act. We found that the 1916 Act, because it targets "dumping" within the meaning of Article VI of the GATT 1994, was fully subject to the provisions of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* and could not evade the disciplines of Article VI by the mere fact that it had anti-trust objectives or included requirements of an anti-trust nature. We therefore find it unnecessary to determine whether some elements of the 1916 Act could be subject to Article III:4.

6.220 We also found that the 1916 Act violates the provisions of Article VI and certain provisions of the *Anti-Dumping Agreement*. We consider these findings sufficiently complete to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance "in order to ensure effective resolution of disputes to the benefit of all Members."⁴⁵³ Therefore, we are entitled to exercise judicial economy in accordance with WTO panel and Appellate Body practice⁴⁵⁴ and decide not to review the EC claims under Article III:4.

H. VIOLATION OF ARTICLE XVI:4 OF THE AGREEMENT ESTABLISHING THE WTO

6.221 We note that the parties disagree as to the scope of Article XVI:4 of the Agreement Establishing the WTO as it relates to this dispute. However, both parties agree that if a Member's law, regulation, or administrative procedure does not conform with its obligations as provided in the WTO Agreement, that Member has an affirmative obligation to bring it into conformity.⁴⁵⁶

6.222 Article XVI:4 of the Agreement Establishing the WTO reads as follows:

"Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

6.223 If Article XVI:4 has any meaning, it is that when a law, regulation or administrative procedure of a Member has been found incompatible with the WTO obligations of that Member under any agreement annexed to the WTO Agreement, that Member is also in breach of its obligations under Article XVI:4.⁴⁵⁷ We found that the 1916 Act violates Article VI:1 and VI:2 of the GATT 1994. The GATT 1994 being one of the "annexed Agreements" within the meaning of Article XVI:4, we find that, by violating those provisions, the United States violates Article XVI:4 of the Agreement Establishing the WTO.

⁴⁵² Emphasis in the original.

⁴⁵³ See Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, Op. Cit., para. 223.

⁴⁵⁴ See footnote 449 above.

⁴⁵⁶ See arguments of the parties in paras. 3.358 and 3.361 above.

⁴⁵⁷ We did not exercise judicial economy with respect to Article XVI:4 because, in that context, a violation of Article XVI:4 "automatically" results from the breach of another provision of the WTO Agreement.

6.224 In light of our conclusion, we do not find it necessary to address the question of the violation of Article XVI:4 of the Agreement Establishing the WTO as a result of the violation of Articles 1, 4 and 5.5 of the Anti-Dumping Agreement.

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

I. NULLIFICATION OR IMPAIRMENT

6.226 The EC claims that, by violating Articles XVI:4 of the Agreement Establishing the WTO, Articles VI:1 and VI:2 of the GATT 1994, Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement and Article III:4 of the GATT 1994, the United States has nullified or impaired benefits accruing to the EC under those agreements.

6.227 We have found that the 1916 Act as such violates Article VI:1 and VI:2 of the GATT 1994, as well as Articles 1, 4 and 5.5 of the Anti-Dumping Agreement. We also concluded that, by not ensuring the conformity of the 1916 Act with its obligations as provided under the above-mentioned provisions, the United States violates Article XVI:4 of the Agreement Establishing the WTO. Since Article 3.8 of the DSU provides that "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment" and as the United States has adduced no evidence to the contrary, we conclude that the 1916 Act nullifies or impairs benefits accruing to the European Communities under the WTO Agreement.

J. SUMMARY OF FINDINGS

6.228 Our findings may be summarised as follows:

- (a) in order to review the conformity of the 1916 Act with the provisions of the WTO Agreement, we were entitled, consistently with the practice of the Appellate Body and of other international tribunals, to carry out an examination of the US domestic law, including a review of the relevant legislative history and an analysis of the relevant case-law;
- (b) Article VI:1 of the GATT 1994, interpreted in accordance with the Vienna Convention, must be understood as applying to any situation where a Member addresses the type of transnational price discrimination defined in that Article;
- (c) on the basis of the terms of the 1916 Act, the transnational price discrimination test found in that law meets the definition of Article VI:1 of the GATT 1994. The legislative history of the 1916 Act and the subsequent interpretation by US courts do not lead us to reach a different conclusion;
- (d) by not providing exclusively for the injury test⁴⁵⁸ provided for in Article VI, the 1916 Act violates Article VI:1 of the GATT 1994;
- (e) by providing for the imposition of treble damages, fines or imprisonment, instead of anti-dumping duties, the 1916 Act violates Article VI:2 of the GATT 1994;

⁴⁵⁸ See footnote 366 above.

- (f) by not providing for a number of procedural requirements found in the Anti-Dumping Agreement, the 1916 Act violates Articles 1, 4, and 5.5 of the Anti-Dumping Agreement;
- (g) by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO;
- (h) since violations have been established that have not been rebutted by the United States, the United States nullifies or impairs benefits accruing to the European Communities under the WTO Agreement.

VII. CONCLUSIONS AND RECOMMENDATIONS

7.1 We *conclude* that

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

7.2 We therefore *recommend* that the DSB request the United States to bring the 1916 Act into conformity with its obligations under the WTO Agreement.
