

**UNITED STATES – ANTI-DUMPING ACT OF 1916**

Complaint by the European Communities

*Report of the Panel*

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

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## 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").<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>1</sup> See WT/DS136/1.

<sup>2</sup> See WT/DS/136/2.

<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup>

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."

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

<sup>5</sup> 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".<sup>6</sup>

## 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."<sup>7</sup> 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"),<sup>8</sup> is built. The Tariff Act of 1930 is implemented through proceedings governed by regulations promulgated by the US Department of Commerce<sup>9</sup> and the US International Trade Commission<sup>10</sup>.

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."<sup>11</sup>

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<sup>6</sup> See 15 U.S.C. §§ 71-74.

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 The Antidumping Act of 1921 was codified at 19 U.S.C. §§ 160-71 (repealed).

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

<sup>9</sup> See 19 C.F.R. Part 351.

<sup>10</sup> See 19 C.F.R. Part 200.

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Thus, the Robinson-Patman Act does not apply to cross-border price discrimination.<sup>14</sup> 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.<sup>15</sup>

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

### 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*<sup>17, 18</sup>.

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

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<sup>12</sup> See 15 U.S.C. 13(f).

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

<sup>14</sup> 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.

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

<sup>16</sup> 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)).

<sup>17</sup> F.2d 666 (2d Cir. 1935).

<sup>18</sup> 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.

<sup>19</sup> 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 (2<sup>nd</sup> 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.<sup>20</sup> All court decisions so far have been rendered by US circuit courts of appeals or US district courts.<sup>21</sup>

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*<sup>22</sup>, 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.<sup>23</sup> Accordingly, no criminal sanctions have ever been imposed pursuant to the 1916 Act.

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*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*").

<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> The case is still pending while the remaining litigants conduct discovery.

<sup>23</sup> 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)."

### III. CLAIMS AND MAIN ARGUMENTS

#### A. REQUESTS DEALT WITH BY THE PANEL IN THE COURSE OF THE PROCEEDINGS

##### 1. Preliminary Objection by The United States and Request for a Ruling by The Panel

3.1 As a preliminary matter, the **United States** considers<sup>24</sup> that the European Communities claims for the first time in its first written submission that the 1916 Act also violates Articles 1 and 18.1 of the Anti-Dumping Agreement because these provisions make anti-dumping duties the exclusive remedy for dumping. The relevant WTO dispute settlement provisions - Articles 6.2 and 7 of the DSU and Articles 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 European Communities' request for the establishment of a panel.<sup>25</sup>

3.2 The United States notes that Article 7 of the DSU provides that the Panel's mandate is to examine the "matter" described in the panel request.<sup>26</sup> The Appellate Body has definitively described the "matter" which is properly before a panel to examine. In *Guatemala - Cement*, it explained that the complaining Member must, in its panel request,

"identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly. [...] The "matter referred to the DSB", therefore, consists of two elements: the *specific measures at issue* and the *legal basis of the complaint* (or the *claims*)."<sup>27</sup>

3.3 According to the United States, the Appellate Body has also settled that the complaining Member may set out the "legal basis for the complaint" - its "claims" - in a summary fashion and that the minimum requirement is simply for the complaining Member to list provisions of a WTO agreement<sup>28, 29</sup>. Vague references to unidentified "other" provisions, however, do not satisfy the

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<sup>24</sup> See the US First Written Submission, dated 3 June 1999, p.2.

<sup>25</sup> The United States refers to WT/DS136/3.

<sup>26</sup> The United States notes that Article 1.2 of the DSU explains that its rules and procedures govern a dispute subject to any special or additional rules and procedures contained in the covered agreements. The same Article provides that, to the extent that there is a "difference" between the rules and procedures of the DSU and the special or additional rules and procedures set forth in a covered agreement, the special or additional rules and procedures in the covered agreement "shall prevail." However, as established in the Appellate Body Report on *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico*, adopted on 25 November 1999, WT/DS60/AB/R, paras. 65-66 (hereinafter "Appellate Body Report on *Guatemala - Cement*"), if there is no "difference," the rules and procedures of the DSU *apply together with* the special or additional rules and procedures of the covered agreement. The Appellate Body expressly held that there is no "difference" between Articles 6.2 and 7 of the DSU, and Articles 17.4 and 17.5 of the Antidumping Agreement. *Ibid.*, paras. 67-68. Accordingly, Articles 6.2 and 7 of the DSU apply together with Articles 17.4 and 17.5 of the Antidumping Agreement when the claims at issue are being made under the Antidumping Agreement. When applied together, these Articles permit a panel to consider only the "matter" set forth in the complaining Member's panel request where, as here, the terms of reference are exclusively defined by reference to the panel request. *Ibid.*, paras. 70-72.

<sup>27</sup> Appellate Body Report on *Guatemala - Cement*, Op. Cit., para. 72 (emphasis in original).

<sup>28</sup> The term "WTO agreement(s)" is used hereinafter to refer to the various agreements contained in Annex 1 and 2 of the WTO Agreement.

<sup>29</sup> The United States refers to the Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, paras. 88-91 (hereinafter "Appellate Body Report on *India - Patents*"); Report of the Appellate Body on *European*

standards of Article 6.2 of the DSU.<sup>30</sup> If a particular "legal basis of the complaint" - a "claim" - is not set forth in the panel request, it is not properly before the panel. Likewise, Article 6.2 is not satisfied by only identifying the claims in the complaining Member's first written submission. In *European Communities - Bananas*, the Appellate Body explained that a deficiency in a panel request cannot be cured by the complaining Member's first submission:

"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. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."<sup>31</sup>

3.4 The United States contends that, under these standards, the European Communities' panel request in the present dispute is insufficient to place claims that the 1916 Act violated Articles 1 and 18.1 of the Anti-Dumping Agreement before the Panel. The European Communities, in its panel request, characterised the 1916 Act as an anti-dumping statute and claimed that the 1916 Act was inconsistent with Article VI:2 of the GATT 1994, which, according to the European Communities, "specif[ies] that anti-dumping duties are the only possible remedy to dumping whereas the 1916 Act is having recourse to treble damages and fines and/or imprisonment."<sup>32</sup> The European Communities at no point claimed - in its panel request or even in its request for consultations - that the 1916 Act was similarly inconsistent with any provision of the Anti-Dumping Agreement or, in particular, with Article 1 or Article 18.1 of the Anti-Dumping Agreement.<sup>33</sup>

3.5 The United States submits that until receipt of the European Communities' first written submission, the United States had no notice that the European Communities was asserting claims under Articles 1 and 18.1 of the Anti-Dumping Agreement. The Appellate Body has explained that a defective panel request cannot be cured by a later submission or statement. Accordingly, the European Communities' claims under Articles 1 and 18.1 of the Anti-Dumping Agreement are not properly before the Panel.

3.6 The United States therefore requests that the Panel rule that the claims are not before it and are eliminated from the instant proceeding. The United States requests that the Panel rule expeditiously and, if possible, by the time of its first meeting.

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*Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R, para. 141 (hereinafter "Appellate Body Report on *European Communities - Bananas*").

<sup>30</sup> The United States refers to the Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/R/USA, paras. 7.29-7.30 (hereinafter "Panel Report on *European Communities - Bananas*").

<sup>31</sup> Appellate Body Report on *European Communities - Bananas*, Op. Cit., para. 143 (emphasis in original).

<sup>32</sup> WT/DS136/1.

<sup>33</sup> The United States notes that the European Communities did reference Article 1 of the Antidumping Agreement but only with regard to a separate claim that Article 1 requires "the carrying out of an investigation (which has to respect a set of procedural rules) prior to the imposition of any duty." Never did the European Communities identify Article 1 of the Antidumping Agreement as the basis for a claim that antidumping duties are the sole remedy for dumping. The United States also refers to the Panel Report on *European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, adopted on 5 July 1995, ADP/137, paras. 442-447 for the proposition that if there is more than one legal basis for alleging a breach of the same provision of an agreement, a separate and distinct claim is required.

3.7 In response to a question of the Panel regarding its position *vis-à-vis* the US request, the **European Communities** states<sup>34</sup> that the United States requests the Panel to exclude claims that the European Communities has not made. The relevant EC claims are that by providing for a remedy other than duties against dumping the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO and Article VI:2 of the GATT 1994. The European Communities makes no separate claims that this feature of the 1916 Act violates Article 1 and 18.1 of the Anti-Dumping Agreement. These provisions were merely mentioned as arguments in support of the European Communities' claims. Accordingly, the US request for a preliminary ruling can be dismissed as being without object.

3.8 The position taken by the Panel in the course of the proceedings *vis-à-vis* the US request is reflected in section VI.B.1 of this report.

## 2. Request by Japan for Enhanced Third Party Rights

3.9 **Japan**, which is a third party in the present case and has requested the establishment of another panel in respect of the 1916 Act,<sup>35</sup> requests to be granted enhanced third party rights.<sup>36</sup> In particular, Japan requests to receive all the necessary documents, including submissions and written versions of statements by the parties, and that it be granted permission to attend all the meetings of the second substantive meeting of the Panel.<sup>37</sup>

3.10 In reply to a request by the Panel for the views of the parties, the **European Communities** states that it is happy to support the request of Japan, provided that the European Communities' similar request in the case initiated by Japan in respect of the 1916 Act (WT/DS162) is also accepted by the Panel.

3.11 The **United States**, in reply to the same request by the Panel, notes that it strongly objects expanded third party rights for Japan in the present case, since the circumstances of the case do not warrant it.

3.12 For the United States, expanded third party rights are not needed in order to obtain access to the parties' submissions. The United States supports full transparency in the WTO and will be making its submissions and oral statements available to the public. Furthermore, the United States recalls that it has requested in both panel proceedings dealing with the 1916 Act (WT/DS136 and WT/DS162) that each party provide a non-confidential summary of the information contained in each submission that could be disclosed to the public unless the party has made the submission public. The United States further recalls that the DSU provides that parties shall make such non-confidential versions available upon request. Accordingly, both the European Communities and Japan will have access to each others' submissions as soon as they comply with the requirements of the DSU in this regard.

3.13 The United States argues, moreover, that, as individual complaining parties, Japan and the European Communities have more than adequate opportunity to present their views and respond to the arguments of the United States. In *EC Measures Concerning Meat and Meat Products (Hormones)*<sup>38</sup>, the panel allowed expanded third party rights because the panel had stated that it intended to conduct concurrent deliberations in those cases meaning that its deliberations were going

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<sup>34</sup> See the European Communities' letter to the Chairman of the Panel, dated 6 July 1999.

<sup>35</sup> See WT/DS162/3. That panel was established on 26 July 1999 and composed on 11 August 1999 (WT/DS162/4).

<sup>36</sup> As stated in Japan's letter to the Chairman of the Panel, dated 2 September 1999.

<sup>37</sup> Japan made its request for enhanced third party rights after the first substantive meeting of the Panel.

<sup>38</sup> Panel Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1999, WT/DS26/R/USA, WT/DS48/R/CAN (hereinafter Panel Report on "*European Communities – Hormones*").

to be based upon the arguments and presentations in both cases, including presentations by experts made jointly to both panels. The panel proceeded with this approach despite the fact that the United States had expressed its unequivocal concern with the panel's "concurrent deliberations" approach. Thus, because the panel was going to consider arguments made in one case in the course of deciding another case, the United States requested and was allowed enhanced third party rights. Otherwise, without an opportunity for the United States to respond, the panel would have been considering what would have been, in effect, *ex parte* submissions.

3.14 The United States notes that, in the present case, the Panel has not stated that it intends to conduct concurrent deliberations, and for the reasons expressed in the *European Communities - Hormones* proceeding, the United States would not support concurrent deliberations. Accordingly, the European Communities will not be denied an opportunity to respond to arguments of the United States that will be considered by the Panel in making its decision in the case initiated by the European Communities. The same holds true for Japan in its case. The apparent purpose for the request for expanded third party rights is to provide the third parties with an opportunity to make an additional submission in their own panel process. There is no provision in the DSU for such additional submissions.

3.15 The position taken by the Panel in the course of the proceedings *vis-à-vis* Japan's request is reflected in section VI.B.2 of this report.

## B. OVERVIEW OF THE CLAIMS OF THE PARTIES AND FINDINGS REQUESTED

3.16 The **European Communities** requests the Panel to find that by maintaining the 1916 Act the United States has violated:

- (a) Article VI:1 and VI:2 of the GATT 1994 and Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement;
- (b) Article III:4 of the GATT 1994<sup>39</sup>;
- (c) Article XVI:4 of the Agreement Establishing the WTO;

and that by doing so it has nullified and impaired benefits accruing to the European Communities under those Agreements.

3.17 The European Communities requests the Panel to hold that the 1916 Act is an anti-dumping measure since it is targeted at imports and at price discrimination between the exporters' market or third country market and the importing country's market in terms which are in substance identical to those laid down in Article VI:1 of the GATT 1994. Since the conditions under which action may be taken under the 1916 Act allow action to be taken which would not be allowed under Article VI of the GATT 1994 or the Anti-Dumping Agreement and in particular because the remedies provided in the 1916 Act are not those allowed under Article VI:2 of the GATT 1994, the Panel should hold that the 1916 Act as such violates Article VI:1 and VI:2 of the GATT 1994 and the cited provisions of the Anti-Dumping Agreement.

3.18 In the alternative, the European Communities asks the Panel to find that the 1916 Act violates the national treatment requirement of Article III:4 of the GATT 1994 because the 1916 Act leads to the application of stricter disciplines on imported goods than domestic goods.

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<sup>39</sup> This claim is made in the alternative. See section III.G.1 below.

3.19 Finally, the European Communities considers that the Panel should also find that the 1916 Act is in violation of Article XVI:4 of the Agreement Establishing the WTO because the United States has failed to ensure, in respect of the 1916 Act, that its laws are in conformity with its WTO obligations.

3.20 The **United States** requests the Panel to find that nothing in Article VI:2 of the GATT 1994 provides that anti-dumping duties are the exclusive remedy for dumping. If the Panel therefore rejects the European Communities' Article VI:2 claim, it need not reach the question of whether the 1916 Act is governed by Article VI and the Anti-Dumping Agreement. The United States also requests the Panel to reject the European Communities' other claims under Article VI:1 and the Anti-Dumping Agreement, because the European Communities has failed to demonstrate that the procedures in Article VI:1 and the various other provisions asserted under the Anti-Dumping Agreement are required to be followed in response to injurious dumping.

3.21 The United States moreover requests the Panel to hold that the 1916 Act is in any event not inconsistent with either Article VI of the GATT 1994 or the Anti-Dumping Agreement because the 1916 Act is not an anti-dumping statute under US law and therefore is not governed by Article VI of the GATT 1994 or the Anti-Dumping Agreement. The United States submits that the 1916 Act is specifically targeted at a very narrow type of objectionable business activity involving antitrust-like predatory intent.

3.22 The United States further requests the Panel to dismiss the European Communities' claim that the 1916 Act accords less favorable treatment to imported goods than the Robinson-Patman Act accords to like domestic goods. The Panel's decision in this regard should be informed by the fact that the 1916 Act establishes a standard for relief which has never been met in the case of importers and imported goods.

3.23 The United States also asks the Panel to conclude that the 1916 Act as such is in any event WTO-consistent because it is susceptible to an interpretation that permits action consistent with the United States' WTO obligations.

3.24 Finally, the United States requests the Panel to find no violation of Article XVI:4 of the Agreement Establishing the WTO. Article XVI:4 of the Agreement Establishing the WTO is not relevant, unless the 1916 Act is shown to be inconsistent with a separate WTO obligation of the United States. The United States submits that this is not the case.

#### C. THE DISTINCTION BETWEEN DISCRETIONARY AND MANDATORY LEGISLATION AND ITS RELEVANCE TO THE PRESENT CASE

3.25 In response to a question of the Panel to both parties regarding whether the 1916 Act should be viewed as mandatory or non-mandatory legislation within the meaning given to those terms by GATT 1947/WTO practice, the **United States** notes that both the civil and the criminal provisions constitute non-mandatory legislation in the context of the European Communities' claims under Articles III:4 and VI:2 of the GATT 1994.

3.26 The United States recalls that GATT 1947 and WTO panels have uniformly drawn a distinction between mandatory and discretionary legislation. Only legislation which mandates WTO-inconsistent action can itself be WTO-inconsistent. In this regard, the panel in *Canada - Measures Affecting the Export of Civilian Aircraft* recently stated:

"We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States - Tobacco*, the panel "recalled that panels had consistently ruled that legislation which

mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority [...] to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge" [citation omitted]."<sup>40</sup>

3.27 The United States further notes that in *EEC - Regulation on Imports of Parts and Components*<sup>41</sup>, the panel found that "the mere existence" of the anti-circumvention provision of the European Communities' anti-dumping legislation was not inconsistent with the European Communities' GATT 1947 obligations, even though the European Communities had taken GATT-inconsistent measures under that provision.<sup>42</sup> The panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions"<sup>43</sup>. In the present dispute, the European Communities is challenging no specific measures taken under the 1916 Act. Rather, it is challenging the mere existence of the 1916 Act. Thus, for that challenge to succeed, the European Communities must demonstrate not only that the 1916 Act authorizes WTO-inconsistent action, but that it mandates such action. In other words, it must show that this legislation is not susceptible to an interpretation that would permit the US government to comply with its WTO obligations.

3.28 The United States further recalls that, in applying the discretionary/mandatory distinction, panels have found that legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action. For example, in *United States - Taxes on Petroleum and Certain Imported Substances*,<sup>44</sup> the Superfund Act required importers to supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise, a penalty tax would be imposed in the amount of five percent *ad valorem* or a different rate to be prescribed in regulations by the Secretary of the Treasury by a different methodology. The regulations in question had not yet been issued. Nevertheless, the panel concluded:

"[W]hether [the regulations] will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement."<sup>45</sup>

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<sup>40</sup> Panel Report on *Canada - Measures Affecting the Export of Civilian Aircraft*, adopted on 20 August 1999, WT/DS70/R, para. 9.124 (hereinafter "Panel Report on *Canada - Aircraft*"), citing the Panel Report on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, BISD 41S/131, para 118 (hereinafter "*United States - Tobacco*").

<sup>41</sup> Panel Report on *EEC - Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132 (hereinafter "*EEC - Parts and Components*").

<sup>42</sup> The United States refers to *EEC - Parts and Components*, Op. Cit., paras. 5.9, 5.21, 5.25-5.26.

<sup>43</sup> *Ibid.*, para. 5.25.

<sup>44</sup> Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 (hereinafter "*US - Superfund*").

<sup>45</sup> *Ibid.*, para. 5.2.9.

3.29 The United States also notes that, in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*<sup>46</sup> the panel examined Thailand's Tobacco Act, which established a higher ceiling tax rate for imported cigarettes than for domestic cigarettes. While the Act explicitly gave Thai officials the authority to implement discriminatory tax rates, this did not render the statute mandatory. The panel concluded that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."<sup>47</sup>

3.30 The United States recalls, finally, the findings of the panel in the *United States - Tobacco* case. That case is factually analogous to the instant case and therefore offers guidance to the Panel. The panel in the *United States - Tobacco* case found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including meanings permitting GATT-consistent action. Specifically, the panel examined the question whether a statute requiring that "comparable" inspection fees be assessed for imported and domestic tobacco mandated that these fees had to be identical for each, without respect to differences in inspection costs. If so, the statute was inconsistent with Article VIII:1(a) of the GATT 1947, which prohibited the imposition of fees in excess of services rendered.<sup>48</sup> The United States argued that the term "comparable" need not be interpreted to mean "identical," and that the law did not preclude a fee structure commensurate with the cost of services rendered.<sup>49</sup> The panel agreed with the United States:

"[T]he Panel noted that there was no clear interpretation on the meaning of the term "comparable" as used in the 1993 legislative amendment. It appeared to the Panel that the term "comparable", including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which could potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of [the US law]."<sup>50</sup>

The United States adds that the panel therefore found that the complaining party had "not demonstrated that [the US law] *could not* be applied in a manner ensuring that fees charged for inspecting tobacco were not in excess of the cost of services rendered."<sup>51</sup>

3.31 In the view of the United States, there is thus a strict burden on a complaining party seeking to establish that a Member's legislation *as such* mandates a violation of WTO obligations: the complaining party must demonstrate that the legislation, as interpreted in accordance with the domestic law of the Member, precludes any possibility of action consistent with the Member's WTO obligations. Moreover, where legislation is susceptible of multiple interpretations, the complaining party must demonstrate that none of these interpretations permits WTO-consistent action.

3.32 The United States contends that, in the present case, the European Communities has failed to meet that burden. The 1916 Act is susceptible to an interpretation that is WTO-consistent. In fact, all final judicial decisions that have considered the 1916 Act have interpreted it as such. Indeed, US courts have repeatedly admonished that the 1916 Act should be interpreted whenever possible to

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<sup>46</sup> Panel Report on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200 (hereinafter "*Thailand - Cigarettes*").

<sup>47</sup> *Ibid.*, para. 86. The United States further notes that the panel, at para. 88, found that the actual implementation of the tax rates through regulations was also consistent with Thai obligations, since these rates were non-discriminatory.

<sup>48</sup> The United States refers to *United States - Tobacco*, Op. Cit., para. 118.

<sup>49</sup> The United States refers to *United States - Tobacco*, Op. Cit., para. 122.

<sup>50</sup> *Ibid.*, para. 123.

<sup>51</sup> *Ibid.* (emphasis added by the United States).

parallel the unfair competition law applicable to domestic commerce.<sup>52</sup> Interpreting the 1916 Act to parallel domestic unfair competition law is clearly consistent with WTO obligations because the WTO does not govern competition laws. Moreover, any susceptibility that particular elements of a 1916 Act claim may have to a range of possible meanings is ultimately of no consequence because the 1916 Act remains different from an anti-dumping statute under the entire range of conceivable interpretations.

3.33 Turning to the basis for the distinction, the United States notes that the distinction in GATT 1947/WTO jurisprudence between discretionary and mandatory legislation is not based upon a particular provision of the WTO Agreement, nor is it limited in its application to a particular WTO provision. In the cases discussed above, for example, this distinction was applied in the context of both Article III and Article VIII of the GATT 1947. The distinction is a general principle developed by panels that most likely has its origin in the presumption against conflicts between national and international laws. It is both general international practice and that of the United States that statutory language is to be interpreted so as to avoid conflicts with international obligations. There is thus a presumption against a conflict between international and national law. In general,

"[a]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict."<sup>53</sup>

3.34 The United States recalls that, under US law, it is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"<sup>54</sup>. While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions [...] [should] be construed, where possible, to be consistent with international obligations of the United States"<sup>55</sup>.

3.35 According to the United States, GATT 1947 jurisprudence distinguishing between mandatory and discretionary legislation does no more than apply the general principle that there is a presumption against conflicts between national and international law. If a law is susceptible to an interpretation that is WTO-consistent, there is a presumption that domestic authorities will interpret that law so as to avoid a conflict with WTO obligations. This presumption may be seen as underlying the *United States - Tobacco* panel's finding that a domestic law susceptible of multiple interpretations would not violate a state's international obligations so long as one possible interpretation permits action consistent with those obligations.<sup>56</sup> This principle applies with equal force in the present case. The 1916 Act is a discretionary statute susceptible of an interpretation that permits action consistent with the United States' WTO obligations under both Article III:4 and Article VI:2, as all judicial decisions to date establish as a matter of fact. Accordingly, the Panel should rule that the 1916 Act, as such, is fully consistent with the United States' WTO obligations.

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<sup>52</sup> The United States refers to *Zenith III*, Op. Cit., p. 1223.

<sup>53</sup> *Oppenheim's International Law*, 9<sup>th</sup> ed., pp. 81-82 (footnote omitted).

<sup>54</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>55</sup> *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988). The United States also refers to the Restatement (Third) of the Foreign Relations of the United States, s. 114 (1987).

<sup>56</sup> The United States refers to *United States - Tobacco*, Op. Cit., para. 123.

3.36 In response to the Panel's question and the US arguments, the **European Communities** notes that the provisions of the 1916 Act are "mandatory" legislation as this term is used in GATT 1947/WTO practice. According to that practice, mandatory measures are those which, under national law, require the executive authority to impose a measure. For example, in *Denial of Most-Favoured-Nation Treatment As To Non-Rubber Footwear From Brazil*, the following definition can be found:

"[...] the Panel examined whether this legislation as such is consistent with Article I:1. The Panel noted that the CONTRACTING PARTIES had decided in previous cases that legislation mandatorily *requiring the executive authority to impose a measure* inconsistent with the General Agreement was inconsistent with that Agreement *as such*, whether or not an occasion for the actual application of the legislation had arisen. The Panel recalled that the backdating provisions of the two Acts *are mandatory legislation*, that is *they impose on the executive authority requirements which cannot be modified by executive action*, and it therefore found that these provisions *as such, not merely their application in concrete cases*, have to be consistent with Article I:1."<sup>57</sup>

3.37 The European Communities recalls that the United States relies in particular on the *EEC - Parts and Components* case. However, that case concerned authorising provisions in respect of which there was discretion for the administration. Whether these provisions produced any effects in practice depended on the discretion of an administration. There is no such discretion in the case of the 1916 Act.

3.38 In light of the foregoing, the European Communities considers that there are two main reasons why the 1916 Act is mandatory legislation. First, when a private party brings an action under the 1916 Act there is no room at all for government discretion.<sup>58</sup> Second, once a court has found that the 1916 Act standard is met, it is required to grant relief to the complainant. The wording of paragraph 2 of the 1916 Act is unequivocal:

"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.*"<sup>59</sup>

3.39 The European Communities notes that the only margin of discretion left to a court is concerned with the type and level of the sanction that will be applied. And even that discretion can be exercised only within statutory limits. Moreover, if it is true, as the United States submits, that the actual meaning of the 1916 Act depends on courts' interpretation of its provisions, it is even clearer that the government has no discretion at all to influence courts' decisions. Nor can the government modify the 1916 Act's legal requirements. This further confirms that the 1916 Act is "mandatory".

3.40 The European Communities further recalls that, in response to a question of the Panel regarding what discretion a US court has in dismissing a 1916 Act case or in deciding not to impose treble damages, for example, because doing so would be contrary to international law obligations of the United States, the United States replies that

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<sup>57</sup> Panel Report on *Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, para. 6.13 (footnote omitted; emphasis added by the European Communities).

<sup>58</sup> The European Communities notes that criminal prosecution under the 1916 Act is the only case within the discretion of the US government.

<sup>59</sup> Emphasis added by the European Communities.

"[a] court would not have discretion to dismiss a well-founded case under the 1916 Act [...] nor would a court have discretion not to impose treble damages that had been properly established."

The European Communities thus considers that neither the administration nor the courts have discretion over civil claims.

3.41 The European Communities points out, moreover, that the situation concerning the criminal liability provisions is somewhat different but that the legislation is still not discretionary within the meaning of GATT 1947/WTO jurisprudence. In this connection, it is important to note that the 1916 Act makes "unlawful" and "misdemeanours" the offences that it describes. The most pertinent analogy under GATT 1947 case law is the report of the panel on *United States - Measures Affecting Alcoholic and Malt Beverages*.<sup>60</sup> One of the many measures examined in that case concerned the maximum price laws in Massachusetts and Rhode Island. The panel held those laws to violate the GATT 1947 even though they were not being enforced, saying:

"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators."<sup>61</sup>

3.42 The European Communities argues that the reason why the panel in *United States - Malt Beverages* considered the legislation in issue in that case to have legal effects is that good corporate citizens, like all good citizens, avoid acting unlawfully and indeed committing misdemeanours, whether or not the law is being actively enforced and they risk actual punishment. The same reasoning is applicable to the present case.

3.43 The European Communities notes, in addition, that the US Department of Justice may only decline to bring a criminal case under certain defined conditions, none of which include a consideration of whether or not the action would be WTO-compatible. Also, once the decision to bring a case has been taken by the US Department of Justice, the courts are obliged to try it and impose a penalty if the conditions and criteria of the 1916 Act are met. That is, courts are obliged to do in criminal cases what the United States said that they are obliged to do in civil cases. In other words, it is mandatory for them to take action against dumping which is inconsistent with WTO rules. Thus, both the civil and criminal provisions of the 1916 Act create legal effects and in neither case does this depend on the administration taking some discretionary action.

3.44 The European Communities submits, finally, that the unadopted report of the panel on *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*<sup>62</sup> as well as the adopted report of the panel on *United States - Definition of Industry concerning Wine and Grape Products*<sup>63</sup> support its view that the 1916 Act is not discretionary legislation as this term is used in GATT 1947/WTO jurisprudence.<sup>64</sup>

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<sup>60</sup> Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206 (hereinafter "*United States - Malt Beverages*").

<sup>61</sup> *Ibid.*, para. 5.60.

<sup>62</sup> Panel Report on *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136 (unadopted), dated 28 April 1995 (hereinafter "*EC - Audio Cassettes*").

<sup>63</sup> Panel Report on *United States - Definition of Industry concerning Wine and Grape Products*, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, BISD 39S/436 (hereinafter "*United States - Definition of Wine Industry*").

<sup>64</sup> See section III.H.2 below.

3.45 In response, the **United States** reiterates its view that the 1916 Act should be viewed as discretionary legislation. In reply to a question of the Panel regarding the discretion enjoyed by the US Department of Justice as to whether to bring a criminal case or not, the United States states that the Department of Justice, an executive branch agency, has the discretion to decide whether or not to bring a criminal prosecution under the 1916 Act. In other words, while the 1916 Act authorises the Department of Justice to bring a criminal prosecution, it does not mandate it.

3.46 The United States notes, in this regard, that the standards used by the Department of Justice in deciding whether to conduct criminal proceedings, including investigative measures, are set out in a public document known as the "United States Attorneys' Manual", specifically, Ch. 9-27 of that Manual entitled "Principles of Federal Prosecution." This document explains that the Department enjoys wide discretion regarding whether, when and how it will bring criminal charges. For example, section 9-27.220 states that, where there is sufficient admissible evidence of a federal offence, the government may nonetheless decline to prosecute because (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. In section 9-27.230, "Substantial Federal Interest" is defined to include, *inter alia*, "federal law enforcement priorities" and "the nature and seriousness of the offense."<sup>65</sup>

3.47 The United States further notes that in cases where the United States, acting through the Department of Justice, is itself a party to litigation, it has direct responsibility for ensuring that its own claims and actions comport with US laws and obligations, and for informing the court of such considerations. Also, where appropriate, the Department can seek to intervene in a private civil litigation in order to protect a federal government interest. The Department does not routinely intervene in private litigation, however, and it remains a matter of judgment when and before what courts it should be done.

3.48 As concerns civil cases, the United States contends that the European Communities misses the point with its argument that when a private party brings an action under the 1916 Act there is no room for government discretion. The question in these circumstances is not whether the executive authority has discretion, but whether the law mandates a violation of a WTO obligation. In the instant case, to answer that question the Panel must determine whether the law is susceptible to an interpretation that is WTO-consistent. Although prior cases applying the mandatory/discretionary distinction have involved executive enforcement of a measure, there is no reason that the principle cannot apply to a measure that is enforced through the judicial branch.

3.49 The United States argues, finally, that the European Communities' reliance on the *United States - Malt Beverages* case is misplaced. The issue in that case was whether the non-enforcement of mandatory legislation rendered the legislation non-actionable. Indeed, this is plainly reflected in the section quoted by the European Communities. Yet, that is not the question in the instant case. The question in the instant case is whether the law is mandatory, not whether the law is being enforced.

3.50 In response to a question of the Panel regarding whether the mandatory/discretionary distinction applies also to cases of judicial enforcement of a measure, the **European Communities** states that, contrary to the view expressed by the United States, the mandatory/discretionary distinction does not apply to such cases. Courts only declare what the law is. Or, as Montesquieu noted, the judiciary is "la bouche de la loi". Accordingly, a court does not make law, it only applies it.

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<sup>65</sup> The United States notes in this connection that Sections One and Two of the Sherman Antitrust Act of 1890 can be and often are enforced through criminal as well as civil proceedings, while the Clayton Antitrust Act is enforceable only through civil actions.

3.51 The European Communities further notes that the US constitution is founded on the principle of the separation of powers. The United States cannot argue that its courts regard themselves in general as having discretion as to whether or not to apply the law, similar to that possessed by the executive arm of government when powers are delegated. Even if this were to be the case in some special areas, such as awarding specific remedies, it does not apply to the adjudication of a dispute under the 1916 Act.

3.52 The European Communities does acknowledge that it may sometimes appear that courts have a number of options in interpreting the law. However, that is simply a reflection of the difficulty of predicting the outcome of a complex debate. No court would admit to being free to choose between a number of options for interpreting the law. All courts endeavour in good faith to establish the true meaning of the law on the basis of the text and established principles of interpretation.

3.53 The European Communities considers that the most pertinent WTO decision for the present case is *India – Patent Protection*. In that case, the Appellate Body concluded that the Indian courts would apply the (mandatory) law even in the face of directly contradictory administrative practice. This conclusion reflects the principle that courts do not have discretion in the same way as administrations do.

3.54 The European Communities argues, moreover, that the cases that have been invoked by the United States all concern cases where the administration was taking action and also had the power to complete, amend or add to the legislation so as to avoid a violation. Clearly, courts are not in the same position and do not have the power to adopt additional or amending rules. In any event, even if one could imagine situations where courts are given discretionary powers to amend or add to legislation in the same way as an administration typically might, that certainly is not the case with the 1916 Act.

3.55 The European Communities also points out that the provisions of the 1947 Protocol of Provisional Application demonstrate that, historically, it was administrative discretion that was considered relevant. That is also one reason why Article XVI:4 of the Agreement Establishing the WTO speaks of "domestic laws, regulations and *administrative* procedures".<sup>66</sup>

3.56 The European Communities notes, finally, that the United States apparently attempts to confuse the issue before the Panel by assimilating discretion in the application of legislation with ambiguity in the interpretation of legislation, which allegedly exists in the instant case. However, there is no basis even under the GATT 1947 to defend legislation which is on its face GATT-inconsistent on the ground that courts might one day interpret it in a GATT-consistent manner.

3.57 The European Communities recalls that the only GATT 1947 case in which there is any reference to interpretation is *United States - Tobacco*, which the United States claims is particularly pertinent to the present dispute. The *United States - Tobacco* case involved a situation in which domestic legislation was incomplete.<sup>67</sup> There was a requirement on the administration to promulgate fees for the inspection of imported tobacco at a level "comparable" to that for domestic tobacco but at the same time the administration had the power to adjust the level of fees for the inspection of domestic tobacco. The panel therefore understandably held that there was no basis to hold that the administration, in fixing the level of fees for imported tobacco, would do so at a level inconsistent with Article VIII:1(a) of the GATT 1947. In other words, the panel held that at such stage there was no mandatory legislation inconsistent with the GATT 1947. In the instant case, there is of course no

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<sup>66</sup> 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." (no emphasis in the original)

<sup>67</sup> The European Communities refers to *United States - Tobacco*, Op. Cit., paras. 114–118.

power for the US administration to complete or amend the 1916 Act which would allow it to make it compatible with WTO rules. All the requirements are already laid down in the 1916 Act.

3.58 The **United States** takes issue with the European Communities' description of the *United States - Tobacco* case as involving domestic legislation that was "incomplete," meaning according to the European Communities that the agency had not yet promulgated its regulations. The United States does not agree that that somehow distinguishes the panel's application of the mandatory/discretionary distinction from the present case. In the *United States - Tobacco* case, the panel considered whether a term in a statute could be interpreted by the relevant government authorities - which happened to be executive branch authorities - in a WTO-consistent manner. Thus, the only difference is that executive branch authorities were involved instead of judicial branch authorities. There is no reason why the same principle should not apply in the present case. The focus in a mandatory/discretionary analysis is not on which branch of government is applying the law, but whether there is room in the application of the law for the relevant government authorities to act in a WTO-consistent manner. In the present case, not only is there room for such an interpretation, but the law has already been so interpreted. Accordingly, the Panel should find that the 1916 Act as such is WTO-consistent.

3.59 The **European Communities** considers that, even if there were any basis for arguing on the basis of the GATT 1947 that any aspect of the 1916 Act is discretionary and not a *per se* violation of the US obligations, the situation is in any event different under the WTO Agreement, since Article XVI:4 of the Agreement Establishing the WTO expressly requires Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations" under the WTO agreements.<sup>68</sup>

3.60 The **United States** replies that the mandatory/discretionary distinction is still being applied in cases brought under the WTO, as is evidenced by the report of the panel on *Canada – Aircraft*.

D. APPLICABILITY OF ARTICLE VI OF THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

1. **The Meaning and Scope of Article VI of the GATT 1994 and The Anti-Dumping Agreement**

3.61 The **European Communities** submits that Article VI of the GATT 1994<sup>69</sup> acknowledges the existence of a particular problem in international trade and then proceeds to provide a solution. Three

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<sup>68</sup> See also part III. H. below.

<sup>69</sup> Article VI:1 of the GATT 1994 provides 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 purposes of this Article, a product is 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

steps are envisaged in this respect: First, Article VI defines the practice of dumping. Second, it sets out certain other conditions that need to be fulfilled for the application of remedial measures, such as the existence of injury. And third, it authorises the remedial measures which can be taken to deal with dumping.

3.62 Regarding the first step, i.e. the definition of the practice of dumping, the European Communities recalls that Article VI:1 of the GATT 1994 defines dumping as follows:

"[...] For the purposes of this Article, a product is 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."

3.63 The European Communities considers that a first essential feature of the above-noted definition is that it refers to rules targeting imports. The definition is based on the concept of price discrimination between the price of these imports and the normal value, which is the domestic price – "the comparable price, in the ordinary course of trade" - in the exporting country or, in the absence of such a price, the highest comparable price for export to any third country in the ordinary course of trade, or the cost of production plus a reasonable addition for selling cost and profit. This analysis yields the definition of the kinds of rules which are anti-dumping rules subject to the discipline of Article VI of the GATT 1994:

- (i) The rules are targeted at imports and by the fact of their importation.
- (ii) The practice is 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.

3.64 As concerns the pre-conditions for taking action against dumping, the European Communities notes that the most important pre-condition is stated to be injury. Article VI:1 provides that dumping

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- (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."

as defined 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."

3.65 Finally, with respect to the remedial measures which can be taken, the European Communities refers to Article VI:2, which reads 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. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

According to the European Communities, this language establishes the application of anti-dumping duties as the sole means authorized by the GATT 1994 by which a contracting party can seek to deal with the problem of dumped imports.

3.66 The European Communities maintains that it is only dumping meeting the definition that is to be condemned, and then only in the stated circumstances of injury, threat of injury or material retardation. Anti-dumping duties may be applied "in order to offset or prevent dumping", but only in an amount no greater than the margin of dumping as defined. The reference to "offsetting" as well as "preventing" also makes clear that anti-dumping duties are the exclusive remedy established by the GATT 1994 for dealing with the problem of dumping, whether past, present or future.

3.67 The European Communities further submits that the Anti-Dumping Agreement is fully consistent with Article VI and defines in greater detail the conditions and in particular the requirements for an investigation that need to be fulfilled to allow anti-dumping action to be taken. Article 1 of the Anti-Dumping Agreement confirms that an anti-dumping measure can be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations conducted in accordance with the Agreement, while Article 18.1 of the Anti-Dumping Agreement stipulates that action can be taken against the import of dumped products from another WTO Member *only if* the dumping causes or threatens material injury, and that no other measures can be taken than those provided for by Article VI of the GATT 1994 and the Anti-Dumping Agreement.

3.68 According to the **United States**, the cornerstone of the European Communities' claim that the 1916 Act violates Article VI and the Anti-Dumping Agreement is its argument that the WTO anti-dumping rules capture any measure which targets imports and is based upon the concept of price discrimination. The text of Article VI or the Anti-Dumping Agreement does not, however, support the European Communities' position. Nowhere does Article VI or the Anti-Dumping Agreement 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. In fact, the European Communities' argument is inconsistent with the text of Article VI. In this regard, paragraph 1 of Article VI begins by explaining that "dumping [...] is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry." Paragraph 2 then provides that, "[i]n order to offset or prevent" this injurious dumping, "a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Article VI thus only addresses actions taken for the purpose of offsetting or preventing injurious dumping. It does not purport to address actions taken that are not designed to offset or prevent injurious dumping, as is the case with the 1916 Act.

3.69 The United States argues, moreover, that to read into the text of Article VI the limitation that all laws with any kind of international price discrimination component must conform to the anti-dumping rules, as the European Communities advocates, would extend the anti-dumping rules far into a realm which pre-dated them and whose objectives, underlying principles and targeted conduct are quite different - namely, the realm of antitrust or competition laws. If the Panel were to rule that

Article VI applies to all forms of international price discrimination, and regardless of the nature of the injury sustained, the 1916 Act would not be the only casualty. Such a ruling would seem to mean that other Members' antitrust legislation prohibiting various forms of discriminatory or low pricing, including Articles 81 and 82 of the EC Treaty, Canada's Competition Act, Japan's Antimonopoly Act, Mexico's Federal Competition Law, India's Monopolies and Restrictive Trade Practices Act, as well as the US Sherman Act, 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. That result could not have been intended by Article VI and the Anti-Dumping Agreement.

3.70 According to the United States, the negotiating history of the GATT 1947 supports the contention that Article VI of the GATT 1994 is not intended as a remedy for predatory pricing. The GATT 1947 was agreed to during negotiations which paralleled the negotiations for a proposed larger agreement, the Havana Charter for an International Trade Organization. The Havana Charter contained one article addressing anti-dumping and several separate articles addressing private anti-competitive practices, among other matters. The GATT 1947 was agreed to first and was intended to be an interim agreement until the Havana Charter could be finalized, although, as is well known, it never was. In any event, the GATT 1947 incorporated *verbatim*, in Article VI, the article on anti-dumping that had been negotiated as part of the Havana Charter. The GATT 1947, however, did not incorporate any of the Havana Charter articles addressing private anti-competitive practices.

3.71 The United States contends that the subsequent history of the GATT 1947 further supports this point. In particular, in 1958, the contracting parties decided to appoint a group of experts to "study and make recommendations with regard to whether, and to what extent if at all, and how the Contracting Parties should undertake to deal with restrictive business practices in international trade."<sup>70</sup> In 1960, the Group of Experts issued a report in which it recommended that the contracting parties engage in consultations if there was an alleged restrictive business practice, but that it was unrealistic to recommend a multilateral agreement on the control of international restrictive business practices.<sup>71</sup>

3.72 The United States submits, finally, that a 1989 OECD Report also illustrated that predatory pricing is not considered the target of anti-dumping rules. The Report states that "predatory pricing is subject to the competition laws and policies of most OECD countries, but there has been a lively controversy over what standards should be applied."<sup>72</sup>

3.73 The **European Communities** considers that the United States is using the term "predatory" in a misleading manner by confusing the US antitrust notion of predation with its more ordinary meaning. According to the European Communities, it is often said that one of the clearest targets of Article VI of the GATT 1994 is precisely "predatory" dumping. Indeed, that is one of the forms of dumping that has always been considered covered by Article VI. When the first Anti-Dumping Code was negotiated, the issue of whether dumping measures authorized under multilateral rules should be limited to predatory conduct was discussed. A Note submitted by the US delegation for consideration by the Group on Anti-Dumping Policies in 1966 made the following observations:

"An historical purpose of anti-dumping measures has been to regulate so-called predatory price discrimination whose objective is to use monopoly power in one's home market to maintain high prices and to reduce prices in an export market in order to destroy competitors and establish an additional market monopoly. [...] The Draft

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<sup>70</sup> Resolution of 5 November 1958 on "Restrictive Business Practices - Appointment of Group of Experts", BISD 7S/29.

<sup>71</sup> The United States refers to document L/1015, adopted on 2 June 1960, BISD 9S/170, para. 5,7.

<sup>72</sup> OECD, Predatory Pricing (1989), p. 3.

Code is not, however, restricted to such conduct, *as indeed Article VI is not thus restricted.*"<sup>73</sup>

3.74 The European Communities also notes that it is a misrepresentation of the EC position for the United States to claim that the European Communities is saying that Article VI and the Antidumping Agreement govern *any* international price discrimination law *regardless* of the other substantive elements of that law. The discriminatory pricing required for action to be taken under anti-dumping laws is qualitatively different from discriminatory pricing addressed by competition laws. The criteria for determining whether a law is subject to the disciplines of Article VI and the Anti-Dumping Agreement are (i) whether the law is targeted at imports, and (ii) whether it defines the regulated conduct as price discrimination in the form of lower prices in the market of the importing country than those practised on the market of the country of export. This approach is confirmed by the basic theory of anti-dumping which recognizes a particular problem posed by price discrimination of this kind, requiring an analysis distinct from that applying to price discrimination within the same market.

3.75 The European Communities points out, finally, that the 1916 Act is directed against price discrimination in the form of lower prices in the market of the importing country than on the market of the country of export. This is exactly what Article VI:1 of the GATT 1994 defines as dumping and does not correspond at all to any known "antitrust" definition of discriminatory pricing.

3.76 The **United States** submits that the distinction between antitrust and anti-dumping is not based upon whether price discrimination occurs within a single market or across markets. That is not the factor that distinguishes anti-dumping analysis from antitrust analysis. At least in the United States, it is not correct to say that antitrust price discrimination is solely a problem within one and the same market. In primary line cases under the Robinson-Patman Act, for example, price differences have been found within the same market or between two markets.

3.77 The United States recalls, moreover, that it has asked the European Communities whether it would consider the 1916 Act WTO-consistent if it were amended to apply to both domestic and imported goods. The European Communities, in its response to the US question, rewords the 1916 Act so that it applies to discriminatory sales between US customers and sales between US customers and foreign customers.<sup>74</sup> The European Communities then reasons that the hypothetical law is not governed by Article VI and the Anti-Dumping Agreement because it does not target imports and does not define the comparison for price discrimination by using the words "lower prices in the market of the importing country than practised in the market of the exporting country."

3.78 According to the United States, there is, however, no substantive difference between the actual 1916 Act and the hypothetical law drafted by the European Communities which it considers to be outside the reach of the anti-dumping disciplines. The same cross-border transaction would be captured by both forms of the law. In each instance of a cross-border transaction, the price

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<sup>73</sup> TN.64/NTB/W/3 (emphasis added by the European Communities).

<sup>74</sup> The hypothetical law drafted by the European Communities reads as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to sell commodities of like grade and quality in the United States at prices which are lower than those applied to other purchasers in the United States or in foreign markets [subject to applicable adjustments for differences in transport and other costs]; 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 the trade and commerce in such articles in the United States."

comparison would be between the price in the United States and the price in a foreign market. To say that one law is WTO-consistent because it also applies to domestic goods is to elevate form over substance and demonstrates that the European Communities' legal approach to the proper scope of Article VI and the Anti-Dumping Agreement in the present case is results-driven and without merit. For example, under the European Communities' theory, if the Sherman Act and Article 82 of the EC Treaty had been drafted in separate pieces of legislation, the measure applicable to imports would be WTO-inconsistent; but because those laws apply to imports and domestic goods, the portion that applies to imports would be consistent with WTO obligations.

3.79 The **European Communities** disputes that it is elevating form over substance. A split Sherman Act applying only to imports would not look at all like the 1916 Act. It would not have a prohibition of price discrimination looking like the definition of dumping in Article VI:1 of the GATT 1994. Also, it is not possible to make the 1916 Act apply to domestic goods without completely changing its nature. The 1916 Act is based on price discrimination between the domestic market of an exporter and the import market. Such distinctions make no sense when applied to a single domestic market.

3.80 In response, the **United States** maintains its view 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 antitrust objective in a law regulating cross-border price discrimination should remove it from the scope of Article VI of the GATT 1994. The issue of cross-border predation is an entirely legitimate and traditional subject of antitrust concern, whether under United States, European or other antitrust laws. Predatory behaviour may constitute monopolisation, abuse of dominance or anti-competitive price discrimination whether the markets concerned are local, regional, national or even international. It would be most unfortunate if the Panel were to rule that antitrust enforcement bodies are powerless to deal with harmful conduct because some of that conduct occurs beyond national borders, and that only domestic conduct, domestic parties or even domestic products are legitimate subjects of competition policy concern, whatever their economic impacts.

3.81 The United States adds that the Panel is in any event not called upon to define the exact parameters of Article VI and the Anti-Dumping Agreement for all possible purposes. Rather, the Panel must only decide whether the 1916 Act, a law with substantively different requirements from the anti-dumping rules and which targets a different practice than the anti-dumping rules, is nonetheless governed by Article VI and the Anti-Dumping Agreement. There is simply nothing in the text, or the objectives, of those agreements that would justify such a far-reaching extension of their disciplines.

## **2. The Nature of the 1916 Act: Anti-Dumping or Antitrust Law?**

(a) The text and distinctive features of the 1916 Act

3.82 The **European Communities** notes that the question to be answered by the Panel is whether the 1916 Act is of such a nature as to be subject to the rules of Article VI of the GATT 1994. The European Communities recalls that the objective criteria for determining whether a law is subject to the disciplines of Article VI and the Anti-Dumping Agreement are (i) whether the law is targeted at imports, and (ii) whether it defines the regulated conduct as price discrimination in the form of lower prices in the market of the importing country than those practised on the market of the country of export. On that basis, the 1916 Act is a law which is subject to Article VI of the GATT 1994 because

- (i) it is targeted at imports. Its prohibition is directed at "any person importing or assisting in importing any articles in the United States". Such persons who breach the

prohibition are guilty of a misdemeanour, and are liable for treble damages to persons who are injured by the prohibited conduct; and

- (ii) the regulated conduct is defined by reference to discrimination between the price of the imported products and "the actual market value or wholesale price of such articles [...] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported".

3.83 The 1916 Act does not, in the view of the European Communities, escape the discipline of Article VI because it requires the prohibited conduct to be "common and systematic", or because the price differential must be "substantial". Article VI applies whether the dumping is limited in occurrence and sporadic, or frequent and systematic. It applies whether the dumping margin is large or small. It takes into account the magnitude and frequency of the dumping only through the rule that the level of anti-dumping duty imposed may not exceed the level of dumping found.

3.84 The European Communities further argues that the 1916 Act does not escape the discipline of Article VI because sanctions can only be imposed under the 1916 Act if one or more of the enumerated specific intents are found. The discipline of Article VI applies to any rule directed at dumping. Once it is established that the rule or law is subject to Article VI, then the sole remedies permitted by Article VI are conditional on a finding of (i) dumping in accordance with the definition of Article VI and (ii) material injury, threat of material injury, or material retardation. Substituting the specific intent tests incorporated in the 1916 Act for the injury tests required by Article VI in no way serves to take the 1916 Act out of the discipline of Article VI. Quite the contrary, it is one of the grounds which cause the 1916 Act to infringe Article VI, since the 1916 Act permits the application of sanctions in circumstances other than the only ones envisaged by Article VI - namely where there is material injury, threat of material injury or material retardation.

3.85 The European Communities notes that, likewise, a law which applies tests other than those provided for in Article VI cannot be saved by an argument that the quantum of difficulty, from the point of view of the party seeking relief, is greater in the case of that law than would be the case if it merely followed the injury test of Article VI. Applying different conditions does not take the measure outside the scope of Article VI of the GATT 1994, it simply violates the requirements of Article VI. In any event, it is far from clear that the specific intent tests of the 1916 Act are necessarily more difficult to meet than the injury tests of Article VI. For example, as regards the test relating to "the intent of destroying or injuring an industry in the United States", it is presumably difficult to show an intent to *destroy* an industry in the United States. But showing an intent to injure an industry may be much easier: an internal memorandum or exchange of correspondence between an importer and an exporter, estimating that, with a price reduction of, say, 10%, the imported product would increase its market share by 15%, and that some or all of this would be taken from domestic producers, would presumably be sufficient to establish an "intent of [...] injuring" a US industry. It is not at all difficult to imagine the existence of such evidence. Given the pre-trial discovery rules applicable in litigation in the United States, it is quite possible that such evidence could be obtained by a plaintiff.

3.86 The **United States** argues that a review of the text of the 1916 Act establishes that the 1916 Act is a predatory pricing statute with antitrust objectives, not an anti-dumping measure within the purview of Article VI and the Anti-Dumping Agreement. The 1916 Act is not a statute that addresses the "dumping" and "injury" that would make it an anti-dumping statute within the meaning of Article VI of the GATT 1994. The 1916 Act is designed to combat a specific form of international price discrimination. This price discrimination not only must involve substantial price differences but also must be undertaken commonly and systematically and with a specified intent. The 1916 Act is not directed at the simple price differences that cause material injury captured by the Anti-Dumping Agreement, nor is it based on the Anti-Dumping Agreement's notion of material injury to a domestic

industry. The 1916 Act is directed at a very different type of harmful business activity than that addressed by Article VI and the Anti-Dumping Agreement.

3.87 The United States further argues that a review of the various substantive and procedural requirements of the 1916 Act confirms that they are the same as, or similar to, the requirements applicable under US antitrust statutes. For example:

- (a) The 1916 Act requires a finding of price differences, like the Robinson-Patman Act.<sup>75</sup> The price differences under the 1916 Act must be "substantial" in amount and undertaken "commonly and systematically," while the Robinson-Patman Act only requires two consummated sales to different buyers at different prices.<sup>76</sup>
- (b) The 1916 Act requires a finding that the pricing at issue be undertaken with a predatory intent. This predatory pricing requirement is similar to that found in Section 2 of the Sherman Act and in so-called primary line cases under the Robinson-Patman Act, although neither of those Acts normally requires proof of any intent, at least in civil cases. There is an intent requirement in criminal antitrust cases, such as a criminal offense under the Sherman Act.<sup>77</sup>
- (c) The 1916 Act applies to articles of "like grade and quality," just as that term is used in the Robinson-Patman Act.<sup>78</sup>
- (d) The statute of limitations for bringing a lawsuit under the 1916 Act is the same as that under the Clayton Act and the Robinson-Patman Act, i.e. four years.<sup>79</sup>
- (e) The 1916 Act provides for enforcement through either a civil lawsuit brought by a private party before a US court or a criminal prosecution brought by the US Department of Justice. These remedies mirror those available under the antitrust laws, including the Sherman Act, the Clayton Act and the Robinson-Patman Act.<sup>80</sup>
- (f) The issue of whether a private party has the requisite standing to bring a 1916 Act lawsuit is determined by reference to antitrust standing principles.<sup>81</sup>
- (g) The 1916 Act authorizes the award of treble damages to a successful private litigant. This remedy is somewhat unusual under US civil law, but it is a common remedy for violations of US antitrust statutes. Indeed, in the third paragraph of the 1916 Act, the US Congress basically replicated the then-existing language of Section 4 of the

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<sup>75</sup> The United States refers to 15 U.S.C. 13(a).

<sup>76</sup> The United States refers to *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, 417, citing E. Kinter, *A Robinson-Patman Primer*, 3<sup>rd</sup> ed. (1979), p. 35.

<sup>77</sup> The United States refers to *U.S. v. Brown*, 936 F.2d 1042, 1046 (9<sup>th</sup> Cir. 1991).

<sup>78</sup> The United States refers to *Zenith III*, Op. Cit., p. 1197. The United States notes that the *Zenith* court, at pp. 1226-1227 explained that "we find that the same standard of 'like grade and quality' limited product comparisons under section 2 of the Clayton Act prior to the Robinson-Patman amendments. Since the Clayton Act was passed in 1914, the same standard is applicable under the Antidumping Act of 1916."

<sup>79</sup> The United States refers to *Helmac I*, Op. Cit., pp. 566-67, noting that where the 1916 Act did not set forth applicable statute of limitations, the Court relied on the purpose of the US Congress in enacting the 1916 Act to interpret the 1916 Act as having same statute of limitations as other antitrust statutes.

<sup>80</sup> In response to a question asked by the Panel in a different context, the United States notes, however, that the Clayton Act is enforceable only through civil actions.

<sup>81</sup> The United States refers to, e.g., *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, Op. Cit., pp. 988-89; *Jewel Foliage Co. v. Uniflora Overseas Florida*, Op. Cit., p. 516; *Schwimmer v. Sony Corp.*, Op. Cit., pp. 796-97.

Clayton Act<sup>82</sup> and Section 7 of the Sherman Act,<sup>83</sup> which authorized treble damages for "any person who shall be injured in his business or property" by reason of any conduct proscribed by US antitrust laws.

- (h) With regard to its criminal provisions, the 1916 Act is virtually identical to, and specifies the same penalties as, the criminal provisions of the Sherman Act in force in 1916.

3.88 The **European Communities** considers that these differences derive from the time at which the 1916 Act was adopted and the peculiarly US form of remedies chosen. For example, the availability of treble damages is by no means an indication that the measure is an antitrust measure, but rather relates to the fact that the US Congress disapproves of certain conduct or activities. Treble damages have been provided for in US legislation in a number of cases which have nothing to do with antitrust.<sup>84</sup> Moreover, the European Communities is not aware of any other jurisdiction which provides for treble damages in this way. Treble damages is not a feature of an antitrust measure, it is an indication of a US measure.

3.89 The **United States** further argues that there are significant differences between the 1916 Act and the anti-dumping rules. As a trade remedy, the anti-dumping rules are triggered only in response to the practice of "dumping," i.e. a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost, which causes "material injury" to producers of the product in the importing country. Once these facts are established, the investigating authorities may impose duties to offset prospectively the injurious dumping. In contrast, the 1916 Act takes action against a different type of harmful business activity. Under the 1916 Act, mere dumping is not enough. The complainant must show price discrimination which is common and systematic as well as substantial, and the complainant must demonstrate a predatory intent. There is also no requirement that actual or threatened "material injury" to a domestic industry be shown. The complainant instead is required to show damages to its business or property. Thus, while an importer may violate the 1916 Act, it cannot be said that the same facts would satisfy the requirements for the imposition of anti-dumping duties.

3.90 The United States contends that the differences between anti-dumping rules and the 1916 Act are readily seen when the requirements of the Anti-Dumping Agreement are contrasted with those of the 1916 Act:

- (a) The price differences required under the two sets of rules are quite different. Under the 1916 Act, the price in the United States must be "substantially less" than the price abroad. Under the Anti-Dumping Agreement, normally a mere price difference

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<sup>82</sup> The United States notes that the relevant Clayton Act language can be found at 38 Stat. 731 (1914).

<sup>83</sup> The United States notes that the relevant Sherman Act language can be found at 26 Stat. 210 (1890). The United States further notes that the US Congress later amended this part of the Sherman Act.

<sup>84</sup> The European Communities lists the following cases: 35 U.S.C. Sec. 296 (Title 35 - Patents / Part III Patents and protection of patent rights / Chapter 29 - Remedies for infringement of patent, and other actions); 7 U.S.C. Sec. 2570 (Title 7 - Agriculture / Chapter 57 - Plant Variety Protection / Subchapter III - Plant Variety Protection and Rights); 12 U.S.C. Sec. 2607 (Title 12 - Banks and Banking / Chapter 27 - Real Estate Settlement Procedures); 25 U.S.C.S. § 305e (United States Code Service; Title 25 - Indians / Chapter 7A - Promotion of Social and Economic Welfare); 15 U.S.C. Sec. 1117 (Title 15 - Commerce and Trade / Chapter 22 - Trademarks / Subchapter III - General Provisions); 15 U.S.C. Sec. 1693f (Title 15 - Commerce and Trade / Chapter 41 - Consumer Credit Protection / Subchapter VI - Electronic Fund Transfers); 18 U.S.C. Sec. 1964 (Title 18 - Crimes and Criminal Procedure / Chapter 96 - Racketeer Influenced and Corrupt Organizations); 22 U.S.C. Sec. 6082 (Title 22 - Foreign Relations and Intercourse / Chapter 69A - Cuban Liberty and Democratic Solidarity (Libertad) / Subchapter III - Protection of Property Rights of United States Nationals).

above a *de minimis* level is all that is required, i.e. the price in the United States only has to be lower than the price abroad.

- (b) The 1916 Act requires that the substantial price differences be undertaken "commonly and systematically." There is no similar requirement under the Anti-Dumping Agreement.
- (c) The 1916 Act requires the complainant to establish "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." Under US law, this intent must be "predatory" in nature. The Anti-Dumping Agreement, in contrast, imposes no intent requirement of any kind.
- (d) In a private action, the 1916 Act requires a showing of damages suffered by the individual complaining party. The Anti-Dumping Agreement, in contrast, requires that material injury to a domestic industry be found to exist.

3.91 The **European Communities** concedes that there are differences between the requirements of the 1916 Act and those of Article VI of the GATT 1994, but these differences do not avoid a violation. They are in large part the reasons why there is a violation. Accordingly, the differences identified by the United States raise the following questions:

- (a) As for the requisite price differences, the European Communities inquires whether the United States means to say that WTO dumping provisions do not reach "substantial" price discrimination, but only price discrimination which is between "*de minimis*" and "substantial".
- (b) With respect to the second distinguishing feature identified by the United States, i.e. the requisite frequency of price discrimination, the European Communities inquires whether the US position is that WTO dumping provisions do not cover "common and systematic" dumping.
- (c) Regarding the intent requirement, the European Communities inquires whether the United States means to say that price discrimination causing "material injury" is outside the scope of WTO dumping provisions if it is also deliberate. The European Communities recalls, in this regard, that the 1916 Act requires a number of alternative "intents", only some of which refer to competition. The intent to injure the US industry is sufficient to found liability and requires no effect on competition.
- (d) Finally, in relation to the last distinguishing feature, i.e. the showing of damages suffered by individual companies, the European Communities inquires whether the US position is that where there is material injury to the domestic industry within the meaning of WTO dumping provisions there would not be damage to one or other individual company.

3.92 The European Communities argues, in addition, that the fact that the 1916 Act only prohibits price discrimination where the price is lower in the United States than elsewhere and thus is limited to protecting the US market against low prices also suggests that the 1916 Act is an anti-dumping measure rather than an antitrust measure.

3.93 In response to the last EC argument, the **United States** notes that the 1916 Act and its interpretation necessarily focus on anti-competitive effects in the United States. In the words of the US Supreme Court:

"Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions in other nations' economies."<sup>85</sup>

3.94 The United States also reiterates its view that, however the 1916 Act is characterized, the fact remains that to succeed under it, a plaintiff must plead and prove many elements that make it qualitatively different from a measure intended to remedy dumping. Foremost among these elements is the specific predatory intent requirement.

3.95 The **European Communities** rejects the US argument that the 1916 Act is qualitatively different from a measure intended to remedy dumping. The European Communities recalls that the primary requirement of the 1916 Act corresponds to dumping within the meaning of Article VI of the GATT 1994. Certain of the additional requirements such as "common and systematic" dumping and "substantial" dumping margin may require dumping to be more severe than under Article VI of the GATT 1994, but this does not make the description of Article VI inapplicable. Article VI covers all dumping practices, including those which are "common and systematic". Article VI covers all forms of "price dumping", as defined therein. The only form of dumping whose exclusion from the scope of the GATT 1947 was ever discussed is "non-price" dumping.<sup>86</sup>

3.96 The **United States** considers that the European Communities attempts to minimise the qualitative differences between the 1916 Act and an anti-dumping measure by arguing that the "primary requirement" of the 1916 Act corresponds to "dumping" and that the other elements required to be proved under the 1916 Act are simply a "few additional conditions" that do not suffice to remove it from the anti-dumping rules. This mischaracterization is an attempt by the European Communities to justify labelling the 1916 Act as an "anti-dumping" measure.

3.97 The **European Communities** replies that the purpose of Article VI and the Anti-Dumping Agreement would be undermined if WTO Members could justify the application of measures other than anti-dumping duties - for example, civil liability for damages or criminal penalties - on the basis that the conduct to which they are applied is defined in a manner which, while incorporating the essential elements of the definition of dumping, differs by the addition of one or another additional condition like, for example, providing that the additional remedy is available in case of aggravated dumping, or if the objective definition of dumping is accompanied by certain specific intents. This is exactly what the 1916 Act does, it being understood that the 1916 Act was not enacted in order to circumvent the discipline of Article VI of the GATT 1994, which was only adopted three decades later. But to accept that the 1916 Act is compatible with Article VI of the GATT 1994 would entail accepting that Article VI can be circumvented by national legislation simply by resorting to the expedient of "bolting on" a few additional definitional elements and providing a remedy other than anti-dumping duties.

3.98 For the **United States**, it remains clear from the text of the statute, its legislative history and the relevant case law that it is the additional elements and their purpose which make the 1916 Act qualitatively different from a mere anti-dumping measure. These elements are not "conditions" any

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<sup>85</sup> *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986) (hereinafter "*Matsushita Electrical*"), quoting *United States v. Aluminum Co. of America*, 148 F.2d. 416, 433 (2d Cir. 1945) (L. Hand, J.).

<sup>86</sup> The European Communities refers to GATT, Analytical Index: Guide to GATT Law and Practice (1994), p. 204.

more than the requirement that the plaintiff must establish the requisite price difference. All of the elements of the 1916 Act must be demonstrated to establish liability. There is no basis for assuming that one element is more important or takes precedence over another.

(b) The theoretical distinction between anti-dumping and antitrust

3.99 According to the **European Communities**, nothing in the GATT 1994, the Anti-Dumping Agreement or any other WTO text supports the proposition that, from a WTO perspective, there is a clear dichotomy between two mutually exclusive categories of national legislation: anti-dumping legislation which is subject to Article VI of the GATT 1994 and the Anti-Dumping Agreement, on the one hand, and antitrust rules which are not subject to those rules, on the other. Indeed, there is nothing in the GATT 1994 and the Anti-Dumping Agreement which deals with or touches on antitrust at all. Accordingly, there is nothing in these texts to prevent laws and rules considered by national courts or legislatures to be "antitrust" in nature from being subject to Article VI and the Anti-Dumping Agreement. The dichotomy on which the United States bases its argument is a false one.<sup>87</sup>

3.100 In reply to a question of the Panel regarding how the basic features, principles and underlying economic assumptions of anti-dumping and antitrust rules differ, the European Communities notes, first of all, that the anti-dumping and antitrust rules in many cases had common origins and rely on common notions.<sup>88</sup> Anti-dumping legislation began to appear in various countries at the beginning of the twentieth century, at about the same time as antitrust legislation appeared in the United States. While the two types of legislation appear to have sprung from the same matrix of ideas prevailing at that time, anti-dumping legislation has from the start been posited on the notion that international trade poses a particular set of problems which require specific legislative solutions and remedies. This notion has increased in importance as tariff and other barriers to international trade have been reduced. In the negotiation of the WTO Anti-Dumping Agreement "the European Communities and the United States [...] took the view that effective and workable anti-dumping rules are essential to maintaining an open and liberal trading system".<sup>89</sup>

3.101 The European Communities further points out that the core element in most accounts of the rationale of dumping is that where national markets are economically separate, economic operators in one market may exploit the different economic conditions prevailing in the two markets to apply different prices. In particular, when there are entry barriers in one market, producers in that market may exploit those barriers to apply high prices in their domestic market, and use the resulting profits to subsidise exports to another market. Such practices may cause injury to actual or potential producers in the export market concerned. To the European Communities, the following description of the economic concept of dumping is a typical one:

"To the economist, dumping is traditionally defined only as price discrimination between national markets, a definition first proposed by Viner. There was need of a restricted definition for the purposes of economic theory and that advanced by Viner

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<sup>87</sup> The European Communities notes that, in any event, even in the United States it was recognized that the 1916 Act addresses the same practices as addressed by anti-dumping legislation in other countries, namely practices described as "the sale of imported merchandise at less than its prevailing market or wholesale price in the country of production". The European Communities refers to the United States Tariff Commission, Information Concerning Dumping and Other Foreign Competition in the United States and Canada's Anti-Dumping Law, Printed for the use of the Committee on Ways and Means, House of Representatives (1919), p. 9.

<sup>88</sup> The European Communities notes that this is why the 1916 Act is inspired by points addressed in the Sherman Act.

<sup>89</sup> M. Koulen, "The New Anti-Dumping Code Through its Negotiating History", in The Uruguay Round Results, J. Bourgeois, ed. (1995), p. 160.

enabled the topic to be subsumed within the overall theory of monopoly and imperfect competition.

A necessary condition for price discrimination is that the total market for a product can be broken down into two or more sub-markets and that at least one of the sub-markets is isolated from the others. In addition, the seller has to have a certain degree of monopoly power in one or more of the isolated sub-markets. In these circumstances, price discrimination is profitable if there is a difference in the elasticities of demand in the separate sub-markets, thus enabling a higher price to be charged for the product in the sub-market in which demand is less elastic.

The factors which cause isolation in international trade are high tariffs, import restrictions and other non-tariff barriers, such as statutorily imposed technical standards. These factors are usually found in the domestic market of the supplier and strengthen his power on that market. They create a less elastic demand for this product and enable him to charge higher prices. The price discrimination need not be between the domestic and export market, however, and may be practised instead between different export markets."<sup>90</sup>

3.102 The European Communities points out that a similar line of argument is found in the following passage taken from a US law review note:

"[T]he recoupment requirement – at least as defined in *Brooke Group* - is too narrow in the international context because it fails to consider the ability of firms with a monopoly or oligopoly in their home markets simultaneously to recoup losses from dumping by increasing monopoly returns at home. Dumping in the US allows foreign producers to reap the economies of scale of producing at optimal capacity while restricting sales at home to protect their home market monopoly prices."<sup>91</sup>

3.103 The European Communities further argues that the GATT 1947 reflects the fact that, by 1947, the idea had coalesced that, in deciding whether to apply anti-dumping measures, the investigating authority should look to a set of defined possible injurious effects to be determined with respect to an "industry" in the country of importation. "Industry" means producers. "Injury" is therefore to be determined by reference to the situation of producers. While there may be an underlying assumption that injury to producers will ultimately lead to injury to consumers, this is not explicit in the rules, and there is no requirement that the injury investigation examine effects of dumping practices on consumers.

3.104 The European Communities notes that, by contrast, it is often said that antitrust law protects competition, not competitors.<sup>92</sup> Modern antitrust theory increasingly tends to explicitly equate

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<sup>90</sup> H.-F. Beseler and N. Williams, Anti-dumping and Anti-subsidy Law, The European Communities, (1986), p.41 (citations omitted).

<sup>91</sup> Note, Rethinking the 1916 Antidumping Act, 110 Harv. L. Rev. 1555, 1566 (1997).

<sup>92</sup> The European Communities points out that antitrust statutes, at least as regards the United States, use general language referring to competition as such: "restraint of trade or commerce among the several States, or with foreign nations" (Section 1 of the Sherman Act); "monopoliz[ing] or attempt[ing] to monopolize [...] any part of the trade or commerce among the several States, or with foreign nations" (Section 2 of the Sherman Act); price discrimination whose effect 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 received the benefit of such discrimination, or with customers of either of them" (Section 2 of the Clayton Act, as amended by the Robinson-Patman Act).

competition and consumer welfare.<sup>93</sup> This is reflected in the reasoning and language used by the US Supreme Court in *Brooke Group* which held that in order to prove a "primary line" violation of the Robinson-Patman Act, a plaintiff must plead and prove predation, consisting of (i) prices below "an appropriate measure" of the defendant's costs, and (ii) a demonstration that the competitor has a reasonable prospect of recouping its investment in below-cost pricing. The Court held that the essential requirements for primary line violations of the Robinson-Patman Act are the same as for claims of monopolisation by predatory pricing under Section 2 of the Sherman Act. Noting criticism of earlier case law made in light of "the antitrust laws' traditional concern for consumer welfare and price competition", the Court said that "the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with the object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."<sup>94</sup>

3.105 For the European Communities, it follows from these theoretical considerations that the essential characteristic of an anti-dumping law covered by the discipline of Article VI and the Anti-Dumping Agreement is that it is aimed at providing a remedy against imports where there is price discrimination consisting of the imports being sold at a lower price than that applied to sales of the same products in the market from which they are exported. Anti-dumping theory and legislation is based on the idea that the kind of price discrimination between different markets described in Article VI of the GATT 1994 poses a problem which is different from, and requires a different set of remedies from, the problem of price discrimination within one and the same market.

3.106 The **United States** disagrees with the European Communities' suggestion that there is a complete dichotomy between antitrust laws and their pursuit of consumer welfare, and trade laws and their focus on producer welfare. This purported dichotomy exaggerates reality. While it is certainly true that the purpose of some very well known antitrust laws is to preserve the competitive process in order to enhance economic efficiency and increase consumer welfare, it is also true that quite a number of antitrust laws have other purposes, including the protection of small enterprises or other individual competitors.

3.107 The United States points out that one example of other antitrust purposes can be found in the Robinson-Patman Act, where, in the "secondary line" context<sup>95</sup>, the statutory concern is for adverse effects on individual competitors, as well as on competition itself. Furthermore, even the European Communities' main antitrust instruments, Articles 81 and 82 of the EC Treaty, retain elements of concern for competitors as well as competition:

"In the E.C., however, there is concern also that large firms may make it hard for smaller firms to compete, even if the latter are less efficient. The preamble to the [Rome] treaty refers to many factors other than efficiency, such as social policy, fair competition, small and medium-sized undertakings, peace and liberty. To protect small firms that are less efficient, it may be necessary to control the conduct of firms that have no power over price."<sup>96</sup>

3.108 The United States also recalls that, unlike US antitrust law, the parallel provisions of EC law condemning abuses of dominant position do not require presentation of "recoupment" evidence to

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<sup>93</sup> The European Communities also notes, however, that there is no commonly accepted standard for what constitutes a "competition" law.

<sup>94</sup> *Brooke Group*, Op. Cit., p. 222.

<sup>95</sup> The United States recalls that in a "secondary line" context certain buyers of a good receive less advantageous sales terms from a given seller than other competing buyers.

<sup>96</sup> Korah, *An Introductory Guide to EC Competition Law and Practice*, 6th ed., Oxford (1997), p. 76; and see also Amato, *Antitrust and the Boundaries of Power* (1997), chs. 3 and 5.

show "predatory pricing."<sup>97</sup> Moreover, EC Member States' own antitrust laws may take similar positions. For example, France noted in its 1996 Annual Report to the OECD Competition Law and Policy Committee that "the aim of the provisions contained in the Law of 1 July 1996 is to fight the practice of artificially low retail prices without the need to prove the existence of an anticompetitive agreement or dominant position."<sup>98</sup> Likewise, the UK's Office of Fair Trading recently released a "Consultation Draft" discussing the "abuse of dominance" provision in Britain's 1998 Competition Act:

"In *Akzo* and *Tetra-Pak II* the European Court of Justice found the undertakings' conduct to be an abuse without explicitly considering whether recouping losses would be feasible. The Director General [of the OFT] therefore does not consider that he would necessarily be required to establish that predation was feasible."<sup>99</sup>

3.109 According to the United States, it can be seen from these examples that the fact that a measure may include protection for competitors does not remove the measure from the category of antitrust laws. It thus remains a challenge for antitrust laws to protect competition without unduly protecting competitors, or to protect competitors without unduly prejudicing competition. This "antitrust paradox" reflects the historic reality that antitrust laws have social and political as well as economic goals.

3.110 The **European Communities** objects to the claim of the United States that the European Communities is relying on a "complete dichotomy between antitrust and anti-dumping laws". The European Communities' position is the opposite. Antitrust and anti-dumping rules have in many cases common origins and rely on common notions. The point is that there is a definition of, and disciplines for, anti-dumping measures and so the only question for the Panel is whether the 1916 Act comes within and violates the anti-dumping disciplines, not whether there is a "dichotomy".

3.111 The **United States** further contends, in response to the same question asked by the Panel to the European Communities, that anti-dumping rules and antitrust laws have different objectives, are founded on different principles, and seek to remedy different problems. The anti-dumping rules are not intended as a remedy for the predatory pricing practices of firms or for any other private anti-competitive practices typically condemned by antitrust laws. Rather, the anti-dumping rules are a trade remedy which WTO Members have agreed is necessary to the maintenance of the multilateral trading system. Without this and other trade remedies, there could have been no agreement on broader GATT 1947 and later WTO packages of market-opening agreements, especially given the imperfections which remain in the multilateral trading system. In contrast, antitrust laws remedy, among other things, private pricing practices which are objectionable because they are instruments of cartelization, monopolisation or abuse of dominant position. While it is true that the anti-dumping rules address certain private pricing practices, it is not because these pricing practices - that is, injurious dumping practices - are anti-competitive in an antitrust sense. Injurious dumping practices will not normally qualify as anti-competitive when analysed under the distinct rules of most national antitrust laws.

3.112 The United States further points out that, as a trade remedy, the anti-dumping rules are triggered only in response to the practice of "dumping," i.e. a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost, which causes "material injury" to producers of the product in the importing country. Once these facts are

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<sup>97</sup> The United States refers to *Korah*, Op. Cit., pp. 97-107; *Tetra Pak II* (C333/94P)[1997] C.E.C., 4 MLR 662.

<sup>98</sup> DAF/CLP(97)11/08, October 1997, at para. 68.

<sup>99</sup> Office of Fair Trading, Formal Consultation Draft - Competition Act 1998 - the Chapter II Prohibition (OFT 402 1998), Part 4, especially para. 4.31.

established, the investigating authorities may impose duties to offset prospectively the injurious dumping. While this simple definition of injurious dumping may suggest certain comparisons with competition laws addressing price discrimination, any careful analysis shows major differences between the principles upon which anti-dumping rules and the competition laws are founded.

3.113 The United States recalls, in this regard, that, although some dumping may be due to business advantages and market segmentation which have arisen in response to commercial forces, more typically it is a government's industrial policies or key aspects of the national economic system which a government has created, promoted, or tolerated that enable injurious dumping to take place. Principally of concern are certain government industrial policies or practices which in most instances are not directly or fully subject to any type of WTO prohibitions or disciplines. In other instances, these policies or practices may not fully conform to WTO disciplines or, even if they do, may not leave all Members on an equal footing because of differences in starting levels of openness and transparency among Members. These policies still are objectionable because they distort market structures or processes and, as a result, provide artificial advantages to home market producers and often do so at the expense of home market consumers. These artificial advantages generally translate into increased profits for these producers in their home market, which make possible and, for various reasons, may encourage these producers to engage in injurious dumping abroad.

3.114 The United States states that one broad category of objectionable policies can be found in government industrial policies which combine limits on domestic competition with market access barriers that keep out foreign competitors. Here, the possible combinations are quite extensive. On the one hand, the existence of only limited domestic competition may be due to many different types of industrial policies falling under the umbrella of government actions intended to influence the structure of the home market with the aim of affecting the number or type of producers, including (1) government policies limiting the number of producers in a particular industry, such as through the restrictive award of licenses, (2) State monopolies, (3) government policies favoring a "national champion" firm within an industry, (4) government policies which divide up and stabilize market shares and (5) any of a variety of other government policies which regulate commerce by creating, promoting or tolerating monopolies or oligopolies or by favoring some domestic competitors over other domestic and foreign competitors. Other general categories of objectionable policies include domestic price controls, government subsidisation and state trading arrangements.

3.115 The United States argues that anti-dumping rules are a practical, albeit indirect, response to these trade-distorting policies. The anti-dumping rules allow Members to respond through the imposition of offsetting duties when confronted with one harmful result of these policies, namely, injurious dumping in export markets by the producers that benefit from these policies. From this perspective, the anti-dumping rules represent an effort to maintain a "level playing field" among producers in different countries. Anti-dumping duties are designed to offset, quantitatively, the artificial advantages realized by the exporting country's producers so that producers in the importing country may compete, at least in the importing country's market, on an equal footing with the exporting country's producers.

3.116 The United States points out that anti-dumping rules also help to neutralise inequities that may arise from differences in national economic systems, even as international trade liberalises. For example, differing social and legal arrangements for employment and under-employment, or differing debt-equity structures and debt burdens, often made possible by indirect government intervention in the banking system, can favor the exporting country's producers over the importing country's producers and lead to injurious dumping. Other circumstances that can lead to injurious dumping can include certain competition-inhibiting private conduct, cross-subsidisation that can result from the legal organisation and operation of foreign business groupings and, in the case of non-market

economies or some economies in transition, export directives and prices and costs not entirely based on market principles.

3.117 The United States considers that the anti-dumping rules thus implicitly recognize that there is an accepted norm for the behavior of governments in the broad multilateral trade context, i.e. a government should not pursue industrial policies which distort market structures or processes and thereby provide artificial advantages to domestic producers to the detriment of producers in other countries. The anti-dumping rules also recognize that there should be a remedy for certain harms caused when different economic systems interact.

3.118 Turning to competition laws, the United States notes that they appropriately do not take these matters into consideration, and they do not address the underlying problems at which the anti-dumping rules are directed. Instead, competition laws remedy private business practices which, in themselves, are objectionable because they are anti-competitive in an antitrust sense. The primary objectives of competition policy, as expressed in competition laws, are to promote economic efficiency and to maximize consumer welfare through innovation and the optimal allocation of resources in competitive markets. The competition laws therefore are largely directed at the competitive practices of private firms and market structures, with the objective of assuring a competitive market. In some countries, the competition laws have additional, less central objectives, such as the preservation of a decentralised economy, support of small businesses or maintenance of economic and social stability.

3.119 The United States acknowledges that the anti-dumping rules address certain private pricing practices as do the competition laws. However, dumping practices are not anti-competitive in an antitrust sense. The anti-dumping rules provide a remedy against injurious dumping as an indirect response to a foreign government's market-distortive industrial policies or differences in national economic systems. As a result, although dumping by foreign producers can, for example, send false signals to the importing country's market that distort investment patterns, dumping practices will not normally qualify as anti-competitive when analysed under the distinct rules of most national competition laws.

3.120 The United States recalls that, in the Working Group on the Interaction between Trade and Competition Policy in 1998, the European Communities recognized the distinction between anti-dumping law and competition law:

"Antidumping law and competition law apply in different economic, legal and institutional contexts. Competition law prohibits and subjects to strict penalties certain forms of pricing behaviour by firms. While competition law applies in principle within the context of an integrated market, antidumping law applies in an economic setting which is still characterized by border measures and other regulatory obstacles and distortions of trade."<sup>100</sup>

3.121 The United States notes that, in addition, during the meeting at which the Working Group considered the above-mentioned document, a representative of the European Communities "reiterated that the submission by his delegation argued that anti-dumping rules and competition rules applied in different economic, legal and institutional contexts and that therefore there could be no question of the replacement of one set of rules for the other, and no question of simply making a mechanical transposition from competition law into anti-dumping law of concepts which were intended to deal with a totally different kind of problem and underlay a totally different type of instrument."<sup>101</sup>

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<sup>100</sup> WT/WGTCP/W/78.

<sup>101</sup> WT/WGTCP/M/5, para. 71.

3.122 In response, the **European Communities** asserts that the United States seeks to develop a new theory of dumping which cannot be reconciled with the wording of Article VI of the GATT 1994 and the Anti-Dumping Agreement as well as decades of US enforcement. The European Communities inquires whether the United States is henceforth going to refrain from applying anti-dumping duties where there is no underlying government trade-distorting policy or practice. Likewise, the European Communities wonders whether the United States is in future going to accept as defences from exporters in dumping cases the argument that "I have no protected domestic market" or "I am not dumping, I am engaging in predatory pricing".

3.123 The European Communities adds that, to state that anti-dumping rules respond to government trade-distorting policies may have far-reaching implications which had certainly never been intended by GATT 1947 contracting parties. This argument implies that anti-dumping rules exercise some sort of indirect constraint on the domestic policies of a dumper's home country – even in areas outside trade policy like industrial policy or social relations, to which the United States refers. There is no underpinning for this in the wording of WTO dumping provisions or in the negotiating history. The only policy limitation underlying WTO dumping rules is the obligation to conform Members' anti-dumping policy to WTO rules and to take WTO-consistent anti-dumping measures.

3.124 The **United States** denies that it is developing a new theory of dumping. The United States refers to the fact that its notion of dumping is discussed in detail in the US paper submitted to the Working Group on the Interaction between Trade and Competition Policy. Moreover, in the same Working Group, the European Communities itself recognized basically the same concepts. Furthermore, it is worth noting that the District Court in *Wheeling-Pittsburgh* even recognized this distinction. In this regard, that court stated that "dumping itself has long been noted to constitute a harmful international trade practice which may, through *government, as opposed to market-driven action*, cause sharp increases in imported goods, to the detriment of domestic producers."<sup>102</sup>

(c) Statements by US executive branch officials

3.125 The **European Communities** argues that the US government's denial that the 1916 Act is an instrument to counter dumping is also in contradiction with a number of official statements made by US Government officials in 1985 and 1986 at the occasion of the discussions on the adoption of section 236 and section 1655, two bills to amend the 1916 Act.<sup>103</sup>

3.126 The European Communities notes that the Chairman of the US Federal Trade Commission, on 17 June 1985, wrote in a letter to the US Senate Committee of the Judiciary that the provisions of the 1916 Act "establish liability, provided that the *dumping* is done" under the conditions described in the statute. In a footnote he further clarifies that "[u]nder the Anti-Dumping 1916 Act dumping is the difference between the price in the US and the price in foreign countries".<sup>104</sup> Moreover, according to the European Communities, the testimony of 18 July 1986 of USTR General Counsel Alan Holmer to the US Senate Finance Committee states, *inter alia*, that the 1916 Act is legal under the GATT 1947 and the Anti-Dumping Code only because it is grandfathered pursuant to the 1947 Protocol of Provisional Application.<sup>105</sup> Similar statements were also made by former US Trade Representative Clayton Yeutter and by the Department of Justice.<sup>106</sup>

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<sup>102</sup> *Wheeling-Pittsburgh*, Op. Cit., p. 604 (emphasis added by the United States).

<sup>103</sup> The European Communities notes that the amendments, aimed, *inter alia*, at making the criteria for applying the 1916 Act less stringent, were never adopted.

<sup>104</sup> Emphasis added by the European Communities.

<sup>105</sup> The European Communities refers to pages 4 and 5 of the testimony where it is stated, *inter alia*, that "[t]he Antidumping Code [...] expressly limits the remedy for dumping to the prospective collection of antidumping duties to offset the margin of dumping. [...] Article 16 [of the Tokyo Round Anti-Dumping Code,

3.127 In the view of the European Communities, this shows 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. The United States failed to seek a grandfather exception under the GATT 1994.<sup>107</sup> The logical conclusion, according to the European Communities, is that, since US authorities admitted that the 1916 Act benefited from grandfathering under the GATT 1947 and since the 1916 Act does not benefit from any grandfather clause under the GATT 1994, it is in breach of the WTO Agreement and the GATT 1994.

3.128 In addition, the European Communities refers to the 1995 Antitrust Enforcement Guidelines for International Operations of the US Department of Justice and the US Federal Trade Commission. Those guidelines expressly mention that "the 1916 Act is not an antitrust statute [...]. It is a trade statute that creates a private claim against importers [...]"<sup>108</sup>.

3.129 In response, the **United States** states that, assuming *arguendo* that the European Communities' characterisation of the statements at issue is accurate, the simple answer to the EC argument is that the two government agencies commenting on the proposed 1986 legislation, i.e. the US Department of Justice and USTR, were mistaken as a matter of fact.

3.130 The United States considers that the GATT 1947 document L/2375/Add. 1 of 19 March 1965 shows that the US government did not include the 1916 Act anywhere in the survey of existing mandatory legislation not in conformity with Part II of the GATT 1947. Indeed, at one point, the US government specifically notified statutes that were not in conformity with Articles III and VI of the GATT 1947, which are the two Articles which the European Communities claims the 1916 Act violates. The 1916 Act was not among them. The plain import of document L/2375/Add.1 is that, in the United States' view, the 1916 Act was GATT-legal and therefore did not require "grandfathering".

3.131 The United States confirms that its notification in document L/2375/Add.1 was not binding, but maintains that it was nevertheless an official statement of the US government's position regarding the GATT-legality of the 1916 Act in a GATT 1947 forum. The United States did not have the occasion to address the GATT-legality of the 1916 Act in the only other possible GATT 1947 forum,

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now Article 18.1 of the WTO AD Agreement] must stand for the proposition that a government can provide its citizens one, and only one, remedy for dumping. That remedy is the collection of duties in a manner consistent with the Antidumping Code. We believe that our reading flows logically from the letter and spirit of the GATT and the Antidumping Code. It also follows that S. 1655 would violate the Code by imposing additional sanctions on top of normal antidumping duties. [...] While the same criticism can be levelled at the Antidumping Act of 1916, that Act was "grandfathered" by the Protocol of Provisional application when the U.S. joined the GATT in 1947. Because of this legal technicality, the 1916 Act in its present form is legal under the GATT."

<sup>106</sup> The European Communities refers to a letter, dated 18 February 1986, from US Trade Representative C. Yeutter to Sen. S. Thurmond, 18 February 1986, where it is stated, as criticism in connection with proposed amendments to the 1916 Act, that "[w]hile many of the above objections can be levelled at the Antidumping Act of 1916, that Act was grandfathered by the Protocol of Provisional Application upon U.S. accession to the GATT and is therefore GATT-legal." The European Communities also refers to another letter, dated 4 February 1986, from Assistant Attorney General J. Bolton to Sen. S. Thurmond, where it is stated that "[t]o the extent that any provisions of the current 1916 Act are inconsistent with the GATT, they are protected by the "grandfather clause", paragraph 1(b) of the 1947 Protocol of Provisional Application of the GATT".

<sup>107</sup> The European Communities notes the existence of paragraph 3(a) of the introductory language to the GATT 1994 which only mentions "measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to the GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone".

<sup>108</sup> Section 2.82 of the Guidelines. The European Communities notes that the full text is available on the Internet at <http://www.usdoj.gov/atr/public/guidelines/internat.txt>.

i.e. a dispute resolution proceeding, because no contracting party challenged the 1916 Act under the GATT 1947, and this despite the fact that the United States had never invoked the "grandfathering" protection made available by the Protocol of Provisional Application.

3.132 The United States further points out that the notification by the United States contained in document L/2375/Add.1, which is an official statement of the US government, contradicts, as a factual matter, the statements cited by the European Communities. Therefore, the Panel should attach no weight to those statements when deciding whether the 1916 Act violates Articles III:4 and VI:2 of the GATT 1994.

3.133 The United States considers it more significant, however, that the inference which the European Communities draws from the statements made by the two agencies is not accurate. In each of the statements, the agency official first discusses why the proposed legislation, which would have amended the 1916 Act, was GATT-illegal. Then, the agency official explains that while the 1916 Act pre-dates the GATT 1947 and is therefore eligible for "grandfathering" if ever challenged as GATT-illegal, the 1916 Act would no longer be eligible for "grandfathering", under GATT 1947 jurisprudence, if it were amended. For example, Assistant Attorney General John Bolton of the US Department of Justice states:

*"To the extent that any provisions of the current 1916 Act are inconsistent with the GATT, they are protected by the "grandfather clause," paragraph 1(b) of the 1947 Protocol of Provisional Application of the GATT. Any amendment to the 1916 Act that is inconsistent with the GATT or the [Antidumping] Code would not benefit from that protection, however, and accordingly, would contravene our international obligations."*<sup>109</sup>

3.134 For the United States it is clear from this statement that the official is not admitting or even suggesting that the 1916 Act, without the proposed amendments, was GATT-illegal. Rather, the official is merely saying that the 1916 Act is eligible for "grandfathering" only if it is not amended and that it would be GATT-illegal if amended as proposed, given that the proposed amendments are GATT-illegal.

3.135 The United States submits that the statements of the two officials from USTR are very similar and attempt to convey the same message, although they are perhaps not as clearly made. For example, former US Trade Representative Clayton Yeutter, after detailing various reasons why the proposed amendments to the 1916 Act were GATT-illegal, states:

*"While many of the above objections can be leveled at the Antidumping Act of 1916, that act was "grandfathered" upon U.S. accession to the GATT and is therefore GATT-legal. By significantly amending the 1916 Act, S. 1655 would remove the protection of the GATT "grandfather clause" [...]"*<sup>110</sup>

3.136 In the view of the United States, it emerges from this statement that, like the US Department of Justice official, former US Trade Representative Yeutter is simply attempting to make the point that the "grandfathering" available to protect the 1916 Act from objections like those applicable to the proposed amendments in question would be lost if the 1916 Act were amended. He is not attempting to opine that those objections actually would be valid if levelled against the 1916 Act.

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<sup>109</sup> Letter of 4 February 1986 from Assistant Attorney General J. Bolton to Sen. S. Thurmond, p. 5 (emphasis added by the United States).

<sup>110</sup> Letter of 18 February 1986 from US Trade Representative C. Yeutter to Sen. S. Thurmond (emphasis added by the United States). The United States also refers to the Letter of 4 February 1986 from Assistant Attorney General J. Bolton to Sen. S. Thurmond, p. 5.

3.137 The United States also points out that the European Communities provided an incomplete quotation from the 1995 Antitrust Enforcement Guidelines for International Operations of the US Department of Justice and the US Federal Trade Commission.<sup>111</sup>

3.138 The United States considers that, for all these reasons, the statements cited by the European Communities deserve to be given no weight by the Panel in determining whether the 1916 Act violates Articles III:4 and VI:2 of the GATT 1994.

(d) The classification of the 1916 Act in the US legal system

3.139 The **United States** notes that the 1916 Act's placement in the United States Code constitutes further evidence of its antitrust nature. When the 1916 Act was codified in the United States Code, it was placed under Title 15, entitled "Commerce and Trade." Also located in Title 15 are the Sherman Act, the Clayton Act and the Federal Trade Commission Act, which are all antitrust laws. In contrast, the US anti-dumping laws are codified in Title 19, entitled "Customs Duties". Moreover, it should be noted that the 1916 Act was enacted under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916. For the United States, in US terminology, dumping is not unfair competition.

3.140 The **European Communities** responds that, so long as the 1916 Act has the objective criteria which bring it under Article VI of the GATT 1994, it does not matter whether it is classified in the US legal system as antitrust or anti-dumping. In fact, the 1916 Act is not considered an antitrust measure in the United States, as is evidenced by the Antitrust Enforcement Guidelines for International Operations of the US Justice Department.

3.141 For the European Communities, it is plain, moreover, that dumping is a form of unfair competition whereas antitrust measures are distinguishable notably because they are designed to protect competition, not competitors. The United States itself has regularly recognized that dumping is unfair competition. For example, in the report of the panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*<sup>112</sup> the US position on the nature of Article VI of the GATT 1947 is reported in the following terms:

"The drafters of the General Agreement had recognized in 1947 that distortions to international *competition* caused by unfair trade practices could be so severe that effective remedies to curb such distortions were essential: indeed, as essential to an overall programme of liberalization of international trade as, for example, the m.f.n. principle and the national treatment principle."<sup>113</sup>

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<sup>111</sup> Section 2.82 of the 1995 Antitrust Enforcement Guidelines provides as follows:

"The Revenue Act of 1916, better known as the Antidumping Act, 15 U.S.C. 71, 74, is not an antitrust statute, but its subject-matter is closely related to the antitrust rules regarding predation. It is a trade statute that creates a private claim against importers who sell goods into the United States at prices substantially below the prices charged for the same goods in their home markets. In order to state a claim, a plaintiff must show both that such lower prices were commonly and systematically charged, and that the importer had the specific intent to injure or destroy an industry in the United States, or to prevent the establishment of an industry."

<sup>112</sup> Panel Report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted by the Committee on Anti-Dumping Practices on 27 April 1994, BISD 41S/229 (hereinafter "*United States - Anti-Dumping Duties on Salmon from Norway*").

<sup>113</sup> *Ibid.*, para. 74 (emphasis added by the European Communities).

3.142 The **United States** rejects the EC assertion that the 1916 Act is not considered an antitrust measure in the United States. Until at least as recently as 1994, the US Congress considered the 1916 Act to be an antitrust statute because it is included in a compilation of selected antitrust statutes under the heading "Principal Antitrust Laws" that was prepared by the US Congress.<sup>114</sup>

3.143 The **European Communities** notes that it does not know the US Congress document of 1994 and maintains its view that it is a recent invention to consider the 1916 Act as an antitrust statute.

(e) Simultaneous or consecutive filings of 1916 Act claims and 1930 Tariff Act petitions in cases involving the same matter

3.144 In response to a question of the Panel to the United States regarding whether there have ever been situations where complaints in respect of the same matter were simultaneously filed under the 1916 Act and the relevant provisions of the 1930 Tariff Act dealing with anti-dumping, the **United States** replies that the situation that most closely approximates the situation described can be found with regard to the matter underlying the *Geneva Steel* case. In *Geneva Steel*, the plaintiff filed a 1916 Act complaint in federal court in September of 1996 addressing the allegedly predatory pricing practices of certain importers of steel plate, and two months later it filed anti-dumping petitions on steel plate with the US Department of Commerce. Thus, although these filings were not simultaneous, they were close in time. Of course, even if these filings had been made simultaneously, it would not be accurate to describe them as addressing the "same matter," as the Panel's question suggests. In this regard, the 1916 Act provides retroactive relief, i.e. treble damages for past conduct. The US anti-dumping law, in contrast, provides prospective relief. It remedies, through the imposition of duties, transactions occurring after the initiation of the anti-dumping investigation. As a result, the same transactions would not be remedied by the simultaneous filings of a 1916 Act complaint and an anti-dumping petition.

3.145 The United States notes that a similar but more complicated situation arose with regard to the matter underlying the *Wheeling-Pittsburgh* case. There, the plaintiff filed a lawsuit against Japanese and Russian importers of hot-rolled steel in state court asserting novel claims under state law but no claim under the 1916 Act, a federal law. For various reasons, that lawsuit was subsequently transferred to federal court and all of the state claims were dismissed. The plaintiff nevertheless was allowed to amend its complaint to state a claim under the 1916 Act. It is the recollection of the United States that, by the time the 1916 Act claim was brought, anti-dumping investigations of hot-rolled steel were already underway.

3.146 The United States notes, finally, that the matter underlying the *Zenith III* case, Japanese television sets, involved both the filing of 1916 Act claims and an anti-dumping petition. The anti-dumping petitions were filed with the then-responsible agency, the US Department of Treasury, in March 1968. In December 1970, the plaintiff NUE (National Union Electric Corporation) filed suit under the 1916 Act among other statutes. In September 1974, the plaintiff Zenith filed a claim under the 1916 Act.

3.147 With regard to another question of the Panel to the United States regarding whether there has ever been any situation where a complaint under the 1916 Act was initiated after an anti-dumping investigation in respect of the same matter was unsuccessful, the United States notes that it is not aware of any situation where a 1916 Act complaint was filed in the wake of an unsuccessful anti-dumping investigation.

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<sup>114</sup> The document referred to by the United States was not submitted to the Panel.

- (f) The relevant US case law
- (i) *The distinction between issues of fact and issues of law*

3.148 The **European Communities** notes that the question whether a given national law is subject to and compatible with the disciplines of the WTO Agreement and the GATT 1994 is a matter of WTO law, which it is for the Panel to decide under the DSU, and subject to appeal to the Appellate Body. The Panel cannot be bound by the views of national courts of WTO Members on this question. Words like "antitrust", "unfair competition", and "predatory" may have different meanings in different Member states. They may be used in different ways at different times. Allowing their use to determine the scope of application of the discipline of Article VI would effectively invite Members themselves to choose to withdraw their legislation from WTO disciplines simply by choosing the right label. On the other hand, judgments 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.

3.149 The European Communities claims that it is clear on the face of the 1916 Act that it targets imported products through sanctions applied to importers and that the regulated conduct is defined by reference to discrimination between the import price and prices on the domestic market or export prices to a third country. The debate down the years among lower courts in the United States as to whether the 1916 Anti-Dumping Act is a trade law or an antitrust law<sup>115</sup> is therefore not relevant for WTO purposes.

3.150 The European Communities considers that, while the Panel must consider US case law and other official pronouncements in order to establish the meaning and substantive content of the 1916 Act, it need not attach importance to the characterisation of the 1916 Act by US courts as being or not being an anti-dumping measure since this is a matter of WTO law, which US courts do not address but which the Panel must. In performing this task, the Panel should not have regard to, and should in any event not be bound by, labels such as "antitrust" or "protectionist" which domestic courts apply for one or another domestic purpose.

3.151 According to the European Communities, the Panel should have regard to the elements which are relevant for the purposes of Article VI of the GATT 1994, i.e. whether the practice which is targeted by the 1916 Act is covered by Article VI. Article VI does not only regulate dumping. It also defines what is meant by dumping. Therefore, the Panel should examine whether the 1916 Act, as interpreted by US Courts, is directed at this kind of practice, irrespective of any categorisation of the 1916 Act as "antitrust" legislation and of the legislative purpose of the statute by US courts for their domestic purposes.

3.152 The European Communities finds support for its position in the report of the panel on *EEC – Parts and Components*. The panel in that case examined whether the description or categorisation of a charge under the domestic law of a contracting party is relevant in determining whether it is subject to the requirements of Article II or those of Article III:2 of the GATT 1994. The panel found that "if the description or categorization 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"<sup>116</sup>. Likewise, if categorisation of the 1916 Act as a dumping statute by US courts and authorities were necessary or relevant to establish whether dumping takes place within the meaning of Article VI of the GATT 1994, the United States could determine itself

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<sup>115</sup> The European Communities refers to *Zenith III*, Op. Cit.; *Wheeling-Pittsburgh*, Op. Cit.; *Geneva Steel*, Op. Cit..

<sup>116</sup> *EC - Parts and Components*, Op. Cit., para 5.7.

whether Article VI would apply to its statute. Clearly, the purpose of this provision could then be easily circumvented.

3.153 According to the **United States**, in all cases, the role of a panel is fundamentally the same: the panel must first assess the facts presented and then determine their conformity with the relevant agreement, which generally entails interpreting the scope and applicability of those agreements to the facts. In the present case, the assessment of the facts could be easily blurred or confused with interpreting the scope of the relevant agreements. It is important that the Panel not lose sight of the distinction between its role as a fact finder in the present case and its role in determining questions of law. 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 an international tribunal.<sup>117</sup> Because it is expedient to its positions in the present case, the European Communities would have the Panel ignore the US case law interpreting the 1916 Act. However, the Panel is not called upon to interpret the 1916 Act as such. Rather, the Panel must assess the current state of jurisprudence in the United States regarding the 1916 Act in order to determine the fact of the 1916 Act. It is not the role of the Panel to agree or disagree with judicial decisions interpreting and applying the 1916 Act. The danger in the Panel interpreting the 1916 Act as such is that the Panel might adopt an interpretation of the law that does not match the true application of the law in the United States. To do so would result in a Panel report based upon hypothetical facts. In order to avoid such an outcome, the Panel should deem the case law interpreting the 1916 Act as dispositive for purposes of determining the fact of US law.<sup>118</sup>

3.154 In support of its position, the United States refers to the *Brazilian Loans* case in which the Permanent Court of International Justice (hereinafter the "PCIJ") deemed controlling the manner in which French courts had interpreted French legislation. The PCIJ admonished in that case that a tribunal of international law should "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."<sup>119</sup> This principle "rests in part on the concept of the reserved domain of domestic jurisdiction, and in part on the practical need of avoiding contradictory versions of the law of a state from different sources."<sup>120</sup>

3.155 In the view of the United States, it therefore follows that the interpretation of the 1916 Act by US courts offers more than just guidance to the Panel. It is their interpretation that is dispositive for purposes of determining the nature of the 1916 Act. The Panel is not called upon to opine upon or interpret the statute itself by agreeing or disagreeing with any particular court's interpretation. In *India – Patents*, the Appellate Body noted approvingly that the panel had not interpreted Indian law as such, but, rather, had reviewed the law to determine whether it was WTO-consistent. Accordingly, it is the responsibility of the Panel to ascertain the interpretation afforded to the 1916 Act by the weight of judicial authority in the United States. This is not to say that that the Panel has no interpretative

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<sup>117</sup> The United States refers to the decision of the Permanent Court of International Justice (hereinafter the "PCIJ") in *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ Rep. 1926, Series A, No. 7, p. 19; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, PCIJ Rep. 1929, Series A, No. 21, pp. 124-25 (hereinafter "*Brazilian Loans*").

<sup>118</sup> The United States refers to the Separate Opinion of Judge Lauterpacht in the PCIJ decision in *Case Concerning the Guardianship of an Infant*, ICJ Rep. 1958, Sep. Op., p. 91. According to the United States, it is settled practice among States that international judicial bodies should accept, and treat as binding, questions of municipal law and practice decided by competent municipal courts. The United States refers to the PCIJ decision in *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ Rep. 1929, Series A, No. 20, p. 46; *Brazilian Loans*, Op. Cit., pp. 124-25.

<sup>119</sup> *Brazilian Loans*, Op. Cit., pp. 124-25.

<sup>120</sup> I. Brownlie, *Principles of Public International Law*, 4th ed., Clarendon Press (1990), p.41.

role in the instant case. As confirmed by the Appellate Body in *India - Patents*, once the Panel has determined the interpretation of the municipal law as a matter of fact, it is the Panel's function to determine the applicability of the relevant WTO agreements to those facts.<sup>121</sup> These are questions of law to be determined by the Panel in the first instance. In the present case, the Panel is called upon to determine the scope of Article VI and Article III of the GATT 1994.

3.156 The **European Communities** rejects the US contention that it does not consider US judicial decisions relevant for WTO purposes. The interpretation of the 1916 Act, i.e. determining what it means, including, notably, 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 present Panel. The Panel should of course look to the text of the statute and the pronouncements of US courts and other authorities to determine this question. By contrast, the question of what is the meaning and the extent of the disciplines laid down in Article VI of the GATT 1994, and the question of whether a Member's legislation with certain features is covered by and is in conformity with Article VI, are matters of WTO law to be determined by the Panel.

3.157 In reply to a question of the Panel regarding the relevance to the present case of the Appellate Body's report in the *India - Patents* case, the European Communities points out that that report is particularly relevant to the present case because it states in very clear terms the task to which the Panel is called. In that report, the Appellate Body distinguished between the possible objectives pursued when interpreting domestic law in international tribunals and other dispute settlement fora, including in WTO dispute settlement, and upheld the panel's review of India's legislation. The considerations developed in the *India - Patents* Appellate Body report also apply to the present dispute. As the Appellate Body found in that case, it is essential that the Panel carry out "an examination of the relevant aspects of [US] municipal law" in order to determine whether the US provisions are in conformity with the obligations laid down in the GATT 1994, the Agreement Establishing the WTO and the Anti-Dumping Agreement. As the Appellate Body pointed out, "[t]here [is] simply *no way for the Panel to make this determination without engaging in an examination of [domestic] law.*"<sup>122</sup> In the same vein as the European Communities has argued before the present Panel, the Appellate Body concluded that "[t]o 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."<sup>123</sup>

3.158 In response, the **United States** notes that the European Communities agrees that the nature of the 1916 Act is a question of fact for the Panel and that US judicial decisions interpreting the 1916 Act are dispositive for this purpose.

(ii) *Comments on the case law in general*

3.159 The **European Communities** asserts that US courts' views on whether the 1916 Act is a trade law or an antitrust law are far from consonant. It is sufficient to note that while some judgments, notably those of the District Court and the Circuit Court of Appeals in the *Zenith III* case, suggest that the 1916 Act is solely an antitrust law and not a trade law, this view has been strongly contested. For example, the District Court in *Geneva Steel* held:

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<sup>121</sup> The United States refers to the Appellate Body Report on *India - Patents*, Op. Cit., paras. 65-66.

<sup>122</sup> *India - Patents*, Op. Cit., para 66 (emphasis added).

<sup>123</sup> *Ibid.*, para 66.

"The 1916 Act means what its plain language says. In addition to its antitrust prohibitions, the Act has a protectionist component that prohibits conduct designed to injure the domestic steel industry."<sup>124</sup>

3.160 The European Communities points out that even those Courts that claim that the 1916 Act is solely an antitrust statute acknowledge that establishing that dumping took place remains the first prerequisite to apply the 1916 Act. For instance, in *In re Japanese Electronic Products II*, which described the 1916 Act as "complex antitrust litigation", the Court of Appeals for the Third Circuit held that:

"The 1916 Act makes it illegal to *dump* imported goods on the US market with the purpose of destroying or injuring US industry. [...] 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 US and the other of which is sold in the exporting country."<sup>125</sup>

3.161 The European Communities reiterates in this connection that the fact that the conduct targeted by a statute is defined by reference to discrimination between the price of the imported products and a benchmark which is generally the price of the product in the exporting country, is sufficient to determine that the statute is directed at dumping and is subject to the disciplines of Article VI of the GATT 1994. There is, therefore, no need to discuss the case law any further.

3.162 Nor does the European Communities accept that for the purposes of establishing the applicability of Article VI of the GATT 1994 it is necessary to examine the question whether the law protects competitors as distinct from competition, or whether the specific intent requirement relates to an intent to injure industry as opposed to an intent to injure competition. The language quoted above makes clear that US courts themselves have taken sharply different positions on these questions, and there is nothing to suggest that there will be greater clarity in the foreseeable future.

3.163 The **United States** contends that the prevailing view among US courts that have addressed the issue supports interpreting the 1916 Act as an antitrust-like statute. Contrary to the European Communities' suggestion that US courts have taken different positions, the prevailing view among US courts that have addressed the issue, which include the US Supreme Court in the *Cooper* case, is that the 1916 Act is an antitrust-like statute. It is their interpretation of the 1916 Act that, as a factual matter, must control in the present dispute. More fundamentally, the prevailing interpretation of the 1916 Act shows that the 1916 Act is not a statute that addresses the "dumping" and "injury" that would make it an anti-dumping statute within the meaning of Article VI of the GATT 1994. As the courts have recognized, the 1916 Act is designed to combat a specific form of international price discrimination. This price discrimination not only must involve substantial price differences but also must be undertaken commonly and systematically and with a specified intent. The 1916 Act is not directed at the simple price differences that cause material injury captured by the Anti-Dumping Agreement, nor is it based on the Anti-Dumping Agreement's notion of material injury to a domestic industry.

3.164 The United States notes that, in *Zenith III*, the US court decision on the interpretation of the specific provisions of the 1916 Act, the Court explained that the 1916 Act was part of the corpus of US antitrust law of the era and, therefore, any given provision generally should be interpreted in a manner consistent with antitrust principles.<sup>126</sup> Every other final and conclusive US court decision in

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<sup>124</sup> *Geneva Steel*, Op. Cit., p. 1214.

<sup>125</sup> *In re Japanese Products II*, Op. Cit, pp. 322 and 324 (emphasis added by the European Communities).

<sup>126</sup> The United States refers to *Zenith III*, Op. Cit., p. 1212, 1223.

this area, moreover, has supported the *Zenith III* analysis.<sup>127</sup> More specifically, these court decisions confirm that the 1916 Act is directed at a very different type of harmful business activity from that addressed by Article VI and the Anti-Dumping Agreement. While the Court of Appeals for the Third Circuit used the term "dumping" in connection with the 1916 Act, it apparently did so in a non-technical sense. Moreover, contrary to the European Communities' assertion, the Court did not state that a finding of "dumping" is itself a necessary precondition to apply the 1916 Act.

3.165 The **European Communities** adds that the domestic case law so heavily relied on by the United States is much less supportive of the US position than the United States would have the Panel believe. In most of the cases cited by the United States as identifying the 1916 Act as "antitrust-like", a careful reading reveals that the problem of categorization was raised as a step in resolving other issues very far removed from those now before the Panel. Among those other issues are: Is the "comparability" test under the 1916 Act the same or different from that under the Robinson-Patman Act?<sup>128</sup> What is the applicable prescription period for claims under the 1916 Act?<sup>129</sup> May an importer of competing products sue under the 1916 Act, or is standing to sue limited to domestic producers?<sup>130</sup>

3.166 The **United States** maintains its position that the prevailing view among US courts is that the 1916 Act is an antitrust-like statute, and it is their interpretation which must control in the present dispute.

(iii) *United States v. Cooper Corp.*

3.167 The **United States** asserts that the US Supreme Court, which is the highest court in the United States and the final arbiter of a statute's meaning, recognized the 1916 Act as an antitrust statute in *United States v. Cooper Corp.*<sup>131</sup> In that case, the Supreme Court expressly described the 1916 Act as "supplemental" to the Sherman Act, the United States' first and most basic antitrust law.<sup>132</sup>

3.168 The **European Communities** contests this US assertion. According to the European Communities, the issue in *Cooper* was whether the United States is a "person" within the meaning of Section 7 of the Sherman Act, entitled to sue for treble damages thereunder. What the Court did in examining the Sherman Act was to list what it described as "supplemental legislation". That list included "the antidumping provisions of the Revenue Act of 1916".<sup>133</sup> This statement from the Supreme Court should rather be interpreted as a confirmation that the 1916 Act is an anti-dumping act.

3.169 The **United States** disagrees with the European Communities that by calling the 1916 Act "supplemental" to the Sherman Antitrust Act, the foremost antitrust law in the United States, the Court thereby "confirmed" that it is an anti-dumping measure. In any event, it should be noted that the leading lower court case addressing how specific provisions of the 1916 Act should be interpreted

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<sup>127</sup> The United States refers to *Schwimmer v. Sony Corp.*, Op. Cit.; *Outboard Marine Corp. v. Pezetel*, Op. Cit.; *Jewel Foliage Co. v. Uniflora Overseas Florida*, Op. Cit.; *Western Concrete Structures Co. v. Mitsui & Co.*, Op. Cit.; *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, Op. Cit.; *Helmac I*, Op. Cit.; *Helmac II*, Op. Cit..

<sup>128</sup> The European Communities refers to *Zenith III*, Op. Cit..

<sup>129</sup> The European Communities refers to *Helmac I*, Op. Cit..

<sup>130</sup> The European Communities refers to *Isra Fruit Ltd. V. Agrexco Agr. Export Co.*, Op. Cit.; *Western Concrete Structures Co., Inc. v. Mitsui & Company (USA) Inc.*, Op. Cit.; *Jewel Foliage Company v. Uniflora Overseas Florida, Inc.*, Op. Cit.; *Schwimmer v. Sony Corp.*, Op. Cit.; *Outboard Marine Corporation v. Pezetel*, Op. Cit..

<sup>131</sup> 312 U.S. 600 (1941) (hereinafter "*Cooper*").

<sup>132</sup> The United States refers to *Cooper*, Op. Cit., pp. 608–610.

<sup>133</sup> The European Communities refers to *Cooper*, Op. Cit., pp. 608-610.

is *Zenith III*. It "conclude[d] [...], on the basis of the statutory text, that the 1916 Act is an antitrust, not a protectionist statute."<sup>134</sup>

(iv) *Zenith Radio Corp. v. Matsushita Electric Industrial Co. and In re Japanese Electronic Products Antitrust Litigation*

3.170 The **European Communities** asserts that in fact none of the cases referred to by the United States clearly establish, even for purely domestic purposes, let alone in a manner that would be relevant for the WTO, that the 1916 Act is an antitrust statute. The closest there is to such a case is the District Court's judgment in the *Zenith III* case. The issue in that case was whether products sold by the defendants in the United States and Japan were sufficiently comparable to give rise to a claim under the 1916 Act. The Court held that they were not, a judgment partially reversed by the Circuit Court of Appeals. The District Court's judgment is based on an analysis of the 1916 Act as having two features:

- (i) The 1916 Act is "intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914", with the result that the "like grade and quality" test of the Robinson-Patman Act should also be used for the 1916 Act.<sup>135</sup> The Court found that this test was narrower than the standard under the 1921 Antidumping Act, which permits a degree of discretion to the administering authority on this issue.
- (ii) The value of imported merchandise is determined by reference to the sales of "similar" merchandise, because the 1916 Act borrows the language from the 1913 Tariff Act.

3.171 The European Communities points out that the question whether the standards under the 1916 Act were more rigorous than those under the 1921 Antidumping Act arose because anti-dumping duties had been assessed against some of the products involved in the litigation under the 1916 Act, and the plaintiffs sought to rely on this to establish comparability.

3.172 The European Communities further recalls that the Court of Appeals agreed that the 1916 Act should be interpreted consistently with its purpose, which was "to prohibit anticompetitive pricing".<sup>136</sup> But it held that products could be comparable under the Act even though "products sold in Japan have technical components that make them work in Japan, and those sold in the United States have technical components that make them work in the United States. Considered in terms of consumer utility, i.e. consumer use and preference, marketability, and commercial interchangeability, the purchaser of a CEP [consumer electronic product] in Japan buys the same thing as the purchaser of a CEP in the United States: an operable CEP. Because the two consumers purchase the same thing, we would, absent other factors, expect them to pay the same price."<sup>137</sup>

3.173 The European Communities asserts that the analysis of the District Court concerning the relationship between the 1916 Act and the antitrust laws is not, however, convincing for WTO purposes or even, as the later US cases show, for purposes of US law. The following arguments support this contention:

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<sup>134</sup> *Zenith III*, Op. Cit., p. 1214 (emphasis added by the United States).

<sup>135</sup> The European Communities refers to *Zenith III*, Op. Cit., p. 1197.

<sup>136</sup> *In re Japanese Electronic Products II*, Op. Cit., p. 324.

<sup>137</sup> *Ibid.*, p. 325.

- (a) The legislative history materials invoked, dating from the period of 1916 to 1921, date from a period when there was no clearly accepted theoretical distinction between antitrust and protectionist legislation.
- (b) The "intent" of a law cannot determine whether it is subject to the discipline of Article VI of the GATT 1994. Otherwise, the discipline could be avoided simply by changing the label and explanation given to a law.
- (c) Nothing in the opinions of either the District Court or the Circuit Court of Appeals holds or suggests that the predation standards which are applicable under the antitrust laws, but which had not been fully developed at the time of the *Zenith* judgments, should also be read into the 1916 Act.

3.174 In the view of the **United States**, the nature of the 1916 Act was squarely addressed in the *Zenith III* case. In that case, the District Court specifically considered the character of the 1916 Act because, according to the Court, "the character of the statute is of salient concern in its construction."<sup>138</sup> To that end, the Court stated that its task "was to ascertain whether the Act was intended to be part of the corpus of antitrust law, or whether the Act was intended to be 'protectionist' legislation, as that term is used in discussion of tariff barriers to free trade."<sup>139</sup> After examining the similarities between the 1916 Act and other antitrust statutes, the Court concluded that the 1916 Act "*is an antitrust, not a protectionist statute.*"<sup>140</sup> The Court also explained that "[t]hat conclusion is strongly corroborated by the political and legal history of the relevant era, and the legislative history of the 1916 Act."<sup>141</sup>

3.175 The United States notes that the *Zenith III* Court also quoted the relevant congressional report, which states that the purpose of the 1916 Act was to adopt a provision "[i]n order that persons, partnerships, corporations, and associations in foreign countries, whose goods are sold in this country, may be placed in the same position as our manufacturers with reference to unfair competition [...]"<sup>142</sup> The Court also recounted how Representative Kitchin, the chairman of the House Committee on Ways and Means and the House sponsor of the 1916 Act, stated "in unambiguous terms" that the 1916 Act was "intended to do no more than to impose on importers the same pricing restrictions which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914."<sup>143</sup> The Court stated that

"Representative Kitchin, explaining his bill at the outset of its consideration by the full House of Representatives, explained:

We believe that the *same* unfair competition law which now applies to the domestic trader should apply to the foreign import trader."<sup>144</sup>

3.176 The United States also points out that the *Zenith III* Court further explained that, at the time of the enactment of the 1916 Act, "unfair competition" referred to the activities addressed by the antitrust laws of the era. The Court quoted the following explanations by the US Secretary of Commerce, William Redfield, in 1915:

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<sup>138</sup> *Zenith III*, Op. Cit., p. 1212.

<sup>139</sup> *Ibid.*, p. 1212.

<sup>140</sup> *Ibid.*, p. 1214 (emphasis added by the United States).

<sup>141</sup> *Ibid.*, p. 1214.

<sup>142</sup> *Ibid.*, p. 1221, quoting H.R. Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916).

<sup>143</sup> *Ibid.*, p. 1222.

<sup>144</sup> *Ibid.*, p. 1222, quoting 53 Cong. Rec. App. 1938 (1916) (footnote omitted; emphasis added by the United States).

"'Unfair competition' is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and takes steps to abate the evil wherever found. The door, however, is still open to "unfair competition" from abroad which may seriously affect American industries for the worse. It is not normal competition of which I speak, but abnormal. [...] If it shall pass beyond fair competition and exert or seek to exert a monopolistic power over any part of our commerce, we ought to prevent it."<sup>145</sup>

3.177 The United States further recalls that the *Zenith* Court ultimately concluded that it would be guided by the following principles when interpreting the 1916 Act:

"The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first [Woodrow] Wilson Administration, is that the statute should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Antidumping Act is a price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936. And, in order to be faithful to the intention of Congress to subject importers to the "same unfair competition law," *we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises.*"<sup>146</sup>

3.178 The United States notes, finally, that, on appeal, the Third Circuit Court of Appeals found that the 1916 Act was enacted "to do with unfair competition" and concluded that the "primary aim of the 1916 Act is to prohibit *anti-competitive pricing*".<sup>147</sup> It also held that the plaintiff must show a specific, not just general, predatory intent to injure or destroy an industry.<sup>148</sup>

3.179 In response, the **European Communities** maintains its view that there is no case law stating that plaintiffs in a 1916 action should provide evidence of predatory intent within the meaning of the Robinson-Patman Act and as defined by the *Brooke Group* ruling. The Third Circuit's 1983 opinion in the *Zenith* case, uses the 1916 Act's phrase "intent of destroying or injuring an industry in the United States" interchangeably with the phrase "specific predatory intent".<sup>149</sup> However, the word "predatory" is not used as a term of art incorporating the concepts of sales "below an appropriate measure of cost" and reasonable prospect of recoupment of losses. It is necessary to quote extensively from the opinion to show exactly what the Court means. The following passage of the opinion summarises the evidence which the Court considered sufficient to create a genuine issue of fact<sup>150</sup> on the issue of specific intent under the 1916 Act:

"To make out a claim that defendants conspired under the antitrust laws, plaintiffs need only show that defendants conspired with general intent to restrain trade [citations]. However, a showing of general intent does not necessarily constitute a prima facie showing of the specific intent required by the 1916 Act [...]. After reviewing the record in this case, we hold that evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether

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<sup>145</sup> Ibid., p. 1219, quoting Annual Report of the Secretary of Commerce 43 (1915).

<sup>146</sup> Ibid., p. 1223 (footnote omitted; emphasis added by the United States).

<sup>147</sup> *In re Japanese Electronic Products II*, Op. Cit., p. 324 (emphasis added by the United States).

<sup>148</sup> The United States refers to *In re Japanese Electronic Products II*, Op. Cit., pp. 327-328.

<sup>149</sup> The European Communities refers to *In re Japanese Electronic Products II*, Op. Cit., pp. 327-28.

<sup>150</sup> The European Communities notes that a "genuine issue of facts" is created where the court concludes that, based on the facts pleaded and the evidence presented before trial, the trier of fact could reach a conclusion favourable to the plaintiff.

defendants agreed to dump CEPs on the United States market with the specific intent to destroy or injure an industry in the United States.

Evidence supporting plaintiff's conspiracy theory would support an inference of predation in the United States market. This evidence is offered to show that the Japanese defendants agreed to stabilise prices at artificially high levels in Japan, insulating themselves by agreement from price-cutting competition at home. There is also evidence that defendants at the same time entered into an agreement to sell the fruits of the excess capacity of the Japanese CEP industry in the United States at low prices. We assume that the minimum price agreement, of which all the Japanese defendants were members, was mandated by the Ministry of International Trade and Industry [MITI]. Plaintiffs offer this evidence to show that defendants used the prices in that agreement as reference prices. Finally, plaintiffs point to evidence that defendants sought to conceal sales below MITI prices by a system of rebating.

The Japanese defendants also allegedly eliminated the possibility of price-cutting competition amongst themselves in the United States by agreeing to [certain customer allocation rules] [...]. By thus allocating the market, defendants allegedly brought to bear the full force of their low-price conspiracy on their United States competitors in an effort to drive them out of the market.

Furthermore, plaintiffs' experts [...] concluded that during the time of the alleged conspiracy, defendants operated an export cartel directed towards the United States with the specific intent to undersell their United States competitors and eventually to drive them out of business. [...]

We believe that the evidence in this summary judgment record creates a genuine issue of fact as to whether defendants conspired to dump CEPs in the United States with the specific intent to injure or destroy an industry in the United States [...]."<sup>151</sup>

3.180 In the view of the European Communities, there is clearly no reference to sales below costs or to recoupment of losses in the quoted passage. The evidence cited is presented as circumstantial evidence of intent to injure and destroy an industry, "injure and destroy" and "predation" being used in an every-day, non-technical sense.

3.181 The European Communities also notes in this connection that in the *Wheeling Pittsburgh* case, it is held that under the 1916 Act "predatory pricing" means something different than under antitrust law and that this distinction renders the predatory pricing element as defined by *Brooke Group* inapplicable to "dumping cases", basically because in the context of international trade the whole premise of *Brooke Group* is lacking. This is echoed in the following passage taken from a US law review note:

"[T]he recoupment requirement - at least as defined in *Brooke Group* - is too narrow in the international context because it fails to consider the ability of firms with a monopoly or oligopoly in their home markets simultaneously to recoup losses from dumping by increasing monopoly returns at home. Dumping in the US allows foreign producers to reap the economies of scale of producing at optimal capacity while restricting sales at home to protect their home market monopoly prices."<sup>152</sup>

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<sup>151</sup> *In re Japanese Electronic Products II*, Op. Cit., pp. 328-29.

<sup>152</sup> Note, Rethinking the 1916 Anti-Dumping Act, Op. Cit., pp. 1555-1572.

3.182 The European Communities points out that, in this view, dumping can allow recoupment through high prices in the domestic market, simultaneous to selling at low prices in an export market, which was exactly what the plaintiffs alleged in *Zenith III*. In this theory of dumping, there could not be any need to show a prospect of recoupment later in time as referred to in *Brooke Group*, since recoupment is already occurring at the same time in another market.

3.183 The **United States** concedes that the Third Circuit Court of Appeals did not further elaborate on the element of "specific predatory intent" in its 1982 opinion, but points out that the meaning of this element was in any event clarified in a subsequent decision. In 1986, the *Zenith* case was remanded from the US Supreme Court and the Third Circuit Court of Appeals again had an opportunity to consider the plaintiffs' 1916 Act claims. The United States considers that some background information is helpful to fully understanding the Third Circuit's 1986 decision.

3.184 The United States thus recalls that *Zenith* and another US company named NEU commenced litigation against Japanese television set manufacturers in the early 1970s, complaining of Sherman Act, Robinson-Patman Act, 1916 Act and other violations of federal law. During a series of decisions by the District Court and the Court of Appeals in the years 1980-83, the Sherman Act and 1916 Act claims were first dismissed by the District Court for lack of evidentiary support and then reinstated by the Third Circuit. The US Supreme Court then accepted the Sherman Act antitrust claims for review. Those claims were based on the theory that defendants had conspired to monopolise the US market by using excess profits in the Japanese home market to launch a predatory pricing attack on the United States. The Supreme Court reversed the Court of Appeals and remanded, stating that the plaintiff had not developed any credible proof of an illegal conspiracy to monopolise. The Supreme Court held that claims under the Sherman Act for conspiracies or attempts to monopolise through predatory low pricing could only be established by proof that such prices were below some appropriate measure of costs as well as evidence of a realistic expectation of recouping prior losses through future monopoly rents.<sup>153</sup> The Court of Appeals was ordered to consider its prior orders in the *Zenith* case in light of the Supreme Court's decision. On remand, the Third Circuit dismissed the plaintiffs' 1916 Act claims, like the Sherman Act claims, upon the basis that there was no evidence of the possibility of recoupment. The Court reasoned that "[s]ince the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping [1916] Act conspiracy claim must fail with it."<sup>154</sup>

3.185 According to the United States, the Supreme Court's decision in *Matsushita Electrical* actually laid the groundwork for the Supreme Court's decision in *Brooke Group* some 7 years later. In *Brooke Group*, the Supreme Court re-examined the so-called "primary line"<sup>155</sup> provisions of the Robinson-Patman Act and held that proof of recoupment was required in order to establish a predatory pricing claim. In doing so, the Supreme Court relied heavily upon its decision in *Matsushita Electrical*.

3.186 The United States therefore argues that, contrary to the European Communities' assertion that antitrust predation standards have never been read into the 1916 Act, in *In re Japanese Electronic Products III*, the 1916 Act claims were dismissed by the Court of Appeals based upon the same

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<sup>153</sup> The United States refers to *Matsushita Electrical*, Op. Cit.. The United States notes that the Supreme Court reiterated this standard in the same year in another antitrust case, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), deciding what constitutes proof of injury to competition in the Clayton Act context of mergers and acquisitions.

<sup>154</sup> *In re Japanese Electronic Products III*, Op. Cit., pp. 48-49.

<sup>155</sup> The United States recalls that "primary line" stands for adverse effects upon direct competitors of the defendant, as opposed to "secondary line," which refers to adverse effects on competitors of the defendant's favoured downstream customers.

predatory pricing/recoupment standards that were established for the Robinson-Patman Act by *Brooke Group* some years later. The Supreme Court's 1986 *Matsushita Electrical* decision was and remains a foundation of US antitrust jurisprudence on predatory pricing issues.

3.187 According to the **European Communities**, it is incorrect to deduce from the 1986 *In re Japanese Electronic Products III* decision that the legal standard applied there for the 1916 Act claims was the same as that applied by the Supreme Court to the Sherman Act claims. To understand the correct meaning of many of the pronouncements made by the various courts concerned, it is necessary to consider the detailed context in which they were made. The original complaint in the *Zenith III* case was based on both Sections 1 and 2 of the Sherman Act and the 1916 Act. The District Court granted summary judgment on both sets of claims.<sup>156</sup> The Court of Appeals reversed the judgments of the District Court on both sets of claims so that, if there had been no appeal to the Supreme Court, they would have been tried by the District Court. The Supreme Court, however, granted *certiorari* as regards the Sherman Act claims, but not the 1916 Act claims. It reversed the judgment of the Third Circuit Court of Appeals, with instructions that the case should be remanded to the Court of Appeals "for further proceedings in conformity with the opinion of this Court". The Court of Appeals, in its subsequent 1986 judgment, expressed some perplexity as to what this signified in relation to the 1916 Act claims. It first considered the consequences of the Supreme Court's judgment with respect to the Sherman Act claims which were the only ones that the latter had considered. It concluded that the District Court's summary judgment on the Sherman Act claims must be reinstated, using reasoning to which it is difficult to do justice without quoting it *verbatim*:

"The conspiracy on which the plaintiffs rely in support of their Sherman Act claims is a horizontal conspiracy among Japanese manufacturers of consumer electronic products to maintain artificially high prices in the Japanese home market to help support sales at low prices in the American export market, thereby injuring American manufacturers competing with them in the latter market. When this court first reviewed the summary judgment record, we concluded it permitted findings that there are high entry barriers in the Japanese home market; that the Japanese manufacturers have higher fixed costs and higher debt-equity ratios than their American counterparts; that the Japanese manufacturers, individually and in the aggregate, created higher plant capacities than could reasonably be absorbed by the Japanese home market, thereby creating an incentive to dispose of the excess capacity in a market outside Japan [citation]. We also concluded that there is direct and circumstantial evidence of an agreement to stabilize Japanese home market prices to realize the profits needed to support sales at low prices in the United States [citation]. Despite these conclusions, the Supreme Court conclusively held that the defendants 'had no motive to enter into the alleged conspiracy'. [citation] [...]. The Supreme Court [...] conclusively held that 'in light of the absence of any rational motive to conspire, neither [defendants'] pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial".' [citation] These holdings are the law of the case and are binding on this court. Consequently the plaintiffs are now foreclosed from arguing that there was a motive to enter into the alleged conspiracy. They are also foreclosed from arguing that the direct and circumstantial evidence to which this court referred in its prior opinion is sufficient to overcome a motion for summary judgment."<sup>157</sup>

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<sup>156</sup> The European Communities recalls that summary judgment is granted where the court concludes that, based on the facts pleaded and the evidence presented before trial, the trier of fact could not reach a conclusion favourable to the plaintiff (there is no "genuine issue of fact"), so the case should be dismissed without a trial.

<sup>157</sup> *In re Japanese Electronic Products III*, Op. Cit., p. 46.

3.188 The European Communities concedes that, in concluding that there was no motive to enter into the alleged conspiracy, the Supreme Court had invoked the antitrust theory of predation, including the theory which holds that true predation can only occur where sales are made below "an appropriate measure of costs" and there is a reasonable prospect of recoupment of the losses so incurred. But the European Communities notes that the Supreme Court had done this in the context of its plenary review of the evidentiary record to determine whether there was a genuine issue of fact which required rejection of the motion for summary judgment. The Supreme Court observed that the Japanese companies "have no motive to sustain [the losses resulting from selling in the US market at low prices] absent some strong likelihood that the alleged conspiracy in this country will eventually pay off" and added that "courts should not permit fact-finders to infer conspiracies when such inferences are implausible".<sup>158</sup> This holding was, and was treated by the Court of Appeals as, a holding regarding the facts presented in the case rather than one regarding the interpretation of the language of the Sherman Act.

3.189 The European Communities notes that it was in this context that the Third Circuit Court of Appeals' 1986 opinion came to reconsider the 1916 Act claims which the Supreme Court had not treated. The Court of Appeals said:

"Since it is now the law of the case that there is insufficient evidence of a conspiracy to price predatorily in the American market, it is necessary to reconsider our disposition of the Antidumping Act claim. As we explained in our earlier opinion, the Antidumping Act of 1916 includes as a substantive element in the cause of action a proviso that the acts complained of 'be done with the intent of destroying or injuring an industry in the United States' [citation]. The plaintiffs assert that the Japanese manufacturers individually and collectively have engaged in illegal dumping. *With respect to the conspiracy claims, we earlier held 'that the evidence supporting plaintiffs' theory that defendants entered into the alleged conspiracy also creates a genuine issue of fact as to whether defendants agreed to dump [consumer electronic products] on the United States market with the specific intent to destroy or injure an industry in the United States'.* [citation] *Since the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping Act conspiracy claim must fail with it. The Antidumping Act claims against individual Japanese manufacturers are equally vulnerable because we relied, in reversing summary judgment on those claims, on the evidence tending to show that the individual manufacturers joined in a conspiracy to sell in the American market at predatory prices [...].*"<sup>159</sup>

3.190 The European Communities contends that it is evident from the foregoing that the reasoning of the Court of Appeals is narrowly logical:

- (a) Based on a plenary review of the factual record, the Supreme Court has held that there is no triable issue of fact as regards the Sherman Act claims;
- (b) the Third Circuit Court of Appeals held in an earlier opinion that the evidence in the factual record in the case supporting the finding of a violation of the Sherman Act is the same evidence which could support findings of an agreement by the Japanese exporters to engage in conduct infringing the 1916 Act, and of individual infringements of the 1916 Act by them;

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<sup>158</sup> *Matsushita Electrical*, Op. Cit., at 593.

<sup>159</sup> *In re Japanese Electronic Products III*, Op. Cit., pp. 47-48 (emphasis added by the European Communities).

- (c) therefore, following the Supreme Court's ruling, and in light of its earlier insistence that the factual basis for the Sherman Act claims and the 1916 Act claims was identical, the Court of Appeals considered to be compelled to dismiss the 1916 Act claims.

3.191 For the European Communities, it is clear that the Third Circuit Court of Appeals in no way held that there is a general requirement, as a matter of statutory interpretation, to prove pricing below cost and a reasonable prospect of recoupment in relation to claims made under the 1916 Act where the claim is based on specific intent to destroy or injure a US industry. Further confirmation is given by the fact that no subsequent court has ever sought to give to the 1986 opinion of the Third Circuit in *In re Japanese Electronic Products III* case the meaning which the United States tries to give it.

3.192 In the view of the European Communities, the decisive feature of the *Zenith III* litigation is that in that specific case the 1916 Act claim had been discussed on the basis of the same evidence which was dismissed for the antitrust claim. The Third Circuit Court of Appeals concluded as follows:

"There is no *other* evidence tending to show that any of the defendants still in the case *dumped* consumer electronic products with the required intent to injure or destroy a United States industry."<sup>160</sup>

The European Communities considers that this statement contains the legal standard which is relevant for the 1916 Act: whether imports are dumped or not. Furthermore, the statement of the Court does not prove that a 1916 Act claim would not have been upheld if based on *other* evidence or arguments, and this irrespective of the fate of possible claims of antitrust nature. In other words, if there had been other evidence, the Third Circuit Court of Appeals could have found a violation of the 1916 Act even though there was no violation of antitrust law.

3.193 The **United States** submits that the European Communities' analysis of the 1986 *In re Japanese Electronic Products III* decision is untenable. In finding that the evidence in the record did not support a claim under the 1916 Act because it was the same evidence the Supreme Court had held to be legally insufficient under the Sherman Act, the Third Circuit Court of Appeals necessarily applied the same legal standard. The reason why the evidence was insufficient under the 1916 Act was because there were no facts in the record that could satisfy the legal standard applied by the Court. And the legal standard that was applied by the Third Circuit in that case was the same as the one applied by the Supreme Court to the Sherman Act claims - namely, that there must be evidence of below cost pricing and possibility of recoupment.

3.194 The United States further points out that even the author of the law review note which the European Communities attached to its second submission agrees with its reasoning. The author states:

"On remand, the Third Circuit failed to acknowledge any significant differences between a 1916 Act claim and a Sherman Act predatory pricing claim, holding that '[s]ince the Sherman Act conspiracy charged failed in the Supreme Court, our holding on the Antidumping Act conspiracy claim must fail with it.' *This decision implies that a 1916 Act defendant must have a reasonable prospect of recouping its lost profits before "predatory" intent can rationally be attributed to it.*"<sup>161</sup>

- (v) *Helmac Products Corp. v. Roth (Plastics) Corp.*

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<sup>160</sup> Ibid., p. 48 (emphasis added by the European Communities).

<sup>161</sup> Note, Op. Cit., p. 1559 (footnote omitted and emphasis added by the United States).

3.195 The **European Communities** contends that the *Helmac I* case is far from categorical on whether the "nature" of the 1916 Act is that of a classical antitrust law such as the Sherman Act or the Robinson-Patman Act.<sup>162</sup> The fact that the 1916 Act has objectives other than protecting competition is confirmed by the statement in *Helmac I* that "[b]esides injury to competition the Antidumping Act also provides a cause of action when defendants attempt to, among other things, injure an industry in the United States".<sup>163</sup>

3.196 The European Communities also notes that the Court in *Helmac I* said that :

"This does not mean that the Antidumping Act of 1916 must be interpreted consistently with the antitrust statutes in all situations. The language differences may have serious implications in other contexts. Such a possibility is recognised in *Zenith Radio*. 'The principal lesson which we draw from the legislative history of the 1916 Act [...] is that the statute should be interpreted *whenever possible* to parallel the unfair competition law applicable to domestic commerce'. [citation] Despite its characterisation of the Antidumping Act of 1916 as an antitrust statute, the *Zenith Radio* concluded that Congress intended to incorporate certain principles provided in the *Tariff Act* of 1913."<sup>164</sup>

3.197 Beyond the issue of the mere label of the 1916 Act, *Helmac I* confirms, in the view of the European Communities, such as was the case with *Zenith III*<sup>165</sup> that the existence of dumping, in the classical sense of the word, is a prerequisite for action under the 1916 Act :

"While *Zenith* is helpful for analysis of the applicability of anti-trust law to an *anti-dumping* case under the Antidumping Act of 1916 [...]."<sup>166</sup>

[...]

"In an *anti-dumping* claim, there are two competitors, one foreign and one domestic, operating on the same level of the marketing chain. [...] Under the Robinson-Patman Act there are two levels of activity at issue."<sup>167</sup>

3.198 The European Communities further notes that the Court in *Helmac I* takes the view that, unlike in Robinson-Patman Act cases, the requirement that sales must take place before action is taken should not stand in 1916 Act cases:

"There is no similar requirement in an *antidumping* claim. When one competitor unilaterally decides to lower his price with the requisite intent, that creates the

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<sup>162</sup> The European Communities recalls that the main point in *Helmac I* was for the Court to decide which statute of limitations is applicable to the 1916 Act, i.e. the 4 year statute of limitations of the Clayton Act or the 5 year statute of limitation of the Tariff Act.

<sup>163</sup> *Helmac I*, Op. Cit., p. 575-576.

<sup>164</sup> *Helmac I*, Op. Cit., p. 566 (emphasis added by the European Communities)

<sup>165</sup> The European Communities recalls that the court in *In re Japanese Electronic Products II*, stated at pp. 321 and 324, that "the 1916 Act makes it illegal to dump imported goods on the US market with the purpose of destroying or injuring US industry. [...] 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 US and the other of which is sold in the exporting country."

<sup>166</sup> *Helmac I*, Op. Cit., p. 573 (emphasis added by the European Communities).

<sup>167</sup> *Ibid.*, p. 574 (emphasis added by the European Communities).

violation. Thus I conclude that the actual sales requirement of a Robinson-Patman claim cannot be transferred to an *antidumping* claim."<sup>168</sup>

3.199 The European Communities infers from these quotations that

- (a) *Helmac I* and also *Zenith III* consider that the existence of dumping, i.e. price discrimination between two different national markets, is essential to undertake action under the 1916 Act;
- (b) *Helmac I* rather considers that the underlying objective of the 1916 Act is to counter dumping;
- (c) therefore *Helmac I* considers that there are differences of interpretation and application between the 1916 Act and classical antitrust rules such as the Robinson-Patman Act, i.e. in the *Helmac I* case regarding whether an offer for sale is sufficient to trigger action.

3.200 The **United States** considers unsustainable the European Communities' claim that the *Helmac I* Court found that the "underlying objective of the 1916 Act is to counter dumping." The decision merely reflects that the District Court found multiple statutory objectives, all of which, broadly speaking, can be considered to come within "competition policy". Moreover, a review of the decision shows that the European Communities' assertion is contradicted by the facts. As the European Communities has noted, the *Helmac I* Court, citing the *Zenith III* decision, exhorted that the 1916 Act, "should be interpreted whenever possible to parallel the 'unfair competition' law applicable to domestic commerce."<sup>169</sup> In any event, the *Helmac I* Court's statement that the 1916 Act is not required to be interpreted consistent with other antitrust laws is not relevant to the Panel's analysis. The relevant point is that the 1916 Act is susceptible to a WTO-consistent interpretation and, in fact, has been so interpreted to date.

(vi) *Geneva Steel Corp. v. Ranger Steel Supply Corp. and Wheeling-Pittsburgh v. Mitsui & Co.*

3.201 The **European Communities** argues that the *Geneva Steel* and *Wheeling-Pittsburgh* cases have confirmed the close link between the 1916 Act and the Trade Act of 1930 as amended, which provides for application of anti-dumping duties. For example, in the most recent case, the *Wheeling-Pittsburgh* case, the Court held:

"Under the United States Constitution, only Congress and the President may regulate international trade. Congress has enacted both [the 1916 Act] as well as the Trade Act of 1930, as amended, [citation]. [The 1916 Act] permits any party injured by international dumping to bring a lawsuit in federal court and recover triple the amount of damages suffered, together with attorney's fees. [...] The Trade Act permits the United States International Trade Commission, upon a finding of dumping, to file a complaint on behalf of an entire industry. Based upon a finding of dumping, the United States Commerce Department is authorized to increase the tariff charged on any unlawfully dumped foreign goods in an amount which would raise the cost of the imported product to the fair market price."<sup>170</sup>

3.202 The European Communities further argues that, unlike the other cases quoted by the United States, the *Geneva Steel* and *Wheeling-Pittsburgh* cases squarely address the nature of the 1916 Act,

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<sup>168</sup> *Helmac I*, Op. Cit., p. 574 (emphasis added by the European Communities).

<sup>169</sup> *Ibid.*, p. 566.

<sup>170</sup> *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 1999 WL 38856, (S.D. Ohio), 22 January 1999.

and do so from the point of view of whether antitrust predation standards should be read into the specific requirements of the 1916 Act. They hold that such standards need not be met as regards the specific intent to destroy or injure a US industry. The *Zenith III* case did not hold to the contrary. The earlier case law does discuss the legislative intent of Congress, but not, as the United States claims, "the interpretation of the intent element of the 1916 Act". Consequently, the 1916 Act has a protectionist component that prohibits dumping designed to injure the domestic industry. The following passage of the *Geneva Steel* decision confirms this:

"[T]he language of the Act itself, in addition to prohibiting antitrust violations, clearly and literally prohibits non-antitrust and no-predatory pricing conduct. By the words it chose, Congress protected United States industries from unfair dumping, whether the dumper possessed predatory intent or not."<sup>171</sup>

3.203 The European Communities does acknowledge, however, that both District Court rulings establish a distinction between "dumping undertaken with the intent to injure industry", i.e. the first three intents, and "dumping undertaken with anti-competitive predatory intent", i.e. the last two intents. Both Courts admit that the last two types of intent under the 1916 Act, i.e. intent to restrain or monopolise commerce, have similarities to domestic antitrust law and do not exclude that the *Brooke Group* requirements may well apply here. They do not further examine this issue, however, as these grounds were not invoked by the respective plaintiffs. Both Courts also point out that their reasoning is supported by the majority of case law, particularly *Helmac I*, though with the exception of the *Zenith III* case.

3.204 The European Communities argues, however, that this distinction made by both District Courts between two kinds of dumping is based exclusively upon concepts and principles of US antitrust law, namely the "intent" that the defendants must be shown to have. Under Article VI of the GATT 1994, dumping is not a matter of intent. It is a matter of selling at a price lower than the one in the country of exportation, and that is precisely the conduct that needs to be shown in the first place under the 1916 Act. The showing of intent under the 1916 Act only comes after "dumping" has been established.

3.205 In response, the **United States** first of all notes that it is the view of the *Geneva Steel* preliminary decision that the 1916 Act has five alternative intents. This does not represent the view of the highest court in the United States to have considered this issue.

3.206 The United States further notes, as a threshold matter, that the *Geneva Steel* and *Wheeling-Pittsburgh* decisions - district court rulings on motions to dismiss - are interlocutory decisions and thus 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. Both cases are currently in the discovery stage, which means that no trial has taken place. A federal district court decision on a motion to dismiss is considered as "final" only once all of the claims in the case have been tried or otherwise adjudicated and the district court has entered judgment.<sup>172</sup> At that point, the district court decision becomes "appealable," meaning that a party to the case may take an appeal to a circuit court of appeals. If no party appeals the case, the district court's decision becomes "conclusive" and therefore binding on the parties. However, even a final district court decision is not binding on other district courts or appellate courts and it does not have persuasive value unless it has been soundly reasoned.<sup>173</sup> If a party does appeal the case, the appellate court, in turn, will conduct a review and

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<sup>171</sup> *Geneva Steel*, Op. Cit., p. 1217

<sup>172</sup> The United States refers to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949); *International Society for Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253, 254-55 (2d Cir. 1984).

<sup>173</sup> The United States refers to *Threadgill v. Armstrong World Industries Inc.*, 928 F.2d 1366, 1371 (3d Cir. 1991).

either affirm, modify or reverse the district court's decision. The appellate court's decision then is the "conclusive" decision in the case, assuming that it is not subsequently reviewed by the US Supreme Court.<sup>174</sup> A "conclusive" appellate court decision is binding precedent on all of the district courts in the appellate court's circuit, and on other panels of judges sitting in the same court of appeals, but offers only persuasive precedent to courts in other circuits.<sup>175</sup>

3.207 The United States considers, moreover, that, under WTO jurisprudence, it is premature for the European Communities to base any aspect of its challenge to the 1916 Act under Article VI:2 of the GATT 1994 on the *Geneva Steel* or *Wheeling-Pittsburgh* decisions. Just as with discretionary authority which the executive may or may not exercise,<sup>176</sup> the mere possibility that the District Courts' decisions in those cases will become final and conclusive under US law is not enough to allow either decision to form any basis of a Panel finding that the 1916 Act is inconsistent with Article VI:2 of the GATT 1994. As long as it remains possible that either the District Court or the Circuit Court, on appeal, will interpret the 1916 Act in a manner that is entirely consistent with Article VI:2 of the GATT 1994, neither decision should be considered.

3.208 The United States also is of the view that, even if the Panel were to consider them, it may only consider how these preliminary decisions affect the prevailing interpretation in the United States. It cannot consider whether these decisions constitute violations themselves because the Panel's terms of reference do not include decisions as measures being challenged. The European Communities has challenged the 1916 Act as such, and not any specific application of the 1916 Act.

3.209 The United States also argues that, in any event, the *Geneva Steel* and *Wheeling-Pittsburgh* decisions do not treat the 1916 Act as an anti-dumping statute. More specifically, these decisions do not interpret the 1916 Act in a way that renders it a statute addressing the "dumping" and "injury" condemned by Article VI. These decisions differ from the other court decisions only in their more expansive reading of one element of a 1916 Act claim, i.e. the element setting forth the requisite intent. In fact, in *Wheeling-Pittsburgh*, the Court ruled that a showing of "predatory" intent is required although it is not necessary to show the possibility of recoupment. Under the *Geneva Steel* decision, a complainant could show either the traditional antitrust predatory intent or an intent to injure a US industry. Just like all of the other court decisions, however, both Courts require the complainant to show intent as well as each of the other elements of a 1916 Act claim. Thus, even under these decisions, the basic differences between the 1916 Act and the Anti-Dumping Agreement remain.

3.210 The United States contends, finally, that the conclusion that the 1916 Act is not an anti-dumping statute remains sound even if the 1916 Act could be considered to have a "protectionist" component. To begin with, the concept of "protectionism" here means a focus on the protection of industry. This component of the 1916 Act still can be said to reflect antitrust standards of earlier eras, such as those found in the 1936 Robinson-Patman Act. Indeed, many governments, including the United States, continue to maintain statutes today that in some ways protect competitors. The fact that a measure may include protection for competitors does not remove the measure from the category of antitrust laws.

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<sup>174</sup> The United States refers to *Metropolitan Water Co. v. Kaw Valley Drainage District*, 223 U.S. 519, 524 (1912).

<sup>175</sup> The United States notes that there are twelve federal court circuits in the United States. Each district court is assigned to a circuit for purposes of appeal.

<sup>176</sup> The United States refers to, e.g., *United States - Tobacco*, Op. Cit., paras. 118 and 121; *United States - Restrictions on Imports of Tuna*, unadopted, dated 3 September 1991, DS21/R, paras. 5.20-5.21; *United States - Superfund*, Op. Cit., para. 5.2.9.

3.211 The **European Communities** notes that, according to the United States, the *Geneva Steel* and *Wheeling-Pittsburgh* rulings are not "authoritative". However, the United States cannot dispute, and does not deny, the fact that they are not merely hypothetical and that they are there. For the European Communities, that is sufficient to make them relevant. Also, the mere fact that these cases depart from what the United States appears to describe as being the most authoritative ruling as yet, i.e. *Zenith III*, rather reveals the unauthoritative nature of this case.

3.212 The **United States** replies that, even if the two preliminary decisions in *Geneva Steel* and *Wheeling-Pittsburgh* are considered by the Panel in the context of analysing possible interpretations of the 1916 Act, they do not change the fact that the 1916 Act is susceptible to an interpretation that is WTO-consistent. This is demonstrated through the *Zenith III* line of cases as well as the other decisions applying antitrust principles to decide the issue at hand. In any event, the *Geneva Steel* and *Wheeling-Pittsburgh* decisions differed from the *Zenith III* line of cases only in their characterization of the intent requirement. This interpretation, however, does not transform the 1916 Act into an anti-dumping statute. Both Courts still required that the requisite specific intent to injure or destroy be pleaded as well as the other elements of the 1916 Act. In *Wheeling-Pittsburgh*, the Court expressly described the intent required as "predatory intent".<sup>177</sup> Furthermore, neither Court required that the plaintiff plead and prove material injury to the domestic industry as required in dumping.

#### E. VIOLATION OF ARTICLE VI:2 OF THE GATT 1994

##### 1. General Arguments

3.213 The **European Communities** submits that the WTO anti-dumping rules, laid down in Article VI of the GATT 1994 and in the Anti-Dumping Agreement, establish a comprehensive and complete multilateral regime to define and address the issue of dumping in international trade. This comprehensive nature also pertains to the regulation of the measures that can be taken once injurious dumping within the meaning of Article VI of the GATT 1994 is found. In that case, as is made clear by Article VI:2 of the GATT 1994, "[i]n 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". This exclusive character cannot but be clearer if the several provisions included in Article VI are examined together. That Article, *inter alia*, assigns a specific function to anti-dumping measures and repeatedly sets precise maximum quantitative limits to their permissible level. The function of anti-dumping measures is to "offset" dumping or "prevent" dumping in the case of threat of material injury. This is then further emphasized in Article 9.1 of the Anti-Dumping Agreement, where it is suggested to limit the duty to the amount necessary to offset the *injury* suffered by the domestic industry, which may be less than the full dumping margin. The imposition of duties is additionally limited in those paragraphs of Article VI of the GATT 1994 which prohibit parties from cumulating anti-dumping and countervailing duties to counter the same practice. It cannot go unnoticed that all those limitations and qualifications applying to the imposition of anti-dumping duties would have absolutely no purpose and absolutely no result if WTO Members were free to choose any other type of measure and then with no maximum limits as to amount and impact.

3.214 The European Communities recalls that the remedial measures provided for by the 1916 Anti-Dumping Act are treble damages and/or criminal penalties. These remedies are not duties. They do not fall into the only type of measures allowed under multilateral anti-dumping rules to counter dumping practices, nor are they authorised by other WTO provisions.

3.215 The European Communities contends that recognition of the fact that duties are the sole allowed remedies was again made by the US authorities. The testimony of USTR General Counsel Alan Holmer to the US Senate Finance Committee on 18 July 1986 contains the following portions:

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<sup>177</sup> The United States refers to *Wheeling-Pittsburgh*, Op. Cit., p. 604.

"The Antidumping Code, however, expressly *limits the* remedy for dumping to the prospective collection of antidumping duties *to offset the margin* of dumping. Article 16 of the Code states: 'No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.' *This language prohibits the use of additional sanctions, such as fines, embargoes, imprisonment or other draconian measures.*

[...]

It has also been argued that "the Code also does not affect other actions that are not in the nature of 'duties' that may affect goods that are 'dumped.'" The thrust of this argument is that if a government chooses to address dumping through the imposition of duties, it must do so under the procedures set out in the Antidumping Code, but at the same time, a government is free to use any other means that it chooses to punish dumping. This interpretation of Article 16, however, appears rather implausible if one considers its consequences. Under this view, *a foreign government would be perfectly within its rights to convict an American businessman of dumping and imprison him for a period of 10 years, since the government would have a right to use whatever alternative sanctions for dumping it pleased.*

*It follows that Article 16 must stand for the proposition that a government can provide its citizens one, and only one, remedy for dumping. That remedy is the collection of duties in a manner consistent with the Antidumping Code. We believe that our reading flows logically from the letter and spirit of the GATT and the Antidumping Code. It also follows that S. 1655 would violate the Code by imposing additional sanctions on top of normal antidumping duties.*

*While the same criticism can be leveled at the Antidumping Act of 1916, that Act was 'grandfathered' by the Protocol of Provisional Application when the U.S. joined the GATT in 1947."<sup>178</sup>*

The European Communities adds that Article 16 of the 1979 Anti-Dumping Code is identical to Article 18 of the WTO Anti-Dumping Agreement.

3.216 The European Communities maintains that the compensatory, remedial objective of the measure authorized in Article VI of the GATT 1994 assumes that only a quantifiable price measure may offset a precisely quantified dumping margin or, possibly, a lower injury level. In other words, only a measure increasing the costs of the exporters up to the point of somehow forcing them to raise prices on their export markets where they have been found to dump is really fit to "offset" dumping. The remedial objective cannot be served by criminal liability and sanctions when their result is to "deprive of liberty" one of the economic actors involved in trade in foreign goods, such as importers in the case of the 1916 Act. As to pecuniary criminal sanctions, even if they were to be within the maximum level imposed by Article VI of the GATT 1994, the additional criminal liability element involved is already beyond the remedial objective described in Article VI and in the Anti-Dumping Agreement. It will obviously also be beyond that objective whenever the level of the penalty exceeds the dumping margin.

3.217 The **United States** argues that, for the European Communities' claim under Article VI:2 to succeed, it must establish two points: first, it must establish that Article VI:2 provides that anti-

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<sup>178</sup> Testimony of 18 July 1986 of USTR General Counsel Alan Holmer to the US Senate Finance Committee, pp. 4-5 (emphasis added by the European Communities).

dumping duties are the sole remedy for dumping; and, second, it must establish that the 1916 Act is the type of measure governed by Article VI and the Anti-Dumping Agreement. The European Communities' claim under Article VI:2 is defective from the outset because nothing in Article VI:2 addresses whether anti-dumping duties are the sole remedy for dumping. Even assuming *arguendo* that Article VI:2 provides the sole remedy for dumping, the European Communities' claim still fails because the 1916 Act, as a statute directed at anti-competitive conduct, is not governed by Article VI of the GATT 1994 or the Anti-Dumping Agreement.

## 2. The Text and Relevant Context of Article VI:2 of the GATT 1994

3.218 The **United States** is of the view that the European Communities' claim fails at the outset because nothing in Article VI:2 of the GATT 1994<sup>179</sup> addresses whether anti-dumping duties are the exclusive remedy for dumping.

3.219 The United States notes that paragraph 2 simply states that a Member "may" levy an anti-dumping duty to offset or prevent dumping. It does not in any way suggest that remedies for dumping other than anti-dumping duties are prohibited. For example, it does not state that a Member "may only" levy anti-dumping duties. If the word "only" had been intended, the text could and would have said so. The European Communities, while focusing on the phrase "in order to offset or prevent dumping," ignores the fact that the directive in the paragraph is permissive and unqualified.

3.220 In the view of the **European Communities**, the United States is reading Article VI:2 of the GATT 1994 out of context and contrary to its clear object and purpose. A provision in an Agreement such as the GATT 1994 stating that something "may" be done does not necessarily mean that any alternative action, which could be more or less restrictive of trade, is in no way restricted. Whether it has this meaning or whether it implies on the contrary that no other action may be taken depends on the context in which the word "may" is being used.

3.221 The European Communities points out that the context of Article VI comprises Articles III to XIX of the GATT 1994, all of which regulate problems in international trade. Thus, Article VI regulates the action that members may take against dumping and the conditions under which they may take this action. Article VI:2 expressly states that the action which may be taken is to levy an anti-dumping duty. It is contrary to the object and purpose of Article VI to argue, as the United States appears to, that nothing in Article VI restricts the ability of members to take other action to prevent dumping, for example imprisoning the importers.

3.222 The **United States** considers that the European Communities' argument relating to the meaning of the term "may" is defective because the European Communities disregards the immediate context provided by paragraphs 3 to 6 of Article VI and instead argues that the context of Article VI comprises Articles III to XIX of the GATT 1994, without, however, explaining why this turns "may" in Article VI:2 into "shall" or "may only."

3.223 In the opinion of the United States, it is significant that the use in Article VI:2 of the permissive term "may" contrasts with the four immediately following paragraphs of Article VI, where express prohibitions on the imposition of duties are stated. In each of these paragraphs, Article VI

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<sup>179</sup> Paragraph 2 of Article VI 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. For purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1."

uses the mandatory term "shall" and clearly conveys what is not permitted. For example, paragraph 5 provides as follows:

"No product of the territory of any Member imported into the territory of any other Member *shall* be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization."<sup>180</sup>

3.224 The United States notes that paragraph 6(a) of Article VI uses a similar formulation:

"No contracting party *shall* levy any anti-dumping [...] duty on the importation of any product of the territory of another Member unless it determines that the effect of the dumping [...] is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."<sup>181</sup>

3.225 The United States asserts, moreover, that the only WTO provisions that arguably address the issue of any possible limitations on the remedies available for dumping are found not in the GATT 1994, but rather in the Anti-Dumping Agreement. The United States does not, however, examine the possible relevance of any provisions of the Anti-Dumping Agreement because the European Communities has not brought any claims under those provisions before the Panel.

3.226 The **European Communities** responds that words must always be interpreted in context. The relevant context in the present case is Article VI of the GATT 1994, which seeks to regulate the problem of dumping, just as other GATT 1994 provisions regulate other problems. The US approach to context is simplistic. It merely points out that paragraphs 3 to 6 of Article VI contain the word "shall" and Article VI:2 does not. It pays no attention to the structure of Article VI. Article VI of the GATT 1994 starts off in paragraph 1 with a definition of a problem, then specifies the action that may be taken to combat it and then imposes certain restrictions on the imposition of those duties.

3.227 The European Communities further contends that the only reason why paragraph 2 of Article VI uses the word "may" is because it was not intended that WTO Members should be obliged to impose anti-dumping duties, i.e. to take action against dumping at all. The ordinary meaning of Article VI:2 when read in context and having regard to the structure of Article VI is that other remedies than duties, such as fines and treble damages, cannot be imposed.

### **3. The Negotiating History**

3.228 The **European Communities** asserts that its view that duties are the sole allowed remedies is borne out by the negotiating history of Article VI of the GATT 1994. According to the European Communities, despite attempts by some contracting parties to the GATT 1947 to provide for other types of offsetting measures, both during the preparatory work and the Review Session of 1955, Article VI was intentionally limited to anti-dumping duties.

3.229 The European Communities points out that the original text of Article VI of the GATT 1947 - that is, the text actually adopted in 1947 - did contain an explicit prohibition of anti-dumping measures other than duties. The structure of the original Article VI was different from what it is now. If the original text is examined, it is seen that it started with a prohibition of duties above a certain

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<sup>180</sup> Emphasis added by the United States.

<sup>181</sup> Emphasis added by the United States.

level of remedy authorized<sup>182</sup> and ended with the explicit statement that duties were the sole allowed remedy.

3.230 The European Communities recalls that the revised text, which originated in Article 34 of the Havana Charter, followed a different drafting technique. Under the revised approach, an explicit rule making duties the exclusive remedy was no longer considered necessary. It is instructive, in this regard, to recall the explanation given by the 1948 Working Party on "Modifications to the General Agreement" for changing the text of Article VI of the GATT 1947. The Report of the Working Party notes in this regard:

"While agreeing that there is no substantive difference between Article VI of the General Agreement and Article 34 of the Charter, the working party recommends the replacement of that article, as the text adopted at Havana contains a useful indication of the principle governing the operation of that article and constitutes a clearer formulation of the rules laid down in that article. The working party, endorsing the views expressed by [the Subcommittee on Article 34 at the Havana Conference] 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."<sup>183</sup>

3.231 The European Communities takes the view that, by expressly stating that there was no substantive change, the Working Party has made it quite clear that there was no intention, in changing the text of Article VI of the GATT 1947, to allow other remedies than duties against dumping.

3.232 The European Communities also recalls another relevant statement of the same Working Party. The Report of the Working Party notes that it "[...] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the General Agreement."<sup>184</sup> In doing so, it confirmed, in the view of the European Communities, the "definite understanding" of the relevant Subcommittee of the Havana Conference, from which the text of Article VI was taken. Therefore, it results not only from the negotiating history of the GATT 1947, but also from subsequent interpretation that duties are the only authorized remedy to counter dumping practices under Article VI of the GATT 1994.

The European Communities further points out that the United States itself acknowledged that the negotiating history of Article VI confirms the exclusivity of the duty remedy. As can be seen from the report of the panel on *United States - Anti-Dumping Duties on Salmon from Norway*, the United States argued before that panel as follows:

"Regarding the negotiating history of the General Agreement, the United States also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit imposition

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<sup>182</sup> The European Communities refers to the language of the original text of Article VI:1 which reads:

"No anti-dumping duty shall be levied on any product of the territory of any contracting party imported into the territory of any other contracting party in excess of an amount equal to the margin of dumping under which such product is being imported [...]."

<sup>183</sup> BISD II/41, 42, para. 12.

<sup>184</sup> Reprinted in GATT, *Analytical Index: Guide to GATT Law and Practice* (1994), pp. 216-217.

of tougher countermeasures than merely offsetting duties. However, in the end the Article VI remedy *had been limited to such duties*.<sup>185</sup>

3.233 The **United States** disputes that the negotiating history confirms the European Communities' view. The negotiating history of Article VI shows that GATT 1947 originally included a paragraph in Article VI - paragraph 7 – which provided in pertinent part:

"No measures other than anti-dumping [...] duties shall be applied by any contracting party [...] for the purpose of offsetting dumping [...]."<sup>186</sup>

3.234 The United States recalls, however, that paragraph 7 existed for only about one year. Article VI was modified soon after GATT 1947 came into force, with the initial relevant discussions on this matter taking place in early 1948 during the so-called "Havana Conference," which addressed the draft charter of the International Trade Organization (hereinafter the "ITO"), a document which was similar in many respects to the GATT 1947. At that time, members of the Subcommittee on Article 34 considered a provision in the draft ITO charter, identical to the original paragraph 7 of Article VI of the GATT 1947, and decided to remove it. The record of these discussions explains:

"The Subcommittee agreed to the deletion of paragraph 6 of the Geneva draft which expressly prohibited the use of measures other than anti-dumping or countervailing duties against dumping or subsidization. It did so with the definite understanding that measures other than compensatory anti-dumping [...] duties may not be applied to counteract dumping [...] except insofar as such other measures are permitted under other provisions of the Charter."<sup>187</sup>

3.235 The United States further notes that, later that year, during the Second Session of the GATT 1947, the Working Party on Modifications to the General Agreement referenced the work of the ITO Subcommittee on Article 34 and agreed, *inter alia*, to replace the entire then-existing Article VI with its counterpart under the draft ITO charter, which in final form contained no provision like paragraph 7 of Article VI of the GATT 1947. In a report, the Working Party explained:

"The working party, endorsing the views expressed by [the ITO Subcommittee on Article 34], agreed that measures other than compensatory anti-dumping [...] duties may not be applied to counteract dumping [...] except insofar as such other measures are permitted under other provisions of the General Agreement."<sup>188</sup>

3.236 The United States points out that, many years later, a paragraph similar in many respects to the original paragraph 7 of Article VI of the GATT 1947 appeared in Article 16.1 of the Tokyo Round Anti-Dumping Code. It provided:

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

3.237 The United States also recalls that in a footnote to Article 16.1 it was stated that Article 16.1 "is not intended to preclude action under other relevant provisions of the General Agreement, as

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<sup>185</sup> *United States – Anti-Dumping Duties on Salmon from Norway*, Op. Cit., para. 75 (footnote omitted; emphasis added by the European Communities).

<sup>186</sup> Reproduced in GATT, *Analytical Index: Guide to GATT Law and Practice*, 6<sup>th</sup> ed. (1995), p. 238.

<sup>187</sup> Reports of Committees and Principal Sub-Committees, ICITO I/8, p. 74, para. 25 (Geneva, September 1948), quoted in GATT, *Analytical Index: Guide to GATT Law and Practice*, Op. Cit., p. 238.

<sup>188</sup> BISD II/41, 42, para. 12.

appropriate." A provision virtually identical to Article 16.1 of the Tokyo Round Anti-Dumping Code now appears in the Anti-Dumping Agreement, in Article 18.1, except that now it refers to the GATT 1994 instead of the GATT 1947.

3.238 In the **European Communities'** view, the introduction of an explicit prohibition of measures other than duties in Article 16.1 of the Tokyo Round Anti-Dumping Code cannot be argued to have changed the meaning of Article VI of the GATT 1947.<sup>189</sup> On the contrary, it confirmed that meaning. Thus, there does not appear to be a rule in Article VI that is not either referred to or repeated in the Code. The reason for this was that the Code and the GATT 1947 were distinct legal sets of rules, with different membership and separate means of enforcement. A claimant under the Code needed to be able to invoke any rule in Article VI. If repetition was necessary for the express provisions of Article VI, it was *a fortiori* necessary for those which had been recognized to be implied in such article. In the light of the foregoing it is therefore not surprising that the Code repeated explicitly the implicit Article VI rule that duties are the exclusive remedy for dumping.

3.239 The European Communities further submits that when the Tokyo Round Code was modified and transposed into the WTO Agreement's text, what happened was a conversion of an earlier treaty, and the non-removal rather than insertion of a clause. It would have been a rather unusual step to remove an explicit clause from an agreement on the basis that the point was implicit. It would have looked rather like a deliberate repeal of the rule.

3.240 The **United States** replies that, in any event, the negotiating history of Article VI does not indicate which of the provisions in Article VI of the GATT 1947 is the one that made the original paragraph 7 unnecessary by implicitly establishing that anti-dumping duties are the exclusive remedy for dumping. There is no indication that the provision in question is paragraph 2.

#### **4. The Relevance of Article 18.1 of the Anti-Dumping Agreement**

3.241 The **European Communities** contends that the adoption of the WTO Anti-Dumping Agreement has not changed the content of Article VI in respect of the limitation to duties because it includes no derogation or conflicting rule on this point. To the contrary, the WTO Anti-Dumping Agreement, and specifically Article 18.1 thereof, does nothing but confirm Article VI in this respect.

3.242 The European Communities therefore considers that 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 practices.

3.243 The **United States** rejects the European Communities' argument that Article VI:2 of the GATT 1994 makes anti-dumping duties the exclusive remedy for dumping and that it is therefore sufficient for the Panel to rely solely on that provision for this proposition. Moreover, the European Communities' view that Article 18.1 of the WTO Anti-Dumping Agreement "does nothing but confirm Article VI in this respect" is also wrong.

3.244 The United States argues, first, that the negotiating history of Article VI does not indicate which of the provisions in Article VI of the GATT 1947 is the one that made the original paragraph 7 unnecessary by implicitly establishing that anti-dumping duties are the exclusive remedy for dumping. There is no indication that the provision in question is paragraph 2.

3.245 The United States notes, second, that during the Tokyo Round, a provision wholly separate from Article VI:2 of the GATT 1947 - Article 16.1 of the Tokyo Round Anti-Dumping Code - was

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<sup>189</sup> The European Communities refers to J. H. Jackson, World Trade and the Law of GATT, The Bobbs-Merrill Co. (1969), pp. 405-408, 420.

adopted to deal directly with the issue of whether, and to what extent, anti-dumping duties are the exclusive remedy for dumping. This provision, like its successor, Article 18.1 of the WTO Anti-Dumping Agreement, uses carefully crafted language to express the intended limitation regarding remedies other than anti-dumping duties, and it is much more precise than any rule that could be derived from the negotiating history of Article VI. The inclusion of these later provisions would seem to suggest the opposite of the European Communities' argument. That is, the fact that Article 16.1 of the Tokyo Round Anti-Dumping Code and its successor, Article 18.1 of the Anti-Dumping Agreement, needed to be added is evidence that Article VI:2 does not mean what the European Communities claims. Otherwise, these later provisions would be redundant and unnecessary. Interpretations which render parts of a treaty superfluous should be avoided.

3.246 The United States recalls, finally, that with the Uruguay Round and the coming into force of the GATT 1994 and the WTO Anti-Dumping Agreement, yet another fundamental change took place that further renders the European Communities' reliance on the negotiating history of Article VI inapposite. Specifically, the relationship between Article VI and the Anti-Dumping Agreement is different from the relationship that had existed between Article VI and the Tokyo Round Anti-Dumping Code. While it previously was possible for a panel to find a violation based independently on a paragraph in Article VI of the GATT 1947, it is now no longer possible for a panel to do so. Any violation must now include an invocation of a particular provision of the Anti-Dumping Agreement. In *Brazil - Measures Affecting Desiccated Coconut*<sup>190</sup>, the Appellate Body explained this fundamental change in the context of considering whether Article VI of the GATT 1994 may be applied independently of the Agreement on Subsidies and Countervailing Measures (hereinafter the "SCM Agreement"). In support of its finding that Article VI may *not* be independently applied, the Appellate Body reasoned that Article VI of the GATT 1994 and the SCM Agreement now constitute a "package of rights and obligations," given the structure of the WTO Agreement, to which the GATT 1994 and the SCM Agreement are annexed.<sup>191</sup> The Appellate Body, quoting from the panel report, stated that the SCM Agreement and Article VI "together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures."<sup>192</sup> Like Article VI of the GATT 1994 and the SCM Agreement, Article VI of the GATT 1994 and the Anti-Dumping Agreement constitute a package of rights and obligations regarding the use of anti-dumping measures. The plain language of Articles 1 and 18.1 shows that these provisions do not merely interpret Article VI, but, rather, go beyond by imposing a limitation on anti-dumping measures where Article VI:2 has none. It is therefore not proper for a panel to apply Article VI independently.

3.247 The United States notes that, in the present case, inexplicably, the European Communities has excluded from its panel request what may be the only relevant part of the package of rights and obligations regarding the use of anti-dumping measures, i.e. Article 18.1 of the Anti-Dumping Agreement. Indeed, regardless of whether it is the only relevant part of this package, it certainly is an essential part of it. In addition, if the Panel were to entertain a claim solely based upon Article VI:2 of the GATT 1994, it would run the very real risk of inconsistent decisions when one panel reviews a claim solely based on Article VI:2 and another panel reviews a claim under Article 18.1 of the Anti-Dumping Agreement.

3.248 The United States submits that, for all these reasons, the Panel should reject the European Communities' argument that Article VI:2, *standing alone*, mandates that anti-dumping duties are the only remedy for dumping.

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<sup>190</sup> Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R (hereinafter "*Brazil - Desiccated Coconut*").

<sup>191</sup> The United States refers to *Brazil - Desiccated Coconut*, Op. Cit., p. 16.

<sup>192</sup> *Brazil - Desiccated Coconut*, Op. Cit., p. 17, quoting from para. 246 of the panel report.

3.249 In response, the **European Communities** notes that the United States seems to accept that Article VI does not allow remedies against dumping other than duties when it insists "that the negotiating history of Article VI does not indicate which of the provisions in Article VI of the GATT 1947 is the one that made the original paragraph 7 unnecessary by implicitly establishing that anti-dumping duties are the exclusive remedy for dumping". Moreover, in relation to the US argument that "there is no indication that the provision in question is paragraph 2", the European Communities inquires which provision it could be other than paragraph 2 read in the context of the other provisions of Article VI.

3.250 Regarding Article 16.1 of the Tokyo Round Anti-Dumping Code, the European Communities reiterates its view that the introduction of an explicit prohibition of measures other than duties in Article 16.1 of the Tokyo Round Anti-Dumping Code cannot be argued to have changed the meaning of Article VI of the GATT 1947.<sup>193</sup> On the contrary, it confirmed that meaning. Thus, there does not appear to be a rule in Article VI that is not either referred to or repeated in the Code. The reason for this was that the Code and the GATT 1947 were distinct legal sets of rules, with different membership and separate means of enforcement. A claimant under the Code needed to be able to invoke any rule in Article VI. If repetition was necessary for the express provisions of Article VI, it was *a fortiori* necessary for those which had been recognized to be implied in such article. In the light of the foregoing it is therefore not surprising that the Code repeated explicitly the implicit Article VI rule that duties are the exclusive remedy for dumping.

3.251 The European Communities further submits that when the Tokyo Round Code was modified and transposed into the WTO Agreement's text, what happened was a conversion of an earlier treaty, and the non-removal rather than insertion of a clause. It would have been a rather unusual step to remove an explicit clause from an agreement on the basis that the point was implicit. It would have looked rather like a deliberate repeal of the rule.

3.252 As concerns the United States' reliance on *Brazil - Desiccated Coconut*, the European Communities notes that the reference made by the Appellate Body to an indivisible relationship between Article VI of the GATT 1994 and the SCM Agreement rather supports the view that a separate citation of the Anti-Dumping Agreement in the present case is not necessary. The Appellate Body in *Brazil - Desiccated Coconut* held that Article VI cannot be read independently of the SCM Agreement and that they "together define, clarify and in some cases modify the whole package of rights and obligations [...]"<sup>194</sup>. The European Communities agrees that the same applies to the Anti-Dumping Agreement. Yet the United States in fact asks the Panel to do the opposite of what the Appellate Body found to be necessary. The United States seems to admit that there is within the "package" an obligation not to apply remedies other than duties against dumping but asks the Panel to only look at Article VI:2 and exclude any argument under Article 1 and 18 of the Anti-Dumping Agreement.

3.253 The European Communities argues that, at any rate, its request for a panel clearly identified a violation of the obligation not to use measures other than duties to combat dumping and considered that this obligation was implicit in Article VI:2 of the GATT 1994. If other parts of the "package" are considered relevant to this obligation they can and must be applied by the Panel, just as the panel and the Appellate Body in *Brazil - Desiccated Coconut* applied provisions of the SCM Agreement that had not been referred to in the request for establishment of that panel.

3.254 In conclusion, the European Communities reiterates its view that the provision violated is Article VI:2 of the GATT 1994. If the Panel should disagree that this is the provision which contains the clearly described violation, it should apply Article 18.1 of the Anti-Dumping Agreement to be

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<sup>193</sup> The European Communities refers to J. H. Jackson, Op. Cit., pp. 405-408, 420.

<sup>194</sup> *Brazil - Desiccated Coconut*, Op. Cit., p. 17, quoting from para. 246 of the panel report.

faithful to the conclusions of the Appellate Body in *Brazil - Desiccated Coconut*. Article 18.1 of the Anti-Dumping Agreement is not in conflict with Article VI, as the United States has also agreed. Therefore, Article 18.1 cannot modify the meaning of Article VI.

3.255 The **United States** notes that the European Communities attempts to cure its defective panel request by suggesting that, while it is not asserting claims under Articles 1 and 18.1 of the Anti-Dumping Agreement, the Panel should consider them as merely "arguments." The Panel should reject such an attempt. The European Communities chose to rely upon Article VI:2 of the GATT 1994 for its position that Article VI and the Anti-Dumping Agreement provide the sole remedy for dumping. It could have included Articles 1 and 18.1 of the Anti-Dumping Agreement in its panel request, but, inexplicably, it chose not to. The European Communities should not be allowed to bootstrap what are in reality new claims into the present case by suggesting that they are only "arguments." For the Panel to analyse whether these newly invoked articles support the European Communities' other claims would be the same as considering them as claims themselves. In both instances, the Panel would be required to determine whether those provisions provide an exclusive remedy for dumping. The European Communities should not be allowed to so easily circumvent the requirements of the DSU.

3.256 The United States in fact takes the view that the Panel does not even have the authority to consider whether Articles 1 and 18.1 of the Anti-Dumping Agreement support the proposition that Article VI of the GATT 1994 provides the sole remedy for dumping. To do so would exceed the jurisdiction of the Panel. In *India - Patents*, the Appellate Body made clear that a panel has authority to consider only those claims which are included in the complaining party's panel request.<sup>195</sup> The Appellate Body stated definitively in that case that "[a] panel cannot assume jurisdiction that it does not have." Because Articles 1 and 18.1 of the Anti-Dumping Agreement were not included in the European Communities' panel request, the Panel does not have the authority to consider them.

3.257 In response to the US argument that the Panel cannot analyse whether Articles 1 and 18.1 of the Anti-Dumping Agreement support the EC position, the **European Communities** recalls that the Appellate Body in *European Communities - Bananas* stated 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 and any third parties to know the legal basis of the complaint."<sup>196</sup>

3.258 The European Communities further notes that there is nothing in the DSU that requires the *numbers* of the provisions of the covered agreements to be cited in a request for the establishment of a panel. The obligation in Article 6.2 of the DSU is to provide a brief summary of the legal basis of the complaint sufficient to state the problem clearly. The Appellate Body has merely said in *European Communities - Bananas* that citing the numbers of the provisions suffices, it has not said it is the only way to set out the legal basis.<sup>197</sup> There can be no doubt that the European Communities has clearly described the obligation concerned and the United States has neither contested this nor misunderstood the obligation described, it is merely disagreeing about the number to be given to it.

3.259 The **United States** rejects the EC argument that "[t]here is nothing in the DSU that requires the *numbers* of the provisions of the covered agreements to be cited in a request for the establishment of a panel." The United States wonders how a Member identifies a provision of a covered agreement other than by listing its number. The Appellate Body certainly anticipates that the complaining

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<sup>195</sup> The United States refers to *India - Patents*, Op. Cit., paras. 92-93.

<sup>196</sup> *European Communities - Bananas*, Op. Cit., para. 143.

<sup>197</sup> The European Communities refers to the Appellate Body Report on *European Communities - Bananas*, Op. Cit., para. 141.

Member will list the number of the relevant provision when setting forth a claim. In *India – Patents*, the Appellate Body explained:

"In *European Communities – Bananas*, we accepted the view of the panel in that case that it was "sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements", and we also agreed with the panel that the request in that case was sufficiently specific to comply with the "minimum standards" established by Article 6.2 of the DSU. In this case, in contrast, there is a failure to identify a specific provision of an agreement that is alleged to have been violated. This falls below the "minimum standards" that we were willing to accept in *European Communities – Bananas*."<sup>198</sup>

3.260 The United States recalls that, in the present case, it is not simply a matter of the European Communities' failure to identify the *number* of the provision on which it was basing its claim. The European Communities did not even identify the *covered agreement*. The European Communities recognizes that it should have identified Article 18.1 of the Anti-Dumping Agreement. Where the European Communities set forth its claim in its panel request, however, the European Communities did not merely fail to reference Article 18.1. It also failed even to identify the Anti-Dumping Agreement as the relevant covered agreement. Thus, the European Communities is left with no basis for arguing that anti-dumping duties are the exclusive remedy for dumping. It cannot rely on Article VI:2 of the GATT 1994, and it did not list Article 18.1 of the Anti-Dumping Agreement in its panel request.

## 5. The Interpretation of the Footnote to Article 18.1 of the Anti-Dumping Agreement

3.261 In reply to a question of the Panel to both parties regarding the correct interpretation of the footnote to Article 18.1<sup>199</sup> of the Anti-Dumping Agreement, the **European Communities** points out that the ordinary meaning of the footnote in this provision and of its predecessor in Article 16.1 of the Tokyo Round Anti-Dumping Code is that the Anti-Dumping Agreement does not prevent Members from taking appropriate action under other trade defence instruments provided within the GATT 1994, such as countervailing duty action and safeguard action.

3.262 The European Communities asserts that this interpretation is confirmed by the negotiating history. The factors taken into account by the negotiators in deciding to delete a corresponding provision when drafting the Havana Charter, and when amending the GATT 1947, were exactly the same. It is true that in the first case the negotiators used the phrase "other provisions of the Charter" whereas those in the second spoke of "other provisions of the General Agreement". However, it is clear that the Charter negotiators had in mind the Charter provisions that were incorporated in the General Agreement.

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<sup>198</sup> *India – Patents*, Op. Cit., para. 91 (footnote omitted).

<sup>199</sup> Article 18.1 and its footnote provide as follows:

"18.1 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.<sup>24</sup>  
[...]

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

3.263 In support of its position, the European Communities references the Report of the Working Party established by Sub-Committee C of the Third Committee of the Havana Conference where, according to the European Communities, it appears clearly from paragraphs 3(iv) and 6 that the express prohibition of other measures against dumping was agreed to be unnecessary, removed and replaced by a statement to the minutes that other measures were not allowed because of concerns that some parties had about the implications for enforcing their rights under Articles 13 and 14 which correspond to what is now Article XVIII of the GATT 1994.<sup>200</sup>

3.264 The European Communities argues that, even if it could be argued that the Charter negotiators intended to preserve a wider range of possible measures, those who negotiated the 1948 amendments to the GATT 1947 clearly did not, since they explicitly refer to "other provisions of the General Agreement". The GATT 1947 negotiators were prepared to refer to the Havana Charter where that was their intention, as is apparent, for instance, from the Note *ad* Article II:4 of the GATT 1947.

3.265 The European Communities considers, finally, that the fact that this footnote was considered necessary merely confirms the EC view that alternative action against dumping such as treble damages, fines and imprisonment are not compatible with WTO rules.

3.266 The **United States**, in reply to the same question of the Panel, reiterates at the outset its view that the Panel should not reach the issue of the correct interpretation of Article 18.1 of the Anti-Dumping Agreement or its footnote. As a legal matter, Article 18.1 is not within the Panel's terms of reference.

3.267 Nevertheless, in response to the Panel's question, the United States notes that the footnote to Article 18.1 should be interpreted as meaning that a Member can take measures which deal with injurious dumping even when such measures are not explicitly set forth in Article VI of the GATT 1994 or the Anti-Dumping Agreement, as long as the measure is not inconsistent with other GATT 1994 provisions.

3.268 The United States recalls that language nearly identical to that used in Article 18.1 and its footnote can be found in Article 16.1 of the Tokyo Round Anti-Dumping Code and its footnote. The meaning of the footnote to Article 16.1 was clear. No action against dumping could be taken except consistently with the GATT 1947. This merely restates the basic principle of *pacta sunt servanda*: every treaty in force is binding on the parties to it and must be performed by them in good faith. However, it is also clear that there was never any intention to eliminate the other GATT-consistent options available to address a factual situation that constituted a case of injurious dumping. A contracting party that was a party to the Code retained the option to address such dumping by eliminating the injury, for instance by raising the duty on the product concerned on an MFN basis to a level not in excess of the relevant tariff binding. Or it could renegotiate the duty on the product consistent with Article XXVIII of the GATT 1947. Or it could provide adjustment assistance for the industry or workers injured by the dumping. Or, if the factual situation also supported the taking of a safeguard action under Article XIX of the GATT 1947 or a countervailing duty under Article VI of the GATT 1947, the contracting party concerned could pursue those avenues.

3.269 The United States further points out that, read literally, Article 16.1 alone might have been misinterpreted to lock any government into levying anti-dumping duties whenever it was faced with a factual situation constituting injurious dumping. The footnote preserved flexibility to take any other measure that was otherwise GATT-consistent. The same conclusions hold today. If a WTO Member is faced with a factual situation constituting injurious dumping, it is not locked into levying anti-dumping duties, but has the option of taking other measures that are in accordance with the GATT

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<sup>200</sup> The European Communities refers to document E.CONF.2/C.3/C/18, paras. 3(iv) and 6.

1994. 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.

F. VIOLATIONS OF ARTICLE VI:1 OF THE GATT 1994 AND ARTICLES 1, 2.1, 2.2, 3, 4 AND 5.5 OF THE ANTI-DUMPING AGREEMENT

3.270 The **European Communities** notes 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 for therein. This gives rise to numerous violations of specific provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement.<sup>201</sup>

3.271 The European Communities submits that Article VI:1 of the GATT 1994 provides that dumping is to be condemned if it causes or threatens material injury and that Article 3 of the Anti-Dumping Agreement lays down a detailed definition of this notion and how injury may be established. The 1916 Act does not require actual injury at all, let alone material injury, but only one or more of the intents, including the intent to injure a domestic industry, no matter how threatening such intent may actually be. As a practical matter, evidence of actual injury will often be used to prove intent to injure under the 1916 Act. Where this occurs, there is nothing in the 1916 Act which ensures that the injury shown must correspond to the "material injury" standard of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Furthermore, because other intents are relevant under the 1916 Act, in certain circumstances measures will be authorised under the 1916 Act without any inquiry into the effects on the US industry. Accordingly, the 1916 Act violates Article VI:1 of the GATT 1994 and Article 3 of the Anti-Dumping Agreement.

3.272 The European Communities further argues that remedies under the 1916 Act are available to private parties without the mediation of governmental authorities. The absence of an administrative procedure means that no investigation conforming to the requirements of the Anti-Dumping Agreement is conducted. Court proceedings are not a substitute for such administrative investigations. In the case of civil damages proceedings, the proceeding is conducted in the framework of the adversarial relationship between the parties. In both civil and criminal proceedings, the ultimate factual finding is made by the judge and/or a jury, who do not have the specialist knowledge of the subject of national authorities – a factor which is important in such a technical area. The conduct of the proceedings is determined by the parties to the proceedings, without the intervention and the responsibility of the importing country's administrative authorities. Accordingly, the 1916 Act fails to respect a number of procedural and due process requirements set forth in the Anti-Dumping Agreement, for example:

- (a) the requirement that national authorities verify the information in a complaint before the investigation is opened;<sup>202</sup>
- (b) the requirement that notice be given to the government of the exporting country before an anti-dumping investigation is launched;<sup>203</sup>
- (c) the requirement that a complaint only be made on behalf of the domestic industry and be supported by a minimum proportion of the domestic industry. This

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<sup>201</sup> The European Communities notes that, even if the Panel were to consider that the provisions of Article VI:2 did not contain mandatory language, all of the other provisions of Article VI:1 and the Anti-Dumping Agreement invoked by the European Communities contain clearly mandatory language.

<sup>202</sup> The European Communities refers to Article 5.3 of the Anti-Dumping Agreement.

<sup>203</sup> The European Communities refers to Article 5.5 of the Anti-Dumping Agreement.

representativity requirement serves an important function of avoiding frivolous complaints and the harassment of exporters and importers;<sup>204</sup>

- (d) the possibility for governments of exporting countries to make comments on proposed findings;<sup>205</sup>
- (e) the possibility for industrial users and representative consumer organisations to provide information on dumping, injury and causality;<sup>206</sup>
- (f) the requirement that measures not be retroactive.<sup>207</sup>

3.273 The **United States** considers that the European Communities' claims under Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement are adjuncts to its claim under Article VI:2 of the GATT 1994 and that each of these claims rests on the assumption that the Panel has already found the 1916 Act to be in violation of Article VI:2 of the GATT 1994. Thus, each of these claims has the same two premises of the alleged violation of Article VI:2 of the GATT 1994, namely, that Article VI:2 of the GATT 1994 makes anti-dumping duties the exclusive remedy for dumping and, further, that the 1916 Act is an anti-dumping statute that provides remedies for dumping other than anti-dumping duties. Because these two premises are erroneous, the European Communities' various claims under the GATT 1994 and the Anti-Dumping Agreement have no merit. Nothing in Article VI:2 of the GATT 1994 provides that anti-dumping duties are the exclusive remedy for dumping. Moreover, even assuming *arguendo* that Article VI:2 of the GATT 1994 makes anti-dumping duties the exclusive remedy for dumping, that provision nevertheless does not govern the 1916 Act because the 1916 Act is not an anti-dumping statute, and it does not provide remedies directed at the type of harmful conduct condemned by Article VI. Accordingly, like the European Communities' claim under Article VI:2, the Panel should reject the European Communities' various other claims under Article VI of the GATT 1994 and the Anti-Dumping Agreement.

3.274 The **European Communities** rejects the US argument that its claims based on Article VI:1 of the GATT 1994 and Articles 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement depend on the claim that duties are the exclusive remedy and fall away if the European Communities' exclusive remedy claim fails.

3.275 The European Communities argues that Article VI:1 defines dumping and provides that it is to be condemned if it causes injury, threat of injury or material retardation. It follows clearly that measures taken against dumping are only consistent with Article VI:1 if there is a finding of both (i) dumping in accordance with the definition in that Article and (ii) injury, threat of injury or material retardation caused by such dumping. There is no mention of anti-dumping duties, so these principles would apply even if other measures could be taken consistently with Article VI:2.

3.276 According to the European Communities, the same argument applies to the cited Articles of the Anti-Dumping Agreement. Article 1 provides in relevant part that "[a]n 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". Articles 2.1 and 2.2 set forth amplified rules on the substantive definition of dumping. Article 3 does the same for injury. Article 4 defines "domestic industry", which is relevant for the injury definition. Article 5.5 provides that, "after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member

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<sup>204</sup> The European Communities refers to Articles 4 and 5.4 of the Anti-Dumping Agreement.

<sup>205</sup> The European Communities refers to Articles 6.9 and 6.11 of the Anti-Dumping Agreement.

<sup>206</sup> The European Communities refers to Article 6.12 of the Anti-Dumping Agreement.

<sup>207</sup> The European Communities refers to Article 10 of the Anti-Dumping Agreement.

concerned". It can easily be seen that all these provisions make no mention of the application of duties as a remedy, and would have to be applied even if it were to be decided that measures other than duties, such as civil damages or criminal penalties, could, consistently with Article VI of the GATT 1994, be applied to remedy dumping.

3.277 The **United States** considers that the European Communities has failed to demonstrate that the various procedural and substantive requirements found in Article VI:1 and the Anti-Dumping Agreement mandate compliance in and of themselves. The European Communities argues that the provisions setting forth these procedural and substantive requirements do not themselves indicate that they apply only when a Member is imposing a measure set forth in the Anti-Dumping Agreement, such as duties. From that assertion, the European Communities concludes that these procedural and substantive requirements apply even when a remedy not set forth in the Anti-Dumping Agreement is imposed. This argument lacks merit. For one thing, it wholly ignores the context provided by the remaining provisions of Article VI and the Anti-Dumping Agreement, all of which are geared toward a Member's imposition of a measure set forth in the Anti-Dumping Agreement, such as duties. If duties are not the exclusive remedy, then it makes no sense to interpret the other provisions of Article VI and the Anti-Dumping Agreement as mandating compliance with their procedures and investigation requirement.

3.278 According to the United States, the European Communities' argument also is defective on a more basic level. It looks at provisions which themselves are silent as to whether they apply only to measures set forth in the Anti-Dumping Agreement or, alternatively, apply to all measures counteracting dumping, even those not set forth in the Anti-Dumping Agreement. Then, without explaining why, the European Communities arbitrarily chooses to read this silence as nevertheless supporting the alternative that supports its claims in the present case. When a WTO agreement is truly silent on a particular matter, however, there is no basis for a panel to find a violation. A panel must terminate its analysis and find no violation.<sup>208</sup>

3.279 The **European Communities** replies that it finds this argument unconvincing since the provisions are also silent as to whether they apply to the steel industry or not but no-one would think – or at least the European Communities would not think of – arguing that there is therefore "no basis for a panel to find a violation" when they are so applied. An obligation which is not restricted in its scope applies generally. In this case the obligation to comply with the procedural requirements of Article VI of the GATT 1994 and the Anti-Dumping Agreement apply to all anti-dumping action and not just to duties.

3.280 The **United States** argues that, in any event, the Panel need not even reach these questions if it concludes, as it should, that the European Communities has failed to show that the 1916 Act is an anti-dumping statute governed by Article VI of the GATT 1994 and the Anti-Dumping Agreement.

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

### 1. Introduction

3.281 The **European Communities** argues that if the Panel considers that the 1916 Act is fully within the scope of Article VI of the GATT 1994 and therefore subject to its disciplines, then there is no need to consider the EC claim under Article III:4 of the GATT 1994. If the Panel considers, however, that all or any portion of the 1916 Act is consistent with Article VI of the GATT 1994 and

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<sup>208</sup> The United States refers to the Panel Report on *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, unadopted, dated 4 December 1992, SCM/153, paras. 243-46 and 247-49; Panel Report on *New Zealand - Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32/S55, paras. 4.2-4.3.

the Anti-Dumping Agreement, then it should consider the European Communities' claim under Article III:4 of the GATT 1994 with respect to that portion of the 1916 Act found to be consistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement.

3.282 The European Communities is of the view that the 1916 Act infringes Article III:4 of the GATT 1994<sup>209</sup> since it accords to products of contracting parties imported into the United States treatment less favourable than that accorded to like products of US origin.

3.283 The **United States** considers that a review of the historical applications of the 1916 Act and the Robinson-Patman Act conclusively demonstrates that the 1916 Act raises no national treatment concerns under Article III:4 of the GATT 1994. In addition, even if the 1916 Act and the Robinson-Patman Act are compared using an element-by-element approach, no national treatment concerns arise.

## **2. The 1916 Act as a Law Affecting the Internal Sale of Imported Products and the Robinson-Patman Act as Comparable Legislation**

3.284 For the **European Communities**, the 1916 Act is a law and it also affects the internal sale of products because it prohibits, *inter alia*, the sale or offering for sale of products below a certain price. The fact that a product cannot be sold at a freely established price affects, indeed may inhibit, its sale. The fact that the measure applies to importers does not prevent the applicability of Article III:4. The US measure before the panel on *United States – Section 337 Tariff Act 1930*<sup>210</sup> also applied to importers by imposing penalties on them but was still held to affect imported products.<sup>211</sup> Furthermore, the circumstances under which a product is imported cannot prevent a product from being "like" comparable domestic products. Indeed, the very fact that the 1916 Act applies exclusively to imported products already establishes a *prima facie* breach of Article III of the GATT 1994 since domestic products are not subject to the requirements of the 1916 Act.

3.285 The European Communities further notes that the 1916 Act is a price discrimination law addressed to the specific case of differences between the price on the US market of goods imported into the United States and the price of the same goods on the domestic market of the exporter or on third country markets. The comparable legislation applying to price discrimination on the US market in respect of US domestic products is the Robinson-Patman Act.<sup>212</sup> The Robinson-Patman Act provides as follows:

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<sup>209</sup> Article III:4 of the GATT 1994 provides as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

<sup>210</sup> Panel Report on *United States – Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345 (hereinafter "*United States – Section 337*").

<sup>211</sup> The European Communities refers to *United States – Section 337*, Op. Cit., para. 5.10.

<sup>212</sup> The European Communities refers to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act in 1936 (15 U.S.C. § 13). According to the European Communities, it is established that this statute applies only to differences in price within the US market, not to differences between prices on the US market and prices on a foreign market. The European Communities refers to *Zenith I*, Op. Cit., p. 248.

"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, [...] and where the effect of such discrimination may be to substantially 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."<sup>213</sup>

3.286 The **United States** takes issue with the European Communities' assertion that a *prima facie* breach is established by the fact that the 1916 Act applies exclusively to imported products. According to the United States, no such presumption arises. The panel on *United States - Section 337* recognized that the nature of the inquiry in an Article III:4 dispute is one of substance, not form. It explained that:

"the mere fact that imported products are subject [...] to legal provisions that are different than those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favorable treatment."<sup>214</sup>

3.287 The United States does agree with the European Communities, however, that the comparable statute applicable to domestic goods is Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.<sup>215</sup>

### 3. The "No Less Favourable Treatment" Standard

#### (a) General arguments

3.288 According to the **European Communities**, if the text of the Robinson-Patman Act is compared with that of the 1916 Act, it can be seen that while the two texts have in common a requirement that price discrimination be found in respect of the relevant markets, they differ as regards the other elements which must be proved in order for an infringement of the law to be present. In the case of the 1916 Act, the additional requirements are the intent to (i) destroy a US industry, or (ii) injure a US industry, or (iii) prevent the establishment of a US industry, or (iv) restrain trade and commerce, or (v) monopolise trade and commerce. By contrast, in the Robinson-Patman Act, the additional requirements are:

"the effect of such discrimination may be to substantially 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."

3.289 The European Communities further notes that among Robinson-Patman cases a distinction is made between the probable impact of price discrimination (i) on direct competitors of the discriminating seller (primary line injury), (ii) on the favoured and disfavoured buyers of the discriminating seller (second-line injury) and (iii) on the customers of either of them (third-line injury). Primary line discrimination is the only direct domestic analogue of international price discrimination as condemned in the 1916 Act. The US Supreme Court has held in the *Brooke Group* case that in order for the requisite effect on competition to be present, it must be shown that (i) the

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<sup>213</sup> 15 U.S.C. § 13(a).

<sup>214</sup> *United States - Section 337*, Op. Cit., para.5.11.

<sup>215</sup> The United States refers to *Zenith III*, Op. Cit., pp. 1213-1214.

defendant charged prices below an appropriate measure of cost, and (ii) it had a reasonable prospect of recouping its investment in below cost prices.

3.290 In light of the foregoing, the European Communities contends that a careful comparison of the two laws, taking into account not only the respective texts but also the additional requirements read into the Robinson-Patman Act as a condition for finding primary line violations, demonstrates that it is substantially more difficult to prove a violation of the Robinson-Patman Act than it is to prove a violation of the 1916 Act. As a consequence, the 1916 Act allows the application of measures to imported products under less favourable conditions than those applicable to domestic products, thus resulting in less favourable treatment of imported products in violation of Article III:4 of the GATT 1994.

3.291 The European Communities points out, finally, that, in the *Zenith III* case, the District Court merely held that the 1916 Act should "whenever possible" be interpreted to parallel the Robinson-Patman Act [...]. The term "whenever possible" suggests that it should not necessarily always be the case, as was confirmed in the *Helmac I* case.

3.292 The **United States** is of the view that any analysis of the compatibility of the 1916 Act with the national treatment provisions of Article III:4 of the GATT 1994 should begin and end with one fundamental point. The 1916 Act has rarely been invoked. More importantly, the 1916 Act establishes a standard for relief which has never been met in the case of importers and imported goods. The Robinson-Patman Act, in contrast, has been successfully invoked in a vast number of civil cases.<sup>216</sup> From this perspective, the 1916 Act can be seen to treat importers and imported goods *more* favourably than the Robinson-Patman Act treats US sellers and their goods.

3.293 In this connection, the United States recalls that, since the 1993 *Brooke Group* decision, there have been more than forty reported court of appeals and district court opinions in more than forty different cases that have addressed allegations that the price discrimination provisions of the Robinson-Patman Act have been violated, including cases leading to more than ten court of appeals and district court decisions in 1998 alone.<sup>217</sup> By comparison, only two district court determinations - at very early stages in their respective proceedings - have during that same period addressed allegations that the 1916 Act has been violated. This vast disparity alone establishes that the price discrimination proscriptions of the Robinson-Patman Act create far more danger of liability for domestic firms than the 1916 Act creates for importers, and therefore treat domestic firms far less favorably than the 1916 Act treats importers. Moreover, while liability for an importer under the 1916 Act can arise only from injury to the firms with which it competes, domestic firm liability under the Robinson-Patman Act can arise both from that type of injury and from injury to one or more

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<sup>216</sup> The United States notes that only in a very small number of cases has the US Department of Justice invoked the criminal provisions of the Robinson-Patman Act over the years, or obtained convictions. The United States refers to ABA Antitrust Law Developments, 4<sup>th</sup> ed. (1997), a US antitrust reference work, which notes, at page 490: "Section 3 [the criminal law provision of the Robinson-Patman Act] has rarely been enforced, and no prosecutions have been brought under that section since the 1960s."

<sup>217</sup> The United States refers to, e.g., *Godfrey v. Pulitzer Publishing Co.*, 161 F.3d 1137 (8<sup>th</sup> Cir. 1998); *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136 (2d Cir. 1998); *Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F.3d 691 (9<sup>th</sup> Cir. 1998), amended, No. 96-56341, 1999 WL 19636 (9<sup>th</sup> Cir. Jan. 20, 1999); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5<sup>th</sup> Cir. 1998); *Sally Bridges v. MacLean-Stevens Studios, Inc.*, 35 F.Supp. 2d 20, 28 (D. Me. 1998); *Malek Wholesaler, Inc. v. First Film Extruding, Ltd.*, 1998 U.S. Dist. LEXIS 3674 (N.D. Ill. Mar. 20, 1998); *City of New York v. Coastal Oil New York, Inc.*, 1998-1 Trade Cas. (CCH) ¶ 72,087 (S.D.N.Y. 1998); *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3d Cir. 1998); *Hoover Color Corp. v. Bayer Corp.*, 24 F. Supp. 2d 571 (W.D. Va. 1998); *Bell v. Fur Breeders Agricultural Cooperative*, 3 F. Supp. 2d 1241 (D. Utah 1998); *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338 (W.D. Pa. 1998); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 957 F.Supp. 1184, 1192 (D. Nev. 1997), affirmed, 146 F.3d 1088 (9<sup>th</sup> Cir.), cert. denied, 119 S. Ct. 541 (1998).

downstream purchasers. As a consequence, cases involving secondary line liability, in addition to those involving primary line liability, are also relevant to any comparison to the 1916 Act.

3.294 The United States further notes that the conclusion that the Robinson-Patman Act treats domestic firms less favorably than the 1916 Act treats importers is strengthened by the number of primary line price discrimination cases since *Brooke Group*. In particular, since the *Brooke Group* decision, four court of appeals decisions, arising from three cases addressing allegations of primary line price discrimination, have been issued.<sup>218</sup> To the extent that the success of a particular case can be measured by the level of the federal court system to which it rises, all of these lawsuits alleging primary line discrimination were more successful than either of the two 1916 Act lawsuits. Moreover, fourteen district court decisions addressing primary line discrimination - in addition to those which led to some of the above court of appeals decisions - have been issued.<sup>219</sup> These figures suggest that allegations of primary line discrimination under the Robinson-Patman Act - even without considering allegations of secondary line discrimination - have continued to pose far more of a threat of liability to domestic firms than the 1916 Act poses to foreign firms.

3.295 The United States contends, moreover, that, even if provisions of the 1916 Act and the Robinson-Patman Act are compared in detail, no national treatment concerns arise. This is because the 1916 Act is intended to prevent unfair competition by extending the prohibitions of unfair competition in domestic commerce embodied in Section 2 of the Clayton Act of 1914 to importers.<sup>220</sup> Consistent with that construction, the prevailing interpretation among the courts that have considered the 1916 Act is either an explicit or implicit endorsement of the following principles enunciated by the District Court in *Zenith III*:

"The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first Wilson administration, is that the statute should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Antidumping Act is a price discrimination law, it should be read in tandem with the domestic price discrimination

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<sup>218</sup> The United States refers to *Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F.3d 691, 694-95 (9<sup>th</sup> Cir. 1998), amended, No. 96-56341, 1999 WL 19636 (9<sup>th</sup> Cir. Jan. 20, 1999); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 188 (1<sup>st</sup> Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1091 (9<sup>th</sup> Cir. 1998), cert. denied, 119 S.Ct. 541 (1998), and 51 F.3d 1421, 1429 (9<sup>th</sup> Cir. 1995).

<sup>219</sup> The United States refers to *J&S Oil, Inc. v. Irving Oil Corp.*, 1999-2 Trade Cas. (CCH) ¶ 72,615 (D.Me. August 4, 1999), at 85551-54; *Wynn ex rel. Alabama v. Philip Morris Inc.*, 51 F.Supp. 2d 1232, 1247 (N.D. Ala. 1999); *Malek Wholesaler, Inc. v. First Film Extruding, Ltd.*, 1998 U.S. Dist. LEXIS 3674 (N.D. Ill. March 24, 1998); *Taylor Publishing Company v. Jostens, Inc.*, 36 F.Supp. 2d 360, 372-73 (E.D. Tex. 1999); *Sally Bridges v. MacLean-Stevens Studios, Inc.*, 35 F.Supp. 2d 20, 27-28 (D. Me. 1998); *City of New York v. Coastal Oil New York, Inc.*, 1998-1 Trade Cas. (CCH) ¶ 72,087 (S.D.N.Y. 1998); *Stearns Airport Equip. Co. v. FMC Corp.*, 977 F.Supp. 1269, 1273 (N.D. Tex. 1997); *Cardinal Indus. v. Pressman Toy Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,738 (S.D.N.Y. Dec. 17, 1996); *The Zeller Corp. v. Federal-Mogul Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,805 (N.D. Ohio June 25, 1996); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 958 F.Supp. 895, 906 (S.D.N.Y. 1997), and 1995-2 Trade Cas. ¶ 71,095 (S.D.N.Y. 1995), at 75,241; *Clark v. Flow Measurement, Inc.*, 948 F.Supp. 519, 522-29 (D. S.C. 1996); *C.B. Trucking, Inc. v. Waste Management, Inc. and WMX*, 944 F.Supp. 66, 68-69 (D. Mass. 1996); *En Vogue v. UK Optical, Ltd. and British Optical Import Company*, 843 F.Supp. 838, 845-47 (E.D.N.Y. 1994); *Lago & Sons Dairy, Inc. v. H.P. Hood, Inc.*, 1994 U.S. Dist. LEXIS 12909 (D. N.H. 1994).

<sup>220</sup> The United States notes that the US Department of Justice, in a letter from Samuel J. Graham, Assistant Attorney General, dated 30 June 1916, published in N.Y. Times on 4 July 1916 at page 10, stated that the "purpose" of the 1916 Act should be to prevent unfair competition. Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner."

law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936."<sup>221</sup>

3.296 As regards the District Court's use of the term "whenever possible", the United States notes that it cannot speculate why the Court employed the term. A court decides one case at a time, and does not act as though it were a legislature. The important point is that the District Court recognized the similarity of the language with other antitrust statutes and held that the issue in question, the standard for comparability of products, should be based upon antitrust principles. It should be noted that the District Court in *Zenith III* also stated the following:

"[The 1916 Act] was intended to complement the antitrust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Antitrust Act of 1914."<sup>222</sup>

[ . . . ]

[I]n order to be faithful to the intention of Congress to subject importers to "the same unfair competition law" [that is applicable to domestic commerce], we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises."<sup>223</sup>

3.297 According to the United States, consistent with these pronouncements, a comparison of the provisions of the 1916 Act with those of the Robinson-Patman Act makes it clear that the 1916 Act actually provides *more* favourable treatment than the Robinson-Patman Act in many ways and, in any event, does not in any instance provide less favourable treatment.

(b) The relevance of trade effects

3.298 The **European Communities** asserts that the approach taken by the United States in respect of the European Communities' claim under Article III:4 of the GATT 1994 is fundamentally flawed. In effect, it seeks to apply a test which focuses on which law - the one applying to imports or the one applying to domestic products - is more often invoked successfully and what are the relative degrees of difficulty of successfully asserting a claim under the respective laws. However, as established in a long series of panel reports and confirmed by the Appellate Body, Article III of the GATT 1994 protects competitive opportunities and not trade flows.<sup>224</sup> Hence, in order to establish a violation of Article III:4 it is not necessary to show that the measure challenged has had any actual effects. The mere possibility that a measure may result in some circumstances in less favourable treatment being afforded to imported products is already sufficient to establish a violation of Article III:4. Thus, in the *EEC - Animal Feed Proteins* case.

"[...] the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a

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<sup>221</sup> *Zenith III*, Op. Cit., p. 1223. The United States also refers to page 1214 of the same decision where it is stated that "[a]s a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business."

<sup>222</sup> *Zenith III*, Op. Cit., p. 1196-1197.

<sup>223</sup> *Ibid.*, p. 1223.

<sup>224</sup> The European Communities refers to, e.g., the Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 16 and the panel reports cited therein.

risk of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4."<sup>225</sup>

3.299 In the view of the European Communities, whether the conditions for applying the 1916 Act make it more or less difficult to apply is completely irrelevant for the purposes of establishing a claim under Article III:4.

3.300 The **United States** replies that it does not argue that the European Communities' claim under Article III:4 should be dismissed because the 1916 Act has not had any trade effects. Although there may be some merit to that argument, the United States has chosen not to make it.

(c) The relevance of the absence of successful invocations of the 1916 Act

3.301 The **European Communities** rejects the US contention that the 1916 Act treats importers of foreign goods more favourably than the Robinson-Patman Act treats sellers of US goods because the latter has been successfully invoked much more often than the former. The European Communities refers the Panel to the panel report on *United States - Standards for Reformulated and Conventional Gasoline*<sup>226</sup> where the panel rejected the argument that the US measures involved in that case could be justified because imported gasoline was treated "on the whole" no less favourably than domestic gasoline. The United States did not appeal this element of the panel report. The panel in the gasoline standards case rejected the "on the whole" reasoning because it would mean that less favourable treatment in one instance could be offset by more favourable treatment in another instance and noted that such an approach had also been rejected by the GATT 1947.<sup>227</sup> It is therefore clear that under Article III:4 an analysis has to be carried out at the level of an individual product, not at the level of the application of the law to all possible products. Any individual product must be treated no less favourably than a like domestic product, and this in all cases.

3.302 The **United States** responds that the European Communities fails to understand the US position. The United States does not argue that the 1916 Act on the whole treats imported goods more favourably than domestic goods and only in a few instances treats imported goods less favourably than domestic goods. The argument made by the United States is unqualified, just as is Article III:4. It is a fact that the 1916 Act establishes a standard for relief that is virtually impossible to satisfy and that has never been met in the case of importers and imported goods. The intent requirement of the 1916 Act is an overarching factor that is present in every instance, not just "on the whole" and exerts offsetting influence to any other perceived disadvantage. The Robinson-Patman Act, in contrast, has been successfully invoked on innumerable occasions to obtain relief involving US sellers and their goods.

3.303 The United States does not suggest that the Panel base its finding regarding the European Communities' Article III:4 claim entirely upon the fact that the 1916 Act has never been successfully invoked. But this fact is relevant to the Panel's determination of whether the alleged differences between the 1916 Act and the Robinson-Patman Act afford less favourable treatment. The difference in terms of the successful invocation of the respective Acts shows that the 1916 Act requirements, taken together, are less rigorous for *every* importer, than the requirements under the Robinson-Patman

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<sup>225</sup> Panel Report on *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, para 141.

<sup>226</sup> Panel Report on *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/R (hereinafter "Panel Report on *United States - Gasoline*").

<sup>227</sup> The European Communities refers to the Panel Report on *United States - Gasoline*, Op. Cit., para. 6.14, which refers to *United States - Section 337*, Op. Cit., para. 5.14.

Act. As a result, the 1916 Act treats importers and imported goods more favourably than the Robinson-Patman Act treats US sellers and their goods.

3.304 The **European Communities** considers that the fact that the 1916 Act has not often been invoked is due to a number of factors which do nothing to demonstrate that it provides more favourable treatment to imports than the Robinson-Patman Act does to domestic goods. The following factors explain why the 1916 Act has not been invoked so often:

- (a) proceedings tend to be complex and time-consuming, and thus very expensive to the defendants;
- (b) plaintiffs have an alternative remedy in normal (Article VI-compliant) anti-dumping action. This may often be more convenient and explains why there have not been many 1916 Act cases. The true comparison should therefore arguably be between all dumping price discrimination cases and domestic Robinson-Patman Act cases;
- (c) in the *Wheeling-Pittsburgh* case a settlement was reached among the parties, which means that the complainant did find relief. The terms of the settlement were not made public, but it is known that the companies have agreed to certain import restrictions and pledged to purchase a certain amount of Wheeling-Pittsburgh steel.

3.305 The **United States** reiterates its view that the substantive reason for the complete absence of successful recoveries under the 1916 Act is found in the requirement that the complaining party show a specific, predatory intent on behalf of the defendant importer. This requirement has been described by the courts, in the particular context of the 1916 Act, as virtually impossible to satisfy. Even the interlocutory decision in *Geneva Steel*, which virtually forms the basis for the European Communities' whole position in the present case, acknowledged that

"[...] the burden of proving such improper intent may not be easy. Absent some compelling evidence, it may be *nearly impossible*."<sup>228</sup>

3.306 Notwithstanding this US contention, the **European Communities** asserts, however, that the 1916 Act is still regarded as an efficient means of action. Recently, for example, a San Francisco law firm has been encouraging (potential) clients to resort to the 1916 Act against illegal exports, which shows that the 1916 Act is still regarded as an efficient means of action. The letter states in relevant part:

"We believe that a legal action on behalf of the numerous steel companies who have been injured as a result of illegal steel dumping by companies from Japan, Brazil, South Korea, Russia and other countries is a viable and appropriate means to recover losses that have been incurred. The claims would be based on the 1916 Antidumping Act [...] which creates a private cause of action for dumping [...]. Our proposed action is similar to, but different in important respects, from actions already brought by Wheeling-Pittsburgh and Geneva Steel. These plaintiffs did not utilize the leverage that multiple plaintiffs can have in obtaining a significant recovery."

According to the European Communities, the letter also shows the growing effectiveness of the harassment value of the 1916 Act.

3.307 The **United States** maintains its view that one element of a 1916 Act claim - the requirement of a specific, predatory intent - renders the 1916 Act more favourable to importers and imported

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<sup>228</sup> *Geneva Steel*, Op. Cit., p. 1224 (emphasis added by the United States).

goods than is the Robinson-Patman Act to US sellers and their goods in every instance. The courts have interpreted this requirement as virtually impossible to satisfy, and the historical applications of the 1916 Act support this view, as there has never been a successful case brought under the 1916 Act. When this factor is taken into account to the extent that it might be capable of exerting an offsetting influence in each individual case, the only reasonable conclusion is that the 1916 Act treats importers and imported goods more favourably than the Robinson-Patman Act treats US sellers and their goods.

3.308 The United States submits, moreover, that this approach was followed by the panel in *United States - Section 337*. There, the panel explained that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment."<sup>229</sup> The panel found that some of the procedural advantages given to foreign respondents under Section 337 operate in all cases, and therefore it "took these factors into account to the extent that they might be capable of exerting an offsetting influence in each individual case of less favourable treatment resulting from an element cited by the Community."<sup>230</sup>

3.309 The United States thus concludes that it would be entirely appropriate for the Panel to begin and end its analysis of the European Communities' Article III:4 claim based upon the fact that the intent requirement is virtually impossible to satisfy.

(d) Element-by-element comparison of the 1916 Act and the the Robinson-Patman Act

3.310 The **European Communities** asserts that there are four principal differences between the 1916 Act and the Robinson-Patman Act that result in unfavourable treatment being afforded to imported products in violation of Article III:4 of the GATT 1994. These concern (i) the intent requirements under each Act, (ii) the measurement of price discrimination, (iii) the sufficiency of offers for sale for supporting claims under each Act, and (iv) the available defences under each Act.

3.311 The **United States** reiterates its view that the intent requirement of the 1916 Act is virtually impossible to satisfy. It is therefore unnecessary or at least inconsequential for the Panel to consider how one element of the 1916 Act might compare to a corresponding element of the Robinson-Patman Act. Even if the Panel were to find a particular element of the 1916 Act to be more rigorous than a corresponding element of the Robinson-Patman Act, that finding could not transform the 1916 Act into a more rigorous statute than the Robinson-Patman Act, given that, when all of the requirements of the 1916 Act are viewed together, they are not more rigorous than the Robinson-Patman Act requirements in light of the 1916 Act's intent standard.

3.312 The United States further notes that, in any event, a careful comparison of each of these differences confirms what is manifest from a review of the actual application of the Acts. That is, the 1916 Act actually affords *more* favourable treatment to imported goods than the Robinson-Patman Act does regarding domestic goods.

(i) *The injury/predation standards*

3.313 The **European Communities** notes that, under the Robinson-Patman Act, the pleading and proof requirements that a primary line complainant must meet in order to demonstrate that it is suffering from a predatory pricing policy are now well established since the US Supreme Court issued its decision in the *Brooke Group* case. Two conditions must be fulfilled in order to successfully demonstrate predatory pricing: (i) the defendant is charging prices below an appropriate measure of

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<sup>229</sup> *United States - Section 337*, Op. Cit., para. 5.16.

<sup>230</sup> *Ibid.*, para. 5.17.

cost, namely, average variable costs<sup>231</sup> and (ii) that it has a reasonable prospect to recoup its investment in below cost prices. In its *Brooke Group* ruling, the Supreme Court defines in detail the conditions that must be met for such a recoupment to occur :

- (i) Below cost pricing must be capable of driving the firm's rivals out of the market or causing them to raise their prices to supra-competitive levels within a disciplined oligopoly;
- (ii) there must be a likelihood that the predatory scheme will cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predatory action.

3.314 The European Communities points out, in this regard, that 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. This represents a burden of proof which it is very difficult to sustain as the Supreme Court itself has recognised.<sup>232</sup> In its *Brooke Group* judgment, the Court held that "predatory pricing schemes are rarely tried and even more rarely successful" and "the costs of erroneous liability are high"<sup>233</sup>.

3.315 The European Communities further recalls that the anti-competitive intents and effects which must be proved in order to establish a primary line Robinson-Patman Act infringement are not required by the 1916 Act. Under the 1916 Act, discriminatory pricing must rather be conducted with the intent of injuring, destroying or preventing the establishment of a US industry. In the *Wheeling-Pittsburgh* case, the Ohio District Court in its Opinion and Order of 22 January 1999<sup>234</sup> found that the complaining party had the duty to demonstrate that the defendants sold their products with the intent to injure or destroy the domestic hot-rolled steel industry but that the additional "predatory pricing" tests as set forth in *Brooke Group* were not applicable to the case before it, since such proof was not required in dumping cases.

3.316 The European Communities submits that the practical result of the difference between the "predatory pricing" test under the Robinson-Patman Act and the "intent to injure" test under the 1916 Act is that the same conduct by two firms, one selling imported products and the other selling domestic products, could be deemed to infringe the 1916 Act in the case of the imported products, and not to infringe the Robinson-Patman Act in the case of the domestic products. This was recognized by the US Court in the *Helmac I* case.<sup>235</sup>

3.317 The European Communities concedes that if it were to be definitively established by a judgment of the US Supreme Court that *Brooke Group* predation is required for a violation of the 1916 Act, all possibility of discrimination in the sense of Article III:4 of the GATT 1994 would be

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<sup>231</sup> The European Communities refers to, e.g., *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1504 (11<sup>th</sup> Cir. 1988); cert. denied, 490 U.S. 1084 (1989); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 87-88 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7<sup>th</sup> Cir. 1980); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 858 (9<sup>th</sup> Cir. 1977), cert. denied, 439 U.S. 829 (1978).

<sup>232</sup> The European Communities refers to *Matsushita Electric*, Op. Cit.

<sup>233</sup> The European Communities recalls that the primary line provisions of Section 2(a) of the Robinson-Patman Act which make price discrimination unlawful "where the effect of such discrimination may be to substantially less competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any" competing seller of the goods in question, has been interpreted as "really referring to the effect upon competition and not merely upon competitors".

<sup>234</sup> The European Communities refers to *Wheeling-Pittsburgh*, Op. Cit., p. 603.

<sup>235</sup> The European Communities refers to *Helmac I*, Op. Cit., p. 575 et seq..

eliminated in respect of the injury/predation elements. But the European Communities denies that there is a reasonable prospect of this occurring. Such a holding would go against the clear language of the 1916 Act.

3.318 In this regard, the European Communities states that, while some courts have made general holdings that the 1916 Act is an antitrust, not a trade statute, others, in the more recent past, have held that it is both. On the assumption that a case raising the issue reached it, the US Supreme Court remains free to interpret the 1916 Act according to its own convictions. In its opinion of 22 January 1999, issued within the context of the *Wheeling-Pittsburgh* case, the Ohio District Court notes that there is no requirement in the US constitution that Congress should impose the same standards of conduct on the importers of goods as it does on domestic producers of goods. If the hypothetical approach of the United States to developments in its Supreme Court case law were followed, it could be said, inferring from actual 1916 Act case law, that there is at least a reasonable prospect that the Supreme Court will take the same view.

3.319 The European Communities concludes that, in these circumstances, the Panel can only take the 1916 Act to mean what its plain language says and what the courts which have considered it to date have taken it to mean. Since a number of them clearly consider that the 1916 Act is at least in part a trade law not incorporating antitrust predation requirements, and since plaintiffs are clearly continuing to pursue litigation on this assumption, discrimination under Article III:4 of the GATT 1994 is present.

3.320 The **United States** points out that the 1916 Act requires a complainant to show that the defendant possessed a specified intent, i.e. an intent to injure, destroy or prevent the establishment of a US industry or to restrain or monopolise trade. The prevailing judicial interpretation of the 1916 Act is that the intent requirement is a predatory intent requirement. Under the Robinson-Patman Act, the comparable element is the requirement that the complainant show "anti-competitive effect" which is commonly called "predatory pricing." This is demonstrated through proving an appropriate measure of below cost pricing and the possibility of recouping the predatory losses.<sup>236</sup>

3.321 The United States notes that the question thus becomes whether this supposed difference between the laws constitutes unfavourable treatment for imported goods. The European Communities concedes that a requirement of predatory intent under the 1916 Act like that required under the Robinson-Patman Act would eliminate all Article III:4 concerns with regard to the 1916 Act. In fact, the current state of US case law holds that evidence of the requisite intent under the 1916 Act is essentially the same predatory intent contemplated by the Robinson-Patman Act. As a factual matter, it is the US case law interpreting the 1916 Act that is dispositive in determining the nature of the 1916 Act. Thus, based upon the European Communities' statement and the prevailing judicial interpretation of the intent requirement, the Panel should find that the 1916 Act is fully consistent with Article III:4 as it accords the exact same treatment to foreign goods as the Robinson-Patman accords like domestic goods.

3.322 According to the **European Communities**, the United States has not demonstrated that the requisite intent under the 1916 Act is essentially the same predatory intent contemplated by the Robinson-Patman Act. It uses the terms "predation" and "predatory intent" very loosely, without recognizing the difference between (i) the narrow and antitrust specific meaning now applied also to primary line infringements of the Robinson-Patman Act as a result of the *Brooke Group* decision of the Supreme Court, which requires, as a condition to establishing predation, a showing of sales below an appropriate measure of cost and a reasonable prospect of recoupment of the losses from selling below cost and (ii) the broader every-day meaning of "predatory" which does indeed correspond to "intent to injure or destroy".

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<sup>236</sup> The United States refers to *Brooke Group*, Op. Cit., pp. 222-23.

3.323 In response, the **United States** notes that it is not familiar with the "broader every-day meaning" of the term "predatory" and the European Communities has neglected to provide a source for this definition. In any event, whether the term is considered an "everyday" term or otherwise, the European Communities cannot dispute that the term "predatory" is an antitrust term.

3.324 The **European Communities**, however, maintains its view that when the 1916 Act refers to "intent to injure or destroy [...] US industry", it means "injure or destroy" in the broad every-day sense of these terms, and not predation in the technical antitrust sense of *Brooke Group*. This conclusion has been reached - after the *Brooke Group* decision - by the two District Courts in *Geneva Steel* and *Wheeling-Pittsburgh*. These cases are important because they are the only cases among those cited by the United States or of which the European Communities is aware in which courts were specifically called on to decide whether an action under the 1916 Act and based on specific intent to injure or destroy a US industry must plead and prove predation in the technical antitrust sense as opposed to the ordinary sense. The Court in *Geneva Steel* said the following:

"Zenith Radio [referring to the opinions dealing with the comparability tests] did not reach the precise issue present in the instant case. However, to the extent Zenith Radio can be read to compel a finding that the 1916 Act has no protectionist aspects, as distinct from antitrust aspects, this court respectfully disagrees. Such a holding could only be reached by the judicial branch rewriting the statute, and thereby inappropriately invading the terrain of the legislative branch."<sup>237</sup>

3.325 The European Communities further recalls that the Court in *Wheeling-Pittsburgh* faced exactly the same issue and gave a similar response:

"The Court finds that, under [the 1916 Act] [...] Wheeling-Pitt must show that the defendants sold their product at a price level prohibited by the statute with the intent to injure or destroy the domestic hot-rolled steel industry. The additional proof of 'predatory pricing' as the term is used in *Brooke Group* is not applicable to this case. [...] Under the domestic antitrust statutes, 'predatory pricing', after *Brooke Group*, means below-cost pricing established with the reasonable expectation that, through later acquired market share, recovery of the cost incurred by the earlier lower prices will occur. Under the Anti-dumping Act of 1916 [...] 'predatory pricing' means something different. The artificially low prices must be set with the goal of injuring, destroying, or preventing the establishment of an American industry. It is certainly within the purview of Congress to distinguish harm caused by domestic competitors from those caused by international ones. For example, dumping itself has long been noted to constitute a harmful international trade practice which may, through government, as opposed to market-driven action, cause sharp increases in imported goods, to the detriment of domestic producers."<sup>238</sup>

3.326 In the view of the European Communities, regardless of whether these two decisions are "final" or "conclusive", they are the most recent pronouncements of US courts on the 1916 Act. They appear to be the only judicial pronouncements, recent or otherwise, which deal specifically and narrowly with the question whether antitrust standards relating to predation apply to what must be pleaded and proved in 1916 Act claims based on an allegation of "intent to injure or destroy a US industry". While it is true that neither opinion was "final" in the sense of "appealable", they are both well reasoned opinions to which weight would be attributed by other courts confronted with the same issue - an issue which was not confronted by the cases on which the United States relies.

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<sup>237</sup> *Geneva Steel*, Op. Cit., p. 1219.

<sup>238</sup> *Wheeling-Pittsburgh*, Op. Cit., pp. 603-04.

3.327 With respect to the suggestion of the United States that district court opinions, interlocutory or otherwise, do not have weight, the European Communities considers that it is sufficient to read the various opinions involved. All of the case law cited, except for two opinions of the Third Circuit Court of Appeals, consists of opinions of district courts. These opinions refer to and cite opinions of district courts, whether interlocutory or final, as well as the opinions of the circuit courts of appeals. The reasoning is very nuanced, paying particular attention to the precise issue dealt with in each case, but also showing a willingness, as illustrated by the opinions in *Geneva Steel* and *Wheeling-Pittsburgh*, to examine the logic applied by a circuit court of appeals other than the one having jurisdiction over the district court in question, and to disagree with it. This is consistent with the common law system as applied by US federal courts. In that system, opinions of circuit courts of appeals are binding on district courts located in the circuit in question which deal with the specific question before the district court, but otherwise district courts are free to, and do, consider the issues before them on the merits, considering all relevant authorities and arguments.

3.328 In summing up its position, the European Communities reiterates that it remains the case that, in respect of the difference between intent to injure under the 1916 Act and predatory intent under the Robinson-Patman Act, there are circumstances where facts caught by the former in respect of imported products would not be caught by the latter in respect of domestic products. To take a simple example, an internal memorandum of the defendant declaring the intention to take market share from a US competitor could, by itself, be evidence of intent to injure under the 1916 Act but would not suffice to show predation under the Robinson-Patman Act.

3.329 In response, the **United States** argues that the European Communities provides no support for the conclusion it draws from its hypothetical example involving the internal memorandum. According to the United States, there is credible evidence to support the opposite conclusion. For example, the European Communities' analysis squarely contradicts a comment by the District Court in *Geneva Steel*. In that case, the District Court observed that

"mere knowledge on the part of the importer that his sales will capture business away from his United States competitor, standing alone, will not be sufficient to demonstrate an intent to injure the entire United States steel industry and will therefore be inadequate to establish a violation of the Act."<sup>239</sup>

3.330 The United States also notes that, in 1983, the Third Circuit Court of Appeals in *In re Japanese Electronic Products II* dismissed the plaintiffs' claims against Sony, Motorola and Sears because the plaintiffs' evidence was found to be legally insufficient. That evidence included that the defendants sold CEPs at substantially lower prices in the United States than the prices at which comparable CEPs were sold in Japan; that they knew that the other defendants were engaging in similar activity; and they knew that concerted dumping could injure or destroy the CEP industry in the United States. The court found that even this evidence did not rise to the level of showing a "specific predatory intent."

3.331 The United States thus considers it, at the very least, highly questionable that the internal memorandum example posed by the European Communities would result in liability under the 1916 Act.

3.332 In concluding, the United States recalls that the highest US court to have considered the issue of intent requirement, the Third Circuit Court of Appeals, has held that the showing of intent required by the 1916 Act is essentially the same as the showing of predatory intent required to establish primary line price discrimination under the Robinson-Patman Act, as interpreted by the Supreme Court in its *Brooke Group* decision.

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<sup>239</sup> *Geneva Steel*, Op. Cit., p. 1224.

3.333 The United States argues, however, that even if recoupment is not the requirement, the Panel should still conclude that the 1916 Act treats imports no less favourably than the Robinson-Patman Act treats domestic products. First, the European Communities does not offer an explanation or support for its opinion that it is more difficult to prove recoupment of losses than a specific intent to destroy an industry. The European Communities' opinion is also contradicted by the actual application of the 1916 Act as well as express statements by the courts and the Tariff Commission. Second, the case-law indicates that the specific predatory intent element is virtually impossible to satisfy. Thus, in no instance do importers receive less favourable treatment.

(ii) *The measurement of price discrimination*

3.334 The **European Communities** notes a difference in the approach to establishment of price discrimination under the 1916 Act and the Robinson-Patman Act. According to the European Communities, the 1916 Act is applicable whenever goods are imported into the United States at prices *substantially below the prices charged in the country* of production or other countries where the goods are commonly exported. The statute reads in the relevant part:

"It shall be unlawful [...] 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."<sup>240</sup>

3.335 The European Communities recalls that, by contrast, to establish a primary line infringement under the Robinson-Patman Act, it must be shown that the defendant is *charging prices below a certain measure of its costs*. In the practice of the courts, that measure is the average variable cost of production. Where prices are above average variable cost of production, there is no infringement, even if the accused company is applying different prices to different customers.

3.336 In the view of the European Communities, in many if not most cases of international price discrimination, prices of imported products are still above average variable costs of production.<sup>241</sup> In such cases, importers may have to face legal proceedings under the 1916 Act for price practices above average variable cost while domestic producers would not be at risk under the Robinson-Patman Act for sales made at similar levels.<sup>242</sup> The fact that sanctions can be imposed and damages awarded in situations involving foreign goods sold at a price which bears a given relation to cost of production, while the same price having the same relation to cost of production charged by domestic producers cannot be challenged under the Robinson-Patman Act, amounts to less favourable treatment of imported products prohibited under Article III:4 of the GATT 1994.

3.337 The **United States** asserts that, as regards the requisite price discrimination, the 1916 Act treats foreign products *more* favourably than the Robinson-Patman Act treats domestic products, because the 1916 Act requires a more difficult showing by the complainant in this area than does the Robinson-Patman Act.

3.338 The United States' first supporting argument is that the 1916 Act requires proof of a far larger number of illegal price differences - imposed in a systematic way - in order to establish liability. In particular, the complainant must show that the defendant "commonly and systematically" made the

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<sup>240</sup> 15 U.S.C. § 72.

<sup>241</sup> According to the European Communities, the use of term 'substantially' in the 1916 Act does not change this conclusion, since there will be many cases where the price discrimination meets the "substantial" test without the price of the imported product falling below average variable costs.

<sup>242</sup> The European Communities notes that the *Geneva Steel* and the *Wheeling-Pittsburgh* proceedings are two concrete examples.

sales prohibited by the 1916 Act. By contrast, under the Robinson-Patman Act, liability can be established on the basis of as few as two consummated sales.<sup>243</sup>

3.339 The United States notes, as a second point, that the 1916 Act requires proof of a larger price difference than the Robinson-Patman Act in an absolute sense. In particular, under the 1916 Act the complainant must establish that the articles at issue are sold within the United States at a price "substantially less than actual market value or wholesale price of such articles [...] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported." By contrast, the Robinson-Patman Act simply requires a showing of a "cognizable" difference in price, which need only be greater than a *de minimis* difference. Thus, for example, a circuit court of appeals recently held that a 2.38 percent price difference provided a basis for liability under the Robinson-Patman Act.<sup>244</sup> Such a small difference would hardly satisfy the requirement that the price be "substantially less" under the 1916 Act.

3.340 The United States considers that the European Communities ignores these facts by focussing instead on what type of price practices will result in an award of damages under the two statutes. The United States further considers that the European Communities' argument is contradicted by US case law. According to the US Supreme Court, under the Robinson-Patman Act, the complainant only needs to "prove that the prices complained of are below an appropriate measure of the rival's cost."<sup>245</sup> Lower courts, meanwhile, have not agreed on what the appropriate measure of a rival's costs are. Some courts have held, for example, that the prices complained of need only be below average cost, while other courts have held that they need to be below average variable costs. In the 1916 Act context, on the other hand, the one court that has squarely addressed this issue has only endorsed the more stringent standard of average variable costs. As that Court explained:

"It is somewhat of a stretch to suggest the [1916] Act justifies damages when [the defendant's] prices equalled or exceeded average variable cost [...]. Therefore, this Court shall limit damages to those cases where [the defendant] set prices below average variable cost."<sup>246</sup>

3.341 The United States considers, therefore, that, in a 1916 Act case, the plaintiff may have to establish two elements: first, the price difference between the US market and the foreign market; and second, the price in the US market, which must be below average variable costs. In contrast, in a Robinson-Patman Act case, the plaintiff must only establish a certain measurement of below cost pricing. Thus, the 1916 Act actually affords more favourable treatment to imports than the Robinson-Patman Act does to domestic goods.

3.342 The United States thus concludes that the European Communities' argument overlooks or ignores the relevant case law, which confirms that on this difference as well the 1916 Act is applied more strictly than the Robinson-Patman Act.

3.343 In response to the US argument that there is some disagreement among US courts on what the appropriate measure of a rival's costs is, the **European Communities** recalls, first of all, how it comes about in the US federal court system that courts reach different results on the same issue of law. For federal court purposes, the United States is divided into circuits, each circuit having its own circuit court of appeals. Appeals from decisions of district courts lie to the circuit court of appeals of

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<sup>243</sup> The United States refers to *International Telephone & Telegraph Corp. et al.*, Op. Cit., p. 417, citing E. Kinter, *A Robinson-Patman Primer*, 3<sup>rd</sup> ed. (1979), p. 35.

<sup>244</sup> The United States refers to *Chroma Lighting v. GTE Products Corp.*, 1997-1 Trade Cas (CCH) 71,836 (9<sup>th</sup> Cir. 1997) at 79,885.

<sup>245</sup> *Brooke Group*, Op. Cit., pp. 222-23.

<sup>246</sup> *Helmac II*, Op. Cit., p. 583.

the circuit in which they are located. District courts are bound by the positions taken by their circuit court of appeals, which is in turn bound by positions taken by the US Supreme Court. So long as the Supreme Court has not spoken on a particular issue of law, it can happen that different and conflicting positions develop among the circuit courts.

3.344 Addressing the substantive aspects of the disagreement among US courts on what is the "appropriate measure of costs", the European Communities notes that at least two Circuits, the Second and the Fifth, have clearly and unequivocally adopted the "average variable cost" test. They have held that sales below the "average variable cost" level are conclusively presumed to be predatory while sales above it are conclusively presumed not to be.<sup>247</sup> Other Circuits have taken more nuanced positions, which allow of the possibility that predation may be established at prices above average variable costs but below average total costs, depending on the presence of other indicia of predatory intent.<sup>248</sup> However, according to the European Communities, what matters is that the test of the 1916 Act concerns differences in sales prices alone, whereas the Robinson-Patman Act after the Supreme Court's *Brooke Group* decision requires not only differences in price but also a price below costs. Whatever the "appropriate measure of costs" is, it is clear that there can be situations where a price in the United States is "substantially" below the sales price applied in the domestic market but is not below costs. In such a situation, the 1916 Act could apply, whereas in the comparable situation involving domestic products, the Robinson-Patman Act could not.

3.345 The European Communities is aware that a Michigan District Court in *Helmac II* declined to award damages under the 1916 Act absent a showing of prices below average variable costs. The Michigan District Court justified this with no other reasoning than the observation that "it is somewhat of a stretch" to allow damages for prices above this level. This decision was not appealed, and the Court's unsupported reasoning would have been a good issue on appeal if there had been one. Its implausibility is accentuated by the fact that the same Court, in the same case, a few months earlier, explicitly held that the other element of antitrust predation - reasonable prospect of recoupment of losses from sales below cost - did not have to be proved in claims under the 1916 Act.<sup>249</sup>

3.346 The European Communities notes, finally, that, even if on the basis of the court decision in *Helmac II* no remedy (damages) were available to a plaintiff if the price is not below costs, there would still be a difference between the Robinson-Patman Act and the 1916 Act. Under the Robinson-Patman Act, there is no liability at all if the price is not below cost. Under the 1916 Act, this would not prevent liability from arising but simply lead to only nominal damages being recovered. This is of only limited help to an importer who has had to suffer the expense and uncertainty of lengthy litigation in the US courts.

3.347 The **United States** replies that *Helmac II* is the only final decision to have considered the issue. The District Court applied precisely the same measure of discrimination to the 1916 Act claim as is applied in many primary line Robinson-Patman Act cases. The European Communities has no answer to this point other than that it believes that the Court's reasoning is "unsupported" or "implausible", which the United States disputes. The European Communities' opinion, however, is

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<sup>247</sup> The European Communities refers to *Northeastern Telephone Company v. AT&T*, Op. Cit.; *International Air Industries v. American Excelsior Co.*, 517 F.2d 714 (5<sup>th</sup> Cir. 1975).

<sup>248</sup> The European Communities refers to, e.g., *Mogahee v. Northern Propane Gas Company*, Op. Cit.; *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, Op. Cit..

<sup>249</sup> The European Communities refers to *Helmac I*, Op. Cit., p. 576 where the Court states the following: "Helmac alleges that Roth (plastics) attempted to injure Helmac, an industry in the United States. Such an allegation, if proven, would establish a violation of the Antidumping Act of 1916. It is not necessary, however, for Helmac to prove that Roth (plastics) had the ability to recoup the losses incurred in eliminating Helmac from competition".

not relevant. It is not for the parties or the Panel to agree or disagree with the judicial interpretations of the 1916 Act. The question of the proper interpretation of the 1916 Act is a question of fact for the present Panel.

3.348 The United States argues that, in any event, there are a number of good reasons for the *Helmac II* Court's decision to measure price discrimination in the same way under both the 1916 Act and the Robinson-Patman Act. In particular, comparing the price charged by a particular firm to the cost structure of that firm can help establish whether the price represents competition on the merits or is instead intended to injure competition as part of a predatory strategy. For example, average variable cost constitutes the shut-down point, i.e. the price level below which it makes more sense to shut down completely than to continue operating. If a firm makes sales at prices below average variable cost for a significant period of time, that suggests that it intends to injure competition, because there is no pro-competitive reason for making sales at such prices.

(iii) *Offering for sale vs. actual sale as threshold requirements for complaints*

3.349 For the **European Communities**, another reason why dumping is easier to establish under the 1916 Act than under the Robinson-Patman Act is that under the former a simple *offer* to sell foreign goods is sufficient to entitle a request for treble damages, while cases against price discrimination under the Robinson-Patman Act require actual sales.<sup>250</sup>

3.350 The **United States** concedes that one district court has suggested that an offer to sell may be sufficient to support a claim under the 1916 Act, but recalls that the Act still requires that the offers to sell were made "commonly and systematically." Any significance this difference may have is more than offset by the greater difficulty of establishing the prevalence of price differences under the 1916 Act than under the Robinson-Patman Act. The 1916 Act requires the plaintiff to prove that the price differences at issue - whether in the form of offers or actual sales - are imposed "commonly and systematically." By contrast, the Robinson-Patman Act can be satisfied with as few as two consummated sales.

(iv) *Defences available under the Robinson-Patman Act, but not expressly provided for in the 1916 Act*

3.351 The **European Communities** believes that price discrimination under the Robinson-Patman Act may be more easily justified, as specific and additional defences against a *prima facie* case of price discrimination are available under its provisions. Under the Robinson-Patman Act, a defence against a *prima facie* case of price discrimination exists when:

- (a) the seller shows "that his lower price or the furnishing of services or facilities to any purchaser was made *in good faith to meet an equally low price of a competitor, or the services furnished by a competitor*" ("meeting competition" defence),
- (b) the price changes occur "*in response to changing conditions* affecting the market for or the marketability of the goods concerned" ("changing market conditions" defence).<sup>251</sup>

3.352 The European Communities notes that none of the above defences is provided for in the 1916 Act. In the view of the European Communities, these two examples are an additional demonstration that sanctioning price discrimination under the Robinson-Patman Act is more difficult than under the 1916 Act.

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<sup>250</sup> The European Communities refers to *Helmac I*, Op. Cit., pp. 575-76.

<sup>251</sup> 15 U.S.C. 13(a),(b) (emphasis added by the European Communities).

3.353 The **United States** agrees that the 1916 Act, on its face, does not specifically authorize any defences. The Robinson-Patman Act, on the other hand, allows three defences namely, a "meeting competition" defence, a defence based upon "changing market conditions" and a "cost justification" defence.<sup>252</sup> The United States contends that these differences do not undermine the conclusion that the 1916 Act accords no less favourable treatment to foreign products than the Robinson-Patman Act accords domestic products because these defences are inherent in the 1916 Act's requirement that an intent to injure or destroy an industry be proven. This is also recognized in the following excerpt from a treatise on US and EC competition laws:

"Unlike the Robinson-Patman Act, the 1916 Act does not expressly provide for meeting competition and cost justification defenses. These considerations would appear relevant to predatory intent and thus should implicitly be included in the 1916 Act."<sup>253</sup>

3.354 The United States therefore considers that, in a 1916 Act case, any evidence which would support the Robinson-Patman Act defences would be equally and directly relevant to whether the showing of predatory intent can be made in the first place. Evidence showing that the defendant's pricing practices were undertaken only with the intent of meeting competition, responding to changing market conditions or to account for cost savings would be used to show whether the defendant had the requisite predatory intent in the first place. This type of evidence would not have to be presented as a defence, but, rather would undermine any other available evidence tending to show that the defendant had a predatory intent. Indeed, a case upon which the European Communities relies, *Geneva Steel*, makes this point. There, the Court explained that one reason why it is difficult to prove the requisite intent under the 1916 Act is that "evidence of normal pricing cuts [...] would be insufficient to establish liability under the 1916 Act."<sup>254</sup> In a Robinson-Patman Act case, it is necessary to provide for these defences. Without them, conduct undertaken merely to meet competition or for other proper purposes could be punished.

3.355 In response to a question of the Panel regarding the implications for US law purposes of the distinction between codified and non-codified defences, the United States further notes that, as far as the defendant is concerned, there is no particular advantage to having a defence codified in a statute as opposed to arguing that the same evidence undermines the plaintiff's required showing. In fact, it would seem that the opposite is true. If a defence is codified, the defendant would bear the burden of pleading and proving the defence. On the other hand, if the same evidence is relevant to rebutting the plaintiff's required showing, the defendant may present this evidence without having to carry the ultimate burden.

3.356 The **European Communities** concedes that the same evidence may be relevant in many cases under both the Robinson-Patman Act and the 1916 Act. However, the European Communities asserts that it is evident that evidence which establishes the "meeting competition" or "changing market conditions" defence under the Robinson-Patman Act will not in all circumstances suffice to negate predatory intent under the 1916 Act. There are other circumstances in which liability under the 1916 Act would arise than predatory pricing, let alone predatory pricing in the antitrust sense.

3.357 The **United States** notes that the European Communities does not offer any examples, concrete or hypothetical, to support this allegation. The United States finds it impossible to imagine, for example, that any court would conclude that a particular defendant intended to destroy a particular industry if the defendant was simply matching the prices of competing firms in that industry or facilitating the sale of perishable merchandise.

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<sup>252</sup> 15 U.S.C. 13(a),(b).

<sup>253</sup> B. Hawk, *United States, Common Market and International Antitrust* (1996-1 Suppl.), p. 357

<sup>254</sup> *Geneva Steel*, Op. Cit., p. 1220.

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

1. **The Meaning and Scope of Article XVI:4**

3.358 The **European Communities** considers that, since, in its view, the 1916 Act is an anti-dumping statute covered by the discipline of Article VI of the GATT 1994 and the Anti-Dumping Agreement, it should, pursuant to Article XVI:4 of the Agreement Establishing the WTO<sup>255</sup>, have been brought into full conformity with the rules set forth in Article VI and in the Anti-Dumping Agreement.

3.359 The European Communities contends that Article XVI:4 lays down a new and additional obligation in the framework of the multilateral trading system. It imposes a positive obligation to ensure the conformity of a Member's domestic laws, regulations and administrative procedures with its WTO obligations. As a result of this obligation, in cases where pre-existing domestic legislation may be inconsistent with new WTO obligations, including those arising under Article VI of the GATT 1994, and Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement, a Member was required to amend its domestic legislation so as to avoid any conflict as from 1 January 1995.

3.360 According to the European Communities, the new principle governing the relationship between domestic laws, regulations and administrative procedures and WTO obligations that is embodied in Article XVI:4 of the Agreement Establishing the WTO is a fundamental one.<sup>256</sup> Because it is laid down in the basic agreement of the system, it covers the whole set of the annexed agreements, whether or not they may contain specific expressions of the same principle. Furthermore, by virtue of Article XVI:3 of the Agreement Establishing the WTO it is a superior rule to provisions in the annexed agreements.

3.361 The **United States** takes the view that the meaning of the text of Article XVI:4 is straightforward. If a Member's law, regulation, or administrative procedure does not conform with its obligations as provided in the WTO agreements, that Member has an affirmative obligation to bring it into conformity. Conversely, if those laws, regulations and administrative procedures conform with its obligations, the Member need undertake no further action. Thus, as regards the instant case, Article XVI:4 is not relevant, unless the 1916 Act is shown to be inconsistent with a separate US obligation under a WTO agreement.

3.362 The United States further considers that the new so-called "obligations" asserted by the European Communities have been created out of whole cloth. Article XVI:4 of the Agreement Establishing the WTO provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations *as provided in the annexed Agreements*."<sup>257</sup> By its terms, this provision does not provide a new and additional obligation beyond those provided in the annexed Agreements.

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<sup>255</sup> 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."

<sup>256</sup> The European Communities refers to the Arbitrator's Report on *Japan - Taxes on Alcoholic Beverages*, dated 14 February 1997, WT/DS11/13, para 9, where it is stated that "[a] general and fundamental obligation imposed on all WTO Members, Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") requires that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the *WTO Agreement*."

<sup>257</sup> Emphasis added by the United States.

3.363 The **European Communities** adds that Article XVI:4 applies over and above similar obligations under general public international law as enshrined in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. The Vienna Convention on the Law of Treaties, in Article 26, codifies the customary principle of good faith implementation of international treaty obligations and, in Article 27, spells out a negative obligation, i.e. to refrain from invoking domestic law in order to justify any departure from an international obligation undertaken by a state. The obligation to respect WTO obligations thus results directly from the presence of those rules in the WTO Agreement and Article XVI:4 of the Agreement Establishing the WTO would be reduced to redundancy if interpreted as not containing an additional and different obligation.

3.364 The European Communities further argues that the obligation in Article XVI:4 of the Agreement Establishing the WTO must go beyond merely revoking the "grandfather clause" of the Protocol of Provisional Application, which permitted the maintenance of mandatory legislation inconsistent with the GATT 1947. This is effected by the introductory text to the GATT 1994.

3.365 The **United States** is perplexed by the European Communities' argument regarding Articles 26 and 27 of the Vienna Convention because the Vienna Convention is not a covered agreement under the WTO. In fact, it is through the provisions of Article XVI:4 that the principles of Article 26 of the Vienna Convention became legally binding on all Members of the WTO, even though not all Members are parties to the Vienna Convention. For example, the United States is not a party.

3.366 With regard to the European Communities' argument based upon the introductory text of the GATT 1994, the United States argues that, by definition, Article 1(a) and (b) are applicable only to the GATT 1994, and not to other WTO agreements such as the General Agreement on Trade in Services (hereinafter the "GATS") and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the "TRIPS Agreement"). Article XVI:4 therefore provides an overarching statement in the Agreement Establishing the WTO, clearly applicable to all annexed agreements and not just the GATT 1994, that no measures are grandfathered. Article XVI:4 thus serves to remove any doubt which might have existed in its absence that all measures must be brought into conformity as from 1 January 1995. Indeed, it was precisely in this manner and for this purpose that the Appellate Body cited Article XVI:4 in *India - Patent*. In that case, India attempted to argue that it could delay changing its law as required by Article 70.9 of the TRIPS Agreement because of differences between the language of that provision and that of other Articles of the TRIPS Agreement. Specifically, India claimed that while other TRIPS Agreement provisions explicitly required changes to domestic laws, Article 70.9 did not. The Appellate Body rejected this argument, stating at the outset of its discussion that "India's arguments must be examined in the light of Article XVI:4 of the *WTO Agreement*".<sup>258</sup> Article XVI:4 thus assisted in clarifying that India could not rely on claimed differences in TRIPS Agreement language to delay compliance.

3.367 In the view of the United States, beyond serving this overarching function of providing context for provisions of the WTO agreements, Article XVI:4 imposed an obligation on Members to review existing legislation at the time the WTO Agreement was to enter into effect to make sure that existing laws, regulations and administrative procedures did, in fact, conform to the Members' WTO obligations, and where those laws did not, to bring them into conformity. In the United States, for example, a comprehensive review of US law was undertaken after the Uruguay Round Final Act to determine which laws, regulations or administrative procedures might need to be changed in order to comply with Article XVI:4. Where a statutory change was necessary, it was proposed to the US Congress and enacted as part of the Uruguay Round Agreements Act, which was signed into law on 8 December 1994. All changes in regulations and administrative procedures that were necessary to

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<sup>258</sup> *India - Patents*, Op. Cit., para. 79.

bring the United States into conformity with its obligations under the WTO Agreement were described in the Statement of Administrative Action which was submitted by the executive branch and approved by Congress as part of the Uruguay Round Agreements Act.

3.368 The US counter-arguments notwithstanding, the **European Communities** maintains its view that Article XVI:4 does not only contain an obligation to avoid violating the WTO agreements. According to the European Communities, it also contains an obligation to take positive action to ensure that nothing in a WTO Member's "laws, regulations and administrative procedures" is inconsistent with the WTO agreements, that nothing in them contains conditions or criteria or powers to take action which conflict with those agreements. This has already been recognised by the Appellate Body in the *India – Patent* case. In that case, both the panel and the Appellate Body upheld the United States' claim that domestic law can be inconsistent with WTO provisions not merely because it mandates WTO-inconsistent actions, but also because it fails to provide "a sound legal basis" for the administrative procedures or any other executive action required to implement WTO obligations.<sup>259</sup> The underlying rationale was that in the absence of a sound legal basis for mailbox patent applications in domestic law, the basic objective of WTO law, namely to create predictable conditions of competition, could not be achieved.

3.369 The European Communities submits that the 1916 Act also does not provide such a "sound legal basis" for implementation of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Its wording conflicts with Article VI of the GATT 1994 and the Anti-Dumping Agreement in the ways that the European Communities has explained. The United States seeks to diminish this by arguing that certain courts have suggested that the 1916 Act may have some characteristics of antitrust legislation. It is clear that this case law, even taken together with the extrapolations thereof which the United States seeks to make and suggests may be adopted in the future, is a long way from "ensuring conformity" with Article VI of the GATT 1994 and the Anti-Dumping Agreement. The two most recent decisions of US courts, *Geneva Steel* and *Wheeling-Pittsburgh*, actually interpret and allow the 1916 Act to be applied in a way which would violate those provisions. In this regard, the European Communities notes that the applicability of Article XVI:4 is not limited to final judgements and that, in any event, the United States has done nothing to fulfil its obligation under Article XVI:4. It has neither amended the 1916 Act nor intervened in the cases referred to in order to ensure that the 1916 Act is not applied in a manner contrary to the United States' WTO obligations. Nor has it even said that it disagrees with the decisions adopted by the District Courts in these two cases.

3.370 In its response, the **United States** recalls that the discussion by the Appellate Body in *India-Patent* of a "sound legal basis" comes in the context of an analysis of the specific textual obligation at issue in that case, Article 70.8(a) of the TRIPS Agreement. That provision affirmatively requires Members to provide in their domestic legal systems a mechanism for the filing of applications for patents which protects their novelty and priority. India instead had on its books a law explicitly prohibiting such applications, that is, specifically mandating a violation of India's TRIPS Agreement obligations. India claimed that unwritten, unpublished "administrative instructions" never produced for the panel took priority over the mandatory law, but the panel and Appellate Body found nothing to support this claim. It was in this context, the context of Article 70.8(a) of the TRIPS Agreement with its requirement of a domestic legal mechanism accomplishing specific ends, that the panel and Appellate Body concluded that the "administrative instructions" failed to provide a sound legal basis.<sup>260</sup> The concept was not analysed in the abstract as somehow derived independently of Article 70.8(a). Furthermore, it is worth noting that the Appellate Body reversed panel findings relating to "legitimate expectations" generally and removal of "reasonable doubts" because these findings were not textually based. Likewise, the European Communities' theory that the 1916 Act

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<sup>259</sup> The European Communities refers to *India – Patents*, Op. Cit., para 58.

<sup>260</sup> The United States refers to *India – Patents*, Op. Cit., paras. 56-58.

violates Article XVI:4 because it does not provide a "sound legal basis" for implementation of Article VI has no textual basis and must therefore be rejected.

## **2. The Relevance to an Article XVI:4 Inquiry of The Distinction Between Mandatory and Discretionary Legislation**

3.371 The **European Communities** argues that, even if it were possible to interpret the 1916 Act in a manner compatible with Article VI of the GATT 1994, Article XVI:4 of the Agreement Establishing the WTO would require a WTO Member to take positive measures to ensure compliance with its WTO obligations and eliminate even a potential incompatibility with WTO obligations. The United States cannot hide behind the excuse that action contrary to WTO obligations might one day not be allowed by the US Supreme Court. The fact that courts are regularly interpreting the 1916 Act in a manner contrary to Article VI of the GATT 1994, should require the United States to intervene and prevent this.

3.372 According to the **United States**, the European Communities' assertion that Members must take affirmative action to eliminate even a "potential" incompatibility suggests that the European Communities believes that WTO Members are under an affirmative obligation to include in their domestic law explicit limits on discretionary authority. This formulation of WTO obligations is diametrically opposed to the principle set forth in each and every panel report which has addressed the issue – that legislation must mandate, and not merely leave open the possibility, of GATT- or WTO-inconsistent action. Likewise, such a formulation is also inconsistent with the approach taken in other GATT 1947 contexts, for example, working parties examining the legislation of a contracting party or acceding country to determine whether that legislation *mandates* GATT-inconsistent results and not whether it *could* deliver such results.<sup>261</sup> Therefore, the analysis of whether the 1916 Act is inconsistent with Article XVI:4 must be based upon an analysis of whether the 1916 Act mandates a violation of the text of Article VI and the Anti-Dumping Agreement.

3.373 The **European Communities** responds that, even if on the basis of the GATT 1947 it could be argued that any aspect of the 1916 Act is discretionary and not a *per se* violation of the United States' obligations, the situation is in any event different under the WTO Agreement, since Article XVI:4 of the WTO Agreement now expressly requires Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations" under the WTO agreements. Article XVI:4 covers both domestic legislation *per se* and its application to specific cases.

3.374 The European Communities further notes that one effect of Article XVI:4 is to shift the borderline between discretionary and mandatory legislation so as to bring legislation with "less mandatory" character under WTO disciplines. Article XVI:4, whatever its other consequences may be, at least broadens the range of acts that can be classified as "mandatory". This is well illustrated by the decision of the GATT 1947 panel in the *EC – Audio Cassettes* case. The panel in that case applied the "shall ensure the conformity" clause of what was then Article 16.6(a) of the Tokyo Round Anti-Dumping Code to hold EC anti-dumping legislation as Code-infringing, despite the fact that the initiation of proceedings under the legislation was discretionary. It then examined particular rules within the legislation to see whether they mandated infringements of the Code or allowed administrators discretion to act in a legal way. The panel expressed itself as follows:

"[T]he Panel did not consider in any event that its task in this case was to determine whether the EC's Basic Regulation in its totality was non-mandatory in the sense that the initiation of investigations and imposition of duties were not mandatory functions. Should panels accept this approach, they would be precluded from ever reviewing the

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<sup>261</sup> The United States refers to the *Report on The European Economic Community*, adopted on 29 November 1957, BISD 6S/70, p. 80, para.10.

content of a Party's anti-dumping legislation, a result that would undermine the requirement of Article 16:6 of the Agreement that Parties bring their legislation, regulations and administrative procedures into conformity with the provisions of the Agreement. Rather, the Panel considered that its task in this case was to determine whether the EC's Basic Regulation was mandatory in the sense that the EC was required by its legislation to use the averaging methodology complained of by Japan."<sup>262</sup>

3.375 The European Communities submits that the *EC - Audio Cassettes* case shows that the criteria and conditions set out in legislation whose overall application may be discretionary must also comply with WTO obligations. The same reasoning can be extended to the instant case. For example, the 1916 Act says that criminal prosecution is discretionary, but once a case is coming into prosecutions, the question arises whether there is an offence.

3.376 The European Communities is aware that the report of the panel in the *EC - Audio Cassettes* case was never adopted, but notes that the reason why the report was not adopted had nothing to do with the distinction between mandatory and discretionary measures. Moreover, the Appellate Body in *Japan - Alcoholic Beverages* noted on the legal status of an unadopted panel report that:

"a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."<sup>263</sup>

3.377 The European Communities adds that the panel in *United States - Definition of the Wine Industry* took the same position as the *EC - Audio Cassettes* panel. The report of that panel was adopted. In *United States - Definition of the Wine Industry*, the United States argued that the case should not proceed in the absence of an application of the law since the violation was purely "hypothetical". The panel rejected this argument and ruled on the compatibility of the US law stating:

"The Panel noted that it had been called upon, in its terms of reference, to review the facts of the matter referred to the Committee by the EEC in document SCM/54, and that the issue raised in this document was the conformity of the US law in question (i.e. Section 612(a)(1) of the Trade and Tariff Act of 1984) as such with the provisions of the Code, as required by its Article 19:5(a)."<sup>264</sup>

3.378 The European Communities notes that Article 19:5(a) of the Tokyo Round Subsidies Agreement was virtually identical to Article 16:6(a) of the Tokyo Round Anti-Dumping Code which the *EC - Audio Cassettes* panel relied on. Both are equivalent to Article XVI:4 of the Agreement Establishing the WTO.

3.379 The European Communities further points out that one of the purposes of Article XVI:4 of the Agreement Establishing the WTO is to ensure security and predictability in the international trading system. Placing importers under the threat of draconian civil and criminal penalties can have a "chilling effect" on imports even if the legislation has for some reason not so far been applied to the point of imposing penalties.<sup>265</sup> Paradoxically, the more a law is effective as a deterrent, the less will be the evidence of actual rather than possible application. The following passage of the report of the panel in *United States - Malt Beverages* is pertinent:

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<sup>262</sup> *EC - Audio Cassettes*, Op. Cit., para. 362.

<sup>263</sup> *Japan - Taxes on Alcoholic Beverages*, Op. Cit., p. 15.

<sup>264</sup> *United States - Definition of the Wine Industry*, Op. Cit., para. 4.1.

<sup>265</sup> The European Communities notes that the mere fact of non-application may be accidental, subject to change and completely out of a government's control.

"[...] the measure continues to be mandatory legislation which may influence the decisions of economic operators".<sup>266</sup>

3.380 The European Communities submits that the report of the GATT 1947 panel in the *Japan – Trade in Semi-conductors* case<sup>267</sup> also illustrates this point. It makes clear that even a measure which is not formally binding can still be capable of constituting an infringement. The same can be said of binding measures that are not often enforced, such as the 1916 Act.

3.381 The **United States** maintains its view that, since the 1916 Act is susceptible to an interpretation that is fully consistent with all of the United States' WTO obligations and has been so interpreted to date, there is no requirement under Article XVI:4 that the United States take action to change the law. Moreover, the distinction is still being applied in cases brought under the WTO, as is evidenced by the report of the panel on *Canada – Aircraft*.

3.382 The **European Communities** responds that the US interpretation would reduce Article XVI:4 of the Agreement Establishing the WTO to inutility and redundancy. The US argument that the 1916 Act "is susceptible to an interpretation that is fully consistent with all US WTO obligations" is based on an alleged non-actionability of discretionary legislation under the GATT 1947 and ignores Article XVI:4 of the Agreement Establishing the WTO, which has at least significantly reduced the required degree of mandatoriness for actionability.

3.383 The European Communities concedes that the mandatory/discretionary distinction continues to be significant, for example, in cases where an administrative authority is given a general power to regulate trade and to adopt measures of commercial policies. This gives to the authority the possibility to take measures which are incompatible with WTO obligations but it can of course also choose to remain within the bounds of what would not violate WTO rules. The fact that the authority has the possibility to take measures which are incompatible is not of itself a violation of WTO obligations. A violation arises where incompatible measures are taken or where the administration is obliged to take into consideration criteria or apply conditions that are inconsistent with those prescribed in the WTO agreements. It is the latter situation that prevails in the case of the 1916 Act.

3.384 As regards the relevance of the panel report on *Canada – Aircraft*, the European Communities recalls that the panel in that case found that the measure authorising grants could not be an infringement of the SCM Agreement since the body in question was not required to subsidize, i.e. to infringe the SCM Agreement.<sup>268</sup> The panel then went on to consider whether that body actually did give subsidies. This case is not, however, of any guidance in the present case in view of the context in which the panel's reasoning occurs. The panel at that point in *Canada – Aircraft* was examining whether there were any subsidies in preparation for examining whether they were *de facto* export contingent and therefore prohibited. Subsidies are not as such inconsistent with the WTO Agreement, as indeed the SCM Agreement recognises in its footnote 23. They only violate the WTO Agreement if certain conditions are met, notably if they are export-contingent. Therefore, *a fortiori* the mere power to grant subsidies is not objectionable. Even if the *Canada – Aircraft* panel's overall conclusion may be correct, its reliance on the discretionary/mandatory distinction to arrive at its conclusion appears misplaced and inappropriate. In any event, this part of the report has not had the benefit of being reviewed by the Appellate Body.

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<sup>266</sup> *United States – Malt Beverages*, Op. Cit., para. 5.60.

<sup>267</sup> Panel Report on *Japan – Trade in Semi-conductors*, adopted on 4 May 1988, BISD 35S/116.

<sup>268</sup> The European Communities refers to *Canada – Aircraft*, Op. Cit., para. 9.127

### 3. Relationship With Article 18.4 of The Anti-Dumping Agreement

3.385 In response to a question of the Panel to both parties regarding the relationship between Article XVI:4 of the Agreement Establishing the WTO and Article 18.4 of the Anti-Dumping Agreement, the **European Communities** argues that Article 18.4 of the Anti-Dumping Agreement reiterates and confirms, for the specific area covered by that Agreement, the general obligation laid down in Article XVI:4 of the Agreement Establishing the WTO in respect of all its annexed agreements. Article XVI:4 is therefore broader in scope than Article 18.4 of the Anti-Dumping Agreement and also applies, for example, to Article VI of the GATT 1994.

3.386 The European Communities further notes that, as regards their respective content, there is essentially no difference between Article 18.4 and Article XVI:4. The only substantive difference results from the qualification in the Anti-Dumping Agreement "as [the WTO provisions] may apply for the Member in question". Apart from a historical explanation that this clause was carried forward from the Tokyo Round Code, in the new Anti-Dumping Agreement the scope for differential treatment of specific countries is rather limited. One example is provided by Article 15 as regards developing country Members. Moreover, the slight difference in wording does not remove the WTO dumping provisions from the scope of Article XVI:4. For example, in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*, the panel reviewed a claim under Article 5.5 of the Anti-Dumping Agreement in the light of Article XVI:4.<sup>269</sup>

3.387 The European Communities adds that Article XVI:4 has generalised an obligation which was first set out in a more sectoral context and within a more limited group of GATT 1947 contracting parties, i.e. the parties to the Tokyo Round Anti-Dumping Code and the parties to the Tokyo Round Subsidies Code. If regard is had to the negotiating history of the Agreement Establishing the WTO, it is clear that it came at a relatively late stage of the Uruguay Round. At that stage, the negotiations of the Anti-Dumping Agreement were much more advanced and the reiteration of the old Code provision had not been questioned.

3.388 The **United States** is of the view that, like any other US law, regulation or administrative procedure, under Article XVI:4, anti-dumping laws, regulations and procedures, assuming they are mandatory, must conform with the requirements of the various WTO agreements.

3.389 With regard to Article 18.4 of the Anti-Dumping Agreement, the United States notes that, although the language is not identical to Article XVI:4, there were similar provisions in the Tokyo Round Codes on Anti-Dumping and Subsidies which have generally been interpreted as requiring the parties to those agreements to adopt laws, regulations and procedures that permit them to act in conformity with their obligations under those Agreements. Article 18.4 of the Anti-Dumping Agreement should be interpreted in the same way.

## IV. THIRD PARTY SUBMISSIONS

### A. INDIA

4.1 According to **India**, Article VI of the GATT 1994 establishes the only GATT-compatible means of dealing with dumping. Three steps are envisaged in this Article. Firstly, what constitutes dumping; secondly, what conditions must be fulfilled for the application of remedial measures; and thirdly, what steps a Member can take once dumping has been established. As regards this third step, Article VI:2 provides for the levying of anti-dumping duties. It is therefore clear that Article VI lays down that, provided that there is material injury to the domestic industry and provided the relevant

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<sup>269</sup> The European Communities refers to the Panel Report on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement From Mexico*, adopted on 25 November 1998, WT/DS60/R, para 7.38.

procedures are followed, WTO Members can levy anti-dumping duties. Hence, Article VI clearly establishes that the application of anti-dumping duties is the sole and only means authorized by the GATT 1994 to deal with the problem of dumped imports.

4.2 India notes, however, that, under the 1916 Act, the United States can apply measures other than anti-dumping duties.<sup>270</sup> Thus the very purpose and intent of Article VI and that of the Anti-Dumping Agreement is thwarted. The remedial measures provided for by the 1916 Act are treble damages and/or criminal penalties, including fines and/or imprisonment. These remedies are not duties and are not, therefore, the type of measures allowed under WTO anti-dumping rules to counter dumping practices. The United States has argued that the use of the phrase "may levy [...] an anti dumping duty" in Article VI:2 does not preclude the use of other remedies for dumping. This argument is not valid. Article VI of the GATT 1994 was specifically incorporated to address the problems of dumping and provides for the levying of anti-dumping duties as the sole remedy. It would be totally unacceptable if Members could not only impose anti-dumping duties, but also such other civil or criminal penalties as are prescribed by the 1916 Act. Clearly therefore, the 1916 Act violates Article VI:2 of the GATT 1994. Read in its proper context, the word "may" in Article VI:2 appears to imply that the levying of an anti-dumping duty is not mandatory. However, it cannot under any circumstances, be interpreted as providing recourse to Members to resort to measures other than "anti-dumping duties".

4.3 Moreover, India does not agree with the US contention that the application of such measures, i.e. measures other than the application of anti-dumping duties, is justified on the grounds that the conduct to which the 1916 Act applies is defined in a manner which, while incorporating the essential elements of dumping, differs by the addition of one or more conditions. It is the view of India that, as long as the 1916 Act provides remedial action for dumping of products into the domestic market, it must be in conformity with the provisions of Article VI and the Anti-Dumping Agreement. Since this is not the case, the 1916 Act is inconsistent with the principles and objectives laid down in Article VI of the GATT 1994 and the Anti-Dumping Agreement.

4.4 India is also of the view that the 1916 Act is inconsistent with Article VI:1 of the GATT 1994 and Article 3 of the Anti-Dumping Agreement because it does not require there to be actual injury, let alone material injury to the domestic industry as a precondition for taking action. It only stipulates that action under the 1916 Act can be taken as long as there is intent to injure the domestic industry. Moreover, the absence of administrative procedures in the 1916 Act means that no investigation conforming to the requirements of the Anti-Dumping Agreement needs to be carried out when taking action under the 1916 Act. Thus, judicial decisions under the 1916 Act can be made without the procedural safeguards otherwise provided for in the Anti-Dumping Agreement. Finally, the 1916 Act fails to respect a number of procedural and due process requirements as set forth in the Anti-Dumping Agreement, including inter alia (i) the requirement that the competent authority verify the information given in any complaint before initiating an investigation; (ii) the requirement that notice be given to the government of the exporting country before such an investigation is started; (iii) the requirement that a complaint will be entertained only if it is supported by a minimum percentage of the domestic industry; (iv) the possibility for the governments of exporting countries to make comments on the proposed findings and (v) the requirement that the measures not be restrictive. The 1916 Act is therefore clearly violative of the procedural provisions of the Anti-Dumping Agreement.

4.5 As regards the US argument that the 1916 Act is not an anti-dumping law at all, but is an antitrust law, India does not agree. As accepted by the United States, the 1916 Act clearly targets products which are being sold within the United States allegedly at a price substantially less than the

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<sup>270</sup> India notes, in this regard, that the 1916 Act can be invoked and has been invoked over the years by complaining parties desirous of using the remedies offered by it as an alternative and, more importantly, as a supplement to the Antidumping Act of 1921 and later US anti-dumping legislation.

actual market value or wholesale price of the products. This is entirely in consonance with the definition of dumping given in Article VI. In accordance with Article VI, dumping occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products". Clearly therefore, the 1916 Act is a law which should be subject to the provisions of Article VI of the GATT 1994 and of the Anti-Dumping Agreement.

4.6 Furthermore, India entirely agrees with the averments by the European Communities relating to the 'grandfathering' of the 1916 Act. It is clear from the various statements made before US Senate Committees, including the testimony by the USTR General Counsel in 1986, that even in the United States the view was that without grandfathering the 1916 Act would be GATT-inconsistent. The failure of the United States to seek a grandfather exception under the GATT 1994, after admitting that the 1916 Act benefited from grandfathering under the GATT 1947, necessarily implies that the United States waived its grandfather rights on the 1916 Act. The United States cannot, therefore, keep in force domestic legislation which is clearly incompatible with the provisions of the GATT 1994.

4.7 India further argues that the 1916 Act cannot escape the discipline of Article VI simply because it requires the prohibited conduct to be "common and systematic". Article VI applies whether the dumping is limited in occurrence or sporadic, and whether the dumping is frequent or systematic. Once it is established that the relevant rule or law, in the present case the 1916 Act, is subject to Article VI, then the only remedy permitted is the imposition of anti-dumping duties, subject to a finding of dumping in accordance with the definition of Article VI and the existence of injury to the domestic industry, or threat thereof. Thus, any anti-dumping law which goes beyond providing relief in the form of anti-dumping duties, such as the 1916 Act, is inconsistent with the GATT 1994.

4.8 Finally, India recalls the United States' argument that the US courts' interpretation of the 1916 Act is dispositive as a factual matter of the nature of the 1916 Act and that the Panel cannot depend on its own interpretation. In this connection, India simply refers the Panel to the Appellate Body's decision in *India – Patents*.<sup>271</sup>

4.9 In conclusion, it is India's view that even though the 1916 Act provides relief against alleged dumping, it does not conform to the provisions of Article VI of the GATT 1994 and those of the Anti-Dumping Agreement. The 1916 Act thereby nullifies and impairs the benefits accruing to the United States' trading partners under those Agreements. India therefore urges the Panel to find the 1916 Act to be violative of the above-mentioned provisions and requests the Panel to direct the United States to bring its domestic law in conformity with its obligations under the GATT 1994.

## B. JAPAN

4.10 **Japan** considers that it has a substantial trade interest in the present matter. In this regard, Japan recalls that, in November 1998, the Wheeling-Pittsburgh Steel Corporation filed a complaint under the 1916 Act against nine companies, including three Japanese trading firms. They are Mitsui & Co., Marubeni America Corp., and Itochu International Inc.. Japan is one of the major steel producing countries, and the US steel market was the largest market abroad for the Japanese steel makers in 1998. The Japan Iron and Steel Exporters Association and other exporters' associations asked the Japanese government to take appropriate action. They are concerned about the negative implications for trade in steel and the threat of substantial trade barriers for steel exports.

4.11 According to Japan, the pending litigation initiated by Wheeling-Pittsburgh Steel has serious negative trade implications. One is the "chilling effect" on exports from Japan. Even if no criminal or civil penalties are ever imposed, the potential liability under the 1916 Act discourages defendants - in

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<sup>271</sup> *India – Patents*, Op. Cit., paras. 65-66.

the *Wheeling-Pittsburgh* case Japanese trading firms - from importing the relevant products at issue once legal proceedings have been initiated. Considering that litigation of this kind usually is protracted and given the possibility of treble damages being imposed, the importers' risk when continuing to import without knowing the final outcome of the litigation is tremendous and prohibitive. The threat of retroactive imposition of treble damages is sufficient to deter imports. The eventual impact of the *Wheeling-Pittsburgh* litigation will not result from the final judgement of the District Court, but from the actual negative effect on imports due to the threat of civil liability or criminal sanctions.

4.12 Japan further argues that the three Japanese trading firms involved in *Wheeling-Pittsburgh* have found the litigation process to be extraordinarily expensive, burdensome as well as disruptive to their business. The effect of these burdens is already so obvious that four non-Japanese defendants in this litigation have reached out-of-court settlements. Although the precise terms of the settlements are not publicly available, these defendants settled with Wheeling-Pittsburgh Steel by agreeing to buy a certain quantity of steel from it at an agreed price. These settlements have obviously distorted sound, market-oriented trade practice, which has been an essential concept during successive rounds of multilateral trade negotiations.

4.13 Japan adds that it cannot be denied that this kind of litigation under the 1916 Act may occur again. So far, no judgement as to whether liability exists have been rendered in the *Geneva Steel* or *Wheeling-Pittsburgh* case. However, even at the present stage of litigation, the existence of the 1916 Act and the ongoing litigation have enormous adverse effects on trade, as shown above.

4.14 Japan also argues that, until and unless overturned by other court decisions, the decisions in *Geneva Steel* and *Wheeling-Pittsburgh* will prevail in the application of the 1916 Act. Even if they were to be overturned, similar cases may arise any time and repeatedly as long as the 1916 Act remains in force.

4.15 Turning to legal aspects, Japan considers that judicial decisions under the 1916 Act are made without the procedural safeguards provided for in the Anti-Dumping Agreement. Furthermore, Japan rejects the US assertion that the 1916 Act is not directed at dumping and therefore is not an anti-dumping statute. The 1916 Act is not only directed at antitrust, but also directed at dumping. The US assertion is not justified, considering recent US court findings, i.e. *Geneva Steel* and *Wheeling-Pittsburgh*, the previous testimonies and documents by US government officials, the legislative history as well as the wording of the 1916 Act.

4.16 Japan further notes that on 26 July 1999 the DSB established another panel in respect of the 1916 Act at Japan's request and pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement. In its panel request, Japan requests that the panel find that the 1916 Act is neither consistent with nor justified by the following relevant provisions:<sup>272</sup>

- (a) Article III:4 of the GATT 1994;
- (b) Article VI of the GATT 1994 and the Anti-Dumping Agreement, and in particular Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement;
- (c) Article XI of the GATT 1994;
- (d) Article XVI:4 of the Agreement Establishing the WTO

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<sup>272</sup> Japan refers to WT/DS162/3.

4.17 Japan also recalls that the subject of and the issues underlying Japan's panel request are the same as in the dispute before the present Panel. In relation to some relevant provisions, Japan has concerns similar to those set out by the European Communities before the present Panel. However, Japan has additional legal arguments which the panel established at its request will need to assess.

C. MEXICO

4.18 **Mexico** is of the view that the present dispute concerns a law which violates the WTO agreements both in its letter and in its operation, regardless of the nature of that law within the US legal system. The 1916 Act has had real adverse effects and represents a risk for trade with the United States.

4.19 Mexico contends that the Panel should not follow the principles of interpretation of the United States courts, as the United States suggests, since its terms of reference are as follows:

"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."<sup>273</sup>

4.20 In the view of Mexico, the terms of reference clearly require the Panel to examine the *matter* referred to the DSB by the European Communities *in the light of the relevant provisions of the WTO Agreement, of the GATT 1994 and of the Anti-Dumping Agreement*. It follows that the examination must be conducted in the light of those three Agreements only, and not of the domestic judicial decisions of the United States, which not only do not form part of the terms of reference of the Panel, but also concern an area of application that is different and independent of the WTO. Mexico agrees with the European Communities that the nature of the 1916 Act should be determined with reference to the provisions of the GATT 1994 and WTO law and not on the basis of the national legislation or case law of any particular Member.

4.21 Mexico notes, in this regard, that the trade practice regulated by the 1916 Act contains several of the elements of Article VI of the GATT 1994 and of the Anti-Dumping Agreement. Mexico agrees with the European Communities that in order to determine the applicability of the disciplines of Article VI of the GATT 1994 to the 1916 Act, it is necessary to compare the content of the two systems. Thus, Article VI contains two basic elements which also appear in the 1916 Act:

- (i) It targets imports;
- (ii) it is based on the difference between the prices of imports and a concept commonly known as "normal value".

4.22 Mexico further notes that there are additional elements common to the two systems, including the following:

- (i) Both systems are based on price differentials;
- (ii) the calculations in both systems require adjustments;
- (iii) both systems incorporate the concept of injury or material retardation;

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<sup>273</sup> WT/DS136/3.

- (iv) both systems condemn the trade practice in question.

4.23 Mexico concludes, therefore, that the trade practice regulated by the 1916 Act comes under the definition of dumping, and consequently, it is a law that regulates dumping and the associated remedies. Both disciplines are provided for in Article VI of the GATT 1994 and the Anti-Dumping Agreement.

4.24 Mexico recalls that the United States asserts that there are a number of differences between the 1916 Act and the Anti-Dumping Agreement. However, for the following reasons, Mexico considers that these differences are irrelevant for the purposes of determining the nature of the 1916 Act:

- (a) The price differential is irrelevant. The Anti-Dumping Agreement applies to small dumping margins and large dumping margins alike. In any case, the concept of "substantially less" coincides with the *de minimis* concept in the Anti-Dumping Agreement.
- (b) The requirement that the differential should be "common and systematic" is also irrelevant. There is no requirement in Article VI of the GATT 1994 or in the Anti-Dumping Agreement that the trade practice should be sporadic.
- (c) According to the United States, unlike the Anti-Dumping Agreement, the 1916 Act requires that there should be intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States. Mexico contends that the United States assertion is at best partial, since it fails to recognize that the purpose of both the GATT 1994 and the Anti-Dumping Agreement, on the one hand, and the 1916 Act, on the other, is to avoid injury or material retardation to the domestic industry.
- (d) The United States argues that the 1916 Act requires that the complaining party suffer damages, while the Anti-Dumping Agreement requires that injury to a domestic industry must be found to exist. However, this argument fails to recognize that both systems provide for the initiation of the procedure at the request of a party when such party is affected by the trade practice in question.

4.25 Mexico notes that, in any case, none of the differences invoked by the United States mean that the 1916 Act does not regulate the trade practice known as dumping, and consequently, the United States has failed to substantiate its assertions that Article VI of the GATT 1994 and the Anti-Dumping Agreement are not applicable thereto. In fact, the only thing that the United States succeeds in showing by highlighting the differences between the two systems is that the 1916 Act does not meet the minimum WTO requirements for initiating and conducting procedures in respect of this kind of unfair international trade practice and for settling such cases.

4.26 Mexico considers, therefore, that the 1916 Act regulates the trade practice known as dumping and that it is subject to the disciplines of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Mexico further considers that the 1916 Act violates certain provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. The table below sets out the most important violations.<sup>274</sup>

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<sup>274</sup> Mexico points out that without prejudice to its view that there may be other provisions that are violated, the present examination will be limited to the provisions that are expressly set forth in the request for the establishment of a panel by the European Communities.

Provisions of the 1916 Act	Provisions violated	Comments
"[A] price substantially less than the actual market value or wholesale price of such articles [...] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported [...]."	Article VI:1(a) and (b) of the GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement	The 1916 Act does not respect the precedence of criteria for establishing normal value.
" <i>Provided</i> , 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".	Article VI:1 of the GATT 1994 and Article 3 of the Anti-Dumping Agreement	In order to condemn dumping, there must be injury, threat of injury or material retardation, while the 1916 Act merely requires the intent thereof.
"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."	Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.	WTO Members may only offset dumping through the imposition of duties not greater than the margin of dumping and only once they have initiated and conducted an investigation in accordance with the Anti-Dumping Agreement.
"[A]nd shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee."	Article VI:2 of the GATT 1994	Anti-dumping duties may not be greater than the margin of dumping of the product in question.
"The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."	Article 1 of the Anti-Dumping Agreement, Article VI of the GATT 1994	The proper means of offsetting dumping consists in anti-dumping measures imposed pursuant to an investigation conducted in accordance with the Anti-Dumping Agreement.

4.27 Furthermore, Mexico agrees with the European Communities that since the 1916 Act is subject to the obligations of Article VI of the GATT 1994 and of the Anti-Dumping Agreement, and since the 1916 Act is not in conformity with the obligations imposed by those Agreements, it also violates Article XVI:4 of the Agreement Establishing the WTO.

4.28 For these reasons, Mexico considers that the Panel should conclude that the 1916 Act violates the provisions of the WTO, in particular of the Anti-Dumping Agreement and of the GATT 1994, and that consequently, it violates Article XVI:4 of the Agreement Establishing the WTO. Similarly, the 1916 Act may also violate Article III of the GATT 1994, but Mexico does not see the need to dwell on this point.

## V. INTERIM REVIEW<sup>275</sup>

### 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* –

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<sup>275</sup> 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*<sup>276</sup> and on those of the panel and of the Appellate Body in the case of *Brazil – Measures Affecting Desiccated Coconut*.<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup>

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

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

<sup>278</sup> See para. 3.27 above.

<sup>279</sup> 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.<sup>280</sup> In this respect, the Appellate Body in

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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.

<sup>280</sup> *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".<sup>281</sup>

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*".<sup>282</sup>

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."<sup>283</sup>

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.<sup>284</sup>

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

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<sup>281</sup> Ibid., para. 64.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid., para. 66.

<sup>284</sup> 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.<sup>285</sup> 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.<sup>286</sup> 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

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<sup>285</sup> *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.

<sup>286</sup> 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.<sup>287</sup>

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)"<sup>288</sup>

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.

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<sup>287</sup> See Article 32.3 of the Agreement on Subsidies and Countervailing Measures.

<sup>288</sup> 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."<sup>289</sup> 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,<sup>290</sup> is a United States legislative text enacted under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.<sup>291</sup> It has been known since as the "Antidumping Act of 1916."<sup>292</sup> The 1916 Act,

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<sup>289</sup> See para. 3.245 above.

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

<sup>291</sup> 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.

<sup>292</sup> 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 discrimination<sup>293</sup> when conducted with specific intent,<sup>294</sup> 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 government<sup>295</sup> at the federal level, not by the executive branch of government; and

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<sup>293</sup> 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).

<sup>294</sup> 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 19<sup>th</sup> 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.

<sup>295</sup> 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.<sup>296</sup>

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 1994<sup>297</sup> and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.<sup>298</sup>

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

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

<sup>297</sup> Referred to hereafter as the "Anti-Dumping Agreement".

<sup>298</sup> 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 Act<sup>299</sup> 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.<sup>300</sup> 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.

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<sup>299</sup> See footnote 294 above.

<sup>300</sup> 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)<sup>301</sup> 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 Body<sup>302</sup> 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.

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<sup>301</sup> 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, 6<sup>th</sup> Ed. (1990), p. 900.

<sup>302</sup> 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 Disputes<sup>303</sup> 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."<sup>304</sup>

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

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<sup>303</sup> Hereinafter the "DSU".

<sup>304</sup> 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".<sup>305</sup>

6.27 We also recall that Article 31 of the Vienna Convention on the Law of Treaties (1969)<sup>306</sup> 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".<sup>307</sup> 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 Agreement<sup>308</sup> 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")*,<sup>309</sup> 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.

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<sup>305</sup> 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.

<sup>306</sup> 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.

<sup>307</sup> Article 31.2 of the Vienna Convention.

<sup>308</sup> See WT/DS136/2.

<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup>

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.<sup>312</sup> 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.<sup>313</sup>

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.

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<sup>310</sup> 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.

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

<sup>312</sup> 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.

<sup>313</sup> 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*,<sup>314</sup> 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

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<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup> No claim under the 1916 Act was ever expressly reviewed by the Supreme Court of the United States.<sup>317</sup>

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*<sup>318</sup> 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

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

<sup>316</sup> 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.

<sup>317</sup> 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.

<sup>318</sup> 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.<sup>319</sup> 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."<sup>320</sup>

"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."<sup>321</sup>

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".<sup>322</sup> 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."<sup>323</sup> 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

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

<sup>320</sup> 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".

<sup>321</sup> Ibid., para. 66.

<sup>322</sup> Ibid., para. 59.

<sup>323</sup> 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.]"<sup>324</sup>

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.<sup>325</sup>

(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.<sup>326</sup> 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.

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<sup>324</sup> Ibid., para. 68 (emphasis added).

<sup>325</sup> 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."

<sup>326</sup> 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 (2<sup>nd</sup> 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 Justice<sup>327</sup> 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)." <sup>328</sup>

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.<sup>329</sup>

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.<sup>330</sup>

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.<sup>331</sup> 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.<sup>332</sup> Therefore,

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<sup>327</sup> Hereinafter "PCIJ".

<sup>328</sup> 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.

<sup>329</sup> 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)

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

<sup>331</sup> *Cooper*, Op. cit.

<sup>332</sup> 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."<sup>333</sup> 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.<sup>334</sup> 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.

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

<sup>334</sup> 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,<sup>335</sup> 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 1947<sup>336</sup> 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".<sup>337</sup> 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,<sup>338</sup> 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 thereof<sup>339</sup> 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.<sup>340</sup> 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

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

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

<sup>337</sup> 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.

<sup>338</sup> 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.

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

<sup>340</sup> 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.<sup>341</sup> 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:

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<sup>341</sup> 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.<sup>342</sup> 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.<sup>343</sup> 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.

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<sup>342</sup> 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.

<sup>343</sup> 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.<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup> 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.

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<sup>344</sup> 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.

<sup>345</sup> 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."

<sup>346</sup> 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.<sup>347</sup> 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,<sup>348</sup> 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."<sup>349</sup> 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.

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<sup>347</sup> 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."

<sup>348</sup> See footnote 344 above.

<sup>349</sup> 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.<sup>350</sup> 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.<sup>351</sup>

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.<sup>352</sup> 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.

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<sup>350</sup> 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.

<sup>351</sup> 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.

<sup>352</sup> 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*.<sup>353</sup> 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.<sup>354</sup>

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

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<sup>353</sup> Op. Cit., hereinafter "*United States – Tobacco*".

<sup>354</sup> 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.<sup>355</sup>

(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 Trade<sup>356</sup> and the Tokyo Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade<sup>357</sup> 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.<sup>358</sup> 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.

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<sup>355</sup> 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.

<sup>356</sup> Hereinafter the "Tokyo Round Subsidies Agreement".

<sup>357</sup> Hereinafter the "Tokyo Round Anti-Dumping Agreement".

<sup>358</sup> 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*<sup>359</sup> 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".<sup>360</sup> 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.<sup>361</sup> 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.<sup>362</sup> 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

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<sup>359</sup> Op. Cit., footnote 305 above.

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

<sup>361</sup> See, in this respect, our reasoning in para. 6.195 below.

<sup>362</sup> 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.<sup>363</sup>

(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

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<sup>363</sup> 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"<sup>364</sup>

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.<sup>365</sup>

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<sup>364</sup> 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."

<sup>365</sup> 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 injury<sup>366</sup> and causality) and procedural requirements; but they do not qualify the original definition of "dumping".<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup>

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

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

<sup>366</sup> 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.

<sup>367</sup> 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.

<sup>368</sup> 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."

<sup>369</sup> 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.<sup>370</sup> 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.<sup>371</sup> 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.<sup>372</sup> 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.<sup>373</sup> If, as the United States seems to argue, a Member could

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<sup>370</sup> 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."

<sup>371</sup> 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".

<sup>372</sup> 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 6<sup>th</sup> Edition (1995), p. 222).

<sup>373</sup> 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]<sup>374</sup>" (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.<sup>375</sup>

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.<sup>376</sup>

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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."

<sup>374</sup> 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.

<sup>375</sup> 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.

<sup>376</sup> 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,<sup>377</sup> 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".<sup>378</sup> 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.<sup>379</sup> Since, as mentioned above,<sup>380</sup> we

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"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."

<sup>377</sup>See section C.1. above.

<sup>378</sup>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)".

<sup>379</sup>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.

<sup>380</sup>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,<sup>381</sup> 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.<sup>382</sup>

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

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<sup>381</sup> See para. 6.112 above.

<sup>382</sup> 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"<sup>383</sup> 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 decision<sup>384</sup> 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".<sup>385</sup> 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."<sup>386</sup>

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

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<sup>383</sup> Op. Cit., p. 1197.

<sup>384</sup> See pp. 1229-1230.

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

<sup>386</sup> 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."<sup>387</sup>

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,<sup>388</sup> 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.<sup>389</sup> Dumping as defined in Article VI:1 of the GATT 1994 was just one specific cause of action under anti-trust law,<sup>390</sup> as noted in 1923 by Jacob Viner:

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

<sup>388</sup> 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.

<sup>389</sup> 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.

<sup>390</sup> 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).<sup>391</sup>

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.<sup>392</sup> 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

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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.

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

<sup>392</sup> 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,<sup>393</sup> 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.<sup>394</sup>

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<sup>393</sup> Op. Cit., p. 308.

<sup>394</sup> 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 statements<sup>395</sup> 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

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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.

<sup>395</sup> 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.<sup>396</sup> The conclusions we drew from the historical context when we addressed the product comparison aspect of the transnational price discrimination test of the 1916 Act<sup>397</sup> 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 action<sup>398</sup> or more generally with the problem of establishing a cause of action.<sup>399</sup> 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."<sup>400</sup>

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"<sup>401</sup> 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."<sup>402</sup>

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<sup>396</sup> See *In Re Japanese Electronic Products II*, p. 324.

<sup>397</sup> See paras. 6.124-6.126 above.

<sup>398</sup> 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).

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

<sup>400</sup> *Zenith III*, p. 1214.

<sup>401</sup> 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

<sup>402</sup> *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*,<sup>403</sup> courts have applied to the 1916 Act the anti-trust predatory pricing/recoupment test developed in those cases.<sup>404</sup>

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.<sup>405</sup> 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.<sup>406</sup>

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

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"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".

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

<sup>404</sup> 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.

<sup>405</sup> Op. cit., pp. 2587-2588.

<sup>406</sup> 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.<sup>407</sup> 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*<sup>408</sup> and *Wheeling-Pittsburgh* cases.<sup>409</sup>

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."<sup>410</sup>

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<sup>407</sup> 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.

<sup>408</sup> Op. Cit. See para. 6.158 below.

<sup>409</sup> Op. Cit. See para. 6.160 below.

<sup>410</sup> *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.<sup>411</sup> 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.<sup>412</sup>

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."<sup>413</sup> 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.<sup>414</sup> 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

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<sup>411</sup> Ibid., p. 575.

<sup>412</sup> *Helmac II*, Op. Cit., at p. 591.

<sup>413</sup> *Geneva Steel*, Op. cit. p. 1217.

<sup>414</sup> 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,<sup>415</sup> 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.<sup>416</sup> 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."<sup>417</sup>

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,<sup>418</sup> 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

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<sup>415</sup> *Ibid.*, p. 1222-1223.

<sup>416</sup> 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.

<sup>417</sup> *Wheeling-Pittsburgh*, Op. cit., p. 605.

<sup>418</sup> 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)."<sup>420</sup> 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.<sup>421</sup> 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

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<sup>420</sup> *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).

<sup>421</sup> *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."<sup>422</sup>

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.<sup>423</sup> 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.<sup>424</sup> 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.<sup>425</sup>

(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

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<sup>422</sup> Op. Cit., para. 362.

<sup>423</sup> 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."

<sup>424</sup> 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.

<sup>425</sup> 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.<sup>426</sup> 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.<sup>427</sup> 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.<sup>428</sup> 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.<sup>429</sup> Comparatively, under anti-trust law, the causes of a given market

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<sup>426</sup> 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.

<sup>427</sup> 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."

<sup>428</sup> 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).

<sup>429</sup> 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:1<sup>430</sup> which we are instructed to consider under Article 31 of the Vienna Convention when interpreting Article VI:1.

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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.

<sup>430</sup> 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".<sup>431</sup> 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.<sup>432</sup> 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,<sup>433</sup> 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.

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<sup>431</sup> Emphasis added.

<sup>432</sup> 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"

<sup>433</sup> 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*<sup>434</sup> 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."

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<sup>434</sup> 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"<sup>435</sup> 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.<sup>436</sup> 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:

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<sup>435</sup> 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".

<sup>436</sup> 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.<sup>437</sup> 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.<sup>438</sup>

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 Agreement<sup>439</sup> establishes an intimate link between the calculation of

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<sup>437</sup> See *India – Quantitative Restrictions*, Op. Cit.

<sup>438</sup> 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.

<sup>439</sup> 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.<sup>440</sup> 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

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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."

<sup>440</sup> 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.<sup>441</sup> 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."<sup>442</sup>

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.<sup>443</sup> 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.<sup>444</sup>

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<sup>441</sup> See section III.E.3. above.

<sup>442</sup> BISD Vol. II, p. 41 (1952).

<sup>443</sup> 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."

<sup>444</sup> 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.

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"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 6<sup>th</sup> 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."<sup>445</sup> 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,<sup>446</sup> 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*.<sup>447</sup> 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,

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

<sup>446</sup> 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.

<sup>447</sup> *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.<sup>448</sup>

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.<sup>449</sup>

(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 4<sup>450</sup> of the Anti-Dumping Agreement, in particular the requirement

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<sup>448</sup> 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).

<sup>449</sup> 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.

<sup>450</sup> 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 levied<sup>450</sup> 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 5.5<sup>451</sup> 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.

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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."

<sup>451</sup> 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*."<sup>452</sup>

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."<sup>453</sup> Therefore, we are entitled to exercise judicial economy in accordance with WTO panel and Appellate Body practice<sup>454</sup> 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.<sup>456</sup>

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.<sup>457</sup> 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.

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<sup>452</sup> Emphasis in the original.

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

<sup>454</sup> See footnote 449 above.

<sup>456</sup> See arguments of the parties in paras. 3.358 and 3.361 above.

<sup>457</sup> 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 test<sup>458</sup> 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;

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<sup>458</sup> 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.

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