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The WTO's First Two and a Half Years of Dispute Resolution

Terence P. Stewart

Mara M. Burr

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The WTO's First Two and a Half Years of Dispute Resolution

Cover Page Footnote

International Law; Commercial Law; Law

The WTO's First Two and a Half Years of Dispute Resolution

Terence P. Stewart[†]

Mara M. Burr[‡]

I. Introduction.....	484
A. The Need for More Effective Dispute Settlement.....	485
B. United States Attempts to Improve Dispute Settlement Unilaterally	487
II. Dispute Resolution Pursuant to the DSU.....	487
A. The Dispute Settlement Body	489
1. Ethical Rules—Conflicts of Interest	490
2. Ethical Obligations—Confidentiality	492
3. Standard of Review—Panels	492
4. Standard of Review—Appellate Body.....	494
B. The Appeals Process	496
1. Time Periods for Appellate Review	497
2. Subject Matter of Appeal	497
3. Issues Not Addressed in the Working Procedures	498
a. Status of GATT 1947 Decisions	499
4. Appellate Body Factual Analysis.....	500
III. Improved Transparency	502
A. Transparency Under GATT 1947	502
B. Transparency Under the WTO—Derestriction of Documents	503
C. Increased Transparency in the United States	506
IV. Concerns: Implementation of WTO Obligations	507
V. Role of the USTR in Dispute Resolution: Enforcement and Monitoring.....	510
VI. Panel and Appellate Body Decisions.....	512
A. Bilateral Resolution Option	514
1. Automobile Dispute.....	515
2. Cuban Embargo	516

[†] Managing Partner, Stewart and Stewart, Washington, DC.

[‡] Associate, Stewart and Stewart, Washington, DC.

3. Current Disputes	517
B. WTO Decisions.....	519
1. Reformulated Gasoline	519
a. Panel Report.....	519
i. Article III:4 Analysis	522
ii. Article XX Analysis.....	528
iii. Article XX(b), (d), and (g) Exceptions	529
b. Report of the Appellate Body	532
i. Implementation of the Appellate Body Recommendations.....	536
2. The Japan Liquor Case	538
a. Panel Report.....	538
i. Like Product Analysis Under Article III:2	540
ii. Imported Like Products Taxed in Excess of Domestic Like Products Analysis.....	541
iii. Article III:2's Second Sentence Analysis	542
iv. Legal Status of Adopted GATT Panel Decisions.....	543
b. Appellate Body Decision	544
3. The Desiccated Coconut Case.....	547
a. Panel Report.....	547
i. Textual Provisions	551
ii. Object and Purpose of the WTO	552
iii. GATT Precedents.....	554
iv. Consequences of Non-Separability of Article VI.....	555
b. Report of the Appellate Body	558
i. Applicability of Article VI of GATT 1994....	559
ii. GATT 1994 within the WTO Agreement.....	560
iii. Principle of Non-Retroactivity of Treaties....	561
iv. Object and Purpose of the WTO Agreement.....	561
v. Terms of Reference of Panels	563
4. Costa Rica Underwear Case.....	563
a. Background of the Dispute	563
b. Panel Report.....	565
i. Standard of Review and Burden of Proof	565
ii. Type of Inquiry Required.....	567

iii.	Evidence Before the Panel	570
(a)	Reimports	570
(b)	Factors Not Sufficiently Addressed	571
iv.	Backdating of Restraint Measure	572
c.	Report of the Appellate Body	573
5.	India Wool Shirts and Blouses Case	576
a.	Panel Report	576
i.	Burden of Proof	577
ii.	Standard of Review	578
iii.	Role of the TMB	579
b.	Report of the Appellate Body	582
i.	Burden of Proof	582
ii.	Evidence Considered by the TMB	583
iii.	Right of Parties to Have All Claims Decided	583
6.	Canada Split-Run Periodicals Case	584
a.	Panel Report	584
i.	Tariff Code Claim	587
ii.	Excise Tax Claim	589
iii.	Article III Claim	591
(a)	Like Product Analysis	591
iv.	Postal Rate Claim	593
(a)	Lower Rate Issue	594
b.	Report of the Appellate Body	596
7.	EC Regime for the Importation, Distribution and Sale of Bananas	601
a.	Background of the Dispute	602
b.	Major Issues Addressed	604
i.	Organizational Issues	605
ii.	Preliminary Issues	608
iii.	Substantive Issues	612
(a)	Like-Product Analysis	613
(b)	Article XIII	614
(c)	Licensing Procedures, GATT, and GATS	620
(d)	Hurricane Licenses	621
(e)	GATS	622
VII.	Treaty Interpretation and the WTO	631

VIII. Observations on Early Panel and Appellate Body	
Decisions Under the WTO.....	633
A. Standard of Review.....	634
B. Role of the TMB in Textile Disputes.....	637
C. Transitional Safeguards as an Integral Part of the ATC	638
D. Number of Disputes Taken to the Appellate Body	639
IX. Implementation of Panel and Appellate Body	
Recommendations.....	640
X. What the Developments at the WTO During the First Two and a Half Years Mean for the Private Bar.....	642
XI. Conclusion	643

I. Introduction

Trade disputes take many forms and can be resolved through a variety of practical and legal means. Some disputes can be resolved bilaterally, others plurilaterally or multilaterally. Some involve the search for common understanding, others the pursuit of solely national objectives. Some disputes can be initiated by private parties, others require government action. Some disputes are covered by international agreements, others are not.

The United States pursues its objectives through a wide variety of fora: trade liberalization in Asia through the Asia-Pacific Economic Cooperation (APEC) process; rules on investment through the Organization for Economic Cooperation and Development (OECD); hemispheric trade liberalization through the North American Free-Trade Agreement (NAFTA) and the Free Trade Agreement of the Americas (FTAA); dismantlement of various barriers to trade through bilateral negotiations through the World Trade Organization (WTO); harmonization of standards (product, health and environmental) through various multilateral bodies; and dispute settlement through the WTO and other bodies.

This paper analyzes dispute settlement under the WTO two and a half years after its debut and discusses what private practitioners should expect in the future. There are many vehicles for resolving issues within the WTO. Some issues may be resolved through committee work and others through negotiations. This paper, however, focuses largely on issues that are resolved through consultations and, in some cases, formal Panel

proceedings. The responsibilities and functions of the United States Trade Representative (USTR) are also analyzed, giving special attention to how the USTR serves to represent the interests of the United States at the WTO.

A. The Need for More Effective Dispute Settlement

The World Trade Organization came into being on January 1, 1995 as a result of the long work program involved in the Uruguay Round of negotiations.¹ A new entity such as the WTO was deemed necessary because of the singular nature of the obligations and rights assumed, and because the new agreements were broader in scope than the General Agreement on Tariffs and Trade (GATT) had been.² A core objective of the United States in the Uruguay Round was a dispute resolution system that would be more effective and more timely.³ Many of the trading partners of

¹ The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed on April 15, 1995, at Marrakesh, Morocco. The main component of the Final Act is the Marrakesh Agreement Establishing the World Trade Organization and its four annexes. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 1 (1994), 33 I.L.M. 1143 (1994). Annex 1A to the Marrakesh Agreement, Establishing the World Trade Organization, contains multilateral agreements on trade in goods which make up the "GATT 1994" as well as a number of side agreements. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 20 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. GATT 1994 has five components, including the General Agreement on Tariffs and Trade, Oct. 30, 1947, 4 GATT B.I.S.D. at 1 (1969) [hereinafter GATT 1947], as amended through the years, instruments adopted under GATT 1947, and the Understandings contained in Annex 1A of the WTO Agreement. See General Agreement on Tariffs and Trade, Apr. 15, 1994, WTO Agreement, *supra*, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994), 33 I.L.M. 1226 [hereinafter GATT 1994]; PHILIP RAWORTH & LINDA C. REIF, THE LAW OF THE WTO 15-16 (1995).

As of November 20, 1996, there were 125 Members of the WTO. In addition, 31 nations have requested to join through the accession process. GATT coexisted with the WTO for 12 months and came to an end, subject to certain ongoing dispute resolution work, on December 31, 1995.

² See Terence P. Stewart, *Dispute Settlement Mechanisms*, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 2663, 2670 (Terence P. Stewart ed., 1993).

³ The U.S. Congress set out its negotiating objectives for dispute resolution in the Uruguay Round as part of the Omnibus Trade and Competitiveness Act of 1988. See 19

the United States, on the other hand, wanted to curb unilateral action by the United States in resolving disputes. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)⁴ within the WTO is the agreement aimed at dealing with both needs.

While dispute settlement had been an integral part of GATT since its inception and had worked satisfactorily in many situations, practice revealed a number of flaws.⁵ For example, parties losing in the dispute settlement proceedings could block adoption of the adverse ruling. While "peer pressure" eventually resolved many cases, the disputes often dragged on for years.⁶ Even in cases where the losing party did not block adoption of Panel reports, there was the opportunity for significant delay because of the absence of time limits for completion of particular phases.⁷ Virtually every aspect of a Panel proceeding could be mired in delay if a participant did not want a speedy resolution.⁸ As a result of these problems, many countries felt that important cases could simply not be decided within the GATT framework.

U.S.C. § 2901 (1994) [hereinafter Trade and Competitiveness Act]. The Act reads in relevant part:

(b) Dispute Settlement—The principal negotiating objectives of the United States with respect to dispute settlement are

(1) to provide for more effective and expeditious dispute settlement mechanisms and procedures; and

(2) to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of the United States' rights.

Id. § 2901(b).

⁴ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS; 33 I.L.M. 1226 (1994) [hereinafter DSU].

⁵ See Stewart, *supra* note 2, at 2669-70.

⁶ See *id.*

⁷ See *id.*

⁸ See Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization*, in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 581, 583-84 (Terence P. Stewart ed., 1996).

B. United States Attempts to Improve Dispute Settlement Unilaterally

In response to these problems, the United States adopted Section 301 of the Trade Act of 1974.⁹ Section 301 allowed private parties to identify various market access problems to the U.S. government and permitted consultations, negotiations, dispute resolution and, if necessary, unilateral action.¹⁰ Importantly, while the U.S. law permitted the pursuit of GATT dispute settlement, it mandated resort to unilateral action if the Panel process did not work quickly enough.¹¹ Starting in the Reagan years, the United States became much more aggressive in pursuing problems through Section 301—threatening and, in a few cases, taking unilateral action.¹² U.S. action was instrumental not only in focusing attention on the need for an improved dispute settlement process but also in expanding the agenda of the Uruguay Round to include new areas like services and Trade-Related Aspects of Intellectual Property Rights (TRIPS),¹³ where Section 301 was increasingly being used.

Many of the procedural delays in the GATT dispute settlement system were addressed on a provisional basis at the Mid-term review of the Uruguay Round negotiations in Montreal in December 1988, where timelines for the various phases were agreed upon.¹⁴ In addition, countries accepted the objective of minimizing delay and blockage of reports.¹⁵

II. Dispute Resolution Pursuant to the DSU

A more final solution came at the end of the Uruguay Round in

⁹ See Stewart, *supra* note 2, at 2704-05.

¹⁰ See *id.*

¹¹ See Cunningham & Smith, *supra* note 8, at 590.

¹² See *Trade Action Monitoring System Pending Investigation Report*, Office of the U.S. Trade Representative, U.S. Department of Commerce (1993).

¹³ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1C, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS; 33 I.L.M. 81 (1994) [hereinafter TRIPS].

¹⁴ See Stewart, *supra* note 2, at 2755.

¹⁵ See *id.*

1994 when the WTO was formed. The DSU was adopted as an annex to the WTO Agreement and formed a critical part of the overall package.¹⁶ It established the rules and procedures for consultations and dispute settlements.¹⁷ The DSU brings about a number of fundamental changes in the way disputes are resolved. It effectively ends the ability of losing parties to block adoption of Panel reports by reversing the concept of consensus. Instead of one party being able to block adoption, all countries must now agree not to adopt (*i.e.*, the winning party can prevent blockage).¹⁸ Timelines reduce the potential for delay.¹⁹ Timelines for implementation of changes, opportunity for review of whether changes implemented correct the WTO violation, rights to compensation or retaliation, and how to determine the amount of compensation or retaliation are all addressed.²⁰ Cross-retaliation (*e.g.*, against goods for a violation of a services or intellectual property right) is authorized in limited circumstances.²¹ Forum shopping, a common practice under the GATT system of plurilateral Codes,²² is brought to an end. Special or additional rules applicable to particular agreements are detailed. Countries are required to resolve their disputes through the system rather than by unilateral action.²³ In addition, in response to deep concerns within the United States about the transparency of GATT

¹⁶ As stated in Article 3.2 of the DSU:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

DSU, *supra* note 4, art. 3.2.

¹⁷ *See id.* art. 1.1.

¹⁸ *See id.* art. 2.4.

¹⁹ *See id.* arts. 17.5, 17.14, 20.

²⁰ *See id.* arts. 20-22.

²¹ *See id.* art. 22.

²² *See id.* art. 3.

²³ *See id.* art. 23.

proceedings,²⁴ countries were given the right to release their submissions and to request public versions or summaries of submissions of other parties in disputes to which they are a party.²⁵

A. *The Dispute Settlement Body*

In order to administer its provisions, the DSU provides for the creation of a Dispute Settlement Body (DSB).²⁶ The DSB is authorized to establish three-person Panels that in turn review disputes.²⁷ Parties unsatisfied with the Panel's recommendations may appeal to a three-person Appellate Body, which is also established by the DSB.²⁸

Panel members are chosen from a list of qualified individuals maintained by the WTO Secretariat.²⁹ The DSU requires special care in the selection of Panel members so as to ensure their independence and diversity.³⁰ Appellate Body members are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."³¹ They are appointed for a four year term and each person may be reappointed once.³²

Members of the Appellate Body are selected "on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin."³³ During the first two years, the Presiding Members were Justice Florentino Feliciano of

²⁴ Some of the United States' concerns probably flowed from the adverse Panel decision, never adopted, rendered in Mexico's challenge of the U.S. Marine Mammal Protection Act. *See* United States-Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155 (1992); Marine Mammal Protection Act of 1972, Pub. L. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. § 1361 (1994)).

²⁵ *See* DSU, *supra* note 4, art. 18.2.

²⁶ *See id.* art. 2.1.

²⁷ *See id.* arts. 6.1, 8.5, 11.

²⁸ *See id.* art. 17.1.

²⁹ *See id.* art. 8.4.

³⁰ *See id.* art. 8.2.

³¹ *Id.* art. 17.3.

³² *See id.* art. 17.2.

³³ WTO Appellate Body, Working Procedures for Appellate Review (Feb. 15, 1996) at 6.2 [hereinafter Working Procedures].

the Philippines; Mr. Julio Lacarte Muro of Uruguay; Professor Claus-Dieter Ehlermann of Germany; Dr. Said El-Naggar of Egypt; Mr. Christopher Beeby of New Zealand; Professor Mitsuo Matsushita of Japan; and Mr. James Bacchus of the United States.³⁴

1. *Ethical Rules—Conflicts of Interest*

Both Panel and Appellate Body members are governed by rules of conduct established by WTO Members.³⁵ These rules include guidance on ethical matters such as conflicts of interest and confidentiality. Panel members and Appellate Body members are to take due care in the performance of their duties to fulfill these expectations, including avoidance of any direct or indirect conflicts of interest with respect of the subject matter of the proceedings.³⁶ The rules require self-disclosure by these “covered persons” of any interest, relationship, or matter that the person could reasonably be expected to know and that is “likely to affect

³⁴ See Swearing-In Ceremony of Appellate Body Members, WTO Secretariat, Press/37 (Dec. 13, 1995).

³⁵ See *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DSB/RC/1 (Dec. 11, 1996) [hereinafter *Rules of Conduct*]. The rules of conduct also apply to arbitrators and experts participating in the dispute settlement mechanism. See *id.* at VII.5-10. The DSU only establishes Panel procedures, not Appellate Body procedures. See *id.* art 12. The DSU allows the Appellate Body to set its own procedures. See *id.* art. 17.9. The Appellate Body adopted the *Rules of Conduct* on a provisional basis. See *Working Procedures*, *supra* note 33, at 8.1. The rules of conduct are subject to review within two years of their adoption and the decision to continue, modify, or terminate these rules is in the hands of the DSB. See *Rules of Conduct*, *supra*, at VIII.

³⁶ See *Rules of Conduct*, *supra* note 35, at V. The Uruguay Round Agreements Act (URAA) implemented the WTO Agreement into U.S. law. See 19 U.S.C. § 3501 (1994). As part of this Act, Congress expressed its desire for certain actions by the United States Trade Representative. The Congress directed the USTR to seek the establishment of conflicts rules:

(c) Rules governing conflicts of interest

The Trade Representative shall seek the establishment by the General Council and the Dispute Settlement Body of rules governing the conflicts of interest by persons serving on Panels and members of the Appellate Body and shall describe, in the annual report submitted under section 3534 of this title, any progress made in establishing such rules.

Id. § 3533(c).

or give rise to justifiable doubts as to that person's independence or impartiality."³⁷ However, unlike Panelists, who are forbidden from sitting on Panels where their governments are a party to the proceeding,³⁸ Appellate Body members are under no such prohibition.³⁹

While the conflict rules could mark an important step in the process of building public confidence in the impartiality of Panelists and Appellate Body members, many questions remain unanswered. During negotiations over the rules, U.S. trade representatives discovered that the concepts being articulated were not well understood by other countries. Moreover, most Panelists have been and continue to be from the Geneva missions of the various countries.

While Panelists take the position in their individual capacities and not as representatives of their governments, Panel members are often from countries with stated positions on given issues. This could lead to sensitive conflicts between countries. For example, Cairnes group countries were generally highly supportive of dramatic trade liberalization in agriculture. Should the European Community (EC), which generally favored a go slow approach on agricultural reform, be able to block use of delegates from Cairnes group countries in any agricultural dispute to which the EC is a party on the theory that the countries involved have well defined positions? Should countries that are subject to import quota regimes in textiles and apparel be viewed as conflicted in determining Agreement on Textiles and Clothing (ATC)⁴⁰ challenges?

Most observers would say no. If that is true, it is hard to imagine how a governmental official would ever be disqualified. One can imagine extreme situations where an official has publicly

³⁷ *Rules of Conduct*, *supra* note 35, at V.2.

³⁸ *See* DSU, *supra* note 4, art. 8.3. However, parties to the dispute may agree otherwise. *See id.*

³⁹ *See Rules of Conduct*, *supra* note 35.

⁴⁰ Agreement on Textiles and Clothing, April 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994), available in 1994 WL 761483 [hereinafter ATC].

taken a position on the very issue before the Panel, but such situations are likely to be rare. If conflicts of interest will seldom, if ever, be found for government officials, perhaps the WTO has simply engaged in a process of eyewash to assuage public concerns without any real movement to address underlying concerns. Answers to these concerns and questions presumably will depend on experience and whether the viewer perceives that there was a bona fide problem that needed to be addressed.

2. *Ethical Obligations—Confidentiality*

In addition to the conflict rules, there is a requirement of confidentiality for persons covered by the rules. Maintaining confidentiality of documents until the Panel process is completed has already proven troublesome. Historically, it has been quite common for Panel reports to be leaked to selected members of the public including the press. Such practices were supposed to be shut down by the new rules under the DSU.⁴¹

Nonetheless, in one of the first Panel proceedings, breach of confidentiality of the interim Panel report was raised to the Panel. Specifically, in the Costa Rica underwear dispute with the United States, the United States raised concerns with the Panel that Costa Rica had violated its obligations of confidentiality by leaking information on the interim Panel report as witnessed by a large range of accounts in the Costa Rican press.⁴² The United States withdrew its claim when the underlying facts suggested that the U.S. Embassy in Costa Rica was partially to blame through its actions in response to press accounts allegedly flowing from Costa Rican leaks.⁴³

3. *Standard of Review—Panels*

The DSU also provides some guidance on the standard of review for Panel and Appellate determinations. A major function of Panels is to evaluate disputed agreements between Members. However, the degree of deference to be accorded Members'

⁴¹ See DSU, *supra* note 4, art. 14.

⁴² See United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear, WT/DS24/R (Nov. 8, 1996) [hereinafter Costa Rica Underwear Panel].

⁴³ See *id.* at 8.

interpretation of their obligations was not clarified by the DSU. Therefore, Panels had to determine from their terms of reference, the agreement or agreements in dispute, and from the submissions of the parties, just what type of inquiry they would undertake.⁴⁴

Under the authority provided in Article 11 of the DSU, Panels are to make an “objective assessment of the facts of the case.”⁴⁵ Thus far, Panels have made decisions regarding Members’ obligations based on the agreements and facts of the particular disputes. It will be interesting to see how Panels deal with disputes arising under the Anti-Dumping Agreement, where a specific standard of review is set out in Article 17.6.⁴⁶ How Panels

⁴⁴ 1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

“To examine, in the light of the relevant provisions in . . . the matter referred to the DSB by (name of party) . . . and to make such findings as will assist the DSB in making the recommendations or giving the rulings provided for in that/those agreement(s).”

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a Panel, the DSB may authorize its Chairman to draw up the terms of reference of the Panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

DSU *supra*, note 4, art. 7.

⁴⁵ *Id.* art. 11.

⁴⁶ The standard of review for anti-dumping cases is established under GATT 1994.

In examining the matter referred to in paragraph 5:

(i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the Panel shall interpret the relevant portions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and

interpret this standard of review and to what degree they actually accord deference to the Member nations remains to be seen.

4. *Standard of Review—Appellate Body*

The DSU sets out the rules for appellate review in Article 17.⁴⁷ However, none of the provisions can be thought of as establishing any cogent standard, such as a “clearly erroneous” or *de novo*, for reviewing Panel decisions.⁴⁸ The DSU only states that “[a]n appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel.”⁴⁹ Therefore, review is limited to legal, not factual, findings of the Panel. The legal conclusions and findings of the Panel are deemed open to review without any concrete guidance from the DSU on the

Trade 1994, WTO Agreement, *supra* note 1, Annex 1A, art. 17.6 [hereinafter Implementation of Article VI].

The WTO Panel process has yet to consider the special rules of review contained in the Anti-Dumping Agreement, although several matters have been noticed through requests for consultations. See *Guatemala-Anti-Dumping Investigation Regarding Imports of Portland Cement from Mexico*, WT/DS60 (Oct. 24 1996) (complaint by Mexico); *United States-Anti-Dumping Measures on Imports of Solid Urea from the Former German Democratic Republic*, WT/DS63 (Dec. 9, 1996) (complaint by the European Communities); *United States-Anti-Dumping Duties on Imports of Colour Television Receivers from Korea*, WT/DS89/1 (July 16, 1997) (complaint by Korea).

⁴⁷ See DSU, *supra* note 4, art. 17. The article reads in relevant part:

17(4) Only parties to the dispute, not third parties, may appeal a Panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

17(5) As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

17(6) An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel.

Id.

⁴⁸ Cf. Implementation of Article VI, *supra* note 46 (providing the text of Article 17.6 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994).

⁴⁹ DSU, *supra* note 4, art. 17.6.

deference they deserve.

This type of review is similar to judicial review, in some situations, in the Federal Courts of the United States. The U.S. Circuit Courts of Appeal do not give deference to the legal interpretations or constructions of lower courts.⁵⁰ Similarly, there is no “reasonableness” standard applied by the Appellate Body to issues of law.

In its first six appeals,⁵¹ the Appellate Body carefully considered the issues appealed and the authority it enjoys in deciding those issues. In the first appeal, Reformulated Gas, the United States challenged certain legal conclusions of the Panel.⁵² The Appellate Body determined that the appeal was to be “sharply limited” due to the limited number of issues appealed by the United States.⁵³ The Appellate Body began by going through the findings of the Panel and analyzing the way in which it had reached its conclusions. There was no articulated standard by which the Appellate Body proceeded to make its determination. The Appellate Body reviewed the Panel’s determinations and its interpretations of the obligations required under the articles and the agreement as a whole. It did not retrace the factual inquiry but

⁵⁰ See *NSK, Ltd. v. United States*, 115 F.3d 965, 972 (Fed. Cir. 1997); *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984).

⁵¹ See *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) [hereinafter *Reformulated Gasoline Panel*], WT/DS2/AB/R (Apr. 22, 1996) [hereinafter *Reformulated Gasoline Appellate Body*]; *Japan-Taxes on Alcoholic Beverages*, WT/DS8, WT/DS10, WT/DS11 (July 11, 1996) [hereinafter *Japan Liquor Panel*], WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan Liquor Appellate Body*]; *Brazil-Measures Affecting Desiccated Coconut*, WT/DS22/R (Oct. 17, 1996) [hereinafter *Desiccated Coconut Panel*], WT/DS22/AB/R (Feb. 21, 1997) [hereinafter *Desiccated Coconut Appellate Body*]; *Costa Rica Underwear Panel*, *supra* note 42, *United States-Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R (Feb. 10, 1997) [hereinafter *Costa Rica Underwear Appellate Body*]; *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R (Jan. 6, 1997) [hereinafter *India Wool Shirts and Blouses Panel*], WT/DS33/AB/R (Apr. 25, 1997) [hereinafter *India Wool Shirts and Blouses Appellate Body*]; *Canada-Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997) [hereinafter *Canada Split-Run Panel*], WT/DS31/AB/R (Apr. 29, 1997) [hereinafter *Canada Split-Run Appellate Body*].

⁵² See *Reformulated Gasoline Appellate Body*, *supra* note 51, at 1.

⁵³ See *id.* at 8.

rather the conclusions the Panel came to based upon the Panel's understanding of the obligations of the parties and the facts of the dispute.

B. The Appeals Process

The appeals process is governed by the DSU as well as a set of working procedures adopted by the Appellate Body. The Appellate Body was given the task, under the DSU, of drawing up its own working procedures.⁵⁴ The Appellate Body accordingly adopted a set of working procedures that address practically all important aspects of appellate decision making.⁵⁵ The Working Procedures set out timelines, requirements for submissions, and guidance for the conduct of the parties during the dispute resolution process.

The rules governing the process of appeals, as set out in part II of the Working Procedures, are set up in the "interests of fairness and orderly procedure in the conduct of an appeal."⁵⁶ The procedures govern the commencement of appeals,⁵⁷ the time periods for appeals,⁵⁸ communications with the Members,⁵⁹ appellant's and appellee's submissions,⁶⁰ rights of third parties,⁶¹ and all other aspects of an appeal. The rules and procedures correspond to the time limits set out in the DSU and attempt to harmonize the Appellate Body's rules with those of the Panels.⁶² Due to the time periods set out in DSU Article 17.5, the Appellate Body performs its functions in a relatively short period of time.⁶³

⁵⁴ See DSU, *supra* note 4, art. 17.9.

⁵⁵ See Working Procedures, *supra* note 33.

⁵⁶ *Id.* pt. II, 16.1.

⁵⁷ See *id.* pt. II, 20.

⁵⁸ See *id.* pt. II, 26.

⁵⁹ See *id.* pt. I, 4.

⁶⁰ See *id.* pt. II, 21-22.

⁶¹ See *id.* pt. II, 24.

⁶² Letter of Appellate Body Chairman to the Dispute Settlement Body Chairman, WTO Appellate Body, (Feb. 7, 1996) [hereinafter Letter of Appellate Body Chairman] (copy of letter on file with author of article).

⁶³ See DSU, *supra* note 4, art. 17.5. As a general rule, the proceedings are not to exceed 60 days, and in no case shall go beyond 90 days from the date a party to the dispute

In the view of the Appellate Body, these rules and procedures “are reasonable within the constraints imposed by the DSU and afford due process to all parties concerned while at the same time providing the Appellate Body with the time it requires for careful study, deliberation, decision-making, report-writing by the division and subsequent translation of the Appellate Report.”⁶⁴

1. *Time Periods for Appellate Review*

The DSU specifies that the Appellate Body has only sixty days from the date the party to the dispute provides notice of its decision to appeal to the date the final report is circulated.⁶⁵ With a few minor exceptions the Appellate Body fulfilled its duties within the sixty-day time period provided.⁶⁶

2. *Subject Matter of Appeal*

The DSU sets out what may be the subject of an appeal. Appeals are limited to issues of law and legal interpretations

formally notifies its decision to appeal to the date the Appellate Body circulates its report. *See id.*

⁶⁴ Letter of Appellate Body Chairman, *supra* note 62, at 3.

⁶⁵ *See* DSU, *supra* note 4, art. 17.5.

⁶⁶ In the Reformulated Gasoline case, the Appellate Body completed its review in exactly 60 days. The United States notified the DSB of its decision to appeal on February 21, 1996 and the Appellate Body signed its report on April 22, 1996. *See* Reformulated Gasoline Appellate Body, *supra* note 51, at 2, 29. In the Japan Liquor case, the Appellate Body completed its review in 58 days. Japan notified the DSB of its decision to appeal on August 8, 1996 and the Appellate Body signed its report on September 25, 1996. *See* Japan Liquor Appellate Body, *supra* note 51, at 2, 33. In the Costa Rica Underwear case, the Appellate Body completed its review in 86 days. Costa Rica notified the DSB of its decision to appeal on November 11, 1996 and the Appellate Body signed its report on February 5, 1997. *See* Costa Rica Underwear Appellate Body, *supra* note 51, at 2, 15. In the Desiccated Coconut case, the Appellate Body completed its review in 60 days. The Philippines notified the DSB of its decision to appeal on December 16, 1996 and the Appellate Body signed its report on February 14, 1997. *See* Desiccated Coconut Appellate Body, *supra* note 51, at 1, 16. In the India Wool Shirts and Blouses case, the Appellate Body completed its review in 61 days. India notified the DSB of its decision to appeal on February 24, 1997 and the Appellate Body signed its report on April 15, 1997. *See* India Wool Shirts and Blouses Appellate Body, *supra* note 51, at 2, 21. In the Canada Split-Run case, the Appellate Body completed its review in 55 days. Canada notified the DSB of its decision to appeal on April 29, 1997 and the Appellate Body signed its report on June 23, 1997. *See* Canada Split-Run Appellate Body, *supra* note 51, at 2, 37.

developed by the Panel.⁶⁷ Although third parties have the right to appear before a Panel and submit arguments, they do not have the right to appeal the Panel's decision.⁶⁸ However, if an appeal is taken by one of the parties, third parties do have the right to make written submissions and be heard by the Appellate Body.⁶⁹

Since the WTO and its dispute settlement system went into effect on January 1, 1995, there have been six Appellate Body decisions.⁷⁰ In two of the cases the Appellate Body upheld all the legal interpretations and findings of the Panel.⁷¹ In the four other cases, the Appellate Body overturned some of the Panel's legal findings.⁷²

3. *Issues Not Addressed in the Working Procedures*

In the six appeals discussed above, the Appellate Body resolved a number of critical issues. Although the DSU and the Working Procedures were helpful in conducting business, they, understandably, did not anticipate everything. For example, it was not clear if earlier GATT 1947 Panel decisions were binding on the Panel and Appellate Body under the WTO. Also, the Appellate Body had to consider just how much factual analysis it could permissibly undertake.

⁶⁷ See DSU, *supra* note 4, art. 17.6. In the first case decided by the Appellate Body, the Body made it clear that only those issues in fact appealed by a party would be considered. See *Reformulated Gasoline Appellate Body*, *supra* note 51, at 8. Stated differently, a party who wishes to preserve the right to challenge an aspect of a Panel decision must do so in its own appeal or in a timely cross-appeal. Under the Appellate Body's Working Procedures, any party may file a separate appeal, See *Working Procedures*, *supra* note 33, pt. II, 23.4., or join in an appeal filed by the original appellant and raise its own alleged errors in the issues of law covered in the Panel report. See *id.* pt. II, 23.1.

⁶⁸ See DSU, *supra* note 4, arts. 10, 17.4.

⁶⁹ See *id.* art. 17.4.

⁷⁰ See *supra* note 51 for citations of all six cases.

⁷¹ See *Desiccated Coconut Appellate Body*, *supra* note 51; *India Wool Shirts and Blouses Appellate Body*, *supra* note 51.

⁷² See *Reformulated Gasoline Appellate Body*, *supra* note 51; *Japan Liquor Appellate Body*, *supra* note 51; *Costa Rica Underwear Appellate Body*, *supra* note 51; *Canada Split-Run Appellate Body*, *supra* note 51.

a. Status of GATT 1947 Decisions

In applying the customary rules of international law in interpreting the WTO and “covered agreements,”⁷³ the Appellate Body had to decide the status of adopted Panel decisions under GATT 1947. The issue arose in the Japan Liquor Panel decision when one of the parties argued that a 1987 Panel decision should be considered controlling authority in the dispute.⁷⁴ In essence, Canada argued that “subsequent practice” should be considered in interpreting the terms of GATT 1994.⁷⁵

The Appellate Body found the Panel’s finding of “subsequent practice” to be in error under recognized principles of customary international and general international law. In particular, the Appellate Body observed:

Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a “concordant, common and consistent” sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice, it is a sequence of acts establishing the agreement of the parties that is relevant.⁷⁶

The Appellate Body concluded that adopted GATT 1947 Panel decisions only bound the parties to the dispute in that particular case.⁷⁷ That determination was supported by the fact that subsequent GATT 1947 Panels did not feel legally bound by the “details and reasoning of a previous Panel report.”⁷⁸ The Appellate Body reasoned:

⁷³ In its first decision, the Appellate Body found that it was required to interpret WTO agreements according to principles of customary international law. *See Reformulated Gasoline Appellate Body, supra* note 51, at 16; *see also* DSU, *supra* note 4, art. 3.2 (stating that agreements should be interpreted “in accordance with customary rules of interpretation of public international law”).

⁷⁴ *See* Japan Liquor Panel, *supra* note 51, at 12-13.

⁷⁵ *See id.* at 13.

⁷⁶ Japan Liquor Appellate Body, *supra* note 51, at 12-13 (citations in original quote omitted).

⁷⁷ *See id.* at 14.

⁷⁸ *Id.* at 13.

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a Panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994 Adopted Panel reports are an important part of the GATT *acquis*. They are often considered by subsequent Panels. They create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.⁷⁹

4. *Appellate Body Factual Analysis*

An important question under the DSU is the degree to which the Appellate Body may engage in factual analysis. The DSU in Articles 17.6 and 17.13 limits appeal to “issues of law covered in the Panel Report and the legal interpretations developed by the Panel.”⁸⁰ In the Canada Split-Run decision, the Appellate Body reversed the findings of the Panel on the issue of “like product” because it could not agree that the Panel had “sufficient grounds” to find the two products at issue were like products.⁸¹ Because the Appellate Body could not uphold the Panel’s findings on this issue, the entire determination regarding GATT 1994 Article III:2, first sentence, which sets out certain national treatment requirements, was invalidated.⁸²

By reversing the Panel’s findings on the issue of “like product,” the Appellate Body had to undertake an analysis of the “consistency of the measure with the second sentence of Article III:2 of the GATT 1994” in order to determine if there was a violation.⁸³ This caused a problem because none of the parties

⁷⁹ *Id.* at 13-14.

⁸⁰ Canada Split-Run Appellate Body, *supra* note 51, at 22.

⁸¹ *See id.*

⁸² *See id.*

⁸³ *Id.*

appealed the findings of the Panel on this provision.⁸⁴ The question was whether it was within the power of the Appellate Body to conduct such an analysis. The Appellate Body determined that it had the authority to do so, reasoning:

As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2 and because we reverse one of those findings, we need to develop our analysis based on the Panel Report in order to issue legal conclusions with respect to Article III:2, second sentence of the GATT 1994.⁸⁵

Thus, the Appellate Body will not hesitate to engage in legal and factual analysis when it determines that such analysis is necessary to complete its job in a timely manner. The Appellate Body's report was adopted by the DSB, and, apart from Canada's objections, there seems to be no real reaction from WTO Members to the Appellate Body's decision and interpretation of its authority. If Members are unhappy with a lack of "remand" authority, they will have a chance to consider modifications during the 1998 review of the DSU.⁸⁶

⁸⁴ *See id.* at 23.

⁸⁵ *Id.* at 24.

⁸⁶ *See* Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, *supra* note 1, Decisions and Declarations 33 I.L.M. 1259 (1994). The Decision provides:

Recalling the Decision of 22 February 1994 that existing rules and procedures of GATT 1947 in the field of dispute settlement shall remain in effect until the date of entry into force of the Agreement Establishing the World Trade Organization,

Invite the relevant Councils and Committees to decide that they shall remain in operation for the purpose of dealing with any dispute for which the request for consultation was made before that date;

Invite the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.

III. Improved Transparency

The WTO dispute resolution system also benefits from a movement towards improved transparency of the resolution process. More information is made available under the current system than was available under GATT 1947.

A. *Transparency Under GATT 1947*

Being a forum for governments, GATT was characterized by substantial confidentiality of proceedings and deliberations. To many, the GATT limitations on access to documents have been excessive and have created unnecessary uncertainty as to the concerns of and conflicts between the trading nations. Restrictions on access have been so overbroad that even public laws and regulations and administrative determinations forwarded to GATT were routinely marked as restricted and not made available to the public for extended periods of time. While selected GATT documents were published periodically, the vast majority of documents were available only to governments. Access to even public GATT documents (other than those published in the BISD series) has been difficult for most members of the public to obtain.

Not surprisingly, the public in the United States has viewed with suspicion the need for such confidentiality within GATT. This suspicion was heightened with the prospect of binding dispute resolution and the controversy over loss of sovereignty.⁸⁷

Id.

⁸⁷ On January 4, 1995, then-U.S. Senator Bob Dole introduced Senate Bill, S. 16. The purpose of the bill was to create a commission that would review the dispute settlement reports of the World Trade Organization. *See* WTO Dispute Settlement Review Commission Act, S. 16, 104th Cong. (1995) [hereinafter Review Commission]. The "Dole Commission," as it became known, would review the decisions of the Panels and Appellate Body to determine if the Panel or Appellate Body had exceeded its authority under the terms of reference. *See supra* note 44 for the text of DSU article 7 on terms of reference. After review of the adverse decisions, the commission would make a report to Congress on the Panel or Appellate Body decisions, and Congress could decide by Joint Resolution to instruct the President to undertake negotiations to amend or modify the rules and procedures of the DSU. *See* Review Commission, *supra*. Ultimately, if the Congress was sufficiently persuaded that continued membership in the WTO was not in the interest of the United States, it could withdraw its approval of the WTO Agreement. *See id.*

This legislation has not been adopted. No nation needs a special commission to withdraw from an international agreement. Agreements typically contain explicit

Moreover, private parties whose interests are directly affected by GATT Panels have had relatively limited access to the process in the United States. While petitioners in underlying trade disputes were often consulted by the USTR for views in GATT Panels, the public had little, if any, input. Submissions by the United States or its trading partners were not part of the public record, making a study of the Panel process quite difficult and essentially incomplete.

Concerns were also raised about unequal access to the GATT. Counsel for foreign interests were occasionally deputized and made part of delegations for dispute settlement proceedings in Geneva (although apparently only where other parties did not object). By contrast, the United States has had a long-standing policy of not allowing non-government personnel into Panel proceedings. Because government interests may not correspond to the interests of the private parties, some have advocated giving a formal role to private litigants in the Panel process.

B. Transparency Under the WTO—Derestriction of Documents

A host of transparency and public access issues were addressed in the Uruguay Round Agreements and in the first two and a half years of the WTO's operation. The United States viewed transparency as one of the critical elements to a successful world trade regime.⁸⁸ Transparency of foreign trade regimes is critical to an understanding of trade barriers and inconsistencies that may exist. The Uruguay Round Agreements have been quite successful in requiring countries to provide notifications of existing laws, regulations, and practices.

The USTR has worked for greater transparency at the WTO

procedures and timelines for withdrawal. *See* WTO Agreement, *supra* note 1, art. XV:1 (withdrawal "should take effect upon the expiration of six months from the date on which written notice of withdrawal is received").

⁸⁸ "The principal negotiating objective of the United States regarding transparency is to obtain broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions through the observance of open and equitable procedures in trade matters by Contracting Parties to the GATT." Trade and Competitiveness Act, *supra* note 3, § 2901(b)(3).

and within the U.S. system.⁸⁹ Since the launch of the WTO, the USTR has pursued substantial revisions in the treatment of documents submitted to and generated by the WTO. An early success for the United States was the initial decision that laws and regulations were not entitled to be restricted.⁹⁰ Resolution of the larger issue of derestriction of documents was held up for some time, in part due to the sensitivity of how dispute settlement proceedings would be handled.

Nonetheless, in July 1996, the WTO General Council decided to adopt procedures for the circulation and derestriction of WTO documents.⁹¹ The General Council decision was a significant success for those seeking greater transparency. While there was a long delay from the General Council in 1997 in deciding actual public access, there is now substantial access to derestricted documents.⁹² Thousands of documents are currently available on-line: more are added daily, and many are no longer restricted. However, the WTO is having problems in making previously restricted documents available to the public.⁹³

The decision mandates that documents be circulated after the

⁸⁹ The URAA puts a premium on transparency.

The Trade Representative shall seek the adoption by the Ministerial Conference and General Council of procedures that will ensure broader application of the principle of transparency and clarification of the costs and benefits of trade policy actions, through the observance of open and equitable procedures in trade matters by the Ministerial Conference and the General Council, and by the dispute settlement Panelists and the Appellate Body under the Dispute Settlement Understanding.

19 U.S.C. § 3536 (1994).

⁹⁰ See WTO General Council, *Procedures for the Circulation and Derestriction of WTO Documents*, WT/L/160 (July 18, 1996) [hereinafter *Derestriction Procedures*] (noting "information that is publicly available or . . . is required to be published under any agreement in Annex 1, 2 or 3 of the WTO Agreement shall be circulated on an unrestricted basis").

⁹¹ See *id.*

⁹² The WTO can be reached via its Internet address at <http://www.wto.org>.

⁹³ The Washington, D.C. law firm of Stewart and Stewart performed an internal review of derestricted documents listed by the WTO. Its search indicated that as of July 30, 1997, several hundred documents had been listed as derestricted by WTO notices. Only two documents, however, were actually found in the WTO Internet database: WT/DER/1, WT/DER/2, WT/DER/3, WT/DER/4 (covering the period 25 March 1997 through 24 July 1997).

effective date of the WTO unless listed in the Appendix. Documents in the Appendix (*i.e.*, restricted documents) are subject to potential derestriction. Importantly, the decision confirms that “any document that contains only information that is publicly available or information that is required to be published under any agreement in Annex 1, 2 or 3 of the WTO Agreement shall be circulated on an unrestricted basis.”⁹⁴

The Appendix lists eight categories that are to be treated as restricted and provides the normal timing of derestriction.⁹⁵ If documents are actually derestricted, there will be, over time, a substantial interest in transparency of the workings of the WTO.

⁹⁴ *Derestriction Procedures*, *supra* note 91, para. 1. Paragraph 2 permits parties to submit other documents as unrestricted and permits restricted documents to be reviewed by various entities or at the request of a member. *See id.* para. 2. Paragraph 3 sets forth the procedures for seeking derestriction. *See id.* para. 3. Paragraph 4 outlines the obligations of the Secretariat to put out a list of documents for possible derestriction. *See id.* para. 4. Paragraph 5 indicates that opposition to derestriction takes the document out of consideration for between one and two years (depending on date of objection). *See id.* para. 5. Paragraph 6 outlines the timetable for circulation of newly derestricted documents and documents that remain restricted. *See id.* para. 6. Paragraph 7 gives the General Council the opportunity to review and, “if necessary,” modify the procedures two years after their adoption — *i.e.*, in July 1998. *See id.* para. 7.

⁹⁵ The eight categories are (a) Working documents in all series (*i.e.*, draft documents such as agendas, decisions and proposals, as well as other working papers); (b) Documents in the secret series (*i.e.*, those documents relating to modification or withdrawal of concessions pursuant to Article XXVII of GATT 1994); (c) Minutes of meetings of all WTO bodies (other than minutes of the Trade Policy Review Body, which shall be circulated as unrestricted), including Summary Records of Sessions of the Ministerial Conference; (d) Reports by the Secretariat and by the government concerned relating to the Trade Policy Review Mechanism, including the annual report by the Director-General on the overview of developments in the international trading environment; (e) Documents relating to working parties on accession; (f) Documents (other than working documents covered by (a) above) relating to balance-of-payments consultations; (g) Documents submitted to the Secretariat by a Member for circulation, if, at the time the Member submits the document, the Member indicates to the Secretariat that the document should be issued as restricted; (h) Reports of Panels which are circulated in accordance with the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (such reports shall be circulated to all Members as restricted documents and derestricted no later than the tenth day thereafter unless prior to the date of circulation a party to the dispute that forms the basis of a report submits to the Chairman of the Dispute Settlement Body a written request for delayed derestriction; a report circulated as a restricted document shall indicate the date upon which it will be derestricted). *See Derestriction Procedures*, *supra* note 91, app. (a)-(h).

However, there are already indications that Members are restricting categories of documents for which there would appear to be no compelling interest but that significantly restricts public understanding. "Informal" papers circulated in working parties would be one example.

C. Increased Transparency in the United States

Congress in the Uruguay Round Agreements Act (URAA) provided specific guidance to the Administration on opening up the dispute settlement process to greater public observation and rights to comment. Specifically, Congress mandated that the USTR consult with various parties including Congress, "relevant private sector advisory committees," and interested parties.⁹⁶ Furthermore, the USTR is required to publish a notice in the Federal Register of any WTO disputes involving the United States.⁹⁷

In addition to these requirements, Congress made clear that the public shall have access to certain documents including U.S. submissions, nonconfidential submissions of the other WTO Member or Members to the dispute, and reports of the Panels and Appellate Body.⁹⁸ The statute also requires that the USTR request nonconfidential summaries of their written submissions from each party to a dispute.⁹⁹

The USTR's performance in adhering to the statutory guidelines has been generally good, although the USTR has adopted constructions of its obligations which limit information that is made available to the public. The USTR does regularly publish notices requesting public comment on each dispute to which the United States is a party.

Information in the USTR public reading room includes a list of public comments received, a copy of U.S. submissions, and the Panel report, when appropriate for public release. However, the files are inconsistent in the inclusion of submissions from foreign

⁹⁶ 19 U.S.C. § 3537(a) (1994).

⁹⁷ *See id.* § 3537(b).

⁹⁸ *See id.* § 3537(c).

⁹⁹ *See id.* § 3537(d).

governments. At times the files are updated regularly with submissions from the parties, and other times the information is not included for months after the submission date. The discrepancy may have to do with the schedules of the limited USTR staff or with inconsistent practices within the USTR in asking for summaries or public versions of foreign government submissions. Under the DSU, public versions or summaries must be provided if requested by a party. However, the DSU does not provide a deadline for public versions, and lawyers within the USTR have indicated that some foreign governments have simply failed to supply public summaries.

While the United States has been a party to most disputes under the WTO, the USTR does not keep files on disputes to which it is not a party. While not required by statute to do so, lack of access to arguments and reasoning of parties in the other disputes reduces transparency of the system. The USTR may wish to consider ways to improve transparency in such disputes as well.

With regard to written views of the public, the USTR has apparently adopted the view (although not in all cases) that responses to the Federal Register notice will not be included in the public record as positions taken may be used by the USTR in preparation of its papers in the case. While such a construction may be reasonable prior to the briefs being filed, there would appear to be little justification in not including such documents in the public file once all briefs have been filed or once the Panel report is issued. The USTR's actions in not releasing such documents at some point are inconsistent with the underlying spirit of the URAA provisions. They limit the public's understanding of the comment process and the type of issues used or not by the USTR, and they prevent academic and other research on the effectiveness of the system.

IV. Concerns: Implementation of WTO Obligations

Although the DSU, DSB, and increased transparency are strides in the right direction, Member countries still have a number of fundamental concerns with the WTO in general. A primary concern has been whether other nations have in fact implemented the new obligations undertaken as part of the WTO agreement. Implementation of rights was a central issue in the reports of the

Committees to the first WTO Ministerial in Singapore.¹⁰⁰ While most of the major trading nations are Members of the WTO and have provided notifications as required, the overall level of compliance remains quite low (generally around fifty percent) since several of the developing and least developed country Members have not provided notifications on a wide range of areas.¹⁰¹

Moreover, the main arena for compliance concerns has been the myriad Committees set up by the WTO. This has led to a massive increase in paperwork for the Committees, as each of them is already involved in reviewing notifications and examining the responses through a system of questions and answers.¹⁰² The technical work program within the Committees of reviewing laws and regulations and raising questions about possible WTO—inconsistency is, of course, critical to the WTO's operation. In light of the huge additional administrative burden on countries, there have been efforts to provide technical assistance to certain developing countries to improve implementation efforts.

In an effort to ensure compliance, the WTO also carries forward the work program started at the Montreal Mid-term of reviewing trade policies of individual countries, with larger countries being reviewed more frequently, under the Trade Policy Review Mechanism (TPRM).¹⁰³ The TPRM provides countries a single source overview of a country's trade policies and highlights areas where the Secretariat or individual Members have concerns. The intention is to highlight developments and, through public disclosure, encourage movement to greater conformity with WTO

¹⁰⁰ See Report of the General Council to the 1996 Ministerial Conference, WT/MIN (96)/2 (Nov. 26, 1996); Singapore Ministerial Declaration, WT/MIN (96)/DEC, paras. 1, 10 (Dec. 18, 1996).

¹⁰¹ See *WTO Singapore Ministerial Meeting: Hearings Before the Subcomm. on Trade of the House Ways and Means Comm.*, 105th Cong. TR-1 (1997) (statement of Terence P. Stewart, Managing Partner, Stewart and Stewart), available in 1997 WL 82264.

¹⁰² See WTO Agreement, *supra* note 1, art. 4.7.

¹⁰³ See Trade Policy Review Mechanism, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 3, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994), available in 1194 WL 761480 [hereinafter TPRM].

obligations. Whether the TPRM has been successful is open to question at this point in time. Nonetheless, the TPRM has been a valuable tool in identifying trade policies of concern to WTO Members.

The WTO has made other efforts to allow countries time to acclimate to the new obligations. Some agreements covering subjects that have been the object of numerous disputes (*e.g.*, anti-dumping and subsidies) and some agreements where substantial new obligations are undertaken have transition rules providing time to implement the new obligations.¹⁰⁴ Hence, the number of disputes or requests for consultations in these areas have been limited, although this is changing.¹⁰⁵

Even with the efforts to facilitate compliance, the DSB has received ninety-nine consultation notifications during its first two years of existence. Eight Panel decisions have been issued, and the Appellate Body,¹⁰⁶ established to handle appeals from Panel decisions, has ruled on six cases. Moreover, a significant number of disputes have been resolved by informal means.

Dispute resolution under the WTO has taken some interesting statistical turns as well. Under the GATT 1947 dispute settlement procedures, the overwhelming majority of cases were brought by industrialized or developed countries.¹⁰⁷ Under the WTO system there have been sixty-four requests for consultations by developed Members, twenty-four requests by developing Members,¹⁰⁸ and ten requests by both developed and developing Members.¹⁰⁹ Also,

¹⁰⁴ See *The WTO Dispute Settlement Procedures, A Collection of the Legal Texts*, World Trade Organization, August 1995, 78-91.

¹⁰⁵ See, *e.g.*, United States-Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabyte or Above from Korea, WT/DS99/1 (Aug. 14, 1997).

¹⁰⁶ See WTO SECRETARIAT, WORLD TRADE ORGANIZATION, OVERVIEW OF THE STATE-OF-PLAY OF WTO DISPUTES, (Aug. 15, 1997) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *WTO Dispute Overview*].

¹⁰⁷ See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 3, 29 (1993); JOHN H. JACKSON, THE WORLD TRADING SYSTEM 99 (1989) (listing GATT disputes from 1947 to 1986).

¹⁰⁸ See *Dispute Overview*, *supra* note 106.

¹⁰⁹ See *id.* at 11-12. The Dispute Overview provides the number of matters and the breakdown of requests for consultation by developed and developing Members. See *id.*

even with the transition rules, a large number of requests for consultations have involved new or "clarified" areas, including intellectual property (TRIPs), agriculture, textiles and apparel (ATC), trade-related investment measures (TRIMs), and services (GATS).¹¹⁰

V. Role of the USTR in Dispute Resolution: Enforcement and Monitoring

As the President's principal adviser and chief spokesperson on trade,¹¹¹ the USTR not only negotiates trade agreements but is also responsible for enforcement of the rights of the United States under these agreements.

The section of the USTR's office responsible for coordinating and supervising all dispute resolution activities at the WTO is the office of Monitoring and Enforcement.¹¹² This office was created in January 1996, by then-USTR Mickey Kantor.¹¹³ Ambassador Kantor outlined the unit's responsibilities: develop, in cooperation with the Department of Commerce, a comprehensive database and tracking system for monitoring compliance of trade agreements; prepare the National Trade Estimate Report on Foreign Trade Barriers; identify foreign government practices for U.S. enforcement action and proper coordination of the Super 301 process and Special 301; use trade policy leverage to bring countries into compliance with their obligations; and, in cooperation and consultation with U.S. businesses, worker representatives, and nongovernmental organizations, systematically examine implementation of regional and multilateral agreements.¹¹⁴

¹¹⁰ This includes ten TRIPs cases, twelve Agriculture cases, seven ATC cases, ten TRIMs cases, and three GATS cases. See *Dispute Overview*, *supra* note 106.

¹¹¹ See Trade Act of 1974, 19 U.S.C. § 2171(c) (1994).

¹¹² See USTR 1996 TRADE POL'Y AGENDA AND 1995 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM [hereinafter USTR 1995 ANN. REP.], Monitoring and Enforcement Activities.

¹¹³ See *USTR Establishes a Permanent Monitoring and Enforcement Unit*, USTR Press Release No. 96-1, Jan. 5, 1996.

¹¹⁴ See *id.* at 2-3.

The office of Monitoring and Enforcement has only been in operation since January 1996 and has been under enormous pressure because of a limited staff and a heavy workload these first two years. In spite of these pressures, having an office to coordinate overall strategy and decision-making for disputes makes sense and should ensure greater consistency in U.S. arguments before the WTO.

The USTR is required to submit an annual report on the WTO to Congress¹¹⁵ that includes a summary of the progress achieved in WTO dispute settlement.¹¹⁶ In addition to this report, the USTR is required to submit a report that reviews trade expansion priorities and identifies foreign country practices that, if eliminated, are likely to increase U.S. exports.¹¹⁷ The USTR, in its 1996 report, gave an overview of WTO dispute settlement and outlined current and possible future cases. The USTR brought fourteen cases in 1996; three of the new cases were as a result of the 1996 Super 301 annual review.¹¹⁸ The cases the USTR lists as successes are Japan liquor; Japan sound recordings, where Japan agreed to change its law during consultations; EC grain imports, where settlement was reached in conjunction with the U.S.-EC settlement on EC enlargement; Turkey film tax, where Turkey agreed in consultations to remove the tax discrimination; and Portugal patent protection, where Portugal changed its system to implement its obligations under the WTO TRIPS agreement.¹¹⁹

From January 1, 1995 to August 1997, the USTR requested formation of a Panel in eleven cases and consultations in thirty-

¹¹⁵ See 19 U.S.C. § 3534 (1994). The 1995 and 1996 reports by the USTR included trade expansion priorities, new section 301 and WTO enforcement actions, results of implementation by other countries of the WTO agreements, Bilateral and Multilateral priorities, WTO dispute settlement proceedings, WTO successes and the ongoing disputes. See USTR 1995 ANN. REP. *supra* note 112; USTR 1997 TRADE POLICY AGENDA AND 1996 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM [hereinafter USTR 1996 ANN. REP.].

¹¹⁶ See 19 U.S.C. § 3534(8) (1994).

¹¹⁷ See REPORT ON TRADE EXPANSION PRIORITIES PURSUANT TO EXECUTIVE ORDER 12901 ("Super 301"), 61 Fed. Reg. 52,827-52,835 (1996) [hereinafter USTR TRADE EXPANSION REP.].

¹¹⁸ See *id.* at 52,831.

¹¹⁹ See *id.*

three cases.¹²⁰ As discussed above, the United States was successful in a number of cases. The United States was able to settle some of the more politically difficult cases in consultations, including ones brought against the United States (*e.g.*, automobiles). Of the sixteen cases brought against the United States, three resulted in Panel and Appellate Body decisions that found the U.S. action to be inconsistent with its obligations under particular WTO Agreements. The three "losses" of the United States at the WTO involved environmental¹²¹ and textiles measures.¹²²

As of August 1997, the United States is a party to an appeal at the Appellate Body,¹²³ a case proceeding forward in the Panel process,¹²⁴ and a case suspended by request of the Complainants.¹²⁵

VI. Panel and Appellate Body Decisions

Although the WTO has had a short history, its Panels and Appellate Body can draw upon Panel decisions of GATT (though such decisions are not binding) and the normal rules of

¹²⁰ See *Dispute Overview*, *supra* note 106.

¹²¹ The first case brought against the United States, concerning Reformulated and Conventional Gasoline, gave the United States its first loss in the WTO at the Panel level and then at the Appellate Body. See *Reformulated Gasoline Panel*, *supra* note 51; *Reformulated Gasoline Appellate Body*, *supra* note 51.

¹²² The Panel in the Costa Rica Underwear case ruled that the United States violated its obligations under Article 6.2 and 6.4 of the Agreement on Textiles and Clothing. See *Costa Rica Underwear Panel*, *supra* note 42, at 104; *ATC*, *supra* note 40. In India's complaint concerning measures affecting imports of woven wool shirts and blouses, the Panel and Appellate Body found that the United States violated its obligations under the ATC when it imposed a transitional safeguard against imports of the shirts and blouses. See *India Wool Shirts and Blouses Panel*, *supra* note 51, at 78; *India Wool Shirts and Blouses Appellate Body*, *supra* note 51, at 16.

¹²³ See *European Communities-Regime for the Importation, Sale and Distribution of Bananas Panel*, WT/DS27/US, WT/DS27/MEX, WT/DS27/ECU, WT/DS27/GUA/HON (May 22, 1997) [hereinafter *EC Bananas Panel*]. The Appellate Body ruled against the EC. See *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R at 105-08 (Sept. 9, 1997).

¹²⁴ See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (Sep. 22, 1997) (Complaint by India, Malaysia, Pakistan, and Thailand) [hereinafter *United States-Shrimp*]. See *infra* notes 149-51 and accompanying text.

¹²⁵ See *United States-The Cuban Liberty and Democratic Solidarity Act*, WT/DS38 (Apr. 25, 1997) [hereinafter *United States-Cuban Act-Suspension*].

international treaty interpretation (*e.g.*, the Vienna Convention).¹²⁶ This section will review the body of Panel reports and Appellate Body decisions through July 30, 1997.

Before proceeding through the reports and decisions, it is important to remember that the primary purpose of dispute settlement under the WTO, as under GATT, is finding a mutually acceptable solution between the governments concerned. The Panel process and Appellate Body review are pursued only where consultations have been unsuccessful. The formal process can be terminated whenever resolution between the parties is achieved. Indeed, the structure of the consultation process provides for a period of at least sixty days following the formal request for consultations for parties to reach a resolution before a party can ask the DSB to establish a Panel.¹²⁷ The parties may continue, and often have continued, consultations far beyond the sixty days provided for in the DSU.¹²⁸

As of August 15, 1997, ninety-nine requests for consultations had been submitted to the DSB.¹²⁹ Many of the requests for consultations resulted in noticed resolutions. Indeed, while the requests for consultations involve sixty-eight distinct matters, roughly three times as many cases have been resolved bilaterally (seventeen) as have resulted in Panel decisions (six).

This is not to say that the approach in Geneva has not become more "legal." Discussion with WTO officials indicates that the records before the Panels are increasing in length and factual content. The pending Panel challenge of certain Japanese actions and practices in photographic film and paper reportedly has a

¹²⁶ See generally Vienna Convention of the Law of Treaties, opened for signature May 23, 1969, U.N.Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention].

¹²⁷ See DSU, *supra* note 4, art. 4.7.

¹²⁸ See, *e.g.*, Japan-Measures Affecting Distribution Services, WT/DS45 (June 13, 1996) (request for consultations by United States; further consultations were requested by the United States on Sept. 20, 1996); Korea-Laws, Regulations and Practices in the Telecommunications Sector, WT/DS40 (May 9, 1996) (request for consultations by the EC); Australia-Measures Affecting the Importation of Salmonids, WT/DS21 (Nov. 17, 1995) (request for consultations by United States). In none of these cases has there been a request for the establishment of a Panel.

¹²⁹ See *Dispute Overview*, *supra* note 106.

record of approximately 20,000 pages.¹³⁰ Because of the time limits on appeals and the continued high percentage of challenges that result in findings of violations, the WTO Secretariat reports that countries often move briskly through the consultation phase and request a Panel. This does not reduce the importance of the consultation process. It does, however, indicate a shift in basic approach to disputes within the WTO. There is a divergence of opinion as to whether the approach is temporary or a harbinger of the future direction.

A. *Bilateral Resolution Option*

Bilateral resolution remains an important option for a country whether it is raising a concern or defending its national laws and practices. This is true whether the countries involved are developed, developing, or both. Indeed, the first request for consultations involved a dispute between two developing countries.¹³¹ The case was ultimately resolved bilaterally. Pressures for finding a bilateral solution, as opposed to running the issue through a dispute settlement, may be greatest where the volume of trade affected is significant or the politics of the case difficult. Consider two high profile cases involving the United States where agreements were reached that either ended the dispute or postponed action by the Panel: the automobile dispute with Japan¹³² and the ongoing dispute with the EC over

¹³⁰ See Japan-Measures Affecting Consumer Film and Paper, WT/DS44/4 (June 11, 1997) (requesting an extension of time to file Panel's report "in light of a number of factors including . . . (iii) the unprecedented volume of the evidence submitted in English and Japanese which is approaching 20,000 pages").

¹³¹ The two countries were Malaysia and Singapore and the dispute involved the importation of polyethylene and polypropylene. See Dispute Overview, *supra* note 106.

¹³² See Dispute Overview, *supra* note 106. In July 1995, the parties notified settlement of the dispute. See also Tracy M. Abels, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV. 467 (1996) (noting that "the United States violated both the language and the spirit of the WTO Agreement by acting unilaterally to change another country's anti-competitive practices"); William E. Scanlan, *A Test Case For The New World Trade Organization's Dispute Settlement Understanding: The Japan-United States Auto Parts Dispute*, 45 U. KAN. L. REV. 591 (1997) (concluding that "the preferred option in cases in which a dispute arises [is to have the parties] work out the dispute on a bilateral basis . . . as was done in the auto-parts dispute").

implementation of the Cuban Liberty and Democratic Solidarity Act.¹³³

1. *Automobile Dispute*

In the automobile case, the United States had sought to resolve the long-standing trade imbalance in automobiles and automobile parts with Japan.¹³⁴ In May 1995, the United States declared two years of talks with Japan unsuccessful and announced "delivery of a pre-filing notification to the WTO indicating the U.S. intent to invoke the dispute settlement mechanism under the WTO to challenge the continuing discrimination against U.S. exports of automobiles and parts to Japan."¹³⁵ The United States also announced, pursuant to the Trade Act of 1974, a retaliation list of Japanese cars on which tariffs could be raised to 100%.¹³⁶ The vehicles were certain luxury automobiles with an estimated trade value of \$5.9 billion.¹³⁷

Japan, like other countries, had pursued restraints on perceived "unilateral" action by the United States during the Uruguay Round negotiations,¹³⁸ and had filed a request for consultations with the United States in May 1995.¹³⁹ Consultations with the United States were held on June 12-13 and June 22-23.¹⁴⁰ A bilateral agreement was reached between the United States and Japan

¹³³ The Panel suspended its work on the Cuban Liberty case. See United States-Cuban Act-Suspension, *supra* note 125. The case relates to the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.S. § 6021 (Supp. 1997) (popularly known as the Helms-Burton Act).

¹³⁴ In the mid-1990s, the United States had less than 1% of the automobile market and only 1.1% of the automobile parts market in Japan. See USITC THE YEAR IN TRADE 1995, OPERATION OF THE TRADE AGREEMENTS PROGRAM DURING 1995, 47th Report, USITC Pub. 2971 at 53 (Aug. 1996) [hereinafter USTIC YEAR IN TRADE 1995] (citing Letter from Michael Kantor, USTR, to Renato Ruggiero, WTO Director-General (May 9, 1995)).

¹³⁵ *Id.* at 53.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See DSU, *supra* note 4, art. 23.

¹³⁹ See *supra* note 132 and accompanying text.

¹⁴⁰ See *id.*

before the retaliatory tariffs were implemented.¹⁴¹

2. Cuban Embargo

A politically sensitive case, which has a relatively minor trade component but that would have tested the United States and its commitment to the WTO, was the EC's challenge to portions of the U.S.'s Cuban Liberty and Democratic Solidarity Act, also known as the Helms-Burton Act.¹⁴² This law was passed following the downing of two civilian aircraft from the United States by the Cuban military.¹⁴³ The EC requested consultations on the act passed by the U.S. Congress in early 1996. The United States took exception to the European action in filing the case with the WTO, claiming that the case involved national security issues and was not properly before the WTO.¹⁴⁴ The EC's challenge did not implicate provisions of the Helms-Burton Act but instead

¹⁴¹ See USITC YEAR IN TRADE 1995, *supra* note 134, at 53.

¹⁴² The principal U.S. measures to which the EC objected are as follows:

- (a) the extraterritorial application of the US embargo of trade with Cuba in so far as it restricts trade between the EC and Cuba or between the EC and the US. This embargo is applied by virtue of the Cuban Assets Control Regulations (CACR) of 1962, which are now codified in part 515 of title 31, Code of Federal Regulations. It is confirmed, codified and reinforced by Sections 102 and 110 Libertad Act;
- (b) denial of access to the U.S. tariff rate quota for sugar by virtue of Section 902(c) of the Food Security Act of 1985, repeated in Section 110(c) of the Libertad Act which prohibits the allocation of any of the sugar quota to a country that is a net importer of sugar unless that country certifies that it does not import Cuban sugar that could indirectly find its way to the U.S. Several Member States of the EC are net importers of sugar and have been unable to export sugar to the U.S. under the quota because of this provision;
- (c) denial of transit by EC goods and vessels of Members States of EC through ports in the U.S. pursuant to Article 6005(b) of Cuban Democracy Act of 1992 (CDA)

United States-The Cuban Liberty and Democratic Solidarity Act, WT/DS38/2, at 1-2 (Oct. 4, 1996) (EC requesting establishment of a Panel).

¹⁴³ See 143 CONG. REC. H645-01 (daily ed. Feb. 26, 1997) (statement of Rep. Diaz-Balart) *available in* 1997 WL 79578.

¹⁴⁴ See *Briefing Given in Washington on Clinton Administration Position on EU's WTO Challenge to the Libertad Act, Feb. 20, 1997* (visited Apr. 4, 1998) <<http://www.usis.usemb.se/topical/econ/libertad/libtwo.htm>>.

concerned U.S. laws that had been on the books for years—some since the Cuban missile crisis in the early 1960s.

Nonetheless, this case pits the ability of the United States to take action to enforce its economic embargo on Cuba against the EC's unhappiness with perceived U.S. unilateralism. Not surprisingly, there is a strong interest by some within Congress in ensuring that the Helms-Burton Act is enforced as written.¹⁴⁵ To date, the Administration has been postponing implementing actions to prevent the challenge from going forward while the United States and the EC search for a mutually satisfactory solution.

3. *Current Disputes*

The ongoing dispute over the EC's banana regime presents issues of political and economic sensitivity to the European Union and to many of the developing and least developed countries that are dependent upon the banana preferences provided by the EC. Political and economic sensitivities of a number of countries in the Caribbean have resulted in, according to some accounts, the United States looking for a way to settle the matter with the EC prior to the appellate process.¹⁴⁶

Of course, not all potentially sensitive cases have been settled prior to the issuance of an adverse Panel decision. Canada, for example, has long viewed its desire to maintain its cultural diversity as a justification for many restrictive actions or limitations on GATT and now WTO activity. Consequently, Canada decided to forego settlement and fully litigate the issue of split-run magazines.¹⁴⁷ Both the Panel and Appellate Body decided against Canada.¹⁴⁸ Canada must now struggle with how it will achieve its objectives in a manner that is not inconsistent with WTO obligations.

¹⁴⁵ See Letter from Jesse Helms, U.S. Senator and Chairman of the U.S. Senate Committee on Foreign Relations to William J. Clinton, President of the United States (July 16, 1997) <<http://www.insidetrade.com>> (addressing enforcement of the Helms-Burton Act).

¹⁴⁶ *Victory may not prove sweet to US*, J. OF COMM., August 20, 1997.

¹⁴⁷ See Canada Split-Run Panel, *supra* note 51.

¹⁴⁸ See *id.* at 74; Canada Split-Run Appellate Body, *supra* note 51, at 35-36.

Similarly, the Panel is presently considering a challenge to a U.S. law protecting sea turtles.¹⁴⁹ The dispute concerns a U.S. law governing the taking of certain sea turtles by shrimp vessels that use nets.¹⁵⁰ The Complaining parties are protesting the U.S. ban on the importation of shrimp and shrimp products from their countries.¹⁵¹ This dispute is widely viewed as potentially having significant political ramifications in the United States, should the U.S. law be found to violate its WTO obligations.

With health problems flowing from a number of highly publicized but unrelated matters, the adverse Panel decision on the EC's ban on beef hormones¹⁵² may similarly test the ability of Member countries within the EC to conform to an external determination on the conformity of national law or practices to WTO obligations.

The United States, EC, and Japan are also pursuing challenges to the Indonesian government's action in the automobile sector.¹⁵³ There is some indication that one or more countries may accept a bilateral solution since this is a politically sensitive issue in Indonesia.¹⁵⁴

As these cases may suggest, some nations are concerned about issues of sovereignty under the WTO dispute resolution system. While countries have the option of rejecting adverse findings

¹⁴⁹ See *United States-Shrimp*, *supra* note 124.

¹⁵⁰ See Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 16 U.S.C. § 1537(a) (Supp. 1997).

¹⁵¹ See *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58, at 1 (May 20, 1997) [hereinafter *United States-Shrimp-India's Complaint*] (first written submission by India).

¹⁵² *European Communities-Measures Affecting Meat and Meat Products (Hormones)*, WT/DS48/R/USA at 268 (Aug. 18, 1997) [hereinafter *EC-Meat Panel*]. On appeal, the Appellate Body also decided against the EC. See *European Communities-Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R at 71 (Jan. 16, 1998) [hereinafter *EC Meat Appellate Body*].

¹⁵³ See *Indonesia-Certain Measures Affecting the Automobile Industry*, WT/DS59 (Oct. 15, 1996) [hereinafter *Indonesia-Auto*] (United States requesting consultations); WT/DS64 (Oct. 14, 1996) (EU requesting consultations); WT/DS54 (Oct. 10, 1996) (Japan requesting consultations).

¹⁵⁴ Subsequent to the writing of this article, the DSB chairman announced the creation of a Panel. See *Indonesia-Certain Measures Affecting the Automobile Industry*, WT/DS55/8 (Aug. 5, 1997).

rather than providing “compensation” or suffering “retaliation,” the issue of whether Member countries can maintain a practice inconsistent with WTO obligations over the long term may itself become the subject of Panel review.

To date, however, the dispute settlement process is receiving generally high marks by most participants. Members also seem to be willing to live with adverse determinations.

Not surprisingly, in the decisions that have been released publicly by the Panels and the Appellate Body through August 15, 1997, a host of important issues (procedural and substantive) have been raised and resolved. This article now turns to a review of the disputes and the seven published reports and decisions.

B. WTO Decisions

1. Reformulated Gasoline

a. Panel Report

The Reformulated Gas decision was the first dispute to make its way through the Panel and Appellate Body process and be adopted by the DSB. The dispute concerned a challenge by Venezuela and Brazil to the consistency of regulations adopted by the U.S. Environmental Protection Agency (EPA) to implement the Clean Air Act of 1963¹⁵⁵ with certain WTO obligations.¹⁵⁶

As stated in the *Federal Register* notice announcing the final regulation, the EPA’s intention was to reduce air pollution,¹⁵⁷ and

¹⁵⁵ See 42 U.S.C. § 7545(k) (1994). The Clean Air Act was originally enacted in 1963 and was subsequently amended in 1990. See Reformulated Gasoline Panel, *supra* note 51, at 2.1. Pursuant to the 1990 amendments, the EPA issued new regulations which gave rise to the dispute before the WTO. See *id.*

¹⁵⁶ See generally Reformulated Gasoline Panel, *supra* note 51.

¹⁵⁷ See Regulations of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716, 7716-17 (1974) (to be codified at 40 C.F.R. § 80). The purpose of the regulation was stated as:

Summary: Through the amended Clean Air Act of 1990, Congress mandated that EPA promulgate new regulations requiring that gasoline sold in certain areas be reformulated to reduce vehicle emissions of toxic and ozone-forming compounds. This document finalizes the rules for the certification and enforcement of reformulated gasoline and provisions for unreformulated conventional gasoline.

it did so by focusing on establishing baseline emission standards on gasolines and mandating certain reductions over time. The regulation stated:

Section 211(k)(1) directs EPA to issue regulations that, beginning in 1995, "require the greatest reduction in emissions of ozone-forming and toxic air pollutants ("toxics") achievable through the reformulation of conventional gasoline, taking into consideration the cost of achieving such emissions reductions, any non air quality environmental impacts and energy requirements." The Act mandates certain requirements for the reformulated gasoline program. Section 211(k)(3) specifies that the minimum requirement for reductions of volatile organic compounds (VOC) and toxics for 1995 through 1999, or Phase I of the reformulated gasoline program, must require the more stringent of either a formula fuel or an emission reduction performance standard, measured on a mass basis, equal to 15 percent of baseline emissions. Baseline emissions are the emissions of 1990 model year vehicles operated on a specified baseline gasoline. CAA compositional specifications for reformulated gasoline include a 2.0 weight percent oxygen minimum and 1.0 volume percent benzene maximum.

For the year 2000 and beyond, the Act specifies that the VOC and toxics performance standards must be no less than that of the formula fuel or a 25 percent reduction from the baseline emissions, whichever is more stringent. EPA can adjust this standard upward or downward taking into account such factors as feasibility and cost, but in no case can it be less than 20 percent. These are known as the Phase II reformulated gasoline

....

1. Background

The purpose of the reformulated gasoline regulations is to improve air quality by requiring that gasoline be reformulated to reduce motor emissions of toxic and tropospheric ozone-forming compounds, as prescribed by section 211(k)(1) of the Clean Air Act (CAA or the Act), as amended. This section of the Act mandates that reformulated gasoline be sold in the nine most severe summertime ozone levels and that other ozone nonattainment areas that opt into the program. It also prohibits conventional gasoline sold in the rest of the country from becoming any more polluting than it was in 1990. This requirement ensures that refiners do not "dump" fuel components that are restricted in reformulated gasoline and that cause environmentally harmful emissions into conventional gasoline.

Id.

performance standards. Taken together, sections 211(k)(1) and 211(k)(3) call for the Agency to set standards that achieve the most stringent level of control, taking into account the specified factors, but no less stringent than those described by section 211(k)(3).¹⁵⁸

The regulations were aimed at improving air quality by controlling the composition and emissions effects of gasoline. The regulations promulgated by the EPA established certain compositional and performance specifications for reformulated gasoline.¹⁵⁹ The EPA's regulations control the reformulated gasoline blends and resulting emissions by establishing "baseline" levels for companies.

The EPA set up three methods for determining a domestic or foreign refiner's individual historic baseline, with different standards for each. The EPA regulations stated that:

Under Method 1, the refiner must use the quality data and volume records of its 1990 gasoline If Method 1 type data are not available, a domestic refiner must use its 1990 gasoline blendstock quality data and 1990 blendstock production records (Method 2). In the event that neither of these two methods [are] available, a domestic refiner must turn to Method 3 type data which consists of its post-1990 gasoline blendstock and/or gasoline quality data modeled in light of refinery changes to show 1990 gasoline consumption. Domestic refiners are not permitted to choose the statutory baseline.

- 2.7 An importer which is also a foreign refiner must determine its individual baseline using Methods 1, 2 and 3 if it imported at least 75 percent, by volume, of the gasoline produced at its foreign refinery in 1990 into the United States in 1990 (the so-called "75%" rule).
- 2.8 Certain entities are, however, automatically assigned to the statutory baseline. Firstly, refineries which began operation after 1990 or were in operation for less than 6 months in 1990 are required to use the statutory baseline. Secondly, importers and blenders are assigned the statutory baseline unless they can establish

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at 7716.

their individual baseline following Method 1 Similarly, EPA considers that importers cannot use Methods 2 and 3, because these methods inherently apply only to refineries and because of the extreme difficulty in establishing the consistency of their gasoline quality over time.¹⁶⁰

The EPA's regulations were designed with two principles in mind: "establishing accurate and verifiable refinery baselines, while avoiding options that might provide incentives for the regulated community to 'game' the baseline-setting process."¹⁶¹ In other words, the regulation's objective was to ensure that the EPA could realistically meet the statutory objectives. There is nothing in the notice or discussion to suggest that the EPA had any desire or interest in affecting trade flows or advantaging domestic producers. For example, the EPA explored at some length whether it could provide identical standards for foreign and domestic products and determined that such an approach was unworkable if the underlying statutory objective was to be achieved.¹⁶² The EPA also considered how records were typically maintained by domestic and foreign companies and determined that ordinary record keeping made certain options, which were available to domestic producers, unrealistic in situations where the vast majority of the foreign refinery product was not exported to the United States.¹⁶³ It also determined that foreign entities might not be subject to the full range of enforcement powers of the EPA.¹⁶⁴

i. Article III:4 Analysis

Under the WTO, countries are not prohibited from taking actions to protect the environment.¹⁶⁵ However, if actions taken for

¹⁶⁰ Reformulated Gasoline Panel, *supra* note 51, at 3.

¹⁶¹ Regulations of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716, 7785 (1974) (to be codified at 40 C.F.R. § 80).

¹⁶² *See id.* at 7785-7788.

¹⁶³ *See id.* at 7786.

¹⁶⁴ *See id.*

¹⁶⁵ *See* GATT 1994, *supra* note 1, art. XX.

health or safety reasons are done in a manner perceived to discriminate between domestic and foreign products, concerns can arise as to whether so-called “national treatment” obligations of the WTO are being met or whether an exception exists to permit such discriminatory action.¹⁶⁶ Because the EPA established different standards for establishing baselines for domestic and certain foreign gasoline, Venezuela and Brazil perceived that their gasoline exports were being discriminated against within the United States.

Brazil and Venezuela claimed that the Gasoline Rule violated the obligations of the United States under Article III:4 of GATT 1994.¹⁶⁷ When claiming a violation of Article III:4, the Complaining party has the burden of showing the existence of both:

- (1) a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product; and
- (2) treatment accorded in respect of the law, regulation or requirement that is less favorable to the imported product than to the like product of national origin.¹⁶⁸

The Gasoline Rule violated Article III:4 in the opinion of Brazil and Venezuela for the following reasons:

. . . because it accorded less favourable treatment to imported gasoline, both reformulated and conventional, than to U.S. gasoline. The Gasoline Rule required imported gasoline to conform with the more stringent statutory baseline when U.S. gasoline had to comply only with a U.S. refiner’s individual baseline. Practically, this meant that imported gasoline with certain parameter levels above the statutory baseline could not

¹⁶⁶ See generally GATT 1994, *supra* note 1, arts. III (National Treatment), XX (General Exceptions).

¹⁶⁷ Article III:4 requires that each Member State’s imports should be treated equally with domestic products:

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.

GATT 1994, *supra* note 1, art. III:4.

¹⁶⁸ Reformulated Gasoline Panel, *supra* note 51, at 30.

be directly sold on the U.S. market whereas gasoline with these same qualities produced in a U.S. refinery could be freely sold in the U.S. market provided that it conformed with that refiner's individual baseline. In order to accommodate this situation, foreign refiners had two options: (i) make expensive investments and changes to their refineries in order to produce gasoline conforming to the more stringent statutory baseline, or (ii) supply a lower price gasoline to an importer that could average that gasoline with other gasolines (if such other gasolines exist in sufficient amount) in order to meet, over an annual period, the requirements of the statutory baseline. Both options adversely affected the conditions of competition for imported gasoline and afforded protection to domestic production in a manner contrary to Article III. Furthermore, these adverse competitive effects were precisely what EPA intended to avoid for U.S. refiners by granting them individual baselines. Brazil added that it was up to the United States to demonstrate that its discriminatory system did not treat imports less favourably.¹⁶⁹

The Panel first had to determine if imported gasoline and domestic gasoline were like products; and second, whether the treatment accorded under the U.S. regulation to imported gasoline was less favorable than that accorded to like gasoline of national origin.

The Panel examined the criteria used to determine "like products" for purposes of Article III:4. The Panel decided to examine the like product issue "in conformity with Article 3.2" of the DSU and Article 31 of the Vienna Convention.¹⁷⁰ The Panel looked to the 1970 Working Party Report on Border Tax Adjustments¹⁷¹ and the 1987 Japan Liquor case¹⁷² for guidance. In its report on border tax adjustments, the Working Party stated, with respect to the like product question:

¹⁶⁹ *Id.* at 6.

¹⁷⁰ *Id.* at 30. Article 31 of the Vienna Convention states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose." *Id.* (quoting the Vienna Convention, *supra* note 126, art. 31).

¹⁷¹ Working Party Report on Border Tax Adjustments L/3464, Dec. 2, 1970, GATT B.I.S.D. (18th Supp.) at 102 (1970) [hereinafter Border Tax Adjustments].

¹⁷² See Japan Liquor 1987, *infra* note 234.

[T]he term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a “similar” product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is “similar”: the product’s end-uses in a given market; consumers’ tastes and habits, which change from country to country; the product’s properties, nature and quality.¹⁷³

From its examination of the Working Party’s analysis and the Japan Liquor case, the Panel determined that the “like product” determination should be made on a case-by-case basis. The products should be evaluated on the basis of: (1) their similar properties, (2) end-uses, and (3) usually uniform classification in tariff nomenclatures.¹⁷⁴ The Panel determined that imported and domestic gasoline are chemically identical and “have exactly the same physical characteristics, end-uses, [and] tariff classification”; and thus, were perfectly substitutable.¹⁷⁵ In addition, the United States had not argued that imported and domestic gasoline were not “like products” per se.¹⁷⁶ Therefore, the Panel concluded that imported and domestic gasoline were “like products” satisfying the first prong of Article III:4.¹⁷⁷

Next, the Panel considered whether the treatment accorded to the imported “like product” was less favorable than that accorded to the “like product” of domestic origin. Venezuela argued that imported gasoline should have the same “distribution opportunities” available to U.S. produced gasoline in order to satisfy the no less favorable treatment standard in Article III:4.¹⁷⁸ The Panel compared the competitive ability of domestic gasoline to imported gasoline and found that:

... domestic gasoline benefited in general from the fact that the seller who is a refiner used an individual baseline, while imported gasoline did not. This resulted in less favourable treatment to the imported product, as illustrated by the case of a

¹⁷³ Border Tax Adjustments, *supra* note 171, at 102.

¹⁷⁴ See Reformulated Gasoline Panel, *supra* note 51, at 31.

¹⁷⁵ *Id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.* at 10.

batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels. In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule. On the other hand, sale of the chemically-identical batch of domestic gasoline on the first day of an annual period would not require a domestic refiner to sell on the whole cleaner gasoline over the period in order to remain in conformity with the Gasoline Rule. The Panel also noted that this less favourable treatment of imported gasoline induced the gasoline importer, in the case of a batch of imported gasoline not meeting the statutory baseline, to import that batch at a lower price. This reflected the fact that the importer would have to make cost and price allowances because of its need to import other gasoline with which the batch could be averaged so as to meet the statutory baseline. Moreover, the Panel recalled an earlier Panel report which stated that "the words 'treatment no less favourable' in paragraph 4 call for effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." The Panel found therefore that since, under the baseline establishment methods, imported gasoline was effectively prevented from benefiting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, imported gasoline was treated less favourably than domestic gasoline.¹⁷⁹

The United States claimed that the difference in treatment between imported and domestic gasoline was justified because importers "could not reliably establish their 1990 gasoline quality, lacked consistent sources and quality of gasoline, or had the flexibility to meet a statutory baseline since they were not constrained by refinery equipment and crude supplies."¹⁸⁰ The Panel disagreed and found the difference in treatment was unjustified because:

¹⁷⁹ *Id.* at 31 (quoting United States-Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 386 (1989)).

¹⁸⁰ *Id.* at 32.

Article III:4 of the General Agreement deals with the treatment to be accorded to like products; its wording does not allow less favourable treatment dependent on the characteristics of the producer and the nature of the data held by it. The Panel noted that in the Malt Beverages case, a tax regulation according less favourable treatment to beer on the basis of the size of the producer was rejected. Although this finding was made under Article III:2 concerning fiscal measures, the Panel considered that the same principle applied to regulations under Article III:4. Accordingly, the Panel rejected the US argument that the requirements of Article III:4 are met because imported gasoline is treated similarly to gasoline from similarly situated domestic parties.

....

Apart from being contrary to the ordinary meaning of the terms of Article III:4, any interpretation of Article III:4 in this manner would mean that the treatment of imported and domestic goods concerned could no longer be assured on the objective basis of their likeness as products. Rather, imported goods would be exposed to a highly subjective and variable treatment according to extraneous factors. This would thereby create instability and uncertainty in the conditions of competition as between domestic and imported goods in a manner fundamentally inconsistent with the object and purpose of Article III.¹⁸¹

The United States also argued that “the treatment accorded to gasoline imported under a statutory baseline was *on the whole* no less favorable than that accorded to domestic gasoline.”¹⁸² According to the U.S. argument, the Gasoline Rule did not discriminate against imported gasoline because the statutory baseline and “the sum of the individual baselines both corresponded to the average gasoline quality in 1990.”¹⁸³ Therefore, according to the argument, domestic and imported gasoline were treated equally overall.¹⁸⁴ The Panel found this argument unconvincing and noted that in these circumstances it “amounted to arguing that less favourable treatment in one

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *See id.*

instance could be offset provided that there was correspondingly more favourable treatment in another.”¹⁸⁵ Accordingly, “[t]his amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others.”¹⁸⁶

In addition, the Panel found that the statistics submitted proved that there was a difference in treatment between imported and domestic gasoline.¹⁸⁷ The Panel concluded that imported gasoline was “effectively prevented from benefiting from as favourable sales conditions as were afforded domestic gasoline by an individual baseline tied to the producer of a product, [and thus] imported gasoline was treated less favourably than domestic gasoline.”¹⁸⁸

ii. Article XX Analysis

After finding that the Gasoline Rule was inconsistent with U.S.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* The Panel noted in reaching this decision that a previous Panel found that: the “no less favourable” treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligations in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.

Id. at 32-33 (quoting United States-Section 337 of the Tariff Act of 1930, *supra* note 179).

¹⁸⁷ *See id.* at 33. The Panel noted:

According to the United States, as of August 1995, approximately 100 US refiners, representing 98.5 percent of gasoline produced in 1990, had received EPA approval of their individual baselines. Only three of the refiners met the statutory baseline for all parameters. Thus, while 97 percent of US refiners did not and were not required to meet the statutory baseline, the statutory baseline was required of importers of gasoline, except in the rare case (according to the parties) that they could establish a baseline using Method 1.

Id.

¹⁸⁸ *Id.*

obligations under Article III:4, the Panel considered whether such inconsistency could be covered by an exception in its text. Article XX provides for general exceptions to Members' obligations, provided the measure at issue both fits within a category provided and is in conformity with the introductory paragraph, or chapeau. The United States claimed that the Gasoline Rule could be justified under either Article XX(b), as "necessary to protect human, animal or plant life or health";¹⁸⁹ XX(d), as "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement";¹⁹⁰ or XX(g) because it was "relating to the conservation . . . of exhaustible natural resources."¹⁹¹ All of these exceptions are "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."¹⁹²

The Panel began its inquiry by stating what must be demonstrated in order to invoke an exception under Article XX. The party invoking an exception bears the burden of proof in demonstrating that the inconsistent measure falls within the scope of the exception.¹⁹³

iii. Article XX(b), (d), and (g) Exceptions

The Panel proceeded to examine the U.S. argument that the Gasoline Rule was consistent with the terms of Article XX(b), (d), and (g) respectively. A party must establish three elements with respect to each of the individual exceptions it claims applies to the measure at issue. The elements that must be established are that: (1) "the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health"; (2) "the inconsistent measures for which the exception was being invoked were necessary to fulfill the policy objective"; and (3) "the measures were applied in conformity with

¹⁸⁹ *Id.* at 14 (quoting GATT 1994, *supra* note 1, art. XX(b)).

¹⁹⁰ *Id.* at 18-19 (quoting GATT 1994, *supra* note 1, art. XX(d)).

¹⁹¹ *Id.* at 19 (quoting GATT 1994, *supra* note 1, art. XX(g)).

¹⁹² *Id.* at 21 (quoting GATT 1994, *supra* note 1, pmb., art. XX).

¹⁹³ *See id.* at 34.

the introductory clause of Article XX.”¹⁹⁴

With respect to Article XX(b) the Panel found that the United States was not able to establish that the Gasoline Rule was “necessary to protect human, animal or plant life or health.”¹⁹⁵ Although the Panel agreed that it would be necessary under such a system to know the origin of gasoline, the Panel concluded that the United States had not shown that this could not have been achieved “by other measures reasonably available to it and consistent or less inconsistent with the General Agreement.”¹⁹⁶

The Panel went on to find that the United States’ concern about possible “gaming” or other circumvention of the regulations by importing dirtier gasoline was not “an adequate justification for maintaining the inconsistency with Article III:4.”¹⁹⁷ In addition, the Panel found that with respect to the third element, the United States had not established that “there was no other measure consistent, or less inconsistent, with Article III:4 reasonably available to enforce compliance with [the] . . . baselines.”¹⁹⁸

With respect to the claim by the United States under Article XX(d), the Panel found that the maintenance of discrimination between imported and domestic gasoline, found to be inconsistent with Article III:4, did not secure compliance with the baseline system. The Panel found that the rules were a means of determining individual baselines but were not enforcement mechanisms such that they would come within Article XX(d).¹⁹⁹

The Panel then turned to an analysis of Article XX(g). First, the Panel recognized “that a policy to reduce the depletion of clean

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 36. The Panel was “not convinced that the United States had satisfied its burden of proving that those reasons precluded the effective use of individual baselines in a manner which would allow imported products to obtain treatment that was consistent, or less inconsistent, with obligations under Article III:4.” *Id.*

¹⁹⁶ *Id.* The Panel considered the fact that “there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third-party verification) there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States.” *Id.* at 36-37.

¹⁹⁷ *Id.* at 37.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 38.

air was a policy to conserve a natural resource within the meaning of XX(g).”²⁰⁰ This conclusion was based on the fact that air was a natural resource and could be depleted.²⁰¹ Therefore, the fact that the resource was renewable could not be an objection to its classification as an exhaustible natural resource.²⁰²

Second, the Panel examined whether the baseline establishment rules were “related to” the conservation of clean air.²⁰³ Venezuela argued that “related to” should be interpreted, as past Panels had done, to mean “primarily aimed at” the conservation of a natural resource.²⁰⁴ The Panel noted that the GATT 1947 Panel had interpreted the term “related to” as meaning “primarily aimed” at conservation, and it agreed with that interpretation.²⁰⁵

The Panel then proceeded to determine if the baseline establishment rules were “primarily aimed” at conservation.²⁰⁶ The Panel “saw no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline, and the US objective of improving air quality in the United States.”²⁰⁷ Indeed, the Panel stated that “being consistent with the obligation to provide no less favourable treatment would not prevent the attainment of the desired level of conservation of natural resources under the Gasoline Rule.”²⁰⁸ Accordingly, it could not find that the baseline establishment methods “were primarily aimed at the conservation of natural resources.”²⁰⁹ In the Panel’s view, the lack of a connection was apparent because affording treatment of imported gasoline consistent with its Article

²⁰⁰ *Id.* at 40.

²⁰¹ *See id.* at 39.

²⁰² *See id.* (citing Canada-Measures Affecting Exports of Unprocessed Herring and Salmon, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1988)), and United States-Restrictions on Imports of Tuna, DS29/R (circulated on June 16, 1994, but not adopted).

²⁰³ *Id.* at 41.

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

III:4 obligations “would not in any way hinder the United States in its pursuit of its conservation policies under the Gasoline Rule.”²¹⁰

The Panel concluded that the baseline establishment methods at issue in this case were not primarily aimed at the conservation of natural resources and, therefore, the baseline establishment rules did not fit within the exception provided for in Article XX(g).²¹¹

Finally, because the Panel found that the baseline establishment measures did not fit within the specific exceptions provided for in sections (b), (d), or (g) of Article XX, it did not proceed to determine whether the measure met the conditions in the chapeau of Article XX.²¹²

The Panel concluded its analysis by stating that its task was not to examine the desirability or necessity of the environmental objectives of the CAA or Gasoline Rule because its examination was “confined to those aspects of the Gasoline Rule that had been raised by the complainants under specific provisions of the General Agreement.”²¹³ Despite the fact that WTO Members were free to set their own environmental objectives GATT, they were still “bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.”²¹⁴

b. Report of the Appellate Body

The only issues the United States appealed were the Panel’s finding that the EPA regulations could not be justified under Article XX(g) and the Panel’s interpretation of Article XX as a whole, including the requirements of the chapeau to Article XX.²¹⁵ The Appellate Body found the Panel erred in both its conclusion that the “baseline establishment rules” did not fall within the terms of Article XX(g) and for failing to decide whether the “baseline establishment rules” fell within the ambit of the chapeau of Article

²¹⁰ *Id.* at 42.

²¹¹ *See id.*

²¹² *See id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *See id.*

XX of GATT.²¹⁶

The Appellate Body considered what the language in Article XX(g) required for a particular measure to fall within its terms and stated that:

Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic product or consumption of natural resources. Put in a slightly different manner, we believe that the clause “if such measures are made effective in conjunction with restrictions on domestic production or consumption” is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.

There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment—constituting real, not merely formal, equality of treatment—it is difficult to see how inconsistency with Article III:4 would have arisen in the first place

In the present appeal, the baseline establishment rules affect both domestic gasoline and imported gasoline, providing for—generally speaking—individual baselines for domestic refiners and blenders and statutory baselines for importers. Thus, restrictions on the consumption or depletion of clean air by regulating the domestic production of “dirty” gasoline are established jointly with corresponding restrictions with respect

²¹⁶ See *id.* at 29. For the text of Article XX(g), see *supra* note 191 and accompanying text. The Appellate Body set out the findings of the Panel:

[T]he Panel concluded that the baseline establishment methods contained in Part 80 of Title 40 of the Code of Federal Regulations are not consistent with Article III:4 of the General Agreement, and cannot be justified under paragraphs (b), (d) and (g) of Article XX of the General Agreement. The Panel recommends that the Dispute Settlement Body request the United States to bring this part of the Gasoline Rule into conformity with its obligations under the General Agreement.

Reformulated Gasoline Appellate Body, *supra* note 51, at 6.

to imported gasoline. That imported gasoline has been determined to have been accorded "less favourable treatment" than the domestic gasoline in terms of Article III:4, is not material for purposes of analysis under Article XX(g). It might also be noted that the second clause of Article XX(g) speaks disjunctively of "domestic production *or* consumption."²¹⁷

Hence, the Appellate Body concluded that the baseline establishment fell within the terms of Article XX(g).

The Appellate Body then had to determine if the measure satisfied the chapeau of Article XX. It decided that the chapeau prohibited application of a measure at issue, otherwise falling within the scope of Article XX(g), that would constitute either: "(a) 'arbitrary discrimination' between countries where the same conditions prevail[ed]; (b) 'unjustifiable discrimination' (with the same qualifier); or (c) a 'disguised restriction' on international trade."²¹⁸ The Appellate Body noted that "the text of the chapeau is also ambiguous with respect to the field of application of the standards it[] contains."²¹⁹ However, it concluded that:

It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.²²⁰

The Appellate Body next addressed whether the particular measure, the baseline establishment rules, fit within the requirements and purpose of Article XX. It determined that there

²¹⁷ Reformulated Gasoline Appellate Body, *supra* note 51, at 20-21.

²¹⁸ *Id.* at 22.

²¹⁹ *Id.* The Appellate Body specifically identified the "the arbitrary or unjustifiable discrimination standards and the disguised restriction on international trade standard" as being particularly ambiguous. *Id.*

²²⁰ *Id.* at 22-23.

had been “two omissions on the part of the United States: [1] to explore adequately means, including in particular cooperation with the governments of Venezuela and Brazil, of mitigating the administrative problems relied on as justification by the United States for rejecting individual baselines for foreign refiners, and [2] to count the costs for foreign refiners that would result from the imposition of statutory baselines.”²²¹

In the view of the Appellate Body, “these two omissions go well beyond what was necessary for the Panel to determine that a violation of Article III:4 had occurred in the first place.”²²² This was because “[t]he resulting discrimination must have been foreseen, and was not merely inadvertent or unavoidable.”²²³ Accordingly, the Appellate Body concluded:

In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute “unjustifiable discrimination” and a “disguised restriction on international trade.” We hold, in sum that the baseline establishment rules, although within the terms of Article XX(g), are not entitled to the justifying protection afforded by Article XX as a whole.²²⁴

Although the Appellate Body decided that the measure failed to meet the requirements of the chapeau of Article XX, the construction of Article XX(g) was important to the United States in terms of justifying its (and any Member State’s) right to take actions for environmental reasons, even if they are allegedly discriminatory. Nonetheless, the Appellate Body’s decision imposes a heavy burden under Article XX on administrations who take discriminatory action to demonstrate not only potential difficulties in achieving the underlying objectives but that every option potentially available that could reduce the discrimination has been pursued. With increased interest in the intersection of trade and environmental policies, the decision is important for all WTO Members. The Appellate Body’s interpretation of how Article III:4 and Article XX are to be interpreted should prove

²²¹ *Id.* at 26.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 26.

helpful for countries considering options for implementing environmental objectives.²²⁵

*i. Implementation of the Appellate Body
Recommendations*

On June 12, 1997, the United States filed its status report on the implementation of the DSB's recommendations.²²⁶ The United States reported that the EPA had issued a proposed revision to its gasoline rule. The proposed rule was published in the *Federal Register* and provided notice of an opportunity for parties to comment and for a public hearing to be held on the issue.²²⁷ The EPA issued its final rule on August 19, 1997, and it was published in the *Federal Register* on August 28, 1997.²²⁸

The EPA decided to allow foreign refiners to establish their own individual baselines.²²⁹ The report stated:

²²⁵ The Appellate Body also made an important jurisdictional decision based on the working procedures. Venezuela and Brazil, parties to the original dispute, did not appeal certain issues to the Appellate Body. However, during the appeal, Brazil and Venezuela pursued certain issues which were not part of the U.S. appeal. The United States argued that such issues were not properly before the Appellate Body. The Appellate Body agreed with the U.S. view. In essence, Members will not be allowed to make, in the words of the Appellate Body, "conditional appeals." Therefore, if an issue is in dispute, it must be appealed by the dissatisfied party or the Appellate Body will not consider it. *See id.* at 10-11.

²²⁶ *See* United States-Standards for Reformulated and Conventional Gasoline, Status Report by the United States, Addendum, WT/DS2/10/Add.5 (June 12, 1997) (source on file with author of article).

²²⁷ *See* Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners, 62 Fed. Reg. 24,776 (1997) (to be codified at 40 C.F.R. pt. 80) (proposed May 6, 1997).

²²⁸ *Id.* at 45,533.

²²⁹ *See id.* at 45,537. The response stated:

Today's final action allows foreign refiners the option to establish and use IBs [individual baselines] under the conventional gasoline program. Specific regulatory provisions will be implemented to ensure that the optional use of an IB will not lead to adverse environmental impacts. This involves monitoring the average quality of imported gasoline, and if a specified benchmark is exceeded, remedial action will be taken. The remedial action involves making the requirements for imported gasoline not subject to an IB more stringent. This will ensure the environmental neutrality of this approach.

Under this final rule, the procedures and methods for setting an IB, as well as the tracking, segregation and other compliance related provisions described

The volume of gasoline that can be imported under the IB for a foreign refinery is limited in the same manner as for domestic refiners, relative to a refinery's 1990 baseline volume. Since the foreign refiner seeks an IB in order to specifically produce gasoline for the U.S. market, the tracking and segregation requirements noted above should not have a significant impact on the ready availability of gasoline for import. The current requirements for imported gasoline will continue to apply for all of the other gasoline imported into the U.S.

There was some concern about the possible environmental impact of providing this option to foreign refiners. A foreign refiner may only have an economic incentive to seek an IB if it will be less stringent than the SB. Gasoline produced by this foreign refiner would then be measured against this less stringent IB. Other imported gasoline would be measured against the SB through the importer. As compared to the situation in 1990, there would be the potential for the quality of imported gasoline to degrade from an emissions perspective.

The size and amount of this impact, however, is difficult to quantify. It would depend on the number of foreign refiners that receive an IB, the specific emissions levels of the IBs assigned, and the volume of gasoline included in the IB It is also hard to quantify to what extent, if any, foreign refiners who produced gasoline in 1990 that was cleaner than the SB would ship gasoline that is dirtier than what they shipped in 1990. These circumstances, as well as the existence of a volume cap on the use of IB's, and the large variation in the total levels of CG and RFG imports each year make it difficult to assess in advance the risk of an adverse environmental impact.

EPA is addressing these potential environmental concerns in the final rule by: (1) Establishing a benchmark for the quality of imported gasoline that will reasonably identify when the factors identified above have led to an adverse environmental impact; (2) monitoring imported gasoline to determine whether the benchmark has been exceeded; and (3) if the benchmark is exceeded, imposing a remedy that compensates for the adverse

below will all apply. However, they will only apply where a foreign refiner chooses to apply for an IB.

Id.

environmental impact.²³⁰

The EPA will accept baseline petitions from foreign refiners at any time prior to January 1, 2002.²³¹ Whether the changes in the EPA regulations will bring the United States into compliance with the WTO recommendations remains to be determined. Offering foreign refiners individual baselines remedies the problems of different treatment. However, volume caps under the IBs and other aspects of the EPA regulation involving corrections for adverse environmental impacts may raise future questions.

2. *The Japan Liquor Case*²³²

a. *Panel Report*

This dispute arose from a Japanese tax law that imposed a higher tax on imported liquor like vodka, rum, and gin ("white spirits"), and whisky and brandy ("brown spirits"), than the tax on the Japanese domestic liquor shochu.²³³ The controversy over Japan's taxation on liquors was not new; a GATT Panel in 1987²³⁴ decided that Japan's tax on imported wines and alcohol violated GATT Article III:2.²³⁵ Despite the 1987 Panel report and

²³⁰ *Id.*

²³¹ *See id.* at 45,548.

²³² *See Japan Liquor Panel, supra* note 51 (translations were submitted to the Panel by Japan).

²³³ *See id.* at 2-3; Shuzeiho [Japanese Liquor Tax Law], Law No.6 of 1953, as amended [hereinafter Liquor Tax Law]. Shochu is defined under the Japanese law as liquor produced by the distillation of alcohol containing substances. The liquor must have an alcoholic strength of 45% or less, included in the Tax Law definition are shochu, whiskey/brandy, spirits and liquors. *See Japan Liquor Panel, supra* note 51, at 3.

²³⁴ *See Panel Report on Japan-Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1987) [hereinafter *Japan Liquor 1987*]. Although the Panel report was adopted, Japan never fully complied with the Panel ruling in the view of its trading partners. On February 2, 1989, the Government of Japan informed the Contracting Parties that the *ad valorem* tax and grading system had been abolished, resulting in a single rate for all grades of whisky/brandies, and that the existing differences in taxation of whisky/brandies and shochu had been considerably reduced by decreasing the specific tax rate for whisky/brandies and raising that on shochu. *See Japan Liquor Panel, supra* note 51, at 2-3.

²³⁵ *See Panel Report on Japan-Customs Duties, Taxes and Labelling Practices on*

subsequent actions taken by Japan, its trading partners remained dissatisfied with market opportunities in Japan for their liquors because of the liquor tax law. Accordingly, the United States, Canada, and the EC individually requested consultations with Japan in June and July 1995.²³⁶ The Complaining parties claimed that the Japanese tax system applicable to distilled spirits had been devised to afford protection to domestic production of shochu over foreign liquors in violation of Article III:2's first and second sentences.²³⁷

The Panel looked at the relationship between Article III:1 and Article III:2's first sentence, which states: "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."²³⁸ It determined that the language used in Article III:1 provided general principles, but that Article III:2 provided legally binding obligations.

The Panel concluded that the wording of Article III:2's first sentence required it to address three issues in order to determine if there was a violation: (1) whether the products concerned were

Imported Wines and Alcoholic Beverages, Nov. 10, 1987, GATT B.I.S.D. (34th Supp.) at 83 (1987).

²³⁶ See Japan Liquor Panel, *supra* note 51, at 1.

²³⁷ Article III:2 of GATT 1994 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

GATT 1994, *supra* note 1, art. III:2.

²³⁸ *Id.* Article III:1 of GATT 1994 provides:

The contracting parties recognize that internal taxes and other charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

GATT 1994, *supra* note 1, art. III:1.

“like”; (2) whether the contested measure was an “internal tax” or “other internal charge”; and (3) if so, “whether the tax imposed on foreign products is in excess of the tax imposed on like domestic products.”²³⁹ If all three questions were answered in the affirmative, then the tax would be in violation of the obligation contained in Article III:2’s first sentence. The second issue, whether the Liquor Tax was an internal tax or other internal charge, was not a contested issue in this dispute.²⁴⁰

i. Like Product Analysis Under Article III:2

The Panel had to determine whether shochu, vodka, and other distilled liquors were “like products” under Article III:2.²⁴¹ The Panel decided that “like products” should be interpreted on a case-by-case basis.²⁴² In the Panel’s opinion, “like products” did not have to be identical in all respects but rather the term “should be construed narrowly in the case of Article III:2’s first sentence.”²⁴³

The Panel gave two reasons for its conclusion. First, “Article III:2 distinguishes between like and directly competitive or substitutable products, the latter obviously being [a] much larger category of products than the former.”²⁴⁴ Second, if “two products are subject to the same tariff binding and therefore to the same maximum border tax, there is no justification, outside of those mentioned in GATT rules, to tax them in a differentiated way through internal taxation.”²⁴⁵ However, in respect to this second reason, the Panel stated that this did not mean that “the determination of whether products were ‘like’ should be based exclusively on the definition of products for tariff bindings, . . . [e]specially where it is sufficiently detailed, a product’s description for this purpose is in this case an important criterion

²³⁹ Japan Liquor Panel, *supra* note 51, at 107.

²⁴⁰ *See id.*

²⁴¹ *See* GATT 1994, *supra* note 1, art. III:2.

²⁴² *See* Japan Liquor Panel, *supra* note 51, at 108. *See, e.g.,* Border Tax Adjustments, *supra* note 171.

²⁴³ Japan Liquor Panel, *supra* note 51, at 108.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

for confirming likeness for the purposes of Article III:2.”²⁴⁶

The Panel looked at the traditional factors used to determine like product: (1) physical characteristics; (2) end-uses; (3) consumer preferences; and (4) tariff classifications or bindings. The Panel compared vodka and shochu and found that they were “like products” because the two shared almost identical physical characteristics.²⁴⁷ It also determined that the alcoholic strength of the two products did not preclude a finding of likeness because alcoholic beverages are often drunk in diluted form and that vodka and shochu are classified under the same tariff heading in Japan’s tariff system.²⁴⁸

ii. Imported Like Products Taxed in Excess of Domestic Like Products Analysis

Once the Panel decided that shochu and vodka were like products, it had to decide if the liquor tax violated Japan’s obligations, under Article III:2, by taxing an imported product in excess of the domestic product. The Panel determined that, in fact, imported spirits were taxed in excess of the like domestic spirits.²⁴⁹ It rejected Japan’s argument that the tax discrepancy was designed to maintain consistent tax/price ratios.²⁵⁰ With respect to the tax/price ratio, the Panel noted:

[T]he statistics submitted by Japan show that significant differences exist between shochu and the other directly competitive or substitutable products and also noted that there are significantly different tax/price ratios within the same product categories. Moreover, there were significant problems with the methodology for calculating tax/price ratios submitted

²⁴⁶ *Id.*

²⁴⁷ *See id.* at 110.

²⁴⁸ *See id.*

²⁴⁹ *See id.* at 111. The following breakdown of the tax rates applied to domestic and imported “like products” provide a helpful illustration of why the Panel came to this determination. Liquor tax per kilolitre: Shochu A (alcoholic strength of 25 degrees) 155,700 yen, Shochu B (alcoholic strength of 25 degrees) 102,100 yen, Whisky (alcoholic strength of 40 degrees) 982,300 yen, Brandy (alcoholic strength of 40 degrees) 982,300 yen, Spirits (gin, rum, vodka) (alcoholic strength of 38 degrees) 377,203 yen, Liqueurs (alcoholic strength of 40 degrees) 328,760 yen. *See id.*

²⁵⁰ *See id.*

by Japan, such that arguments based on that methodology could only be viewed as inconclusive Since the prices of the domestic spirits and whisky/brandy are much lower than the prices of the imported ones, this exclusion has the impact of reducing considerably the tax/prices ratios cited by Japan for those products. In this connection, the Panel noted that one consequence of the Japanese tax system was to make it more difficult for cheaper imported brands of spirits and whisky/brandy to enter the market.²⁵¹

Having rejected Japan's tax/price ratio argument as justification, the Panel found that by taxing vodka in excess of shochu, Japan had violated its obligation under Article III:2's first sentence.²⁵²

iii. Article III:2's Second Sentence Analysis

The Panel next examined Article III:2's second sentence to determine if the Liquor Tax Law also violated that provision. In determining if Article III:2's second sentence was violated, two questions were answered: (1) "whether the products concerned (whisky, brandy, gin, genever, rum and liqueurs) are directly competitive or substitutable"; and, if so, (2) "whether the treatment afforded to foreign products is contrary to the principles set forth in paragraph 1 of Article III."²⁵³

First, the Panel found that the evidence presented by the Complaining parties supported the conclusion that the imported and domestic products were "directly competitive or substitutable."²⁵⁴ The Panel found that the study put forward by the Complainants, the ASI study,²⁵⁵ proved that there was a high degree of price-elasticity between shochu, the five brown spirits, and the three white spirits.²⁵⁶ This price-elasticity between the

²⁵¹ *Id.* at 117.

²⁵² *See id.* at 118.

²⁵³ *Id.* at 112.

²⁵⁴ *Id.* at 114.

²⁵⁵ *See id.* at 92. The study was commissioned by the Liquor Committee of the European Business Community in Tokyo and carried out in February, 1996 by ASI Market Research. *See id.*

²⁵⁶ *See id.* at 114.

products, combined with the findings of the 1987 GATT Panel decision, led the Panel to conclude that these products were directly competitive or substitutable.²⁵⁷

The Panel next had to determine if the tax was applied in a manner so as to afford protection to the domestic product.²⁵⁸ The Panel concluded that “if directly competitive or substitutable products are not ‘similarly taxed’” and, if the tax favors domestic products, then unfair protection would be afforded to such products, and Article III:2, second sentence, is violated.²⁵⁹ The fact that the products were taxed dissimilarly and, because of this, shochu was given a competitive advantage was sufficient evidence for the Panel to find Japan in violation of its obligations.²⁶⁰

In the Panel’s view, the Japanese internal taxes and high import duties managed to “isolate domestically produced shochu from foreign competition.”²⁶¹ Therefore, Japan had violated its obligations under Article III:2’s second sentence by maintaining such a system.

iv. Legal Status of Adopted GATT Panel Decisions

The Japan Liquor case also raised an important issue regarding

²⁵⁷ *See id.* at 116.

²⁵⁸ *See id.* In making this inquiry, the Panel looked to the Interpretive Note of Article III:2 that stated:

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Id. (quoting GATT 1994, *supra* note 1, art. III:2).

²⁵⁹ *Id.* at 116.

²⁶⁰ *See id.* In this connection, the Panel noted that for it to conclude that dissimilar taxation afforded protection, it would be sufficient for it to find that the dissimilarity in taxation was not *de minimis*. *See id.* at 116 n.118. “In the Panel’s view, it is appropriate to conclude, as have other GATT Panels including the 1987 Panel, that it is not necessary to show an adverse effect on the level of imports, as Article III generally is aimed at providing imports with ‘effective equality of opportunities’ in ‘conditions of competition.’” *Id.* at 116 (citations omitted).

²⁶¹ *Id.* at 118.

the status of prior GATT Panel decisions.²⁶² In its submission to the Panel, the Canadian Government made the argument that the 1987 Panel decision²⁶³ regarding Japan's taxes on alcoholic beverages was particularly authoritative and should be followed by the Panel established under the DSU.²⁶⁴ Thus, the legal status of the 1987 Panel decision became an issue for the Panel.

Canada argued that Article XVI:1 of the WTO Agreement "provides clear guidance to a Panel and the DSB respecting the legal value of reports adopted by CONTRACTING PARTIES under GATT 1947."²⁶⁵ Canada based this argument on the words in Article XVI:1 that said future Panels "shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."²⁶⁶ Canada argued that the decision made by the parties to adopt the prior decisions made them an integral part of GATT 1994, and, therefore, binding on the parties in their interpretation of Article III:2 of GATT 1994.²⁶⁷ The United States argued that Canada's argument ran counter to GATT 1947 Panel practice because "in the GATT 1947 system, Panel reports were an input for the interpretative process, but not an independent source of binding norms."²⁶⁸

The Panel agreed with Canada and decided that "[P]anel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them."²⁶⁹

b. Appellate Body Decision

Japan and the United States appealed the Panel decision.²⁷⁰

²⁶² See *id.* at 116.

²⁶³ Japan Liquor 1987, *supra* note 234.

²⁶⁴ See Japan Liquor Panel, *supra* note 51, at 13.

²⁶⁵ *Id.* at 12.

²⁶⁶ WTO Agreement, *supra* note 1, art. XVI:1.

²⁶⁷ See Japan Liquor Panel, *supra* note 51, at 13.

²⁶⁸ *Id.* at 14.

²⁶⁹ Japan Liquor Appellate Body, *supra* note 51, at 31 (citation omitted).

²⁷⁰ See generally Japan Liquor Appellate Body, *supra* note 51.

Japan's basic contentions were that the Panel had failed to determine the effect Article III:1 had on the interpretation of Article III:2 and that it erred in its interpretation of the "so as to afford protection" language and its like product analysis.

The United States supported the Panel's overall conclusions but, nevertheless, appealed certain issues. The U.S. claim questioned the Panel's interpretation of Article III:2, the way it determined "like product," and that it did not consider the full scope of products subject to the dispute.²⁷¹ In particular, the United States claimed that the Panel's understanding of the relationship between Article III:2 and Article III:1 was erroneous because it disregarded Article III:1. According to the United States, this was an error because Article III:1 was an integral part of the context that must be considered in interpreting Article III:2.²⁷² In addition, the United States appealed the Panel's characterization of adopted GATT 1947 Panel reports as subsequent practice under the Vienna Convention.²⁷³

The Appellate Body agreed with the United States' argument with respect to the interpretation of Article III. It concluded that Article III:1 informs Article III:2 by "establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III."²⁷⁴ In addition, the Appellate Body found that the first sentence of Article III:2 is in effect an application of the general principle stated in Article III.

We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with this general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of the general principle. The ordinary meaning of the words of Article

²⁷¹ *See id.* at 4-5.

²⁷² *See id.* at 4.

²⁷³ *See id.* at 5. The parties listed more issues, but these were the issues actually decided by the Appellate Body. *See generally id.*

²⁷⁴ *Id.* at 18.

III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the WTO Agreement, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are “like” and, second, whether the taxes applied to the imported products are “in excess of” those applied to the like domestic products. If the imported and domestic products are “like products”, and if the taxes applied to the imported products are “in excess of” those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.²⁷⁵

The Appellate Body held that three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2's second sentence.²⁷⁶ These issues are whether: (1) the imported products and the domestic products are “directly competitive or substitutable products” that are in competition with each other; (2) the directly competitive or substitutable imported and domestic products are “not similarly taxed”; and (3) the dissimilar taxation of the directly competitive or substitutable imported domestic products is “applied . . . so as to afford protection to domestic production.”²⁷⁷ The Appellate Body agreed with the Panel's legal reasoning and concurred that Japan's liquor tax was discriminatory and in violation of its obligations under Article III:2's first sentence.²⁷⁸

The Appellate Body took up the issue of the legal status of adopted GATT Panel reports and then, after careful analysis of the requirements of Articles 31 and 32 of the Vienna Convention, rejected the Panel's conclusion.²⁷⁹ Article 31(3)(b) of the Vienna Convention states that “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is to be “taken into account together

²⁷⁵ *Id.* at 18-19.

²⁷⁶ *See id.* at 24.

²⁷⁷ *Id.*

²⁷⁸ *See id.* at 32.

²⁷⁹ *See id.* at 14. *See also* Vienna Convention, *supra* note 126.

with the context” in interpreting the terms of the treaty.²⁸⁰ The Appellate Body observed that “[g]enerally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.”²⁸¹ A single Panel report was not enough to establish a sequence of acts. The DSU makes clear that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”²⁸² Moreover, Members could seek a binding interpretation through other means at the WTO.²⁸³

The Appellate Body concluded that a decision to adopt a Panel decision by the Contracting Parties did not constitute subsequent practice and, therefore, those decisions are not binding upon future Panels, even those deciding a similar dispute between the same parties.²⁸⁴

3. *The Desiccated Coconut Case*

a. *Panel Report*

The Desiccated Coconut case²⁸⁵ concerned the interplay between the Tokyo Round Subsidies Agreement, Article VI of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM).²⁸⁶ The Philippines initiated the dispute in response to Brazil’s imposition of countervailing duties on imports

²⁸⁰ Japan Liquor Appellate Body, *supra* note 51, at 12 (quoting the Vienna Convention, *supra* note 126, art. 31(3)(b)).

²⁸¹ *Id.* at 13 (citations omitted).

²⁸² DSU, *supra* note 4, art. 3.

²⁸³ *See id.* art. 3.9.

²⁸⁴ *See* Japan Liquor Appellate Body, *supra* note 51, at 14.

²⁸⁵ Desiccated Coconut Panel, *supra* note 51.

²⁸⁶ *See id.* at 4; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 4, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994), available in 1994 WL 761483 [hereinafter SCM].

of desiccated coconuts.²⁸⁷ The underlying question was whether Article VI of GATT 1994, the Tokyo Round Subsidies Code, or the Agreement on Subsidies and Countervailing Measures (SCM Agreement) applied to the dispute.²⁸⁸

The Philippines claimed that Brazil had violated its obligations under Articles I and II, and that Brazil's actions were not justified under Article VI:3 and VI:6 of GATT 1994.²⁸⁹ The Philippines did not claim that either the Tokyo Round Code or the SCM Agreement applied.²⁹⁰

In 1994, after the signing ceremony in Marrakesh, and before the WTO's formal launch on January 1, 1995, countries considered how to proceed with disputes that were underway or might yet arise before the WTO's launch. The issue was of particular importance in the anti-dumping and subsidy/countervailing duty areas, where the new agreements by their terms were applicable only with regard to investigations or reviews initiated after January 1, 1995. GATT Contracting Parties agreed to keep the dispute settlement procedures alive for causes of action arising under the GATT 1947 system for two years after the launch of the WTO, through December 31, 1996, a full year after GATT otherwise ceased to exist.²⁹¹

²⁸⁷ See Desiccated Coconut Panel, *supra* note 51, at 2. The CVD investigation by Brazil was actually initiated in 1994, prior to the effective date of the WTO, and the duties were imposed beginning in 1995, after the WTO went into effect. See *id.*

²⁸⁸ See *id.* at 4. Article 32.3 of the SCM indicates that the SCM applies to investigations initiated *after* the WTO came into effect. SCM Article 32.3 of GATT 1994 contains the following language: "Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." SCM, *supra* note 286, art. 32.3.

²⁸⁹ See Desiccated Coconut Panel, *supra* note 51, at 3.

²⁹⁰ See *id.* at 4. As noted above, Article 32.3 of the SCM renders the SCM inapplicable to investigations initiated prior to January 1, 1995. See SCM, *supra* note 286, art. 32.3.

²⁹¹ See Transitional Co-Existence of the GATT 1947 and the WTO Agreement, adopted Dec. 8, 1994, GATT Doc. PC/12-L/7583 (final); Decision on Transitional Co-Existence of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Marrakesh Agreement Establishing the World Trade Organization, adopted Dec. 8, 1994, GATT Doc. PC/13-L/7584 (final); and Transitional Co-Existence of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade and the Marrakesh Agreement

The Philippines was faced with the following situation: either file a challenge under GATT 1947, where dispute settlement ultimately was non-binding without the consent of the losing party; or request consultations and pursue a dispute within the WTO on the hope or expectation that consistency with underlying GATT articles can be challenged independent of an agreement that is part of the WTO and that specifically expands and clarifies rights and obligations under the GATT Article. Such bifurcated approaches to challenging governments' actions had been possible under GATT.²⁹²

The Philippines argued that when a party has alternative legal grounds upon which to base a claim, the party has a right to choose the legal basis for its claim.²⁹³ In support of its position, the Philippines cited prior cases brought under provisions of GATT 1947 that could have been brought under the Tokyo Round SCM Agreement.²⁹⁴

The Panel considered whether a Member can bring a case under the WTO dispute settlement provisions using a GATT 1994 Article as the basis for its claim. Stated differently, where the applicable Agreement not only *was not* invoked but also *could not* be invoked, could a Member, by alleging a violation of Article VI of GATT 1994, invoke the dispute settlement system? Brazil took the position that the SCM Agreement controlled and that a dispute Panel could not review the decision being challenged. Brazil's argument was that:

under customary principles of international law and the terms of the WTO Agreement itself, neither GATT 1994 nor the Agreement on Agriculture apply to this dispute, as the

Establishing the World Trade Organization, adopted Dec. 8, 1994, GATT Doc. PC/16-L/7587 (final).

²⁹² See Desiccated Coconut Panel, *supra* note 51, at 14 (citing United States-Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, July 11, 1991, GATT B.I.S.D. (38th Supp.) at 30 (1991) [hereinafter Pork]; EEC-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 116 (1990) [hereinafter Oilseeds]). In these cases the parties chose to proceed with their claim under provisions of GATT 1947 and not the Tokyo Round SCM Code to which they were parties.

²⁹³ See *id.* at 14.

²⁹⁴ See *id.* The GATT 1947 dispute settlement Panels neither objected to nor questioned a party's right to bring such actions.

investigation leading to the imposition of the measure was initiated pursuant to an application received prior to the date of entry into force of the WTO Agreement.²⁹⁵

The Panel, therefore, had to decide whether Article VI created rules that are separate and distinct from those in the SCM Agreement or whether they “represent an inseparable package of rights and disciplines that must be considered in conjunction” with each other.²⁹⁶

The Panel decided that Article VI of GATT 1994 is not independently applicable to a dispute to which the SCM Agreement is not applicable.²⁹⁷ Two reasons for the Panel’s decision were stated: (1) the temporal application of the SCM agreement and (2) the interrelationship of Article VI of GATT 1994 and the SCM Agreement.²⁹⁸ The plain language of SCM’s Article 32.3 provided that it was inapplicable to investigations or reviews commenced prior to the entry into force of the WTO Agreement.²⁹⁹ This, read in conjunction with the customary rules of interpretation of international agreements, and, specifically, Article 28 of the Vienna Convention, which provides that treaties are not to be applied retroactively, led to the conclusion that the SCM was not applicable to the current dispute.³⁰⁰

Next, the Panel considered the separability of Article VI from the SCM Agreement. As previously discussed under GATT 1947 dispute settlement practice, a claim could be brought under either a particular agreement or under a GATT 1947 article.³⁰¹ The issue for the Panel was whether the provisions of GATT 1994 relating to countervailing duties “are susceptible of application and interpretation independently of the SCM Agreement.”³⁰² In addressing this issue the Panel examined: (1) the textual provisions; (2) the object and purpose of the relevant provisions of

²⁹⁵ Desiccated Coconut Panel, *supra* note 51, at 57.

²⁹⁶ *Id.* at 58.

²⁹⁷ *See id.* at 74.

²⁹⁸ *See id.*

²⁹⁹ *See* SCM, *supra* note 286, art. 32:3.

³⁰⁰ *See* Desiccated Coconut Panel, *supra* note 51, at 74.

³⁰¹ *See supra* notes 291-92 and accompanying text.

³⁰² Desiccated Coconut Panel, *supra* note 51, at 60.

the SCM and Article VI of GATT 1994; (3) precedents under GATT 1947; and (4) the consequences of a conclusion that Article VI of GATT 1994 cannot apply independent of the SCM Agreement.³⁰³

i. Textual Provisions

The Panel examined the language of the SCM Agreement to determine whether anything in the language of the agreement would lead to the conclusion that Article VI could be invoked as an independent basis for a claim. Finding the language of the agreement to be less than decisive on the issue, the Panel continued its analysis stating:

It is significant, however, that Article 32.1³⁰⁴ refers to the SCM Agreement as *interpreting* Article VI of GATT 1994. Article VI of GATT 1994 sets forth a series of core concepts central to the WTO regulation of countervailing measures (*e.g.*, subsidy, material injury, domestic industry). These concepts are, however, expressed in only the most general terms, and are thus susceptible of a wide range of interpretations. In our view, the Tokyo Round SCM Code and its successor the SCM Agreement were developed in part to lend greater precision and predictability to the rights and obligations under Article VI. Article 32.1 makes clear that where the SCM Agreement applies the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement. The drafters clearly foresaw the possibility of conflict between GATT 1994 and the MTN Agreements, as evidenced by the general interpretive note to Annex 1A. If there could be conflicts between GATT 1994 and the MTN agreements, there could also be conflicts between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an MTN Agreement.³⁰⁵

....

The clear non-applicability of the SCM to this dispute means

³⁰³ See *id.* at 60-75.

³⁰⁴ Article 32.1 of the SCM Agreement states: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." SCM, *supra* note 286, art. 32.1.

³⁰⁵ Desiccated Coconut Panel, *supra* note 51, at 62 (emphasis in original).

that if we were to conclude that Article VI of GATT 1994 may apply on its own, we would be obliged to interpret it as if the SCM Agreement did not exist. . . . It would be legally improper to seek to reconcile any emergent differences between Article VI applied on its own and Article VI as it would be understood in conjunction with the SCM Agreement by reverting to the SCM Agreement, not as applicable law but as an interpretive aid—even though the latter Agreement by its own terms does not apply to this dispute. Such an approach would be contrary to the ordinary meaning of Article 32.3 of the SCM Agreement. It would not be appropriate for this Panel to incorporate the requirements of the SCM Agreement indirectly where the SCM Agreement does not apply directly. If then, we interpret the relevant provisions of the WTO Agreement as permitting the application of Article VI of the GATT 1994 on its own, there would be a real and altogether serious possibility that Article VI of GATT 1994 would be imbued with one meaning where applied independently, and with a different, and potentially conflicting, meaning where applied in conjunction with the SCM Agreement as required by Article 32.1.³⁰⁶

After its textual analysis, the Panel looked to the object and purpose of the WTO Agreement as a whole.

ii. Object and Purpose of the WTO

In reviewing the WTO Agreement and the Preamble, the Panel determined that one of the central objects and purposes of the agreement was to develop a more integrated and durable multilateral trading system. The Panel stated:

In our view, one of the central objects and purposes of the WTO Agreement, as reflected in the Preamble to that Agreement, is to “develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations” This is one of the reasons that the WTO Agreement is a single undertaking, accepted by all Members. Unlike the pre-WTO regime, where contracting parties to GATT 1947 could elect whether or not to adhere to the Tokyo

³⁰⁶ *Id.* (footnotes in text omitted).

Round SCM Code, such option has been removed in the present regime. The integrated nature of the WTO system is reflected in Article II.2, which states that “[t]he agreements and associated legal instruments included in Annexes 1, 2, and 3 . . . are integral parts of this Agreement binding on all Members” To revert to a situation where Article VI of GATT 1994 could have different meanings depending on whether or not it was applied in conjunction with the SCM Agreement would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid.³⁰⁷

In light of its interpretation of the object and purpose of the WTO Agreement, the Panel then looked at the rights and obligations of Members under Article VI, the SCM Agreement and its predecessor, the Tokyo Round SCM Code.³⁰⁸ In particular, the Panel reviewed the package of rights and obligations and how its interpretation of the applicability of Article VI could alter those rights and obligations. The Panel concluded that:

Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose *additional* substantive and procedural *obligations* on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of *rights* and obligations of a potential user of countervailing measures.

Member’s actions could potentially be found to be inconsistent with Article VI of GATT 1994 even though those actions were consistent with Article VI of GATT 1947 in conjunction with the Tokyo Round SCM Code and/or would have been consistent with Article VI of GATT 1994 in conjunction with the SCM Agreement, had the latter agreement applied.³⁰⁹

The possible inconsistency in what rights and obligations Members would have if Article VI were applied independent of the SCM Agreement led the Panel to discuss how this might place

³⁰⁷ *Id.* at 62-63.

³⁰⁸ *See id.* at 63.

³⁰⁹ *Id.* at 63-64 (emphasis added).

more onerous obligations on Members than they had originally undertaken. The Panel stated that if it were to determine that Article VI of GATT 1994 was independently applicable to disputes initiated under the Tokyo Round SCM Code, it “would not only be opening a risk of conflicting interpretations of Article VI of GATT 1994 but would [also] be holding WTO Members to a package of rights and obligations that were potentially more onerous [than] those to which they were subject under Article VI in conjunction with the Tokyo Round SCM Code when they initiated the investigation.”³¹⁰ With these concerns in mind, the Panel concluded that the proper interpretation of the SCM Agreement prohibited it from finding that Article VI could apply independently in situations where the SCM Agreement did not apply.³¹¹

iii. GATT Precedents

The Philippines also raised the issue of past GATT dispute settlement cases where parties were allowed to bring a dispute under either the article or agreement that applied.³¹² In determining the relative value to be placed on these past decisions, the Panel looked to Article XVI:1 of the WTO Agreement. Article XVI:1 provides that: “Except as otherwise provided under this Agreement of the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.”³¹³ The Panel held that although Panel reports do not constitute formal precedent, they are nevertheless useful and persuasive guidance.³¹⁴ However, in this dispute, the Panel found the prior Panel decisions to be of “very limited relevance.”³¹⁵

³¹⁰ *Id.* at 66.

³¹¹ *See id.* at 67.

³¹² *See supra* notes 293-94 and accompanying text.

³¹³ Desiccated Coconut Panel, *supra* note 51, at 67 (quoting WTO Agreement, *supra* note 1, art. XVI:1).

³¹⁴ *See id.* at 67.

³¹⁵ *Id.* The Panel based this evaluation on that fact that:

the central contentious issue before us was neither argued before the Pork Panel

*iv. Consequences of Non-Separability
of Article VI*

The last issue raised by the Philippines, with respect to the applicability of Article VI in isolation from the SCM Agreement, was what the consequences to Members would be if Article VI was found to be non-separable. The Philippines claimed that it would effectively be left without access to WTO dispute settlement if Article VI was found not to constitute the applicable law.³¹⁶

In the Philippines' view, such a consequence would clearly be inequitable because it would "deny access to WTO dispute settlement with respect to a duty imposed as a result of a determination made after the entry into force of the WTO Agreement if that determination was the result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement."³¹⁷ The Philippines also argued that "some WTO Members could be left without a forum to pursue their rights under either the GATT or WTO systems with respect to countervailing measures imposed as a result of investigations initiated pursuant to applications made before the date of entry into force of the WTO Agreement."³¹⁸

The Panel disagreed with the arguments put forward by the Philippines. It did not believe that the option to resort to dispute settlement was denied to the Philippines. The Panel stated:

In the first place it rests on a simple misconception of the true effect of a finding that Article VI of GATT 1994, standing alone, does not constitute applicable law to a dispute of the type

nor formed part of its deliberations and findings. Little weight can be given to the Panel's failure to consider the dispute *sua sponte*. In any event, it is doubtful whether, given the fragmented nature of dispute settlement in the GATT system, a Panel established under Article XXIII of GATT 1947 would have had the authority under its terms of reference to determine, in the light of provisions of the Tokyo Round SCM Code, that GATT Article XXIII was not the proper basis on which to pursue an application.

Id. at 68. Therefore, the Panel concluded that the Pork Panel decision was not persuasive especially in light of its interpretation of the relevant textual provisions of the WTO Agreement. *See id.*

³¹⁶ *See id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

before us. The WTO substantive provisions and dispute resolution procedure are not in fact fully denied in either situation. They are, instead, phased in by the transnational provisions in the WTO.³¹⁹

In addition, because the Philippines and Brazil were both members of the Tokyo Round SCM Code and the fact that the Philippines could have invoked the dispute settlement provisions of that agreement, the Philippines was not left without recourse to dispute settlement under GATT 1947.³²⁰ The Panel determined that at some point it could pursue the claim under the WTO dispute settlement system because of the way the SCM Agreement was to be phased in³²¹ and the procedural rules contained therein.³²²

The Panel concluded that measures to which the WTO Agreement is not immediately applicable will in time fall under its provisions.³²³ The Panel also found that it was best to balance the

³¹⁹ *Id.* at 69-70 (footnote omitted).

³²⁰ *See id.* at 71. The Panel reasoned:

Pursuant to the Decision on the Transitional Co-existence of the GATT 1947 and the WTO Agreement, L/7538 (adopted 8 December 1994), the GATT 1947 continued in force for one year after the date of entry into force of the WTO Agreement As a result, Contracting Parties to GATT 1947 which desired to pursue dispute settlement with respect to a countervailing measure to which neither the Tokyo Round SCM Code nor Article VI of GATT 1994 in conjunction with the SCM Agreement applied had an additional year in which to invoke GATT 1947 dispute settlement.

Id.

³²¹ Article 21.2 of the SCM Agreement states:

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

SCM, *supra* note 286, art. 21.2.

³²² *See id.* at 72 (citing SCM, *supra* note 286, art. 21.2). The Panel noted that "reviews of existing measures initiated pursuant to requests made after the date of entry into force of the WTO Agreement are subject to the SCM Agreement." *Id.*

³²³ *See id.* at 73.

interests of the Philippines in having their dispute settled immediately under the WTO regime with the potential problems such a conclusion would cause.³²⁴ The claims raised by the Philippines under Articles I and II were also found to be inapplicable to this dispute.³²⁵

Having concluded that Article VI of GATT 1994 was not applicable law for the dispute, the Panel turned to the Philippines' claim under the Agreement on Agriculture.³²⁶ In particular, the Philippines claimed that Brazil had violated the provisions of Article 13(b)(i) of the Agreement on Agriculture, which provides an exemption "from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement."³²⁷ The Agreement on Agriculture also states that "due restraint shall be shown in initiating any countervailing duty investigations."³²⁸

The Panel concluded that countervailing duties are subject to the provisions of Article 13 of the Agreement on Agriculture only if they are covered by both Article VI of GATT 1994 and the SCM Agreement.³²⁹ Because the Panel already concluded that Article VI of GATT 1994 did not apply, and that the SCM Agreement by its

³²⁴ *See id.* at 69.

³²⁵ *See id.* at 75. The Panel recognized that "Articles I, II and VI of GATT 1994 are interrelated and that Article VI allows measures which might otherwise be inconsistent with Articles I and II of GATT 1994." *Id.* at 74. However, having interpreted the WTO Agreement and its provisions "in their context and in light of their object and purpose . . . [the Panel concluded] that Article VI of GATT 1994 does not constitute applicable law for the purposes of this dispute." *Id.* at 75. Therefore, "the Philippines' claims under Articles I and II, which derive from their claims of inconsistency with Article VI of GATT 1994, cannot succeed." *Id.*

³²⁶ Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 1, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS (1994) [hereinafter Agriculture Agreement].

³²⁷ Desiccated Coconut Panel, *supra* note 51, at 75 (quoting Agriculture Agreement, *supra* note 326, art. 12). Note 4 to Article 13 provides that "[c]ountervailing duties where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures." Agriculture Agreement, *supra* note 326, art. 12 n.4.

³²⁸ *Id.*

³²⁹ Desiccated Coconut Panel, *supra* note 51, at 76.

terms did not apply to this dispute, it decided that the claim under Article 13 of the Agreement on Agriculture must fail.³³⁰

The last issue the Panel considered was the Philippines' claim that Brazil had failed to consult it under the provisions of the DSU.³³¹ In the Panel's view, the duty to consult under the DSU was "absolute, and not susceptible to the prior imposition of any terms and conditions by a Member."³³² However, the Panel found the issue not to be within its terms of reference because it was not in the Philippines' request for establishment of a Panel.³³³ Therefore, the Panel did not reach the issue of what type of obligations Members have to consult upon request by another Member.

b. Report of the Appellate Body

Both the Philippines and Brazil appealed certain aspects of the Panel's ruling. In particular, the Philippines appealed the issue of whether Article VI of GATT 1994 applies, independently of the SCM Agreement, to a countervailing duty measure imposed as a result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement.³³⁴ The Philippines asserted that the Panel's analysis was erroneous because it did not correctly address the relationship between Articles I, II and VI of GATT 1994 and Article 32.3 of the SCM Agreement.³³⁵ In addition, the Philippines submitted that the Panel erred in concluding that Article VI of GATT 1994 cannot be independently applied in transitional situations where the SCM Agreement is not applicable pursuant to Article 32.3 of the SCM Agreement.³³⁶ In the Philippines' view, Article 32.3 of the SCM Agreement:

at most, precludes the application of the SCM Agreement to WTO-era measures applied for before the entry into force of the

³³⁰ *See id.*

³³¹ *See DSU, supra* note 4, arts. 4.1-4.3.

³³² Desiccated Coconut Panel, *supra* note 51, at 76.

³³³ *See id.*

³³⁴ *See* Desiccated Coconut Appellate Body, *supra* note 51, at 3.

³³⁵ *See id.*

³³⁶ *See id.* at 3-4.

WTO Agreement due to differences between the SCM Agreement and the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Tokyo Round SCM Code), but such a transitional rule does not affect the applicability of Articles I, II and VI of the GATT 1994, whose texts are exactly identical to their counterpart provisions in the General Agreement on Tariffs and Trade 1947³³⁷

Brazil agreed with the Panel's decision except in regard to the applicability of Articles I and II of GATT 1994, believing that the issue of the applicability of those articles was properly before the Panel.³³⁸

The Appellate Body upheld the legal findings and conclusions of the Panel.³³⁹ Its analysis of the Panel's decision essentially follows the sequence in the Panel decision.

i. Applicability of Article VI of GATT 1994

The Appellate Body first looked at the differences between the WTO and GATT 1947 and concluded that the WTO is one integrated agreement, while the GATT 1947 system was comprised of several agreements, understandings, and legal instruments.³⁴⁰ The Appellate Body outlined the difference between the GATT 1947 and WTO systems:

Each of these major agreements was a treaty with different membership, an independent governing body and a separate dispute settlement mechanism. The GATT 1947 was administered by the CONTRACTING PARTIES, whereas the Tokyo Round SCM Code was administered by the Tokyo Round Committee on Subsidies and Countervailing Duty Measures comprised of the signatories to that Code. With respect to disputes brought under Article XXIII of the GATT 1947, the CONTRACTING PARTIES were responsible for dispute settlement, including establishment of panels, adoption of panel reports, surveillance of implementation of rulings and recommendations, and authorization of suspension of

³³⁷ *Id.* at 4.

³³⁸ *See id.* at 6.

³³⁹ *See id.* at 22.

³⁴⁰ *See id.* at 9-10.

concessions or other obligations. The Tokyo Round Committee on Subsidies and Countervailing Measures was responsible for administering and monitoring dispute settlement under Articles 12, 13, 17 and 18 of the Tokyo Round SCM Code.³⁴¹

GATT 1947 and the Tokyo Round SCM Agreement were of separate legal identities, meaning that a party wishing to bring a dispute regarding countervailing measures had to either bring the dispute under Article VI of GATT 1947 or under the Tokyo Round SCM Code.³⁴² The WTO system is a single undertaking; those nations wishing to join have to accept all the agreements other than certain plurilateral agreements not relevant to the dispute.³⁴³ In particular, the Dispute Settlement Understanding, found in Annex 1A, governs the settlement of disputes under the WTO system.³⁴⁴ Therefore, WTO Members must settle their disputes under the rules and procedures set forth in the DSU.

ii. GATT 1994 within the WTO Agreement

The Appellate Body examined the WTO Agreement and focused on the language contained in certain articles to aid in its understanding of how the WTO system fits together. The Multilateral Trade Agreements found in Annexes 1, 2, and 3 are “integral parts” of the WTO Agreement, as stated in Article II:2 of the WTO Agreement.³⁴⁵ There are also thirteen multilateral agreements contained in Annex 1A.³⁴⁶ The general interpretive note included in Annex 1A states that in the event of a conflict between a provision of GATT 1994 and a provision of another agreement in Annex 1A, the latter shall prevail to the extent of the conflict.³⁴⁷

³⁴¹ *Id.* at 9 (citations omitted). The Appellate Body stated that “[b]y the end of 1994, the GATT 1947 had 128 contracting parties, whereas the Tokyo Round SCM Code had 24 signatories.” *Id.* at 9 n.14.

³⁴² *See id.* at 10. Under the GATT 1947 system there was, in essence, a choice of forum for settling disputes. *See id.*

³⁴³ *See id.*

³⁴⁴ *See id.*; *see also supra* notes 16-86 (discussing the DSU).

³⁴⁵ *See* Desiccated Coconut Appellate Body, *supra* note 51, at 10.

³⁴⁶ *See id.*

³⁴⁷ *See id.* at 11.

iii. Principle of Non-Retroactivity of Treaties

The Appellate Body decided that according to Article 28 of the Vienna Convention of the Law of Treaties, treaties are non-retroactive, absent a contrary intention.³⁴⁸ Therefore, the text of the SCM Agreement, on its face, was effective after the entry into force of the WTO.³⁴⁹ The relationship between Article VI of GATT 1994 and the SCM Agreement, as set out in Article 10 and 32.1 of the SCM Agreement,³⁵⁰ made it clear that “countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the SCM Agreement.”³⁵¹ The Appellate Body determined that the Panel was correct in its determination that Article VI of GATT 1994 was not applicable law for this dispute because the SCM Agreement did not apply to the dispute and Article VI of GATT 1994 could not be applied independently of the SCM Agreement to countervailing duties.³⁵²

iv. Object and Purpose of the WTO Agreement

The Appellate Body agreed with the Panel that the WTO Agreement was intended by its authors to put an end to the fragmentation that had plagued the GATT 1947 system. In particular, the Appellate Body determined that, because of the “integrated nature” of the WTO system, it was necessary to draw certain distinctions and “lines” between the application of the GATT 1947 system and the WTO regime.³⁵³ The Appellate Body

³⁴⁸ *See id.* at 12.

³⁴⁹ *See id.*

³⁵⁰ *See id.* Article 10 of the SCM provides:

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

SCM, *supra* note 286, art. 10. For the language of Article 32.1 of the SCM Agreement, see *supra* note 304.

³⁵¹ Desiccated Coconut Appellate Body, *supra* note 51, at 13.

³⁵² *See id.* at 13-14.

³⁵³ *See id.* at 14. The decision’s report stated:

declared:

Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the WTO Agreement came into effect.³⁵⁴

Because of the transitional decision allowing for extended dispute settlement under the Tokyo Round SCM Code for two years, and because the measures at issue would eventually fall within the scope of the WTO provisions, the Appellate Body found, as did the Panel, that the Philippines was not without a right of action.³⁵⁵

The Appellate Body then reviewed the issue of the applicability of Articles I and II to the dispute and agreed with the Panel that Article VI of GATT 1994 was not applicable to this dispute.³⁵⁶ Because Article VI of GATT 1994 was found to be inapplicable, the Appellate Body also agreed with the Panel that the applicability of Articles I and II was also foreclosed.³⁵⁷

The Appellate Body sees Article 32.3 of the SCM Agreement as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or review.

Id.

³⁵⁴ *Id.* at 15.

³⁵⁵ *See id.* at 16. The Appellate Body explained:

[T]he complaining party in this dispute, the Philippines, had legal options available to it, and, therefore, was not left without a right of action as a result of the operation of Article 32.3 of the SCM Agreement Until 31 December 1996, as a result of the Decision on Consequences of Withdrawal from or Termination of the Tokyo Round SCM Code approved by the signatories to the Tokyo Round SCM Code, dispute settlement was available under the provisions of the Tokyo Round SCM Code. Within a reasonable period of time after the definitive countervailing duty was imposed, the Philippines had the right to request a review pursuant to Article 21.2 of the SCM Agreement—a right which remains available to the Philippines today.

Id.

³⁵⁶ *See id.* at 16-17.

³⁵⁷ *See id.* at 17. The Appellate Body explained:

In the same manner as the Panel found that “the measures are neither consistent nor ‘inconsistent’ with Article VI of GATT 1994; rather, they are simply not

v. *Terms of Reference of Panels*

In response to a claim by Brazil regarding what properly was within the Panel's terms of reference, the Appellate Body reviewed the importance of a Panel's terms of reference and stated:

A Panel's terms of reference are important for two reasons. First, terms of reference fulfill an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the Panel by defining the precise claims at issue in the dispute.³⁵⁸

The Appellate Body determined that the "matter" referred to a Panel consists of the specific claims stated by the parties to the dispute in the documents in the terms of reference.³⁵⁹ Therefore, it is important for the Panel to have an issue properly within its terms of reference in order for it to decide the issue.

4. *Costa Rica Underwear Case*

a. *Background of the Dispute*

The Panel decision in the Costa Rica dispute concerned the U.S. restrictions on imports of cotton underwear under the transitional safeguards provisions of the Agreement on Textiles and Clothing (ATC).³⁶⁰ In early 1995, the U.S. Committee for the Implementation of Textiles Agreements (CITA) reviewed data on

subject to that Article", we believe that the measures here are neither "consistent" nor "inconsistent" with Articles I and II of the GATT 1994, because those Articles are also not applicable law for purposes of this dispute.

Id.

³⁵⁸ *Id.*

³⁵⁹ See *id.* at 21 (citing United States-Denial of Most Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 128 (1992)); EC-Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, ¶ 456 (Oct. 30 1995); United States-Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, ¶ 212 (Apr. 28, 1994); United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, ¶ 336 (Apr. 26-27, 1994).

³⁶⁰ See Costa Rica Underwear Panel, *supra* note 42; ATC, *supra* note 40.

total imports of cotton and man-made fiber underwear and determined that serious damage could occur to the U.S. underwear industry.³⁶¹ The potential damage to the U.S. industry was identified as coming from imports from seven countries: Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Thailand, and Turkey.³⁶²

The United States requested consultations with Costa Rica, along with some of the other parties, on March 27, 1995.³⁶³ The consultations were entered to "initiat[e] the transitional safeguard procedure for establishing a quantitative restriction on . . . [underwear] in accordance with Article 6 of the ATC and [to] provide[] a statement of serious damage setting out the factual information in the matter."³⁶⁴

The consultations between Costa Rica and the United States did not lead to an agreement.³⁶⁵ The United States proceeded to impose quotas on the product in question and notified the Textiles Monitoring Body (TMB), as required by Article 6.10 of the ATC.³⁶⁶ During the TMB's review, the United States supplied updated data and other relevant information including the July 1995 Market Statement.³⁶⁷ The TMB found that serious damage had not been demonstrated by the United States but could not reach a consensus on the "existence of actual threat of serious damage."³⁶⁸ At the end of the thirty days after the sixty-day period

³⁶¹ See Costa Rica Underwear Panel, *supra* note 42, at 3.

³⁶² See *id.*

³⁶³ See *id.*; see also Request for Public Comments on Bilateral Textile Consultations on Cotton and Man-Made Fiber Underwear, 60 Fed. Reg. 19,891 (1995) (listing the restraint period which may be established if no solution is reached in consultations at a level of 14,423,178 dozen).

³⁶⁴ Costa Rica Underwear Panel, *supra* note 42, at 3. During the consultations, the United States proposed a "two-part measure comprising a specific limit (SL) of 1.25 million dozen and a guaranteed access level (GAL) of 20 million dozen." *Id.*

³⁶⁵ See *id.* at 4.

³⁶⁶ See *id.*

³⁶⁷ See *id.* at 4. There were two Market Statements: March and July 1995. The reports covered certain variables: output, utilization of capacity, employment, domestic prices, profits, and investment. However, they failed to include information on productivity, inventories, exports, and wages. See *id.*

³⁶⁸ *Id.* at 4.

for consultations between the United States and Costa Rica, as provided for in Article 6.7 of the ATC, the United States imposed the restraint measure on imports from Costa Rica.³⁶⁹ The measure included all imports received after March 27, 1995, in the amount allowed under the transitional safeguard measure, meaning, in effect, that all imports received after that date would be counted against the limit imposed by the transitional safeguard measure.³⁷⁰ In other words, the date of the measure was backdated to the date of the request for consultations.

Costa Rica requested consultations with the United States on December 22, 1995, in order to reach a mutually acceptable solution to the dispute under the DSU.³⁷¹ The consultations did not result in a solution and on March 5, 1996, Costa Rica requested the DSB to establish a Panel.³⁷²

b. Panel Report

The Panel for the dispute addressed the following issues: (i) the standard of review the Panel should employ when reviewing the actions of the domestic authority; (ii) the type of inquiry a Member must undertake and what the Member is required to show before imposing a transitional safeguard measure; (iii) the specific evidence before the Panel; and (iv) the effective date of any restraint measure.

i. Standard of Review and Burden of Proof

The United States submitted that the appropriate standard of review for the importing country's determination to impose safeguards was a standard of reasonableness.³⁷³ In particular, the

³⁶⁹ See *id.* The request for consultations and the restraint level was published in the *Federal Register* on April 21, 1995, and was to become effective on June 23, 1995. See Establishment of an Import Limit for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Costa Rica, 60 Fed. Reg. 32,653 (1995) (“[T]he United States Government has decided to control imports in Categories 352/652 for the period beginning on March 27, 1995 and extending through March 26, 1996 at a level of 14,423,178 dozen.”).

³⁷⁰ See Costa Rica Underwear Panel, *supra* note 42, at 4.

³⁷¹ See *id.* at 5.

³⁷² See *id.*

³⁷³ See *id.* at 16.

United States argued that “[t]he standard for Panel evaluation of such determinations should follow established GATT practice, which was based on the GATT 1947 case concerning the withdrawal by the United States under Article XIX of a tariff concession on women’s fur felt hats and hat bodies.”³⁷⁴ In an earlier case, the Working Party reviewing the U.S. action in the Fur Felt Hat case³⁷⁵ found that the U.S. determination was reasonable and that the standard was not conclusive proof of serious injury caused or threatened.³⁷⁶ The Panel decided that “a policy of total deference to the findings of national authorities could not ensure objective assessment as foreseen by Article 11 of the DSU.”³⁷⁷ The Panel went on to state that “[w]e do not, however, see our review as a substitute for the proceedings conducted by national investigating authorities or by the TMB. Rather, in our view, the Panel’s function should be to assess objectively the review conducted by the national investigating authority, in this case the CITA.”³⁷⁸ The Panel noted that many decisions made it clear that it was not the role for Panelists to

³⁷⁴ *Id.*

³⁷⁵ Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade Concerning Women’s Fur Felt Hats and Hat Bodies, CP/106 (Mar. 27, 1951), available in 1951 WL 7547 G.A.T.T. [hereinafter Fur Felt Hat Case].

³⁷⁶ See Costa Rica Underwear Panel, *supra* note 42, at 16 (citing Fur Felt Hat Case, *supra* note 375, para. 30). The report in the Fur Felt Hat Case stated that “the United States is not called upon to prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious; since the question under consideration is whether or not they are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt.” *Id.* (citing Fur Felt Hat Case, *supra* note 375, para. 30).

³⁷⁷ *Id.* at 73. Article 11 of the DSU states:

The function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

DSU, *supra* note 4, art. 11.

³⁷⁸ Costa Rica Underwear Panel, *supra* note 42, at 73.

“engage in *de novo* review.”³⁷⁹

The Panel then examined the issue of which party bore the burden of proof under the ATC. The United States argued that it had established that the restriction was consistent with the rules of the ATC in its March Market statement and that it was under no obligation to re-establish that consistency.³⁸⁰ Costa Rica argued that the United States had the burden of proof and was required to establish to the “Panel’s satisfaction” that the restriction was consistent with the terms of the ATC.³⁸¹

ii. Type of Inquiry Required

To determine what type of inquiry was needed in order to have sufficient information to put a transitional safeguard measure in place, the Panel examined the provisions of Article 6 of the ATC. Article 6.2 of the ATC³⁸² specifically conditions the “applicability of a transitional safeguard on a finding that a product is being imported in such increased quantities so as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products.”³⁸³ Furthermore, Article 6.3 of the ATC contains a list of economic indicators and variables “that can be taken into account in order to

³⁷⁹ *Id.*

³⁸⁰ *See id.* at 74.

³⁸¹ *See id.* The Panel explained:

Consequently, in our view, it is up to the United States to demonstrate that it had fulfilled the requirements contained in Article 6.2 and 6.4 of the ATC in the March Statement which, as the parties to the dispute agreed, constitutes the scope of the matter properly before the Panel.

Id. at 75.

³⁸² Article 6.2 of the ATC reads as follows:

Safeguard action may be taken under this Article when, on the basis of a determination by a Member, it is demonstrated that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must be demonstrably caused by such increased quantities in total imports of that product and not by such other facts as technological changes or changes in consumer preference.

ATC, *supra* note 40, art. 6.2.

³⁸³ Costa Rica Underwear Panel, *supra* note 42, at 76.

assess the serious damage or actual threat thereof.”³⁸⁴ The Panel concluded:

After having satisfied the conditions of Article 6.2 of the ATC, Members must attribute the serious damage or actual threat thereof to a particular Member or Members, since, in accordance with Article 6.4 of the ATC, transitional safeguards “shall be applied on a Member-by-Member basis.”³⁸⁵

For the foregoing reasons, the Panel decided that a determination under Article 6.2 of the ATC is “a necessary but not sufficient condition to have recourse to bilateral consultations under Article 6.7 of the ATC.”³⁸⁶ The Panel concluded that only in situations where “serious damage or actual threat thereof has been demonstrated under Article 6.2 and has been attributed to a particular Member or Members under Article 6.4 of the ATC[] can recourse to Article 6.7 of the ATC be made in a way consistent with the provisions of the ATC.”³⁸⁷

The Panel then examined Costa Rica’s basic contention that the United States had failed to demonstrate, as required under Articles 6.2 and 6.4 of the ATC, that the domestic industry had suffered serious damage from imports from Costa Rica.³⁸⁸ In order

³⁸⁴ *Id.*

³⁸⁵ *Id.* Article 6.4 of the ATC reads as follows:

Any measure invoked pursuant to the provisions of this Article shall be applied on a Member-by-Member basis. The Member or Members to whom serious damage, or actual threat thereof, referred to in paragraphs 2 and 3, is attributed, shall be determined on the basis of sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other sources, market share, and import and domestic prices at a comparable stage of commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. Such safeguard measure shall not be applied to the exports of any Member whose exports of the particular product are already under restraint under this Agreement.

ATC, *supra* note 40, art. 6.4. Footnote 6 accompanying the text of Article 6.4 (imminent increase) states: “Such an imminent increase shall be a measurable one and shall not be determined to exist on the basis of allegation, conjecture or mere possibility arising, for example, from the existence of production capacity in the exporting Members.” *Id.* art. 6.4 n.6.

³⁸⁶ Costa Rica Underwear Panel, *supra* note 42, at 77.

³⁸⁷ *Id.*

³⁸⁸ *See id.*

to decide the issue, the Panel set out to make an objective assessment of the U.S. action in accordance with the standard of review.³⁸⁹ The Panel decided to examine the U.S. determination in respect to: (1) whether the U.S. industry suffered serious damage; (2) the cause of the serious damage (*i.e.*, imports or other factors); and (3) the attribution of serious damage to Costa Rican imports as opposed to imports from other Members.³⁹⁰

The Panel first decided to limit the scope of their inquiry to the March Statement provided by the United States.³⁹¹ In the Panel's opinion, the statements subsequent to the March Statement "should not be viewed as a legally independent basis for establishing serious damage or actual threat thereof."³⁹² In reviewing the March Statement, the Panel determined that it only needed to address the issue of serious damage and not actual threat, stating:

Article 6.2 and 6.4 of the ATC make reference to "serious damage, or actual threat thereof." The word "or" distinguishes between "serious damage" and "actual threat thereof." . . . In our view, "serious damage" refers to a situation that has already occurred, whereas "actual threat of serious damage" refers to a situation existing at present which might lead to serious damage in the future. Consequently, in our view, a finding on "serious damage" requires the party that takes action to demonstrate that damage has already occurred, whereas a finding on "actual threat of serious damage" requires the same party to demonstrate that, unless action is taken, damage will most likely occur in the near future. The March Statement contains no elements of such a prospective analysis. . . . [T]he fact that the March Statement made no reference to actual threat and contained no elements of such a prospective analysis was dispositive *per se*. Consequently, we do not agree with the US argument that the March Statement supports a finding on actual

³⁸⁹ *See id.*

³⁹⁰ *See id.*

³⁹¹ *See id.*

³⁹² *Id.* The March Statement was the legal basis by which the United States took the transitional safeguard action and if the United States was acting in accordance with Articles 6.2 and 6.4 of the ATC, then the March Statement would provide the necessary evidence. *See id.*

threat of serious damage.³⁹³

iii. Evidence Before the Panel

The March Statement provided the Panel with the information the United States used to make a determination of serious damage. The information provided in the March Statement was divided into the following categories: (1) output (U.S. production); (2) market share (market share loss/import penetration); (3) employment; (4) man-hours; (5) sales; (6) profits; (7) investment; (8) utilization of capacity; (9) prices; (10) causality; and (11) attribution of serious damage to Costa Rica.³⁹⁴

In analyzing the March Statement, the Panel found serious problems that led it to question the accuracy of the data provided. For example, the March Statement referred to 395 establishments that manufactured cotton and man-made fiber underwear; however, the July Statement identified only 302.³⁹⁵ In the Panel's view, this raised serious questions about the "accuracy of the information contained in the March Statement and the conclusion that serious damage exists."³⁹⁶

(a) Reimports

The Panel next went through all the categories previously mentioned to determine if the United States had sufficient information to conclude that serious damage had occurred. With regard to output, the Panel found that the data only weakly supported a determination of serious damage.³⁹⁷ The Panel found

³⁹³ *Id.* at 84-85.

³⁹⁴ *See id.* at 79-83.

³⁹⁵ *See id.* at 78.

³⁹⁶ *Id.* The March Statement provided that:

[e]mployment in the U.S. cotton and man-made fibre underwear industry dropped from 46,377 production workers in 1992 to 44,056 workers in 1994, a five percent decline and a loss of 2,321 employees. In the July Statement, the number of production workers in the industry was 35,191 in 1992. The number of production workers declined to 33,309 in 1994, a five percent decline and a loss of 1,882 employees.

See id.

³⁹⁷ *See id.* at 79. The Panel noted that "if those firms with declining underwear production shifted their capacity to other products . . . then it is quite possible that

that in making its determination as to market share, the United States included re-imports³⁹⁸ and that as long as the rest of the conditions of Article 6 were met those re-imports could properly be considered.³⁹⁹

(b) Factors Not Sufficiently Addressed

The Panel determined that the data presented with respect to man-hours, sales, and profits, was not sufficient to draw a conclusion of serious damage.⁴⁰⁰ In addition, the United States did not address the question of investment and the statement was vague as to utilization of capacity and prices.⁴⁰¹

The United States was also required under Article 6.2 of the ATC to demonstrate that such serious damage was caused by imports.⁴⁰² The Panel examined whether the United States had met its burden and determined that:

[b]ecause of the nature of the trade, it is not possible in these circumstances to conclude from the simple fact that there has been a fall in production that there has also been serious damage. The Market Statement undertakes no such discussion. Moreover, the March Statement suggests other possible causes of serious damage, such as rising cotton prices . . . but does not consider their role as a cause of such damage. Thus, it cannot be said that the March Statement “demonstrably” shows that serious damage was caused by increased levels of imports. We find, therefore, that an objective assessment of the March

neither the firms nor their workers would be seriously damaged.” *Id.*

³⁹⁸ Where manufacturers utilize the outward processing regime, assembly of the products are contracted out to overseas manufacturers and then the finished products are re-imported by the U.S. manufactures for sale in the U.S. market.

³⁹⁹ See Costa Rica Underwear Panel, *supra* note 42, at 79.

⁴⁰⁰ See *id.* at 82. The Panel explained:

The weaknesses in the March Statement that are discussed above raise considerable doubts as to whether serious damage has been demonstrated. However, we refrain from making a finding on this point of law. The factors listed in Article 6.3 of the ATC do not provide sufficient and exclusive guidance in this case. We are, therefore, not in a position to conclude that the United States has failed to demonstrate serious damage or actual threat thereof.

Id.

⁴⁰¹ See *id.* at 81-82.

⁴⁰² See *id.* at 82.

Statement leads to the conclusion that the United States failed to comply with its obligations under Article 6.2 of the ATC by imposing a restriction on imports of Costa Rican underwear without adequately demonstrating that increased imports caused serious damage.⁴⁰³

Of note is the analysis by the Panel and its treatment of information that was submitted to the TMB, but that was not before CITA when it reached its decision. The Panel discounted the probity of information that was not before CITA, but that was submitted to the TMB, to support the U.S. action; and the Panel indicated it would not consider CITA as a decision maker for the purpose of its analysis.⁴⁰⁴ Because the later data was different (though trends identified were identical), the Panel viewed the initial data as possessing limited value.⁴⁰⁵ Based on its analysis of the data before CITA at the time of its decision, the Panel then determined that the United States had not complied with its obligations under Articles 6.2 and 6.4 of the ATC.⁴⁰⁶

iv. Backdating of Restraint Measure

The Panel also concluded that the United States acted inconsistently with Article 6.10 of the ATC when it made the effective date of the transitional safeguard measure the date of the request for consultations.⁴⁰⁷ The Panel found nothing in the ATC that provided guidance as to the appropriate date of application of a transitional safeguard measure.⁴⁰⁸ Therefore, the Panel turned to Article X:2 of GATT 1994, which provides that measures of general application shall not be enforced prior to being published.⁴⁰⁹ Because the transitional safeguard measure was made

⁴⁰³ *Id.*

⁴⁰⁴ *See id.* at 83.

⁴⁰⁵ *See id.*

⁴⁰⁶ *See id.* at 89.

⁴⁰⁷ *See id.* at 89-90.

⁴⁰⁸ *See id.* at 87.

⁴⁰⁹ *See id.* Article X:2 of GATT 1994 provides:

No measure of general application taken by any [Member] effecting an advance in a rate duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or

effective on June 23, 1995, but the restriction on imports related back to the original request for consultations on March 27, 1995, the measure was “enforced” prior to its publication. The Panel found that if a Member sets the initial date of the restraint period as the date of the request for consultations, the Member is acting in violation of Article X:2 of GATT 1994.⁴¹⁰ However, in the Panel’s view, it would not have been inconsistent with the ATC or GATT 1994 to have April 21, 1995, be the effective date for the transitional safeguard measure as this was the date of publication of the request for consultations.⁴¹¹

c. Report of the Appellate Body

Costa Rica appealed only the issue of the effective date of application of the U.S. transitional safeguard measure from the Panel ruling to the Appellate Body.⁴¹² The Panel concluded that the United States’ restraint measure could have legal effect between the date of publication of the notice of consultations in the *Federal Register* on April 21, 1995, and the date of the application of the measure, June 23, 1995.⁴¹³ Costa Rica argued that Article XIII:3(b) of GATT generally prohibits the backdating of import quotas.⁴¹⁴ Furthermore, Costa Rica contended that a backdated transitional safeguard measure restricting imports could be allowed only if it was expressly authorized by Article 6 of the ATC; therefore, because Article 6 did not authorize such backdating, the United States could not impose a backdated quota.⁴¹⁵

The Appellate Body disagreed with the Panel in its conclusion

prohibition of imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

GATT 1994, *supra* note 1, art. X:2.

⁴¹⁰ See Costa Rica Underwear Panel, *supra* note 42, at 88.

⁴¹¹ See *id.*

⁴¹² See Costa Rica Underwear Appellate Body, *supra* note 51, at 4.

⁴¹³ See *id.* at 9. “The restriction was introduced on 23 June 1995 for a period of 12 months starting on 27 March 1995.” *Id.* March 27, 1995, was the original date when consultations were requested, but April 21, 1995, was the date the request for consultations was actually published in the *Federal Register*. See *id.*

⁴¹⁴ See *id.* at 4.

⁴¹⁵ See *id.*

that Article 6.10 of the ATC did not substantively address the issue of backdating, stating:

To the contrary, we believe it does and that the answer to this question is to be found within Article 6.10 itself—its text and context—considered in the light of the objective and purpose of Article 6 and the ATC.

Under the express terms of Article 6.10, the importing Member which “propose[s] to take safeguard action,” may, “after the expiry of the period of 60 days” from the date of receipt of the request for consultations without agreement having been reached, “apply the restraint (measure) within 30 days following the 60-day period for consultations” As we understand it, apply when used as here in respect of a governmental measure—whether a statute or an administrative regulation—means, in an ordinary acceptance, putting such measure into operation

Accordingly, we believe that, in the absence of an express authorization in Article 6.10, ATC, to backdate the effectivity [sic] of a safeguard restraint measure, a presumption arises from the very text of Article 6.10 that such a measure may be applied only prospectively.⁴¹⁶

The Panel had examined the different language used in the Multi-Fibre Arrangement (MFA)⁴¹⁷ and in the ATC to determine whether the drafters intended that the practice of “backdating” be allowed under the ATC regime.⁴¹⁸ Article 3(5)(i) of the MFA provided the following:

If however, after a period of sixty days from the date on which the request has been received by the participating exporting country or countries, there has been no agreement either on the request for export restraint or on any alternative solution, the requesting participating country may decline to accept imports for retention from the participating country or countries referred to in paragraph 3 above of the textiles and textile products causing market disruption (as defined in Annex A) at a level *for the twelve-month period beginning on the day when the request*

⁴¹⁶ *Id.* at 10-11 (some punctuation in original text omitted from quote).

⁴¹⁷ Arrangement Regarding International Trade in Textiles, Dec. 20, 1973, 2 U.S.T. 1001, 930 U.N.T.S. 166 [hereinafter MFA].

⁴¹⁸ See Costa Rica Underwear Appellate Body, *supra* note 51, at 9.

was received by the participating exporting country or countries not less than the level provided for in Annex B. Such level may be adjusted upwards to avoid undue hardship to the commercial participants in the trade involved to the extent possible consistent with the purposes of this Article. At the same time the matter shall be brought for immediate attention to the Textile Surveillance Body.⁴¹⁹

The Appellate Body decided that the absence of the above language in the ATC was intended to end the practice of backdating the effective date of a restraint measure.⁴²⁰

The Appellate Body also determined that Article X:2⁴²¹ of GATT 1994 did not speak to the issue of retroactive application of a safeguard restraint measure.⁴²² However, the Appellate Body did explain that prior publication of a measure of general application, as required by Article X:2, did not cure the deficiency because there was no authority provided in Article X:2 to give such a measure retroactive effect.⁴²³

Although the Appellate Body agreed that the safeguard restraint was a measure of general application, it concluded that this did not conflict with the finding that backdating the effective date of a restraint measure was prohibited by Article 6.10 of the ATC. The Appellate Body explained:

The conclusion we have arrived at, in respect of permissibility of backdating, is that the giving of retroactive effect to a safeguard restraint measure is no longer permissible under the regime of Article 6 of the ATC and is in fact prohibited under Article 6.10 of that Agreement. The presumption of prospective effect only, has not been overturned; it is a proposition not simply presumptively correct but one requiring our assent.⁴²⁴

⁴¹⁹ *Id.* at 12 (quoting the MFA) (emphasis added).

⁴²⁰ *See id.* at 12-13.

⁴²¹ GATT 1994, *supra* note 1, art. X:2.

⁴²² *See Costa Rica Underwear Appellate Body, supra* note 51, at 16.

⁴²³ *See id.*

⁴²⁴ *Id.* at 15.

5. *India Wool Shirts and Blouses Case*

a. *Panel Report*

In this dispute, India claimed that the United States violated its obligations under the ATC.⁴²⁵ The United States imposed a transitional safeguard measure on wool shirts and blouses from India on April 18, 1995, and published the request for consultations in the *Federal Register* on May 23, 1995.⁴²⁶ Prior to imposing the measure, the United States and India held consultations regarding the U.S. claim that imports of wool shirts and blouses were causing serious damage to the domestic industry, which did not bring about a successful solution to the dispute.⁴²⁷ The United States took action, as required under Article 6.10 of the ATC. Accordingly, the TMB examined the U.S. action and agreed that the United States had demonstrated an actual threat of serious damage.⁴²⁸

India made the following claims: (1) the U.S. action imposing a transitional safeguard measure effective from April 18, 1995, was inconsistent with the requirements of Articles 2, 6, and 8 of the ATC; (2) the onus of demonstrating serious damage or its actual threat was on the United States as the importing Member, and it had to choose at the beginning whether it would claim the existence of "serious damage" or "actual threat"; and (3) the U.S. action nullified or impaired the benefits accruing to India under

⁴²⁵ See generally *India Wool Shirts and Blouses Panel*, *supra* note 51.

⁴²⁶ See Request for Consultation, 60 Fed. Reg. 27,274 (1995).

⁴²⁷ See *India Wool Shirts and Blouses Panel*, *supra* note 51, at 3. Because no mutual settlement was reached within the sixty-day period, the United States notified India on July 14, 1995 that a restraint would be applied to imports from India (category 440), effective from April 18, 1995 and extending through April 17, 1996. The restraint level was 76,698 dozen for the 12-month period. See *id.*

⁴²⁸ See *id.* India sent a communication to the TMB on October 16, 1995, informing the TMB that they would not be able to conform to its recommendations. India requested that the TMB give a thorough consideration to the reasons it had given and asked that it recommend that the United States rescind the restraint. The TMB at its November 13-17, 1995, meeting reviewed India's request and concluded that its review of the matter was complete. During its review, the TMB found that the actual threat of serious damage had been demonstrated, and that, pursuant to paragraph 4 of Article 6, this actual threat could be attributed to the sharp and substantial increase in imports from India. See *id.*

the WTO Agreement, GATT 1994, and the ATC.⁴²⁹ With regard to its claim that the United States had to choose either serious damage or actual threat as the justification for its actions, India claimed that these two options were not “interchangeable because the data requirement would vary with the chosen situation.”⁴³⁰

The United States countered with the following: (1) the safeguard measure was consistent with Article 6 of the ATC; (2) the measure was not inconsistent with Article 2 or any other provision of the ATC; and (3) the measure did not nullify or impair benefits accruing to India under the ATC or GATT 1994.⁴³¹

India asked for the establishment of a Panel to resolve the issues in dispute. In addressing the underlying substantive issues, the Panel also addressed certain additional issues important to the claims made by India: (1) burden of proof; (2) standard of review; and (3) the role of the TMB.⁴³²

i. Burden of Proof

India claimed that the United States bore the burden of proving that it had met the requirements of Article 6 of the ATC.⁴³³ The United States claimed that, consistent with accepted GATT 1947 dispute settlement, India bore the burden to establish a prima facie case of a violation and, in particular to this case, that the U.S. action was inconsistent with the ATC.⁴³⁴ In addition, the United States argued that it was not required to re-establish that its actions in imposing the transitional safeguard were justified.⁴³⁵

The Panel concluded:

First, we consider the question of which party bears the burden of proof before the Panel. Since India is the party that initiated the dispute settlement proceedings, we consider that it is for India to put forward factual and legal arguments in order to establish that the U.S. restriction was inconsistent with Article 2

⁴²⁹ See *id.* at 4.

⁴³⁰ *Id.*

⁴³¹ See *id.* at 5.

⁴³² See *id.* at 11.

⁴³³ See *id.*

⁴³⁴ See *id.*

⁴³⁵ See *id.*

of the ATC and that the U.S. determination for a safeguard action was inconsistent with provisions of Article 6 of the ATC.

Second, we consider the question of what the importing Member must demonstrate at the time of its determination. Concerning the substantive obligations under Article 6 of the ATC, it is clear from the wording of Article 6.2 and 6.3 of the ATC that, in its determination of the need for the proposed restraint, the United States had the obligation to demonstrate that it had complied with the relevant conditions of application of Article 6.2 and 6.3 of the ATC.⁴³⁶

ii. Standard of Review

Next, the Panel discussed the appropriate standard of review. India argued that the proper standard of review was to determine whether the United States had observed the requirements of Article 6 of the ATC, not whether it had acted reasonably.⁴³⁷ The United States argued that the standard of review should be the same as the standard used in the *Fur Felt Hat*, Working Party Report,⁴³⁸ where the domestic determination was "entitled to the benefit of reasonable doubt."⁴³⁹

The Panel reviewed the relative weight to be given GATT 1947 decisions and stated that "the Appellate Body has made clear in the Japan Liquor report that past GATT Panel reports do not constitute binding 'subsequent practice' referred to in Article 31 of the Vienna Convention on the Law of Treaties."⁴⁴⁰ Therefore, it

⁴³⁶ *Id.* at 64.

⁴³⁷ *See id.* at 12. The Report explained:

India was not requesting the Panel to conduct a *de novo* review of the matter and to replace the United States' determination by its own, but was asking the Panel to objectively assess, in accordance with Article 11 of the DSU, whether the United States had made its determination in accordance with its obligations under Article 6 of the ATC.

Id. India also argued that the reasonableness standard that the United States supported would be similar to the standard set out in Article 17.6 of the Anti-Dumping Agreement (reflecting in India's view the Chevron Standard in U.S. law), and should not be incorporated into the ATC through the acceptance by the Panel of the standard advocated by the United States. *See id.*

⁴³⁸ *Fur Felt Hat Case*, *supra* note 375.

⁴³⁹ *India Wool Shirts and Blouses Panel*, *supra* note 51, at 65.

⁴⁴⁰ *Id.*

was “not bound by past GATT reports, although we may follow their reasoning to the extent relevant.”⁴⁴¹

The Panel rejected both the U.S. and India’s positions. Instead, the Panel decided that with respect to the standard of review, “the function of this Panel established pursuant to Article 8.10 of the ATC and Article 6 of the DSU, is limited to making an objective assessment of the facts surrounding the application of the specific restraint by the United States (and contested by India) and of conformity of such restraint with the relevant WTO agreements.”⁴⁴²

iii. Role of the TMB

India also claimed that the United States had submitted information to the TMB which it had not possessed when it made its determination of serious damage.⁴⁴³ At issue was what type of information the TMB could consider, and, based on its consideration of information, its ability to uphold a safeguard action taken by a Member. The Panel reviewed Articles 8.2,⁴⁴⁴ 8.3,⁴⁴⁵ and 8.10⁴⁴⁶ of the ATC and Articles 4 and 7 of the DSU.

⁴⁴¹ *Id.*

⁴⁴² *Id.* at 66.

⁴⁴³ *See id.* at 47.

⁴⁴⁴ Article 8.2 of the ATC provides: “The TMB shall develop its own working procedures. It is understood, however, that consensus within the TMB does not require the assent or concurrence of members appointed by Members involved in an unresolved issue under review by the TMB.” ATC, *supra* note 40, art. 8.2.

⁴⁴⁵ Article 8.3 of the ATC states:

The TMB shall be considered as a standing body and shall meet as necessary to carry out the functions required of it under this Agreement. It shall rely on notifications and information supplied by the Members under the relevant Articles of this Agreement, supplemented by any additional information or necessary details they may submit or it may decide to seek from them. It may also rely on notifications to and reports from the WTO bodies and from such other sources as it may deem appropriate.

ATC, *supra* note 40, art. 8.3.

⁴⁴⁶ Article 8.10 provides:

If a Member considers itself unable to conform with the recommendations of the TMB, it shall provide the TMB with the reasons therefor not later than one month after receipt of such recommendations. Following thorough consideration of the reasons given, the TMB shall issue any further

Upon their review of the articles, the Panel decided that when differences arise, the ATC requires parties to first seek consultations before taking action.⁴⁴⁷ If the consultations do not result in a mutually agreeable solution, then the matter should be brought before the TMB, which will embark on a "genuine fact finding and evidence building exercise."⁴⁴⁸ In contrast, the terms of the DSU do not require it to reinvestigate the market situation. In particular, the Panel noted:

When assessing the WTO compatibility of the decision to impose national trade remedies, DSU Panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure. *In addition, such DSU Panels, contrary to the TMB, do not consider developments subsequent to the initial determination.* In respect of the U.S. determination at issue in the present case, we consider, therefore, that this Panel is requested to make an objective assessment as to whether the United States respected the requirements of Article 6.2 and 6.3 of the ATC at the time of the determination.⁴⁴⁹

The Panel then turned to the U.S. determination to impose the safeguard action. The Panel referred to the Reformulated Gasoline⁴⁵⁰ and Japan Liquor⁴⁵¹ decisions and how the Appellate Body had stressed that the fundamental rule of treaty interpretation contained in Article 31 of the Vienna Convention should be kept in mind when interpreting provisions of the WTO Agreement.⁴⁵²

recommendations it considers appropriate forthwith. If, after such further recommendations, the matter remains unresolved, either Member may bring the matter before the Dispute Settlement Body and invoke paragraph 2 of Article XXIII of GATT 1994 and the relevant provisions of the Dispute Settlement Understanding.

ATC, *supra* note 40, art. 8.10.

⁴⁴⁷ See India Wool Shirts and Blouses Panel, *supra* note 51, at 67.

⁴⁴⁸ *Id.* at 68.

⁴⁴⁹ *Id.* (emphasis added).

⁴⁵⁰ Reformulated Gasoline Panel, *supra* note 51; Reformulated Gasoline Appellate Body, *supra* note 51; see *supra* notes 155-231 and accompanying text.

⁴⁵¹ Japan Liquor Panel, *supra* note 51; Japan Liquor Appellate Body, *supra* note 51; see *supra* notes 232-84 and accompanying text.

⁴⁵² See India Wool Shirts and Blouses Panel, *supra* note 51, at 68.

Accordingly, the Panel “endeavor[ed] to give effect to them in their natural and ordinary meaning and in the context in which they occur.”⁴⁵³

The Panel determined that Article 6.2 of the ATC requires “that serious damage or actual threat thereof to the domestic industry must *not* have been caused by such other factors as technological changes or changes in consumer preferences.”⁴⁵⁴ Therefore, an importing Member must at least answer the question of whether the serious damage or actual threat thereof was caused by changes in consumer preferences or technological changes; the United States made no mention of these issues in its market statement.⁴⁵⁵

The Panel also found that on its face, the U.S. determination did not respect the parameters laid down in Article 6 of the ATC.⁴⁵⁶ In particular, the determination did not address certain factors required by Article 6 in making a determination to impose the transitional safeguard measure.⁴⁵⁷ The Panel concluded that in making its determination, an importing Member must fully comply with Article 6’s requirements that: (1) all the economic factors listed in Article 6.3 of the ATC are “considered”, (2) it demonstrate that the increase in imports is the cause of the serious damage or actual threat thereof, and (3) the state of that industry is not caused by such other factors as technological changes or changes in consumer preferences.⁴⁵⁸

The Panel also examined the need to consult, and the obligation to obtain, TMB endorsement of any safeguard before imposing a restraint. Although finding that Members should refer matters to the TMB for recommendations, the Panel did not find that there was a requirement to do so before imposing a restraint.⁴⁵⁹

⁴⁵³ *Id.* (citing, Japan Liquor, *supra* note 34 and the text of Article 6.2 of GATT 1994).

⁴⁵⁴ *Id.* at 70 (emphasis in original).

⁴⁵⁵ *See id.*

⁴⁵⁶ *See id.* at 76.

⁴⁵⁷ *See id.*

⁴⁵⁸ *See id.*

⁴⁵⁹ *See id.*

Indeed, it concluded that the language of Article 8.9 of the ATC⁴⁶⁰ made it clear that the recommendations of the TMB were not binding upon Members.⁴⁶¹ Finally, the Panel decided that because it had found the U.S. action inconsistent with the requirements of both Articles 6.2 and 6.3 of the ATC, it was unnecessary to consider the date of the imposition of the measure.⁴⁶²

b. Report of the Appellate Body

India appealed certain findings and conclusions of the Panel to the Appellate Body. India appealed essentially three issues: (1) which party has the burden of demonstrating that there has been an infringement of the obligations assumed under the ATC, (2) the limitation on the TMB of using only evidence the importing Member used in making its determination, and (3) whether under Article 11 of the DSU the Complaining party is entitled to a finding on all of the legal claims it makes to a Panel.

i. Burden of Proof

The Appellate Body agreed with the Panel that the burden of proof was on India to present evidence "sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with Article 6 of the ATC."⁴⁶³ The Appellate Body stated:

Consequently, a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the ATC. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having

⁴⁶⁰ ATC Article 8.9 states: "The Members shall endeavor to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations." ATC, *supra* note 40, art. 8.9.

⁴⁶¹ India Wool Shirts and Blouses Panel, *supra* note 51, at 78.

⁴⁶² See *supra* Costa Rica Underwear Appellate Body, *supra* note 51; notes 412-424 and accompanying text (discussing similar issue).

⁴⁶³ India Wool Shirts and Blouses Appellate Body, *supra* note 51, at 13.

done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim.⁴⁶⁴

ii. Evidence Considered by the TMB

India claimed that the Panel's finding as to what evidence the TMB could examine to determine whether a transitional safeguard measure was applied in accordance with Article 6.10 of the ATC was erroneous. In particular, India disagreed with the Panel's statement that the TMB "is not limited to the initial information submitted by the importing Member as parties may submit other additional information."⁴⁶⁵ India was concerned that this finding would permit the TMB to examine information that was not available at the time when the safeguard determination was made.⁴⁶⁶ The Appellate Body interpreted the Panel's comments on the TMB to be "purely a descriptive and gratuitous comment providing background concerning the Panel's understanding of how the TMB functions."⁴⁶⁷ Therefore, this statement was not a legal finding or conclusion; the Appellate Body had no authority to uphold, modify or reverse the Panel on this point.⁴⁶⁸

iii. Right of Parties to Have All Claims Decided

India claimed that it had a right under the DSU to have all of its claims considered by the Panel. The Appellate Body examined Article 11 of the DSU and determined that nothing in it required a Panel to examine all the legal claims made by the Complaining party.⁴⁶⁹ In reviewing past GATT 1947 and WTO Panel decisions, the Appellate Body observed that "frequently [Panels] addressed only those issues that such Panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues."⁴⁷⁰ Therefore, the Appellate Body concluded

⁴⁶⁴ *Id.* at 16.

⁴⁶⁵ *Id.* at 4.

⁴⁶⁶ *See id.* at 5.

⁴⁶⁷ *Id.* at 17.

⁴⁶⁸ *See id.*

⁴⁶⁹ *See id.* at 18.

⁴⁷⁰ *Id.* The Appellate Body cited a number of cases as examples of this statement.

that Panels must consider only those legal claims necessary to achieve a mutually satisfactory settlement of the matter; there was no requirement for Panels to consider all the legal claims put forward by the parties.⁴⁷¹

6. *Canada Split-Run Periodicals Case*

a. *Panel Report*

The basic issues in this dispute between the United States and Canada arose after Canada imposed a prohibition on imports of "split-run" periodicals.⁴⁷² The import prohibition was effectuated by Tariff Code 9958,⁴⁷³ which prohibits the importation of

See generally EEC-Quantitative Restrictions Against Imports of Certain Products from Hong Kong, July 12, 1993, GATT B.I.S.D. (30th Supp.) at 129 (1993); Canada-Administration of the Foreign Investment Review Act, Feb. 7, 1984, GATT B.I.S.D. (30th Supp.) at 140 (1984); United States-Imports of Sugar from Nicaragua, Mar. 13, 1984, GATT B.I.S.D. (31st Supp.) at 67 (1984); United States-Manufacturing Clause, May 15-16, 1984, GATT B.I.S.D. (31st Supp.) at 74 (1984); Japan-Measures on Imports of Leather, May 15-16, 1984, GATT B.I.S.D. (31st Supp.) at 94 (1984); Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 37 (1988); Japan-Trade in Semiconductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116 (1988); Japan-Restrictions on Imports of Certain Agricultural Products, Mar. 22, 1988, GATT B.I.S.D. (35th Supp.) at 163 (1988); EEC-Regulations on Imports of Parts and Components, May 16, 1990, GATT B.I.S.D. (37th Supp.) at 132 (1990); United States-Denial of Most Favored Nation Treatment as to Non-Rubber Footwear from Brazil, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 128 (1992).

⁴⁷¹ *See* Canada Split-Run Panel, *supra* note 51, at 18.

⁴⁷² *See id.* at 2, 62. Split-run periodicals have the same or similar editorial content as those published in foreign countries, but contain advertisements directed to the Canadian market. *See id.* *See infra* note 475 for statutory definition of the term under Canadian law.

⁴⁷³ *See id.* at 63. Tariff Code 9958 provides:

1. Issues of a periodical, one of the four immediately preceding issues of which has, under regulations that the Governor in Council may make, been found to be an issue of special edition, including a split-run or a regional edition, that contained an advertisement that was primarily directed to a market in Canada, and that did not appear in identical form in all editions of that issue of that periodical that were distributed in the country of origin;

2. Issues of a periodical, one of the four immediately preceding issues of which has, under regulations that the Governor in Council may make, been found to be an issue of more than five per cent of the advertising space in which consisted of space used for advertisements that indicated specific sources of availability in Canada, or specific terms of conditions relating to the sale or

periodicals where more than five percent of the advertising content is directed to the Canadian market, regardless of whether an edition with similar editorial content is sold outside Canada.⁴⁷⁴ In addition, Canada imposed an excise tax of eighty percent on the value of advertisements in “split-run” periodicals distributed in Canada on a per issue basis through Part V.1 of the Excise Tax Act.⁴⁷⁵ Finally, the Canadian Post Corporation applied reduced or “funded” postal rates, funded by the Department of Canadian Heritage, to certain periodicals published in Canada; however, certain Canadian periodicals not eligible for the “funded” rates still received postal rates lower than those available to imported periodicals, which had to pay the “international rates.”⁴⁷⁶

The United States claimed that: (1) the Tariff Code 9958 was inconsistent with Article XI:1 of GATT 1994;⁴⁷⁷ (2) Part V.1 of the

provision in Canada, of any goods or services except where the indication of such sources of availability or such terms or conditions was primarily directed at persons outside Canada.

Id. (citing Tariff Code 9958, R.S.C., ch. 41 (1985) (Can.), as amended by sched. VII, § 114 (1996)).

⁴⁷⁴ *See id.* at 2-3, 62-63.

⁴⁷⁵ *See id.* at 3. On December 15, 1995, the bill (C-103), 42-43-44 Elizabeth II, chapter 46, December 15, 1995, adding Part V.1 of the Excise Tax became law. Section 36(1) imposes in respect of each split-run edition of a periodical a tax equal to 80% of the value of all the advertisements in the edition. *See* Act to Amend the Excise Tax Act and the Income Tax Act, ch. 46, S.C. (1995) (Can.). Section 35(1) defines a split-run addition of a periodical as one:

- (i) that is distributed in Canada;
- (ii) in which more than 20 percent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals; and
- (iii) that contains an advertisement that does not appear in identical form in all those excluded editions.

Id.

⁴⁷⁶ *See* Canada Split-Run Panel, *supra* note 51, at 5-8.

⁴⁷⁷ *See id.* at 8. Article XI:1 of GATT 1994 provides:

General Elimination of Quantitative Restrictions 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT 1994, *supra* note 1, art. XI:1.

Excise Tax Act was inconsistent with Article III:2 of GATT 1994,⁴⁷⁸ or in the alternative, was inconsistent with Article III:4 of GATT 1994;⁴⁷⁹ (3) the application by Canada Post of lower postal rates to domestically produced periodicals than to imported periodicals was inconsistent with Article III:4 of GATT 1994; and (4) the funded rate scheme was not a domestic subsidy within the meaning of Article III:8.⁴⁸⁰

Canada denied each claim made by the United States and insisted its Tariff Code 9958, the Excise Tax, and the postal scheme did not violate any of its obligations under the WTO Agreements. Canada claimed that its laws concerning split-run periodicals were intended to maintain Canadian culture and preserve its related industries.⁴⁸¹ Canada argued that because split-run magazines had their editorial costs largely paid for in their original market, they could charge a lower rate for advertising than Canadian magazines.⁴⁸² Therefore, the split-run magazines competed unfairly for advertising revenues in Canada and this would ultimately lead “to a reduction of material dealing with the Canadian scene and in turn to a Canadian public that is less well-

⁴⁷⁸ See Canada Split-Run Panel, *supra* note 51, at 15. For the text of Article III:2 of GATT 1994, see *supra* note 237.

⁴⁷⁹ See Canada Split-Run Panel, *supra* note 51, at 45. Article III:4 of 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.

GATT 1994, *supra* note 1, art. III:4.

⁴⁸⁰ See Canada Split-Run Panel, *supra* note 51, at 54. Article III:8(b) of GATT 1994 states: “The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.” GATT 1994, *supra* note 1, art. III:8(b).

⁴⁸¹ See generally Canada Split-Run Panel, *supra* note 51, at 9, 43.

⁴⁸² See *id.* at 41-43.

informed on Canadian affairs.”⁴⁸³

i. Tariff Code Claim

The Panel first examined Tariff Code 9958 to see whether it was consistent with Article XI:1 of GATT 1994. The Panel analyzed the language of Tariff Code 9958 and determined that “the importation of certain foreign products into Canada is completely denied under Tariff Code 9958[;] it appears that this provision by its terms is inconsistent with Article XI:1.”⁴⁸⁴ It next examined the language of Article XI:1, which provides: “[N]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member]”⁴⁸⁵

Canada claimed that even if the measure violated Article XI:1, it could be justified under the exceptions provided in Article XX(d) of GATT 1994.⁴⁸⁶ The Panel cited the relevant portion of Article XX:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures: . . . necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents,

⁴⁸³ *Id.* at 43. The Panel observed:

These are not only legitimate legislative concerns; they are far removed from the idea of protecting domestic production which is referred to in Article III. Ultimately, of course, the concern behind this legislation is with the preservation of Canadian culture in the face of an extraordinary challenge from across the border.

Id.

⁴⁸⁴ *Id.* at 63.

⁴⁸⁵ *Id.*

⁴⁸⁶ *See id.* at 64.

trademarks and copyrights, and the prevention of deceptive practices⁴⁸⁷

The Panel then reviewed the approach taken by the Panel in the Reformulated Gas decision,⁴⁸⁸ and stated a party invoking an exception under Article XX must demonstrate that: (1) the particular trade measures that are inconsistent with GATT secure compliance with laws or regulations that by themselves are not inconsistent with the GATT, (2) the measures for which the exception was being invoked were necessary to secure compliance with those specific laws or regulations, and (3) "the measures were applied in conformity with the requirements of the introductory clause of Article XX."⁴⁸⁹ The Panel decided to follow the same approach taken by the Panel in Reformulated Gas and require that "all the above elements had to be satisfied" in order to justify the claimed exception of Article XI:1 obligations contained in XX(d).⁴⁹⁰

In reviewing the functions of Tariff Code 9958, the Panel also had to determine whether 9958 was a measure designed to secure compliance with Section 19 of the Income Tax Act.⁴⁹¹ The Panel found that Tariff Code 9958 did not secure compliance with Section 19 of the Income Tax Act because it "cannot be regarded as an enforcement measure for Section 19 of the Income Tax Act."⁴⁹² The Panel explained this finding as follows:

It is true that if a government bans imports of foreign periodicals with advertisements directed at the domestic market, as does Canada in the present case, the possibility of non-

⁴⁸⁷ *Id.* (citing GATT 1994, *supra* note 1, art. XX(d)).

⁴⁸⁸ *See* Reformulated Gasoline Panel, *supra* note 51; *see also supra* notes 155-231 and accompanying text.

⁴⁸⁹ Canada Split-Run Panel, *supra* note 51, at 64 (quoting Reformulated Gasoline Panel, *supra* note 51, at 38). The requirements of the introductory paragraph or chapeau of Article XX are "that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." Reformulated Gasoline Panel, *supra* note 51, at 38 (quoting GATT 1994, *supra* note 1, art. XX).

⁴⁹⁰ *See* Canada Split-Run Panel, *supra* note 51, at 64.

⁴⁹¹ *See id.* at 64-65.

⁴⁹² *Id.* at 65.

compliance with a tax provision granting tax deductions for expenses incurred for advertisements in domestic periodicals will be greatly reduced. It would seem almost impossible for an enterprise to place an advertisement in a foreign periodical because there would be virtually no foreign periodical available in which to place it. Thus, there would be no way for the enterprise legally to claim a tax deduction therefor. However, that is an incidental effect of a separate measure distinct (even though it may share the same policy objective) from the tax provision which is designed to give an incentive for placing advertisements in Canadian, as opposed to foreign, periodicals. We thus find that Tariff Code 9958 does not “secure compliance” with Section 19 of the Income Tax Act.⁴⁹³

Because the Panel did not agree that Tariff Code 9958 secured compliance with Section 19 of the Income Tax, the Panel did not need to review the other criteria for justification under Article XX(d) of GATT 1994.⁴⁹⁴

ii. Excise Tax Claim

The next issue addressed concerned Part V.1 of Canada’s Excise Tax. The Panel framed the issue as whether the eighty percent excise tax on advertisements in split-run periodicals was compatible with Canada’s obligations under Article III of GATT 1994.⁴⁹⁵ Canada first challenged the applicability of GATT 1994 to this part of the Excise Tax on the theory that the measure pertains to an advertising service that is within the purview of the General Agreement on Trade in Services (GATS).⁴⁹⁶ Canada’s argument, as paraphrased by the Panel, was:

[S]ince Canada has made no specific commitments for advertising services under GATS, the United States should not be allowed to “obtain benefits under a covered agreement that have been expressly precluded under another covered agreement.” Put another way, Canada seems to argue that if a

⁴⁹³ *Id.*

⁴⁹⁴ *See id.*

⁴⁹⁵ *See id.*

⁴⁹⁶ *See id.*; General Agreement on Trade in Services, WTO Agreement, *supra* note 1, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS; 33 I.L.M. 44 (1994) [hereinafter GATS].

Member has not undertaken market-access commitments in a specific service sector, that non-commitment should preclude all the obligations or commitments undertaken in the goods sector to the extent there is an overlap between the non-commitment in services and the obligations or commitments in the goods sector.⁴⁹⁷

The Panel was not convinced by Canada's characterization of the Excise Tax as "a measure intended to regulate trade in advertising services."⁴⁹⁸ In considering Canada's argument, the Panel examined the structure of the WTO Agreement, including its annexes, and stated:

Article II:2 of the WTO Agreement is the relevant provision, which reads as follows:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members—

. . . as the Appellate Body has repeatedly pointed out, "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretive Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two.⁴⁹⁹

Accordingly, the Panel concluded that Article III of GATT 1994

⁴⁹⁷ Canada Split-Run Panel, *supra* note 51, at 66.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

was applicable to Part V.1 of the Excise Tax.⁵⁰⁰

iii. Article III Claim

Having determined that Article III was applicable, the Panel then had to consider whether the Excise Tax was inconsistent with Article III:2.⁵⁰¹ Article III:2 requires that imports “shall not be subject, directly or indirectly, to internal taxes, or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products.”⁵⁰² The Panel addressed two questions in ascertaining whether there was a violation of Article III:2: (1) whether imported split-run periodicals and domestic non-split-run periodicals are like products, and (2) whether imported split-run periodicals are subject to an internal tax in excess of that applied to domestic non-split-run periodicals.⁵⁰³ An affirmative answer to both of these questions would mean that it was a violation of Article III:2’s first sentence.⁵⁰⁴ However, if the answer to the first question was negative, then further examination would be required to determine if a violation under Article III:2’s second sentence was present.⁵⁰⁵

(a) Like Product Analysis

The Panel first had to determine if imported split-run periodicals and domestic non-split-run periodicals were “like products.”⁵⁰⁶ The United States argued that the Canadian excise tax created an artificial distinction between “otherwise entirely like products—split run and non-split run magazine editions.”⁵⁰⁷ The United States pointed out that a similar edition of a magazine sold in another country did not alter the fact that magazines have similar “physical characteristics, end-uses, content, advertising, or

⁵⁰⁰ *See id.* at 67.

⁵⁰¹ *See id.*

⁵⁰² *Id.* (quoting GATT 1994, *supra* note 1, art. III:2).

⁵⁰³ *See id.* at 68.

⁵⁰⁴ *See id.*

⁵⁰⁵ *See id.*

⁵⁰⁶ *See id.* at 69.

⁵⁰⁷ *Id.* at 23.

any other attribute.”⁵⁰⁸ These traditional factors for determining like product, according to the United States, were satisfied with respect to imported split-run and non-split-run domestic magazines.⁵⁰⁹

Canada argued that imported split-run periodicals basically reproduced foreign editorial content and combined it with advertising directed at the Canadian public.⁵¹⁰ Canadian periodicals, on the other hand, had editorial content developed for the Canadian market; therefore, Canada argued, imported split-run periodicals and domestic non-split-run periodicals were “distinguishable on the basis of their content, the essential characteristic of any magazine” and were not “like products” within the meaning of Article III:2.⁵¹¹

The Panel examined the magazine *Harrowsmith Country Life* and compared the Canadian edition with a hypothetical U.S. edition of the publication.⁵¹² The Panel concluded that the magazines would have “common end-uses, very similar physical properties, nature and qualities.”⁵¹³ In addition, the magazines would most likely have “the same readership with the same tastes and habits.”⁵¹⁴ However, one magazine, the imported split-run periodical, would be subject to the excise tax while the domestic non-split-run magazine would not.⁵¹⁵ Therefore, based on the traditional factors used to determine “like products” the Panel determined that imported split-run periodicals and domestic non-split-run periodicals were like products.⁵¹⁶

Next, the Panel had to determine if imports were subject to an internal tax in excess of that applied to domestic non-split-run

⁵⁰⁸ *Id.*

⁵⁰⁹ *See id.*

⁵¹⁰ *See id.*

⁵¹¹ *Id.* at 23-24.

⁵¹² *See id.* at 69.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *See id.*

⁵¹⁶ *See id.*

periodicals.⁵¹⁷ Canada argued that the excise tax did not apply “indirectly,” under the definition in Article III:2, to periodicals but rather was levied on the value of advertisements in the periodical.⁵¹⁸ The Panel did not accept this argument because the tax was applied to “each split-run edition of a periodical on a per-issue basis.”⁵¹⁹ The Panel stated:

We note that the excise tax is not “directly” applied to periodicals in that it is levied on the value of advertisements, not on the value of periodicals per se. However, it is clear that the tax is applied in respect of each split-run edition of a periodical on a “per issue” basis. Therefore, the tax is applied “indirectly” to periodicals within the ordinary meaning of the terms of Article III:2. Canada’s narrow reading of the term “indirectly” is supported only by Canada’s own interpretation of the drafting history, which is contested by the United States. . . . Furthermore, the Panel report cited by Canada in support of its argument referred to taxation on raw materials by way of example. It did not conclude that the scope of the term “indirectly” is limited to taxation on inputs. We thus conclude that imported “split-run” periodicals are subject to an internal tax in excess of that applied to domestic non “split-run” periodicals.⁵²⁰

It determined that Part V.1 of the Excise Tax violated Article III:2’s first sentence.⁵²¹ It did not need to examine whether the tax was inconsistent with Article III:2’s second sentence or if it violated Article III:4.⁵²²

iv. Postal Rate Claim

The last issue examined by the Panel was whether the postal rate scheme employed by Canada violated its obligations under Article III.⁵²³ The Panel found that there were actually two

⁵¹⁷ *See id.*

⁵¹⁸ *See id.* at 69-70.

⁵¹⁹ *Id.* at 70.

⁵²⁰ *Id.*

⁵²¹ *See id.*

⁵²² *See id.*

⁵²³ *See id.*

separate issues involved in the postal rate scheme: (1) whether the fact that Canada Post applies the "commercial Canadian" rates or the "funded" rates to Canadian periodicals, which are lower than the "international" rates applied to imported periodicals, constitutes a violation of Article III:4; and (2) whether the funded rate scheme for certain periodicals is allowed as a subsidy within the meaning of Article III:8(b).⁵²⁴

(a) Lower Rate Issue

As to the application of lower rates to Canadian periodicals than to imported periodicals, the Panel first looked at the text of Article III:4, which provides:

The products of the territory of any [Member] imported into the territory of any other [Member] 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.⁵²⁵

Having previously determined that the products involved were "like" products, the Panel considered whether the postal rates could be viewed as governmental regulations or requirements for the purposes of Article III:4.⁵²⁶ Although Canada argued that Canada Post had a "legal personality distinct" from the Canadian government, the Panel found that Canada Post generally operated under governmental instructions and that the Canadian government controlled Canada Post's pricing and other policies.⁵²⁷

In support of its conclusion, the Panel cited the GATT 1947 Panel decision in *Japan Trade in Semiconductors*.⁵²⁸ In that case,

⁵²⁴ *See id.*

⁵²⁵ *Id.* (quoting GATT 1994, *supra* note 1, art. III:4).

⁵²⁶ *See id.* at 71.

⁵²⁷ *See id.* In addition, Canada admitted that it could instruct Canada Post to change its pricing policy. *See id.*

⁵²⁸ Panel Report on *Japan-Trade in Semiconductors*, May 4, 1988, GATT B.I.S.D.

the GATT Panel found that “the operation of measures . . . was essentially dependent on Government action or intervention.”⁵²⁹ The Canada Split-Run Panel explained that “in view of the control exercised by the Canadian Government on ‘non-commercial’ activities of Canada Post, we can reasonably assume that sufficient incentives exist for Canada Post to maintain the existing pricing policy on periodicals.”⁵³⁰ The Panel also considered that “Canada Post’s operation is generally dependent on Government action,” which led it to “the conclusion that Canada Post’s pricing policy on periodicals can be regarded as governmental regulations or requirements within the meaning of Article III:4 of GATT 1994.”⁵³¹

The Panel then considered the provisions of Article III:1, “which articulates the general principle that internal measures should not be applied so as to afford protection to domestic production.”⁵³² The Panel held that the “funded” rate scheme “strongly suggests that the scheme is operated so as to afford protection to domestic production”⁵³³ because the commercial Canadian rates were lower than the international rates applied to imported products.⁵³⁴ The Panel concluded that the application of the “commercial Canadian” and “funded” rates to Canadian periodicals and the higher “international” rates applied to imports were inconsistent with Article III:4 of GATT 1994.⁵³⁵

The second inquiry the Panel undertook was whether the “funded” rate scheme found to violate Article III:4 could nevertheless be justified under Article III:8(b) of GATT 1994, which states:

(35th Supp.) at 116 (1988).

⁵²⁹ Canada Split-Run Panel, *supra* note 51, at 71.

⁵³⁰ *Id.* at 72.

⁵³¹ *Id.*

⁵³² *Id.* (citing Japan Liquor Appellate Body, *supra* note 51, at 18 for the proposition that the purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of words actually used in the texts of those other paragraphs).

⁵³³ *Id.*

⁵³⁴ *See id.*

⁵³⁵ *See id.*

The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.⁵³⁶

The Panel determined that Canada Post did not retain any economic benefits from the “funded” rate scheme it applied to certain Canadian periodicals.⁵³⁷ The Panel further noted that the payment of the subsidy was made “exclusively” to qualifying Canadian publishers.⁵³⁸ Therefore, the Panel found that Canada’s “funded” rate scheme satisfied the terms of Article III:8(b) and that the rate discrimination between domestic and foreign periodicals did not run afoul of Article III.⁵³⁹

Although the Panel found that some of the Canadian measures were inconsistent with Canada’s obligations under the WTO, it did not lose sight of the fact that maintaining Canadian culture was an important public policy goal of the Canadian government.⁵⁴⁰ In anticipation of possible criticism that the decision might cast doubt on the ability of countries to take action to protect cultural identity, the Panel report noted that this decision did not pass judgment upon the “ability of any Member to take measures to protect its cultural identity . . . [It] was not at issue in the present case.”⁵⁴¹

b. Report of the Appellate Body

Both the United States and Canada appealed certain aspects of the Panel’s decision. Although the United States agreed with the findings and conclusions of the Panel concerning the Tariff Code and Part V.1 of the Excise Tax Act, it took issue with the Panel’s conclusion that Canada’s “funded” postal rate scheme was justified by Article III:8(b) of GATT 1994.⁵⁴²

⁵³⁶ GATT 1994, *supra* note 1, art. III:8(b).

⁵³⁷ See Canada Split-Run Panel, *supra* note 51, at 73.

⁵³⁸ See *id.*

⁵³⁹ See *id.*

⁵⁴⁰ See *id.*

⁵⁴¹ *Id.*

⁵⁴² See Canada Split-Run Appellate Body, *supra* note 51, at 9.

Canada appealed the Panel's finding that Part V.1 of the Excise Tax Act was a measure regulating trade in goods subject to GATT 1994.⁵⁴³ Moreover, Canada submitted that even if GATT 1994 applied, the finding by the Panel that Part V.1 was inconsistent with Article III:2 was erroneous.⁵⁴⁴ Canada argued that the Panel erred when it found that imported split-run periodicals and non-split-run periodicals were like products.⁵⁴⁵ Canada also disagreed with the Panel's finding that it had failed to apply the principle of non-discrimination embodied in Article III:2.⁵⁴⁶ Canada agreed with the Panel's conclusion that the "funded" postal rate scheme was a permissible subsidy according to Article III:8(b) of GATT 1994.⁵⁴⁷ The Panel's finding with regard to the Tariff Code was not appealed.

With respect to the first issue, whether Part V.1 of the Excise Tax Act applied in the case of split-run periodicals, Canada argued that it was a measure regulating trade in services and, as such, was subject to GATS.⁵⁴⁸ The issue of whether there can be potential overlaps between GATT 1994 and GATS was not addressed by the Appellate Body because the parties agreed it was not relevant to the appeal.⁵⁴⁹

The Appellate Body found that Part V.1 of the Excise Tax Act was a measure that "clearly applies to goods—it is an excise tax on split-run editions of periodicals."⁵⁵⁰ After an examination of the measure, the Appellate Body focused on the purpose of Article III. The Appellate Body articulated well established principles that: (1) "the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found inconsistent with Article III"⁵⁵¹ and (2) the fundamental purpose of Article III of GATT 1994 is to ensure

⁵⁴³ See *id.* at 3.

⁵⁴⁴ See *id.* at 5.

⁵⁴⁵ See *id.*

⁵⁴⁶ See *id.* at 6.

⁵⁴⁷ See *id.* at 7.

⁵⁴⁸ See *id.* at 16. See also GATS, *supra* note 496.

⁵⁴⁹ See Canada Split-Run Appellate Body, *supra* note 51, at 19.

⁵⁵⁰ *Id.* at 20.

⁵⁵¹ *Id.* at 18 (citing Japan Liquor Appellate Body, *supra* note 51, at 16).

equality of competitive conditions between imported and like domestic products.⁵⁵² The Appellate Body revisited its analysis in the Japan Liquor decision and stated that it was not “necessary to look to Article III:1 or Article III:4 of the GATT 1994 to give meaning to Article III:2, first sentence, in this respect.”⁵⁵³

The Appellate Body agreed with the Panel’s determination on the violation of Article III:2 regarding the treatment Members are to accord “like products.”⁵⁵⁴ The Appellate Body stated that:

the Panel found (and Canada did not contest on appeal) [Canada’s Import Tariff Code 9958] to be inconsistent with the provisions of Article XI of GATT 1994, hypothetical imports of split-run periodicals have to be considered. As the Panel recognized, the proper test is that a determination of “like products” for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

- (i) the product’s end-uses in a given market;
- (ii) consumers’ tastes and habits; and
- (iii) the product’s properties, nature and quality.⁵⁵⁵

The Appellate Body found that the Panel had not adequately analyzed the criteria in relation to imported split-run periodicals and domestic non-split-run periodicals.⁵⁵⁶ For this reason, it had to determine whether there had been a violation of Article III:2’s second sentence.⁵⁵⁷ The Appellate Body explained that the problem with the Panel’s analysis was that it compared two editions of the same magazine (both imported) “which could not

⁵⁵² *See id.*

⁵⁵³ *Id.* The Appellate Body explained that in its Japan-Alcoholic Beverages decision it had stated that “Article III:1 articulates a general principle” which “informs the rest of Article III.” *Id.* However, that decision “also said that it informs the different sentences in Article III:2 in different ways With respect to Article III:2, second sentence, we held that ‘Article III:1 informs Article III:2, second sentence, through specific reference.’” *Id.*

⁵⁵⁴ *See id.* at 20.

⁵⁵⁵ *Id.* at 20-21 (citing Canada Split-Run Panel, *supra* note 51, para. 5.23, and Japan Liquor Appellate Body, *supra* note 51, at 20).

⁵⁵⁶ *See id.* at 20.

⁵⁵⁷ *See id.*

have been in the Canadian market at the same time.”⁵⁵⁸ Therefore, in the opinion of the Appellate Body, the Panel’s analysis was flawed and the lack of proper legal reasoning forced it to overturn the Panel’s conclusion.⁵⁵⁹ The Appellate Body found that the Panel could not have logically concluded that imported split-run periodicals and domestic non-split-run periodicals were like products and reversed the legal findings and conclusions of the Panel on this issue.⁵⁶⁰

The Appellate Body examined the consistency of the measure (Part V.1 of the Excise Tax Act) with the requirement in the second sentence of Article III:2, which required that “no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.”⁵⁶¹ Canada argued that the Appellate Body did not have jurisdiction to examine a claim under Article III:2’s second sentence because no party appealed the findings of the Panel on that issue.⁵⁶² In response to Canada’s argument, the Appellate Body stated:

We believe the Appellate Body can, and should, complete the analysis of Article III:2 of the GATT 1994 in this case by examining the measure with reference to its consistency with the second sentence of Article III:2, provided there is sufficient basis in the Panel Report to allow us to do so As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2. In the case at hand, the Panel made legal findings and conclusions concerning the first sentence of Article III:2, and because we reverse one of those findings, we need to develop our analysis based on the Panel report in order to issue legal conclusions with respect to Article III:2, second

⁵⁵⁸ *Id.*

⁵⁵⁹ *See id.* at 22.

⁵⁶⁰ *See id.*

⁵⁶¹ GATT 1994, *supra* note 1, art. III:2.

⁵⁶² *See* Canada Split-Run Appellate Body, *supra* note 51, at 23.

sentence, of the GATT 1994.⁵⁶³

Based on its analysis, the Appellate Body concluded that imported split-run periodicals and domestic non-split-run periodicals were "directly competitive or substitutable."⁵⁶⁴

The last question to be answered in the analysis of Article III:2's second sentence was whether the dissimilar taxation was applied so as to afford protection to the domestic product. First, the Appellate Body found that the tax on imported split-run periodicals was "beyond excessive, indeed it [was] prohibitive."⁵⁶⁵ Second, the Appellate Body determined that there was ample evidence that the very design and structure of the measure was such as to afford protection to domestic periodicals.⁵⁶⁶ Third, Canada admitted that the objective and structure of the tax was to insulate Canadian magazines from competition in the advertising sector, thus leaving significant Canadian advertising revenues for the production of editorial material created for the Canadian market.⁵⁶⁷ Based on its analysis of the structure and purpose of the tax, the Appellate Body found that Part V.1 of the Excise Tax Act was designed to afford protection to the production of Canadian periodicals.⁵⁶⁸

The Appellate Body then turned to the issue of Canada's "funded" postal rate scheme and the applicability of Article III:8(b) of GATT 1994. The Appellate Body reviewed the text, context, and object and purpose of Article III:8(b).⁵⁶⁹ An accurate reading of Article III:8(b), according to the Appellate Body, leads to the conclusion that "it was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government."⁵⁷⁰ The Appellate Body found there was no reason to distinguish a

⁵⁶³ *Id.* at 23-24.

⁵⁶⁴ *Id.* at 28.

⁵⁶⁵ *Id.* at 30.

⁵⁶⁶ *See id.*

⁵⁶⁷ *See id.* at 31.

⁵⁶⁸ *See id.* at 32.

⁵⁶⁹ *See id.* at 32-33.

⁵⁷⁰ *Id.* at 34.

reduction of tax rates on a product from a reduction in transportation or postal rates.⁵⁷¹ In addition, the Appellate Body agreed with the GATT Panel in *United States-Malt Beverages* that:

Article III:8(b) limits, therefore, the permissible producer subsidies to “payments” after the taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, *e.g.*, on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.⁵⁷²

The Appellate Body, based on the text, context, and purpose of Article III:8(b), found that the Panel erred in its interpretation of that provision. Accordingly, the Appellate Body concluded that the “funded” postal rate scheme was not justified under Article III:8(b) of GATT 1994.

7. *EC Regime for the Importation, Distribution and Sale of Bananas*⁵⁷³

In February 1996, Ecuador, Guatemala, Honduras, Mexico, and the United States requested consultations with the EC over their regime for the importation, distribution, and sale of bananas. The resulting Panel decision dealt with a complicated structure

⁵⁷¹ *See id.*

⁵⁷² *Id.* (quoting *United States-Malt Beverages*, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1992)).

⁵⁷³ *See EC Bananas Panel, supra* note 123. There were four separate Panel reports issued in this dispute. *See* *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/USA, WT/DS27/MEX, WT/DS27/ECU, WT/DS27/GUA/HON, (May 22, 1997). These reports are identical except for some paragraph numbers. In addition, certain claims were not raised by all the parties. Where a complainant did not raise an issue, it was not addressed in the Panel report for the particular party. With this in mind, the cites to the Panel report will be to the U.S. report, WT/DS27/R/USA. Where a particular issue is not addressed in the U.S. report, the Panel report in which the issue was addressed will be cited.

first put in place by individual members of the EC and then by the EC collectively.

a. Background of the Dispute

The facts of this case are complex and require an understanding of several years of history and diplomacy. In order to continue some form of support for their former colonies in Africa, the Caribbean, and the Pacific (ACP countries), European countries put in place several different programs, one of which concerned the importation of bananas. On July 1, 1993, the EC introduced a common market organization for bananas that replaced the individual regimes that were in place among the Member countries.⁵⁷⁴ The economic importance of the banana regime to the ACP countries is substantial because many of the ACP exporting countries are developing nations with relatively small gross domestic products (GDP).⁵⁷⁵ The banana regime provides many small nations with a protected market and steady income from exports. For example, for St. Lucia, a long time beneficiary of the EC banana regime, bananas account for seventeen percent of its GDP.⁵⁷⁶ Without assured access to the EC banana markets, many of these small nations would probably not be able to compete because their bananas are not price

⁵⁷⁴ See Council Regulation 404/93 of 25 February 1993, 1993 O.J. (L 47) 1 [hereinafter Regulation 404/93].

The EC common market organization allows for imports of bananas from traditional ACP countries, non-traditional imports from ACP countries, imports from non-ACP third countries, and EC bananas. The bananas from traditional ACP countries enter duty free up to a maximum quantity of 857,700 tons. The amount each ACP country can supply is fixed. The imports of non-traditional ACP bananas and bananas from third countries are subject to a bound tariff rate quota of 2.2 million tons. With Austria, Finland, and Sweden joining as new members, the EC increased the bound tariff rate quota by 353,000 tons. See *European Communities and Their Member States-Schedule of Specific Commitments* (Apr. 15, 1994), at 16,373-16,377.

⁵⁷⁵ The countries enjoying preferential treatment under the EC banana regime are as follows: Belize, Cameroon, Colombia, Costa Rica, the Ivory Coast, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Nicaragua, Saint Vincent, the Grenadines, Saint Lucia, Senegal, Suriname, and Venezuela. This list includes the traditional ACP countries and the parties to the Banana Framework Arrangement.

⁵⁷⁶ See Canute James & Francis Williams, *Bananas: Growers Fear Bleak Future*, FIN. TIMES, July 22, 1997, at 1, available in 1997 WL 11042787.

competitive.⁵⁷⁷ In fact, production costs in the Windward Islands⁵⁷⁸ are approximately one third higher than those of Latin America.⁵⁷⁹ Without the EC banana regime, banana growers fear that production of bananas will have to be halted and replaced with other crops that would offer less income than bananas have provided in the past.⁵⁸⁰

Under the Fourth Lome Convention,⁵⁸¹ the EC is obligated to accord "more favorable treatment than that granted to third countries benefiting from the most-favored nation clause for the same products."⁵⁸² With respect to bananas, Protocol 5 of the Lome Convention states that "[i]n respect of banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favorable situation than in the past or at present."⁵⁸³

In addition to the Lome Convention, the EC negotiated an agreement with certain countries having an interest in supplying the EC with bananas. The agreement negotiated with Colombia, Costa Rica, Nicaragua, and Venezuela, called the Banana Framework Agreement (BFA), allowed imports from those countries at the MFN tariff rate of seventy-five European Currency Units (ECU) per ton.⁵⁸⁴ Imports of bananas in excess of the amounts allowed under category one and two were subject to a tariff of 822 ECU per ton.⁵⁸⁵

⁵⁷⁷ *See id.*

⁵⁷⁸ The Windward Islands consist of: Dominica, Grenada, St. Vincent, and St. Lucia. *See id.*

⁵⁷⁹ *See id.*

⁵⁸⁰ *See id.*

⁵⁸¹ African, Caribbean and Pacific States-European Economic Community: Final Act, Dec. 15 1989, 29 I.L.M. 783 (1990) [hereinafter Lome Convention]. The Lome Conventions were a series of conventions the last of which was signed in 1989 and will remain in effect until the year 2000. *See also* EC Bananas Panel, *supra* note 123, at 300 n.705 (citing the Lome Convention).

⁵⁸² EC Bananas Panel, *supra* note 123, at 301 (citing Article 168(2)(a)(ii) of the Lome Convention, *supra* note 581).

⁵⁸³ *Id.*

⁵⁸⁴ *See id.* at 24.

⁵⁸⁵ *See id.*

The challenge by Ecuador, Guatemala, Honduras, Mexico, and the United States to the EC system was the third time a Panel had reviewed the EC banana regime. The first two Panels were under the GATT 1947 dispute settlement system and both found that certain aspects of the EC banana regime were inconsistent with its obligations under GATT.⁵⁸⁶ However, neither Panel report was adopted because of a lack of consensus.⁵⁸⁷ Not coincidentally, the Complainants in earlier Panel disputes with the EC were the parties to the BFA negotiated in 1994. Also, in 1994, the EC requested and received a waiver from GATT known as the Lome waiver.⁵⁸⁸ The GATT Contracting Parties adopted the waiver in December 1994, and the waiver was extended by the WTO General Council in October 1996. The waiver provided in pertinent part:

[T]he provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lome Convention, without being required to extend the same preferential treatment to like products of any other contracting party.⁵⁸⁹

b. Major Issues Addressed

In the following discussion, all the major issues raised and decided by the Panel are addressed. The issues presented in this dispute are best summarized and organized as addressed by the Panel and can be divided into three categories: (a) organizational issues, (b) preliminary issues, and (c) substantive issues.⁵⁹⁰

⁵⁸⁶ See EEC-Import Regime for Bananas, Report of the Panel, DS38/R (Feb. 11, 1994) (not adopted); EEC-Member States Import Regimes for Bananas, Report of the Panel, DS32/R (June 3, 1993) (not adopted). The EC blocked adoption of each report, as was common under the GATT 1947 dispute settlement regime.

⁵⁸⁷ See *supra* note 586.

⁵⁸⁸ See Lome Convention, *supra* note 581, Waiver Decision L/7604 of 9 Dec. 1994; Extension of the Waiver WT/L/186, Decision of 14 Oct. 1996 (commonly referred to as the "Lome Waiver").

⁵⁸⁹ EC Bananas Panel, *supra* note 123, at 301.

⁵⁹⁰ See *id.* at 272-73.

i. Organizational Issues

Two organizational issues arose in this dispute: first, the extent to which third-parties would be allowed to participate in the Panel proceedings; and second, the presence of private lawyers at Panel proceedings.

The first organizational issue arose because of the number of third parties that wanted to participate. There were no less than seventeen third party participants who requested that they be allowed to participate more fully in the proceedings than was normally permitted.⁵⁹¹ The Panel examined Article 10 and Appendix 3 of the DSU for guidance on the issue. Article 10, paragraphs 2 and 3, provide that:

2. Any Member having a substantial interest in a matter before a Panel and having notified its interest to the DSB . . . shall have the opportunity to be heard by the Panel and to make written submissions to the Panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the Panel report.

3. The parties shall receive the submissions of the parties to the dispute to the first meeting of the Panel.⁵⁹²

The Working Procedures set out in Appendix 3, paragraph 6 of the DSU provides that “[a]ll third parties . . . shall be invited in writing to present their views during a session of the first substantive meeting of the Panel set aside for that purpose.”⁵⁹³ The EC requested that third parties be allowed to participate in other Panel meetings and not just the first one. The Complainants did not agree with the EC and believed the rights of third parties were sufficiently safeguarded by the normal procedures in the DSU.⁵⁹⁴ The Panel determined that third parties would be able to observe the whole of the proceedings at the first Panel meeting and not just the session set aside for hearing third-party arguments.⁵⁹⁵

The Panel reviewed GATT 1947 practice with regard to third

⁵⁹¹ See *id.* at 274.

⁵⁹² DSU, *supra* note 4, arts. 10.2-3.

⁵⁹³ *Id.* app. 3, para. 6.

⁵⁹⁴ See EC Bananas Panel, *supra* note 123, at 274.

⁵⁹⁵ See *id.*

party participation in Panel meetings and found that under the prior practice expansive rights had been granted to third parties, but only after agreement between the parties involved.⁵⁹⁶ Because no such agreement between the parties could be reached in this dispute, the Panel decided that third parties would be allowed to “have the opportunity also to make a brief statement at a suitable moment during the second meeting.”⁵⁹⁷ The Panel also stated that it did “not expect them to submit additional written material beyond responses to the questions already posed during the first meeting.”⁵⁹⁸ The Panel based its decision on the following considerations:

- (i) the economic effect of the disputed EC banana regime on certain third parties appeared to be very large;
- (ii) the economic benefits to certain third parties from the EC banana regime were claimed to derive from an international treaty between them and the EC;
- (iii) past practice in Panel proceedings involving the banana regimes of the EC and its member States; and
- (iv) the parties to the dispute could not agree on the issue.⁵⁹⁹

The third parties requested that they be allowed further participatory rights, including the right to participate in the interim review process. In the Panel’s view, this was not proper because of the language in DSU Article 15, which only refers to parties as participants in the interim review process.⁶⁰⁰ Therefore, it decided to grant no further participatory rights than those outlined above.⁶⁰¹ The Panel reasoned that “to give third parties all of the rights of parties would inappropriately blur the distinction drawn in the DSU between parties and third parties.”⁶⁰² Thus, the Panel extended third party rights beyond normal limits despite opposition because of the importance of the case to many third

⁵⁹⁶ See *id.* at 274 n.657.

⁵⁹⁷ *Id.* at 275.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ See *id.*

⁶⁰¹ See *id.*

⁶⁰² *Id.*

parties. This decision to extend participatory rights suggests that, had there been agreement between the parties to the dispute, there could have been broader participation by third parties including, perhaps, participation in the interim review process.

The second organizational issue addressed was the presence of private lawyers at the Panel's first substantive meeting on September 10, 1996. The Complainants objected to the presence of private lawyers at the Panel proceedings.⁶⁰³ The Panel reviewed Article 12.1 of the DSU and the Working Procedures at Appendix 3 and concluded that "only members of governments (including the European Commission and an international civil servant of the ACP Secretariat) [could] attend the Panel meeting."⁶⁰⁴ In coming to this conclusion, the Panel listed the factors it weighted:

(a) It has been past practice in GATT and WTO dispute settlement proceedings not to admit private lawyers to Panel meetings if any party objected to their presence and in this case the Complainants did so object.

(b) In the working procedures of the Panel, which were adopted at the Panel's organizational meeting, we had expressed our expectation that only members of governments would be present at Panel meetings.

(c) The presence of private lawyers in delegations of some third parties would be unfair to those parties and other third parties who had utilized the services of private lawyers in preparing their submissions, but who were not accompanied by those lawyers because they assumed that all participants at the meeting would comply with our expectations as expressed in the working procedures adopted by the Panel at its organizational meeting.

(d) Given that private lawyers may not be subject to disciplinary rules such as those that applied to members of governments, their presence in Panel meetings could give rise to concerns about breaches of confidentiality.

(e) There was a question in our minds whether the admission of private lawyers to Panel meetings, if it became common practice, would be in the interest of smaller Members as it could

⁶⁰³ *See id.*

⁶⁰⁴ *Id.*

entail disproportionately large financial burdens for them.

(f) Moreover, we had concerns about whether the presence of private lawyers would change the intergovernmental character of the WTO dispute settlement proceedings.

We noted that our request would not in any respect adversely affect the right of parties or third parties to meet and consult with their private lawyers in the course of Panel proceedings, nor to receive legal or other advice in the preparation of written submissions from non-governmental experts.⁶⁰⁵

The Panel's decision not to allow private lawyers in Panel proceedings, despite their having been deputized as part of a delegation, has drawn interest from the organized bar in the United States and from bar associations in Europe and elsewhere. For example, the American Bar Association, Section of International Law and Practice, International Trade Committee has established a Subcommittee on Private Counsel on WTO Dispute Settlement Proceedings; the Subcommittee is examining the issue as this article goes to print. The justifications listed in the Panel's report are the ones generally mentioned by Members when asked why other Members would be denied the right to counsel of their choosing. In addition, because the WTO is the creature of an international agreement, Members who believe the right to deputize non-governmental lawyers for purposes of Panel proceedings is an important issue can seek to have existing practice modified through negotiations within the WTO.

In any event, the Appellate Body in the banana dispute authorized the appearance of private counsel to represent Member governments in the banana appeal.⁶⁰⁶ It is not clear whether the actions of the Appellate Body will result in a revisiting of the practices of the Panels by Member nations or will be maintained in future appeals.

ii. Preliminary Issues

The Panel addressed certain "preliminary" issues raised by the EC. The EC claimed that the Complainants did not fulfill the minimum consultation requirement of affording a reasonable

⁶⁰⁵ *Id.* at 275-76.

⁶⁰⁶ *See id.*

possibility for arriving at a mutually satisfactory solution and that the Complainants had also failed to set out a clear statement of the claims of the dispute.⁶⁰⁷ The EC also questioned the request for the establishment of a Panel, arguing that it was unacceptably vague and failed to comply with the requirements of Article 6.2 of the DSU.⁶⁰⁸ Furthermore, the EC claimed that the United States had no legal interest in the dispute and should not be allowed to raise any claims.⁶⁰⁹ Finally, the EC claimed it was entitled to separate Panel reports under Article 9 of the DSU.⁶¹⁰

The Panel took up these “preliminary” issues in turn. The Panel rejected the EC’s claim that the consultations were inadequate and stated that:

[t]he only prerequisite for requesting a Panel is that the consultations have “fail[ed] to settle a dispute within 60 days of receipt of the request for consultations Ultimately, the function of providing notice to a respondent of a complainant’s claims and arguments is served by the request for establishment of a Panel and by the complainant’s submissions to that Panel.”⁶¹¹

The Panel next considered whether the request for the Panel provided enough specificity as to the issues raised by the Complainants.⁶¹² Ultimately, the question was determined by

⁶⁰⁷ See *id.* at 276.

⁶⁰⁸ See *id.* DSU, *supra* note 4. Article 6.2 reads:

The request for the establishment of a Panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a Panel with other than standard terms of reference, the written request shall include the proposed text of the special terms of reference.

DSU, *supra* note 4, art. 6.2.

⁶⁰⁹ See EC Bananas Panel, *supra* note 123, at 276.

⁶¹⁰ See *id.*

⁶¹¹ *Id.* at 278 (citing DSU, *supra* note 4, art. 4.7).

⁶¹² See *id.* at 279. The request for establishment of a Panel stated:

The Governments of Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, each in the exercise of the rights accruing to it as a member of the WTO, therefore, respectfully request the establishment of a Panel to examine this matter in light of the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, the GATS, and the TRIMS Agreement, and find that the EC’s measures are inconsistent with

observing the requirements of Article 6.2 of the DSU. In particular, the Panel stated:

We therefore find that the Panel request made by Complainants was sufficient to meet the requirements of Article 6.2 of the DSU to the extent that it alleged inconsistencies with the requirements of specific provisions of specific WTO agreements.

In light of the foregoing finding, since the invocation of the Agreement on Agriculture in the Panel request did not indicate a specific provision thereof, we will not consider the claim raised by Ecuador in its first written submission under that Agreement. We will also not consider the claim raised by Ecuador, Guatemala and Honduras, and the United States in their first written submission under Article 5 of the TRIMs Agreement since the Panel request referred only to Article 2 of the TRIMs Agreement.⁶¹³

In arriving at its conclusion the Panel reviewed previous WTO Panel requests⁶¹⁴ and observed that "in most cases there [was] no specific explanation given as to how the contested measure is inconsistent with the requirements of the specified provisions of the specified agreements."⁶¹⁵ The Panel found that to date no WTO Panel had found a request to be either inadequate or inconsistent with the terms of Article 6.2 of the DSU.⁶¹⁶ The Panel's decision appears to create clear lines for judging the propriety of claims being pursued before a Panel: was the Agreement and Article of the Agreement identified in the request for consultations; if yes, the Panel will have jurisdiction.

The requirement of a "legal interest" when requesting the establishment of a Panel was raised by the EC with respect to claims made by the United States. The EC argued that because

the following Agreements and provisions among others: (1) Articles I, II, III, X, XI and XIII of the GATT 1994, (2) Articles 1 and 3 of the Agreement on Import Licensing Procedures, (3) the Agreement on Agriculture, (4) Articles II, XVI and XVII of the GATS, and (5) Article 2 of the TRIMs Agreement.

Id.

⁶¹³ *Id.* at 285-86.

⁶¹⁴ *See id.* at 284 n.679.

⁶¹⁵ EC Bananas Panel, *supra* note 123, at 284.

⁶¹⁶ *See id.*

banana production in the United States was minimal and its exports were nil, it had no legal interest in the claims it was pursuing.⁶¹⁷ Article 3.3 of the DSU provides:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.⁶¹⁸

The EC argued that this language in Article 3.3 of the DSU implied a requirement that the United States suffer nullification or impairment of WTO benefits in respect to trade in bananas. The United States, in the EC's view, could not raise a "goods" issue because it had "no legal right or interest" in the trade of bananas as a good.⁶¹⁹

The Panel examined Article 3.7⁶²⁰ of the DSU to determine what type of legal interest was required. The Panel stated that "[t]he likelihood of litigation by all against all seems unlikely, as Members are admonished by Article 3.7 of the DSU to exercise restraint in bringing cases"⁶²¹

The Panel found that neither Article 3 nor any other portion of the DSU contained an explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a Panel.⁶²²

⁶¹⁷ See *id.* at 286. The Panel report lists U.S. banana production (including Puerto Rico) as 54,500 tons and U.S. banana importation as 0.4 million tons in 1994. See EC Bananas Panel, *supra* note 123, at 15 (citing FAO and Eurstat sources).

⁶¹⁸ DSU, *supra* note 4, art. 3.3.

⁶¹⁹ EC Bananas Panel, *supra* note 123, at 286.

⁶²⁰ Article 3.7 of the DSU provides:

Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements

DSU, *supra* note 4, art. 3.7.

⁶²¹ EC Bananas Panel, *supra* note 123, at 287.

⁶²² See *id.* at 286.

The Panel went on to explain:

We fail to see that there is, or should be, a legal interest test under the DSU. This view is corroborated by past GATT practice, which suggests that if a complainant claims that a measure is inconsistent with the requirements of GATT rules, there is not a requirement to show actual trade effects. GATT rules have been consistently interpreted to protect "competitive opportunities" as opposed to actual trade flows.⁶²³

Therefore, the Panel decided that the United States had a right to advance the claims it raised in its request.⁶²⁴

The last "preliminary" issue the Panel addressed was the number of Panel reports to be issued in the dispute. The EC had argued for four separate reports.⁶²⁵ In support of its argument, the EC invoked Article 9 of the DSU, which addresses situations where more than one Member requests the establishment of a Panel.⁶²⁶ In particular, the EC argued that the Panel was required to submit its findings to the DSB in a manner that protected "the rights the parties to the dispute would have enjoyed had separate Panels examined the complaint."⁶²⁷ The Panel agreed and concluded that Article 9 required separate Panel reports to be issued in the dispute in order to protect the rights of the EC.⁶²⁸

iii. Substantive Issues

The Panel had to decide the claims of five Complaining parties.⁶²⁹ The claims involved several aspects of GATT 1994, and

⁶²³ *Id.*

⁶²⁴ *See id.* at 288.

⁶²⁵ *See id.*

⁶²⁶ *See id.*

⁶²⁷ *Id.* (quoting Article 9.2 of the DSU, *supra* note 4).

⁶²⁸ *See id.* The Panel explained its decision as follows:

In our view, one of the objectives of Article 9 is to ensure that a respondent is not later faced with a demand for compensation or threatened by retaliation under Article 22 of the DSU in respect of uncured inconsistencies with WTO rules that were not complained of by one of the complaining parties participating in the Panel proceeding. Our reports must bear this objective in mind.

Id.

⁶²⁹ *See id.* at 26-27. Although there were five complaining parties, Ecuador,

a tremendous amount of evidence was put forward by the parties regarding a number of extraordinarily complex issues. As previously noted, the Panel decided that the EC had a right to four separate Panel reports for each Complaining party, each of which was approximately 380 pages in length when the decisions were issued.⁶³⁰ Although the Complainants submitted several of the same issues to the Panel, some Complainants raised different issues. The following chart provides an overview of the issues raised by each of the respective parties.

Complainants and Issues Raised⁶³¹

Country	GATT 1994	Import	TRIMs	GATS
		Licensing Agreement		
United States	I:1; III:4; X; and XIII	1.3; 3.2; and 3.5	2 and 5	II and XVII
Mexico	I:1; III:4; X; and XIII	1.2; 1.3; 3.2; and 3.5	2	II and XVII
Ecuador	I:1; III:4; X; and XIII	1.2; 1.3; 3.2; and 3.5	2 and 5	II and XVII
Honduras and Guatemala	I:1; II; III:4; X; and XIII	1.3; 3.2; and 3.5	2 and 5	II and XVII

(a) Like Product Analysis

The issue of “like product” was dispensed with quickly by the Panel. The Panel found, according to the factors commonly used in GATT practice and the fact that all the parties to the dispute had

Guatemala, Honduras, Mexico and the United States, two of these countries, Guatemala and Honduras, filed their request for consultations jointly and were considered as pursuing a joint claim. Therefore, the Panel issued one report to cover the claims put forward by Guatemala and Honduras.

⁶³⁰ See *id.*

⁶³¹ See *id.* at 26-27. The Panel stated: “Aspects of the EC’s measures applying to bananas were cited as being inconsistent with the following provisions and Agreements in those submissions . . .” *Id.* (citing the first submissions of the Complaining Parties).

“proceeded in their legal reasoning on the assumption that all bananas are ‘like products,’” that bananas from ACP, non-ACP, and the EC were like products.⁶³² The issue was not seriously pursued in this dispute and the Panel found that the submissions of the parties resolved the issue.

(b) Article XIII

The report took each issue raised by the Complainants in turn, starting with whether the EC market regime for bananas was consistent with Article XIII of GATT 1994. Article XIII:2(d) addresses country-specific allocations of tariff quota shares and requires that shares must be given to Members with a “substantial interest” in supplying the product concerned.⁶³³ The position of new Members who acceded to the WTO after the implementation of the EC banana regime was also an important issue in determining the rights of the parties because the EC allocated tariff quota shares to some ACP and BFA countries and not others. The Panel stated:

In this case, the EC allocated tariff quota shares by agreement and assignment to some Members (*e.g.*, ACP countries (in respect of traditional and non-traditional exports), Nicaragua and Venezuela) without allocating such shares to other Members (*e.g.*, Guatemala). Moreover, under the BFA, the BFA countries were given special rights in respect of reallocation of tariff quota shares that were not given to other Members (*e.g.*, Guatemala). For the reasons noted above . . . such differential treatment of like products from Members is inconsistent with the requirements of Article XIII:1.

. . . .

We now consider the position of a Member who acceded to the WTO or GATT after the implementation of the EC common market organization for bananas (a “new” Member) There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a

⁶³² *Id.* at 289.

⁶³³ *Id.* at 292 (quoting GATT 1994, *supra* note 1, art. XIII:2(d)).

substantial interest in supplying the product in question.

Thus, although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so. The provisions on consultations and adjustments in Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge the consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights.⁶³⁴

The Panel set out the requirements of Article XIII to determine if the EC's allocations were consistent with its obligations under that Article. In a case in which quotas are allocated among supplying countries, "the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned."⁶³⁵ In a case where this method is not reasonably practicable:

the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.⁶³⁶

⁶³⁴ *Id.* at 298-99 (footnotes in quoted text have been omitted).

⁶³⁵ *Id.* at 290-91 (quoting GATT 1994, *supra* note 1, art. XIII:2(d)).

⁶³⁶ *Id.* at 291. Article XIII, sections (4) and (5) provide:

4. With regard to restrictions applied in accordance with paragraph 2(d) of this Article or under paragraph 2(c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the

The Panel determined that Article XIII was clear and required that when quantitative restrictions were used, that they must be used in the least trade-distorting manner possible.⁶³⁷ In the words of the Panel, this case was “the first case in which a broad challenge to a quota or tariff quota system has been made.”⁶³⁸ Therefore, it was necessary for the Panel to determine how the terms and subdivisions of Article XIII work together.

The Panel found that Article XIII’s general non-discrimination requirement was modified by Article XIII:2(d), which provides that tariff shares can be allocated to supplying countries because “the terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted.”⁶³⁹ Therefore, in the absence of agreements with “all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares within the rules of Article XIII:2(d), second sentence.”⁶⁴⁰

The next question was whether country-specific shares must be allocated to Members that do not have a “substantial interest” in supplying the product. The Panel noted that the first sentence of Article XIII:2(d) refers to allocation of a quota “among supplying countries.”⁶⁴¹ It then recognized that “this could be read to imply that an allocation may also be made to Members that do not have a

restriction: Provided that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the [Contracting Parties], consult promptly with the other Member or the [Contracting Parties] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

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

GATT 1994, *supra* note 1, art. XIII:4-5.

⁶³⁷ See EC Bananas Panel, *supra* note 123, at 291.

⁶³⁸ *Id.* at 292.

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

substantial interest in supplying the product.”⁶⁴² However, if this interpretation was accepted, then “any such allocation must . . . meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d).”⁶⁴³ The Panel stated:

Therefore, if a Member wishes to allocate shares of a tariff rate quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1. As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would not be met.⁶⁴⁴

The Panel then examined this practice in light of the object and purpose of Article XIII and determined:

Members not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the “others” category and possibly achieve “substantial supplying interest” status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4. New entrants will be able to compete in the market, and likewise have an opportunity to gain “substantial supplying interest” status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII.⁶⁴⁵

The Panel found that the banana import system, by allocating the tariff rate quota amounts to ACP countries, was inconsistent with

⁶⁴² *Id.* at 292-93.

⁶⁴³ *Id.* at 293.

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.*

the provisions of Article XIII.⁶⁴⁶

The Panel then looked to the Lome waiver to determine if it applied to cover the inconsistency with Article XIII.⁶⁴⁷ The Lome waiver, by its own terms only covered the EC's obligations with respect to Article I:1.⁶⁴⁸ Therefore, the Panel had to determine if a measure that was inconsistent with Article XIII, could be covered by a waiver applicable to Article I.⁶⁴⁹ The Panel found that the Lome waiver did cover the inconsistency with Article XIII because it was the only way to give real effect to the waiver.⁶⁵⁰

The Panel explained:

[I]n order to give real effect to the Lome waiver, it needs to cover Article XIII to the extent necessary to allow the EC to allocate country-specific tariff quota shares to the ACP countries in the amount of their pre-1991 best-ever banana exports to the EC. Otherwise, the EC could not practically fulfill its basic obligation under the Lome Convention in respect of bananas, as we have found that it was not unreasonable for the EC to conclude that the Lome Convention may be interpreted to require country-specific tariff quota shares at levels not compatible with Article XIII. Since it was the objective of the Lome waiver to permit the EC to fulfill that basic obligation, logically we have no choice therefore but to interpret the waiver so that it accomplishes that objective.⁶⁵¹

In addition to giving effect to the terms of the waiver, the Panel concluded that the foregoing interpretation was correct because of the close relationship between Article I and Article XIII. The Panel reasoned that:

Article I requires MFN treatment in respect of "rules and formalities in connection with importation", a phrase that has been interpreted broadly in past GATT practice, such that it can appropriately be held to cover rules related to tariff quota allocations. Such rules are clearly rules applied in connection

⁶⁴⁶ *See id.*

⁶⁴⁷ *See id.* at 301.

⁶⁴⁸ *See id.* at 303.

⁶⁴⁹ *See id.* at 304.

⁶⁵⁰ *See id.*

⁶⁵¹ *Id.*

with importation To describe the relationship somewhat differently, Article I established a general principle requiring non-discriminatory treatment in respect of, *inter alia*, rules and formalities in connection with importation. Article XIII:1 is an application of that principle in a specific situation, *i.e.*, the administration of quantitative restrictions and tariff quotas. In that sense, the scope of Article XIII:1 is identical with that of Article I.⁶⁵²

In effect, any inconsistency between the obligations under Article XIII and the EC banana regime was covered by application of the Lome waiver.

The EC also claimed that the BFA quota share allocations were consistent with GATT rules because they were included in their Schedules as a result of the Uruguay Round negotiations.⁶⁵³ The Complainants argued that a prior adopted GATT Panel report⁶⁵⁴ supported the conclusion that tariff bindings in Schedules cannot justify an inconsistency with the Members obligations under the WTO Agreement.⁶⁵⁵ In the GATT Panel report, commonly referred to as the “Sugar Headnote case,” the United States was found to be in violation of its obligations under Article XI:1, even though it put certain qualifications regarding quantitative restrictions in its Schedule.⁶⁵⁶ The Panel agreed with the GATT Panel in the Sugar Headnote case and determined that the EC’s inclusion of allocations inconsistent with the requirements of Article XIII did not prevent a Member from challenging those allocations.⁶⁵⁷

⁶⁵² *Id.*

⁶⁵³ *See id.* at 305.

⁶⁵⁴ *See id.* (citing Panel Report on US-Restrictions on Imports of Sugar, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 341-343 (1989) [hereinafter Sugar Headnote Case]).

⁶⁵⁵ *See id.*

⁶⁵⁶ *See id.* In the Sugar Headnote decision, the Panel found that “Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1.” Sugar Headnote Case, *supra* note 654, at 343.

⁶⁵⁷ *See EC Bananas Panel, supra* note 123, at 307.

(c) *Licensing Procedures, GATT, and GATS*

Under the EC regime, there were three categories of import licenses for bananas: Category (A), consisted of operators who marketed third-country bananas and non-traditional ACP bananas during the preceding three-year period; Category (B) operators were those who marketed bananas from EC and traditional ACP sources during a preceding three-year period; and Category (C) operators were new market entrants who started marketing third-country or non-traditional ACP bananas. Operators who marketed third-country and non-traditional ACP bananas as well as traditional ACP and EC bananas qualified for both category (A) and (B).⁶⁵⁸ The EC Regulation allows for 66.5% of the licenses allowing the lower tariff rate quota for Category A operators; the next 30% is reserved for Category B operators; and the last 3.5% is reserved for Category C operators.⁶⁵⁹

The Complainants claimed that the licensing categories and restrictions were inconsistent with EC obligations under Article I and Article III of GATT 1994 and that the effect it had on service providers was inconsistent with Articles II and XVII of GATS.⁶⁶⁰ The Panel found that the licensing procedures and restrictions were inconsistent with the provisions of Articles I and III of GATT 1994 and Articles II and XVII of GATS.⁶⁶¹ In the Panel's interpretation, such a regime was inconsistent with the EC's obligations under Article I:1 because it constituted an advantage of the type covered by Article I that accorded an advantage to traditional ACP bananas not accorded to the like products from other Members.⁶⁶² The Panel noted that Article I:1 of GATT 1994

obliges Members to accord any advantage granted to any product originating in any country to the like product originating in the territories of all other Members, in respect of matters referred to in Article III:4. The matters referred to in

⁶⁵⁸ *See id.* at 317.

⁶⁵⁹ *See id.*

⁶⁶⁰ *See id.* at 318.

⁶⁶¹ *See id.*

⁶⁶² *See id.* at 319. The Panel noted that the second Banana Panel had reached the same result. *See id.* (citing Panel Report on EEC-Import Regime for Bananas, DS8/R (Feb. 11, 1994) (not adopted)).

Article III:4 are “laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution and use [of a product]”. In our view, the allocation to Category B operators of 30 percent of the licenses allowing for importation within the tariff quota of third-country bananas means *ceteris paribus* that operators who in the future wish to maintain or increase their share of licenses for the importation of third-country and non-traditional ACP bananas at in-quota tariff rates would be required to maintain or increase their current purchases and sales of traditional ACP (or EC) bananas in order to claim that they market traditional ACP (or EC) bananas for purposes of the operator category rules. Such a requirement to purchase and sell a product from one country . . . in order to obtain the right to import a product from any other country . . . at a lower rate of duty under a tariff quota is a requirement affecting the purchase of a product within the meaning of Article III:4 and I:1.⁶⁶³

The Panel determined, with respect to the licensing procedures applied to third-country and non-traditional ACP imports, that the Lome waiver did not waive the EC’s obligations under Article I:1.⁶⁶⁴ The Panel reasoned that the licensing procedures violated the preamble of the waiver because they “creat[ed] undue difficulties for the trade of other parties.”⁶⁶⁵ Second, the Panel found that the Lome waiver did not apply to the licensing procedures because those procedures were not one of the advantages that ACP countries formerly enjoyed.⁶⁶⁶ The Panel concluded that this finding was in accordance with past Panel practice of interpreting waivers narrowly.⁶⁶⁷

(d) Hurricane Licenses

The EC granted hurricane licenses only to operators including

⁶⁶³ *Id.* at 326.

⁶⁶⁴ *See id.* at 330.

⁶⁶⁵ *Id.*

⁶⁶⁶ *See id.* at 329.

⁶⁶⁷ *See id.* at 330 (citing Panel Report on US-Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 256-57 (1990)).

or directly representing EC (or traditional ACP) banana producers or producer organizations.⁶⁶⁸ In order to be granted a hurricane license, the operators had to have suffered damage by a tropical storm.⁶⁶⁹ Category A operators who have historically marketed third-country and non-traditional ACP bananas would not be allocated hurricane licenses under the EC regime.⁶⁷⁰ The Panel found that the EC's practice of only issuing hurricane licenses to ACP and EC producers and producer organizations or operators, was not applied in a neutral manner nor administered fairly and equitably, and, therefore, was inconsistent with the requirements of Article 1.3 of the Licensing Agreement.⁶⁷¹

(e) GATS

This dispute was the first to examine a measure affecting trade in services where a Member had undertaken specific commitments in the particular service sector.⁶⁷² Although the GATS Agreement applies to trade in services, its coverage is not universal because it does not cover those provided for in the exercise of governmental authority, and it contains national treatment and most-favored-nation principles.⁶⁷³ In order to determine if a Member has obligations under GATS, it is necessary to review the Member's Schedule of Commitments because Members can choose the particular services in which they make market access and national treatment commitments.⁶⁷⁴ A Member will only have obligations

⁶⁶⁸ See *id.* at 337. Hurricane licenses authorize operators to import third-country and non-traditional bananas when it is otherwise impossible to supply the EC with bananas because of tropical storm damage. See *id.* at 337-38. Article 1.3 of the Licensing Agreement provides: "The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner." *Id.* at 339. This was an issue pursued primarily by Guatemala, Honduras, and Mexico. See *id.*

⁶⁶⁹ See *id.*

⁶⁷⁰ See *id.* at 339.

⁶⁷¹ See *id.*

⁶⁷² See also Canada Split-Run Appellate Body, *supra* notes 548-49 and accompanying text noting that the issue was not raised on the appeal from the Panel's decision. See generally Canada Split-Run Panel, *supra* notes 496-99 and accompanying text for a discussion on the application of GATS to a measure aimed primarily at goods but that also had an impact on services.

⁶⁷³ See EC Bananas Panel, *supra* note 123, at 342.

⁶⁷⁴ See The Design and Underlying Principles of the GATS, WTO Secretariat, (Apr.

concerning a particular service or service provider if the Member has so provided in its schedules.⁶⁷⁵

The arguments put forward by the parties concerned the measures applied to wholesale trade services involving the distribution of bananas.⁶⁷⁶ The Panel found that with respect to the measures within the EC import licensing regime, GATS applied because: (1) GATS, like GATT, was an umbrella agreement that applies to all sectors of trade in services and all types of regulations;⁶⁷⁷ (2) the preparatory work of GATS confirmed that the word “affecting” did not mean “in respect of” and, therefore, GATS covered not only laws and regulations that directly governed the conditions of sale or purchase but also those that might adversely modify conditions of competition between like

23, 1997).

⁶⁷⁵ *See id.*

⁶⁷⁶ *See* EC Bananas Panel, *supra* note 123, at 342.

⁶⁷⁷ Article I of GATS provides:

1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, trade in services is defined as the supply of a service:
 - (a) from the territory of one Member into the territory of any other Member;
 - (b) in the territory of one Member to the service consumer of any other Member;
 - (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
 - (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
3. For the purposes of this Agreement:
 - (a) “measures by Members” means measures taken by:
 - (i) central, regional or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities; In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;
 - (b) “services” includes any service in any sector except services supplied in the exercise of governmental authority;
 - (c) “a service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

domestic and imported products on the internal market; and (3) GATS covers the supply rather than the delivery of services.⁶⁷⁸

The Complainants argued that the EC's import licensing provisions directly targeted North and South American firms that distributed bananas.⁶⁷⁹ The licensing procedures provided definite competitive advantages to EC and ACP owned firms that engaged in wholesale services.⁶⁸⁰ The Complainants submitted that four key components of the EC banana regime were inconsistent with GATS: (1) the operator category licenses, (2) export certificates, (3) hurricane licenses, and (4) activity function allocations.⁶⁸¹ In the Complainants' view, the EC had drastically altered the competitive conditions by structuring the regime for the wholesale distribution of bananas to favor domestic service suppliers.⁶⁸²

The EC argued that the measures the Complaining parties raised were not "measures affecting trade in services."⁶⁸³ In the EC's view, the measures regulated the importation of goods, not services. The EC argued that, "the objective of the GATS is to regulate trade in services as such [I]t covers the supply of services as products in their own right."⁶⁸⁴ The EC further argued that a measure could not be covered by both GATT and GATS because the coverage of the two agreements was intended to be mutually exclusive.⁶⁸⁵ GATS, under the EC's analysis, governs "measures affecting trade in services" and not the supply of goods.⁶⁸⁶

The Panel did not agree with the EC and undertook its own analysis of what GATS covered. In particular, the Panel reviewed the rules of interpretation and how they related to their analysis of

GATS, *supra* note 496, art. I.

⁶⁷⁸ See EC Bananas Panel, *supra* note 123, at 343-44.

⁶⁷⁹ See *id.* at 195.

⁶⁸⁰ See *id.*

⁶⁸¹ See *id.*

⁶⁸² See *id.*

⁶⁸³ *Id.* at 342.

⁶⁸⁴ *Id.*

⁶⁸⁵ See *id.*

⁶⁸⁶ *Id.*

GATS. The Panel applied the following legal reasoning:

In accordance with Article 31 of the Vienna Convention on the Law of Treaties, we note that the ordinary meaning of the term “affecting”, in Article I:1 of GATS, does not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain. On the contrary, Article I:1 refers to measures in terms of their effect, which means they could be of any type or relate to any domain of regulation. Like GATT, the GATS is an umbrella agreement which applies to all sectors of trade in services and all types of regulations. We also note that the definition of “measures by Members affecting trade in services” in Article XXVII(c) has been drafted in an illustrative manner by the use of the term “include.” Sub-paragraphs (i)-(iii) do not contain a definition of “measures by Members affecting trade in services” as such, but rather are an illustrative list of matters in respect of which such measures could be taken. In other words, the term “in respect of” does not describe any measures affecting trade in services, but rather describes what such measures might regulate.

....

With respect to the claim by the EC that GATT and the GATS cannot overlap, we note that such a view is not reflected in any of the provisions of the two agreements. On the contrary, the provisions of the GATS referred to above explicitly take the approach of being inclusive of any measure that affects trade in services whether directly or indirectly. These provisions do not make any distinction between measures which directly govern or regulate services and measures that otherwise affect trade in services.⁶⁸⁷

In determining what the provisions of GATS required of Members, the Panel examined the language in Article II:1 of GATS which provided that “[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.”⁶⁸⁸

⁶⁸⁷ *Id.* at 343-44.

⁶⁸⁸ *Id.* at 348-49 (citing GATS, *supra* note 496, art. II). Article II:2 provides: “A Member may maintain a measure inconsistent with paragraph 1 provided that such a

The Panel found that the “obligations contained in Article II:1 of the GATS to extend ‘treatment no less favorable’ should be interpreted to require providing no less favorable conditions of competition.”⁶⁸⁹ In addition, the EC had undertaken a full commitment on national treatment in the sector of wholesale trade services with respect to supply through commercial presence.⁶⁹⁰ This meant that the EC had committed in its GATS schedules to accord no less favorable treatment to the wholesale trade service providers from other Members than it accorded domestic wholesale trade service providers.⁶⁹¹

The Panel then examined Article XVII of GATS. With respect to the allocation of import licenses on the basis of operator categories, the Complaining parties claimed this was a violation of the national treatment obligation in Article XVII of GATS.⁶⁹² The Panel analyzed Article XVII, which provided that in order to

measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.” GATS, *supra* note 496, art. II:2. Article II:3 provides: “The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.” *Id.* art. II:3.

⁶⁸⁹ EC Bananas Panel, *supra* note 123, at 351.

⁶⁹⁰ *See id.* at 352.

⁶⁹¹ *See id.*

⁶⁹² Article XVII (National Treatment) of GATS provides:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service providers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. (Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant service or service suppliers.)
2. A Member may meet the requirements of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

GATS, *supra* note 496, art. XVII.

establish a breach of the national treatment obligation, three elements must be demonstrated: (1) the EC had undertaken a commitment in a relevant sector and mode of supply, (2) the EC had adopted or applied a measure affecting the supply of services in that sector and/or mode of supply, and (3) the measure accords to service suppliers of any other Member treatment less favourable than it accords to the EC's own like service suppliers.⁶⁹³

The Panel reviewed the categorization of A and B operators and stated:

We note that the categorization of A and B operators is based on whether they have during a previous three-year period marketed EC and traditional ACP bananas or third-country and non-traditional ACP bananas. The operator category rules apply to service suppliers regardless of their nationality, ownership or control Thus, the EC rules establishing operator categories do not formally discriminate against Complainant's wholesale service suppliers on the basis of their origin.⁶⁹⁴

The Panel then turned to the question of whether the "application of formally identical operator category rules, nevertheless, modifies conditions of competition in favour of service or service suppliers of EC origin, or at the expense of services or service suppliers of third-country origin."⁶⁹⁵ The Panel determined that, according to Article XVII, identical treatment could be considered less favorable treatment if it adversely modifies conditions of competition for foreign services or service providers.⁶⁹⁶

The Panel examined how the rules for establishing operator categories had impacted the conditions of competition for foreign-owned or controlled service suppliers.⁶⁹⁷ The EC's allocation to

⁶⁹³ See EC Bananas Panel, *supra* note 123, at 353.

⁶⁹⁴ *Id.* at 355.

⁶⁹⁵ *Id.* at 356; see GATS, *supra* note 496, art. XVII:2-3.

⁶⁹⁶ See EC Bananas Panel, *supra* note 123, at 357.

⁶⁹⁷ See *id.* at 358. The Panel examined the complainants' arguments and the impacts that would result and explained that:

[T]he Complainants submit that before the introduction of the EC banana regime, companies controlled or owned by natural or juridical persons of their

Category B operators of thirty percent of the licenses for importation of bananas from third-country and non-traditional ACP countries at in-quota tariff rates had created less favorable conditions of competition for the like service suppliers of Complainant's origin and was inconsistent with Article XVII of GATS.⁶⁹⁸ Accordingly, the Panel stated:

[W]hen licences authorizing in-quota imports of third-country and non-traditional ACP bananas are traded, sellers of licenses will usually be Category B operators and purchasers of licenses will usually be Category A operators Thus in general, Category A operators are able to purchase the licences they need in addition to their annual licence entitlement if they wish to maintain their previous market share. However, initial licence holders who carry out the physical importation of bananas or sell the licences in any case reap tariff quota rents, whereas licence transferees have to purchase these licences for a price up to the amount of the tariff quota rent from initial licence holders Given that licence transferees are usually Category A operators who are most often service suppliers of foreign origin and since licence sellers are usually Category B

nationalities held a market share of over 95 per cent of the imports of Latin American bananas to the EC.

. . . .

[T]he Complaints submit that prior to the introduction of the EC common market organization, the share of the three large banana companies (i.e., Chiquita, Dole and Del Monte) in the EC/ACP market segment was only 6 per cent and that the share for all non-ACP foreign-owned companies was less than 10 per cent. While the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large banana companies, for our purposes what is important is the relative share of service suppliers of the Complainants' origin of the EC market for EC/ACP bananas. On either view, we conclude that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified as Category B for the vast majority of their past marketing of bananas.

Id. Operators classified in Category A cited for most of their past trade volume were: Chiquita Brands (U.S.), Dole Foods (U.S.), Noboa (Ecuador), Del Monte (Mexico), Uniban (Colombia), Banacol (Colombia) (information submitted by Complainants). *See id.* at 358 n.812. Operators in Category B cited for most of their past trade volume were Geest (UK), Fyffes (Ireland), Pomona (France), Compagnie Fruitiere (France), CDB/Durand (France), Gipam (France), Coplaca (Spain), Bargaso SA (Spain). *See id.* at 358 n.813.

⁶⁹⁸ *See id.* at 357.

operators who are most often service suppliers of EC (or ACP) origin, we conclude that service suppliers of Complainants' origin are subject to less favourable conditions of competition in their ability to compete in the wholesale services market than service suppliers of EC (or ACP) origin.⁶⁹⁹

Because the categorization of operator licenses created less favorable conditions of competition for foreign-owned service suppliers, the Panel found that the EC's commitments under GATS were not fulfilled under Article XVII of GATS.⁷⁰⁰

For essentially the same reasons, the Panel found the categorization of service suppliers also violated Article II of GATS.⁷⁰¹ In order to establish a claim under Article II of GATS two elements must be satisfied: (1) the EC has adopted or applied a measure covered by GATS; and (2) the EC's measure accords to services or service suppliers of Complainants' origin treatment less favorable than it accords to the like services or service providers of any other country.⁷⁰² The Panel established that the measures implementing the operator category rules constituted measures affecting trade in services, satisfying the first requirement of a GATS Article II violation.⁷⁰³ The Panel determined that the allocation to Category B operators of thirty percent of the licenses allowing importation of third-country and non-traditional ACP bananas at in-quota tariff rates creates less favorable conditions of competition for like service suppliers of Complainants' origin.⁷⁰⁴ Therefore, the measure was inconsistent with the requirements of Article II.

The Panel rejected both the narrow interpretation of GATS offered by the EC and the argument that the agreements are mutually exclusive. This means that if a measure relates to goods but affects trade in services, it could be found to violate GATT, with respect to goods, GATS, with respect to services, or both.

Although the Panel found that most of the EC banana regime

⁶⁹⁹ *Id.* at 359-60.

⁷⁰⁰ *See id.* at 361.

⁷⁰¹ *See generally id.* at 361-63.

⁷⁰² *See id.* at 361.

⁷⁰³ *See id.* at 362.

⁷⁰⁴ *See id.* at 363.

was inconsistent with its obligations under the WTO Agreements, it nevertheless recognized that there were great economic and social effects from the measures at issue in the dispute.⁷⁰⁵ However, the Panel also noted that the fundamental principles of the WTO and the WTO rules were designed to foster, not impede, the development of countries.⁷⁰⁶

The Panel's decision has been appealed by the EC and the Complaining Parties to the Appellate Body.⁷⁰⁷ Therefore, the final chapter in the EC Banana dispute has not at this point been written.

The EC appealed the Panel's decision to the Appellate Body on June 11, 1997. The principle issues the EC appealed were the Panel's interpretations and legal conclusions regarding: (1) its interpretation of Article XIII of GATT 1994; (2) its finding that GATT and GATS are two mutually overlapping agreements and that the measures complained fell simultaneously under GATT and GATS; (3) its interpretations of Article II of GATS; and (4) its finding that the United States had a legal right or interest in advancing claims under GATT.⁷⁰⁸

Ecuador, Guatemala, Honduras, Mexico, and the United States filed a joint cross-appeal under Rule 23(1) of the Working

⁷⁰⁵ *See id.* at 376.

⁷⁰⁶ *See id.*

⁷⁰⁷ On June 11, 1997, the EC notified its intention to appeal certain issues of law and legal interpretations developed by the Panel, European Communities-Regime for the Importation, Sale and Distribution of Bananas, Notification of an Appeal by the European Communities under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), WT/DS27/9 (June 13, 1997). *See WTO Dispute Overview, supra* note 106, at 2. The Complainants, the United States, Mexico, Ecuador, Guatemala and Honduras submitted their joint appeal to the Appellate Body on June 26, 1997.

⁷⁰⁸ European Communities-Regime for the Importation, Sale and Distribution of Bananas, Notification of Appeal by the European Communities under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, (DSU) WT/DS27/9 (June 13, 1997). In addition, the EC made claims regarding, the scope of the Lome Convention, the characterization of the TRQs (tariff rate quotas) and the preferential regime as a single import regime for bananas, the finding of nullification of impairment with respect to the United States, and the burden of proof under GATS. The EC also claimed that the Panel failed in its obligation to interpret the WTO and its annexed agreements in conformity with the customary rules of interpretation of public international law under Article 3.2 of the DSU.

Procedures for Appellate Review.⁷⁰⁹ The Appellate Body communicated to the DSB that its decision would be released by September 9, 1997.⁷¹⁰

VII. Treaty Interpretation and the WTO

An important issue in WTO dispute settlement is how the agreements are to be interpreted. The rights and obligations of Members must be carefully considered by the Panels and the Appellate Body. In each previously reviewed decision, the Panel and Appellate Body analyzed the interpretation issue. The Panel and Appellate Body both relied on the Vienna Convention on the Law of Treaties and the interpretation rules adopted by the DSB to date.

The DSU provides that agreements should be interpreted “in accordance with customary rules of interpretation of public international law.”⁷¹¹ Panels and the Appellate Bodies have construed this language to reference the Vienna Convention on the Law of Treaties.⁷¹² The principles of treaty interpretation set out in

⁷⁰⁹ European Communities-Regime for the Importation, Sale and Distribution of Bananas (AB-1997-3), Appeal of Ecuador, Guatemala, Honduras, Mexico and the United States, Under Rule 23(1) of the Working Procedures for Appellate Review (26 June 1997), appealing 3 issues: (1) the Panel’s extension of the waiver to GATT Article XIII breaches with respect to the EC’s assignment of country-specific allocations to “traditional” ACP suppliers; (2) the Panel’s extension of the EC’s WTO waiver for measures “required” by the Lome Convention to cover certain tariff preferences provided to “non-traditional” ACP bananas; and (3) the Panel’s decision to exclude from its considerations GATS claims made by Guatemala, Honduras and Mexico that were within its terms of reference, solely on the basis that those claims were not made in their first written submissions.

⁷¹⁰ European Communities-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/10 (Aug. 11, 1997) (Communication from the Appellate Body).

⁷¹¹ DSU, *supra* note 4, art. 3.2. The Appellate Body circulated its decision on September 9, 1997. See *Dispute Settlement Overview*, *supra* note 106. It “mostly upheld the Panel’s findings, but reversed the Panel’s findings that the inconsistency with GATT Article XIII is waived by the Lome waiver, and that certain aspects of the licensing regime violated Article X of GATT and the Import Licensing Agreement.” *Id.* The complainants applied for binding arbitration to determine “‘reasonable period of time’ for implementation of the recommendations and rulings of the DSB.” *Id.* The reasonable period of time was determined to be between September 25, 1997 and January 1, 1999. See *id.*

⁷¹² See *supra* notes 126, 170, 440, 452, 499, 687 and accompanying text. There are 73 parties to the Vienna Convention including most of the major trading partners of the

the Vienna Convention are viewed by many as customary international law—that is, as a rule or set of norms so universally accepted by nations that they obey the rule or norms out of a sense of obligation.

Certain articles of the Vienna Convention are particularly important and are frequently cited by Panels and the Appellate Body. The most often cited article is 31, found in section 3 of the Vienna Convention. Article 31 establishes that treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷¹³ The Convention also allows for the consideration of related agreements and subsequent practice in order to interpret treaties.⁷¹⁴ Article 32 provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion” where the provisions are ambiguous or would lead to an absurd result.⁷¹⁵

United States. Major trading partners who are parties to the Vienna Convention include, to name just a few: Canada, Mexico, Germany, Japan, United Kingdom, Italy, Russian Federation, Korea, Chile, and Colombia.

⁷¹³ Vienna Convention, *supra* note 126, art. 31(1).

⁷¹⁴ *See id.* art. 31(2)-(4). The Convention reads as follows:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Id.

⁷¹⁵ *Id.* art. 32.

Article 28 provides for the non-retroactive application of treaties.⁷¹⁶ The principle of non-retroactive interpretation of treaties is important for parties because it provides them with the assurance as to their obligations under a treaty. Parties would likely be discouraged from signing treaties if retroactive application were allowed because they could be found in immediate violation of the treaty for past acts. This result is avoided under the principle contained in Article 28.

Although the United States is not a party to the Vienna Convention on the Law of Treaties, it nevertheless recognizes that the Treaty represents generally accepted principles of customary international law.⁷¹⁷ Section 325 of the Restatement (Third) of the Foreign Relations Law of the United States adopts the same provisions as Article 31 of the Vienna Convention.⁷¹⁸

VIII. Observations on Early Panel and Appellate Body Decisions Under the WTO

In general, the Panel and Appellate Body process has worked relatively well in the first two and a half years of the WTO. A

⁷¹⁶ See *id.* art. 28. The article reads:

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

Id. See also *supra* notes 300, 348 and accompanying text.

⁷¹⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 325 cmt. a (1987). Therefore, unless the Vienna Convention comes into force for the United States, this section does not strictly govern interpretation by the United States or by its courts in the United States. But it represents generally accepted principles and the United States has appeared willing to accept them despite differences of nuance and emphasis.

⁷¹⁸ The Restatement reads:

§ 325. Interpretation of International Agreement

(1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

(2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 325 (1987).

variety of procedural issues have arisen in the cases and in the mechanics of requesting Panels. Some have been resolved through Panel reports and Appellate Body reports. Issues resolved include (1) whether parties can raise issues on appeal that were not separately noticed, (2) the amount of content that is needed for an issue to properly be before a Panel, (3) whether Members can be represented by private counsel and under what conditions. While some of these issues could be revisited during the 1998 review of the dispute settlement system by the WTO or may evolve over time (*e.g.*, private counsel), issues addressed by the Panels on procedural issues are likely to be accepted as correct and will promote more uniform practice going forward.

Some procedural issues, however, will almost certainly be addressed during the 1998 review. For example, Article 6.1 of the DSU states that "a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda."⁷¹⁹ The Article does not cover all possible situations. For example, consider what happens if, at a DSB meeting, the party whose action is the subject of the request for a Panel objects, and the party seeking a Panel does *not* request a Panel at the next meeting because of ongoing consultations. If the Complaining party asks for a Panel a second time at the third meeting, is the establishment of a Panel a matter of right or a matter of whether the other party chooses not to object? This issue has arisen in disputes and the disagreement has led to delays in Panel formation. Ideally, this issue will be addressed in 1998.

A. *Standard of Review*

On factual issues, Panels are guided by Article 11 of the DSU where they are instructed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case."⁷²⁰ This approach has led to little or no deference to Member governments charged with gathering the factual information and to date has resulted in no sympathy being shown for administrative burdens or difficulties in compiling information.

⁷¹⁹ DSU, *supra* note 4, art. 6.1.

⁷²⁰ DSU, *supra* note 4, art. 11.

An arguably different standard of review for factual determinations is called for under Article 17.6(i) of the Anti-Dumping Agreement, which provides:

[I]n its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned.⁷²¹

This standard of review was added at the insistence of the United States at the end of the Uruguay Round to deal with the problem of perceived substitution of judgment by a Panel in matters where the Panel generally had little of the massive administrative record that was before the agency. The United States expects that this standard will apply to both anti-dumping and countervailing duty determinations that are challenged at the WTO.⁷²²

In mid-1997, several requests for consultations on U.S. anti-dumping determinations were made by the Republic of Korea. Those cases and other disputes involving anti-dumping and countervailing duty measures should provide some insight into whether the language included in Article 17.6(i) will be a more deferential standard than that applied in other disputes or whether Panels choose to construe the language as permitting the continued substitution of judgment.⁷²³

The standard of review for interpretations of agreements has resulted in Panels and the Appellate Bodies construing the Agreement terms with no deference to Member states. The United

⁷²¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6, in Annex 1A to WTO Agreement, *supra* note 1 [hereinafter Anti-Dumping Agreement].

⁷²² See *supra* notes 308-11 and accompanying text; Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures (SCM).

⁷²³ Some have argued that such a construction would be permissible. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

States pushed for adoption of a standard that would give the benefit of the doubt to the contracting party, but that suggestion was rejected.⁷²⁴ To date no legal issue has been viewed as properly left to the construction of the Member countries because the issue was not addressed or was vague, although such results may simply reflect the sampling of cases that have made it through the dispute settlement process. As reviewed in some of the individual disputes, reference to the negotiating history occurs only where there is ambiguity. Thus, intentions of parties may seldom be reflected in constructions by particular Panels or by the Appellate Body. Similarly, construction of similar or identical language under prior agreements, if not trade liberalizing (*e.g.*, practice and construction under the MFA for textiles and apparel), appear to be given little, if any, consideration in constructing WTO terms.

The United States also insisted on an arguably different standard of review of legal interpretations in the anti-dumping and countervailing duty area. Article 17.6(ii) of the Anti-Dumping Agreement states:

[T]he Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation or public international law. Where the Panel finds that relevant provisions of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.⁷²⁵

Unlike the standard of review on facts, anti-dumping and countervailing duty challenges use the same operative language in the first sentence: "in accordance with customary rules of interpretation of public international law."⁷²⁶ However, the second sentence requires that Member governments be given the option of selecting any of the constructions that are permissible. Time will tell whether Panels will ever perceive that multiple constructions of agreement terms are permissible.

Finally, Panels and the Appellate Body appear to be doing little more than paying lip service to the requirement that

⁷²⁴ See *supra* notes 433-36 and accompanying text.

⁷²⁵ Anti-Dumping Agreement, *supra* note 721, art. 17.6(ii).

⁷²⁶ Implementation of Article VI, *supra* note 46, at ii.

“[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁷²⁷ Take, for example, the Banana Panel’s views on the effects of scheduled commitments that may be viewed as contrary to other GATT 1994 Articles. Throughout the course of the Uruguay Round negotiations, agriculture liberalization was one of the most difficult issues. Many countries who promoted significant trade liberalization in agriculture (*e.g.*, the Cairnes group of countries) signed onto the Uruguay Round package only because of specific entries made in various countries’ schedules. If such obligations in the schedules can be voided by other parties on the theory that the obligations contravene other GATT 1994 articles, how do the Panel reports not change the rights and obligations of the Members? This is particularly true where all parties to the Uruguay Round had an opportunity to review the schedules of commitments and raise objections prior to the conclusion of the Uruguay Round process.

B. Role of the TMB in Textile Disputes

Unlike other agreements, the Agreement on Textiles and Clothing (ATC) requires that emergency actions (imposition of quotas under Article 6) be reviewed by a special body before a challenge can be brought to the DSB.⁷²⁸ Such a review ideally permits quick decisions and, if there are errors, quick correction. As can be seen from the review of the two Panel decisions involving textiles,⁷²⁹ the special Textiles Monitoring Body (TMB), conducts something akin to a *de novo* factual review of the decision of the Member state applying restrictions.

Information that becomes available to a Member country after the date of the action challenged is routinely gathered and considered by the TMB in determining whether the action of the Member country is warranted. The TMB then makes appropriate recommendations or findings to the Members where a consensus is

⁷²⁷ DSU, *supra* note 4, art. 3.2.

⁷²⁸ See ATC, *supra* note 40, art. 8.10.

⁷²⁹ See *supra* notes 360-424 and accompanying text (discussing the Costa Rica Underwear decision); *supra* notes 425-71 and accompanying text (discussing the India Wool Shirts and Blouses Panel and Appellate Body decisions).

reached. Any party who is dissatisfied with the action of another party after the recommendations are made may seek consultations and dispute settlement under the DSU.⁷³⁰

The early Panel decisions under the WTO make clear that: (1) the issue before the Panel is not whether the recommendation of the TMB was correct or incorrect but rather whether the underlying decision of the administrator comports with ATC Article 6, and (2) the Panel will not consider later facts to support action by a Member but may consider later facts to discredit a finding of serious damage.⁷³¹

Thus, the TMB process serves little function if a matter is not resolved at the TMB stage and is essentially ignored by Panels and the Appellate Body. To the extent that Panels and the Appellate Body are correct in ignoring developments at the TMB, it raises questions as to why Member nations wanted the TMB to publish reasons for its decisions.⁷³² It is possible that fuller decisions will make consensus easier in cases over time or will satisfy the concerns of Members about recommendations contrary to their positions. However, the added work does not presumably simplify the task for Panels as the factual record will always be "polluted" with information not before the decision maker at the time of the initial decision.

C. Transitional Safeguards as an Integral Part of the ATC

In both of the textile cases, the Panels found that a transitional safeguard measure under the ATC was to be viewed as an exception rather than an integrated part of the Agreement rights.⁷³³ As Panel reports dealing with the "exception" make clear, GATT precedent construes "exceptions" narrowly.

However, in the India Wool Shirts and Blouses dispute, the Appellate Body characterized the "transitional safeguard

⁷³⁰ See *supra* note 446.

⁷³¹ See Costa Rica Underwear Panel, *supra* notes 373-99 and accompanying text; India Wool Shirts and Blouses Panel, *supra* notes 443-55 and accompanying text.

⁷³² The WTO Members decided to require the publication of full reasons as part of the Ministerial Declaration in December 1996.

⁷³³ See Costa Rica Underwear Panel, *supra* note 42; India Wool Shirts and Blouses Panel, *supra* note 51.

mechanism provided in Article 6 of the ATC as a fundamental part of the rights and obligations of WTO Members.”⁷³⁴ The Appellate Body’s construction is preferred because Article 6 is an integrated part of the ATC package. It is part of the rights and obligations and countries understood and expected action would be taken. There is no basis for treating these rights as exceptions.

D. Number of Disputes Taken to the Appellate Body

Not surprisingly, in the early stages of the WTO, every Panel report has been appealed. Perhaps more surprising has been the large number of instances where legal constructions by Panels have been reversed. The relatively high rate of reversal on appeal is likely to ensure that dockets stay jammed for some time to come.

The practical effect of a heavy Appellate Body workload is the probable desirability of having Appellate Body Members be present full time in Geneva. With the “collegiality” objective and the large number of disputes, participating on the Appellate Body has already approached a full time task. Such a change may have implications for the type of individuals who will be able to serve on the Appellate Body. At the same time, the heavy workload raises practical issues in terms of adequacy of staff and other resources for the Appellate Body (and, of course, for Panels) at the WTO.

Opinion appears divided in Geneva as to whether the dispute settlement process will slow down in terms of numbers of cases within the next few years. The workload will likely remain heavy and become increasingly complex, particularly as cases challenging anti-dumping, countervailing duty, SPS, TBT and other actions that may involve massive administrative records start to work their way through the system.

Also, the Canada Split-Run decision by the Appellate Body raises the interesting question of whether there should be the capability of remanding a matter to a Panel where the Appellate Body reverses and the remaining record does not contain adequate

⁷³⁴ India Wool Shirts and Blouses Appellate Body, *supra* note 51, at 16. The Appellate Body did not address this issue in the Costa Rica case because it was not one of the issues appealed.

information to permit the Appellate Body to complete its work without some evaluation of factual information.⁷³⁵ Obviously, the trade-off is increased time before a final decision is rendered. With judicial experience in the United States as an example, Member nations would do well to resist the urge to add a remand process to the DSU during the 1998 review.

For Panels, the complexity of cases, such as those involving photographic film and paper, and beef hormones, raises concerns about the adequacy of resources within the WTO to staff,⁷³⁶ and of the Missions within Geneva to provide, acceptable Panelists. While there are many non-governmental Panelists available, WTO staff limitations and budget limitations for use of non-governmental Panelists raise significant questions about the volume of disputes that can practically be handled at any given time.

IX. Implementation of Panel and Appellate Body Recommendations

As was discussed above, the WTO dispute settlement system is fundamentally different from the system under GATT 1947. It is more legalistic and automatic. Decisions cannot be blocked as they were in the past.⁷³⁷ Members must comply with adopted Panel or Appellate Body decisions, pay compensation, or face retaliation.⁷³⁸ The degree to which Members are implementing adverse decisions indicates that Members are taking the dispute settlement process seriously.

In the Japan Liquor dispute, the United States alleged that Japan was taking too long to implement the Appellate Body's ruling. The United States applied for binding arbitration under Article 21(3)(c) of the DSU on December 24, 1996, almost two months after the Appellate Body's decision was adopted by the

⁷³⁵ See Canada Split-Run Appellate Body, *supra* notes 556-64 and accompanying text.

⁷³⁶ Reportedly, in 1997, every lawyer within the WTO, regardless of division, worked on staffing Panels because of the existing workload.

⁷³⁷ See *supra* notes 5-8 and accompanying text.

⁷³⁸ See *supra* notes 16-21 and accompanying text.

DSB.⁷³⁹ The United States wanted the arbitrator to determine the reasonable period of time for implementation of the recommendation of the Appellate Body.⁷⁴⁰ In that case, the arbitrator found that a reasonable time to implement the recommendations would be fifteen months.⁷⁴¹

This decision is not binding on other parties in other cases, but it does provide an example of a timetable deemed reasonable for implementation of recommendations. From the Japan Liquor case it appears that the WTO will monitor implementation of recommendations but the Complainants must be vigilant in their efforts to ensure compliance and implementation in a reasonable period of time.

No other Members to date have invoked the arbitration article under the DSU to speed along a Member's implementation of a Panel or Appellate Body recommendation. It is unclear if this means that Members are faithfully and fully implementing the recommendations within a reasonable period of time. For example, the Panel and Appellate Body recommendations were adopted by the DSB in the Reformulated Gas dispute on May 20, 1996.⁷⁴² The U.S. EPA issued its final rule, to bring the U.S. measure in conformity with the adopted recommendations, on August 28, 1997.⁷⁴³

The ruling by the arbitrator in the Japan Liquor case and the EPA's action indicate that Members are taking adopted Panel and Appellate Body recommendations seriously. Implementation of adopted Panel and Appellate Body recommendations will be monitored by the DSU and the Complaining parties.

⁷³⁹ See Japan-Taxes on Alcoholic Beverages, WT/DS8/15, WT/DS10/15, WT/DS11/13 (Feb. 14, 1997) [hereinafter Report of the Arbitrator].

⁷⁴⁰ See *WTO Dispute Overview*, *supra* note 106, at 1.

⁷⁴¹ See Report of the Arbitrator, *supra* note 739, at 9.

⁷⁴² See United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/9 (May 20, 1996).

⁷⁴³ Regulation of Fuels and Fuel Additives: Baseline Requirements for Gasoline Produced by Foreign Refiners, 62 Fed. Reg. 45,533 (1997) (to be codified at 40 C.F.R. pt. 80).

X. What the Developments at the WTO During the First Two and a Half Years Mean for the Private Bar

For private practitioners and their clients in the United States, the first two and a half years of the WTO have brought about some important developments in Geneva as well as in Washington.

First, substantially increased transparency has been obtained in dispute Panel proceedings in which the United States is a party.⁷⁴⁴ This means that lawyers and their clients have a better opportunity to track issues of potential relevance and to provide comments to USTR. USTR's actual track record in complying with new statutory requirements on information available to the public is reasonably good although some problems remain.⁷⁴⁵ There are also policy questions about why written comments from the public should not be included in the public record at some point in a dispute.

Second, a framework to deal with conflicts of interest has been adopted, which should give the appearance, and hopefully the reality of more impartiality among the Panelists serving on individual disputes.

Third, the early actions of the Appellate Body suggest that parties losing Panel decisions will be able to obtain meaningful review by the Appellate Body. Lawyers will want to improve their knowledge of public international law and encourage their clients to pursue their interests through parties to the dispute.

Fourth, the role for U.S. lawyers within the WTO dispute hearing process is evolving. Counsel representing foreign governments can actively support those governments in factual research, brief writing, and, at least at the Appellate Body, in arguing if the government so wishes. At Panels, to date, appearance is permitted on consent. Counsel for U.S. interests will be able to provide input to USTR for consideration.

Fifth, just as bi-national Panels use U.S. lawyers under NAFTA, the United States has submitted a list of U.S. lawyers for inclusion on the WTO's list of non-governmental Panelists. Unlike NAFTA, inclusion on the WTO's roster will likely provide

⁷⁴⁴ See *supra* notes 87-95 and accompanying text.

⁷⁴⁵ See *supra* notes 96-99 and accompanying text.

less direct involvement simply because of the observed preference for using members of the Geneva missions as Panelists and because of WTO budget considerations.

Sixth, the potentially historic decision to derestrict most WTO documents in a timely fashion should permit lawyers and their clients to better understand the development of WTO agreements and decisions, permit the formulation of strategies that are more consistent with WTO objectives, and identify issues needing to be addressed within the WTO or in new negotiations.⁷⁴⁶ The importance of the decision will depend in significant part on the willingness of the WTO and its Members to derestrict quickly and for the WTO and/or USTR to assure ready access once documents are derestricted. The online access from the WTO to large volumes of documents is very encouraging.⁷⁴⁷

Seventh, NGOs have made modest progress in their access to the WTO. Lawyers representing NGOs should benefit from the increased access.

XI. Conclusion

Despite some unsightly squabbling during 1995 over the composition of the Appellate Body and the Director General position of the WTO, the WTO has moved forward with reasonable dispatch in assessing compliance with WTO rights and obligations. While noncompliance and non-notification, which characterized GATT, remain a problem for many developing and least developed countries, the WTO and major developed countries and some leading developing countries are providing increased technical assistance to improve both notification and compliance.

The dispute settlement process has started quickly and the high success rate of those challenging conduct of others continues under the WTO. To date, the United States has lost three challenges brought against it.⁷⁴⁸ Efforts to trim U.S. unilateralism

⁷⁴⁶ See discussion *supra* at Part III.B.

⁷⁴⁷ The WTO documents are available on line at <http://www.wto.org>.

⁷⁴⁸ See generally Reformulated Gasoline Panel and Appellate Body, *supra* notes 155-231 and accompanying text; Costa Rica Underwear Panel and Appellate Body, *supra* notes 360-424 and accompanying text; India Wool Shirts and Blouses Panel and

have had some success, although the dispute with Japan on automobiles and automobile parts shows that there will be some cases in which the United States remains willing to invoke unilateral action.⁷⁴⁹ More important, the United States, as the leading user of the dispute settlement system, has enjoyed significant success in consultations and through Panel and Appellate Body decisions.

The issue of the propriety of private counsel representing Members will remain topical for the near term. The Appellate Body, by allowing private counsel to participate in its proceeding in the EC Banana case, may create a testing ground for expanded participation, assuming it maintains this course in other disputes.⁷⁵⁰ Member nations could address the issue directly through negotiations in the DSB. Such negotiations could clarify rights before Panels and the Appellate Body. Therefore, expect any formal recognition of the right to outside counsel to be accomplished by conflict and confidentiality requirements.

The 1998 review of the DSU by Members should leave the dispute settlement system substantially unaltered. All in all, the new system has enjoyed reasonable success to date, even though significant challenges loom immediately on the horizon.

Appellate Body *supra* notes 425-71 and accompanying text.

⁷⁴⁹ See *supra* notes 134-41 and accompanying text.

⁷⁵⁰ See *supra* notes 603-06 and accompanying text.