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UNITED STATES – SECTIONS 301-310 OF THE TRADE ACT OF 1974

Report of the Panel

The report of the Panel on United States – Sections 301-310 of the Trade Act of 1974 is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 December 1999 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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

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I. PROCEDURAL BACKGROUND

1.1 This proceeding has been initiated by a complaining party, the European Communities.

1.2 On 25 November 1998, the European Communities requested consultations with the United States under Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU") with regard to Title III, chapter 1 (Sections 301-310) of the United States Trade Act of 1974, as amended (19 U.S.C., paragraphs 2411-2420)(WT/DS152/1). The United States agreed to the request. Dominica Republic, Panama, Guatemala, Mexico, Jamaica, Honduras, Japan, and Ecuador requested, in communications dated 7 December 1998 (WT/DS152/2), 4 December 1998 (WT/DS152/3), 9 December 1998 (WT/DS152/4, WT/DS152/5 and WT/DS152/6), 7 December 1998 (WT/DS152/7), and 10 December 1998 (WT/DS152/8 and WT/DS152/10) respectively, to be joined in those consultations, pursuant to Article 4.11 of the DSU. Consultations between the European Communities and the United States were held on 17 December 1998, but the parties were unable to settle the dispute.

1.3 On 26 January 1999, the European Communities requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS152/11).

1.4 In its panel request, the European Communities claims that:

> "By imposing specific, strict time limits within which unilateral determinations must be made and trade sanctions must be taken, Sections 306 and 305 of the Trade Act of 1974 do not allow the United States to comply with the rules of the DSU in situations where a prior multilateral ruling under the DSU on the conformity of implementing measures has not yet been adopted by the DSB. Where measures have been taken to implement DSB recommendations, the DSU rules require either agreement between the parties to the dispute or a multilateral finding on non-conformity under Article 21.5 DSU before any determination of non-conformity can be made, let alone any measures of retaliation can be announced or implemented. The DSU procedure resulting in a multilateral finding, even if initiated immediately at the end of the reasonable period of time for implementation, cannot be finalised, nor can the subsequent DSU procedure for seeking compensation or suspension of concessions be complied with, within the time limits of Sections 306 and 305.
>
> The European Communities considers that Title III, chapter 1 (Sections 301 - 310) of the Trade Act of 1974, as amended, and in particular Sections 306 and 305 of that Act, are inconsistent with, in particular, but not necessarily exclusively, the following WTO provisions:
>
> (a) Articles 3, 21, 22 and 23 of the DSU;
>
> (b) Articles XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization; and
>
> (c) Articles I, II, III, VIII and XI of GATT 1994.
>
> Through these violations of WTO rules, this legislation nullifies or impairs benefits accruing, directly or indirectly, to the European Communities under

> GATT 1994. This legislation also impedes important objectives of the GATT 1994 and of the WTO.

1.5 The Dispute Settlement Body ("DSB") agreed to this request for a panel at its meeting of 2 March 1999, establishing a panel pursuant to Article 6 of the DSU. In accordance with Article 7.1 of the DSU, the terms of reference of the Panel were:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS152/11, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 Brazil, Cameroon, Canada, Columbia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, Hong Kong (China), India, Israel, Jamaica, Japan, Korea, St. Lucia, and Thailand, reserved their rights to participate in the Panel proceedings as third parties. Cameroon later withdrew its reservations as a third party.

1.7 On 24 March 1999, the European Communities requested the Director-General, pursuant to Article 8.7 of the DSU, to determine the composition of the Panel. On 31 March 1999, the Director-General announced the composition of the Panel as follows:

Chairman: Mr. David Hawes

Member: Mr. Terje Johannessen

Mr. Joseph Weiler

1.8 The Panel had substantive meetings with the parties on 29 and 30 June 1999, and 28 July 1999.

II. FACTUAL ASPECTS

A. BASIC STRUCTURE OF MEASURES AT ISSUE[1]

1. Section 301(a)

2.1 Section 301(a) applies to any case in which "the United States Trade Representative determines under section 304(a)(1) that (A) the rights of the United States under any trade agreement are being denied" or "(B) an act, policy or practice of a foreign country – (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce".[2]

2.2 According to Section 304(a)(1),

> "On the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the [United States] Trade Representative shall … determine whether … the rights to which

[1] The original text of the Sections 301-310 is attached hereto as Annex I.
[2] Section 301(a)(1), 19 U.S.C. §2411(a)(1).

> the United States is entitled under any trade agreement are being denied, or any act, policy, or practice described in sub-section (a)(1)(B) or (b)(1) of section 301 exists".[3]

2.3 Section 301(a) also provides that if the USTR determines that one of these situations has occurred, "the Trade Representative shall take action authorized in [Section 301](c), subject to the specific direction, if any, of the President regarding any such action ... to enforce such rights or to obtain the elimination of such act, policy, or practice".[4]

2.4 According to Section 301(a)(2)(A), action is not required under Section 301(a) if the DSB adopts a report finding that United States rights under a WTO Agreement have not been denied or that the act, policy or practice at issue "(I) is not a violation of, or inconsistent with, the rights of the United States, or (II) does not deny, nullify, or impair benefits to the United States under any trade agreement".[5]

2.5 Section 301(a)(2)(B)(i) also provides that the USTR is not required to take action if "the Trade Representative finds that the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement". The commitment of a WTO Member to implement DSB recommendations favourable to the United States within the period foreseen in Article 21 of the DSB has, for example, been determined by the USTR to be a "satisfactory measure" justifying a termination of the investigation without taking any action under Section 301.[6]

2.6 According to Section 301(a)(2)(B)(ii) and (iii), the USTR is not required to take action if the foreign country agrees to "eliminate or phase out the act, policy or practice"[7] at issue or if it agrees to "an imminent solution to the burden or restriction on United States commerce", [8] or "provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative", when "it is impossible for the foreign country to achieve the results described in clause (i) or (ii)".[9]

2.7 Further, according to Section 301(a)(2)(B)(iv) and (v), the USTR is not required to take action when she finds that:

> "(iv) in extraordinary cases, where the taking of action ... would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this chapter";[10] or

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[3] Section 304(a)(1), 19 U.S.C. §2414(a)(1).
[4] Section 301(a), 19 U.S.C. §2411(a).
[5] Section 301(a)(2)(A), 19 U.S.C. §2411(a)(2)(A).
[6] The European Communities notes that the USTR terminated on this basis the original Section 301 investigation concerning the EC banana regime. (See Federal Register, Vol. 63, No. 204, October 22 1998, page 56688).
[7] Section 301(a)(2)(B)(ii)(I), 19 U.S.C. §2411(a)(1)(B)(ii)(I).
[8] Section 301(a)(2)(B)(ii)(II), 19 U.S.C. §2411(a)(1)(B)(ii)(II).
[9] Section 301(a)(2)(B)(iii), 19 U.S.C. §2411(a)(1)(B)(iii).
[10] Section 301(a)(2)(B)(iv), 19 U.S.C. §2411(a)(1)(B)(iv).

"(v) the taking of action under this subsection would cause serious harm to the national security of the United States".[11]

2.8 Section 301(a)(3) provides:

"(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce".[12]

2. Section 301(b)

2.9 Section 301(b) applies to an act, policy or practice which, while not denying rights or benefits of the United States under a trade agreement, is nevertheless "unreasonable or discriminatory and burdens or restricts United States commerce".[13]

2.10 Section 301(d)(3)(B) provides examples of unreasonable acts, among them the denial of opportunities for the establishment of an enterprise, failure to protect intellectual property rights, export targeting, toleration of anti-competitive practices by private firms and denial of worker rights.[14] "Discriminatory" acts, policies and practices are defined in Section 301(d)(5) as including those that deny "national or most-favoured-nation treatment to United States goods, services, or investment".[15] If the USTR determines that an act, policy or practice is actionable under Section 301(b) and determines that "action by the United States is appropriate" the USTR shall take retaliatory action "subject to the specific direction, if any, of the President regarding such action".[16]

B. SCOPE OF AUTHORITY TO TAKE ACTION

2.11 Section 301(c) authorizes the USTR to "suspend, withdraw, or prevent the application of, benefits of trade agreement concessions", or "impose duties or other import restrictions on the goods of, and … fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate".[17] If the act, policy or practice of the foreign country fails to meet the eligibility criteria for duty-free treatment under the United States' Generalised System of Preferences, the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, the USTR is also authorized to withdraw, limit or suspend such treatment. In addition, the USTR may enter into binding agreements with the country in question.

C. PROCEDURES

2.12 Sections 301-310 of the Trade Act of 1974 provide a means by which U.S. citizens may petition the United States government to investigate and act against potential violations of international trade agreements.[18] These provisions also authorize the USTR to initiate such

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[11] Section 301(a)(2)(B)(v), 19 U.S.C. §2411(a)(1)(B)(v).
[12] Section 301(a)(3), 19 U.S.C. §2411(a)(3).
[13] Section 301(b), 19 U.S.C. §2411(b).
[14] Section 301(d)(3)(B), 19 U.S.C. §2411(d)(3)(B).
[15] Section 301(d)(5), 19 U.S.C. §2411(d)(5).
[16] Section 301(b), 19 U.S.C. §2411(b).
[17] Section 301(c), 19 U.S.C. §2411(c).
[18] Section 302(a)(2), 19 U.S.C. § 2412(a)(2).

investigations at her own initiative.[19] The USTR is a cabinet level official serving at the pleasure of the President, and her office is located within the Executive Office of the President.[20] The USTR operates under the direction of the President and advises and assists the President in various Presidential functions.[21]

2.13 According to Section 302, investigations may be initiated either upon citizen petition or at the initiative of the USTR. After a petition is filed, the USTR decides within 45 days whether or not to initiate an investigation.[22] If the investigation is initiated, the USTR must, according to Section 303, request consultations with the country concerned, normally on the date of initiation but in any case not later than 90 days thereafter.[23]

2.14 Section 303(a)(2) provides that, if the investigation involves a trade agreement and a mutually acceptable resolution is not reached "before the earlier of A) the close of the consultation period, if any, specified in the trade agreement, or B) the 150th day after the day on which consultation commenced", the USTR must request proceedings under the formal dispute settlement procedures of the trade agreement.[24]

2.15 Section 304(a) provides that on or before the earlier of "(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated",[25] "[o]n the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the Trade Representative shall … determine whether" US rights are being denied.[26] If the determination is affirmative, USTR shall at the same time determine what action it will take under section 301.[27]

2.16 If the DSB adopts rulings favourable to the United States on a measure investigated under Section 301, and the WTO Member concerned agrees to implement that ruling within the reasonable period foreseen in Article 21 of the DSU, the USTR can determine that the rights of the United States are being denied but that "satisfactory measures" are being taken that justify the termination of the Section 301 investigation.

2.17 Section 306(a) requires the USTR to "monitor" the implementation of measures undertaken by, or agreements entered into with, a foreign government to provide a satisfactory resolution of a matter subject to dispute settlement to enforce the rights of the United States under a trade agreement.[28]

2.18 Section 306(b) provides:

> "(1) IN GENERAL.—If, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not

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[19] Section 302(b), 19 U.S.C. § 2412(b).
[20] See 19 U.S.C. § 2171(a), (b)(1) (1998).
[21] See 19 U.S.C. § 2171(c)(1) (1998); Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979); 19 C.F.R. § 2001.3(a) (1998).
[22] Section 302(a)(2), 19 U.S.C. §2412(a)(2).
[23] Section 303(a)(1), 19 U.S.C. §2413(a)(1)
[24] Section 303(a)(2), 19 U.S.C. §2413(a)(2).
[25] Section 304(a)(2), 19 U.S.C. §2414(a)(2).
[26] Section 304(a)(1)(A), 19 U.S.C. §2414(a)(1)(A).
[27] Section 304(a)(1)(B), 19 U.S.C. §2414(a)(1)(B).
[28] Section 306(a), 19 U.S.C. §2416(a).

> satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section 301(a). For purposes of section 301, any such determination shall be treated as a determination made under section 304(a)(1).
>
> (2) WTO DISPUTE SETTLEMENT RECOMMENDATIONS.—If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes …".[29]

2.19 Section 305(a)(1) provides that, "Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 304(a)(1)(B), subject to the specific direction, if any, of the President regarding such action" "by no later than … 30 days after the date on which such determination is made".[30]

2.20 According to Section 305(a)(2)(A), however, "the [USTR] may delay, by not more than 180 days, the implementation" of any action under Section 301 in response to a request by the petitioner or the industry that would benefit from the Section 301 action or if the USTR determines "that substantial progress is being made, or that a delay is necessary or desirable to obtain United States rights or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action".[31]

III. CLAIMS OF PARTIES

3.1 In the light of the considerations set out above and of the general principles laid down in Article 3.7 of the DSU, **the European Communities requests** the Panel

> to find that:
>
> (a) inconsistently with Article 23.2(a) of the DSU:
>
> - Section 304(a)(2)(A) of Trade Act of 1974 requires the USTR to determine whether another Member denies US rights or benefits under a WTO agreement irrespective of whether the DSB adopted a panel or Appellate Body finding on the matter; and
>
> - Section 306(b) requires the USTR to determine whether a recommendation of the DSB has been implemented irrespective of whether proceedings on this issue under Article 21.5 of the DSU have been completed;

[29] Section 306(b), 19 U.S.C. § 2416(b).
[30] Section 305(a)(1), 19 U.S.C. §2415(a)(1).
[31] Section 305(a)(2)(A), 19 U.S.C. §2415(a)(2)(A).

(b) inconsistently with Article 23.2(c) of the DSU:

- Section 306(b) requires the USTR to determine what further action to take under Section 301 in the case of a failure to implement DSB recommendations; and

- Section 305(a) requires the USTR to implement that action,

and this in both instances, irrespective of whether the procedures set forth in Articles 21.5 and 22 of the DSU have been completed; and

(c) Section 306(b) is inconsistent with Articles I, II, III, VIII and XI of the GATT 1994 because, in the case of disputes involving trade in goods, it requires the USTR to impose duties, fees or restrictions that violate one or more of these provisions; and

to rule on these grounds, that the United States, by failing to bring the Trade Act of 1974 into conformity with the requirements of Article 23 of the DSU and of Articles I, II, III, VIII and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI.4 of the WTO Agreement and thereby nullifies or impairs benefits accruing to the European Communities under the DSU, the GATT 1994 and the WTO Agreement; and

to recommend that the DSB request the United States to bring its Trade Act of 1974 into conformity with its obligations under the DSU, the GATT 1994 and the WTO Agreement.

3.2 **The United States requests** that the Panel reject the EC's claims in their entirety, and find that:

(a) Section 304(a)(2)(A) is not inconsistent with Article 23 of the DSU because the EC has failed to demonstrate that it requires the Trade Representative to determine that U.S. agreement rights have been denied in the absence of DSB rulings;

(b) Section 306(b) is not inconsistent with Article 23 of the DSU because the EC has failed to demonstrate that it requires the Trade Representative to determine that U.S. agreement rights have been denied;

(c) Sections 306(b) and 305(a)(1) are not inconsistent with Article 23 of the DSU because the EC has failed to demonstrate that these provisions require the Trade Representative to suspend concessions without DSB authorization;

(d) Section 306(b) is not inconsistent with Articles I, II, III, VIII and XI of the GATT 1994 because the EC has failed to demonstrate that this provision requires the suspension of concessions in a manner inconsistent with DSB authorization; and

(e) Sections 301-310 are not inconsistent with Article XVI:4 because they do not mandate action in violation of any provision of the DSU or GATT 1994, nor do they preclude action consistent with those obligations.

IV. ARGUMENTS OF THE PARTIES

A. OVERVIEW

4.1 **The European Communities argues** that Article 23 of the DSU prohibits unilateralism in the framework of the WTO dispute settlement procedures. Members must await the adoption of a panel or Appellate Body report by the DSB, or the rendering of an arbitration decision under Article 22 of the DSU, before determining whether rights or benefits accruing to them under a WTO agreement are being denied and whether rulings or recommendations by the DSB or an arbitrator have been implemented.

4.2 The European Communities indicates that Article 23 also requires Members to follow the procedures of the DSU on the suspension of concessions and to await an authorization by the DSB before responding to a failure to comply with such rulings or recommendations.[32]

4.3 The European Communities states that while Sections 301-310 require the United States administration to resort to the DSU in respect of WTO matters, they explicitly mandate the United States administration to proceed unilaterally on the basis of determinations reached independently of the DSB, and without its authorization, once specified time periods have lapsed. A law that requires resort to the DSU procedures but expressly stipulates unilateral determinations and actions before the end of these procedures makes a mockery of the WTO dispute settlement system.

4.4 The European Communities therefore believes that Sections 301-310 must be amended to make clear that the United States administration is required to act in accordance with the United States' obligations under the WTO agreements in all circumstances and at all times.

4.5 The European Communities indicates that the obligation set out in Article 23 of the DSU is one of the key elements in the negotiated balance of rights and obligations of the Uruguay Round.

4.6 The European Communities states that the European Communities itself as well as many other countries, consistently took the position in the Uruguay Round that a strengthened dispute settlement system must include an explicit ban on any government taking unilateral action to redress what that government judges to be the trade wrongs of others.

4.7 The European Communities argues that the creation of automatic dispute settlement procedures leave no excuse for any government to take the law into its own hands. Article 23 of the DSU and Article XVI:4 of the WTO Agreement are the principal reflections of the outcome of the negotiation in the Uruguay Round on these issues.

4.8 The European Communities indicates that its Regulation on the enforcement of WTO rights adopted after the Uruguay Round meets both the letter and the spirit of Article 23 of the DSU. This Regulation, generally referred to as the "Trade Barriers Regulation", enables Member States and Community enterprises to request the European Commission to examine

[32] The European Communities notes that an alternative route with the agreement of the parties to the dispute would be to follow the procedures under Article 25 of the DSU before an authorization to suspend concessions is sought.

obstacles to trade and to initiate international dispute settlement procedures on such obstacles.[33] However, all actions under the Regulation are "subject to compliance with existing international obligations and procedures".[34] Specifically, the Regulation provides that "where the Community's international obligations require the prior discharge of an international procedure for consultation or for the settlement of disputes" any response to the obstacle "shall only be decided after that procedure has been terminated".[35] The European Communities has faithfully implemented its obligations under Article 23 of the DSU and Article XVI:4 of the WTO Agreement and expects all the other Members of the WTO, including the United States, to do the same.

4.9 According to the European Communities, although the present complaint was ultimately prompted by the experience of the Communities with the measures the United States took under Sections 301-310 in the dispute on the European banana regime, this complaint does not concern those measures. The European Communities indicates that these measures are presently the subject matter of a different dispute (WT/DS165/1).

4.10 The European Communities further argues that this experience did however reveal the seriousness of the inconsistencies between the requirements under which the USTR is mandated to act under the domestic law of the United States and the requirements for the completion of dispute settlement procedures under WTO law. It also confirmed that the United States has implemented *ob torto collo* the results of the Uruguay Round into its legislation, keeping open for itself the possibility of resorting to unilateral measures, in clear contradiction with its obligations under the DSU.

4.11 The European Communities notes that in the statement of administrative action submitted by the President to the Congress on 27 September 1994 and approved by the Congress together with the Uruguay Round Agreements Act of 1994[36], the United States announced that

> "[t]he administration intends to use section 301 to pursue vigorously foreign unfair barriers that violate U.S. rights or deny benefits to the United States under the Uruguay Round agreements".[37]
>
> "... There is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply Section 301 sanctions that may be inconsistent with U.S. trade obligations because such sanctions could engender DSU-authorized counter-retaliation. Although in specific cases the United States has expressed its intention to address an unfair foreign practice by taking action under Section 301 that has not been authorized by the GATT, the United States has done so infrequently. In certain cases the United States has taken such action

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[33] Council Regulation (EC) No. 3286/94 of 22 December 1994, which, according to the European Communities, lays down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization.

[34] Ibid., Article 1.

[35] Ibid., Article 12.2.

[36] Section 101(a) (1).

[37] Statement of Administrative Action, *reprinted in* H.R. Doc. No. 103-316, at 1029 (US Exhibit 11), Chapter B, subchapter 2, littera b (enforcement of US rights), p. 364.

> because the foreign government has blocked adoption of a GATT panel report against it.
>
> Just as the Unites States may now choose to take Section 301 actions that are not GATT-authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round agreements".[38]

4.12 According to the European Communities, this way of implementing the results of the Uruguay Round multilateral trade negotiations is simply incompatible with the international obligations of the United States resulting from the basic deal that was struck in Marrakech in 1994.

4.13 The European Communities argues that it is in exchange for a US commitment not to resort to unilateral determination of the consistency of foreign trade measures with WTO trade rules and to section 301-type trade restrictions without multilateral authorization that the European Communities and other Uruguay Round participants agreed to accept a dispute settlement system that would allow binding adjudication of all trade disputes coming under the purview of the WTO and a credible enforcement procedure.

4.14 In the view of the European Communities, this deal responded to US criticism of the perceived imperfections of the GATT dispute settlement system which had been discussed at a special session of the GATT Council on unilateralism in 1989,[39] i.e. the possibility to block the adoption of adverse panel reports. That possibility has now been removed. Thus, it is only fair for the European Communities to require the United States to carry out the agreed counterpart of the deal by refraining from mandating recourse to unilateral section 301-type trade restrictions. This is the deal for which the European Communities bargained in the Uruguay Round.

4.15 The European Communities argues that it therefore resorted to the present dispute settlement procedures in order to ensure that the United States brings Sections 301-310, as such, into conformity with Article 23 of the DSU, as required by Article XVI:4 of the WTO Agreement. It follows from these considerations that the present complaint is not intended in any way to either foreclose or prejudge the resort of the European Communities to the DSU with respect to the discriminatory specific measures that the United States has applied or might apply in the future to European exports under Sections 301-310 of the Trade Act of 1974.

4.16 Also, the European Communities explains the legislative history of Sections 301-310 as follows: Under the Trade Expansion Act of 1962, the United States Congress granted the President the power to take actions against imports under certain conditions.[40] This statute was replaced and expanded by Title III of the Trade Act of 1974, which granted similar powers to the President in its Section 301. The Act also established procedures enabling U.S. citizens to petition the government for action against measures by foreign governments. This part of the Trade Act of 1974 was amended several times, most recently by the Uruguay Round

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[38] Statement of Administrative Action, op. cit., Chapter B, subchapter 2, littera b (enforcement of US rights), p. 366 (emphasis added).

[39] GATT doc. C/163 of 16 March 1989 (The European Communities referred to the arguments for example, contained in paras. 4.75-4.81, and 4.374-4.378 of this Report for a more detailed discussion of the negotiating history concerning Article 23 DSU).

[40] Trade Expansion Act of 1962, § 252, Pub.L. No. 87-794, 75 Stat. 879.

Agreements Act of 1994.[41] Title III of the Trade Act of 1974, as amended, entitled "Relief from unfair trade practices", comprises Sections 301-310 which set out in detail how the administration is to enforce the United States rights under trade agreements and respond to certain foreign trade practices.

4.17 The European Communities adds that most of the amendments enacted between 1974 and 1994 were designed to reduce the President's discretion under Section 301. The prevailing view in Congress was that the President had not made sufficient use of the powers under Section 301 because he had given priority to foreign policy concerns over trade interests. In the hearings preceding the 1988 amendments, Senator George J. Mitchell stated:

> "The history of Section 301 is a history of administration after administration of both parties refusing to implement the law. Instead, this president and his predecessors have used the wide discretion provided in the law to deny or to delay taking action sometimes for close to a decade… The administration will claim that [the proposed Section 301] reforms limit their discretion. But it is this very discretion which had led to the disastrous record of enforcement under Section 301".[42]

The Chairman of the Senate Finance Committee, Senator Lloyd Bentsen, took a similar position:

> "We need a trade policy that our trade partners can predict, and I maintain that requires limits on the President's discretion not to act. He needs plenty of discretion on what action to take, but limits have to be placed on his discretion to take no action".[43]

4.18 The European Communities further states that prior to the 1988 amendments of Section 301, it was the President who was authorized to determine whether the foreign government practices were actionable and whether the United States should respond to them with trade measures. In 1985, the Congress discussed whether the President's power should be transferred to the United States Trade Representative ("USTR"). Those in favour argued that it "will ensure that when decisions are made under Section 301 authority, these decisions will be made primarily for reasons of trade policy" and that it would "enhance USTR's position as the lead trade agency and ... make it less likely that trade retaliation would be waived because of foreign policy, defence, or other considerations".[44] The administration strongly opposed such a transfer of authority, arguing that the President required discretion to defend the United States interests effectively, and that the USTR in any case served at the President's pleasure and could therefore not be expected to act contrary to the President's views. Moreover, the President was in a better position to weigh the national and industry-specific interests at stake in a Section 301 investigation. Ambassador Yeutter, the former USTR, wrote to the Chairman of the Committee on Ways and Means that

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[41] See the description of the legislative history of Section 301 in. Jackson-Davey-Sykes, *Legal Problems of International Economic Relations,* Third Edition (West Publishing Co., 1995), page 818.

[42] Quoted from Judith Hippler Bello and Alan F. Holmer, The Heart of the 1988 Trade Act. A Legislative History of the Amendments to Section 301, in Jagdish Bhagwati and Hugh T. Patrick, Editors, Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System (Harvester Wheatsheaf.1990), page 58.

[43] Ibid., page 59.

[44] Quoted from Bello and Holmer, op. cit., page 51.

> "Section 301 is the H-bomb of trade policy; and in my judgement, H-bombs ought to be dropped by the President of the United States and not by anyone else".[45]

4.19 **The United States responds** that in its request for the establishment of this Panel, the European Communities defined its legal challenge to Sections 301-310 of the Trade Act of 1974 as follows:

> "By imposing specific, strict time limits within which unilateral determinations must be made that other WTO Members have failed to comply with their WTO obligations and trade sanctions must be taken against such WTO Members, this legislation does not allow the United States to comply with the rules of the DSU and the obligations of GATT 1994 in situations where the Dispute Settlement Body has, by the end of those time limits, not made a prior determination…".[46]

4.20 The United States argues that the European Communities thus from the outset has acknowledged its burden in this case: since it is challenging a law as such, and no specific action taken pursuant to the law, it must demonstrate that Sections 301-310 themselves do not allow the US government to act in accordance with its WTO obligations. As panel reports cited by the European Communities make clear, a law is not in itself inconsistent with a WTO Member's obligations unless that law mandates action which violates those obligations, even if the law does not preclude such action. The question before this Panel is therefore straightforward: do Sections 304(a)(2)(A), 306(b) and 305(a) of the Trade Act of 1974 mandate actions that are inconsistent with US obligations under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994")?

4.21 According to the United States, the European Communities falls woefully short of demonstrating that they do. The European Communities ignores key provisions of the statute and engages in tortured readings of others in an unsuccessful attempt to find even the narrowest of WTO violations – that if WTO dispute proceedings were to require the maximum time authorized under the DSU, Sections 304(a)(2)(A), 306(b) and 305(a) would require US government determinations and actions shortly before formal – and inevitable – adoption of panel, Appellate Body and arbitral findings which have already been issued. However, not even this claim is true. Sections 301 - 310 of the Trade Act of 1974 on their face ensure that the US government may make its determinations and take actions in a manner which is fully consistent with DSU Article 23 and GATT 1994 Articles I, II, III, VIII and XI. The statute does not require the USTR to make a unilateral determination that US agreement rights have been denied, nor does it impose time limits which preclude prior action by the Dispute Settlement Body either to support US determinations or to authorize actions responding to another Member's failure to comply with DSB recommendations.

4.22 The United States maintains that the USTR need not and may not, under Section 304(a)(1), determine that US agreement rights have been denied if there are not adopted panel or Appellate Body findings to that effect. The requirement to make a determination within 18 months is not frustrated by the need to comply with the additional statutory requirement that a determination that agreement rights have been denied must be based on the results of dispute settlement proceedings. The USTR is required under Section 304(a)(1) to

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[45] Quoted from Bello and Holmer, op. cit., page 52.
[46] Circulated on 2 February 1999 as document WT/DS152/11 (emphasis added).

base a determination of whether agreement rights have been denied on the results of WTO dispute settlement proceedings. Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the USTR would not be able to make a determination that US agreement rights have been denied. On this basis, she could determine that dispute settlement proceedings had not yet finished, and that a determination concerning US agreement rights would be made following completion of these proceedings. She could also, for example, terminate the Section 304 investigation on the basis of the fact that information necessary to make her Section 304(a)(1) determination is not available, then reinitiate another case. The USTR has terminated and reinitiated Section 302 investigations before, including in the *Bananas* dispute,[47] and has terminated investigations without making a determination on numerous occasions.[48]

4.23 The United States adds with respect to Section 306(b) that the European Communities is simply wrong in asserting that there are "explicit requirements to make a determination within a specified time frame whether … failure to implement DSB recommendations has occurred". When the USTR considers non-implementation to have occurred, this is not a determination. Moreover, there are no "specified time frames" for such a "consideration". Inasmuch as a consideration is no more than a belief, the USTR may, at any time – before, during or after the reasonable period of time – consider that another Member has not implemented DSB rulings and recommendations, just as a Member may consider, may believe, that another Member has violated its WTO obligations before, during and after the deadline for submitting a request to establish a panel at a given DSB meeting. Section 306 provides only that if, during the 30 days following the reasonable period, the USTR considers that non-implementation has occurred, she shall determine whether to avail herself of Article 22 procedures. Indeed, as Article 22 is currently drafted, she must avail herself of these procedures within this time frame if the United States is to preserve its WTO rights. However, nothing prevents her from not considering during that 30-day period that non-implementation has occurred.

4.24 The United States argues that nothing in Sections 301-310 requires the US government to act in violation of its WTO obligations. To the contrary, Section 303(a) of the Act requires the USTR to undertake WTO dispute settlement proceedings when a WTO agreement is involved,[49] and Section 304(a)(1)(A) provides that the USTR will rely on the results of those proceedings when determining whether US agreement rights have been denied.[50] Likewise, Section 301(a)(2)(A) explicitly indicates that the USTR need not take action when the DSB has adopted a report finding no denial of US WTO rights.[51] The European Communities acknowledges that these provisions, the core provisions establishing the relationship between Sections 301-310 and the WTO dispute settlement process, are "in conformity with the principles set out in Article 23".

4.25 The United States argues that as the complaining party to this proceeding, the European Communities bears the burden of presenting evidence and arguments sufficient to establish a presumption that Sections 301-310 of the Trade Act of 1974 are inconsistent with the DSU and

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[47] The United States refers to Termination of Investigation; Initiation of New Investigation and Request for Public Comments: European Union Banana Regime, 60 Fed. Reg. 52026 (1995) (US Exhibit 18).

[48] The United States provides a list as US Exhibit 13.

[49] Section 303(a), 19 U.S.C. § 2413(a)(2).

[50] Section 304(a)(1)(A), 19 U.S.C. § 2414(a)(2)(A).

[51] The United States notes that all of these provisions predate the conclusion of the Uruguay Round.

GATT 1994.[52] In this case, the evidence is the language of Sections 301-310 and how this language is interpreted and applied under United States law.[53] Under well-established GATT and WTO jurisprudence and practice which the European Communities appears to accept, a law may be found inconsistent with a Member's WTO obligations only if it precludes a Member from acting consistently with those obligations. The European Communities must therefore demonstrate that Sections 301-310 do not permit the United States government to take action consistent with US WTO obligations – that this legislation in fact mandates WTO-inconsistent action. The European Communities has failed to meet this burden. Its analysis of the language of Sections 301-310 ignores pertinent statutory language and relies on constructions not permitted under US law. Sections 301-310 of the Trade Act of 1974 are fully consistent with US WTO rights and obligations.

4.26 **The European Communities argues** that it has basically submitted to the panel's examination a single, fundamental claim, which is supported by a number of arguments: by adopting, maintaining on its statute book and applying Sections 301-310 (as they are presently worded) after the entry into force of the Uruguay Round Agreements (i.e. after 1 January 1995) the United States has breached the historical deal that was struck in Marrakech between the United States on the one hand, and the other Uruguay Round participants, among them its major trading partners like the European Communities and the developing countries, on the other hand.

4.27 The European Communities indicates that that deal, which it has proposed to call the "Marrakech Deal", has found its expression in the legal texts of the WTO Agreements, *inter alia* in Articles 3, 21, 22 and, most importantly, 23 of the DSU and Article XVI:4 of the Marrakech Agreement. It is the trade-off between the practical certainty of adoption by the DSB of panel and Appellate Body reports and the authorizations for Members to suspend concessions (an explicit US request[54]) and the complete and definitive abandoning by the United States of its long-standing policy of unilateral action. The second leg of the deal, which is the core of the present panel procedure, has been enshrined in the following WTO provisions:

(a) Strengthening of the multilateral system (Article 23 of the DSU and the related provisions under Articles 21 and 22)

(b) Security and predictability of the multilateral trading system (Article 3 of the DSU)

(c) Ensuring the conformity of domestic law (Article XVI:4 of the Marrakech Agreement)

4.28 The European Communities states that Article 23 of the DSU prohibits unilateralism in the framework of the WTO dispute settlement procedures. Members must await the adoption of

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[52] Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Shirts and Blouses*"), adopted 23 May 1997, WT/DS33/AB/R, p. 14.

[53] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), adopted 16 January 1998, WT/DS50/AB/R, para. 65.

[54] According to the European Communities, the United States confirmed indirectly the EC views in the following phrase: "... the United States infrequently expressed its intention to take retaliatory action, and such action was often a response to a trading partner's decision to obstruct dispute settlement proceedings". The European Communities does not warrant, of course, the statement of the United States defining the retaliatory actions also in the past as "infrequent". The reality, as all the third parties have shown, is quite different.

a panel or Appellate Body report by the DSB before determining that rights or benefits accruing to them under a WTO agreement are being denied and that rulings or recommendations by the DSB have not been implemented.

4.29 In the view of the European Communities, Article 23 also requires WTO Members to follow the procedures of the DSU, including the procedure under Article 21.5, before determining a failure to comply with such rulings or recommendations and to await an authorization by the DSB before resorting to the suspension of concessions or other obligations, where applicable on the basis of the level of such suspension determined by an arbitration decision under Article 22 of the DSU.

4.30 The European Communities further argues that Article 3 of the DSU describes the dispute settlement system of the DSU as "a central element in providing security and predictability to the multilateral trading system". As the Appellate Body has indicated in the *EC – Computer Equipment* report,[55] the objective of the "security and predictability of the multilateral trading system" is also an object and purpose of the WTO Agreements themselves. It is the reflection of the general principle of public international law "*pacta sunt servanda*" (Article 26 of the Vienna Convention of the Law of Treaties), which requires that international agreements be performed in good faith. According to the Appellate Body report in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*[56], this means in practice not merely the possibility for the Members' executive authorities to act consistently with WTO law, but requires WTO Members to provide "a sound legal basis" in domestic law for the measures required to implement their WTO obligations. The Appellate Body ruling was adopted at the request of the United States and should therefore be easily accepted by the United States as applicable also in the present case.

4.31 The European Communities further states that Article XVI:4 of the Marrakech Agreement is a fundamental, additional principle of the WTO legal system governing the relationship between domestic laws, regulations and administrative procedures (i.e. the entire domestic law of each WTO Member) and WTO law that applies over and above the obligation under general public international law enshrined in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. In fact, Article 27 of the Vienna Convention on the Law of Treaties spells out a negative obligation to refrain from invoking the domestic law in order to justify any departure from the international obligation undertaken by a State.

4.32 According to the European Communities, Article XVI:4 of the Marrakech Agreement establishes a positive obligation to ensure the conformity of such domestic law with their WTO obligations. Therefore, in cases where pre-existing domestic law was inconsistent with the new WTO obligations, including those under Article 23 of the DSU, Members were required to amend their domestic laws, regulations or administrative procedures.

4.33 For the European Communities, this also constitutes a fundamental difference from the pre-existing rules under the Protocol of Provisional Application (PPA) of GATT 1947 and the protocols of accession that permitted the maintenance of mandatory legislation inconsistent with the GATT 1947. Article XVI:4 not only confirms the abrogation of the PPA in the Introduction to the General Agreement on Tariffs and Trade 1994, but requires WTO Members to be pro-

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[55] Appellate Body Report on *European Communities/United Kingdom/Ireland – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), adopted 26 June 1998, WT/DS62/AB/R - WT/DS67/AB/R - WT/DS68/AB/R.

[56] Appellate Body Report on *India – Patents (US)*, op. cit.

active in ensuring, on their own initiative, the conformity of all of their internal law with WTO law. This task had to be accomplished by the United States no later than 1 January 1995.

4.34 The European Communities argues that the violation by the United States of its obligations enshrined in the above WTO provisions inevitably entails also a violation of Articles I, II, III, VIII and XI of the GATT 1994.

4.35 The European Communities maintains that Sections 301-310 breach the above-mentioned provisions and fundamentally undermine the Marrakech deal. The EC's main legal grounds supporting this basic claim, which will be examined in turn in more detail below, are threefold:

(a) Sections 301-310, on their face, mandate unilateral action by the US authorities in breach of Article 23 of the DSU (and consequently of Articles I, II, III, VIII and XI of the GATT 1994). This is true both under the former GATT 1947 standards concerning mandatory versus discretionary legislation and the present standards under the GATT 1994 and the Marrakech Agreement, which the European Communities considers the relevant sources of law applicable after the entry into force of the WTO Agreements. The European Communities recalls that the issue of the standards applicable to determine whether legislation is genuinely discretionary was examined at length, as shown below.

(b) In addition, Sections 301-310, even if they could be interpreted to permit the USTR to avoid WTO-inconsistent determinations and actions, could not be regarded as a sound legal basis for the implementation of the US obligations under the WTO. The lack of this "sound legal basis" produces a situation of threat and legal uncertainty against other WTO Members and their economic operators that fundamentally undermines the "security and predictability" of the multilateral trading system.

(c) Furthermore, Sections 301-310 are not in conformity with the United States' WTO obligations since they are an expression of a deliberate policy creating a pattern of executive action which is biased against WTO-conformity. Even if Sections 301-310 could be interpreted to provide the USTR with a legal basis for the implementation of the United States' obligations under the WTO, they could not be considered to be in conformity with WTO law within the meaning of Article XVI:4 of the Marrakech Agreement.

4.36 In the view of the European Communities, the arguments presented by the United States are entirely unconvincing. In particular, it defies common sense when the United States asserts

(a) that the verb "shall" in Sections 301-310 should be read to mean "may";

(b) that definite deadlines like those in Section 306 could be considered an "invitation" to the executive authorities, without showing a legal basis for such a reading of the text;

(c) that the legislation always authorizes USTR to determine that rights of the United States have not been denied and no failure to implement DSB recommendations has occurred, while the text of Section 304(a)(1) requires the USTR to base her determinations on the results of the investigation initiated under Section 302;

(d) that a chapter heading called "Mandatory action" containing a mandatory list of retaliatory measures or, in the alternative, the possibility of entering into a bilateral agreement whose main conditions are set by the law, shows that the executive has broad discretion what action to take;

(e) that the power of the President to give specific directions to the USTR in individual cases covers also the right to bar the USTR from implementing actions required by the text of Sections 301-310 and which are qualified as "mandatory" by the US Congress; and

(f) that the existence of a limited exception left in the hands of the President, which has never been used so far, conveys to the law the character of discretionary legislation.

4.37 The European Communities further argues that this is of course by no means a theoretical debate only. Sections 301-310 were drafted by the United States in the present convoluted way in order to correspond to a very precise, albeit illegitimate, goal.

4.38 According to the European Communities, eminent scholars have expressed their view on this particular aspect. For instance, Professor Robert E. Hudec wrote:

> "Section 301 is an intricate maze of mandatory commands in one place and extremely wide loopholes in the other. One needs a wiring diagram to trace whether mandatory commands given in one part will actually reach their final target without passing through at least one discretionary exit point. Even with the aid of such a diagram, one cannot predict actual outcomes".[57]

4.39 The European Communities also indicates that Professor John H. Jackson testified before the Senate Foreign Relations Committee as follows:

> "Although there are plausible ways to interpret the statutory provisions of regular Section 301 so as to give the President discretion to act consistently with the Uruguay Round dispute settlement rules, in a few cases, particularly in Section 301(a) (mandatory provision) the interpretations to do this are a bit strained. It would clearly therefore be better if the statute were amended to give the President and the Trade Representative in all cases under the statute the discretion to act in a way consistently with U.S. international obligations".[58]

4.40 According to the European Communities, these comments were prompted also by the consideration that the uncertainty about the possible use by the United States of unilateral measures "inconsistent with the Uruguay Round dispute settlement rules" defeats the purpose pursued by the Uruguay Round participants when they agreed to adopt the DSU: namely to provide security and predictability to the multilateral trading system (Article 3.2 of the DSU). This objective was subsequently confirmed by the Appellate Body in *EC – Computer Equipment* case (WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R) where it affirmed that

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[57] Robert E. Hudec, Thinking About the New Section 301: Beyond Good and Evil, in:. Jagdish Bhagwati and Hugh T. Patrick, Editors, *Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System* (Harvester Wheatsheaf 1990), page 122.

[58] Senate Committee on Foreign Relations, Hearing on the World Trade Organisation, June 14, 1994 (testimony of Professor John H. Jackson).

security and predictability are "an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994".

4.41 In the view of the European Communities, despite these comments and well-advised suggestions of eminent lawyers well versed in international trade law, the statute was adopted without amendment.

4.42 The European Communities notes that this comes as no surprise when considering the legislative history of the 1988 Trade Act which is at the origin in particular of the present draft of Section 301 (Mandatory action). During the hearings before the Senate Committee on Finance, 100th Congress, 1st session, Robert Strauss, former Special Trade Representative is quoted in an exchange with Senator Bob Packwood, Chairman of that Committee, as follows:

> Sen. Packwood: "Do you think any trade [bill] that we have should require mandatory retaliation?"
>
> Mr. Strauss: "Well, I am a little hesitant to require mandatory retaliation …I hate to make [Section 301] mandatory. I think somewhere in between…[M]ore mandatory is a bum choice of words".
>
> Sen. Packwood: "But not compulsory".[59]

The advice to "make retaliation mandatory but not compulsory" was frequently referred to throughout the debate in the Senate on mandatory retaliation.

4.43 The European Communities thus concludes that everything indicates that the apparent confusion in Sections 301-310 is nothing else than a deliberate policy. In fact, the European Communities is convinced that the United States, by maintaining a legislation on the statute book which on its face and by its intent mandates unilateral determinations and actions in breach of US obligations under the DSU and the GATT, implements a deliberate policy pursuing a double objective, which could be called the "Damocles sword effect".

4.44 The European Communities further states that on the one hand, the very existence of Sections 301-310, with their mixture of clear-cut mandatory provisions inconsistent with the DSU patched together with convoluted exceptions, creates a climate of legal uncertainty that entails by itself immediate and very concrete trade effects.

4.45 The European Communities maintains that in particular, the constant threat of imposition of unilateral measures has an influence on the behaviour and the decisions of the economic operators. In practice, the fact of the filing of a petition or the simple publication of a notice in the Federal Register announcing the initiation of an investigation, within the concrete context of the provisions contained in Sections 301-310 and the publicly known interpretation given by the US administration and the Congress, creates "chilling" trade effects that may range from the slowing down of importation of products to the more radical stoppage of any bilateral trade with the United States in those products. The recent events in the banana dispute, where retaliatory measures stopping the trade of some specific non-banana related products were adopted while the procedure for authorization to suspend concessions within the WTO had not yet been concluded, demonstrate what could happen to practically any trade operator once the unilaterally set deadlines in Sections 301-310 have expired in a given dispute.

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[59] Senate Committee on Finance, 100th Congress, 1st session, pt.1, 44-45.

4.46 For the European Communities, on the other hand, the present text and intent of Sections 301-310 are used by the United States as a "bargaining" tool in order to extract trade concessions from their trading partners, which they are not bound to make under WTO law, by threatening the violation of commitments the United States has assumed under WTO law. Whatever one may think about the legitimacy of this type of action outside the WTO, this is no longer acceptable in the WTO system, which was established on the basis of multilateralism, equality and law.

4.47 The European Communities argues that the Damocles sword effect is thus very real. The European Communities would refer the Panel not only to its own experience, but also to the cases described in the third party submissions filed by practically all of the most important trading partners of the United States.

4.48 The European Communities contends that Canada, Korea, Hong Kong China, India, Japan and Brazil, all insist on the Damocles sword effects - which they experienced themselves even after the conclusion of the Uruguay Round - and they all concur with the European Communities in indicating to the panel the unacceptable effects of this legislation with regard to the security and predictability of international trade.

4.49 **In response, the United States claims** that the European Communities, confronted with the need to find a legal basis to justify what is in essence a political case, has been forced to rely on false assumptions, speculation and miscalculations. Such an approach would be fatal to any complaining party seeking to meet its burden of proof, and this case is no exception.

4.50 In the view of the United States, the European Communities claims that Sections 301-310 of the Trade Act of 1974 on their face mandate a violation of US WTO obligations. The European Communities challenges no particular application of this legislation. Rather, it argues that the legislation by its terms "does not allow the United States to comply with the rules of the DSU and the obligations of GATT 1994" because of time frames in the statute.

4.51 The United States maintains that the terms of Sections 301-310 are readily available and may easily be compared to the requirements of DSU Article 23. Sections 301-310 do not prevent the United States from following to the letter the requirements of the DSU. This legislation provides ample discretion to the United States Trade Representative to pursue and comply with multilateral dispute settlement procedures in every instance. The United States notes that the European Communities cites with approval the conclusion of Professor Hudec that Section 301 includes "extremely wide loopholes", which further reinforces the fact that Section 301 provides for very broad discretion. The European Communities may not assume that the USTR will exercise this discretion in a WTO-inconsistent manner, nor may the European Communities assume away discretionary elements of the statute in order to make its case. The European Communities has taken on the task of demonstrating that Sections 301-310 mandate a WTO violation, and it has failed.

4.52 The United States explains that as the European Communities made clear, this case does not call for the Panel to examine whether the actions of either party in connection with the *Bananas* case were consistent with their WTO obligations. Nevertheless, the reason this case has been filed is because the European Communities found itself in the position of having failed to comply with DSB rulings and recommendations in that matter. The EC's reaction to that situation was: to bring this case. EC officials publicly and loudly attempted to cast the issue in *Bananas* as one of US unilateralism, and declared a case against Section 301 the appropriate response. In other words, the European Communities decided to bring a political case to distract attention from itself.

4.53 The United States argues that notwithstanding its political origins, this case must not be about politics, but about law. The issue before the Panel is not whether Sections 301-310 of the Trade Act of 1974 are popular or desirable; rather, it is whether the European Communities has demonstrated that this legislation "does not allow" the United States to comply with DSU rules, as the European Communities asserts in its panel request.

4.54 In the view of the United States, the European Communities has brought a political case that is in search of a legal argument. It is apparent that this search continues. Having unsuccessfully argued that Sections 301-310 mandate violations of DSU Article 23 based on a comparison of statutory and DSU time frames, the European Communities now argues that DSU time frames are irrelevant. Indeed, the European Communities appears to argue that the textual obligations set forth in the DSU and WTO Agreement are irrelevant. In their stead, the European Communities posits a "new legal environment", in which certain discretionary legislation may be treated as mandatory, and may be found to violate an unspecified and non-existent obligation to avoid "uncertainty". The EC's approach to this case is driven by its desire for a specific result at the expense of sound legal reasoning. This approach reinforces the fact that its goal is political, and its legal approaches without merit.

4.55 The United States argues that the EC's main objective in, and approach to, this proceeding is illustrated by two statements in the EC's answers to the Panel's questions:

> "It is true that Article 23.2(a) of the DSU was drafted with Sections 301-310 of the Trade Act of 1974 in mind. But this means, of course, that the Uruguay Round participants had also in mind the threat to the security and predictability of the international trade relations created by the text of the Trade Act as it was drafted in the 1988 version. They had therefore in mind the need to insert in the covered agreements language that would constitute the second leg of what the EC has proposed in its oral statement of 29 June to call the 'Marrakesh deal'.
>
> A law that requires a determination in all cases *whether* a violation of WTO law has occurred therefore comprises the requirement to determine in certain cases *that* a violation of WTO law has occurred. Such a law therefore mandates determinations that are inconsistent with Article 23".

4.56 According to the United States, the first quotation illustrates the EC's view of the purpose of DSU Article 23: as a tool to attack Sections 301-310. However, the EC's intention to use DSU Article 23 against Sections 301-310 has been hamstrung by the fact that this legislation does not mandate any violation of DSU Article 23 or any other WTO obligation. The European Communities itself quotes the conclusions of Professors Jackson and Hudec that, "there are plausible ways to interpret the statutory provisions of regular Section 301 as to give the President discretion to act consistently with the Uruguay Round dispute settlement rules", and that Section 301 includes "extremely wide loopholes". Under the well-established principle that discretionary legislation is not WTO-inconsistent if it permits WTO-consistent action, Sections 301-310 cannot be found inconsistent with DSU Article 23. This is because Sections 301-310 provide adequate discretion for the United States to comply with DSU rules and procedures in each and every case.

4.57 The United States is of the view that the EC's response to this situation has been to develop novel and untenable definitions of the term "mandatory", as illustrated by the second quotation, and to create out of whole cloth new WTO obligations centering on "security and predictability" where the text of the WTO Agreement, including the DSU, cannot be stretched to achieve the EC's political objectives. Apparently unwilling to go so far as Hong Kong and

dispense with the distinction between mandatory and discretionary legislation altogether, the European Communities now argues that the Panel should disregard the clear and consistent delineation between discretionary and mandatory measures set forth in each and every GATT and WTO panel report that has dealt with the issue, and instead redefine "mandatory" to include a law which *might* "in certain cases" be exercised in violation of DSU Article 23. The European Communities further asks the Panel to find that avoiding "uncertainty" and ensuring "security and predictability" are not only objectives of the WTO and DSU, but are obligations, or else require the Panel to adopt interpretations of DSU Article 23 and WTO Agreement Article XVI:4 that are at odds with the actual text of those provisions.

4.58 The United States states the Panel must reject these requests. The European Communities has failed to meet its burden in this dispute on either the law or the facts. The continued applicability of the rule distinguishing mandatory and discretionary legislation is clear, as is the ordinary meaning of the text of DSU Article 23 and WTO Article XVI:4. It is also clear that Sections 301-310 provide more than adequate discretion to the USTR to comply with DSU Article 23 and other WTO obligations in every case. Section 304 permits the USTR to base her determinations on adopted panel and Appellate Body findings in every case. And Section 306 permits, in every case, the USTR to request and receive DSB authorization to suspend concessions in accordance with DSU Article 22. As Japan correctly notes, "laws are not inconsistent with WTO rules when … discretion [to comply with WTO obligations] is given to administrators under the laws". Sections 301-310 are thus consistent with DSU Article 23, WTO Agreement Article XVI:4, and GATT 1994 Articles I, II, III, VIII and XI.

4.59 The United States argues that with respect to WTO Agreement Article XVI:4, it is important to recognise that a measure must first violate some other WTO commitment in order to violate Article XVI:4. The ordinary meaning of the text of this provision makes this clear: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". If those laws, regulations and administrative procedures conform with the obligations in the annexed agreements, including the DSU, there is no violation of Article XVI:4. The European Communities may not assume that Sections 301-310 violate the DSU for the purpose of finding a violation of Article XVI:4.

4.60 The United States asserts that in the end, the legal analysis of whether Sections 301-310 are consistent with US WTO obligations must focus on the text of the provisions setting forth those obligations. It must focus on the language of the Agreement. Not on objectives, and not on alleged deals so recently invented that their names have to be "proposed". The rights and obligations of the Members of the World Trade Organization are found in the text of the agreements they negotiated. The text reflects, better than any paraphrasing by any Member, the objectives and purposes of all Members when they negotiated those agreements. The Panel's analysis must begin, and end with text.

4.61 The United States argues that the question in this dispute, and the only question, is whether Sections 301-310 command the United States to violate specific WTO obligations found in the text of DSU Article 23, WTO Agreement Article XVI:4 and GATT 1994 Articles I, II, III, VIII and XI. The answer to this question is no, and the only way the European Communities can achieve its desired political result is to assume bad faith on the part of another WTO Member. This it may not do.

4.62 The United States further states that if ever there were a case which emphasised the importance of the rule of law, this is that case. The law is the protector of both the weak and the strong, equally. It protects the small and the large, equally. It protects the popular and the

unpopular, equally. While there are cases where the small and weak are grateful for the restraints it places on the powerful, there are others in which the law provides a shelter to the unpopular, whatever its size, when it has done no wrong. The United States knows that Sections 301-310 are not popular. But the WTO and the DSU are not a club to be used in a popularity contest against any one Member. If they are credibly to protect the weak, they must also protect the strong against attacks not on what they have done, but on who they are. And a statute does no wrong unless it commands authorities to violate their WTO obligations.

4.63 According to the United States, here at the WTO, the law, the substantive provisions of the WTO Agreement and its annexes, enforced through the provisions of the dispute settlement system, provides security and predictability to all WTO Members. That security and predictability rests firmly on a mode of legal analysis which focuses first and foremost on the text of the Agreement, because that is what the Members have agreed to. It is the text which they signed; it is the text which they submitted to their legislatures for approval by the representatives of their people. The Members brought to the negotiation of the text a number of objectives and purposes, some of which are explicitly listed in the text, and some of which are not. In either case, however, those objectives and purposes are reflected in the agreement text itself. There can be no security and predictability in the multilateral trading system if the explicit rules Members have agreed to may be ignored in favour of a mode of analysis driven by a desire to achieve a specific result. The law must apply equally to all, and in all cases.

4.64 The United States notes that by its terms of reference, this dispute is not about something the United States has done. Because of this, it is not proper to speculate about what the United States might do, any more than it would be proper for the United States to bring a case based on speculation that another Member will not act in accordance with its obligations. The only way that a panel may rule on something that a Member might do in the future is if that Member's law commands it to do it. It may not be assumed that they will not fulfill their solemn international obligations if they are in a position to do so. Only when a Member has crossed the line, by enacting a law which does not permit compliance with its international obligations, has it created a situation in which other Members have a legitimate and non-speculative basis for assuming that another Member will not abide by its international obligations. Only then will those Members find the security and predictability of their trade threatened in a manner distinguishable from the ever-present uncertainty as to whether other Members will fulfill their obligations.

4.65 The United States contends that as has been clear from the outset of this case, Sections 301-310 allow the USTR to comply fully with US obligations under the WTO Agreement and its annexes. This law does not command the USTR to violate the WTO obligations of the United States. This law by its mere existence violates none of these obligations. The EC's transparent efforts to turn this proceeding into a forum for making political attacks on US trade policy only highlight the absolute void at the center of its legal case. It has none. This Panel must find that the European Communities has failed to meet its burden of establishing that Sections 301-310 of the Trade Act of 1974 are inconsistent with DSU Article 23, WTO Agreement Article XVI:4 and GATT 1994 Articles I, II, III, VIII and XI, and that Sections 301-310 are therefore not inconsistent with these obligations.

B. WTO PROVISIONS AT ISSUE - DSU ARTICLE 23.2(A) AND (C)

4.66 **The European Communities points out** that the parts of Article 23 of the DSU relevant in this proceeding are:

> "1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding
>
> 2. In such cases, Members shall:
>
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
>
> ...
>
> (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".

4.67 The European Communities claims that these provisions clearly oblige the United States to refrain from unilaterally determining whether another Member has denied rights or benefits under a WTO agreement to the United States and whether DSB rulings and recommendations have been implemented. They also leave no doubt that obligations under the GATT and the GATS may be suspended in response to a failure to comply with DSB rulings and recommendations only upon the grant of an authorization by the DSB.

4.68 **The United States notes** that Article 23.2(a) provides that Members shall:

> "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding".

4.69 The United States argues that thus, for there to be a violation of Article 23.2(a): (1) there must be a determination that a WTO agreement violation has occurred; and (2) that determination is not consistent with panel or Appellate Body report findings adopted by the DSB or an arbitration award rendered under the DSU. Because the European Communities has not, as part of this case, alleged that a specific US determination violates Article 23.2(a), the European Communities must show that, under Sections 301-310, the USTR is required to make a violation determination, and to do so in a manner inconsistent with panel or Appellate Body findings adopted by the DSB.

4.70 The United States states that Article 23.2(c) requires Members to "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations" when a Member has failed to implement DSB rulings and recommendations. Again, no actual case involving the suspension of concessions is before this Panel. It is thus not possible to determine whether the United States in such a concrete case actually complied with the requirements of Article 22. The only question, then, is whether Section 306(b) commands the USTR not to follow Article 22 procedures or to suspend concessions without DSB authorization. The United States indicates that it manifestly does not. Nothing in Section 306(b) or in Section 305(a) prevents the USTR from complying to the letter with Article 22 procedures, including DSB authorization.

4.71 **The European Communities adds** that international customary law recognises that a party to a treaty breached by another party may reciprocally suspend proportional obligations under the treaty.[60] However, it is also recognised that this right may only be exercised in accordance with any provision in the treaty applicable in the event of a breach.[61]

4.72 The European Communities maintains that Articles XXII and XXIII of the GATT 1947 were such provisions. Clair Wilcox, a drafter of the Havana Charter for an International Trade Organisation (ITO), from which these provisions derived, explained their rationale as follows:

> "We have introduced a new principle in international economic relations. We have asked the nations of the world to confer upon an international organisation the right to limit their power to retaliate. We have sought to tame retaliation, to discipline it, to keep it within bounds. By subjecting it to the restraints of international control, we have endeavoured to check its spread and growth, to convert it from a weapon of economic warfare to an instrument of international order".[62]

4.73 The European Communities states that this idea was forcefully expressed in Article 92 of the Havana Charter:

> "Reliance on the Procedures of the Charter
>
> 1. The Members undertake that they will not have recourse, in relation to other Members and to the Organisation, to any procedure other than the procedures envisaged in this Charter for complaints and the settlement of differences arising out of its operation.
>
> 2. The Members also undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter".

4.74 According to the European Communities, international customary law also recognises that a fundamental change of circumstances not foreseen by the parties to a treaty may, under certain conditions, be invoked as a ground for terminating or withdrawing from the treaty.[63]

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[60] Vienna Convention on the Law of Treaties, Article 60.1.
[61] Ibid., Article 60.4.
[62] UN document E/PC/T/A/PV6, page 4.
[63] Vienna Convention on the Law of Treaties, Article 62.

However, the right of a party to such action may in principle be exercised only with respect to the treaty as a whole.[64] International customary law does not entitle a party to a treaty to perform its obligations selectively on the ground that the balance of interest under the treaty has shifted to its disadvantage.

4.75 The European Communities argues that in respect of the GATT 1947, the United States did not consider itself prevented from taking unilateral restrictive trade actions.[65] In its view, unilateral measures were justified because the dispute settlement procedures of Article XXIII were based on consensus and the approval of the suspension of obligations in response to another contracting party's failure to observe obligations could therefore be blocked by the defendant party.

4.76 In the view of the European Communities, the United States also did not consider itself bound by the unconditional most-favoured-nation principle of the GATT 1947 because it enabled contracting parties to obtain the benefit of negotiated market access commitments or new rules even if they had not contributed to the liberalisation efforts or accepted the new rules.

4.77 According to the European Communities, the United States believed that these features of the GATT 1947 justified resorting to unilateral trade measures inconsistent with the GATT whenever the GATT mechanisms did not produce results meeting its expectations. In 1989, during a special session of the GATT Council of Representatives on unilateral measures, the United States explained:

> "Wherever it could, the United States would challenge unfair practices under the dispute settlement provisions of the General Agreement or the Tokyo Round Codes, but where other contracting parties prevented or impeded that process or blocked efforts to ensure that their practices were covered by multilateral disciplines, the United States would act to protect its interests. If such action was considered unilateral, it should be nevertheless recognised as perfectly justifiable, responsive action necessitated by the failure of bilateral or multilateral efforts to address a problem. The way to minimise or avoid unilateralism was to create a credible multilateral system - by strengthening the existing system".[66]

4.78 The European Communities further argues that the Uruguay Round ended with a considerably strengthened multilateral system:

(a) the possibility of blocking the dispute settlement procedures was eliminated;

(b) the Uruguay Round results were adopted as a "single undertaking" replacing the GATT 1947. This ensured that, notwithstanding the most-favoured-nation provisions of the GATT 1947, only those countries that accepted the additional obligations were accorded the corresponding rights;

(c) as a result, all WTO Members are now bound by agreements similar to the Tokyo Round Codes and the main areas the United States had found missing in

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[64] Ibid., Article 44.
[65] Cf. Statement of Administrative Action, op. cit.
[66] GATT document C/163 of 16 March 1989, page 4.

> the GATT 1947 - protection of intellectual property rights and trade in services - were made subject to enforceable rules.

4.79 The European Communities contends that as a counterpart, the United States accepted the obligations in Article 23 of the DSU, the introductory clause of which reads:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding".

4.80 The European Communities considers this provision to be one of the cornerstones of the multilateral trading system. Security and predictability in international trade relations is inconceivable unless each and every WTO Member scrupulously submits all trade disputes to the DSU procedures.

4.81 According to the European Communities, if Members take the law into their own hands and unilaterally impose their own views on their rights under the WTO by threatening or taking measures violating their obligations, they risk provoking spirals of retaliatory actions that would jeopardise the results of half a century of trade negotiations.

C. EVIDENTIARY AND OTHER MATTERS

1. Burden of Proof and Fact-finding concerning Domestic Law

4.82 **The European Communities** argues that according to the Appellate Body's decision in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*,

> "The foundation of dispute settlement under Article XXIII of the GATT 1994 is the assurance to Members of the benefits accruing directly or indirectly to them under the GATT 1994. This was true as well of dispute settlement under the GATT 1947. If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then dispute settlement is available. With respect to complaints of violation of obligations pursuant to Article XXIII:1(a) of the GATT 1994, Article 3.8 of the *DSU* codifies previous GATT 1947 practice:
>
> > 'In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge'.
>
> Article 3.8 of the *DSU* provides that in cases where there is an infringement of the obligations assumed under a covered agreement – that is, in cases where a violation is established – there is a presumption of nullification or impairment. Article 3.8 then goes on to explain that "the Member against whom the complaint has been brought" must rebut this presumption. However, the issue

> in this case is not what happens after a violation is established; the issue in this case is which party must first show that there is, or is not, a violation. …
>
> In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[67]

4.83 The European Communities considers that in the *India - Patents (US)* case, the Appellate Body refined its above-mentioned milestone decision by addressing the specific issue of the authority of Panels and the Appellate Body when interpreting India's municipal law (i.e. a domestic law of a Member) as follows:

> "In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations. For example, in *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:
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> > It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures. *The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.* (original emphasis)
>
> In this case, the Panel was simply performing its task in determining whether India's 'administrative instructions' for receiving mailbox applications were in conformity with India's obligations under Article 70.8(a) of the *TRIPS Agreement*. It is clear that an examination of the relevant aspects of Indian municipal law and, in particular, the relevant provisions of the Patents Act as they relate to the 'administrative instructions,' is essential to determining

[67] WT/DS33/AB/R, chapter IV, page 12 and following.

> whether India has complied with its obligations under Article 70.8(a). There was simply no way for the Panel to make this determination without engaging in an examination of Indian law. But, as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law 'as such'; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*. To say that the Panel should have done otherwise would be to say that only India can assess whether Indian law is consistent with India's obligations under the *WTO Agreement*. This, clearly, cannot be so".

4.84 In the view of the European Communities, more specifically on the issue of which of the parties bore the burden of determining the interpretation of India's domestic law in order to assess its conformity with the TRIPs Agreement, the Appellate Body then added the following:

> "The Panel states:
>
> > 'As the Appellate Body report on *Shirts and Blouses* points out, 'a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim'. In this case, it is the United States that claims a violation by India of Article 70.8 of the TRIPS Agreement. Therefore, it is up to the United States to put forward evidence and legal arguments sufficient to demonstrate that action by India is inconsistent with the obligations assumed by India under Article 70.8. In our view, the United States has successfully put forward such evidence and arguments. Then, ... the onus shifts to India to bring forward evidence and arguments to disprove the claim. We are not convinced that India has been able to do so (footnotes omitted)'.
>
> This statement of the Panel is a legally correct characterization of the approach to burden of proof that we set out in *United States - Shirts and Blouses*. However, it is not sufficient for a Panel to enunciate the correct approach to burden of proof; a Panel must also apply the burden of proof correctly. A careful reading of paragraphs 7.35 and 7.37 of the Panel Report reveals that the Panel has done so in this case. These paragraphs show that the United States put forward evidence and arguments that India's 'administrative instructions' pertaining to mailbox applications were legally insufficient to prevail over the application of certain mandatory provisions of the Patents Act. India put forward rebuttal evidence and arguments. India misinterprets what the Panel said about "reasonable doubts". The Panel did not require the United States merely to raise "reasonable doubts" before the burden shifted to India. Rather, after properly requiring the United States to establish a *prima facie* case and after hearing India's rebuttal evidence and arguments, the Panel concluded that *it* had 'reasonable doubts' that the 'administrative instructions' would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court".

4.85 The European Communities finally points out that in the context of the *Argentina – Textiles and Apparel (US)* panel procedure, the United States submitted its views on how the burden of proof should be shared between the parties to the dispute when considering the interpretation of a Member's domestic law:

> "The United States contended that, by any standard, the evidence submitted by the United States was sufficient to establish a presumption of a violation of Article II. In fact, the Panel needed look no further than the face of the Argentine resolutions and decrees imposing the specific duties that were the subject of this dispute. ... Previous GATT jurisprudence had made clear that this potential, in and of itself, was a sufficient basis for the Panel to find that Argentina had violated Article II.
>
> The United States also argued that a Panel could condemn Argentina's mandatory minimum specific import duties even if they were not yet being applied".[68]

4.86 The European Communities further argues that the panel in the *Argentina – Textiles and Apparel (US)* case assessed the legal situation as follows:

> "We consider that when the Appellate Body refers to the obligation of the complainant party to provide sufficient evidence to establish a "presumption", it refers to two aspects: the procedural aspect, i.e. the obligation for the complainant to present the evidence first, but also to the nature of evidence needed. In the present case, we consider that it was for the United States to raise a presumption that Argentina did violate the provisions of Article II of GATT. Then, it is for Argentina to provide sufficient evidence to rebut the said presumption. When, however, Argentina is claiming a specific affirmative defense, such that its national challenge procedure can be used to correct any alleged violation of GATT rules, it is for Argentina to raise first a presumption that such system operates in a way that there is, in effect, no infringement of GATT/WTO rules".[69]

4.87 In the view of the European Communities, it appears from the above mentioned quotations from earlier Panel and Appellate Body reports that, in the specific case at hand, the European Communities is subject to the burden of proving the existence of the attacked US domestic legislation (i.e. Sections 301-310). Moreover, the European Communities bears the burden to establish the existence of a *prima facie* violation of the provisions of the covered agreements invoked in its request for establishment of this Panel.

4.88 The European Communities contends that the Appellate Body therefore concluded that, while panels cannot interpret domestic law as such, they can examine it to determine whether the WTO Member has met its obligations. Otherwise, so the Appellate Body ruled, only the defendant itself would be able to assess whether its law is consistent with its obligations. This could clearly not be so. The Appellate Body noted that GATT/WTO panels had conducted a detailed examination of domestic law to determine its conformity with GATT/WTO obligations. The Appellate Body cited,[70] as an example, the GATT panel on *United States - Section 337 of the Tariff Act of 1930*[71] which conducted a detailed examination of the relevant United States'

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[68] Panel Report on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel (US)*"), adopted 22 April 1998, WT/DS56/R, paras. 3.199-3.200.

[69] Ibid., para. 6.37.

[70] Appellate Body Report on *India – Patents (US)*, op. cit., para. 67.

[71] Panel Report on *United States - Section 337 of the Tariff Act of 1930* ("*US – Section 337*"), adopted on 7 November 1989 , BISD 36S/345.

legislation and practice to determine whether Section 337 was consistent with Article III.4 of the GATT 1947.

4.89 The European Communities states that it may therefore be concluded that the United States could not validly claim that only it can interpret its own laws and that the Panel would consequently have to rely on the United States' interpretation of Sections 301-310 to determine whether they are in conformity with WTO law.

4.90 The European Communities maintains that with all these elements in mind, it appears that the interpretation of the burden of proof suggested by the United States itself in the *Argentina – Textiles and Apparel (US)* case constitutes an appropriate way forward in the context of this particular dispute.

4.91 The European Communities argues that it is thus required

(a) to submit the text of the relevant provisions of Sections 301-310 and

(b) to indicate how, on their face, their wording is in contradiction with the US WTO obligations.

4.92 According to the European Communities, in particular, it has shown and will further show that the text of Sections 301-310 mandates determinations and actions in violation of Articles 3, 21, 22 and 23 of the DSU and, consequently, of Articles I, II, VIII and XI of the GATT 1994; it has shown and will further show that Sections 301-310 do not provide a sound legal basis for the executive actions necessary to implement US WTO obligations, thus violating the good faith implementation principle under the Vienna Convention on the Law of Treaties and Article 3.2 of the DSU; finally, it has shown and will further show that the text, structure, design and architecture of Sections 301-310 create a pattern of executive practice that undermines the substantial objectives of the WTO thus also violating Article XVI:4 of the Marrakech Agreement. This already meets the burden of proof of the European Communities and therefore shifts the burden upon the United States as the respondent.

4.93 The European Communities then maintains that in any case, *ad abundantiam*, it submitted and will submit as further evidence additional contextual documentation and information concerning the official interpretation by the US executive authorities and the Congress. Finally, the European Communities also provided, and will continue to provide, additional proof by submitting contextual evidence concerning the practice followed by the United States in the practical implementation of Sections 301-310.

4.94 In the EC's view, at the end of this procedure, given the particular context of this case and having considered the specific obligations of positive action enshrined in Article XVI:4 of the Marrakech Agreement, a legal uncertainty that might persist with respect to the interpretation of Sections 301-310 should play to the detriment of the respondent, in its capacity of WTO Member on which legally lies the obligation to ensure the compatibility of its internal legislation with WTO obligations as from 1 January 1995.

4.95 **The United States responds** that as the complaining party, it is the European Communities, not the United States, that bears the burden of proof in this case.[72] As a result,

[72] The United States cites Appellate Body Report on *US – Shirts and Blouses*, op. cit., p. 14 as stating that "it is a generally-accepted canon of evidence in civil law, common law and, in fact, most

the European Communities is obligated to establish a *prima facie* case with respect to each of the elements necessary to demonstrate the violations alleged. Establishing a *prima facie* case requires presenting both sufficient legal arguments and, where factual issues are in dispute, adequate supporting evidence. The Appellate Body has made this clear, stating that a panel should begin "its analysis of each legal provision by examining whether the [complaining party] has presented evidence and legal arguments sufficient to demonstrate that the … measures were inconsistent with the obligations assumed by the [responding party] under each article of the [applicable] agreement addressed by the Panel".[73]

4.96 The United States further argues that to establish a *prima facie* case, the European Communities must provide evidence and arguments sufficient to establish a presumption that Sections 301-310 violate a provision of a WTO agreement.[74] In this regard, the Appellate Body has stated, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof . . . [T]he party who asserts a fact … is responsible for providing proof thereof".[75]

4.97 The United States asserts that absent such a showing, the United States, as the responding party, need not rebut the allegations. The Appellate Body has explained that "[o]nly after such a *prima facie* determination has been made by the Panel may the onus be shifted to the [responding party] to bring forward evidence and arguments to disprove the complaining party's claim".[76] The United States notes that, despite this fact, it has nevertheless rebutted each EC claim.

4.98 According to the United States, the EC's statements in this case with respect to whether Sections 301-310 mandate determinations and actions violating DSU Article 23 have consisted of mere assertions, a fact exemplified by the statement of the European Communities that it had met its burden simply by providing a copy of the text of Sections 301-310. The United States reiterates that the EC's case rests on numerous unsupported, erroneous assumptions. To meet its burden, the European Communities must in fact prove why, under US law, each and every one of the EC assumptions identified by the United States is correct, and why, under US law, the interpretations of Sections 301-310 put forward by the United States are incorrect.

4.99 The United States points out that in meeting its burden in this dispute, the European Communities may not rely on "mere assertions".[77] The European Communities claims that it

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jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".

[73] Appellate Body Report on *EC – Measures Affecting Meat and Meat Products (Hormones)* ("*EC - Hormones*"), adopted 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 109; see also, Appellate Body Report on *US - Shirts and Blouses*, op. cit., p. 16 ("a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim"); and Appellate Body Report on *India – Patents (US)*, op. cit., para. 74 (noting that the Panel had "properly requir[ed] the [complaining party] to establish a *prima facie* case" before proceeding to the next step of its evaluation of the claim at issue).

[74] Appellate Body Report on *US - Shirts and Blouses*, op. cit., p. 13.

[75] Ibid., p. 14.

[76] Appellate Body Report on *EC - Hormones*, op. cit., para. 109; see also, Appellate Body Report on *US - Shirts and Blouses*, op. cit., p. 14.

[77] The United States cites Appellate Body Report on *US – Shirts and Blouses*, op. cit., p. 14 as stating that "we find it difficult, indeed, to see how any system of judicial settlement could work if it

may meet its burden merely by submitting the text of Sections 301-310, because the statute on its face mandates a violation. It cites *Argentina – Textiles and Apparel (US)* for this proposition. However, in *Argentina – Textiles and Apparel (US)*, the issue was whether Argentina's law provided for a tariff in excess of bound rates, and the United States demonstrated that the law did, in fact, provide for such a tariff. Moreover, contrary to the impression the European Communities attempts to leave, the United States made its case not only through an analysis of the law, but also through submission of data and charts relating to average prices and specific transactions. As a result, the burden shifted to Argentina.[78]

2. Relevance of the US Statements before the Panel and Statement of Administrative Action

4.100 **The European Communities indicates** the International Court of Justice has, in a limited number of cases, considered unilateral declarations made by high State representatives as internationally binding on that State. Moreover, some GATT 1947 panels have attached legal value to declarations made by a party to a panel procedure concerning the future exercise of the discretionary power conferred to it domestically by a legislative act.

4.101 In the view of the European Communities, in the *East Greenland* case,[79] the declaration at issue was made by the Minister of Foreign Affairs of Norway in a bilateral meeting with a representative of Denmark. The declaration had to do with a dispute over the territorial sovereignty with regard to certain parts of Eastern Greenland.

4.102 According to the European Communities, it is clear that this situation is not comparable with the present situation, because while the Permanent Court of International Justice considered that such a declaration was binding on Norway, this declaration had a recipient and was made in a context similar to that of the conclusion of an international agreement.

4.103 The European Communities considers this case irrelevant for present purposes, because in the *East Greenland* case the issue of the application and correct interpretation of a piece of domestic legislation was not at stake. This could never have been achieved by a declaration made in private during a bilateral contact between governments. The situation described in the judgement does not in fact resemble a unilateral declaration of the executive branch of the Norwegian government, but was made in bilateral contacts aimed at settling a dispute over territorial sovereignty.

4.104 The European Communities argues that in the *Nuclear Tests* case,[80] the International Court of Justice dealt with unilateral public declarations of high representatives of France, including the President of the French Republic concerning the termination of atmospheric nuclear tests. In this context, the ICJ states the following:

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incorporated the proposition that the mere assertion of a claim might amount to proof . . . [T]he party who asserts a fact . . . is responsible for providing proof thereof".

[78] See Panel Report on *Argentina –Textiles and Apparel (US)*, op. cit., paras. 6.41-6.65.

[79] Judgement of the Permanent Court of International Justice of 5 April 1933 on the *Legal Status of Eastern Greenland*, PCIJ Reports 1933, p. 21 (cf. specifically p. 71 referring to the reply by the Minister of Foreign Affairs of Norway to a request by the representative of Denmark).

[80] Judgement of the International Court of Justice of 20 December 1974 in the *Nuclear Tests Case*, ICJ Reports 1974, 253 (cf. specifically para. 43).

> "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding".

It appears from the judgement that the ICJ considered the intent of being bound, the public character of the declaration and the rank of the representatives of France decisive for its finding that the declaration created international obligations for France.

4.105 The European Communities asserts that in the circumstances of the present case, the situation is quite different, because the European Communities is confronted with the issue of the application and correct interpretation of a piece of domestic US law, i.e. Sections 301-310 of the US Trade Act of 1974.

4.106 According to the European Communities, even if it were demonstrated (*quod non*) that the executive branch of the US government has broad discretion on how to apply Sections 301-310 in individual cases, it must be recalled that, as a matter of fact, the United States has already made an official and public declaration by its President concerning the way in which it intends to apply Sections 301-310 in cases of disputes under the procedures instituted by the WTO in form of the Statement of Administrative Action.

4.107 The European Communities states that the Statement of Administrative Action was approved by the US Congress together with the Uruguay Round Agreements and is thus domestically binding on the executive branch of the US government. As the United States has explained itself, the Statement of Administrative Action is "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law".[81]

4.108 The European Communities points out that as the Panel is aware, the Statement of Administrative Action contains the following portion:

> "There is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply section 301 sanctions that may be inconsistent with U.S. trade obligations because such sanctions could engender DSU-authorized counter-retaliation. Although in specific cases the United States has expressed its intention to address an unfair foreign practice by taking action under section 301 that has not been authorized by the GATT, the United States has done so infrequently. In certain cases, the United States has taken such action because a foreign government has blocked adoption of a GATT panel report against it.
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> Just as the United States may now choose to take section 301 actions that are not GATT authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay

[81] The European Communities points out that, according to Section 101(a) of the Uruguay Round Agreements Act of 1994, the US Congress approves (1) the trade agreements resulting from the Uruguay Round of multilateral trade negotiations and (2) the statement of administrative action that was submitted to Congress on 27 September 1994.

> Round agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking action in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone-treated beef".[82]

4.109 The European Communities further contends that it is obvious that this portion of the Statement of Administrative Action provides for an authoritative interpretation of the Uruguay Round Agreements Act that undermines the security and predictability of international trade relations. Moreover it announces in very clear terms a policy: the United States will not feel impeded by its international obligations to have recourse to retaliatory action.

4.110 The European Communities maintains that in the presence of these explicit indications on the political intentions and the legal texts as they stand, the explanation given by the United States[83] is by no means reassuring.

4.111 In this context, the European Communities recalls that, after the entry into force of the Uruguay Round agreements, the United States has as a matter of fact resorted to retaliatory action without having recourse to WTO dispute settlement procedures or without awaiting the result of the relevant WTO dispute settlement procedure in at least two well-documented cases (*Japan - Autos* and *EC – Bananas III*).[84] The assertions made by the United States therefore give rise to the additional concern that the US administration apparently considers itself to be judge and jury also with regard to the applicability of the WTO dispute settlement procedures *ratione materiae*.[85]

4.112 The European Communities goes on to state that it appears thus obvious that the statements made so far by the US representatives in the present procedure are of a completely different nature from the declaration considered binding by the ICJ in the *Nuclear Tests* case.

4.113 The European Communities further argues that this legal assessment would not change even if those statements were incorporated into the Panel report. In fact, the statements made in the present case by the US representatives were not made with the intent to create an international obligation by a person empowered to undertake a substantial legal commitment on

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[82] Statement of Administrative Action, op. cit., p. 366 *et seq.*

[83] The European Communities quotes the US following argument: "The last paragraph on page 366 of the Statement of Administrative Action does not relate to a situation in which the United States is seeking redress for the denial of US WTO rights, and thus is not covered by DSU Article 23, nor is it otherwise within the terms of reference of this dispute". The European Communities would also underline that it does not agree with the United States that the terms of reference of this panel include in any way a limitation of the examination of Sections 301-310. With respect to the EC claims of violation of WTO provisions listed in doc. WT/DS152/11, Sections 301-310 are under the scrutiny of this panel in their entirety. The same is also valid for the US comments on a statement from Korea.

[84] The European Communities claims that these cases are documented by Japan.

[85] According to the European Communities, this concern is corroborated by the following paragraph from the Statement of Administrative Action (at the top of p. 366):

> "Neither section 301 nor the DSU will require the Trade Representative to invoke DSU dispute settlement procedures if the Trade Representative does not consider that a matter involves a Uruguay Round agreement. Section 301 will remain fully available to address unfair practices that do not violate U.S. rights or deny U.S. benefits under the Uruguay Round agreements and, as in the past, such investigations will not involve recourse to multilateral dispute settlement procedures".

behalf of the United States.[86] It is thus obvious that none of the conditions on which the judgement of the ICJ in that case was based is fulfilled in the present case.

4.114 According to the European Communities, in any event, the problem of the present case is not the absence of a clearly defined international commitment, because that already exists in the form of Article 23 of the DSU which clearly was accepted by the United States as part of the Uruguay Round agreements. Rather, it is the subsequent implementation of that international obligation into the US legislation by the United States legislature, compounded by the Statement of Administrative Action, that runs counter to the United States obligation to respect its international commitments.

4.115 The European Communities further notes that at the same time, US executive determinations and actions add to the uncertainty as to the willingness of the United States to respect its international obligations in future.

4.116 The European Communities claims that given the importance of the United States in the multilateral trade relations and within the institutional framework of the WTO, this situation is the source of uncertainty and unpredictability, which is unacceptably detrimental to the multilateral trading system.

4.117 The European Communities further states that, looking at the panel findings in the *Superfund* case,[87] it must be recalled that in that case the panel accepted the statement of the United States only because it considered that the United States had discretion to act in accordance with its statement. In addition, that decision was adopted in a legal situation where the strict interpretation of mandatory legislation under the PPA had a decisive influence on the examination of domestic legislation.

4.118 According to the European Communities, the only possible way for a panel to "marry" the limitation of the "existing legislation" clause of the PPA with the need to control the implementation of the broadly-defined discretionary legislation was, in cases such as the "*Superfund*", to obtain promises or commitments concerning the exercise of the discretionary power in the future.

4.119 In the EC's opinion, there is no reason for a WTO panel to follow the legal path of the *US - Superfund* panel under the new WTO rules. In fact, in the present case, given the new legal environment after the entry into force of the WTO Agreements and in particular of Article XVI:4 of the Marrakech Agreement, and given also the public policy statement contained in the Statement of Administrative Action made by the highest representative of the executive branch of the US government and approved by its legislative branch, a simple statement to the Panel in a meeting behind closed doors without revoking the Statement of Administrative Action in this regard would clearly be insufficient to lift the uncertainty created by the Statement of Administrative Action.

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[86] In the EC's view, this power is generally vested in the Head of State, the Head of Government and the Minister of Foreign Affairs. Any other representative of the State would either have to be specifically accredited or need full powers to be able to make a substantial commitment under public international law (cf. Art. 7 VCLT).

[87] Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances* ("*US – Superfund*"), adopted 17 June 1987, BISD 34S/136, in particular, para. 5.2.9 *in fine*.

4.120 **In the view of the United States,** Section 304(a)(1) requires that determinations under that section be made "on the basis of the investigation initiated under Section 302 and the consultations (and the proceedings, if applicable, under section 303)". The "proceedings" under Section 303 are dispute settlement proceedings.[88] Moreover, such proceedings would be "applicable" in any case involving a trade agreement, since Section 303 requires that dispute settlement procedures under a trade agreement be invoked in any case involving a trade agreement, if no mutually acceptable resolution has been achieved.[89]

4.121 The United States indicates that its Administration has, in the Statement of Administrative Action approved by Congress, provided its "authoritative expression ... concerning its views regarding the interpretation and application of the Uruguay Round agreements, ... for purposes of domestic law".[90] The Statement of Administrative Action must, by law, be treated as the authoritative expression concerning the interpretation of the statute in any judicial proceeding.[91] The Statement of Administrative Action at page 365-366 provides that the USTR will:

- invoke DSU dispute settlement procedures, as required under current law;
- base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB;
- following adoption of a favorable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and
- if the matter cannot be resolved during that period, seek authority from the DSB to retaliate.[92]

4.122 The United States explains that it is an established principle of US statutory construction that the administering agency's interpretation of a statute is entitled to deference if the statute is "silent or ambiguous with respect to [a] specific issue". *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43. In such circumstances, the court must uphold the agency's interpretation as long as it is based upon a "permissible construction" of the statute. Ibid. The agency's interpretation need not be the "only possible construction", *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990), nor must it be the construction the court would have selected in the first instance. *Chevron*, 467 U.S. at 844. A court errs by substituting "its own construction of a statutory provision for a reasonable interpretation made by [the agency]". Ibid. The court's duty is not to weigh the wisdom of the agency's legitimate

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[88] The United States notes that Section 303(a)(2) provides that if dispute settlement consultations under a trade agreement have not resulted in a mutually acceptable resolution, the Trade Representative shall request "proceedings" under the "formal dispute settlement procedures provided under such agreement".

[89] Ibid.

[90] Statement of Administrative Action, op. cit., p. 1.

[91] The United States refers to 19 U.S.C. § 3512(d) as stating that "[t]he statement of administrative action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application".

[92] Statement of Administrative Action, op. cit., pp. 365-366 (emphasis added).

policy choices. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir.. 1992). Thus, under US law, the USTR's interpretations of its authority to undertake multiple determinations, determinations other than violation/non-violation determinations, or termination of investigations would receive such deference in a US court – to the extent such determinations would be subject to judicial review at all.[93] Likewise, the USTR's interpretation of Section 304(a)(1) as requiring her to rely on DSB-adopted findings in determining that US WTO agreement rights have been denied would be accorded such deference.

4.123 The United States indicates that it is not merely offering assertions of its legal authority. Rather, these interpretations are reflected in longstanding practice, in investigations predating this case and predating the WTO. Under US law, these interpretations would be entitled to deference, and, in examining whether the statute commands WTO-inconsistent action, the Panel is required to examine the meaning of the statute as it would be interpreted under US law.[94]

4.124 The United States further argues that another legal basis for US interpretations of statutory provisions is the US principle of statutory construction known as legislative ratification. As the US Supreme Court has stated, this principle provides that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 783, *citing Albemarle paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

4.125 The United States also states that the multiple determinations in *Oilseeds* predated the WTO, and the fact that Congress did not amend the statute to prevent such determinations when other amendments were made in 1994 supports the view that the Administration's interpretation is permitted. Similarly, the USTR's practice of applying Sections 301-310 to make determinations other than simple "yes/no" determinations on whether agreement rights have been denied, and to terminate Section 302 investigations before making a determination, predates 1994. Exhibit 13 describes examples of this long-standing practice since 1988, though it predates 1988 as well. And, although Congress amended section 301 in 1994, it did not amend it to undermine the USTR's interpretation or application of Sections 301-310, even though it was fully aware of how it was being applied.

4.126 **The European Communities disagrees** with the US introduction of an entirely new defence at this late stage. The European Communities stresses the fact that the new US arguments are very similar to those submitted by India in the *India - Patents (US)* case. They were rejected by the panel and the Appellate Body at the request of the US as a complainant in that case.[95]

4.127 The European Communities further states that the quotation of the AB report in *India - Patents (US)*, paragraph 65 [in fact 66], is incorrect. The Appellate Body did not state that "the Panel is required to examine the meaning of the statute as it would be interpreted under US law". Rather, the correct quotation, which has an entirely different meaning, is the following:

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[93] The United States points out that if, in fact, these determinations were not reviewable, the USTR's interpretations would be definitive.

[94] The United States refers to Appellate Body Report on *India – Patents (US)*, op. cit., para. 65.

[95] Ibid., para. 69, "... like the Panel, we are not persuaded that India's "administrative instructions" would prevail over the contradictory mandatory provisions of the Patents Act".

> "... as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law "as such"; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*".

4.128 **The United States rebuts** the EC argument that the US response raises a new defense, and that allegedly similar arguments were rejected in *India – Patents (US)*. Both of the EC's contentions are incorrect. First, the United States has not raised a new defense. The US discussion of judicial deference under U.S. law was directly responsive to the Panel's request for the textual or other legal basis which permits the USTR to make multiple determinations – a factual issue in this dispute. While the textual basis for the USTR's interpretation is sufficiently clear, the doctrine of judicial deference would serve as an additional basis under US law were a US court to consider the statutory language ambiguous.

4.129 The United States also contends that the EC's references to *India – Patents (US)* fail to support its position. The Appellate Body, in paragraphs 65-66 of its report in *India – Patents (US)*, emphasizes that it was necessary in that case to examine Indian law to determine its compliance with India's international obligations. Domestic law consists not only of statutory provisions, but of domestic legal rules concerning the interpretation of those provisions or, in the case of *India – Patents (US)*, domestic rules concerning conflicts between laws. In *India – Patents (US)*, the Appellate Body examined "the relevant provisions of the Patents Act as they relate to the 'administrative instructions'" at issue in that case[96]; in other words, the Appellate Body examined whether there was any support under Indian law for India's assertion that unpublished, unwritten administrative instructions would prevail over a conflicting statute explicitly mandating a WTO violation. India in that case failed to provide sufficient evidence that, under Indian law, the instructions would prevail.

4.130 In the US view, the doctrine of judicial deference to an agency's interpretation of its statute is part of U.S. law, though it would only become relevant in this dispute were the panel to conclude that there was some ambiguity as to whether a particular provision of Sections 301-310 commanded specific actions violating a WTO obligation. In fact, as the U.S. has explained throughout this proceeding, the statute contains no such ambiguity. On its face, the U.S. statute does not command violation determinations in the absence of DSB-adopted findings, and in fact requires that any such determinations be based on the results of WTO proceedings.[97]

4.131 According to the United States, however, should the Panel find the statute ambiguous, the US Executive Branch interpretation of the statute is of great importance under US law. First, many Executive Branch determinations are not subject to judicial review. As already noted, if this were the case with respect to Section 301 determinations, the USTR interpretation would be definitive under US law. Second, even if a US court were to review such determinations, and even if that court were to conclude that the statutory language is ambiguous, it would be required under US law to interpret that language in light of the *Chevron* standard of judicial deference.

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[96] Appellate Body Report on *India – Patents (US)*, op. cit., para. 66.

[97] The United States again states that this US legal requirement goes beyond what the EC asserts are a Member's WTO obligations: "[I]t would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include specific language in their domestic law precluding WTO-inconsistent action".

4.132 The United States recalls again that the burden in this dispute lies with the European Communities. As already discussed, the European Communities failed to establish that US law commands the USTR to take actions which violate Article 23, failed to establish that US rules of statutory interpretation permit the European Communities and this Panel to interpret "whether" to mean "that", and failed to establish that it is permissible to disregard entire sections of the statute providing the USTR with discretion to delay or not take action. Likewise, in its latest submission, the European Communities failed to establish that the *Chevron* deference standard may, under US law, be disregarded.

4.133 The United States points out that the last paragraph on page 366 of the Statement of Administrative Action does not relate to a situation in which the United States is seeking redress for the denial of US WTO rights, and thus is not covered by DSU Article 23, nor is it otherwise within the terms of reference of this dispute. As described in the preceding paragraphs on page 366, there will often be cases not involving WTO rights, or involving a mixture of actions only some of which are covered by WTO rules. Moreover, this paragraph describes the fact that, even before establishment of the WTO and its strengthened dispute settlement procedures, the United States infrequently expressed its intention to take retaliatory action, and such action was often a response to a trading partner's decision to obstruct dispute settlement proceedings. The statement that the Administration will not be "more reluctant" to impose sanctions given the DSU should be read in that context.

4.134 In response to the Panel's question as to the US statement that "[t]he last paragraph on page 366 of the Statement of Administrative Action does not relate to a situation in which the United States is seeking redress for the denial of U.S. WTO rights", the United States maintains that it is clear from their context that neither the last paragraph on page 366 nor the first full paragraph on page 367 relate to situations in which the United States is seeking redress for denial of US WTO rights. The Statement of Administrative Action at pages 365-67 addresses three situations in which Section 301 may be invoked: (1) cases involving a WTO Member and its denial of US WTO rights; (2) cases involving a WTO Member and non-WTO rights; and, (3) cases involving non-WTO Members or WTO Members to which the United States does not apply the Uruguay Round Agreements pursuant to Article XIII of the WTO Agreement.

4.135 The United States also explains that the last paragraph on page 365 deals with the first type of case, that is, situations involving the denial of US rights under the WTO Agreement. The following paragraph, the first full paragraph on page 366, introduces the discussion of the second type of case, those involving WTO Members but not US WTO rights. Each of the first four paragraphs on page 366 explicitly clarifies the types of situations in which a case may involve a WTO Member, but not a US WTO right. The next two paragraphs (those addressed in the question, the last on 366 and the first on 367) follow directly on that discussion and are part of the section of the Statement of Administrative Action discussion relating to situations not involving a US WTO right. Finally, the last paragraph of this section of the Statement of Administrative Action, the second full paragraph on page 367, addresses the third type of case, that is, cases not involving WTO Members or cases involving WTO Members as to which the United States does not apply the Uruguay Round Agreements. The organization of the discussion in the Statement of Administrative Action thus follows precisely the three types of cases for which Section 301 may be applicable.

4.136 In the view of the United States, the statement in the first paragraph on page 367 may be reconciled with the earlier bullet points on pages 365-366 of the Statement of Administrative Action, and are logical, only if understood as referring to two different types of cases, those involving US WTO rights and those which do not. The paragraph on page 367 should not be read so as to produce an illogical result.

4.137 With respect to the substance of these paragraphs, the United States reiterates again that the last paragraph on page 366 emphasises the infrequency with which the United States took action under the GATT 1947 which had not been authorized, as well as the fact that such situations often involved efforts by a losing party (generally the European Communities) to obstruct multilateral dispute settlement proceedings.

4.138 According to the United States, with respect to the first paragraph on page 367, the statement only provides that the prospect of counter-retaliation by a trading partner would not enter into the consideration of whether to take action against that partner in a case not involving the denial of US WTO rights by that partner. The listed cases are provided only as illustrations of this point. None of this says anything about the factors which would be taken into consideration in deciding whether and how to take action when a US WTO Agreement right is not involved, factors such as the US desire to comply with its international obligations. Again, the paragraphs indicate that even under the GATT 1947, the instances in which action was taken were infrequent.

4.139 The United States states that because these paragraphs do not relate to situations involving US rights under the WTO Agreement, on that basis alone they are irrelevant to an examination of whether Sections 301-310 are inconsistent with DSU Article 23. Article 23 deals only with situations in which Members "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements".[98] However, even were the statements in the paragraphs on pages 366-367 somehow relevant to Article 23, they would not be relevant to the analysis of whether the European Communities has demonstrated that the law itself, Sections 301-310, command the USTR to violate specific US WTO obligations. The mere existence of the statements is no substitute for the analysis the European Communities has consistently failed to provide on precisely how specific requirements in Sections 301-310 mandate actions inconsistent with specific textual obligations in the WTO provisions set forth in the terms of reference.

4.140 The United States finally notes that the statements speak to no more than the possibility of WTO-inconsistent action, a possibility which other WTO Members have repeatedly made a reality through not only their initial decisions to create and implement WTO-inconsistent measures, but in their decisions to disregard DSB rulings and recommendations with respect to these measures. Neither the United States nor any other WTO Member is entitled to bring a successful WTO challenge against another Member because of the mere possibility that it may, in the future, breach its WTO obligations. There must be a measure which does in fact, currently breach a specific WTO obligation, or at the least legislation which commands such a breach in the future.

4.141 **The European Communities criticises** the United States for introducing a new argument by asserting that the Statement of Administrative Action, at pages 365-367 "addresses three situations ...". The European Communities recalls its argument: irrespective of the allegations made by the US concerning its views on the interpretation of the Statement of Administrative Action (and this latest attempt has no more support in the text of the Statement of Administrative Action than the previous ones), the examples provided at page 367 of the Statement of Administrative Action are clearly within the scope of the WTO Agreements and thus defeat also the latest US argument in this respect.

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[98] DSU, Article 23.1.

4.142 **The United States reiterates** that the only logical reading of the statements at pages 366-67 is that they apply only to cases not involving a US WTO right, that this conclusion also follows from the organization of the Statement of Administrative Action, and that the statements refer to no more than hypothetical possibilities, as it already argued.

4.143 The United States contends that the European Communities has brought an essentially political case. The European Communities and several third parties have attempted to leave the impression that the United States is an implacable foe of the Dispute Settlement Understanding and of multilateral determinations of WTO Agreement rights. They hope through these accusations to raise doubts among the panel about how the Trade Representative could be expected to exercise her discretion under Sections 301-310. However, beyond the lack of relevance of these accusations to the legal question of whether Sections 301-310 mandate a WTO violation, they are quite simply untrue. The United States was an early and strong supporter of the creation of the Dispute Settlement Understanding and of the fundamental improvements in dispute settlement procedures which have established the credibility of the new system: the negative consensus rule, strict deadlines and virtually automatic panel establishment, adoption of reports, and authorization to suspend concessions upon non-implementation.

4.144 The United States points out that it has brought 49 disputes to the WTO under its multilateral procedures and has defended itself in 28 others. In five cases, a US measure was found inconsistent with US obligations. The United States not only committed to bring its measure into compliance with DSB rulings and recommendations in each of these cases, it did in fact bring its measure into compliance in three cases, and the reasonable period of time has yet to expire in the remaining two. The US commitment to multilateral dispute settlement procedures is thus evident in the US role in developing those procedures, in the active US use of those procedures, and in US compliance with multilateral decisions when those decisions have been adverse.

4.145 In the view of the United States, when stripped of political arguments, it is clear that the European Communities is attempting in this case to challenge a statute based on statutory provisions which do not exist. The European Communities cannot meet its burden in this case by assuming such provisions into existence. The United States therefore respectfully requests that this Panel reject the EC's speculative arguments in their entirety.[99]

4.146 **The European Communities,** in response to the Panel's question whether Sections 301-310 would be rendered consistent with US obligations under the WTO, assuming that the panel were to find that Sections 301-310 leave sufficient discretion to the USTR to allow it to meet its WTO obligations, **claims** that this question is of a highly hypothetical nature, and – as the Panel is aware – the European Communities disagrees with the hypothesis that is underlying the question.

4.147 According to the European Communities, its complaint concerns Sections 301-310 as such. The European Communities recalls in this context that both parties agree that the question of how the USTR enforces Sections 301-310 is irrelevant in this proceeding.

4.148 In the view of the European Communities, in order to address the EC's complaint, the Panel needs to answer the question of whether Sections 301-310, by their terms or expressed

[99] With regard to Statement of Administrative Action, see further the US arguments shown below (in particular, in paras. 4.534-4.536) and the corresponding EC arguments.

intent, mandate WTO-inconsistent determinations or actions, whether they provide the USTR with a sound legal basis for the implementation of the United States' WTO obligations and whether they make certain ("ensure") the conformity with WTO obligations within the meaning of Article XVI:4 of the WTO Agreement.

4.149 The European Communities contends that any (hypothetical) reassuring statement by the United States' executive authorities could not change the terms and expressed intent of Sections 301-310 nor could it create a sound legal basis for WTO-consistent actions in US law nor could it bring Sections 301-310, as such, into conformity with WTO law. Such a statement could only relate to the intentions of the current administration on the enforcement of Sections 301-310.[100]

4.150 In the present case, the European Communities considers that the statute compels the executive branch of the US government to act in contradiction with the US WTO obligations or, in any case, creates a legal situation which is biased against compatibility with those obligations. As the European Communities has explained, this legal situation, created by Sections 301-310 as such, is highly detrimental to the multilateral trading system.

4.151 It is the EC's understanding of the US internal legal order that no statement of the executive authorities of the United States, however it would be formulated and by whomever it would be made, could do away with the constraints under which the executive branch of the US government finds itself under the US Constitution which imposes on the executive authorities to act in accordance with statutory requirements enacted by the US Congress. In addition, under US law these statutory requirements take precedence over any international obligation contracted by the United States under the Uruguay Round agreements pursuant to Section 102(a) of the Uruguay Round Agreements Act of 1994.

4.152 The European Communities recalls once more that the US representative, during the first substantive meeting with the Panel, could not exclude the possibility of a legal challenge before the US domestic courts concerning the implementation of Sections 301-310.

4.153 The European Communities reiterates that the situation of the present case is not comparable to the situation that was addressed by the ICJ in the *Nuclear Tests Case* where the French President and certain highly ranked French representatives made public statements on behalf of the French Republic that were not in contradiction with any piece of domestic legislation.

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[100] The European Communities recalls in this context the rulings of the panel on *India - Protection for Pharmaceutical and Agricultural Products*, and states that the assurances that the Indian government had given to the United States regarding its interpretation and application of the Indian Patent Act, the fact that no mail box application had been rejected by the Indian authorities and that the Indian government had informed the Parliament that it would treat the mailbox applications in a WTO-consistent manner were not considered to be relevant to the panel's finding that the Indian mailbox system lacked a sound legal basis in the domestic law of India. The European Communities refers to Panel Report on *India – Protection for Pharmaceutical and Agricultural Products* ("*India – Patents (US)*"), adopted 2 September 1998, WT/DS50/R, paras. 4.5 and 4.6.

In the EC's view, the United States sought in that case an amendment of the Patents Act to achieve greater legal security for its intellectual property right holders notwithstanding the assurances by the executive authorities. It would be very surprising for the WTO's membership if one standard were applied to domestic law when the United States is a complainant and another when it is a defendant.

4.154 **In rebuttal, the United States points out** that the European Communities attempts to make much of the fact that, in US courts, US law would prevail in the event of a conflict with the Uruguay Round Agreements. For example, the European Communities cites Professor D.W. Leebron for this proposition. However, the European Communities fails to quote Professor Leebron's conclusion on page 232 of the very same work cited in footnote 27 that, "Nothing, however, in those provisions [that is, the provisions of Section 301] requires the President or the USTR to act in violation of the Uruguay Round Agreements". In other words, because there is no conflict between Sections 301-310 and the WTO Agreement, it does not matter which would prevail in the event of a conflict. In fact, were there actually a conflict, that is, if a US law mandated a violation of the WTO Agreement, there would be a WTO violation regardless of whether a US court would apply US law. The EC's discussion of US law on when actual conflicts are present is thus completely irrelevant to the Panel's analysis.

D. ANALYSIS OF WTO-CONSISTENCY OF MEASURES AT ISSUE

1. Reach of WTO obligations with respect to law authorizing WTO-inconsistent action, not specific applications

(a) General Arguments

(i) Relevance of GATT/WTO Precedents

4.155 **The European Communities first contends** that previous GATT panels recognised that a law requiring the executive authorities to impose a measure inconsistent with a provision of the GATT can be challenged under the dispute settlement procedure whether or not it had been applied to the trade of the complaining party. The 1987 panel on *United States - Taxes on Petroleum and Certain Imported Substances* reasoned as follows:

> "...The general prohibition of quantitative restrictions under Article XI ... and the national treatment obligation of Article III ... have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade. Just as the very existence of a regulation providing for a quota, without it restricting particular imports, has been recognised to constitute a violation of Article XI.1, the very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III.2, first sentence. The Panel noted that the tax on certain imported substances had been enacted, that the legislation was mandatory and that the tax authorities had to apply it after the end of next year and hence within a time frame within which the trade and investment decisions that could be influenced by the tax are taken. The Panel therefore concluded that Canada and the EEC were entitled to an investigation of their claim that this tax did not meet the criteria of Article III.2, first sentence".[101]

[101] Panel Report on *US – Superfund*, op. cit., para. 5.2.2.

4.156 The European Communities further argues that it follows that a WTO obligation proscribing a particular behaviour is violated by the adoption of a domestic law mandating such behaviour. Such a law also violates Article XVI:4 of the WTO Agreement. The European Communities is therefore entitled to findings and rulings by the Panel on the question of whether the United States has brought the provisions of the Trade Act of 1974, as such, into conformity with its WTO obligations under Article 23 of the DSU.

4.157 According to the European Communities, the 1992 panel on *United States - Measures Affecting Alcoholic and Malt Beverages* examined legislation which, by its terms, mandatorily required the authorities to impose GATT-inconsistent measures, but which was not actually applied. The United States argued that such legislation did not constitute a measure in respect of which Article XXIII of the GATT could be invoked. The panel ruled as follows:

> "The Panel then proceeded to consider the United States argument that the provisions in the state of Illinois permitting manufacturers to sell directly to retailers were not given effect. In this regard, the Panel recalled the decisions of the CONTRACTING PARTIES on the relevance of the non-application of laws in dispute. Recent panels addressing the issue of mandatory versus discretionary legislation in the context of both Articles III.2 and III.4 concluded that legislation mandatorily requiring the executive authority to take action inconsistent with the General Agreement would be inconsistent with Article III, whether or not the legislation were being applied, whereas legislation merely giving the executive authority the possibility to act inconsistently with Article III would not, by itself, constitute a violation of that Article. The Panel agreed with the above reasoning and concluded that because the Illinois legislation in issue allows a holder of a manufacturer's license to sell beer to retailers, without allowing imported beer to be sold directly to retailers, the legislation mandates governmental action inconsistent with Article III.4".[102]

4.158 The European Communities notes that with respect to a law in the state of Mississippi, the panel similarly found:

> "The Panel then proceeded to consider the United States argument that the Mississippi law was not being applied. In this regard, the Panel recalled its previous discussion of this issue. ... The Panel noted that the option law in Mississippi provides discretion only for the reinstatement of prohibition, but not for the discriminatory treatment of imported wines. The Panel concluded, therefore, that because the Mississippi legislation in issue, which permits native wines to be sold in areas of the state which otherwise prohibit the sale of alcoholic beverages, including imported wine, mandates governmental action inconsistent with Article III.4, it is inconsistent with that provision whether or not the political subdivisions are currently making use of their power to reinstate prohibition".[103]

4.159 The European Communities then argues that the panel explained the rationale behind these rulings when presenting its findings on the maximum price laws in Massachusetts and Rhode Island:

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[102] Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages* ("*US – Malt Beverages*"), adopted on 19 June 1992, BISD 39S/206, pp. 281-282.

[103] Ibid., p. 289.

> "In respect of the United States contention that the Massachusetts measure was not being enforced and that the Rhode Island measure was only nominally enforced, the Panel recalled its discussion of mandatory versus discretionary laws in the previous section. The Panel noted that the price affirmation measures in both Massachusetts and Rhode Island are mandatory legislation. Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply. Similarly, the contention that Rhode Island only 'nominally' enforces its mandatory legislation a fortiori does not immunise this measure from Article III.4. The mandatory laws in these two states by their terms treat imported beer and wine less favourably than the like domestic products. Accordingly, the Panel found that the mandatory price affirmation laws in Massachusetts and Rhode Island are inconsistent with Article III.4, irrespective of the extent to which they are being enforced".[104]

4.160 The European Communities explains that in the proceedings of the WTO panel on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the United States claimed that the "mailbox system" for patent applications which India had established by administrative action did not meet the requirements of Article 70.8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), because mandatory provisions of the India Patents Act required the rejection of the mailbox applications within a specified delay.

4.161 In the view of the European Communities, India cited provisions of its Constitution on the distribution of authority between the legislative and the executive branch and court rulings on the non-binding nature of statutes requiring administrative actions by a specified date, to argue that a mail box system could be established by administrative action notwithstanding the mandatory provisions of the Patents Act.

4.162 The European Communities points out that the United States responds to the European Communities claiming that the GATT 1947 jurisprudence on mandatory legislation made clear that India was obliged to eliminate the legal uncertainty created by the fact that its administrative practices were inconsistent with mandatory provisions of the Patents Act. India was consequently required to amend its Patents Act. Referring to the GATT [105] and on *United States - Measures Affecting Alcoholic and Malt Beverages* (*Beer II*), the United States argued:

> "The mailbox system … had a rationale common to many other WTO obligations, "namely to protect expectations of the contracting parties as the competitive relationship between their products and those of other contracting parties". The *Superfund* report had established clearly the importance of "creat[ing] the predictability needed to plan future trade". (…) Despite India's claim that it had decided for the moment not to enforce the mandatory provisions of (…) its Patent Act … that "measure continues to be mandatory legislation which may influence the decisions of economic operators". The

[104] Ibid., p. 290.
[105] Ibid.

> economic operators in the present case - potential patent applicants - had no confidence that a valid mailbox system had been established … To paraphrase the *Beer II* panel, a non-enforcement of a mandatory law that violated a WTO obligation did not ensure that the obligation was not being broken".[106]

4.163 The European Communities notes that the United States thus argued that the domestic law of a Member must not only be such as to enable it to act consistently with its WTO obligations; the domestic law must also not create legal uncertainty by prescribing WTO-inconsistent measures.

4.164 For the European Communities, the panel accepted the United States' argumentation. It examined the provisions of India's Patent Act and then ruled:

> "In the light of these provisions, the current administrative practice creates a certain degree of legal insecurity in that it requires India officials to ignore certain mandatory provisions of the Patents Act. We recall that the Malt Beverages panel dealt with a similar issue. There the respondent offered as a defence that certain GATT-inconsistent legislation was not currently enforced. The panel rejected this defence by stating as follows:
>
> > 'Even if Massachusetts may not currently be using its policy powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply'.
>
> We find great force in this line of reasoning. There is no denying that economic operators - in this case the patent applicants - are influenced by the legal insecurity created by the continued existence of mandatory legislation that requires the rejection of product patent applications in respect of pharmaceutical and agricultural chemical products".[107]

4.165 The European Communities argues that these findings imply that a law that, by its terms, mandates behaviour inconsistent with a provision of a WTO agreement, violates that provision, irrespective of whether and how the law is or could possibly be applied.

4.166 According to the European Communities, this principle is a reflection of the fact that a law with such terms creates uncertainty adversely affecting the competitive opportunities for the goods or services of other Members.

4.167 The European Communities points out that one of the basic objectives of the WTO agreements, however, is to ensure that goods or services of domestic and foreign origin are accorded equal competitive opportunities. In the framework of a treaty designed to ensure stable and predictable conditions of competition, a party does not act in good faith if it accepts an obligation stipulating one behaviour, but adopts a law explicitly stipulating another. The fact

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[106] Panel Report on *India – Patents (US)*, op. cit., para. 4.4 (footnotes omitted, emphasis added).
[107] Ibid., para.7.35.

that it might exceptionally apply that law in a way that is not inconsistent with its WTO obligations does not affect the above conclusion, particularly where there is no legal entitlement to obtain such an exceptional "act of grace". This manner of implementing WTO obligations is simply incompatible with the fundamental requirement of security and predictability in international trade relations, which is at the basis of the WTO.[108]

4.168 In the view of the European Communities, the consistent line followed by GATT panels is therefore essentially an application of the general principle of international law that a treaty must be interpreted and performed in good faith.[109]

4.169 The European Communities goes on to state that Article XVI:4 of the WTO Agreement turns this principle into a specific legal obligation that can be separately invoked. This provision and the related panel findings quoted above have important implications for the scope of the Panel's examination.

4.170 The European Communities maintains that it is sufficient for the Panel to examine whether Sections 301-310 mandate determinations and actions by the USTR that are inconsistent with the United States' obligations under Article 23 of the DSU.

4.171 The European Communities further argues that there is no need to examine whether the USTR has actually implemented Sections 301-310 as mandated, whether Sections 301-310 are mandatory in the sense that their application could be enforced by domestic courts, or whether the President would be entitled to instruct the USTR to refrain from taking the actions prescribed by Sections 301-310.

4.172 The European Communities concludes that it follows from the above that, if the Panel were to find that certain provisions of Sections 301-310, on their face, mandate determinations or actions that are inconsistent with Article 23 of the DSU, it would have to rule that these provisions must be amended.

4.173 **The United States responds** that GATT and WTO panels have uniformly found that legislation may be challenged as such only if it mandates action inconsistent with WTO or GATT obligations. Most recently, the panel in *Canada – Measures Affecting the Export of Civilian Aircraft* stated:

> "We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States – Tobacco*, the panel "recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge". (citation omitted)[110]

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[108] Cf. DSU, Article 3.2, first sentence.

[109] Vienna Convention on the Law of Treaties, Articles 26 and 31.

[110] Panel Report on *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*"), circulated 14 April 1999, WT/DS70/R, para. 9.124, appeal pending on other grounds, citing

4.174 The United States notes that the European Communities was the beneficiary of the settled distinction between mandatory and discretionary legislation in *EEC – Regulation on Imports of Parts and Components*.[111] In that case, the panel found that "the mere existence" of the anticircumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the European Communities had taken GATT-inconsistent measures under that provision.[112] The panel based its finding on its conclusion that the anticircumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions".[113]

4.175 The United States further contends that in this dispute, the European Communities is challenging no specific measures taken under Sections 301-310.[114] It is challenging the mere existence of Sections 301-310. Thus, for that challenge to succeed, the European Communities must demonstrate not only that Sections 301-310 authorize WTO-inconsistent action, but that they mandate such action. As the European Communities acknowledges, it must show that this legislation "does not allow" the US government to follow DSU procedures.[115]

4.176 The United States further indicates that in applying the discretionary-mandatory distinction, panels have found that legislation explicitly directing action inconsistent with GATT principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action. For example, in *United States – Taxes on Petroleum and Certain Imported Substances*,[116] the Superfund Act required importers to supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise, a penalty tax would be imposed in the amount of five percent *ad valorem* or a different rate to be prescribed in regulations by the Secretary of the Treasury by a different methodology. The regulations in question had not yet been issued. Nevertheless, the panel concluded:

> "[W]hether [the regulations] will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty

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Panel Report on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* ("*US – Tobacco*"), adopted 4 October 1994, BISD 41S/131, para 118.

[111] Panel Report on *EEC – Regulation on Imports of Parts and Components* ("*EEC – Parts and Components*"), adopted 16 May 1990, BISD 37S/132.

[112] Ibid., paras. 5.9, 5.21, 5.25-5.26.

[113] Ibid., para. 5.25.

[114] According to the United States, to the contrary, the European Communities has explicitly acknowledged that its complaint does not address the US measures taken in the context of the EC's failure to comply with DSB recommendations in the *Bananas* case. The European Communities has initiated separate dispute proceedings relating to the *Bananas* case, and the United States intends in that proceeding to rebut EC claims specific to that dispute.

[115] See WT/DS152/11.

[116] Panel Report on *US – Superfund*, op. cit.

> rate provisions as such does not constitute a violation of the United States obligations under the General Agreement".[117]

4.177 The United States adds that similarly, in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*,[118] the panel examined Thailand's Tobacco Act, which established a higher ceiling tax rate for imported cigarettes than for domestic cigarettes. While the Act explicitly gave Thai officials the authority to implement discriminatory tax rates, this did not render the statute mandatory. The panel concluded that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement".[119]

4.178 The United States finally points out that in *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*,[120] the panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. The panel examined the question of whether a statute requiring that "comparable" inspection fees be assessed for imported and domestic tobacco mandated that these fees had to be identical for each, without respect to differences in inspection costs. If so, the statute would be inconsistent with GATT 1947 Article VIII:1(a), which prohibits the imposition of fees in excess of services rendered.[121] The United States argued that the term "comparable" need not be interpreted to mean "identical", and that the law did not preclude a fee structure commensurate with the cost of services rendered.[122] The panel agreed with the United States:

> "[T]he Panel noted that there was no clear interpretation on the meaning of the term "comparable" as used in the 1993 legislative amendment. It appeared to the Panel that the term "comparable", including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which could potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of [the US law]".[123]

4.179 In the view of the United States, the Panel therefore found that the complaining party had "not demonstrated that [the US law] *could not* be applied in a manner ensuring that fees charged for inspecting tobacco were not in excess of the cost of services rendered".[124]

4.180 In conclusion, the United States states that there is thus a strict burden on a complaining party seeking to establish that a Member's legislation mandates a WTO agreement violation: the complaining party must demonstrate that the legislation, as interpreted in accordance with the

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[117] Ibid., para. 5.2.9.

[118] Panel Report on *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thai – Cigarettes*"), adopted 7 November 1990, BISD 37S/200.

[119] Ibid., para. 86. The United States notes that the panel found that the actual implementation of the tax rates through regulations was also consistent with Thai obligations, since these rates were non-discriminatory. Ibid., para. 88.

[120] Panel Report on *US – Tobacco*, op. cit., footnote 47.

[121] Ibid., para. 118.

[122] Ibid., para. 122.

[123] Ibid., para. 123.

[124] Ibid.

domestic law of the Member, precludes any possibility of action consistent with the Member's WTO obligations. Moreover, where legislation is susceptible of multiple interpretations, the complaining party must demonstrate that none of these interpretations permits WTO-consistent action. As described in the following section, the European Communities has failed to meet that burden in this case.

4.181 The United States adds that the distinction between mandatory and discretionary action in GATT/WTO jurisprudence was a basic element of the practice of the GATT 1947 Contracting Parties in interpreting the GATT 1947, and remains a basic element of the practice of WTO Members in interpreting the WTO Agreement. The alternative to this distinction would be to require Members to write into their domestic laws specific limitations on the exercise of discretion in order to avoid even the possibility of WTO-inconsistent action. Each Member would be required to make the WTO Agreement pre-eminent in its legal order – a step which the European Communities expressly rejected for itself in 1994.[125] No such obligation now exists in the WTO agreements, and the European Communities has conceded as much in the current review of the Dispute Settlement Understanding. There, the European Communities has submitted a proposal which "would remove the *current distinction* between discretionary and mandatory measures"[126] and make it possible to establish the WTO-incompatibility of discretionary measures.[127]

4.182 The United States argues that when addressing specific provisions of Sections 301-310, the European Communities generally appears to accept that it must demonstrate that the US statute actually mandates (and not merely permits) WTO-inconsistent behaviour. Indeed, the EC's fundamental claim in its request for a panel is that the Section 301 legislation "does not allow" the United States to comply with its WTO obligations.[128]

4.183 In the view of the United States, in its introductory remarks, however, and in statements scattered throughout its submission, the European Communities suggests that it believes that WTO Members are under an affirmative obligation to include in their domestic law explicit limits on discretionary authority. For example, the European Communities states,

> "The European Communities ... believes that Sections 301-310 must be amended to make clear that the United States administration is required to act in accordance with the United States' obligations under the WTO agreements in all circumstances and at all times". (emphasis added)

4.184 The United States contends that likewise, the European Communities laments remaining discretion within Sections 301-310 and decries the alleged fact that the United States is "keeping open for itself the possibility" of resorting to unilateral measures.[129]

4.185 The United States argues that these formulations of WTO obligations are diametrically opposed to the principle set forth in each and every panel report which has addressed the issue –

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[125] The United States refers to Council Decision 94/800, 1994 O.J. (L 336) 1 as stating that "by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts".

[126] The United States refers to *Review of the Dispute Settlement Understanding*, Non-Paper by the European Communities (Oct. 1998) (emphasis added); and also Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998).

[127] Ibid.

[128] WT/DS152/11.

[129] Ibid., para. 9.

that legislation must require, and not merely leave open the possibility, of GATT or WTO-inconsistent action.[130] Likewise, they are also inconsistent with the approach taken in other GATT contexts, for example, working parties examining the legislation of a contracting party or acceding country to determine whether that legislation mandates GATT-inconsistent results, and not whether it could deliver such results.[131]

4.186 In the US view, surely the European Communities understands this. Wholly apart from the fact that the European Communities in its submissions generally acknowledges this principle in its analysis, the European Communities has, in the context of the on-going DSU Review, submitted a proposal which "would remove the current distinction between discretionary and mandatory measures"[132] and make it possible to establish the WTO-incompatibility of discretionary measures.[133] The European Communities now appears to be asking this Panel to legislate that very change.

4.187 In the US view, the implications of the EC DSU proposal and of its request to this panel to establish a rule that all municipal legislation must "make clear" that authorities must act consistently with their WTO obligations "in all circumstances and at all times" are profound. The proposed rule would touch on the sovereignty of Members in a manner they have not, to date, agreed to. One has to ask whether the European Communities has thoroughly considered the implications of its argument. Would, for example, the European Communities be required to amend the legislative and Treaty of Amsterdam authority under which it has been implementing its banana regime in order to include the specific requirement that this regime must comply with the EC's WTO obligations?

4.188 The United States argues that in fact, under the EC's proposal, the European Communities would have to amend virtually every piece of European Communities and Member State legislation to require that it be administered in WTO-consistent fashion, since the EC's WTO commitments are at present not directly enforceable under EC law.[134] The EC Council of Ministers stated this clearly at the time it ratified the WTO agreements: "[B]y its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts".[135] Thus, the European Communities does not differ from the United States in this regard, contrary to the impression the European Communities attempts to leave.

4.189 The United States further notes that it appears that the European Communities would have to amend its "Trade Barriers Regulation" to remove discretionary elements, which, in the

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[130] The United States refers to Panel Report on *Canada – Aircraft,* op. cit., para 9.124; Panel Report on *US – Superfund,* op. cit., para. 5.2.9; Panel Report on *Thai – Cigarettes,* op. cit., para. 86; Panel Report on *EEC – Parts and Components*, op. cit., paras. 5.25-5.26; Panel Report on *US – Tobacco*, op. cit., para. 118; Panel Report on *US – Malt Beverages*, op. cit., para. 5.39; Panel Report on *India – Patents (US)*, op. cit., para. 7.35; GATT *Analytical Index/Guide to GATT Law and Practice* (6th ed. 1995), 133-36, 645-49.

[131] The United States refers to Report on *The European Economic Community*, L/778, adopted on 29 November 1957, 6S/70, 80, para. 10.

[132] The United States refers to *Review of the Dispute Settlement Understanding*, Non-Paper by the European Communities (Oct. 1998); and also Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998).

[133] Ibid.

[134] The United States refers to Case C-280/94, *Germany v. Council,* 1994 ECJ CELEX LEXIS 2609 (5 Oct. 1994).

[135] Council Decision 94/800, 1994 O.J. (L 336) 1.

EC's words, "keep[] open for itself the possibility" of WTO-inconsistent action. The "General Provisions" in Article 15 of the Regulation provide in part:

> "[This Regulation] shall be without prejudice to other measures which may be taken pursuant to Article 113 of the Treaty, as well as to Community procedures for dealing with matters concerning obstacles to trade raised by Member States in the committee established by Article 113 of the Treaty".[136]

4.190 The United States maintains that under Article 133 of the Treaty of Amsterdam (formerly, Article 113 of the Treaty of Rome), the European Communities appears to have complete discretion to take any action, for any reason, at any time, in the commercial policy field without regard to WTO rules or DSB authorization. In fact, despite the implication left by the European Communities that its Trade Barriers Regulation is the sole mechanism by which it brings disputes at the WTO, the European Communities has brought only six of 45 WTO disputes through that regulation.[137] The remainder have been brought through the unpublished, non-transparent procedures of the Article 133 Committee (if, indeed, any such procedures exist).[138] The United States is not aware of any EC legislation or treaty provision which would make "retaliatory action of the [European Communities under its Article 133 procedures] dependent on the authorization of the DSB", nor is the United States aware of any such provision which creates any "legal entitlement to obtain such an exceptional 'act of grace'". Presumably, under the EC's requested rule, it would be required to amend the Treaty of Amsterdam to provide the clarity and further assurances it seeks from the United States.

4.191 In the view of the United States, while the European Communities appears to have lost its appreciation for the importance of distinguishing between discretionary and mandatory measures in the context of this dispute, it understood this distinction well in 1957. The 1957 Report on "The European Economic Community" states,

> "Following an exchange of views on the provisions of the Rome Treaty in the field of quantitative restrictions, the Sub-Group noted that these provisions were not mandatory and imposed on the Members of the Community no obligation to take action which would be inconsistent with the General

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[136] Art. 15, Council Reg. 3286/94, 1994 O.J. (L 349) 71.

[137] The United States notes that the WTO cases brought through the TBR are: *United States – Measures Affecting Textiles and Apparel Products* (DS85); *United States – Antidumping Act of 1916* (DS136); *Japan – Tariff Quotas and Subsidies Affecting Leather* (DS147); *United States – Measures Affecting Textiles and Apparel Products (II)* (DS151); *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (DS155); and *United States – Section 110(5) of the U.S. Copyright Act* (DS160).

[138] The United States argues that a former Chairman at the Deputies level of the Article 133 Committee has written that its proceedings are formally confidential (though, in practice, strict confidentiality is not maintained), and that the Committee does not issue public statements. Michael Johnson, European Community Trade Policy and the Article 113 Committee, 35 (Royal Institute of Int'l Affairs 1998). With respect to the operation of the Committee, the author concludes,

"The Committee's development over a period of forty years – erratic and largely unplanned – reflects that of the Community itself. On the basis of … political compromises … it has found practical ways of responding to the escalating demands of international trade relations …. By consent of all concerned it has grown to exercise an authority well beyond the apparent legal limits set by its vague remit in Article 113 of the Treaty of Rome. The result is a highly pragmatic body in which most of the time individuals who recognize each other as experts can settle trade issues in a familiar setting". Ibid. p. 37.

> Agreement. On the other hand because of the very general scope and competence conferred on the institutions of the Community, it could be within their powers to take measures which could be inconsistent with the GATT whatever the interpretation given to the provisions of Article XXIV. The Six pointed out that many contracting parties had permissive domestic legislation of a general character which, if implemented in full, would enable them to impose restrictions in a manner contrary to Article XI. These countries were not, however, required to consult with the CONTRACTING PARTIES about their possible intentions as regards the implementation of such legislation. The six could not accept that any contracting party by virtue of its adherence to the Rome Treaty should be subjected to additional requirements or obligations as to the consultations about the use of quantitative restrictions".[139]

4.192 The United States argues that however much the European Communities may now wish to amend WTO treaty terms to authorize panels to find discretionary legislation inconsistent with WTO rules, no such term now exists. The European Communities refers to Article XVI:4 of the WTO Agreement, which requires each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".[140] However, inasmuch as Sections 301-310 neither mandate action in violation of any provision of the DSU or GATT 1994 nor preclude action consistent with those obligations, Sections 301-310 are in conformity with those obligations and with Article XVI:4 as well. Likewise, because Sections 301-310 do not preclude the USTR from having recourse to, and abiding by, the rules and procedures of the DSU, Sections 301-310 are not inconsistent with DSU Article 23.1.

4.193 The United States emphasises the applicable legal standard, which the European Communities appears to recognise. That is the proposition that, where a law itself is challenged under WTO rules, that law must mandate action which is inconsistent with a Member's obligations. A law which provides discretion which may be exercised in a manner either consistent or inconsistent with the Member's obligations does not in itself violate those obligations. The EC panel request recognises this standard when it asserts that the Section 301 legislation "does not allow" the USTR to adhere to DSU procedures as a result of time frames in the statute. In addition, the EC proposal in the DSU review to "remove the current distinction between discretionary and mandatory measures" also reinforces the fact that the European Communities appreciates that WTO Members have never, to date, consented to limitations on their right to adopt discretionary legislation.

4.194 The United States argues that in the *US – Tobacco* case, the panel not only affirmed this rule, it clarified that where statutory language is ambiguous and is susceptible of multiple readings, the complaining party must demonstrate that none of those readings permits action consistent with the defending party's obligations. This approach follows logically from the applicable burden of proof in dispute settlement proceedings, since a complaining party is responsible for proving that the statute does not permit the defending party to comply with its international obligations. One may not assume that a party will not act in good faith to comply with its obligations. Only in cases where the party adopts legislation which does not allow its authorities to comply with its WTO obligations may that legislation be found inconsistent with those obligations.

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[139] The United States cites Report on *The European Economic Community*, L/778, adopted on 29 November 1957, BISD 6S/70, para. 10 (emphasis added).

[140] Marrakesh Agreement Establishing the World Trade Organization, Art. XVI:4.

4.195 In the view of the United States, no panel under the GATT or the WTO has diverged from this rule. Contrary to the claims of some that only GATT panels have applied this rule, the WTO panels in the *Canada – Aircraft* and *Turkey – Clothing and Textile* cases have also applied it. Moreover, as just noted, the European Communities has, in the context of the DSU review, recognised the rule's continued applicability. There is nothing in the WTO Agreement or its annexes which alters this practice.

(ii) Relevance of Protocol of Provisional Application

4.196 **In response, the European Communities argues** that the distinction between mandatory and discretionary legislation in GATT 1947 practice was a reflection of the fact that the contracting parties to GATT 1947, under the existing legislation clause in the Protocol of Provisional Application (PPA) and the protocols of accession, were bound by their obligations under the GATT 1947 only to the extent that their domestic legislation permitted the executive authorities to perform those obligations.

4.197 The European Communities points out that according to paragraph 1(b) of the PPA,

> "The Governments of ... undertake ... to apply provisionally on and after January 1, 1948 ... Part II of that Agreement to the fullest extent not inconsistent with existing legislation" (emphasis added)

4.198 In the view of the European Communities, this clause allowed the government of the United States and other governments to accept the GATT 1947 without submitting it for ratification by their legislature. Under the GATT 1947 there was thus an assumption and the clear expectation that pre-existing legislation stipulating measures contrary to the provisions of the GATT 1947 could continue.

4.199 The European Communities contends that the notion of mandatory legislation under the GATT 1947 was adopted in this particular context of a conflict between an existing legislation and a new GATT-Part II obligation: the existing legislation clause required each contracting party to resolve such a conflict in favour of the former and to the detriment of the latter.

4.200 In the EC's view, already in its deliberations in 1947, i.e. before the provisional application of the GATT 1947, the Tariff Agreement Committee stated the following:

> "the intent is that it should be what the executive authority can do - in other words, the administration would be required to give effect to the general provisions to the extent that it could do so without either (1) changing the existing legislation or (2) violating existing legislation. If a particular administrative regulation is necessary to carry out the law... that regulation would, of course, have to stand; but to the extent that the administration had the authority within the framework of existing laws to carry out these provisions, it would be required to do so".[141] (emphasis added)

4.201 The European Communities points out that after the GATT 1947 was provisionally applied by means of the PPA, a 1949 GATT Working party, examining, in the course of its work, measures that could be permitted to be exempted under the "existing legislation" clause of the PPA, confirmed this view:

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[141] EPCT/TAC/PV.5 page 20

> "The working party agreed that a measure is so permitted, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action"[142] (emphasis added).

4.202 The European Communities notes that the contracting parties therefore had no right to expect that the legal uncertainty arising from the existence of such legislation would be eliminated. All they could expect was that the executive authorities would use the discretion available to them under the legislation in a GATT-consistent manner.

4.203 The European Communities argues that this explains the need of a restrictive interpretation of mandatory legislation with the aim to allow a rapid entry into force of the GATT 1947. The intention was in fact to limit the scope of the "existing legislation" clause of the PPA thus allowing an effective application of GATT 1947. A more open reading of the PPA clause would have *de facto* reduced considerably the achievement of the objectives of the GATT.

4.204 The European Communities further maintains that the GATT panels had no option but to apply the same standard to all domestic legislation, whether it was adopted before or after the entry into force of the GATT. The working parties and Panels under GATT 1947[143] therefore faced a dilemma: adopting a narrow definition of "mandatory" legislation furthered the objectives of the GATT with respect to existing legislation[144] but had exactly the opposite effect when applied to new legislation. The findings of the 1987 *United States - Taxes on Petroleum and Certain Imported Substances* show that this Panel was aware of this dilemma[145]:

> "... These regulations have not yet been adopted. Thus, whether they will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, ... remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose tax inconsistent with the national treatment with respect to that case ... The Panel noted with satisfaction the statement of the

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[142] BISD Vol. II/49, para. 99

[143] Panel Report on *Belgium - Family allowances*, adopted on 7 November 1952, BISD 1S/59, para. 6; Reports of the Working Parties on *Organizational and Functional Questions*, adopted on 28 February, 5 and 7 March 1955, BISD 3S/231, para. 58; and Report of the Working Parities on *Import Restrictions of the Federal Republic of Germany*, adopted on 30 November 1957, BISD 6S/55, para. 12; Panel Report on *Norway - Restrictions on Imports of Apples and Pears* ("*Norway – Restrictions on Apples and Pears*"), adopted on 22 June 1989, BISD 36S/306, para. 5.6; Panel Report on *Thai – Cigarettes*, op. cit., para. 83; Panel Report on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies,* adopted on 18 February 1992, DS17/R, para. 5.9; and Panel Report on *US - Malt Beverages*, op. cit., para. 5.44.

[144] The European Communities notes that in the "Belgian Family Allowances" case, paragraph 6, a Panel explicitly stated what follows: "the Panel noted, however, that, in another case ["Brazilian Internal Taxes" case], the Contracting Parties agreed that the Protocol of Provisional Application had to be construed so as to limit the operation of the provisions of paragraph 1 (b) of the Protocol to those cases where "the legislation on which [the measure] is based is, by its tenor or expressed intent, of a mandatory character - that is, it imposes on the executive authorities requirements which cannot be modified by executive action"

[145] Panel Report on *US – Superfund,* op. cit., para. 5.2.9

> United States that, given the tax authorities' regulatory authority under the Act, 'in all probability the 5 per cent penalty rate would never be applied'" (emphasis added)".

4.205 In the EC's view, along the same lines, the 1990 *EEC - Parts and Components* panel report stated that

> "...the mere existence of the anti-circumvention provision in the EEC's anti-dumping Regulation is not inconsistent with the EEC's obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect to contracting parties".[146]

4.206 The European Communities adds that more explicitly referring to the PPA, the 1989 *Norway - Restrictions of Imports of Apples and Pears* panel report reaffirmed the 1947 understanding that a legislation should be considered to

> "be mandatory in character by its terms or expressed intent".

4.207 The European Communities further argues that the 1990 panel report's findings on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* were expressly based on the two earlier precedents, i.e. the 1989 *Norway - Apples and Pears* panel report and the 1949 *Working party on 'Notifications of existing measures and procedural questions'*. The European Communities draws the attention of the Panel to the fact that, consistently with the *Norway - Apples and Pears* panel report and the *1949 - Working party* report, the *Thai - Cigarettes* panel report dealt with the issue of mandatory *versus* discretionary legislation exclusively in the context of the interpretation of a clause in Thailand's Protocol of accession identical to paragraph 1(b) of the PPA.

4.208 The European Communities maintains that the 1992 *United States - Measures Affecting Alcoholic and Malt Beverages*, the panel again had to assess as a matter of priority the scope of application of the PPA with respect to state legislation in the United States. In that context, it came to the conclusion that

> "the record does not support the conclusion that the inconsistent state liquor legislation at issue in this proceeding is 'mandatory existing legislation' in terms of the PPA".

4.209 The European Communities recalls the 1992 *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* panel report. The context was again provided by the PPA:

> "2.6 This legislation, in effect at the time the United States acceded to the GATT in 1947, was inconsistent with Article VI:6(a), which proscribes the levy of countervailing duties without a determination of injury. However, Section 303 was covered by the "existing legislation" clause of paragraph 1(b) of the Protocol of Provisional Application of the General Agreement (the "PPA").

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[146] Panel Report on *EEC – Parts and Components,* op. cit., para. 5.26

> Paragraph 1(b) of the PPA states that GATT contracting parties shall apply Part II of the General Agreement (which includes Article VI) "to the fullest extent not inconsistent with existing legislation". Section 303 remains in effect today and applies to dutiable imports from all countries that are not signatories to the Subsidies Agreement.
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> 2.7 It was under Section 303 that the countervailing duty order on non-rubber footwear from Brazil was imposed in 1974, without the benefit of an injury test.
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> 2.8 In 1974, the United States enacted Section 331 of the Trade Act of 1974,[147] amending its countervailing duty law to apply also to imports of duty-free products. The United States acknowledged that this provision was not in existence in 1947 and, therefore, was not sheltered by the PPA. Accordingly, the United States law provided that, with respect to imports of duty-free products from a GATT contracting party, the United States would provide an injury test before the imposition of countervailing duties". (emphasis added)

4.210 The European Communities contends that the only legislation that was therefore under the scrutiny of the Panel was Section 331 of the Trade Act of 1974. This provision, which is part of the Trade Act of 1974 that includes also Sections 301-310 that are the subject-matter of the present dispute settlement procedure, was drafted, in relevant part, as follows:

> "(a)(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there is an affirmative determination by the Commission under subsection (b)(1) ...
>
> (b) Injury Determination With Respect to Duty-Free Merchandise; Suspension of Liquidation.—(1) Whenever the Secretary makes a final determination under subsection (a) that a bounty or grant is being paid or bestowed with respect to any article or merchandise which is free of duty and a determination by the Commission is required under subsection (a)(2), he shall—
>
> (A) so advise the Commission, and the Commission shall determine within three months thereafter, and after such investigation as it deems necessary, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such article or merchandise into the United States; and the Commission shall notify the Secretary of its determination; ...
>
> (c) Application of Affirmative Determination.--An affirmative determination by the Secretary under subsection (a) with respect to any imported article or merchandise shall apply with respect to articles entered ... on or after the date of the publication in the Federal Register of such determination. In the case of any imported article or merchandise which is free of duty, so long as a finding of injury is required by the international obligations of the United States, the preceding sentence shall apply only if the Commission makes an affirmative determination of injury under subsection (b)(1)".

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[147](Original footnote) 19 U.S.C. Section 1303(a)(2)

4.211 The European Communities underlines the very similar wording used by Section 331 and Sections 301-310 of the same Trade Act. With respect to the above mentioned provisions in Section 331, the 1992 "*Non-Rubber Footwear*" Panel found that

> "6.13 Having found that Section 331 of the 1974 Act and Section 104(b) of the 1979 Act are applicable to like products, the Panel examined whether this legislation as such is consistent with Article I:1. The Panel noted that the CONTRACTING PARTIES had decided in previous cases that legislation mandatorily requiring the executive authority to impose a measure inconsistent with the General Agreement was inconsistent with that Agreement as such, whether or not an occasion for the actual application of the legislation had arisen. The Panel recalled that the backdating provisions of the two Acts are mandatory legislation, that is they impose on the executive authority requirements which cannot be modified by executive action, and it therefore found that these provisions as such, not merely their application in concrete cases, have to be consistent with Article I:1". (footnote omitted)

4.212 The European Communities notes that, under the United States' countervailing duty law, the administration has discretion whether or not to apply a countervailing duty on subsidised products. The requirement that the Administration not apply the injury criterion *if* it decides to apply a countervailing duty was nevertheless regarded to be "mandatory".

4.213 In the view of the European Communities, in the case of the 1994 *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco* panel report,[148] its findings were based, on the one hand, on the "*Superfund*" and the *Thai - Cigarettes* panel reports (thus confirming the past GATT 1947 practice). On the other hand, the panel explicitly indicated that the discriminatory measures in Section 1106(c) of the 1993 US Budget Act had not been followed by the promulgation of the implementing rules required by the Act.

4.214 The European Communities contends that further "useful guidance"[149] for this Panel could also be found in the unadopted panel report on *EEC - Member States' Import Regimes for Bananas*[150], paragraphs 342 to 349.

4.215 **The United States responds by recalling** that the European Communities argues that GATT 1947 panels implicitly relied on a "restrictive interpretation of mandatory legislation" because such an interpretation was necessary in light of the Protocol of Provisional Application. According to the European Communities, because the Protocol exempted from GATT 1947 coverage existing legislation, "effective application of GATT 1947" required that this exemption have a limited scope. The European Communities states, "[t]he contracting parties therefore had no right to expect that the legal uncertainty arising from the existence of such [mandatory] legislation would be eliminated". According to the European Communities, GATT panels in fact either implicitly or explicitly relied on the existence of the Protocol in those cases finding discretionary legislation non-actionable.

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[148] Panel Report on *US – Tobacco,* op. cit., in particular, para. 118.

[149] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, page 15.

[150] Panel Report on *EEC - Member States' Import Regimes for Bananas,* adopted 3 June 1993, DS32/R.

4.216 The United States then contends that the EC's logic is flawed and hard to follow, and it is not clear what "legal uncertainty" arose from "the existence of" pre-existing mandatory legislation. The European Communities apparently is attempting to claim that "uncertainties" existed and had to be tolerated under the GATT 1947 in order to support its argument that they may no longer be tolerated under the WTO Agreement. The United States will address the EC's arguments regarding "uncertainty" in more detail shortly. For now it is sufficient to note that the distinction between the consistency of discretionary and mandatory legislation arose for reasons having nothing to do with the Protocol of Provisional Application or any "uncertainties" the Protocol created.

4.217 The United States notes that the European Communities claimed that the panel reports which developed this doctrine either cited the Protocol or cases citing the Protocol, but it fails to establish this in its analysis of these panel reports. To the contrary, these cases never once reference the Protocol or cases citing the Protocol when dealing with the issue of whether the mere existence of discretionary legislation is actionable. The analysis of these cases confirms this. It also confirms that there has been no change in the application of this doctrine in WTO jurisprudence, nor any reference in that jurisprudence to the fact that the Protocol was eliminated. The EC's assertions concerning the relationship between the development of this doctrine and the Protocol are completely without foundation.

4.218 The United States notes that the European Communities purports to demonstrate how the doctrine of the non-actionability of discretionary legislation arose in connection with the Protocol of Provisional Application. The European Communities stated that the panels which developed this doctrine either cited the Protocol or cases citing the protocol. The following analysis of these cases reveals that this is not true, and that the EC's discussion of these cases is highly distorted, inaccurate and misleading.

4.219 The United States argues that the first panel to find that the mere existence of discretionary legislation is not actionable was the 1987 *US - Superfund* panel.[151] In its analysis of this case, the European Communities makes the bald assertion that this panel "was aware of" the dilemma allegedly created by the Protocol. It offers absolutely no support for this assertion. The EC offers no evidence that the *Superfund* case so much as references the Protocol, because there is no such reference. The *Superfund* panel referred neither to prior panel reports, nor to the Protocol, in making its finding regarding discretionary legislation.[152]

4.220 The United States argues that after referencing *US - Superfund*, the European Communities next introduces, with the phrase "[a]long the same lines", a quotation from the 1990 panel report on *EEC - Parts and Components* applying the mandatory/discretionary distinction, as if the leap it made with respect to the *Superfund* panel may be transferred to yet another case. However, the *EEC – Parts and Components* case makes no reference to the

[151] Panel Report on *US – Superfund,* op. cit., para. 5.2.9.

[152] See Panel Report on *US - Superfund*, op. cit., para. 5.29. The United States notes that elsewhere in the *Superfund* report, the panel cited *Japan Leather* in support of its finding that mandatory legislation is actionable even if not yet in effect. Ibid., para. 5.22. The *Japan Leather* panel made no reference to the Protocol or to any cases citing the protocol. Rather, the panel found that a quantitative restriction was actionable even if an exporting country had not filled its quota. Panel Report on *Japanese Measures on Imports of Leather*, adopted 15/16 May 1984, BISD 31S/94, para. 55.

Protocol, or to cases citing the Protocol. Instead, it refers to the *Superfund* panel report which, as we have seen, makes no reference to the Protocol or to cases citing the Protocol.[153]

4.221 In the view of the United States, the European Communities next juxtaposes a reference to the 1989 panel on *Norway -- Restrictions on Imports of Apples and Pears*, a case which does, indeed, refer to the Protocol and the question of whether certain mandatory legislation was, by virtue of the Protocol, exempt from GATT coverage. This case did not, however, involve the question of whether the mere existence of discretionary legislation is actionable.[154]

4.222 According to the United States, the European Communities identifies a case which discusses both the Protocol and the question of whether the mere existence of discretionary legislation is actionable: *Thai - Cigarettes*. However, the European Communities incorrectly states that the *Thai - Cigarettes* panel report "dealt with the issue of mandatory *versus* discretionary legislation exclusively in the context of the interpretation of a clause in Thailand's Protocol of accession identical to paragraph 1(b) of the PPA".

4.223 The United States contends that in fact, the issue of mandatory versus discretionary legislation arises three times in *Thai – Cigarettes*. The first is in the context of addressing whether Thailand's Protocol exempted a provision of the Tobacco Act (Section 27) from the application of Article XI:1 of the GATT 1947. [155] The Panel's discussion of this point references *Norway Apples*, but makes no reference to *US - Superfund* or to *EEC - Parts and Components.*[156] The next reference to a discretionary/mandatory distinction comes in the context of determining whether the mere existence of excise tax provisions allowing for the possibility of a violation of GATT 1947 Article III:2 could be said to violate that provision.[157] The panel found it did not, relying on the *US – Superfund* and *EEC – Parts and Components* panel reports.[158] Despite the fact that the Panel had one paragraph earlier applied the discretionary/mandatory distinction in the context of the PPA, the panel did not refer to this finding or to the Protocol.[159] Likewise, when the panel for a third time addressed a mandatory/discretionary distinction, this time to determine whether the existence of a provision "enabling the executive authorities to levy [a] discriminatory [business and municipal tax]" violated Article III, the panel concluded that it did not.[160] In making this finding, the panel referenced its finding with respect to excise taxes (which referenced the *US – Superfund* and *EEC – Parts and Components* reports), but made no reference to its earlier findings with respect to the Protocol.[161] The panel thus drew no connection between the non-actionability of discretionary legislation and the exemption of pre-existing mandatory legislation under the Protocol, despite the opportunity presented by the fact that the dispute dealt with both issues.

4.224 The United States notes that the EC citation to *US - Malt Beverages* is equally without support. The European Communities notes that this panel report addressed the question of whether legislation was exempt from the GATT 1947 because it was covered by the Protocol (the panel found it was not), but neglects to point out that the Protocol is not so much as mentioned in the separate discussion in that report of whether the non-enforcement of

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[153] See *EEC – Parts and Components*, op. cit., paras. 5.25-5.26.
[154] Panel Report on *Norway – Restrictions on Apples and Pears*, op. cit., paras. 5.6-5.13.
[155] Panel Report on *Thai – Cigarettes,* op. cit., paras. 82-83.
[156] Ibid.
[157] Ibid., para. 84.
[158] Ibid.
[159] See ibid.
[160] Ibid., paras. 85-86.
[161] See ibid.

mandatory legislation rendered legislation non-actionable.[162] That discussion again references *Thai - Cigarettes, EEC Parts and Components* and *US - Superfund,* but not the Protocol or cases citing the Protocol.[163] The Protocol issue cited by the European Communities is clearly unrelated to the issues presented here.

4.225 The United States notes that the European Communities next discusses the 1992 panel report on *United States - Non-Rubber Footwear*. The European Communities asserts that "the context was again provided by the PPA", an assertion which is at best misleading. While issues relating to the PPA were responsible for the fact that the United States was applying multiple countervailing duty regimes to countries in different circumstances, the exemption of various of these regimes under the PPA was not at issue.[164] Rather, the issue related to the comparative treatment different countries received under each of these regimes, which the panel found to violate GATT 1947 Article I:1.[165] The panel found that the specific provisions of these regimes granting more or less favorable treatment were mandatory because they could not be modified through executive discretion, and were therefore actionable as such.[166] In a footnote to this finding omitted by the European Communities, the panel cited *US - Superfund* and *EEC – Parts and Components*.[167] There is no reference to the Protocol or to cases citing the Protocol.

4.226 The United States points out that the European Communities also draws false comparisons between Sections 301-310 and the laws at issue in *Non-Rubber Footwear*. First, the EC focuses on only one of the laws under examination in that case, an amendment to a 1930s law included in the Trade Act of 1974. That amendment, like the other laws at issue dating to the 1930s and 1979, related to countervailing duties and had nothing to do with Sections 301-310. Second, the EC quotes with emphasis references in the 1974 amendment to "determinations" and the word "shall", and states, "the EC cannot help but underline the very similar wording used by Section 331 and Sections 301-310 of the same Trade Act".

4.227 The United States argues that the European Communities ignores the fact that the "determinations" on which it focuses had absolutely nothing to do with the finding in the case. The issue in *Non-Rubber Footwear* was the timing and procedures under each of the laws for lifting existing countervailing duty orders. Existing countervailing duty orders on products of countries newly granted GSP benefits were automatically given an injury review. If that review was negative, the order was revoked, "backdated" to the date these countries were granted GSP benefits. On the other hand, countervailing duty orders on dutiable products from countries acceding to the Subsidies Code were given an injury review only upon application within three years of accession, and the revocations were "backdated" only to the date of the application. The differential treatment was the basis for the panel's Article I:1 finding; that finding had nothing to do with the language highlighted in the EC description.

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[162] The United States refers to Panel Report on *US – Malt Beverages*, op. cit., paras. 5.39, 5.57, 5.60.

[163] See ibid., para. 5.39 and note.

[164] The United States refers to Panel Report on *Denial of Most-favoured Treatment as to Non-Rubber Footwear from Brazil* ("*Brazilian Non-Rubber Footwear*"), adopted 19 June 1992, BISD 39S/128, paras. 2.6, 2.8 (explaining that the United States did not contest the fact that while a countervailing duty law dating to the 1930s was exempt under the PPA, a 1974 amendment to that law was not).

[165] Ibid., paras. 6.14, 6.17.

[166] Ibid., para. 6.13.

[167] Panel Report on *Brazilian Non-Rubber Footwear*, op. cit., paras. 6.4, 6.5, 6.14, 6.17.

4.228 In the US's view, the European Communities further attempts to draw false parallels between the 1974 countervailing duty law amendment and Sections 301-310 by stating that, under the countervailing duty law,

> "the administration has discretion whether or not to apply a countervailing duty on subsidized products. The requirement that the Administration not apply the injury criterion *if* it decides to apply a countervailing duty was nevertheless regarded to be mandatory".

4.229 According to the United States, the only problem with the EC's analysis is that it bears no relationship to that of the panel. "The requirement that the Administration not apply the injury criterion" was (1) not at issue in the case, if for no other reason than (2) no such requirement is in the law. Again, the issue in the case was the timing and procedures for injury reviews and for revocation of existing countervailing duty orders. Because the case dealt with existing orders, the Administration had already in each of these cases determined that a countervailable subsidy existed, years before the issue of revocation, and the application of different revocation regimes, ever arose. Thus, even were it accurate to describe such determinations as discretionary (the procedures and methodologies for making the determination are detailed in statutory and regulatory provisions, and allow for limited discretion), these determinations were never at issue in the case, and were completely irrelevant to the "backdating provisions" which the panel considered mandatory and therefore actionable as such.

4.230 The United States points out that the European Communities fails to include any discussion of how this practice allegedly changed under the WTO because the Protocol was no longer in effect. The non-actionability of discretionary legislation (or the actionability of mandatory legislation) was again at issue in *Canada – Civil Aircraft, Turkey - Textiles* and *Argentina – Textiles and Apparel (US)*, but the European Communities addresses only the last of these. In its discussion of that case the European Communities provides no demonstration that the panel applied a new definition of "mandatory", or that the panel referred to the Protocol of Provisional Application. Instead, the panel found that Argentina's specific duties were mandatory measures, relying on the consistent line of GATT and WTO cases establishing the mandatory/discretionary distinction.[168] The panel stated, "GATT/WTO case law is clear in that a mandatory measure can be brought before a Panel, even if such an adopted measure is not yet in effect".[169] In a footnote omitted from the EC's discussion, the panel cited *US - Superfund.* The panel also noted that the *U.S. Tobacco* report confirmed this interpretation.[170]

4.231 According to the United States, had the EC bothered to address the *Canada – Aircraft* and *Turkey - Textile* cases, it would have found that neither of these cases did anything other than apply the GATT distinction on discretionary/mandatory legislation. For example, in *Canada – Aircraft*, the panel stated:

> "We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States Tobacco*, the panel 'recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act

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[168] Panel Report on *Argentina – Textiles and Apparel(US)*, op. cit., para. 6.45.
[169] Ibid.
[170] Ibid.

> inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge'".[171] (citation omitted)

4.232 The United States considers that neither *Canada - Aircraft* nor *Turkey - Textiles* redefined the meaning of "mandatory" or refer to the Protocol of Provisional Application to do so.[172] The EC's claim that the definition of mandatory has changed because of the elimination of the Protocol of Provisional Application is thus pure fantasy. Neither the GATT cases establishing the actionability of mandatory legislation nor the WTO cases which have continued to apply this rule relied on the existence, expiration, or anything else regarding, the Protocol of Provisional Application.[173]

(iii) Marrakech Agreement

4.233 **The European Communities also argues** that Article XVI:4 of the Marrakech Agreement provides for a more far-reaching and novel obligation upon WTO Members when compared to Articles 26 and 27 of the Vienna Convention on the Law of Treaties or to the legal situation existing under the GATT 1947,

> "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations [under the WTO agreements]".

4.234 The European Communities points out that in particular, the provision requires a positive action by the WTO Member ensuring the conformity of its domestic law, which includes not only legislation but also regulations and administrative procedures.

4.235 The European Communities further indicates that through Article 3.2 of the DSU, the Uruguay Round participants when they agreed to adopt the DSU explicitly pursued the objective of providing security and predictability to the multilateral trading system. This objective has been subsequently confirmed by the Appellate Body in *EC – Computer Equipment* case[174] as

> "'an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994'".

4.236 The European Communities finally contends that the existing legislation clauses in the PPA and the protocols of accession have been explicitly excluded from the definition of the General Agreement on Tariffs and Trade 1994.

4.237 In the view of the European Communities, four sets of important consequences derive from the above-mentioned new legal environment:

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[171] Panel Report on *Canada – Aircraft,* op. cit., para. 9.124, *citing* Panel Report on *US – Tobacco,* op. cit., para. 118.

[172] See *Canada – Aircraft*, op. cit., para. 9.124; Panel Report on *Turkey – Restrictions on Imports of Textile and Clothing Products,* circulated 31 May 1999, WT/DS/34/R, para. 9.37.

[173] The United States adds that even if the distinction between mandatory and discretionary measures had originated in the distinction drawn in the Protocol of Provisional Application, it is difficult to understand how the definition of "mandatory" could change. Either legislation "mandates" – commands or obliges - a violation, or it does not.

[174] Appellate Body Report on *EC – Computer Equipment,* op. cit.

(a) Unlike under the GATT 1947, a conflict between a pre-existing incompatible legislation and any obligation under the covered agreements must be resolved in favour of the latter and to the detriment of the former. As the Appellate Body has decided in the *India - Patents (US)* case[175], this new rule is applicable with no exceptions as from 1 January 1995;

(b) The obligations under Article XVI:4 encompass not only legislation but also regulations and administrative procedures and thus include the type of law that is normally adopted and amended by actions of executive authorities. The distinction between law that binds the executive authorities and law that can be modified by them is thus no longer relevant.

(c) As was recalled in the EC's oral statement of 29 June 1999, the terms "ensure" and "conformity" in Article XVI:4, taken together in their context, indicate that that provision obliges all WTO Members not merely to grant their executive authorities formally the right to act consistently with WTO law but to structure their law in a manner that "makes certain" that the objectives of the covered agreements will be achieved.[176]

(d) Article 3.2 of the DSU and the principle of "good faith" implementation of international obligations under Article 26 of the Vienna Convention on the Law of Treaties no longer allow the existence of legal situations, under domestic legislation, regulations, administrative procedures or under any combination of them, which could seriously impair the security and predictability of the international trading system. A domestic law, regulation or administrative procedure whose structure and architecture is specifically designed to create uncertainty for the trade with other Members could therefore never be deemed to ensure conformity with WTO law.

4.238 The European Communities further argues that in this new legal environment it is then no longer justified to apply as such the standards developed under the GATT 1947 to domestic legislation. According to Articles XVI:4 of the WTO and 3.2 of the DSU together with the principle of "good faith" implementation under Article 26 of the Vienna Convention on the Law of Treaties Members' domestic law cannot be considered to be WTO-consistent merely because it does not formally preclude WTO-consistent actions. WTO Members must now go further and ensure that their domestic law is not designed to frustrate the implementation of their WTO obligations.

4.239 The European Communities argues that the Panel practice after the entry into force of the WTO is either inconclusive (and therefore does not stand in the way of the above-described interpretation) or supports the EC's views.

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[175] Appellate Body Report on *India - Patents (US)*, op. cit., para. 81

[176] The European Communities notes that it is interesting to note that in a different factual context, the Human Rights Committee - established by Article 28 of the International Covenant on Civil and Political Rights - followed a logic that, *mutatis mutandis*, is comparable to the logic suggested by the European Communities in this case. In the "Mauritian Women" case, it held with respect to the possibility of a direct violation of a right by a law that "it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility" (emphasis added). (35/1978, paragraph 9.2)

4.240 The European Communities points out that the 1998 Report of the Panel *Japan – Measures Affecting Agricultural Products* dealt in particular with the interpretation of paragraph 1 of Annex A to the SPS Agreement. That provision reads as follows:

> "phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures".

4.241 In the view of the European Communities, this provision has a function similar to that of Article XVI:4 of the Marrakech Agreement. It defines the domestic law related to phytosanitary measures, not merely actions taken under such law, as a phytosanitary measure. This means that each Member must ensure that that its domestic law related to phytosanitary measures is in conformity with its obligations under the SPS Agreement. Japan essentially argued that its domestic law is in conformity with the SPS Agreement because it does not mandate actions inconsistent with the SPS Agreement. The Panel rejected this argument on the following grounds:

> "8.111 Even though the varietal testing requirement is not mandatory – in that exporting countries can demonstrate quarantine efficiency by other means – in our view, it does constitute a "phytosanitary regulation" subject to the publication requirement in Annex B. The footnote to paragraph 1 of Annex B refers in general terms to "phytosanitary measures such as laws, decrees or ordinances".[177] Nowhere does the wording of this paragraph require such measures to be mandatory or legally enforceable. Moreover, Paragraph 1 of Annex A to the SPS Agreement makes clear that "phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures". It does not, in turn, require that such measures be mandatory or legally enforceable. The interpretation that measures need not be mandatory to be subject to WTO disciplines is confirmed by the context of the relevant SPS provisions, a context which includes provisions of other WTO agreements and the way these provisions define "measure", "requirement" or "restriction"[178], as interpreted in GATT and WTO jurisprudence.[179] This context indicates that a

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[177] [original footnote] In accordance with Article 3.2 of the DSU and established WTO jurisprudence, we shall interpret these terms in paragraph 1 of Annex A in accordance with the interpretative rules of the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention"), in particular Article 31 thereof which provides in relevant part as follows: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

[178] [original footnote] For example, the Illustrative List of Trade-Related Investment Measures ("TRIMs") contained in the Annex to the Agreement on TRIMs indicates that TRIMs inconsistent with Articles III:4 and XI:1 of the GATT include those which are "mandatory or enforceable under domestic law or under administrative rulings, *or compliance with which is necessary to obtain an advantage*" (emphasis added).

[179] [original footnote] Recently, for example, the Panel on *Japan – Measures Affecting Consumer Photographic Film and Paper* (adopted on 22 April 1998, WT/DS44/R), addressing a claim of non-violation nullification and impairment under Article XXIII:1(b) of the GATT, stated the following (at paragraph 10.49):

> a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient

> non-mandatory government measure is also subject to WTO provisions in the event compliance with this measure is necessary to obtain an advantage from the government or, in other words, if sufficient incentives or disincentives exist for that measure to be abided by". (emphasis added)

4.242 The European Communities considers that the above reasoning can be transposed to Article XVI:4 of the WTO Agreement because the rationale of that provision is similar to that of paragraph 1 of Annex A to the SPS Agreement: what is relevant are the trade effects of the law at issue and the incentives or disincentives it creates, not merely whether it is mandatory.

4.243 The European Communities further notes that in its 1997 report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items,*[180] a panel found what follows:

> "6.45 In respect of the Argentine argument that the US claim should not be considered because it addresses only a potential violation - in support of which it refers to the *Tobacco* Panel report – we note that the Argentine measures, the specific duties, are mandatory measures. Argentina admits that its customs officials are obligated to collect the specific duties on all imports. GATT/WTO case law is clear in that a mandatory measure can be brought before a Panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect of such measure for the complaining party:
>
> > '[T]he very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence'.
>
> We are also of the view that the *Tobacco* Panel report merely confirms this principle.
>
> 6.46 Moreover, in *Bananas III*, the Appellate Body confirmed that the principles developed in *Superfund* were still applicable to WTO disputes and that any measure, which changes the competitive relationship of Members, nullifies any such Members' benefits under the WTO Agreement.
>
> > 'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the

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> incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access.

See also the Panel Report on *Japan – Trade in Semi-Conductors* ("*Japan - Semiconductors*"), adopted on 4 May 1988, BISD 35S/116, where the Panel found (at paragraph 109) that although measures are not mandatory, they could be considered as "restrictions" subject to Article XI:1 of the GATT in the event "sufficient incentives or disincentives existed for non-mandatory measures to take effect". Similarly, the Panel on *EEC – Regulation on Imports of Parts and Components* (adopted on 16 May 1990, BISD 37S/132) considered (at paragraph 5.21) that the term "laws, regulations or requirements" contained in Article III:4 of the GATT included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government".

[180] Panel Report on *Argentina – Textiles and Apparel (US)*, op. cit.

> competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement'.
>
> We consider that this principle is also appropriate when dealing with the application of the obligations contained in Article II of GATT which requires a 'treatment no less favourable than that" provided in a Member's Schedule. In the present dispute we consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has the potential to violate its bindings, thus undermining the security and the predictability of the WTO system'". (emphasis added).

4.244 In the view of the European Communities, the panel's decision fully supports the EC's approach as well.

4.245 **The United States contends** that the European Communities claims that panel practice after entry into force of the WTO "is either inconclusive (and therefore does not stand in the way of the [the EC's "new legal environment" theory]) or supports the EC's views". In support of this statement, the European Communities cites *Japan – Measures Affecting Agricultural Products*[181] and *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*. However, the *Argentina – Textiles and Apparel (US)* panel does no more than reaffirm that mandatory legislation is actionable, without redefining the term "mandatory" as the European Communities seeks to do here.

4.246 The United States points out that as for *Japan – Agricultural Products*, the European Communities refers to a panel discussion involving the publication requirement in paragraph 1 of Annex B of the Agreement on Sanitary and Phytosanitary Measures. This discussion did not involve the question of whether discretionary measures are actionable, nor did the issue arise at any point in *Japan – Agricultural Products*. Japan did not, as the European Communities would have it, "essentially argue[] that its domestic law is in conformity with the SPS Agreement because it does not mandate actions inconsistent with the SPS Agreement".[182] Rather, Japan argued that its varietal testing requirement did not come within the specific terms of the definition of "sanitary and phytosanitary regulations" provided in Annex B of the SPS Agreement.[183] The panel rejected Japan's argument, finding that the definition in the Annex was not limited as proposed by Japan.

4.247 The United States notes that according to the European Communities, the *Japan – Agricultural Products* panel's reasoning "can be transposed to" WTO Agreement Article XVI:4 "because the rationale of that provision is similar to that of paragraph 1 of Annex A to the SPS Agreement". This conclusion is absurd. The rationale of paragraph 1 of Annex B – publication of SPS measures – cannot be equated with that of WTO Agreement Article XVI:4 – to ensure that domestic laws permit compliance with international obligations. Moreover, a panel's

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[181] Panel Report on *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products*"), adopted 19 March 1999, WT/DS76/R.

[182] Ibid. page 10.

[183] Footnote 5 to Annex B provided that the annex covered "phytosanitary measures such as laws, decrees or ordinances". See Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B, footnote 5.

examination of an explicit definition of "measures" cannot be equated to the question of whether the mere existence of non-mandatory legislation can result in a finding of WTO inconsistency.

4.248 The United States further argues that the European Communities also claims that the *Japan – Agricultural Products* panel's reliance on a line of GATT cases which pre-date the WTO[184] somehow supports the EC's claim that the advent of the WTO changed the definition of "mandatory". Beyond the issue of timing, the European Communities is confusing two separate lines of GATT cases which stand for very different propositions: (1) the *Superfund* line of cases, which stand for the mere existence of legislation which grants governmental authorities the discretion to comply or not comply with their GATT/WTO obligations is not grounds for a finding of inconsistency; and (2) the *Italian Machinery/FIRA* line of cases, which stand for the proposition that a measure which nominally does not mandate compliance by private actors may nevertheless be considered a government "requirement" or "restriction" subject to the requirements of GATT 1947 Article III or XI if it creates sufficient incentives or disincentives for those private actors to comply.[185]

4.249 The United States claims that the EC's confusion recalls that of the panel in *India - Patents (US)*, which "merge[d], and thereby confuse[d], two different concepts from previous GATT practice".[186] In similar fashion, the European Communities posits a theory of "not genuinely discretionary" measures it has pieced together from assumptions, inferences and misreadings of unrelated panel findings, the Protocol of Provisional Application and miscellaneous DSU and WTO objectives. Like the theories at issue in *India - Patents (US)* and *US - Shrimp,* the EC's theory has no textual basis and must be rejected. The analysis of whether Sections 301-310 are consistent with DSU Article 23 and WTO Agreement Article XVI:4 must be based on the text of those provisions.

4.250 In response to the Panel's question as to what standards should be used in order to determine whether a Member has ensured the conformity of its laws, regulations and administrative procedures with its WTO obligations, **the European Communities contends** that as demonstrated above, it is no longer correct to rely on the distinction between mandatory and discretionary legislation along the legal path followed by the GATT 1947 practice. However, this does not mean that all domestic law that does not preclude WTO-inconsistent measures and thus provides for the possibility of actions deviating from WTO law (a "potential deviation") is WTO-inconsistent. It is now necessary to distinguish between

(a) domestic law that is merely meant to transfer decision-making authority from one constitutional body (most often the Parliament) to another constitutional body (most often the executive authorities) within specified parameters, and

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[184] These cases include Panel Report on *Japan – Semiconductors*, op. cit., para. 109 and Panel Report on *EEC – Parts and Components*, op. cit., para. 5.21.

[185] See Panel Report on *Italian Discrimination Against Imported Agricultural Machinery* ("*Italian Machinery*"), adopted 23 October 1958, BISD 7S/60; Panel Report on *Canada – Administration of the Foreign Investment Review Act* ("*Canada - FIRA*"), adopted 7 February 1984, BISD 30S/140, para. 5.4; *EEC – Parts and Components*, para. 5.21; Panel Report on *Japan –Semiconductors*, op. cit., para. 109.

[186] Appellate Body Report on *India - Patents (US)*, op. cit., para. 36. According to the United States, the *India - Patents (US)* panel confused the concept of protecting expectations of parties as to the competitive relationship between their products and those of other parties with the concept of protecting reasonable expectations of parties relating to market access concessions, all in the service of developing a theory of "protection of legitimate expectations" not found in the text of the TRIPs Agreement. Ibid.

(b) domestic law that does not preclude the executive authorities from acting consistently with WTO law but that is - by its design, structure and architecture - manifestly intended to encourage violations of WTO law or is otherwise biased against WTO-consistent action.

4.251 In the view of the European Communities, the first type of domestic law is genuinely discretionary. It is simply a consequence of the legislator's decision to delegate decision-making power to the administration. WTO Members are free to decide how to distribute decision-making authority on trade policy matters between the legislature and executive authorities. Article XVI:4 positively requires WTO Members to ensure that their domestic law is in conformity with their obligations under the covered agreements and therefore does not frustrate the objectives of the WTO. However, nothing in Article XVI:4 requires Members to transfer all decision making to the legislator. For these reasons, it would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include explicit language in their domestic law precluding WTO-inconsistent actions.

4.252 The European Communities goes on to state that the second type of legislation is not genuinely discretionary. It is not intended to transfer decision-making authority within specified parameters from one branch of the government to another but to frustrate the implementation of specific WTO obligations. It creates, for no legitimate reason, legal uncertainty and unpredictability for the trade with other Members. A Member that maintains such law has not ensured the conformity of its law with its WTO obligations even if the law does not preclude the theoretical possibility of WTO-consistent actions.

4.253 The European Communities recalls its argument that in order to determine whether legislation that does not preclude WTO-consistent actions is genuinely discretionary, Panels should concentrate their examination as a matter of priority on the text of the domestic law or regulation.

4.254 In the view of the European Communities, this analysis on the text should focus firstly on verifying whether that domestic legislation leaves a large degree of liberty of action to the administration to develop a policy within certain predetermined parameters[187] or whether it

[187] The European Communities notes that the United States quoted the still unadopted Panel Report on *Canada – Aircraft*, op. cit., as an evidence of the continuing application of the GATT 1947 practice concerning the definition of mandatory and discretionary legislation after the Uruguay Round. The European Communities disagrees. The European Communities is of the view that this recent Panel report supports fully the EC's suggested approach. When considering the legal nature of Canada's Export Development Act (EDA), Section 10, the Panel reached the correct conclusion that "a mandate to support and develop Canada's export trade does not amount to a mandate to grant subsidies, since support and development could be provided in a broad variety of ways" (para. 9.127, *in fine*). The reading of the relevant provision of Canada's EDA confirms it as a clear example of a genuine discretionary legislation within the criteria suggested here by the European Communities:

"Purposes and Powers
10. (1) The Corporation is established for the purposes of supporting and developing, directly or indirectly, Canada's export trade and Canadian capacity to engage in that trade and to respond to international business opportunities.
Powers.
(1.1) Subject to any regulations that may be made under subsection (6), in carrying out its purposes under subsection (1), the Corporation may
(a) acquire and dispose of any interest in any property by any means;
(b) enter into any arrangement that has the effect of providing, to any person, any insurance, reinsurance,

induces the executive to act systematically in conflict with the Member's WTO obligations and that it is at the very least sufficiently constraining and well-defined. In the latter situation, the measure should not be considered genuinely discretionary.

4.255 In the view of the European Communities, in addition, Panels should consider the design, structure and architecture of the domestic legislation under examination. Any domestic legislation or regulation whose structure, design or architecture is biased against compatibility with the Member's WTO obligations, or that is designed to create uncertainty and unpredictability in the trade relations among WTO Members, or that is structured so as to render difficult, unlikely or practically impossible for the executive to pursue a WTO compatible implementation could not be considered genuinely discretionary.

4.256 The European Communities points out in this respect that, as the very recent Panel Report on *Chile - Taxes on Alcoholic Beverages*[188] rightly indicates at paragraph 7.119

> "Statements by a government against WTO interests (e.g. indicating a protective purpose or design) are most probative. Correspondingly, it is less likely that self-serving comments by a government attempting to justify its measure would be particularly probative".

4.257 The European Communities further explains that finally, an additional guiding principle to be used in order to determine whether a domestic law or regulation corresponds to a genuinely discretionary measure is the definition by Dailler and Pellet of the public international law principle of "good faith" implementation: "[L]'exécution de bonne foi, exige positivement fidélité et loyauté aux engagements pris" and should therefore exclude "toute tentative de 'fraude à la loi', toute ruse".[189]

4.258 In response to the Panel's question as to whether the standards applicable under WTO law in general and Article XVI:4 of the WTO Agreement in particular are met by legislation that mandates discriminatory tax but at the same time allows for "some limited exceptions in special circumstances subject to discretionary powers", the European Communities argues that this specific issue raised by the Panel can be resolved by applying the criteria suggested by the European Communities above.

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indemnity or guarantee;
(c) enter into any arrangement that has the effect of extending credit to any person or providing an undertaking to pay money to any person;
(d) take any security interest in any property;
(e) prepare, compile, publish and distribute information and provide consulting services;
(f) procure the incorporation, dissolution or amalgamation of subsidiaries;
(g) acquire and dispose of any interest in any entity by any means;
(h) make any investment and enter into any transaction necessary or desirable for the financial management of the Corporation;
(i) act as agent for any person or authorize any person to act as agent for the Corporation;
(j) take such steps and do all such things as to it appear necessary or desirable to protect the interests of the Corporation; and
(k) generally, do all such other things as are incidental or conducive to the exercise of its powers, the performance of its functions and the conduct of its business.

[188] Panel Report on *Chile - Taxes on Alcoholic Beverages*, circulated 15 June 1999, WT/DS87/R - WT/DS110/R.

[189] Droit International public, (1994), paragraph 143.

4.259 The European Communities points out that according to the Oxford English Reference Dictionary, a rule is "a principle to which an action conforms or is required to conform". An exception is "an instance that does not follow the rule". In practice, the existence of exceptions is considered to be the confirmation of the existence of the rule.

4.260 The European Communities argues that in the example submitted by the Panel to the parties, the fact that the administration is granted, in some limited circumstances, with the power to act by exception to the rule should therefore be interpreted in the following way:

(a) The administration is required to follow as a matter of principle the (WTO-inconsistent) rule;

(b) The use of the exception is limited to specific and limited cases;

(c) The existence of the exception confirms the existence of the (WTO-inconsistent) rule in the first place.

(d) Consequently, the exceptions could not be implemented in such a way as to systematically replace the rule without amending the law itself and, in any case, without defeating its overall (WTO-inconsistent) purpose that the legislative body intended to achieve.

4.261 In the EC's view, therefore, a Member's legislation providing for a (number of) rule(s) that are inconsistent with one or more of the obligations under a WTO Agreement should be deemed to violate as such that Member's WTO obligations irrespective of whether the legislation was actually implemented and also independently from the existence of some "limited exceptions in special circumstances subject to discretionary powers".

4.262 The European Communities then contends that the design, structure and architecture of such legislation (i.e. its objectively expressed "intent") would be dominated by the (WTO-inconsistent) rule. It would be a legislation purposefully biased against WTO compatibility and thus could not be mended by the existence of some "limited exceptions" to the (WTO-inconsistent) rule. Moreover, the mere existence of such a legislation imposing (WTO-inconsistent) rules would inevitably create a pattern of uncertainty, insecurity and unpredictability in the trade relations among the Members and could by no means constitute a "good faith" implementation of the Member's WTO obligations under Article 26 of the Vienna Convention on the Law of Treaties or (even less so) under the more demanding standard set out in Article XVI:4 of the Marrakech Agreement.

4.263 The European Communities further argues that this is, if at all possible, even more relevant in instances where only a remote possibility to obtain an "act of grace" in a specific case, a kind of waiver, to be granted by the highest political authorities of the WTO Member concerned[190] and where such an "act of grace" is subject to a number of objective criteria that may, in practice, require the targeted WTO Member to give in to WTO-inconsistent pressure.

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[190] The European Communities notes that in a different factual context, the European Court of Human Rights followed a logic that, *mutatis mutandis*, is comparable to the logic suggested by the European Communities in this case. In the "*Soering*" case (1/1989/161/217), the ECHR stated the following:

"In the independent exercise of his discretion the Commonwealth's attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination

4.264 **The United States points out** that the European Communities suggested that WTO Agreement Article XVI:4, read together with DSU Article 3.2 and the elimination of the Protocol of Provisional Application, have created a "new legal environment". According to the European Communities, "In this new legal environment it is then no longer justified to apply as such the standards developed under the GATT 1947 to domestic legislation". Rather, "WTO Members must now go further and ensure that their domestic law is not designed to frustrate the implementation of their WTO obligations". Panels must therefore apply new standards in distinguishing among discretionary legislation to determine which are "not genuinely discretionary". According to the European Communities, a law is not genuinely discretionary if it "does not preclude the executive authorities from acting consistently with WTO law but that is - by design, structure and architecture - manifestly intended to encourage violations of WTO law or is otherwise biased against WTO-consistent action". Such a law "creates, for no legitimate reason, legal uncertainty and unpredictability for the trade with other Members".

4.265 According to the United States, the European Communities claims to derive this test from "Article 3.2 of the DSU and the principle of 'good faith' implementation of international obligations under Article 26 of the Vienna Convention on the Law of Treaties", which "no longer allows" legal situations "which could seriously impair the security and predictability of the international trading system". Leaving aside the fact that the language of Article 3.2 dates to the 1989 Montreal Rules, and thus predates the EC's "new legal environment", the European Communities is seeking to create from a WTO provision relating to the objectives of the Dispute Settlement Understanding, and its own notions of "good faith" and "uncertainty", an entirely new obligation not found in any provision of the WTO Agreement or its annexes.

4.266 The United States puts forth that the Appellate Body has confronted such a situation before. The European Communities even alludes to one such situation in its oral statement, when it refers to the US endorsement in *India - Patents (US)* of panel findings that the "protection of legitimate expectations of WTO Members regarding conditions of competition is as central to trade relating to intellectual property as it is to trade in goods that do not relate to intellectual property". What the European Communities fails to mention is that the Appellate Body squarely reversed the panel on this point.

4.267 The United States points out that the *India - Patents (US)* panel found that "the legitimate expectations of WTO Members" must be taken into account, and that the "protection of legitimate expectations of Members regarding the conditions of competition is a well established GATT principle" derived in part from GATT 1994 Article XXIII, the basic dispute settlement provisions of the GATT and WTO, and GATT 1947 panel reports relating to GATT 1947 Article III.[191] Further, based on Article 31 of the Vienna Convention, which provides for "good faith" interpretation of treaty terms in accordance with their ordinary meaning in their context and in light of their object and purpose, the Panel stated,

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supports such action. (…) The Court's conclusion is therefore that the likehood of the feraed exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 into play".

[191] Panel Report on *India – Patents (US)*, op. cit., paras. 7.20, 7.22. The panel reports which the panel cited included Panel Report on *Italian Machinery*, op. cit., paras. 12-13; Panel Report on *US – Superfund*, op. cit., para. 5.22, and Panel Report on *US – Section* 337, op. cit., para. 5.13.

> "In our view, good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement".[192]

4.268 The United States further notes that the Appellate Body rejected this approach, noting that the panel had "merge[d], and thereby confuse[d], two different concepts from previous GATT practice,[193] and had misapplied VCLT Article 31:

> "The Panel misunderstands the concept of legitimate expectations in the context of the customary rules of interpretation of public international law. The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[194]

4.269 The United States indicates that the Appellate Body went on to refer to DSU Article 3.2, which provides, "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements", and DSU Article 19.2, which provides, "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".[195] The Appellate Body stated, "These provisions speak for themselves. Unquestionably, both panels and the Appellate Body are bound by them".[196]

4.270 According to the United States, the European Communities in this case is attempting to engage in even more dramatic fashion in the "imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended",[197] the approach which the Appellate Body rejected in *India - Patents (US)*. Nowhere is the EC's "not genuinely discretionary" test found in WTO Agreement Article XVI:4, DSU Article 3.2, or any other provision of a covered agreement. Indeed, the European Communities does not claim that it does. Its test is based on extrapolation from the concept of "security and predictability" in Article 3.2 – an objective, not an obligation – and from a vague explanation of the "good faith" obligation in the VCLT – not a covered agreement.

4.271 The United States notes that Article 3.2 opens with the statement, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system".[198] This enunciation of the purpose of the DSU contains within it the understanding that it is the DSU itself which achieves this purpose. In other words, the substantive obligations in the text of the WTO Agreement and its annexes, enforced through the DSU, provide security and predictability. "The legitimate expectations of the parties to a treaty

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[192] Panel Report on *India - Patents (US)*, op. cit., para. 7.18.
[193] Appellate Body Report on *India - Patents (US)*, op. cit., para. 36.
[194] Ibid., para. 45. (emphasis added)
[195] Ibid., para. 47, citing DSU Arts. 3.2 and 19.2.
[196] Ibid.
[197] Ibid., para. 45. (emphasis added)
[198] The United States notes that this language is derived from the 1989 Montreal Rules.

are reflected in the language of the treaty itself".[199] As the Appellate Body underlined in *India - Patents (US)*, interpretations which go beyond the text to make up obligations out of thin air and aspirations can threaten the legitimacy of the dispute settlement system. Article 3.2 draws a line between dispute settlement and legislation, and directs that panels abstain from the latter.

4.272 The United States further contends that similarly, in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body stated, "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought".[200] In *US – Shrimp*, the Appellate Body rejected a panel's interpretation of the chapeau of Article XX that focused not on the ordinary meaning of the words of the chapeau and its immediate object and purpose, but instead on the general object and purpose of the GATT and WTO Agreement. Just as the European Communities now seeks to derive new obligations from the general notion of security and predictability, the *US – Shrimp* panel concluded that the chapeau included a general obligation "not to undermine the WTO multilateral trading system". According to the panel,

> "we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure,* if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system".[201]

4.273 The United States emphasises that the Appellate Body rejected this approach. The Appellate Body explained that, rather than examining the consistency of the measure in question with the chapeau of Article XX, the panel focused repeatedly on "*the design of the measure itself*".[202] The Appellate Body referred to this as:

> "a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione materiae*, fall outside the justifying protection of Article XX".[203]

4.274 In the view of the United States, the Appellate Body therefore reversed the panel's analysis and the findings based on that analysis.[204] It described the panel's analysis as "abhorrent to the principles of interpretation we are bound to apply".[205]

4.275 The United States argues that the European Communities is proposing a mode of analysis strikingly similar to one already rejected by the Appellate Body in *US - Shrimp*. Based on the same generalized notion of "security and predictability", the European Communities is proposing a test not found in DSU Article 23 or WTO Agreement Article XVI:4, a test focusing

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[199] Appellate Body Report on *India - Patents (US)*, op. cit., para. 45.

[200] Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US - Shrimp*"), adopted 6 November 1998, WT/DS58/AB/R, para. 114. (emphasis added)

[201] Panel Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 November 1998, WT/DS58/R, para. 7.44 (underlining added), quoted in Appellate Body Report on *US - Shrimp*, op. cit., para. 112.

[202] Appellate Body Report on *US - Shrimp*, op. cit., para 115. (emphasis in original)

[203] Ibid., para. 121.

[204] Ibid., para. 122.

[205] Ibid., para. 121.

on "the design of the measure itself": whether a discretionary domestic law's "design, structure and architecture" is "manifestly intended to encourage violations of WTO law or is otherwise biased against WTO-consistent action". The Panel must reject this test. The analysis of whether Sections 301-310 are consistent with DSU Article 23 and WTO Agreement Article XVI:4 "must begin with, and focus upon, the text of"[206] these provisions.

4.276 In this respect, further, the United States responds to the Panel's request for comments on the following statement in the third-party submission by Hong Kong, China:

> "The question is consequently raised as to how international obligations can be implemented in good faith if the possibility of deviation exists in a domestic legislation? Are there expectations that the international obligations will be observed and not impaired when the possibility of deviation is *expressis verbis* provided for in a domestic legislation? Is the predictability, necessary to plan future trade as the *Superfund* panel acknowledged, not affected when trading partners know *ex ante* that their partners have enacted legislation which allows them to disregard their international obligations?"

4.277 The United States answers that the question Hong Kong raises in the first sentence quoted above is a *non sequitur*. Parties to an international agreement have, by becoming parties, committed to implement their agreement obligations in good faith. It is this very fact that leads to the conclusion that one cannot assume that authorities will exercise discretion under domestic legislation so as to violate international obligations.

4.278 In the view of the United States, if authorities exercise their discretion such that they actually deviate from their international obligations, they may then be found to have violated those obligations. Until that point, however, it may not be assumed that they will exercise their discretion in this manner. It may not be assumed that parties will act in bad faith. Certainly the European Communities should accept this: in the Article 21.5 proceedings in the *Bananas* dispute and again in its recent proposal to amend Article 21, the European Communities has taken the position that there is a presumption of compliance in all WTO proceedings, even in Article 21.5 proceedings to determine whether a Member has brought into compliance a measure already found to be WTO-inconsistent.[207]

4.279 The United States adds that with respect to the relevance of whether legislation provides *expressis verbis* for the "possibility of deviation" from international obligations, the United States notes that any legislation which does not explicitly limit the exercise of discretion provides for such a possibility, and the United States doubts that Hong Kong authorities lack

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[206] Appellate Body Report on *US - Shrimp*, op. cit., para. 114.

[207] See Panel Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by the European Communities*, WT/DS27/RW/EEC, paras. 2.19, 4.13 (12 April 1999) (The United States points out that according to the European Communities, implementing measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged under appropriate DSU procedures" (para. 4.13); also according to the European Communities, a trading system based on a presumption of inconsistency would not be based on security and predictability of international trade relations and thus would be the opposite of the multilateral trading system envisaged by the Marrakesh Agreement (para. 2.19)); DSU Review, Discussion Paper from the European Communities dated 30 June 1999, Document No. 3864, para. 5, circulated on 1 July 1999 ("In the multilateral procedure to determine the conformity of implementing measures, the task of bringing a challenge and the burden of proof are on the party arguing non-conformity".) (US Exhibit 12).

such discretion.[208] This does not change the fact that WTO Members with discretionary legislation, whatever the form, have made a binding legal commitment to comply with their WTO obligations – in other words, to exercise their discretion in a WTO-consistent manner. As discussed further in response to the following question, there is no greater assurance that a Member will act in accordance with its WTO obligations if it exercises broad, undefined discretionary authority than if it must exercise discretion not to undertake WTO-inconsistent action explicitly provided for in legislation.

4.280 In the view of the United States, Hong Kong's reference to the *Superfund*[209] panel's discussion of "predictability" ignores the facts and findings of that case, which contradict Hong Kong's position. There, the legislation in question specifically did, *expressis verbis*, provide for action which, if delegated discretion were not exercised in a particular manner, would have been inconsistent with US obligations under the GATT 1947. The 1986 Superfund Act required importers to supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise, a penalty tax would be imposed in the amount of five percent ad valorem or a different rate to be prescribed in regulations by the Secretary of the Treasury by a different methodology.[210] The five per cent penalty tax, which was to go into effect on January 1, 1989 if regulations to the contrary were not issued, would have been inconsistent with GATT 1947 Article III:2.[211] At the time of the panel proceedings in 1987, the regulations in question had not yet been issued. Nevertheless, the panel concluded:

> "[W]hether [the regulations] will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement".[212]

4.281 According to the United States, it is worth emphasising the *US – Superfund* panel's reliance on the fact that there were "open questions" regarding the *Superfund* regulations which would have to be answered before a panel could determine the GATT-inconsistency of the penalty tax provision. On the one hand, this illustrates the fact that the panel would not assume that the United States would ultimately exercise its discretion in bad faith. However, it also illustrates the fact that, even where a statute is discretionary, the actual exercise of that discretion remains open to challenge. In *Superfund*, the regulations in that case – once issued – would have been subject to challenge if they violated GATT rules. Likewise, it remains open to WTO Members, including the European Communities, to challenge the US exercise of discretion under Sections 301-310 in particular cases if they believe it to be inconsistent with

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[208] The United States moreover notes that even were specific limits on discretion included in a country's domestic laws, this would not eliminate the possibility that authorities might exercise their power in violation of both these limits and their international obligations.

[209] Panel Report on *US – Superfund*, op. cit.

[210] Ibid., para. 5.2.9.

[211] Ibid.

[212] Ibid. (emphasis added)

US WTO obligations.[213] Thus, for this Panel to confirm the consistent findings of every GATT and WTO panel to date regarding the mandatory/discretionary distinction would in no way deny the European Communities or other Members the ability to challenge US actions taken under Sections 301-310.[214]

4.282 The United States further contends that the *Superfund* panel's discussion of "predictability" came in the context of explaining why mandatory legislation may be challenged even if it will not go into effect until a fixed time in the future.[215] As described above, the Superfund Act was enacted in 1986 but the penalty tax provision would not become effective until 1989. According to the panel, the fact that legislation is not yet in effect would not excuse any GATT-inconsistent acts which the legislation mandates.[216] However, the panel went on to conclude that the penalty tax provisions of the legislation were not mandatory because they also included discretion to implement regulations consistent with US GATT obligations.[217] As the panel indicated, the legislation gave US authorities "the possibility" to avoid GATT-inconsistent action.[218] Thus, as the United States has emphasized, it is the possibility of compliance, and not the possibility of deviation, which is the proper question for panels examining whether the mere existence of legislation as such is consistent with a Member's obligations. This has uniformly been the analysis which GATT and WTO panels have applied to date.

4.283 The United States claims that Hong Kong's attempt to subject to WTO findings of inconsistency discretionary legislation which "allows WTO-inconsistent action to be taken" also ignores the fact that domestic legislation may be applicable not only to WTO Members in connection with rights under covered agreements, but also to countries which are not WTO Members, and to WTO Members with respect to matters not subject to a covered agreement. The WTO Agreement and its annexes by definition are not applicable to such cases. Thus, even if discretionary legislation were to "leave open the possibility" of determinations which would violate DSU Article 23 if applied to a WTO Member regarding rights under a covered agreement, DSU Article 23 may not be read so as to circumscribe the exercise of a Member's rights with respect to non-WTO Members and non-WTO matters.

4.284 The United States indicates that to put another way, international agreements are made between contracting parties. The actions of those parties towards one another may or may not violate the obligations they have undertaken vis-à-vis one another. However, the actions taken towards non-parties are not relevant to this analysis. It is one thing to conclude that a contracting party may challenge legislation mandating action towards all if that action violates an obligation with respect to contracting parties. However, if legislation permitting such action

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[213] The United States notes that likewise, if it believes the European Communities is exercising its broad discretion under Article 133 of the Treaty of Amsterdam to regulate or restrict international commerce in a manner inconsistent with the EC's WTO obligations, or its broad discretion under the Treaty of Amsterdam to create WTO-inconsistent banana import regimes, it may challenge the European Communities in dispute settlement proceedings. However, the United States, like the European Communities, must wait until such discretion is actually exercised in a given case, and may then only challenge that specific exercise of discretion.

[214] The United States emphasises again that no such specific action, of the recent or more distant past, is within the terms of reference of this Panel. Unlike the situation in *EEC – Parts and Components,* op. cit., this case does not include a challenge both to the exercise of statutory discretion in a given case and to the "mere existence" of the statute. See ibid., paras. 5.25-5.26. It only includes the latter.

[215] Panel Report on *US – Superfund*, op. cit., paras. 5.2.1-5.2.2.

[216] Ibid.

[217] Ibid., para. 5.2.9.

[218] Ibid.

could also be challenged, contracting parties would effectively be precluded from exercising sovereign powers with regard to non-parties, except by establishing parallel sets of laws applicable to parties and non-parties, or by explicitly providing for limits in their domestic laws as to how discretion may be exercised towards parties. There is absolutely no indication in the WTO Agreement or its annexes that Members agreed to this degree of interference with the exercise of national sovereignty.

4.285 In response to a question posed by the Panel, the United States further agues that no distinction can or should be made between different types of discretionary legislation for purposes of determining whether the mere existence of that legislation violates a Member's WTO obligations. In either case, authorities may exercise their discretion in a manner consistent or inconsistent with their international obligations. One may not assume that authorities will fail to implement their international obligations in good faith.

4.286 The United States contends that leaving aside the fact that it may not be assumed that a Member will fail to act in good faith to comply with its obligations, it would be impossible to distinguish "good" and "bad" discretionary legislation. The Panel's question implies that it may be possible to distinguish based on whether the legislation provides for general, non-specific discretion to achieve certain goals, rather than discretion not to undertake a specified course of action which would violate a country's international obligations. However, if this were the test, it could lead to the odd result that legislation providing for broad discretion could not be reviewed as such even if authorities repeatedly exercise their discretion in a WTO-inconsistent manner, while legislation providing for discretion not to take WTO-inconsistent action could be found inconsistent even if authorities always exercise that discretion so as to be consistent with their WTO obligations.

4.287 The United States further points out that on the other hand, if the means of distinguishing discretionary legislation were based on whether there were a pattern of exercising that discretion in a WTO-inconsistent manner, as the European Communities suggests, this would present other problems. For example, the first requirement of any such test would be that a particular incident could not be included in the pattern unless there were panel or Appellate Body findings of a violation with respect to that incident. Complaining parties could not merely assert that violations had taken place in the past, and panels could not merely accept these assertions. However, if no such findings exist, the panel could itself make these findings only if the subject matter of each incident were within the panel's terms of reference, and involved a violation of a covered agreement.[219] Moreover, incidents occurring prior to entry into force of the covered agreements – before 1995 – could not be considered as part of the "pattern".

4.288 The United States adds that such a "pattern of conduct" test would imply a presumption that a Member will not comply with its WTO obligations. If experience under the WTO Agreement has established any pattern, it is that the European Communities has persistently failed to comply with its obligations with respect to its banana import regime, and any presumption of non-compliance could be expected to apply in this case. Yet, as noted above, in the Article 21.5 proceedings in the *Bananas* dispute and again in its recent proposal to amend DSU Articles 21, 22 and 23, the European Communities has taken the position that there is a presumption of compliance in all WTO proceedings, even in Article 21.5 proceedings. Article 21.5 proceedings will only take place if there is a disagreement on the existence or consistency of measures taken to implement DSB rulings or recommendations, in other words if, after the DSB has at least once already adopted findings that a Member has violated its WTO

[219] See DSU, Article 7.

obligations, there remain doubts as to whether the Member has fulfilled its commitment pursuant to Article 21.3 to bring its measure into compliance. Nevertheless, even under these circumstances (and in the *Bananas* dispute, the DSB rulings had been preceded by adverse rulings by two GATT panels), the European Communities insists that there remains a presumption that a Member is complying with its obligations. It is difficult to square this position with one suggesting that, after a pattern of violations has been demonstrated, one may assume that a Member will violate its obligation to implement in good faith.

4.289 The United States goes on to state that in addition, in order to find a pattern of conduct, it would be necessary to define a "pattern". How many actions inconsistent with WTO rules would establish such a pattern? Moreover, if such a pattern were established and a violation found, how could a Member bring itself into compliance? For example, if the EC's pattern of violating its international obligations in connection with its banana import regime were sufficient to establish that the Treaty of Amsterdam authority for this regime is WTO-inconsistent, would the European Communities have to amend its Treaty authority to preclude any further WTO violations?

4.290 In the view of the United States, all of this illustrates the complexity of this issue. It is a proper subject of debate in the DSU Review, since any change from current practice would require an amendment under Article X of the WTO Agreement or interpretation under Article IX of the WTO Agreement. In that connection, the United States again notes that the European Communities has in those discussions conceded that there currently is a distinction between mandatory and discretionary legislation in GATT/WTO jurisprudence and practice, by offering a proposal to "remove the *current distinction* between discretionary and mandatory measures",[220] thereby making it possible to establish the WTO-incompatibility of discretionary measures.[221]

4.291 **In rebuttal, the European Communities argues** that according to consistent GATT 1947 practice, a law that mandates a measure inconsistent with an obligation under the GATT is deemed to be inconsistent with that obligation even if it has not yet been applied. The GATT 1947 panels were of the view that the objective of predictability could not be achieved if a GATT 1947 contracting party adopted domestic legislation stipulating actions at variance with its obligations.

4.292 The European Communities asserts that even in applying the standard developed by the GATT 1947 panels, the obligations of the United States set out in Article 23 of the DSU and Articles I, II, III, VIII and XI of the GATT 1994 are violated by Sections 301-310 because they mandate the executive authorities of the United States to act inconsistently with these DSU and GATT provisions.

4.293 In the view of the European Communities, the United States recognises that Sections 301-310 must meet the standard developed under GATT 1947 practice. Its principal argument is that Sections 301-310 do not require the USTR to determine that a WTO Member is denying the United States' rights under a WTO agreement or is failing to implement DSB recommendations. In its view, Sections 301-310 therefore do not "preclude" WTO-consistent action and are consequently not mandatory within the meaning of the GATT 1947 practice.

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[220] *Review of the Dispute Settlement Understanding*, Non-Paper by the European Communities (Oct. 1998) (US Exhibit 12)(emphasis added); see also, Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998) (US Exhibit 12).

[221] Ibid.

4.294 According to the European Communities, the United States further claims that the USTR is not required to determine that United States' rights under a WTO agreement are being denied and that a failure to implement DSB recommendations occurred and that, consequently, Sections 301-310 do not mandate determinations inconsistent with Article 23 of the DSU. However, these determinations must be based on the investigation initiated by the USTR under Section 302 or the monitoring conducted by the USTR under Section 306(a).

(b) Arguments specific to distinction between mandatory law and discretionary law

4.295 **The European Communities is of the view** that the US arguments are based on a misinterpretation of the legal standard developed by GATT 1947 panels.

4.296 In the view of the European Communities, under the GATT 1947, the United States maintained provisions of its countervailing duty law, pre-dating the provisional application of the GATT 1947, that required its executive authorities to impose countervailing duties without an injury criterion, which was inconsistent with Article VI of the GATT. The United States consistently claimed that these provisions constitute mandatory legislation, even though the executive authorities of the United States could theoretically have acted consistently with Article VI by not making the affirmative determinations required for the imposition of countervailing duties. The GATT Panel on *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* endorsed the US claim and considered on this basis that part of the relevant US legislation, i.e. Section 303 of the Tariff Act of 1930, was covered by the "existing legislation" clause of the GATT Protocol of Provisional Application.[222]

4.297 The European Communities points out that the United States countervailing duty law that was at issue in that case is comparable to Sections 301-310 to the extent that it also required the executive to make a negative or affirmative determination on the basis of specified factual criteria and mandated a GATT-inconsistent action if the determination was affirmative.

4.298 The European Communities further notes that the fact that the countervailing duty legislation did not preclude GATT-consistent action because there was the possibility for the USTR to determine that there was no basis to impose countervailing duties did not, in the view of United States and the GATT 1947 panel, turn this legislation into discretionary legislation.

4.299 The European Communities is thus of the view that this conclusion was compelled by the fact that there was no basis under the US countervailing duty law to exercise the discretion available under it for the purpose of avoiding inconsistencies with the provisions of Article VI of the GATT 1947 on injury findings. In addition, such an exercise of the discretion would have frustrated the objectives pursued by the US law.

4.300 The European Communities argues that as for the US countervailing duty law, the mere fact that Sections 301-310 provide for the possibility to determine that rights of the United States have not been denied and no failure to implement DSB recommendations has occurred and that these provisions therefore do not "preclude" WTO-consistency does not turn them into discretionary legislation: the discretion in making determinations was not given to the USTR to ensure the WTO-consistency but only to the limited effect to take into account the results of her investigations under Section 302 or the monitoring of implementation under Section 306(b), which constitute the compelling basis of her decisions.

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[222] Panel Report on *Brazilian Non-Rubber Footwear*, op. cit., para. 2.3.

4.301 **In rebuttal, the United States points out** that the European Communities appears to be unwilling to go so far as Hong Kong in discarding the distinction between mandatory and discretionary legislation. Further, the European Communities opposes the notion that discretionary legislation must include explicit language limiting that discretion so as to "preclud[e] WTO inconsistent actions".[223] The European Communities thus rejects Hong Kong's argument that legislation which allows for "a potential deviation" from WTO obligations is WTO-inconsistent.[224] Indeed, the European Communities would have significant difficulty complying with such an obligation to avoid "potential deviations". Having recognised the danger to the WTO system of embarking upon such an interpretation, the European Communities nonetheless seeks a case-specific, results-driven approach to the definition of "mandatory" to ensure that Sections 301-310 be found mandatory. The EC's approach denies the meaning of GATT/WTO jurisprudence based on the spurious claim that these cases relied on the now inapplicable Protocol of Provisional Application, and argues that the term "mandatory" – and the language of Sections 301-310 – must be interpreted by reference to a new-found obligation to avoid uncertainty and to ensure "security and predictability".

4.302 The United States argues that the European Communities clearly and correctly sets forth the distinction between discretionary and mandatory legislation in its panel request: legislation is mandatory, and actionable, if it "does not allow" a Member's authorities to comply with its WTO obligations.[225] Having offered this clear formulation and using it as the basis for its analysis, the European Communities now appears to realize that Sections 301-310 do, indeed, allow the United States to comply with DSU rules and procedures in every case. The European Communities therefore attempts to walk away from its earlier formulation, arguing that the United States overstates the conclusion of GATT and WTO panel reports when it points out that laws are not inconsistent with WTO obligations when those laws do not preclude compliance, or may reasonably be interpreted to permit compliance .

4.303 In the view of the United States, to say that a law "does not allow" WTO-consistent action is no different than saying that the law "precludes" such action. A law allows authorities to comply with their WTO obligations if, under domestic law, there is an interpretation of that law which permits WTO-consistent action. The US formulation follows directly from that set forth by the European Communities. Moreover, it is solidly grounded in GATT/WTO jurisprudence and applicable international practice in construing national and international law.

4.304 The United States argues that several statements from the panel reports it cited demonstrate the clear line drawn between mandatory and discretionary legislation. In *US – Tobacco*, the panel found against the complaining party because it had "not demonstrated that [the US law at issue] could not be applied in a [GATT-consistent] manner".[226] In other words, the complaining party had not demonstrated that the law precluded authorities from complying with their GATT obligations. Moreover, the *Tobacco* panel's finding turned on the fact that the term "comparable" in the US legislation was "susceptible of a range of meanings", including

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[223] The United States quotes the EC following argument: "[I]t would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include specific language in their domestic law precluding WTO-inconsistent action".

[224] The United States points out, according to the European Communities, "[T]his does not mean that all domestic law that does not preclude WTO inconsistent measures and thus provides for the possibility of actions deviating from WTO law (a "potential deviation") is WTO inconsistent".

[225] See EC Panel Request, Circulated on 2 February 1999 as document WT/DS152/11.

[226] Panel Report on *US – Tobacco*, op. cit., para. 123. (emphasis added)

one which permitted GATT-consistent action.[227] The *US – Tobacco* panel report thus rests squarely on a finding that the burden is on the complaining party to demonstrate that domestic law does not allow an interpretation permitting a party to comply with its international obligations.

4.305 The United States further contends that likewise, in *US – Superfund*, the panel found, "since the Superfund Act also gives [US authorities] the possibility to avoid the need to impose [a GATT-inconsistent penalty] tax by issuing regulations [not yet issued or drafted], the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement".[228] It is difficult to conceive of any reading of this finding other than that drawn by the United States, namely, that a law which provides for the possibility of GATT-consistent action provides authorities with adequate discretion to comply with their GATT/WTO obligations. Again – unlike Sections 301-310 – the Superfund Act explicitly provided for a GATT-inconsistent tax; yet the panel found it sufficient that the statute also provided for the possibility that authorities might take action in the future that would be GATT-consistent. The panel did not assume that they would not.

4.306 The United States also points out that similarly, in *Thai – Cigarettes*, the panel was unfazed by a provision in the statute explicitly authorizing a tax which would, if implemented, have constituted a violation of Thailand's GATT obligations. The panel concluded that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement".[229] Again, the possibility of deviation from a party's international obligations does not render mean that law is WTO inconsistent. To the contrary, the very fact that there is a possibility of compliance is *dispositive* of whether the law is discretionary, and its mere existence is not a WTO violation. If the law permits a party to comply with its international obligations, it must be assumed that it will.

4.307 The United States is of the view that all of these GATT findings are consistent with the ordinary meaning of "mandatory", which is "obligatory in consequence of a command, compulsory".[230] If a law does not make it compulsory for authorities to act so as to violate their international obligations, that law may not be said to command such action. This can be illustrated through a simple example. A law which provides, "the Trade Representative shall take a walk in the park on Tuesdays, unless she chooses not to" does not oblige the USTR to walk in the park on Tuesdays. She has complete discretion not to take a walk in the park on Tuesdays; the law in no way obliges or commands her to do so. This remains true despite the use of the word "shall" in that law.

4.308 The United States maintains that the clear distinction in GATT/WTO jurisprudence between discretionary and mandatory legislation is also consistent with general international practice in interpreting domestic legislation in light of international law, and of US practice in particular. Under the principles set forth in *India - Patents (US),* the relevant facts of this case are to be found in US municipal law, which includes not only the language of Sections 301-310, but also how those provisions would be interpreted under US law.[231] It is both general international practice and that of the United States that statutory language is to be interpreted so

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[227] Ibid.
[228] Panel Report on *US – Superfund*, op. cit., para. 5.2.9. (emphasis added)
[229] Panel Report on *Thai – Cigarettes*, op. cit., para. 86.
[230] The New Shorter Oxford English Dictionary, at 1683 (1993).
[231] Appellate Body Report on *India – Patents (US)*, op. cit., para. 65.

as to avoid conflicts with international obligations. There is thus a presumption against a conflict between international and national law. In general,

> "[A]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict".[232]

4.309 The United States further notes that in US law, it is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States". *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988).

4.310 In the view of the United States, GATT jurisprudence distinguishing between mandatory and discretionary legislation does no more than apply the general practice of nations, including the United States, that there is a presumption against conflicts between national and international law. If a law provides discretion not to violate international obligations, there is a presumption that domestic authorities will interpret that law so as to avoid a conflict with those obligations. Likewise, this presumption may be seen as underlying the *US – Tobacco* panel's finding that a domestic law susceptible of multiple interpretations would not violate a party's international obligations so long as one possible interpretation permits action consistent with those obligations.[233]

4.311 The United States explains that the mandatory/discretionary distinction in GATT/WTO jurisprudence is clear and unequivocal: a law which allows WTO-consistent action is not WTO-inconsistent. The EC's attempt to qualify this principle to satisfy its political objectives would have the Panel presume bad faith on the part of the United States in its observance of its international obligations. Such a presumption would clearly be contrary to this jurisprudence and to the international practice underlying it.

4.312 In support of its argument, the United States refers to the text of DSU Article 23.2(a). That Article deals with "determinations to the effect that a violation has occurred". It prohibits Members from making these determinations without following DSU rules and procedures, and these determinations must be consistent with findings in panel and Appellate Body reports adopted by the DSB.

4.313 In the view of the United States, there is no "determination to the effect that a violation has occurred" before the Panel in this case. The European Communities does not challenge a determination which has actually been made. It is therefore not possible to analyze whether such a determination meets the requirements of Article 23.2(a). One cannot say whether, in

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[232] *Oppenheim's International Law*, 9th ed., at 81-82 (footnote omitted).
[233] Panel Report on *US – Tobacco*, op. cit., para. 123.

making such a determination, the United States followed DSU rules and procedures, nor whether the United States made a determination consistent with DSB-adopted findings. Neither the findings nor the determination exist.

4.314 The United States asks how the Panel can perform its analysis under these circumstances. In the absence of a concrete determination, how is it possible to know whether a Member has breached its obligations under Article 23.2(a)? It is not permissible to speculate about how the Member will make its determination in the future. It is not permissible to look at determinations made in the past which are not within the terms of reference. It is not permissible to assume that certain Members are not to be trusted. It is not permissible to assume that they will act in bad faith. Under these circumstance, must the conclusion be that without a concrete determination, there can be no violation of Article 23.2(a)?

4.315 The United States points out that over 10 years ago, in 1987, a GATT panel wrestled with this type of question. It looked at a statute which would not go into effect for another three years and asked, may a panel determine whether this law is inconsistent with a party's GATT obligations when it is possible that the party may change the law before it goes into effect? The panel's conclusion was that it could, but it was very careful in how it drew this conclusion. The panel found that only if a statute commands a party's authorities to violate a specific GATT obligation could that statute be found inconsistent with that obligation. In enacting such legislation, the party crossed a line. It left itself with no choice but to violate its obligations, even if only at some point in the future. Conversely, the panel found, if a statute does not command the party's authorities to violate a specific GATT obligation, it is not possible to conclude that the statute violates that obligation. The party may exercise its discretion so as to comply with its international obligations. Any other conclusion would be speculation as to whether the party will act in bad faith, speculation with no more foundation than if the statute did not exist at all.

4.316 The United States again states that the reasoning of the *Superfund* panel made very good sense. It was so good that at least five GATT panels adopted it as their own. At least three WTO panels have also adopted it. And none of those panels in any way revised the core question asked by the *Superfund* panel: does the statute command, does it mandate, a violation of a specific agreement obligation?

4.317 The United States further argues that the *Superfund* analysis is not an analysis of character. It is not necessary to examine whether the character of the Member enacting the legislation is bad, whether that party had a WTO-inconsistent motive. Nor is it necessary to examine whether the "character" of the legislation is bad, whether the legislation reflects an intent to breach WTO-obligations. All that matters is whether the law commands an action which violates a specific textual obligation. Absent such a command, the Panel is left with the fundamental problem – there is nothing that can be said to violate a specific textual obligation. Legislation which leaves open the possibility of a violation cannot be considered a violation, any more than may a constitutional system which provides broad authority to act. However, by including a specific command in legislation to violate a specific obligation, the legislation itself becomes that violation.

(c) Arguments specific to "Security and Predictability"

4.318 **The European Communities claims** that the second legal standard that Sections 301-310 must meet has been developed by two panels[234] and the Appellate Body in the *India – Patents (US)* case. In this case, the Appellate Body interpreted Article 70:8(a) of the TRIPS Agreement to require Members "to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates".[235]

4.319 The European Communities contends that there was in this case no dispute that India had a "mailbox" system based on administrative instructions in place. The dispute was on the question whether this system rested on a legal basis in Indian law sufficiently sound to ensure that the patent applications could not be invalidated by Indian courts.

4.320 In the view of the European Communities, one of the issues before the panel was whether a provision in India's Patent Act requiring the rejection of certain patent applications permitted the Patent Office to act consistently with the TRIPS Agreement by simply not acting on the patent application.

4.321 According to the European Communities, another issue was whether, under Indian law, the competitors of a patent applicant had the right to challenge a patent application in the courts or whether they had to wait until the patent was actually granted.

4.322 The European Communities contends that the panel ruled against India because, based on the evidence submitted by the parties, "it had reasonable doubts that the administrative instructions would prevail over the mandatory provisions of the Patents Act if a challenge were brought in an Indian court".[236] As the United States correctly stated before the Appellate Body in this case:

> "Protection of legitimate expectations of WTO Members regarding conditions of competition is as central to trade relating to intellectual property as it is to trade in goods that do not relate to intellectual property".[237]

4.323 The European Communities argues that there must consequently be a sound legal basis in domestic law for the executive actions required to implement WTO obligations also in the area of trade in goods.

4.324 The European Communities further points out that the *India – Patents (US)* Appellate Body report sets an important precedent that should guide the resolution of the present case if the Panel were to conclude that Sections 301-310 do not mandate WTO-inconsistent determinations or actions.

4.325 According to the European Communities, in this case, the question would arise whether Sections 301-310 provide the USTR with a sufficiently sound legal basis for the implementation of the US obligations under the DSU and the GATT 1994. The European Communities submits

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[234] Panel Report on *India – Patents (US)*, op. cit. and Panel Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (EC)*"), adopted 2 September 1998, WT/DS79/R.

[235] Appellate Body Report on *India – Patents (US)*, op. cit., para. 58.

[236] Ibid., para. 74.

[237] Ibid., para. 15.

that, to the extent that there is uncertainty on the mandatory nature of Sections 301-310, this legislation does not provide a sound legal basis for the implementation of the US obligations under the DSU and the GATT 1994 by the USTR.

4.326 The European Communities cites Professor Robert E. Hudec as writing:

> "Section 301 is an intricate maze of mandatory commands in one place and extremely wide loopholes in the other. One needs a wiring diagram to trace whether mandatory commands given in one part will actually reach their final target without passing through at least one discretionary exit point. Even with the aid of such a diagram, one cannot predict actual outcomes".[238]

4.327 The European Communities also points out that Professor John H. Jackson testified before the Senate Foreign Relations Committee as follows:

> "Although there are plausible ways to interpret the statutory provisions of regular Section 301 so as to give the President discretion to act consistently with the Uruguay Round dispute settlement rules, in a few cases, particularly in Section 301(a) (mandatory provision) the interpretations to do this are a bit strained ...".[239]

4.328 According to the European Communities, if the United States' two foremost scholars on international trade law are unable to identify a sound legal avenue in Sections 301-310 permitting the USTR to act consistently with the DSU and the GATT 1994, nobody else can do it.

4.329 The European Communities maintains that the legislative history of the 1988 Omnibus Trade and Competitiveness Act, which is at the origin in particular of the present version of Sections 301-310, demonstrates that the lack of a sound legal avenue was deliberate.

4.330 In the view of the European Communities, the United States now attempts to benefit from the creation of this legal "maze" by claiming that it is for the European Communities to prove that it is not possible to interpret Sections 301-310 as permitting WTO-consistent implementation.

4.331 The European Communities contends that the fundamental objective of the WTO - namely to create security and predictability in international trade relations - could not be achieved if WTO Members were permitted to maintain domestic legislation that fails to provide the executive authorities with a sound legal basis for the measures required to implement their WTO obligations.

4.332 The European Communities is therefore of the view that, in a panel's examination of whether domestic legislation stipulates WTO-inconsistent determinations or action, the defendant should not be able to hide behind legal uncertainties arising from its own law, in particular if these uncertainties have been deliberately created. In accordance with the approach

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[238] Robert E. Hudec, Thinking About the New Section 301: Beyond Good and Evil, in:. Jagdish Bhagwati and Hugh T. Patrick, Editors, *Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System* (Harvester Wheatsheaf 1990), p. 122.

[239] Senate Committee on Foreign Relations, Hearing on the World Trade Organization, June 14, 1994 (testimony of Professor John H. Jackson).

endorsed by the Appellate Body in *India - Patents (US),* a panel should rule against the defendant if it concludes, on the basis of the evidence before it, that there is an objective (and thus reasonable) uncertainty on whether the domestic law permits WTO-consistent determinations or actions.

4.333 The European Communities argues that if the panel has reasonable doubts, so will economic operators planning their future trade. No legitimate interest would be protected if Members were entitled to retain law lacking such a basis. In fact, as the case before the Panel demonstrates, this would be an invitation to Members to restrict trade by exposing it deliberately to legal uncertainties.

4.334 The European Communities further contends that each Member is required to perform its WTO obligations in good faith. No additional policy constraint is therefore imposed on Members by requiring them to create a sound legal basis in their domestic law for the performance of their WTO obligations. If it is the intention of the United States to perform its WTO obligations in the framework of the Section 301-310 procedures, why does it object to the EC's demand to create a sound legal basis for the performance of these obligations? If the legal uncertainties under Sections 301-310 are an expression of the contrary intention, why should they nevertheless be considered to be a sound legal basis for a good faith performance of the United States' WTO obligations?

4.335 In the view of the European Communities, the legal standard applicable to domestic law that the United States defended so vigorously when Indian patent law was at issue is equally applicable to United States trade law.

4.336 The European Communities indicates that it would be extremely regrettable if the unjustifiably low standard for the evaluation of the WTO-consistency of domestic law that the United States opportunistically defends in the present proceedings were to be endorsed as the generally applicable standard. United States law should be adapted to WTO law, not *vice versa*. Otherwise, the considerable legal progress of the WTO legal system endorsed by the Appellate Body in *India - Patents (US)* would be lost.

4.337 **The United States argues** that the Statement of Administrative Action and accompanying legislation are the definitive congressional materials with respect to the WTO-consistency of Sections 301-310 before the adoption of the Uruguay Round Agreements Act by the Congress. Page 360 of the Statement of Administrative Action (US Exhibits 3 and 11) outlines the changes considered necessary to ensure compliance. In addition, the United States directs the Panel's attention to the testimony on this topic of Professor John Jackson when he appeared before the Senate Finance Committee.[240]

4.338 The United States points out that Professor Jackson concluded that, "There may need to be some alterations to some time limits, or transition measures, but the basic structure of 301 is not necessarily inconsistent with the Uruguay Round results". He also concluded that even when Section 301 is considered "in its current statutory form" (i.e. before the 1994 amendments), "the Executive appears to have the discretion to apply actions under Section 301 in a manner consistent with the proposed new rules of the Uruguay Round dispute settlement

[240] *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Committee on Finance*, 103d Cong. 195 (1994) (statement of Professor John Jackson) (US Exhibit 24). The European Communities excerpts this testimony.

understanding".[241] Professor Jackson thus considered that with only minor changes, Section 301 would be clearly consistent with the WTO obligations of the United States. Moreover, his emphasis on the fact that the Executive had adequate discretion to apply Section 301 in a WTO-consistent manner reflects the fact that he took for granted that the reasoning applied in the *Superfund* line of cases would continue to apply under the WTO.

4.339 The United States notes that Professor Jackson believed that sufficient clarity could be provided to the interpretation of the statute through the inclusion of language in the Statement of Administrative Action.[242]

4.340 The United States further points out that the *India - Patents (US)* discussion of a "sound legal basis" comes in the context of an analysis of the specific textual obligation at issue in that case, TRIPs Article 70.8(a). This provision affirmatively requires Members to provide in their domestic legal systems a mechanism for the filing of applications for patents which protects their novelty and priority. India instead had on its books a law explicitly prohibiting such applications, that is, specifically mandating a violation of India's TRIPs obligations. India claimed that unwritten, unpublished "administrative instructions" never produced for the panel took priority over the mandatory law, but the panel and Appellate Body found nothing to support this claim. It was in this context, the context of TRIPs Article 70.8(a)'s requirement for a domestic legal mechanism accomplishing specific ends, that the panel and Appellate Body concluded that the "administrative instructions" failed to provide a sound legal basis. The concept was not analyzed in the abstract as somehow derived independently of Article 70.8(a) and, as noted, the Appellate Body reversed panel findings relating to "legitimate expectations" generally and removal of "reasonable doubts" because these findings were not textually based.

4.341 In response to the Panel's request for clarification on the US reference to "security and predictability" as an objective, not an obligation, the United States notes that Article 31(1) of the Vienna Convention on the Law of Treaties provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

4.342 The United States also notes that the Appellate Body explained the proper role of an examination of an agreement's object and purpose in *US - Shrimp* as follows:

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought".[243]

4.343 The United States then concludes that while the terms of an agreement are to be examined in light of the object and purpose of the agreement, it is the ordinary meaning of those terms which must first be analyzed in interpreting an agreement provision, and relied upon in

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[241] Ibid. at 200.
[242] Ibid.
[243] Appellate Body Report on *US – Shrimp*, op. cit., para. 114. (emphasis added)

applying that provision to a given set of facts. The object and purpose cannot change the ordinary meaning of the agreement terms. Where the terms are ambiguous, and their meaning is not clear on their face or in their context, a consideration of the object and purpose of the agreement can be productive. However, a consideration of the object and purpose of an agreement is secondary to, and cannot serve as substitute for, an analysis of the ordinary meaning. Nor can an examination of the object and purpose of an agreement be made to the exclusion of an analysis of the ordinary meaning of the agreement text.

4.344 The United States further states that in *US - Shrimp* the Appellate Body chastised the panel in that case for not examining the ordinary meaning of the words of the chapeau of GATT 1994 Article XX, the chapeau's context within Article XX, or the chapeau's object and purpose, and for instead focusing on the "object and purpose of the *whole of the GATT 1994 and the WTO Agreement*".[244] Just as the European Communities asks the Panel to focus on "security and predictability", the *US - Shrimp* panel focused on the very same concept of security and predictability in the context of its discussion of an overall goal of the WTO Agreement to avoid "undermin[ing] the multilateral trading system". According to the *US - Shrimp* panel, "we must determine . . . whether [the type of measure in *US - Shrimp*] would threaten the security and predictability of the multilateral trading system".[245]

4.345 The United States further notes that in response, the Appellate Body drew the clear distinction between objectives and obligations that the United States is asking the Panel to recognise again in this dispute. According to the Appellate Body:

> "Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying *WTO Agreement*; but it is not a right or obligation, nor is it an interpretive rule which can be employed in the appraisal of a given measure under the chapeau of Article XX".[246]

4.346 According to the United States, just as maintaining the multilateral system is a premise – an objective – underlying the WTO Agreement as a whole, "security and predictability" are explicitly set forth in Article 3.2 as a *premise*, an objective, underlying the DSU: "The dispute settlement system of the WTO *is* a central element *in providing* security and predictability to the multilateral trading system".[247] Security and predictability are thus the objective which the DSU itself *helps to achieve*.

4.347 In the view of the United States, to put this in its most fundamental terms, Article 3.2 does *not* state "Members shall provide security and predictability to the multilateral trading system". This would impose an obligation. Rather, Article 3.2 states, the DSU is a central element in providing security and predictability to the multilateral system. In other words, the DSU is premised on the need for security and predictability, and itself helps to provide it.

4.348 The United States points out that the European Communities does not claim that Sections 301-310 are inconsistent with Article 3.2 precisely in recognition of the fact that it does

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[244] Ibid., para. 116 (emphasis in original).

[245] Panel Report on *US - Shrimp*, op. cit., para. 7.44 (underlining added), quoted in Appellate Body Report on *US - Shrimp*, op. cit., para. 112.

[246] Appellate Body Report on *US - Shrimp*, op. cit., para. 116 (underlining added).

[247] DSU Article 3.2 (emphasis added).

not impose an obligation to provide security and predictability. However, neither does DSU Article 23 impose such an obligation.

4.349 **The European Communities stresses** that the US comparison of this case with the *US - Shrimp* case is incorrect. The legal error which the panel committed in that case was that it formulated a broad standard or an *a priori* test which found no basis in the text[248] of the Treaty. By contrast, in the present case, the Panel's task is to provide an interpretation of the text of several provisions of the WTO agreements (i.e. Article 3.2 of the DSU, Article XVI:4 of the Marrakech Agreement, Article 23 of the DSU).

4.350 **The United States challenges** the EC claim that while *US – Shrimp* involved a panel formulating a new, broad test which found "no basis in the text of the Treaty", the EC proposal in this case for a new, broad test involves "an interpretation of the text of several provisions". However, as explained earlier, there is no basis in the text of any of these provisions to conclude that Article 23 imposes an obligation to provide "security and predictability". The situation is thus precisely analogous to that in *US – Shrimp*, and the EC's proposal to create new obligations must be rejected for the same reasons.

4.351 In response to the Panel's further question whether providing "security and predictability" to other Members in respect of avoiding determinations and actions prohibited under Article 23 of the DSU – read in light of Article 3.2 of the DSU and Article XVI:4 of the WTO Agreement – is part of the legal obligation imposed in Article 23, the United States indicates that providing security and predictability to other Members is not part of the obligation set forth in DSU Article 23. Rather, the obligation set forth in DSU Article 23 itself helps to provide that security and predictability. Any reading of Article 23 which creates an obligation to provide security and predictability would repeat the error of the panel in *US - Shrimp.*

4.352 In the view of the United States, the consideration of the object and purpose of an agreement cannot serve as a substitute for an analysis of the ordinary meaning. Even worse would be the consideration of the object and purpose of an agreement to the apparent exclusion of an analysis of the ordinary meaning of the text of an agreement provision. Yet that is what the European Communities asks the Panel to do. Without regard to the ordinary meaning to be ascribed to the term "determination to the effect that a violation has occurred", read in the context of requirements in Article 23.2(a) applicable to that specific type of determination, the European Communities instead asks this Panel to find an obligation "to provide security and predictability", and to analyze whether the very act of making a determination would breach this new-found obligation.

4.353 The United States notes that DSU Article 23.2(a) does not state, "Members *shall* provide security and predictability". Nor does this provision even state, "Members *should* provide security and predictability". Nor does Article 23.2(a) state, "Members shall/should make determinations so as to provide security and predictability", or "so as to avoid insecurity and unpredictability". The WTO Members agreed to none of these formulations. They agreed that they "shall not make determinations to the effect that a violation has occurred" unless specified conditions have been met. That is all they agreed to. Nowhere does the term "security and predictability" appear in Article 23, nor is Article 3.2 cross-referenced. Like the rest of the substantive obligations of the WTO Agreement, the provisions of DSU Article 23 itself, enforced through the dispute settlement system, help to provide security and predictability.

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[248] Appellate Body Report on *US – Shrimp*, op. cit., para. 121.

4.354 The United States claims that the ordinary meaning of the words of Article 23.2(a) are that it relates only to certain determinations, that is, "determinations to the effect that a violation has occurred". As Brazil and Canada have noted, it does not apply to determinations that a violation has not occurred, or even to determinations that a violation of a non-WTO agreement has occurred. Nothing in the ordinary meaning of "determination to the effect that a violation has occurred" would permit a panel to examine such other determinations against the requirements of Article 23.2(a), or to examine the very act of making determinations generally.

4.355 In the view of the United States, likewise, nothing in the ordinary meaning of Article 23.2(a)'s requirements permits an analysis of whether the very act of making determinations harms "security and predictability". Article 23.2(a) imposes the requirement that a determination to the effect that a violation has occurred not be made without recourse to dispute settlement "in accordance with the rules and procedures" of the DSU, and the requirement that any such determination be consistent with DSB-adopted findings. Nothing in the ordinary meaning of the language setting forth these requirements imposes an additional, independent requirement to provide "security and predictability". There is no "rule" of the DSU which requires that security and predictability be provided. Again, Article 3.2 states that the rules themselves help to provide security and predictability.

4.356 The United States further considers that an examination of Article 23.2(a)'s context supports the conclusion to be drawn from an examination of the ordinary meaning of its language. The immediate context of Article 23.2(a) is provided by paragraphs (b) and (c) and by Article 23.1. Like paragraph (a), paragraphs (b) and (c) impose requirements to follow DSU procedures when undertaking dispute settlement proceedings or when taking action. The references in these provisions are to specific DSU requirements which must be met, just as paragraph (a) refers to following DSU rules and procedures and to DSB adopted panel and appellate body findings. Similarly, Article 23.1 requires recourse to DSU rules and procedures, none of which impose a separate obligation to provide security and predictability. There is thus nothing in the context of Article 23.2(a) which supports the notion that there is an independent obligation to provide security and predictability in making determinations generally.

4.357 The United States argues that given the fact that nothing in "the meaning imparted by the text itself[, read in its context,] is equivocal or inconclusive",[249] there is no need to examine the object and purpose of Article 23.2(a). However, such an examination confirms the meaning yielded by the ordinary meaning of the language of that provision. To avoid the mistake of *US - Shrimp*,[250] it is necessary to look to the object and purpose of Article 23, which is "strengthening the multilateral system". It does nothing to strengthen the multilateral system to restrict determinations that a violation has not occurred, or to restrict determinations not relating to WTO agreement rights and obligations. Looking to the broader purpose of providing "security and predictability" to the multilateral trading system, security and predictability is affirmatively harmed when the text of agreement provisions may be disregarded and new obligations created out of thin air.

4.358 The United States further maintains that the obligations set forth in DSU Article 23, enforced through the dispute settlement system, thus themselves help to provide the security and predictability referred to in Article 3.2. The ordinary meaning of the language of Article 23,

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[249] Appellate Body Report on *US - Shrimp*, op. cit., para. 114.

[250] See ibid., para. 116 (criticizing the panel for examining the objectives of the WTO Agreement as a whole (maintaining the multilateral trading system) rather than the object and purpose of the chapeau to Article XX).

read in its context, is unambiguous that there is no separate obligation imposed by that article to provide security and predictability.

4.359 **The European Communities states** the US argument based on the assertion that nowhere do the terms "'security and predictability' appear in Article 23, nor is Article 3.2 cross-referenced", is both new and incorrect. All the provisions of the DSU, including of course Article 23, must be read in the light of Article 3.2 of the DSU which informs the interpretation of the obligations of the WTO Members contained in the more detailed provisions. In fact, Article 3.2 of the DSU is part of the "General Provisions" contained in Article 3 and thus is applicable throughout the whole dispute settlement understanding without the need for cross-references in each and every Article.

4.360 **The United States rebuts** the EC claim that Article 3.2 is a general provision, applicable throughout the whole dispute settlement proceeding. However, as noted earlier, Article 3.2 does not set forth an obligation to provide security and predictability. Instead, Article 3.2 explains that the dispute settlement system *itself* provides security and predictability. The general applicability of this explanation does not create an obligation under Article 23.2(a) to provide security and predictability. However, Article 3.2 does, in fact, impose a generally applicable obligation – on panels: not to add to or diminish the rights and obligations under the covered agreements. This provision mandates that the Panel reject the EC's proposal to add a new obligation not found in the text of the WTO Agreement.

(d) Arguments specific to WTO Agreement Article XVI:4

4.361 **The European Communities also argues** that the third legal standard that domestic law must meet is set out in Article XVI:4 of the Marrakech Agreement according to which "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations [under the WTO agreements]".

4.362 The European Communities contends that by creating a new type of obligation that goes beyond the commitments under the GATT 1947, this specific provision governing domestic law sets without any doubt a standard more demanding than the standards that Members' domestic law must meet under the WTO practice in order to ensure a good faith implementation of their substantive obligations in accordance with principles codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

4.363 The European Communities then concludes that this third legal standard would therefore need to be considered by the Panel only if, and to the extent that, it were to conclude that Sections 301-310 do not mandate WTO-inconsistent determinations or actions and provide a sound legal basis for the implementation of the United States' WTO obligations.

4.364 The European Communities argues that the United States claims, without any supporting arguments, that "Sections 301-310 are not inconsistent with Article XVI:4 because they do not mandate action in violation of any provisions of the DSU or GATT 1994, nor do they preclude action consistent with those provisions".

4.365 The European Communities recalls that Article XVI:4 of the Marrakech Agreement requires a positive action by the WTO Member ensuring the conformity of its entire domestic law. The distinction between legislative and executive actions is not made in this provision. It covers also regulations and administrative procedures, which can typically be adopted and modified by the executive branch of the government. The question of whether the domestic law

mandates the executive authorities to take WTO-inconsistent measures is therefore irrelevant under Article XVI:4.

4.366 The European Communities further maintains that moreover, if Article XVI:4 were interpreted to merely impose the requirements that arise already under the Vienna Convention on the Law of Treaties, it would be redundant. As the Appellate Body recognised in the *US-Gasoline* case,[251] interpretations rendering whole clauses of a treaty redundant are however not permitted under the principles of interpretations set out in the Vienna Convention on the Law of Treaties (Articles 31 and 32).

4.367 The European Communities alleges that the United States' reading of Article XVI:4 of the Marrakech Agreement is therefore clearly incompatible with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the WTO Agreement to ensure security and predictability in international trade relations.

4.368 In the view of the European Communities, one of the important tasks before this Panel is to give meaning to the terms "ensure" and "conformity" in Article XVI:4. The principles of interpretation set out in the Vienna Convention require the Panel to interpret these terms in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of the WTO Agreement.

4.369 The European Communities points out that the ordinary meaning of the term "ensure" is to "make certain". The ordinary meaning of the term "conformity" is, firstly, "action or behaviour in accordance with established practice; compliance" and, secondly, "correspondence in form or manner, likeness, agreement" (Oxford).

4.370 The European Communities repeats its argument that Article XVI:4 must be interpreted to impose requirements with respect to domestic law additional to the requirements that arise already from the substantive WTO obligations themselves. This is achieved if Article XVI:4 is interpreted to stipulate a "correspondence, likeness or agreement" between domestic law and the relevant WTO obligations.

4.371 In the view of the European Communities, the terms "ensure" and "conformity", taken together in their context, therefore indicate that Article XVI:4 obliges Members not merely to give their executive authorities formally the right to act consistently with WTO law, but to structure their law in a manner that "makes certain" that the objectives of the covered agreements will be achieved.

4.372 The European Communities notes that one basic objective of WTO law is to strengthen the multilateral system. Another basic objective is to obtain greater legal certainty in multilateral trade relations.

4.373 The European Communities claims that a domestic law, regulation or administrative procedure whose structure, design and architecture is specifically framed to create uncertainty for the trade with other WTO Members could therefore never be deemed to ensure conformity with WTO law.

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[251] Appellate Body Report on *United States – Standards for Reformulated and Conventional Gasoline* ("*US - Gasoline*"), adopted 20 March 1996, WT/DS2/AB/R.

4.374 The European Communities further argues that the participants in the Uruguay Round expected the United States not only to commit itself to refrain from unilateral action but also to bring its domestic law into conformity with that commitment. One of the earliest texts on dispute settlement submitted on 19 October 1990 by Mr. Julio Lacarte-Muró, Chairman of the Negotiating Group on Dispute Settlement, contained the following provision:

> "The contracting parties shall:
>
> (i) abide by GATT dispute settlement rules and procedures;
>
> (ii) abide by the recommendations, rulings and decisions of the CONTRACTING PARTIES;
>
> (iii) not resort to unilateral action inconsistent with GATT rules and procedures; and
>
> (iv) for the purpose of (iii), undertake to adapt their domestic trade legislation and enforcement procedures in a manner ensuring the conformity of all measures with GATT dispute settlement procedures".

4.375 The European Communities goes on to state that subsequent drafts of the DSU no longer contained a provision on the adaptation of domestic legislation. However, a provision to that effect was included in the proposed draft Agreement Establishing the Multilateral Trade Organisation. Article XVI:4 of this draft Agreement stated:

> "The Members shall endeavour to take all necessary steps, where changes to domestic laws will be required to implement the provisions of the agreements annexed hereto, to ensure the conformity of their laws with these agreements".[252]

4.376 The European Communities points out that in an informal note to the Legal Drafting Group, the Secretariat noted:

> "Under general international law, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty and according to several GATT panels, laws mandating action inconsistent with the General Agreement constitute themselves violations of the General Agreement, whether or not such action has been taken. This paragraph would therefore provide for a lesser level of obligation under the Multilateral Trade Agreements than that provided for under the current GATT".[253]

4.377 The European Communities further notes that the final version of Article XVI:4 was therefore drafted not as a "best-endeavours" clause, applicable only to cases where changes to domestic laws are required, but as an unqualified obligation:

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[252] Informal note by the Secretariat "Draft Agreement Establishing the Multilateral Trade Organisation" (No. 462, dated 12 March 1992), page 26.

[253] Ibid.

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

4.378 The European Communities explains that the Tokyo Round agreements on government procurement, subsidies, licensing procedures, civil aircraft and anti-dumping each contained provisions similar to Article XVI:4.[254] These provisions were taken over into the final provisions of the corresponding WTO agreements, but not however into the GATT 1994, the GATS or the DSU.[255] The effect of Article XVI:4 is to extend the explicit requirement of the WTO-conformity of domestic law to all agreements and legal instruments in Annexes 1, 2 and 3 of the WTO Agreement, including the DSU.[256]

4.379 **The United States points out** that the EC's claims with respect to the GATT 1994 and WTO Agreement Article XVI:4 each rely on the assumption that the EC's claims with respect to DSU violations are correct. For example, there can be no violation of GATT 1994 if the United States takes no action and, for the reasons already discussed, one cannot assume that Sections 301-310 require such action. Moreover, it cannot be assumed that any action taken pursuant to Sections 301-310 would not be preceded by DSB authorization.

4.380 The United States argues that with respect to WTO Agreement Article XVI:4, it is important to recognise that a measure must first violate some other WTO commitment in order to violate Article XVI:4. The ordinary meaning of the text of this provision makes this clear: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". If those laws, regulations and administrative procedures conform with the obligations in the annexed agreements, including the DSU, there is no violation of Article XVI:4. The European Communities may not assume that Sections 301-310 violate the DSU for the purpose of finding a violation of Article XVI:4.

4.381 The United States points out that Article XVI:4 of the WTO Agreement provides:

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

4.382 The United States argues that nothing in this provision suggests, let alone dictates, the redefinition of the concept of mandatory legislation as proposed by the European Communities. The meaning of the text of Article XVI:4 is straightforward: if a Member's law, regulation, or administrative procedure does not conform with its obligations as provided in the annexed Agreements, that Member has an affirmative obligation to bring it into conformity. Conversely,

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[254] The European Communities refers to Article IX.4(a) of the Agreement on Government Procurement, Article 19.5(a) of the Agreement on Interpretation and Application of Article VI, XVI and XXIII, Article 5.4 (a) of the Agreement on Import Licensing Procedures, Article 9.4.1 of the Agreement on Trade in Civil Aircraft, and Article 16.6(a) of the Agreement on Implementation of Article VI.

[255] The European Communities refers to Article XXIV.5(a) of the Agreement on Government Procurement, Article 32.5 of the Agreement on Subsidies and Countervailing Measures, Article 8.2(a) of the Agreement on Import Licensing Procedures, Article 9.4.1 of the Agreement on Civil Aircraft, and Article 18.4 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[256] The European Communities refers to Article II.1 of the WTO Agreement.

however, if those laws, regulations and administrative procedures conform with its obligations, it need undertake no further action.

4.383 The United States claims that Article XVI:4 does not in any way provide that the definition of "mandatory legislation" may now include "certain discretionary legislation". Nor does Article XVI:4 create a "new legal environment" which would permit substantive obligations to be created out of whole cloth.

4.384 The United States notes that the European Communities suggests that Article XVI:4's inclusion of regulations and administrative procedures as well as laws is part of this "new legal environment". According to the European Communities, "[t]he distinction between law that binds the executive authorities and law that can be modified by them is thus no longer relevant". This EC distinction is baseless. Regulations and administrative procedures have always been subject to the rules of the GATT 1947,[257] and there is absolutely nothing extraordinary about their inclusion in Article XVI:4. The obligation with respect to regulations and administrative procedures is the same as that for laws: if they are not in conformity with the Member's WTO obligations under the covered Agreements, they must be brought into conformity. However, if they are in conformity, they need not be changed.

4.385 The United States goes on to state that the European Communities also claims that the inclusion of the word "ensure" in Article XVI:4 means that laws must be structured in a manner that "makes certain" that "the objectives of the covered agreements will be achieved". As discussed above, the objectives of the covered agreements are reflected in their text, and in any event "objectives" are not themselves "obligations". One may not depart from the text on the basis of fanciful, results-driven constructions of agreement objectives. A Member may "ensure" that its laws, regulations and administrative procedures are in compliance with its obligations through any number of means:

> "From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices".[258]

4.386 The United States indicates that one of those means by which a Member may ensure conformity with its obligations is to ensure that the Member's authorities have adequate discretion to comply with the Member's obligations. This notion lies at the heart of the doctrine of the non-actionability of discretionary legislation reflected in the consistent, unmodified GATT and WTO practice in this area. As Japan noted in responses to the Panel's questions, "laws are not inconsistent with WTO rules when … discretion [to comply with WTO obligations] is given to administrators under the laws".

4.387 The United States argues that there is no basis for distinguishing among different forms of discretionary legislation, or for recharacterising some discretionary legislation as "mandatory". If legislation provides adequate discretion for a Member's authorities to comply

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[257] E.g. GATT 1947 Article III:4 covers "laws, regulations and requirements".
[258] Oppenheim's International Law, 9th ed., at 82-83 (footnote omitted).

with their obligations, it may not be assumed that the Member will not exercise that discretion in good faith so as to comply with its obligations. The good faith principle of which the European Communities speaks is the very reason it may not be assumed that a Member's authorities will violate its international obligations.

4.388 In the view of the United States, even if there were some conceivable construction of the text of Article XVI:4 which would permit the redefinition of "mandatory legislation" so as to include legislation which does not require a Member to violate its international obligations, it would not be permissible to adopt that construction in interpreting Article XVI:4. The Appellate Body explained in *EC – Hormones* that the customary principle of interpretation of international law known as *in dubio mitius* is applicable in WTO disputes as a supplementary means of interpretation. That principle applies

> "in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties".[259]

4.389 The United States argues that the EC's proposed construction of Article XVI:4, even if it had so much as an ambiguous textual basis, would run afoul of the *in dubio mitius* principle, since that construction would interfere with a Member's sovereign right to choose the form by which it implements its obligations in domestic law, and require each and every Member to re-examine and potentially revise the form of various pieces of legislation they quite correctly assumed in 1995 to be consistent with their WTO obligations based on the consistent application of the doctrine of the non-actionability of discretionary legislation.

4.390 The United States points out that the European Communities claims that the *India - Patents (US)* case and DSU Article 3.2's reference to "security and predictability" support its claim that Article XVI:4 includes a prohibition against "uncertainty". As discussed above, the reference to "security and predictability" in DSU Article 3.2 is made in the context of explaining that the dispute settlement system provides such security and predictability, and it does so through the substantive obligations in the text of the WTO Agreement and its annexes, enforced through the DSU. Article 3.2 also provides that DSB rulings and recommendations "cannot add to or diminish the rights and obligations provided in the covered agreements".

4.391 In view of the United States, neither the facts nor findings of *India - Patents (US)* support the EC position. As described above, that case stands strongly for the proposition that obligations may not be divined from vague and free-standing notions such as "uncertainty" divorced from the agreement's text.[260] Nor in its specifics does *India - Patents (US)* support the EC's position that such an "uncertainty" principle may be found in the text of Article XVI:4. The *India - Patents (US)* Appellate Body report refers to Article XVI:4 only in the context of reinforcing the fact that India's WTO obligations dated from 1 January 1995, and could not be delayed.[261] There is no reference in the report to an obligation in Article XVI:4 to avoid "uncertainty". Rather, the obligation in Article XVI:4 is to comply with the obligations of the annexed Agreements.

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[259] Appellate Body Report on *EC – Hormones*, op. cit., para. 165 and footnote 154, citing *Oppenheim's International Law*, 9th ed., at 1278.

[260] The United States refers to Appellate Body Report on *India - Patents (US)*, op. cit., para. 45.

[261] The United States refers to id., paras. 78-84.

4.392 The United States argues that the *India – Patents (US)* discussion of mandatory/discretionary legislation in no way modifies that doctrine. That case, like the *Malt Beverages* case before it, stands for the proposition that the non-application of mandatory legislation does not render that mandatory legislation non-actionable.[262] The issue in *India - Patents (US)* was whether India's unpublished, unwritten "administrative instructions" prevailed over mandatory legislation which prohibited India from complying with its TRIPs obligations.[263] The Appellate Body found that because of this conflict, the administrative instructions did not create a sound legal basis to preserve the novelty and priority of patent applications.[264] Even then, however, the Appellate Body emphatically rejected the position that a Member is required to remove any reasonable doubts regarding whether a patent application could be rejected.[265]

4.393 The United States explains that the *India - Patents (US)* case thus offers no support for the EC position that Article XVI:4 provides for a new definition of mandatory legislation to be determined based on the legislation's "design, structure and architecture". In fact, *India - Patents (US)* undermines the EC's position. The analysis of whether Sections 301-310 is consistent with WTO Agreement Article XVI:4 must be based on the text of that provision. The ordinary meaning of Article XVI:4 is that a law, regulation or administrative procedure is not inconsistent with Article XVI:4 unless it is also inconsistent with a separate obligation of a covered agreement. Sections 301-310 are not inconsistent with any such provision, and are therefore consistent with Article XVI:4.

4.394 **In response, the European Communities argues** that as the Appellate Body has indicated in the *Japan - Alcoholic Beverages* case following its earlier decision in the *US - Gasoline* case, the principle of effectiveness (*ut res magis valeat quam pereat*) is a

> "fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31".

4.395 The European Communities contends that with this rule in mind, the correct interpretation of Article XVI:4 of the Marrakech Agreement could not be such as to read this provision just as a useless *replica* of the obligations under the covered agreements. Such an interpretation would reach the non-permissible effect of rendering "whole clauses of a treaty redundant".

4.396 Thus, in the view of the European Communities, the US following assertion cannot be correct:

> "[T]he ordinary meaning of Article XVI:4 is that a law, regulation or administrative procedure is not inconsistent with Article XVI:4 unless it is also inconsistent with a separate obligation of a covered agreement".

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[262] The United States refers to Panel Report on *India - Patents (US)*, op. cit., para. 7.35.

[263] The United States refers to Appellate Body Report on *India - Patents (US)*, op. cit., paras. 60-62.

[264] Ibid., paras. 69-70.

[265] Ibid., para. 58. The United States notes that the Appellate Body stated, "[W]e do *not* agree with the Panel that Article 70.8(a) requires a Member to establish a means 'so as to eliminate any reasonable doubts regarding whether mailbox applications and eventual patents based on them could be rejected or invalidated …. In our view, India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides a sound legal basis to preserve … novelty … and priority of the applications …. No more". (Emphasis in original)

4.397 The European Communities argues that "discretionary" legislation is not as such defined under any of the WTO agreements. There is thus no textual basis in any of the WTO agreements to distinguish between "discretionary" and other legislation of a WTO Member.

4.398 The European Communities goes on to state that the relevance in the WTO legal system of a definition of discretionary legislation lies in the fact that WTO Members frequently adopt open-ended legislation, which delegates powers to the executive branch of government. This legal phenomenon should not, in our view, be sidelined or underestimated.

4.399 According to the European Communities, in addressing this issue, a balance must be struck between two basic sets of principles of WTO law and of public international law: on the one hand, the obligation to ensure the protection of "the security and predictability of the multilateral trading system" (Article 3.2 of the DSU) by "ensuring the conformity of [domestic] laws, regulations and administrative procedures" (Article XVI:4 of the Marrakech Agreement) through a "sound [domestic] legal basis" (Appellate Body Report on *India - Patents (US)*).

4.400 The European Communities maintains that on the other hand, the (rebuttable) presumption of compliance according to which one may not assume that WTO-Members' authorities will fail to implement their WTO obligations in good faith.

4.401 The European Communities argues that in this legal perspective, it is impossible to accept the US approach which would require WTO panels to mechanically continue past panel practice based on a legal situation which is no longer in force. The European Communities cannot, on the other extreme of the *spectrum*, go as far as Hong Kong, China has done in suggesting that any "potential deviation" is in breach of Article 3.2 of the DSU, Article XVI:4 of the Marrakech Agreement and the principles developed by the Appellate Body in the *India - Patents (US)* case. This will practically deny any distinction between "discretionary" and other legislation. *In medio stat virtus* (The truth lies in the middle ground).

4.402 In the view of the European Communities, there are a number of practical criteria that would assist panels in discerning the dividing line between a "genuinely discretionary" legislation and all the other legislation.

4.403 The European Communities recalls that the presumption of compliance would be overturned by a legislation which, by its terms, design, architecture and revealing structure, is biased against compatibility or otherwise creates a conflict with the Member's WTO obligations.

4.404 The European Communities maintains that on the other hand, the fewer criteria such legislation contains and the more freedom it leaves to the executive authorities with regard to the decision-making process, in principle the less problematic such legislation is from a WTO standpoint.

4.405 According to the European Communities, an additional argument in this issue was submitted by the United States. In the US's view, all legislation that is not "mandatory" in the sense of the definition adopted by the 1949 GATT Working Party decision with respect to the "existing legislation" clause of the PPA must thus be "discretionary" and, by way of consequence, cannot be construed to be in violation of the relevant WTO obligations. This US view is obviously incorrect on several counts.

4.406 The European Communities firstly argues that as the Appellate Body has found in the *India - Patents (US)* case, the implementation of WTO obligations must take place on a "sound legal basis". This would not be the case if a given piece of legislation creates a situation biased

against WTO compatibility, because the situation created by such a piece of legislation undermines the security and predictability of the multilateral trade relations. It could also not be considered in line with the presumption of compliance, given that its text would already defeat such a presumption.

4.407 The European Communities further contends that the bias against WTO compatibility will be discernible in particular where WTO-inconsistent measures are required by the law as a rule and WTO-consistent action is permitted only as an exception under limited circumstances. In this way, the competitive opportunities, which the WTO Agreements intend to foster, cannot be achieved.

4.408 The European Communities secondly supposes that the legislation of a WTO Member provides that in a given factual situation, described in some detail in the piece of law, the executive authorities have the choice between several actions, each of them being WTO-inconsistent. While such a law may be described as "discretionary", because it allows several different types of action, such a law must nevertheless be considered WTO-incompatible, simply because it does not allow for an action of the executive authorities that is WTO-compatible.

4.409 The European Communities goes on to state that even under the GATT 1947, domestic legislation which gave the executive branch of government only a choice between several measures which all were inconsistent with the GATT 1947 would not have qualified as genuinely "discretionary" legislation. In the view of the European Communities, this is the situation that characterises the present case. This, of course, does not mean that the panel practice under the GATT 1947 still holds good under the WTO to the extent that it was based on the much narrower interpretation of "mandatory legislation".

4.410 The European Communities thirdly contends that, to come even closer to the legal situation underlying this case, it may happen that the law requires the executive authorities to take action on the basis of the results of an investigation. Suppose the fiscal authorities are required to take WTO-inconsistent action each time they find on the basis of an investigation that an act of tax fraud has been committed. Of course, the tax authorities are not "free" to abstain from finding a case of fraud and in this way avoid WTO-inconsistent action. Any other reading of such a piece of legislation would defy its intent, as expressed in the law. It should be noted in this context that it was clearly understood under the GATT 1947 that legislation could be mandatory not only by its terms but also by its expressed intent.[266]

4.411 Fourthly, the European Communities disagrees with the US allegation that a domestic legislation such as Section 301(a) contains sufficient discretionary powers for the executive authorities to take WTO consistent action because the highest political authorities of the WTO Member concerned, *in casu* the US President, may give directions to the administration. It would defy the purpose and the spirit of the law to consider this legislation discretionary rather than mandatory.

4.412 The European Communities recalls that Sections 301-310 provide as a rule strict time limitations on the actions of the USTR. This is in fact one of the most characteristic features of this piece of legislation. At the end of these firmly set time frames, the USTR is required to take

[266] "Guide to GATT Law and Practice" (Analytical Index), 1995 edition, page 1075, penultimate paragraph.

action based on the result of the investigation initiated under section 302. Such action shall be taken "subject to the specific direction, if any, of the President regarding any such action".

4.413 In the view of the European Communities, it is simply not credible that such a clause should be understood as providing the President with the discretionary power to grant waivers on a regular basis. This would obviously run counter to the express will of the legislator, *in casu* the US Congress, by reversing the relationship between rules and exceptions. As a matter of fact, the President has never granted such a waiver.

4.414 Moreover, the European Communities notes that the vague formulations contained in Section 301(a) do not mean that the President would be entitled to direct the USTR against what she is required to do by the law itself. This provision, unlike other US legislation providing for explicit powers of the President to waive requirements of the law, states that any direction from the President concerns "any other appropriate and feasible action within the power of the President". The President does not have the power to ignore a law providing that an action must be taken within a mandatory time limit.

4.415 The European Communities claims that if on this basis Sections 301-310 were considered to be entirely discretionary and thus not capable of being challenged as such under WTO dispute settlement procedures, this would mean that an exception that was never applied in practice would be considered, from the standpoint of WTO law, as governing the entire legislation that is under scrutiny, in clear conflict with the design, architecture and revealing structure of this piece of legislation.

4.416 The European Communities submits that this cannot be correct under WTO law as a result of its enhanced requirement to "ensure the conformity" of domestic legislation under Article XVI:4 of the WTO Agreement and the requirement of a "sound legal basis" for administrative action developed from the provision contained in Article 3.2 of the DSU. These legal standards, which the United States itself has taken great pains to develop before the panel and the Appellate Body in the *India - Patents (US)* case, are of course applicable in other contexts as well.

4.417 The European Communities then concludes that under WTO law, an ill-defined exception that is not applied in practice and that goes against the main purpose of a piece of domestic legislation cannot possibly be the basis of the analysis of that piece of domestic legislation.

4.418 **The United States rebuts** the EC claim that Sections 301-310 are inconsistent with WTO Agreement Article XVI:4. The United States recalls that the European Communities asks the Panel "to rule":

> "that the United States, by failing to bring the Trade Act of 1974 into compliance with the requirements of Article 23 of the DSU and of Articles I, II, III, VIII and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI:4 of the WTO Agreement ... ". (emphasis added)

4.419 The United States notes that the European Communities thus acknowledges that there must be a violation of another WTO provision before there can be a violation of Article XVI:4. Unfortunately, elsewhere the European Communities argues that Article XVI:4 forms the basis of a new set of obligations not derived from the text of that provision.

4.420 In the view of the United States, WTO Agreement Article XVI:4 provides that each Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". By its terms, this provision does not state that there is now a "new legal environment". Nor does Article XVI:4 by its terms "creat[e] . . . an obligation to provide certainty and predictability in multilateral trade relations", as the European Communities asserts. It should be added that Article XVI:4 does not, by its terms, provide that legal findings of WTO-inconsistency may be based on transparently political attacks. The EC's contorted formulations cannot change the ordinary meaning of the text of Article XVI:4.

4.421 According to the United States, that text makes clear that the only obligation set forth in Article XVI:4 which is independent of the obligations in the annexed Agreements is that a Member "ensure the conformity" of its laws, regulations and administrative procedures with those obligations. The European Communities has explained that the definition of "ensure" is "make certain". According to the Oxford English Dictionary, it also means "make sure". Members were thus required, as of January 1, 1995, to review and make certain, to make sure, that existing laws, regulations and procedures conformed with the substantive obligations in the annexed Agreements, and where they did not, to bring them into conformity.

4.422 The United States claims that this is precisely the meaning ascribed to Article XVI:4 by the Appellate Body in *India - Patents (US).* The United States reiterates that the Appellate Body in *India - Patents (US)* referenced Article XVI:4 in order to reinforce its finding that India's obligation to bring itself into conformity with its TRIPs obligations dated from 1 January 1995, and could not be delayed. The European Communities is thus incorrect that the US and Appellate Body interpretation of this provision renders it redundant. In reinforcing the date by which Members had an affirmative obligation to bring measures into conformity, Article XVI:4 makes crystal clear that existing laws and regulations not in conformity had to be changed, that no such measures would be "grandfathered.

4.423 The United States maintains that the European Communities takes two contradictory positions on Article XVI:4. On the one hand, the European Communities takes the position that Article XVI:4 obliges Members to structure their law in a manner that "makes certain" that Agreement violations will not occur. However, the European Communities at the same time opposes the notion that discretionary legislation must include explicit language limiting discretion so as to preclude WTO-inconsistent actions. This contradiction highlights how the EC's arguments are directed towards achieving a particular political result in this dispute, without regard to generally applicable legal reasoning or principles. The European Communities apparently wants a panel finding that Sections 301-310 must be amended to remove "uncertainty", but is unwilling to accept panel intervention requiring the European Communities to limit its unfettered authority to implement WTO-inconsistent banana regimes or hormone bans, or to stop trade at any time, for any reason, without regard to DSU requirements, pursuant to Article 133 of the Treaty of Amsterdam.

4.424 The United States notes that the European Communities claims that Article XVI:4 requires an examination of a statute's structure, design and architecture. The United States explained the Appellate Body's clear rejection of attempts to create obligations and modes of analysis based on "the design of the measure" where there is no textual basis for either. The same reasoning would apply to the EC's attempt to create a generalized obligation to provide a "sound legal basis" for the implementation of US WTO obligations. The *India - Patents (US)* and *US - Shrimp* Appellate Body reports are clear that new obligations may not be created out of thin air. The objectives of agreements are reflected in the specific obligations set forth in those agreements.

4.425 The United States then claims that the EC's analysis under Article XVI:4 ultimately degenerates into random accusations concerning past US actions not within the terms of reference of this Panel, and for which no GATT or WTO panel has made findings. The EC's discussion strips bare the utter lack of legal foundation for the EC's arguments, and reinforces the fact that its goal in this case is to obtain a political declaration by this Panel that the United States is a "bad actor", a declaration it hopes will counter the impression left by the EC's consistent pattern of disregarding its obligations in connection with its banana import regime. The European Communities particularly hopes to obtain a political declaration that the United States does not respect the multilateral dispute settlement system, to counter the impression left in the context of the *Bananas* dispute by the EC's unilateral disregard of several multilateral dispute settlement panel findings, its unilateral decision to disregard its pledge to bring its measure into compliance with these multilateral findings, and its unilateral efforts to block the operation of multilateral provisions of Article 22 through the unprecedented and extraordinary action of attempting to block the agenda of a DSB meeting. The United States regrets having been forced to raise these matters, but the EC's attacks in its Second Submission have left us no choice. The United States does not claim that these points are relevant to the Panel's legal analysis. However, neither is the EC's discussion of such matters. The question in this dispute, and the only question, is whether Sections 301-310 command the United States to violate specific WTO obligations found in the text of DSU Article 23, WTO Agreement Article XVI:4 and GATT 1994 Articles I, II, III, VIII and XI.

4.426 **The European Communities stresses** a fundamental inconsistency in the US approach. A quote from the US arguments is particularly revealing:

> "Nowhere is the EC's "not genuinely discretionary" test found in WTO Agreement Article XVI:4, DSU Article 3.2, or any other provision of a covered agreement. Indeed, the EC does not claim that it does. Its test is based on extrapolation from the concept of "security and predictability" in Article 3.2 – an objective, not an obligation – and from a vague explanation of the "good faith" obligation in the VCLT – not a covered agreement".

4.427 According to the European Communities, however, the United States is incapable of showing that a distinction between mandatory versus discretionary legislation which constitutes the basis of its defence, can – to use the United States' own terms – be "found in WTO Agreement Article XVI:4, DSU Article 3.2, or any other provision of a covered agreement".

4.428 The European Communities claims that the United States is incapable of quoting any legal basis in WTO law in support of its defence simply because this legal basis does not exist. This becomes even clearer when the United States argued that:

> "[T]he *Superfund* panel referred neither to prior panel reports, nor to the Protocol, in making its finding regarding discretionary legislation".

4.429 The European Communities maintains that logically, there is no legal basis under the WTO which allows the United States to insist that GATT 1947 precedents like the *Superfund* case are applicable *sic et simpliciter* to this case.

4.430 The European Communities accepts that, in general, the reasoning followed by panels when interpreting provisions of the GATT and, after the entry into force of the Marrakech Agreement, of the WTO agreements may constitute an extremely valuable source of inspiration for subsequent panels dealing with identical or similar issues of law. However, this cannot be

mistaken with an implicit obligation of panels, of this Panel, to mechanically apply panel practice developed under the GATT 1947 that has lost its basis under WTO law.

4.431 The European Communities recalls that the Appellate Body has entirely dismissed the existence of the principle *stare decisis* within the WTO legal system in the *Japan - Alcoholic Beverages* report (quoted selectively by the United States):

> "a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.
>
> 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".

4.432 The European Communities goes on to state that in contrast to the legal situation in WTO law, under the GATT 1947 a legal basis providing for a distinction between mandatory and discretionary legislation existed. It was the Protocol of Provisional Application and, in particular, its "existing legislation" clause as interpreted already in 1949 by a working party report adopted by the GATT CONTRACTING PARTIES:

> "The working party agreed that a measure is so permitted, provided that the legislation on which it is based is by its terms or expressed intent of a mandatory character - that is, it imposes on the executive authority requirements which cannot be modified by executive action".

4.433 The European Communities then concludes that the "mandatory legislation" requirement evolved under the GATT 1947 as an interpretation of the "existing legislation" clause of the PPA. The GATT 1947 panel practice was therefore a development based on that fundamental initial decision within that specific context.

4.434 The European Communities argues that GATT 1947 standards to determine whether a legislation was mandatory were

(a) the "text" and the "expressed intent" of the legislation and

(b) the further requirement that the obligations imposed upon "the executive authorities" could not "be modified by executive action".

4.435 The European Communities, referring to the US argument that:

> "It is not necessary to examine whether the character of the Member enacting the legislation is bad, whether that party had a WTO-inconsistent motive",

argues that this statement contradicts the interpretation of the GATT CONTRACTING PARTIES of mandatory legislation under the strict interpretation pursuant to the "existing legislation" clause of the PPA. It also contradicts the United States' own interpretation as

expressed already 50 years ago during the discussions leading to the 1949 Working Party report on the "existing legislation" clause of the PPA:

> "... The United States representative suggested the addition of the words 'without departing from the intent of a measure embodied in the legislation' to the last sentence cited, so as to cover the case of legislation which was mandatory in intent but couched in permissive terms. ... It was agreed that the United States position would be met by the insertion of the wording 'by its terms or expressed intent' ".[267]

4.436 In the view of the European Communities, in the specific legal situation under the PPA, the strict interpretation of mandatory legislation had a decisive influence on the examination of domestic legislation by the GATT 1947 panels.

4.437 The European Communities then claims that the only possible way for a GATT 1947 panel to "marry" the limitation of the "existing legislation" clause of the PPA (aimed at applying the GATT 1947 as broadly as possible) with the need to control the implementation of the consequently broadly-defined discretionary legislation was, in extreme cases such as the *US – Superfund* case or the *EEC Parts and Components* case, to obtain from the defendant political assurances concerning the exercise of the executive power in the future.

4.438 According to the European Communities, for the rest, the United States does not contest the central point made by the European Communities that all the other GATT 1947 panel reports dealing with the issue of mandatory versus discretionary legislation made either direct reference to the PPA (or to the identical provisions in the Protocols of accession) or were based on panel precedents directly referring to the PPA. This is the objective legal context in which all these panels took their decision.

4.439 The European Communities points out that it was simply not necessary for the GATT 1947 panels to base every decision concerning this issue specifically on the "existing legislation" clause of the PPA as soon as they had already accepted, often without any further legal analysis, to apply that distinction based directly or by reference on the interpretation of the "existing legislation" clause of the PPA. When reading all the GATT 1947 panel reports that the European Communities has quoted with this approach in mind, it is clear that the US simply misses the point.

4.440 The European Communities maintains that the legal situation under WTO law is fundamentally different. The PPA and its "existing legislation" clause are no longer in force. Rather, an opposite obligation has been agreed by the Uruguay Round participants according to which the conformity of the domestic (even pre-existing) legislation must be ensured as from 1 January 1995.

4.441 The European Communities further argues that the insertion in the text of Article XVI:4 of the Marrakech Agreement of the terms "regulations and administrative procedures" renders from now on impossible the application of the third standard under the GATT 1947 definition of mandatory legislation, i.e. that the obligations imposed upon " the executive authorities" could not "be modified by executive action". In fact, regulations and administrative procedures are

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[267] "Guide to GATT Law and Practice" (Analytical Index), 1995 edition, page 1075, penultimate paragraph.

acts typically within the full powers of the executive authorities that, by definition, can always modify them "by executive action".

4.442 **The United States disagrees** with the European Communities that the European Communities is asking this Panel to disregard decades of GATT/WTO jurisprudence and practice in the name of "security and predictability". In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body explained,

> "Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. 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".[268]

4.443 The United States contends that WTO Members were most certainly aware of the discretionary/mandatory distinction when they signed the Marrakesh Agreement, and panels have continued to apply it. In the DSU review, the European Communities has even asked that WTO Members agree to remove it.[269] However, the European Communities now asks this Panel, five years after the conclusion of the Uruguay Round, to discard a fundamental principle of jurisprudence and create uncertainty as to the WTO-consistency of an indeterminate number of domestic laws heretofore considered discretionary. Even if "security and predictability" were themselves an independent WTO obligation, it would be difficult to conclude that a law which permits WTO-consistent action in every instance would do more harm to "security and predictability" than what the European Communities now proposes. Beyond this, the European Communities simply fails in its attempt to argue that "discretionary means mandatory" because of changes under the WTO Agreement.

4.444 With regard to the textual basis for the mandatory/discretionary distinction, the United States refers to the text of DSU Article 23.2(a). That Article deals with "determinations to the effect that a violation has occurred". It prohibits Members from making these determinations without following DSU rules and procedures, and these determinations must be consistent with findings in panel and Appellate Body reports adopted by the DSB.

4.445 In the view of the United States, there is no "determination to the effect that a violation has occurred" before the Panel in this case. The European Communities does not challenge a determination which has actually been made. It is therefore not possible to analyze whether such a determination meets the requirements of Article 23.2(a). One cannot say whether, in making such a determination, the United States followed DSU rules and procedures, nor

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[268] Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., p. 14.

[269] See *Review of the Dispute Settlement Understanding*, Non-Paper by the European Communities (Oct. 1998) (emphasis added); see also, Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998).

whether the United States made a determination consistent with DSB-adopted findings. Neither the findings nor the determination exist.

4.446 The United States asks how the Panel can perform its analysis under these circumstances. In the absence of a concrete determination, how is it possible to know whether a Member has breached its obligations under Article 23.2(a)? It is not permissible to speculate about how the Member will make its determination in the future. It is not permissible to look at determinations made in the past which are not within the terms of reference. It is not permissible to assume that certain Members are not to be trusted. It is not permissible to assume that they will act in bad faith. Under these circumstance, must the conclusion be that without a concrete determination, there can be no violation of Article 23.2(a)?

4.447 The United States points out that over 10 years ago, in 1987, a GATT panel wrestled with this type of question. It looked at a statute which would not go into effect for another three years and asked, may a panel determine whether this law is inconsistent with a party's GATT obligations when it is possible that the party may change the law before it goes into effect? The panel's conclusion was that it could, but it was very careful in how it drew this conclusion. The panel found that only if a statute commands a party's authorities to violate a specific GATT obligation could that statute be found inconsistent with that obligation. In enacting such legislation, the party crossed a line. It left itself with no choice but to violate its obligations, even if only at some point in the future. Conversely, the panel found, if a statute does not command the party's authorities to violate a specific GATT obligation, it is not possible to conclude that the statute violates that obligation. The party may exercise its discretion so as to comply with its international obligations. Any other conclusion would be speculation as to whether the party will act in bad faith, speculation with no more foundation than if the statute did not exist at all.

4.448 The United States again states that the reasoning of the *Superfund* panel made very good sense. It was so good that at least five GATT panels adopted it as their own. At least three WTO panels have also adopted it. And none of those panels in any way revised the core question asked by the *Superfund* panel: does the statute command, does it mandate, a violation of a specific agreement obligation?

4.449 The United States further argues that the *Superfund* analysis is not an analysis of character. It is not necessary to examine whether the character of the Member enacting the legislation is bad, whether that party had a WTO-inconsistent motive. Nor is it necessary to examine whether the "character" of the legislation is bad, whether the legislation reflects an intent to breach WTO-obligations. All that matters is whether the law commands an action which violates a specific textual obligation. Absent such a command, the Panel is left with the fundamental problem – there is nothing that can be said to violate a specific textual obligation. Legislation which leaves open the possibility of a violation cannot be considered a violation, any more than may a constitutional system which provides broad authority to act. However, by including a specific command in legislation to violate a specific obligation, the legislation itself becomes that violation.

4.450 In response to the Panel's request for any *travaux preparatoires* that may be relevant for an interpretation of Article XVI:4 of the WTO Agreement, the United States first indicates that there was no decision to create any official *travaux preparatoires* for the Marrakesh Agreement Establishing the WTO. The discussions of October and November 1993, when the most contentious and politically sensitive issues in the WTO Agreement text were settled, were conducted orally in small meetings that did not include all delegations. Some issues, including the final wording of Article XVI:4, were resolved in plurilateral working groups that were

smaller still. When the plurilateral subgroups reported to the larger Institutions Group, some delegations objected to having written documents become part of a negotiating history, because if there were to be an official negotiating history, its importance would be such that its contents would have to be negotiated line by line, and this added burden was clearly impossible given the November 15, 1993 deadline for finishing the Institutions Group's work. In any event, absent a complete picture of every note and proposal from every delegation, it would be difficult to obtain an accurate picture of the parties' intentions. For these reasons, the Chairman, Ambassador Julio Lacarte, announced during these discussions that no negotiating history would be issued and all trade-offs had to be made in the text of the agreement itself.

4.451 According to the United States, the informal record of the final negotiations on the "MTO Agreement" (as it was known at the time) therefore is incomplete, and consists only of a series of "room" documents circulated in the room where the Institutions Group met, and the notes of individual negotiators. No official summary of these meetings was prepared, and no documents prepared for negotiating sessions were collected as an official negotiating record.

4.452 The United States then provided the following documents as US Exhibit 23:

(a) Draft Agreement Establishing the Multilateral Trade Organization, Informal Note by the Secretariat (Third Revised Text of the MTO Agreement (27 May 1992);

(b) Comparison of the Second and Third Revised Texts of the Draft Agreement Establishing the Multilateral Trade Organization (27 May 1992) (Document 551).

(c) Draft of Article XVI:4 (11 November 1993).

(d) Excerpt from Daily Report From US Negotiator on MTO Issues, Including Article XVI:4 (November 11, 1993).

(e) Draft of Article XVI:4 (12 November 1993).

(f) Draft Agreement Establishing the Multilateral Trade Organization, Revised Text (14 November 1993).

(g) Draft Agreement Establishing the Multilateral Trade Organization (24 November 1993).

4.453 The United States explains that the Dunkel Draft Final Act included the text of an Agreement Establishing a Multilateral Trade Organization (MTO), with the caveat that the MTO text required further elaboration "to ensure a proper relation to the other results of the Uruguay Round". Participants in the negotiations generally understood that further negotiation concerning establishment of an organization would be required. Negotiations proceeded from February through December 1992 with additional problems being raised with the draft text. The Secretariat produced a "third revised text" on May 27, 1992 and a comparison document (document 551), which the United States has included in Exhibit 23. When work on the MTO text intensified in September 1993, the May 1992 text was the starting point.

4.454 In the view of the United States, two points relevant to the negotiating history of Article XVI:4 must be noted from the "third draft" document that the Secretariat produced. First, the language states that

> "[T]he Members shall endeavor to take all necessary steps, where changes to domestic laws will be required to implement the provisions of the agreements annexed hereto, to ensure the conformity of their laws with these agreements" (emphasis added)

4.455 According to the United States, it was the view of several delegations, including the United States, that this language required a government to take the relevant procedural steps to implement the other agreements negotiated in the Uruguay Round. Moreover, use of the term "endeavor" called into question the obligatory nature of even this limited undertaking.

4.456 Second, the United States claims that while it merely questioned the need for this provision, other delegations actively opposed the provision as indicated in the remarks column of the May 1992 document. The document states that "Further discussions are necessary to determine whether the provision should be retained, deleted, reformulated or moved into the Final Act". This comment is unique in this document.

4.457 The United States points out that while the European Communities correctly notes that the use of the term "endeavor" in the third draft called into question the obligatory nature of this undertaking, it neglects to explain several steps in the negotiating process which followed. As described below, when the term "endeavor" was removed, the trade-off was removal of terms including "taking all necessary steps" and the clarification that only obligations were subject to this provision (through inclusion of the phrase "obligations as provided in the annexed agreements").

4.458 The United States goes on to state that in the fall of 1993, the "Lacarte Group" working on institutional issues held several discussions of Article XVI:4. During these negotiations, the European Communities recognised the weakness of the "endeavor" language and proposed to delete the "endeavor" language and make the provision mandatory.

4.459 The United States further points out that several objections were raised. Brazil and other Latin delegations with legal systems providing for "direct incorporation" of certain international agreements into their law were concerned that the draft language could require them to attempt to enact laws on matters of extreme sensitivity. Second, delegations with federal systems, such as Canada, Brazil and the United States, questioned the interaction between the new language and provisions in Article XXIV:12 of GATT 1994 and GATS Article I:3(a). These provisions related to measures of regional and local governments and require national governments to take "such reasonable steps as may be available to it" to ensure compliance.

4.460 In the view of the United States, direct negotiations between those delegations and the European Communities took place in November 1993. Our negotiators' notes show that as of November 11th, the EC's latest proposal – "The Members shall take all necessary steps to ensure the conformity of their laws, regulations and administrative procedures with the provisions of the annexed agreements, in accordance with their individual constitutional or legal systems" – was rejected because it was seen to weaken the duty under international law to implement agreements.[270]

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[270] See Daily Report From U.S. Negotiator on MTO Issues, Including Article XVI:4 (November 11, 1993).

4.461 The United States notes that the European Communities on the following day (November 12) proposed that the language read, "The Members shall ensure the conformity of their laws, regulations and administrative procedures with the provisions of the annexed Agreements". This draft, as well, was opposed by Brazil and others. It was incorporated in brackets into a November 14 draft of the agreement as a whole, along with the note, "For further consideration".

4.462 The United States further explains that the draft Agreement Establishing the Multilateral Trade Organization of 24 November 1993 includes bracketed language on Article XVI:4 that was ultimately agreed upon.[271] This language included the phrase "obligations as provided in the annexed agreements", limiting language making clear that an expansive interpretation of Article XVI:4 was not intended. On the basis of the inclusion of this term, (and the earlier removal of EC language which would have created a weaker obligation than that under VCLT Article 26), the Members agreed to include Article XVI:4 in the WTO Agreement.

4.463 The United States points out that a final point is that, near the end of the negotiations on this provision, Brazil and other delegations asked the EC legal expert who was present how this provision differed from Article 26 of the Vienna Convention. The EC's legal adviser did not identify a difference or distinction.

4.464 The United States further indicates that on the other hand, shortly afterward, this same legal adviser provided the following views on Article XVI:4:

> "A provision that has been championed to a large extent by the Community, but which may have serious consequences for the Community itself, and for the Member States too, is Article XVI:4 of the WTO. . . . This may turn out to be a very onerous obligation, requiring full conformity of all Community and national laws . . . with the precise provisions of the WTO's annexes. It may also have hardly any consequences at all, compared to the present situation, if it is interpreted in the light of standing panel case law which determines that a law or regulation is contrary to the GATT only if it is mandatory and as such contrary to GATT terms, but that such is not the case, if the text of the law or regulation permits a GATT conform [sic] application of the text.[272] If conformity to WTO obligations is interpreted in this way - which would not be unreasonable in the light of the succession of the WTO to the «acquis gattien»[273] – it should be clear that the added value of Article XVI:4 is rather limited".[274]

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[271] The United States notes that the only changes were the modifications to number and tense made throughout the WTO Agreement during the legal review in early 1994.

[272] See the Panel Report on *US - Superfund*, op. cit., para. 5.2.9. and the Panel Report on *EEC – Part and Components,* op. cit., para. 5.25-26. (Citation in original. The United States specifically requests the Panel to note that no reference is made to the Protocol of Provisional Application, or to cases citing the Protocol of Provisional Application.)

[273] (citation in original) See Article XVI:1 of the WTO Agreement.

[274] Pieter-Jan Kuyper, *The New WTO Dispute Settlement System: The Impact on the Community*, *in* The Uruguay Round Results, A European Lawyers' Perspective 87, 110 (Jacques H.J. Bourgeois, Frédérique Berrod & Eric Gippini Fournier eds. 1995) (emphasis added) (US Exhibit 25).

4.465 The United States notes that the EC legal adviser stated in a footnote that the conclusion that the value of Article XVI:4 is "rather limited" "is the view of the author himself".[275] He went on to note that if a more expansive view of Article XVI:4 were adopted, "it must be clear that the European Communities and the Member States have an obligation to maintain their laws and regulations in constant conformity with the terms of the WTO Agreement and its annexes. That is no simple matter".[276]

4.466 According to the United States, this Article provides a nearly contemporaneous record of the understanding of the legal adviser to the EC negotiators, who was the chief GATT lawyer in the EC Legal Service and a former professor of public international law. While he earlier could not explain the difference between Article XVI:4 and VCLT Article 26, he shortly afterward recognised that Article XVI:4 would have a limited impact, and that, were a contrary interpretation adopted, it would be highly disruptive to the sovereignty of WTO Members, including the EC itself. The EC lawyer also expressed his expectation that the *Superfund* reasoning would not be affected by Article XVI:4; indeed, he was relying on this conclusion.

4.467 **The European Communities challenges** the US quote from an article written by Mr. Pieter-Jan Kuyper in his personal capacity[277] in order to contest the EC's interpretation of Article XVI:4 of the WTO Agreement. The United States purposefully omits to indicate that the quotation stems from a chapter of the article dealing with the relations between the European Communities and its member States. It is with this concern in mind that the author refers to the potential burden imposed on the European Communities by Article XVI:4 o the WTO Agreement, and not in the much more general way that the United States would have it now.

4.468 The European Communities also argues that the conclusion drawn by the United States from this article is also quite wrong (and in contradiction with the internal meeting report of 11 November 1993 by the US delegate, Mr. Andy Shoyer, cf. US Exhibit 23). The European Communities never considered the final version of Article XVI.4 of the WTO Agreement to be of limited impact because, as is clear from the developments the European Communities described in this proceeding and the internal meeting report of the United States, the European Communities always strove for and finally achieved substantial strengthening of what is now Article XVI:4 of the WTO Agreement.

4.469 The European Communities adds that when writing his article based on a conference held in Bruges in October 1994, Mr. Kuyper for obvious reasons could not be aware of the legal development that occurred in the *India - Patents (US)* case where the Appellate Body found that WTO Members are required to provide a sound legal basis in their domestic law in order to ensure conformity with the covered agreements.

4.470 **The United States challenges** the EC suggestion that it is somehow significant that Mr. Pieter-Jan Kuyper drew his conclusions concerning Article XVI:4 in the context of a discussion of the relations between the European Communities and its Member States, and that his statements concerning "the potential burden imposed on the European Communities" by the interpretation of Article XVI:4 that the European Communities now posits must be understood

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[275] Ibid. at footnote 46.

[276] Ibid. at 110.

[277] Pieter-Jan Kuyper, The New WTO Dispute Settlement System: The Impact on the Community, in: J.H.J. Bourgeois *et al.,* The Uruguay Round Results, A European Lawyers' Perspective, p. 87, publishing the papers of a conference held in Bruges in October 1994.

in this context. The European Communities appears to be arguing that Mr. Kuyper's conclusions, and a panel's, should depend on whether the defending party in a particular dispute is the United States or the EC. If the defending party is the EC, then the *Superfund* rule should continue to be applied (as Mr. Kuyper anticipated it would in 1995[278]), and the "burden on the European Communities" (i.e. the *in dubio mitius* principle, as the United States already argued) would be relevant. However, as the United States emphasised, the law must apply equally to all parties, and at all times. The Panel must reject the EC's self-serving, *post hoc* reassessment of its legal position on Article XVI:4 and its attempt to apply a double standard.

4.471 The United States further states that with respect to the EC's argument that it always sought a "strengthened" Article XVI:4, the United States notes that what the European Communities sought is not what it actually got. In fact, as already discussed, in seeking a "strengthened" Article XVI:4, the European Communities on several occasions proposed language which would have unintentionally resulted in an obligation weaker than that found in VCLT Article 26. Moreover, as the United States pointed out, Mr. Kuyper as the legal adviser to the EC negotiators was unable to explain the difference between Article XVI:4 and VCLT Article 26 when Brazil and other delegations requested such an explanation towards the close of negotiations.

4.472 In response to the Panel's question as to what would be different in a legal universe without Article XVI:4, the United States claims that by definition, Article 1(a) and (b) are applicable only to the GATT 1994, and not to other WTO Agreements such as the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Article XVI:4 therefore provides an overarching statement in the WTO Agreement, clearly applicable to all annexed agreements and not just the GATT 1994, that no measures are grandfathered. Article XVI:4 thus serves to remove any doubt which might have existed in its absence that all measures must be brought into conformity as from January 1, 1995.

4.473 The United States recalls its argument that it was precisely in this manner and for this purpose that the Appellate Body cited Article XVI:4 in *India - Patents (US)*. In that case, India attempted to argue that it could delay changing its law as required by TRIPs Article 70.9 because of differences between the language of that provision and that of other TRIPs articles. Specifically, India claimed that while other TRIPs provisions explicitly required changes to domestic laws, Article 70.9 did not.[279]

4.474 The United States notes that the Appellate Body rejected this argument, stating at the outset of its discussion, "India's arguments must be examined in the light of Article XVI:4 of the *WTO Agreement*", and then quoting this provision.[280] Article XVI:4 thus assisted in clarifying that India could not rely on claimed differences in agreement language to delay compliance.

4.475 According to the United States, beyond serving this overarching function of providing context for other agreement provisions, Article XVI:4 imposed an obligation on Members to

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[278] According to the United States, Mr. Kuyper's reliance on the *Superfund* reasoning, like that of Mr. Roessler and Professor Jackson, highlights the importance of the Appellate Body's conclusion that adopted panel reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute". Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., p. 14.

[279] Appellate Body Report on *India - Patents (US)*, op. cit., para. 78.

[280] Ibid., para. 79.

review existing legislation at the time the Agreement was to enter into effect to make sure that existing laws, regulations and administrative procedures did, in fact, conform to the Members' WTO obligations, and where those laws did not, to bring them into conformity.

4.476 In response to the Panel's further question as to what would be the use and meaning of Article XVI:4 if no difference would exist, with or without Article XVI:4, the United States argues that in respect of the application *ratione temporis* of the WTO Agreement nor in respect of "grandfathering" or the removal of mandatory legislation, the United States states that Article XVI:4 does provide additional clarity with respect to the need to bring non-conforming measures into conformity as from January 1, 1995. The Appellate Body in *India - Patents (US)* found this provision useful in clarifying potential ambiguities in other provisions which might be read to permit delayed implementation. The provision also serves the useful function of establishing, under the umbrella of the WTO Agreement, that none of the annexed agreements – and not just the GATT 1994 – are subject to grandfathering.

4.477 The United States adds that through the provisions of Article XVI:4, the principles of Article 26 of the Vienna Convention on the Law of Treaties became legally binding on all Members of the WTO, even though not all Members are parties to the Vienna Convention.[281]

4.478 The United States further argues that beyond this, another function of Article XVI:4 is suggested by comments by Frieder Roessler, formerly the Director of the Legal Affairs Division of the GATT Secretariat, who explained:

> "There are similar provisions [to Article XVI:4] in the Tokyo Round Agreements on Anti-dumping and Subsidies[282], which have generally been interpreted as requiring the parties to these Agreements to adopt laws, regulations and procedures that permit them to act in conformity with their obligations under these Agreements. The main function of these provisions was to permit the committees established under these Agreements to review the law of the parties and not merely the practices followed under that law".[283]

4.479 The United States also asserts that likewise, the inclusion of Article XVI:4 makes clear that the laws of Members, and not just the application of these laws, may be the subject of reviews conducted in various WTO committees.

4.480 The United States further notes that in *EC – Bananas III*, the Appellate Body examined Article 4.1 of the Agreement on Agriculture, which provides:

> "Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market access commitments as specified therein".

4.481 The United States notes that the European Communities argued that Article 4.1 is a substantive provision, which, read in context of Article 21.1 of the Agreement on Agriculture

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[281] The United States points out as an example that it is not a party.

[282] (Footnote in original) Article 16(6) of the Anti-Dumping Code and Article 19(5) of the Agreement on Subsidies and Countervailing Duties.

[283] Frieder Roessler, *The Agreement Establishing the World Trade Organization, in* The Uruguay Round Results, A European Lawyers' Perspective 67, 80 (Jacques H.J. Bourgeois, Frédérique Berrod & Eric Gippini Fournier eds. 1995)(emphasis added).

(providing that the provisions of the GATT 1994 "shall apply subject to the provisions of this Agreement"), demonstrates that Schedules of concessions supersede the requirements of GATT 1994 Article XIII.[284] Accordingly, the European Communities contended that the tariff rate quotas provided for in its Schedule would not be subject to Article XIII.[285] The Appellate Body disagreed. It concluded, "Article 4.1 does no more than merely indicate where market access concessions and commitments for agricultural products are to be found".[286] The Appellate Body went on, "If the negotiators intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly".[287]

4.482 The United States claims that the Appellate Body's interpretation of Article 4.1 illustrates the fact that sometimes an agreement provision may serve a limited purpose, and that obligations should not be extracted from a provision unless the language explicitly supports that interpretation. Likewise, Article XVI:4 does not by its terms provide that there is an obligation to "provide security and predictability", and such an obligation must not be inferred merely to augment the utility of Article XVI:4.

4.483 The United States refers again to Professor Jackson's testimony at the Senate Finance Committee, in which he concludes, "There may need to be some alterations to some time limits, or transition measures, but the basic structure of 301 is not necessarily inconsistent with the Uruguay Round results", and that even when Section 301 is considered "in its current statutory form" (i.e. before the 1994 amendments), "the Executive appears to have the discretion to apply actions under Section 301 in a manner consistent with the proposed new rules of the Uruguay Round dispute settlement understanding".[288] Professor Jackson thus considered that with only minor changes, Section 301 would be consistent with the WTO obligations of the United States. He clearly did not believe that any provision of the WTO Agreement or its annexes, including Article XVI:4, would require significant changes to the statute.

4.484 In response to the Panel's question as to the situation in which a Member can be found to be in breach of Article XVI:4, the United States argues that in precisely that manner set forth by the European Communities. There it asked the Panel to rule:

> "on the basis of these findings [with respect to DSU Article 23 and GATT Articles I, II, III, VIII and XI] that the United States, by failing to bring the Trade Act of 1974 into compliance with the requirements of Article 23 of the DSU and of Articles I, II, III, VIII and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI:4 of the WTO Agreement ...". (emphasis added)

4.485 In the view of the United States, in other words, the fact that a Member has not brought into conformity a measure inconsistent with its obligations in an annexed agreement would constitute a breach of Article XVI:4. For example, the TRIPS Agreement obligates WTO Members to grant a term of protection for patents that runs at least 20 years after the filing date of the underlying protection, and requires each Member to grant this minimum patent term to all

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[284] See Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), adopted 25 September 1997, WT/DS27/AB/R, para. 20.

[285] Ibid.

[286] Ibid., para. 156.

[287] Ibid., para. 157.

[288] Jackson Testimony at 200.

patents existing as of the date of application of the Agreement to that Member. Under the Canadian Patent Act, the term granted to patents issued on the basis of applications filed before October 1, 1989 is only 17 years from the date on which the patent is issued. The United States considers that by failing to bring this law into conformity with its obligations under the TRIPs Agreement, Canada has breached Article XVI:4. The same conclusion could be drawn in the case of failure to implement other provisions of the TRIPS Agreement; failure to eliminate notified TRIMs by the end of the period provided in Article 5.2 of the TRIMs Agreement; or failure to fully implement the customs valuation obligations in the Valuation Agreement.

4.486 **The European Communities emphasises** that the US arguments are both new and incorrect, as can be seen already from the internal meeting report of 11 November 1993 by the US delegate contained in US Exhibit 23. This exhibit, in particular, shows that several Uruguay Round participants, including the European Communities, worked for a strengthening of Article XVI:4 of the WTO Agreement beyond the "natural obligation under int'l law" which finds its source in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. This "natural obligation" is already incorporated into the WTO by virtue of Article 3.2, second sentence, of the DSU, which provides that "[t]he Members recognise that [the dispute settlement system] serves to … clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The US reply thus appears to be an attempt to go back on the achievements of the Uruguay Round.

4.487 **The United States rebuts** the EC argument that the principles of VCLT Article 26 have already been incorporated into the WTO through DSU Article 3.2, second sentence, and that Article XVI:4 therefore need not serve this purpose. However, DSU Article 3.2 provides for the dispute settlement system to clarify WTO provisions "in accordance with customary rules of interpretation of public international law". Article 26 is not such a customary rule of interpretation. As the Appellate Body explained in *US – Gasoline* and *Japan – Alcoholic Beverages*, these rules of interpretation are reflected in VCLT Articles 31 and 32, which, indeed, are entitled "General rule of interpretation" and "Supplementary means of interpretation", respectively.[289] Inasmuch as Article 26 is not such a rule of interpretation, DSU Article 3.2, second sentence, may not be read to reference it. Thus, the EC argument fails to undermine the United States point that Article XVI:4 made the principles of VCLT Article 26 binding on all WTO Members, even those Members not parties to the Vienna Convention. It is worth noting that, during negotiations from 1991-1993, the United States negotiator explicitly brought to the attention of other delegations that the United States is not a party to the Vienna Convention.

4.488 The United States responds to the Panel's request to provide examples where the United States took steps in accordance with the US argument that Section 304 determinations have to be made within the 18 months time-frame but that their publications can wait completion of WTO procedure, and the Panel's question as to why the United States does not immediately publish a notice, e.g. before the end of WTO procedures, thereby assuring Members that it will await the completion of WTO procedures before making a final determination. The United States states that it cannot offer an example from the handful of Section 302 investigations which have taken place since January 1, 1995. Providing assurances is not an obligation under DSU Article 23; Article 23 itself helps to provide these assurances. In other words, the US commitment to comply with DSU Article 23, combined with the availability of effective dispute settlement procedures should the United States not comply, provides the very assurances to

[289] The United States cites Appellate Body Report on *US – Gasoline,* op. cit., pp. 16-17; Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., pp. 10-12.

which the question refers. Further, although not required to by any WTO obligation, the United States has gone beyond its WTO obligations in providing assurances in the form of US legal requirements to resort to dispute settlement procedures and to base determinations that US WTO agreement rights have been denied on DSB-adopted panel and Appellate Body findings. The European Communities has acknowledged that no such obligation to limit the exercise of discretion is provided for in Article XVI:4. Nevertheless, the United States has done so. It is for this reason that Professor Jackson concluded that Section 301 "is a constructive measure for US trade policy, and for world trade policy".[290]

4.489 The United States indicates that any delay in publishing or issuing a determination changes none of this. The United States remains subject to its international obligation to comply with DSU Article 23 (not to actually make proscribed determinations or take action), US law continues to require reliance on DSB-adopted findings, and the dispute settlement system remains available both as a deterrent to WTO-inconsistent action and for redress of any such action. In the end, however, the question is not whether Sections 301-310 provide "adequate assurances", but whether Sections 301-310 command action inconsistent with DSU Article 23. The timing of publication, or even of the determination itself, is not relevant to this question. DSU Article 23 sets forth conditions applicable to "determinations to the effect that a violation has occurred" and to suspension of concessions. No actual determination to the effect that a violation has occurred, and no actual suspension of concessions, is before this Panel. And none is commanded by the statute which is before the Panel. There is no basis in either the text of DSU Article 23 or Sections 301-310 for a finding that this statute violates that, or any other, WTO provision cited by the European Communities.[291]

2. Section 304

(a) Overview

4.490 **The European Communities claims** that the USTR is required to proceed unilaterally when the results of the WTO dispute settlement procedures are not available within the time limits set out in Sections 301-310.[292]

4.491 The European Communities first notes that Section 304(a)(2)(A) provides in relevant part:

> "The Trade Representative shall [determine whether the rights to which the United States is entitled under any trade agreement are being denied] [in the case of an investigation involving a trade agreement] on or before . . . the earlier of

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[290] Jackson Testimony, op. cit., at 200.

[291] See also the parties' further arguments contained in Paragraphs 4.759-4.790 below.

[292] The European Communities notes that its complaint does not relate to those provisions of Sections 301-310 that are in conformity with the principles set out in Article 23. This applies in particular to Section 303(a), according to which the USTR must resort to the DSU in cases involving a WTO agreement, as well as Section 304(a)(1)(A), according to which the USTR's determination of denial of United States' rights or benefits under a WTO agreement must be based not only on the investigation and the consultations with the country concerned but also on the WTO dispute settlement proceeding, and Section 301(a)(2)(A), according to which the USTR is not required to take action in a case in which the DSB has adopted a report confirming that the defendant Member does not deny United States' rights or benefits under a WTO agreement.

(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or

(ii) the date that is 18 months after the date on which the investigation is initiated".

4.492 The European Communities next states that Section 303 prescribes that the decision to initiate the investigation and the request for consultations in accordance with Article 4.3 of the DSU must normally take place on the same day. If there is a delay in the request for consultations, there is a corresponding extension of the 18-month time limitation.

4.493 The European Communities argues that Section 304(a)(2)(A) therefore mandates the USTR to make a determination 18 months after the request for consultations on the United States' denial of rights under a WTO agreement, even if the DSB has not adopted a report with findings on the matter within that time frame.

4.494 The European Communities further asserts that the text and the intent of Section 304 are that after a maximum of 18 months USTR must proceed with a determination of whether the rights of the United States have been denied, whether or not the WTO dispute settlement procedure is concluded at that time.

4.495 The European Communities points out that the text does not say anywhere that the determination must be negative if by the end of the 18 months the WTO procedure has not finished.

4.496 In the view of the European Communities, by providing explicitly that the determination must either be made 30 days after the end of the WTO procedure (in which case the result of that procedure can be taken into account) or by the end of 18 months (meaning that in certain cases the result of the WTO procedure cannot possibly be taken into account), whichever the earlier, the legislator has made clear its intention that in the latter case USTR must go ahead and make a substantive determination even though the "results" from the WTO are not yet available.

4.497 The European Communities then concludes that one must thus assume that, given the language of the law and its design, architecture and revealing structure, if the intent of the legislator were different, as the United States affirms, Congress would have said so explicitly.

4.498 The European Communities further claims that at the very least, the text is so unclear and ambiguous that economic operators and foreign governments perceive it as imposing upon the USTR an obligation to make a unilateral determination that US rights have been denied even in the absence of a WTO ruling. In that sense, the text does not provide a "sound legal basis" (for the implementation of Article 23 of the DSU) as required by the Appellate Body in the *India – Patents (US)* case.

4.499 **The United State points out** the numerous assumptions on which the EC argument rests. US Exhibit 10 is reproduced in part here, summarizes these assumptions. The United States argues that for each EC claim, all of the EC's assumptions must be correct for it to prevail, but none of them is correct.

US view on EC assumptions or miscalculations

EC Claim	Relevant WTO Provisions	EC Assumptions or Miscalculations
The 18-month time-frame in Section 304(a)(2)(A) requires the USTR to make a violation determination inconsistent with DSU Article 23.2(a).	DSU Article 23.2(a): (1) violation determination (2) not consistent with adopted panel or Appellate Body finding or arbitral award	**EC Assumption (1)**: The USTR's determination under Section 304(a)(1) must be a violation determination, even if the DSB has not yet adopted panel or Appellate Body findings. In fact, the USTR is required to base her determination on dispute settlement proceedings, and may make any of a number of determinations – including terminating an investigation – if those proceedings are not complete. **EC Assumption (2)**: The maximum period for dispute settlement is 19 ½ months, rather than 18. - the European Communities assumes that panels may extend proceedings by 3 months rather than 2 months; - the European Communities assumes that DSB meetings will always take place on the final day authorized under the DSU, even though regularly scheduled meetings take place more frequently; - the European Communities assumes that the United States cannot request DSB meetings. In fact, the maximum period is 18 months, and can be less given regularly scheduled DSB meetings and the fact that Members may request meetings. **EC Assumption (3)**: The USTR cannot initiate WTO dispute proceedings before initiating a Section 301 investigation. In fact, the USTR may initiate dispute settlement proceedings before initiating a Section 301 investigation.

4.500 In the view of the United States, the first set of EC assumptions relates to its claim that Section 304 mandates a violation of DSU Article 23.2(a). The European Communities argues that Section 304 requires the USTR to make a determination that US trade agreement rights have been violated within 18 months of initiation of a Section 302 investigation, while the DSU provides for a longer period for completion and adoption of panel and Appellate Body proceedings in some instances.

4.501 The United States challenges the EC assumption, its most fundamental assumption, that Section 304 requires the USTR to make an affirmative determination that US agreement rights have been denied even if the DSB has not adopted panel or Appellate Body findings to this effect. It is important to recognise that Article 23.2(a) does not prohibit determinations that a violation has not occurred, nor does it prohibit accurate descriptions of a process which is under way. Article 23.2(a) prohibits determinations that another WTO Member has violated its WTO obligations unless DSU rules and procedures have been followed. In other words, Article 23.2(a) relates only to a finding of a violation.

4.502 The United States notes that the European Communities makes absolutely no attempt to explain how Sections 301-310 mandate such a determination. The European Communities

merely assumes that in determining "whether" US agreement rights have been denied, the USTR must make an affirmative determination. Unless the European Communities can explain why, under US law, this assumption is correct, it has failed to meet its burden with respect to this claim. The United States reiterates that the USTR is completely free to make any of a number of determinations, including a negative determination, if the DSB has not yet adopted panel or Appellate Body findings.

4.503 The United States notes that the European Communities also makes assumptions relating to the time frames in Section 301 and the DSU. However, because Section 304 does not mandate an affirmative determination, these time frames are simply not relevant to the Panel's decision. Nevertheless, even were this not so, the 18-month time frame in the statute would not prevent the USTR from complying to the letter with DSU rules and procedures. The EC's calculation of the time by which a panel may extend its proceedings is incorrect by one month. Moreover, the European Communities ignores the fact that DSB meetings normally are held monthly and instead assumes that DSB meetings would not be held until the final day permitted under the DSU. The European Communities also assumes that the United States would not attempt to affect the schedule of DSB meetings. Finally, the European Communities ignores the fact that Sections 301-310 do not preclude the USTR from initiating dispute settlement proceedings before initiating a Section 301 investigation. Thus, wholly apart from the fact that the European Communities cannot assume that the USTR will always make an affirmative determination, the time frames in the US statute do, in fact, permit the USTR to base her determination on adopted panel and Appellate Body findings. The DSU time frames were negotiated with this 18-month time frame in mind, and the European Communities and others were well aware of this fact during the Uruguay Round.

4.504 The United States further indicates that Section 304(a)(1) of the Trade Act of 1974 does not command the authorities of the United States of America to violate the obligations found in the text of DSU Article 23.2(a). It does not command the United States USTR to determine, within the meaning of Article 23.2(a), that another WTO Member is denying US trade agreement rights absent DSB recommendations and rulings to that effect.

4.505 The United States recalls that the European Communities asked the Panel to find that Section 304(a)(2)(A),

> "is inconsistent with Article 23.2(b) [sic] of the DSU because it requires the USTR to determine whether another Member denies rights or benefits under a WTO Agreement irrespective of whether the DSB adopted a panel or Appellate Body finding on this matter". (emphasis added)

4.506 The United States emphasised that the EC's formulation is wrong because it assumes that "whether" means "that". In requiring that she make a determination of whether US trade agreement rights have been denied, the statute does not command the USTR to conclude that such rights have been denied. In the absence of a concrete determination that another Member has violated its WTO obligations, or a command in the statute to make that specific determination, there is quite simply nothing for the Panel to examine against the requirements of Article 23.2(a). The closest the European Communities has come to arguing that Section 304(a)(1) mandates a determination of breach is its statement that the Section 304(a)(1) determination must be based on the results of the Section 302 investigation. But this is no argument at all, for the investigation won't be concluded without the DSB rulings and recommendations the USTR is required to seek under Section 303(a) and is required to rely on under Section 304(a)(1), a point the European Communities was willing to acknowledge.

Section 304(a)(2)(A) is not inconsistent with DSU Article 23.2(a) because Section 304(a)(1) does not mandate a determination that a violation has occurred.

(b) Discretion not to make a determination of violation

(i) Interpretation of Section 304

4.507 **The European Communities claims** that there is nothing in Sections 301-310 that would permit the USTR to make her determinations on any other basis, for instance on the basis of a delay in the WTO dispute settlement proceedings. The United States in effect makes the astonishing claim that the USTR may determine under Sections 301-310 that no denial of rights and no failure to implement DSB recommendation occurred because the WTO dispute settlement have not been completed.

4.508 The European Communities submits that it would not be logical to interpret Sections 301-310 to authorize determinations on the WTO-consistency of measures on the basis of factors that are entirely outside the plain language of the law and, as such, irrelevant to such a determination.

4.509 The European Communities argues that Sections 301-310 as they appear on the US statute books cannot be described as discretionary legislation.

4.510 The European Communities first claims that the United States has unconvincingly claimed for example that the USTR is somehow "free" not to make a finding that US trade agreement rights have been denied in a situation where the results of an investigation undertaken under Section 302 do not support such a determination. Even less convincing is the US argument that the USTR could postpone making such a determination until after the conclusion of a WTO dispute settlement case or could terminate the investigation without making any determination at all and instead open a new investigation.

4.511 The European Communities adds that there is simply no support for any of these allegations in the relevant provisions of the 1974 Trade Act. It is striking that the United States itself does not point to any provision in the law that would bear out such a reading which goes in fact against the express terms and declared purpose of that law.

4.512 The argument of the European Communities thus is that Sections 301-310 are not genuinely discretionary in that they instruct the USTR to take her decisions in a way that does not allow her to avoid WTO-inconsistent action in situations where the time-frames stipulated in section 304(a)(1) and 306(b) are overstepped.

4.513 In the view of the European Communities, it is of little importance what the USTR has actually done in such situations, since the terms of the law are such that they limit any marginal discretion that the USTR may have in such a way that she cannot avoid to choose between either violating the law or violating the WTO. It is this element of "diabolic choice" that makes a law WTO-inconsistent, whatever the characterisation of the law under the "discretionary versus mandatory" criterion may otherwise be.

4.514 The European Communities secondly points out that in order to rebut the EC interpretation of the text of Sections 301-310, the United States affirmed that:

> "... the Trade Representative is required under Section 304(a)(1) to base a determination of whether agreement rights have been denied on the results of

> WTO dispute settlement proceedings. The Trade Representative has done so in every GATT and WTO case to date in which the US was a complainant. Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the Trade Representative would not be able to make a determination that US agreement rights have been denied".

4.515 The European Communities considers that the text of Sections 301-310 does not support such a description of the factual and legal situation.

> "Section 304 (a) is applicable in two instances:
>
> (a) in the initial phase after the conclusion of an initial investigation and
>
> (b) pursuant to Section 306 (b) (2) and, by reference, to Section 306 (b) (1), in the later phase of "monitoring of compliance".

4.516 The European Communities deems it appropriate to quote in extenso the text of the relevant provisions under Section 304 (a) (1):

> "(a) In general
>
> (1) On the basis of the investigation initiated under section 2412 [Section 302] of this title and the consultations (and the proceedings, if applicable) under section 2413 [Section 303] of this title, the Trade Representative shall -
>
> (A) determine whether -
>
> (i) the rights to which the United States is entitled under any trade agreement are being denied, ...". (emphasis added)

4.517 The European Communities then notes that Section 304 (a) (2) provides as follows:

> "(2) The Trade Representative shall make the determinations required under paragraph (1) on or before -
>
> (A) in the case of an investigation involving a trade agreement, the earlier of -
>
> (i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or
>
> (ii) the date that is 18 months after the date on which the investigation is initiated ...". (emphasis added)

4.518 The European Communities argues that the chapeau of Section 304 imposes an obligation ("shall") upon the USTR to determine whether the rights of the United States are being denied "on the basis of the investigation initiated under section 302".

4.519 In support of its argument, the European Communities points out that the sentence in the chapeau of Section 304 (a) (1):

> "(and the proceedings, if applicable) under section 303", (emphasis added)

explicitly refers to Section 303 ("Consultation upon initiation of investigation"), where, under Section 303 (2), the USTR

> "shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement". (emphasis added)

4.520 The European Communities states that, according to Section 304, the obligatory ("shall") determination by the USTR on whether rights of the United States are being denied is not discretionary but must be based upon the results of the investigation (where the domestic industry interests become therefore decisive) and "if applicable" on the "proceedings" under Section 303. Moreover, according to Section 304(a)(2), it must be made within "the earlier of" certain time frames.

4.521 The European Communities argues that the result of the investigation is obviously not discretionary, as the USTR is not free to determine whether such situation arises or not independently from the facts of the case. Rather, it is the USTR's duty to ascertain the existence of a factual situation: to even suggest that an authority charged with investigative powers as regards factual situations possesses discretion as to the actual results of the investigation would be equivalent to replacing the rule of law with arbitrariness.

4.522 The European Communities adds that the United States has officially stated both in the DSU review process and in front of you that it does not consider that any panel proceedings under the formal dispute settlement procedures are obligatory in the phase of "monitoring of compliance" in order to determine a failure of compliance of a WTO Member with the recommendations and rulings of the DSB. However, in the WTO dispute settlement system, no other procedure to that effect is available at the request of the original complainant. Section 303 referred to in the chapeau of Section 304(a)(1) clearly requires a positive "request" by USTR to make the dispute settlement procedure "applicable" in the context of Section 304.

4.523 **The United States argues**, in connection with the foregoing EC arguments, that the European Communities asserts that Section 304(a)(2)(A) violates DSU Article 23, in particular Article 23.2(a), because it requires the USTR to determine whether another WTO Member has denied rights under a WTO Agreement within 18 months of a request for consultations, even if the DSB has not adopted a report with findings on the matter within that time frame. This assertion is based on numerous miscalculations and unsupported assumptions.

4.524 The United States argues that the EC's formulation on its face fails to state a violation of Article 23, since it claims only that the USTR must determine whether US rights have been denied within the prescribed time frames, and not that the USTR must determine that such rights have been denied. Nothing in Sections 301-310 compels the USTR to find that US rights have been denied in the absence of panel or Appellate Body findings adopted by the DSB. Therefore, regardless of the relationship between the time frames in Section 304(a)(2)(A) to those in the DSU, the European Communities may not conclude that they compel a violation of Article 23.

4.525 The United States recalls that Article 23.2(a) provides that Members shall:

> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this

> Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

4.526 The United States argues that for there to be a violation of Article 23.2(a): (1) there must be a determination that a WTO agreement violation has occurred; and (2) that determination is not consistent with panel or Appellate Body report findings adopted by the DSB or an arbitration award rendered under the DSU. Because the European Communities has not, as part of this case, alleged that a specific US determination violates Article 23.2(a), the European Communities must show that, under Sections 301-310, the USTR is required to make a violation determination, and to do so in a manner inconsistent with panel or Appellate Body findings adopted by the DSB.

4.527 According to the United States, Section 304(a)(2)(A) establishes time limits for the USTR's determination of whether US trade agreement rights are being denied: the earlier of 30 days following the date on which dispute settlement proceedings are concluded or 18 months from the initiation of a Section 301 investigation.[293] While Section 304(a)(2)(A) sets forth the time limits for this determination, Section 304(a)(1)(A) sets forth the criteria: the USTR's determination is made on the basis of WTO dispute settlement proceedings.[294]

4.528 The United States argues that nothing in the language of Section 304(a)(1)(A) compels a specific determination, and the European Communities has made no attempt to demonstrate that it does. Therefore, even if the 18-month target date in Section 304(a)(2)(A) were to occur before the DSB has adopted panel and Appellate Body findings, nothing in Section 304(a)(1) would compel the USTR to find an agreement violation, let alone one inconsistent with panel or Appellate Body findings.

4.529 In the view of the United States, the USTR has broad discretion to issue any of a number of determinations which would not remotely conflict with Article 23.2(a) – most fundamentally, a determination that no violation has occurred. In order to meet its burden in this case, the European Communities must explain why, under US law, the USTR *could not*[295] make such a negative determination, or could not, for example, determine that no violation has been confirmed by the DSB, that a violation will be confirmed on the date the DSB adopts circulated panel or Appellate Body findings, or that, in order to comply with US international obligations, the USTR must terminate the current Section 302 investigation and reinitiate another.

4.530 According to the United States, the European Communities makes no attempt to address these threshold questions, and instead rests its case with regard to Section 304(a)(2)(A) on pure speculation that the USTR will always make an affirmative determination that US agreement rights have been denied. However, unless the European Communities can demonstrate that such a determination is mandated by law, and that no other determinations are possible, the fact that there is an 18-month time frame in Section 304(a)(2)(A) is irrelevant.

4.531 The United States further challenges the EC assumption, its most fundamental assumption, that Section 304 requires the USTR to make an affirmative determination that US agreement rights have been denied even if the DSB has not adopted panel or Appellate Body

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[293] Section 304(a)(2)(A), 19 U.S.C. § 2414(a)(2)(A).
[294] Section 304(a)(1), 19 U.S.C. § 2414(a)(1).
[295] The United States cites Panel Report on *US – Tobacco*, op. cit., para. 123.

findings to this effect. It is important to recognise that Article 23.2(a) does not prohibit determinations that a violation has not occurred, nor does it prohibit accurate descriptions of a process which is under way. Article 23.2(a) prohibits determinations that another WTO Member has violated its WTO obligations unless DSU rules and procedures have been followed. In other words, Article 23.2(a) relates only to a finding of a violation.

4.532 The United States notes that the European Communities makes absolutely no attempt to explain how Sections 301-310 mandate such a determination. The European Communities merely assumes that in determining "whether" US agreement rights have been denied, the USTR must make an affirmative determination. Unless the European Communities can explain why, under US law, this assumption is correct, it has failed to meet its burden with respect to this claim. The United States reiterates that the USTR is completely free to make any of a number of determinations, including a negative determination, if the DSB has not yet adopted panel or Appellate Body findings.

4.533 In response to the Panel's question regarding the precise basis under Section 304, or any other legal basis, for the United States to argue that unless WTO procedures are completed, the USTR is precluded from making a determination of violation, the United States states that Section 304(a)(1) requires that determinations under that Section be made "on the basis of the investigation initiated under Section 302 and the consultations (and the proceedings, if applicable, under section 303)". The "proceedings" under Section 303 are dispute settlement proceedings.[296] Moreover, such proceedings would be "applicable" in any case involving a trade agreement, since Section 303 requires that dispute settlement procedures under a trade agreement be invoked in any case involving a trade agreement, if no mutually acceptable resolution has been achieved.[297]

4.534 The United States considers that the United States Administration has, in the Statement of Administrative Action approved by Congress, provided its "authoritative expression . . . concerning its views regarding the interpretation and application of the Uruguay Round agreements, . . . for purposes of domestic law".[298] The Statement of Administrative Action must, by law, be treated as the authoritative expression concerning the interpretation of the statute in any judicial proceeding.[299] As already noted, the Statement of Administrative Action at page 365 provides that the USTR will:

> "base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB".[300]

4.535 The United States notes that this commitment is consistent with the requirements of US case law that in US law, it is an elementary principle of statutory construction that "an act of

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[296] The United States notes that Section 303(a)(2) provides that if dispute settlement consultations under a trade agreement have not resulted in a mutually acceptable resolution, the Trade Representative shall request "proceedings" under the "formal dispute settlement procedures provided under such agreement".

[297] Ibid.

[298] Statement of Administrative Action, op. cit., p. 1.

[299] 19 U.S.C. § 3512(d) ("The statement of administrative action approved by Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application".).

[300] Statement of Administrative Action, op. cit., p. 365 (emphasis added).

Congress ought never to be construed to violate the law of nations if any other possible construction remains". Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States". Footwear Distributors and Retailers of America v. United States, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council, 485 U.S. 568 (1988).

4.536 Based on these considerations, the United States considers that, under US law, it is required to base an affirmative determination that US WTO agreement rights have been denied on adopted panel and Appellate Body findings. That is to say, US law precludes such an affirmative determination not based on adopted panel or Appellate Body findings. The United States notes that in so doing, United States law goes beyond what the European Communities argues is required by Article XVI:4. The United States recalls that the European Communities states: "[I]t would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include specific language in their domestic law precluding WTO-inconsistent action".

4.537 The United States points out that the European Communities acknowledged the requirement in US law to base determinations that US agreement rights have been denied on adopted DSB findings. There, the European Communities notes that certain provisions of Sections 301-310 "are in conformity with the principles set out in Article 23", such as

> "Section 304(a)(1)(A), according to which the USTR's determination of denial of United States rights or benefits under a WTO agreement must be based not only on the investigation and the consultations with the country concerned but also on the WTO dispute settlement proceeding". (emphasis added)

4.538 The United States adds that there have been numerous statements that the United States will resort to WTO dispute settlement procedures in cases involving WTO rights,[301] and these procedures include basing determinations on adopted panel and Appellate Body findings. More importantly, the Statement of Administrative Action is by law an authoritative expression of the proper interpretation of the statute in any judicial proceeding.[302]

4.539 The United States further considers that in this dispute, the law does not provide for a determination inconsistent with Article 23.2(a), and the European Communities has failed to establish that it does. While the European Communities merely assumed that Section 304(a)(1)(A) mandated a determination that US agreement rights have been denied, in its answers to Panel questions it explicitly concedes that Section 304(a)(1)(A) does not mandate such a determination. The European Communities states that the USTR "may make only one of two determinations: United States' WTO rights are being denied or the United States' WTO rights are not being denied". This statement in and of itself admits that the USTR is not

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[301] The United States notes that for example, in an appearance before the Senate Foreign Relations Committee, Deputy US Trade Representative Rufus Yerxa explained that under the GATT, "it is explicitly provided [in the statute] that we take matters covered by GATT rules to the GATT for dispute resolution", and that this would not change under the WTO. Senate Foreign Relations Committee Hearing on the World Trade Organization, Federal News Service, June 14, 1994.

[302] 19 U.S.C. § 3512(d).

mandated to make "a determination to the effect that a violation has occurred", and the EC's case with respect to Section 304(a)(1)(A) must therefore fail.

4.540 The United States notes that the European Communities similarly admits that the USTR need not determine that a violation has occurred when it states, "The EC would like to underline that a determination of the absence of a violation is of course the mirror image of a determination that a violation has occurred. It is not possible to make a determination . . . in one direction without at least the possibility of coming to a different conclusion".[303] In this statement, the European Communities again concedes that it is possible for the USTR not to determine that US agreement rights have been denied.

4.541 The United States notes that the European Communities concluded:

> "A law that requires a determination in all cases *whether* a violation of WTO law has occurred therefore comprises the requirement to determine in certain cases *that* a violation of WTO law has occurred. Such a law therefore mandates determinations that are inconsistent with Article 23".

4.542 In the view of the United States, these *non-sequiturs* now comprise the sole basis for the EC's argument that Section 304(a)(1)(A) mandates a determination inconsistent with DSU Article 23.2(a) (and that Section 306(b) mandates violations of DSU Article 23.2(a) and (c)). Only if the Panel agrees that a determination "whether" agreement rights have been denied may be equated with a determination "that" such rights have been denied – that, contrary to the EC's earlier admission, there is no possibility of making a negative determination – will the first requirement for a violation of Article 23.2(a) be met. However, aside from the absence of any logical or legal foundation for the EC's argument, it would have the impermissible consequence of preventing even determinations of consistency, notwithstanding the explicit language of Article 23.2(a), which only addresses certain determinations of inconsistency.

4.543 The United States claims that both Canada and Brazil make this point. Canada states in its response to a Panel question that DSU Article 23.2(a):

> "does not prohibit determination of consistency with WTO norms. Any such prohibition would be counterproductive to the objectives of Article 3.7 of the DSU which states that '(a) solution mutually acceptable to the parties to the dispute and consistent with the covered agreements is clearly to be preferred'".

4.544 The United States further notes that likewise, Brazil states:

> "WTO Members are, of course, entitled to make unilateral determinations of non-violation and of any interests they may have that are not currently covered by the WTO Agreements".

4.545 The United States challenges the EC's argument because it would have the impermissible consequence of reading out of Article 23.2(a) the exception for violation determinations made in accordance with DSU rules and procedures. Under the EC's reading, the very fact of making a determination would be inconsistent with Article 23.2(a), thereby prohibiting even those violation determinations made in accordance with DSU rules and procedures.

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[303] Ibid. at 25 (emphasis in original).

4.546 The United States claims that the EC admission that Section 304 does not mandate a determination that US agreement rights have been denied is a sufficient basis for this Panel to find that Section 304 is not inconsistent with DSU Article 23.2(a). Nevertheless, even if the Panel were to conclude otherwise, the EC's claim fails because the USTR is not limited under Section 304(a)(1)(A) to making the two determinations the European Communities refers to, and because the time frames in Sections 304(a)(2)(A) do not preclude the USTR from basing her determinations on panel and Appellate Body findings in every case.

4.547 The United States points out that as provided at page 365 of the Statement of Administrative Action,[304] the USTR is required under Section 304(a)(1) to base a determination of whether agreement rights have been denied on the results of WTO dispute settlement proceedings. The USTR has done so in every GATT and WTO case to date in which the United States was a complainant.[305] Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the USTR would not be able to make a determination that US agreement rights have been denied. On this basis, she could, for example, determine that dispute settlement proceedings had not yet finished, and that a determination concerning US agreement rights would be made following completion of these proceedings. There is no limitation in the statute on the definition of "determination" which would prevent such determinations.

4.548 The United States further maintains that even if the European Communities were correct that Section 304(a)(1)(A) permits only two determinations, this would not explain why the USTR does not have a third option: terminating the investigation without making a determination. There is nothing in Sections 301-310 to prevent this, and US Exhibit 13 demonstrates that this option has frequently been exercised in the past. The USTR would then be free to reinitiate a new investigation, as in fact occurred in the *Bananas* dispute.

4.549 The United States considers that because of the requirement in Section 304 to base determinations under that provision on adopted panel and Appellate Body findings and because the USTR may either terminate an investigation or else make multiple determinations under Section 304, Section 304 would not mandate actions inconsistent with Article 23.2(a) even if a panel or the Appellate Body were to exceed the time frames set forth in the DSU.

4.550 **The European Communities also notes** that legal scholars differ on the question of whether Section 301 actions are subject to judicial review under United States law.[306] There is, however, no doubt that, even if such actions were subject to review, no domestic court would declare invalid an action taken under Section 301 on the ground that it is inconsistent with the United States' obligations under a WTO agreement. This follows from Section 102(a)(1) of the Uruguay Round Agreements Act, according to which United States law prevails in the case of a conflict with a WTO provision:

> "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect".

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[304] US Exhibit 11

[305] See US Exhibit 13.

[306] On this issue, the European Communities refers to Erwin P. Eichman and Gary N. Horlick, *Political Questions in International Trade . Judicial Review of Section 301? in* Mich. J. Int'l L., Vol. 10 (1989), pages 735-764.

4.551 The European Communities points out that Section 102(a)(1) also provides that nothing in the Uruguay Round Agreements Act shall be construed

> "to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974".

Section 102(c) further states:

> "No person other than the United States ... may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such [a WTO] agreement".

4.552 **In rebuttal, the United States points out** that the European Communities attempts to make much of the fact that, in US courts, US law would prevail in the event of a conflict with the Uruguay Round Agreements. For example, the European Communities cites Professor D.W. Leebron for this proposition. However, the European Communities fails to quote Professor Leebron's conclusion on page 232 of the very same work cited in footnote 27 that, "Nothing, however, in those provisions [that is, the provisions of Section 301] requires the President or the USTR to act in violation of the Uruguay Round Agreements". In other words, because there is no conflict between Sections 301-310 and the WTO Agreement, it does not matter which would prevail in the event of a conflict. In fact, were there actually a conflict, that is, if a US law mandated a violation of the WTO Agreement, there would be a WTO violation regardless of whether a US court would apply US law. The EC's discussion of US law on when actual conflicts are present is thus completely irrelevant to the Panel's analysis.

4.553 The United States further argues that Sections 301-310 provide for the President and the USTR to exercise discretion at various points in the Section 302 investigation. Among the most relevant discretionary decisions for purposes of this proceeding are those relating to the USTR's determination of whether US trade agreement rights have been denied, the determination of action to be taken if those rights have been denied, and the timing of that action.

4.554 The United States notes that the USTR determines whether US agreement rights have been denied pursuant to Section 304(a)(1). That section provides:

> "(1) On the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the Trade Representative shall -
>
> (A) determine whether -
>
> (i) the rights to which the United States is entitled under any trade agreement are being denied, ...".[307]

4.555 The United States contends that in Section 302 investigations where a WTO agreement is involved, the USTR thus makes her determination on the basis of the results of any WTO dispute settlement proceeding.[308] If the DSB has adopted a panel or Appellate Body report, the

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[307] Section 304(a)(1)(A)(i); 19 U.S.C. § 2414(a)(1)(A)(i).
[308] See Section 303(a)(1)-(2), 19 U.S.C. § 2413(a)(1)-(2).

USTR will make her determination on the basis of that adopted report. If, on the other hand, WTO dispute settlement proceedings have not yet concluded, the USTR is not required to determine that US rights have been denied. Nothing in Section 304(a)(1) or any other provision of Sections 301-310 requires the USTR to make a determination that US agreement rights have been denied if the DSB has not ruled to that effect. The USTR is free, for example, to determine that no violation has been confirmed by the DSB, that a violation found in a panel or Appellate Body report will be confirmed on the date of the DSB meeting at which the report will be adopted, or that there is reason to believe that a violation has occurred, but that the DSB has not yet confirmed this. The USTR is also free to make a negative determination, and then reinitiate a second investigation in order to make a definitive determination of an agreement violation upon DSB adoption of panel and Appellate Body findings.[309]

4.556 The United States stresses that the USTR is a cabinet level official serving at the pleasure of the President, whose office is located within the Executive Office of the President.[310] Pursuant to 19 U.S.C. § 2171(c)(1) (1998), Reorg. Plan No. 3 of 1979, Sec. 1(b)(4), 44 Fed. Reg. 69273 (1979) and 19 C.F.R. § 2001.3(a) (1998), the USTR operates under the direction of the President and advises and assists the President in various Presidential functions.[311] The President may through this authority direct the Trade Representative as to the determinations she makes.

4.557 **The European Communities responds** to the US argument that Section 304(a)(1) refers to WTO "proceedings" as a basis for the determination to be made, and until WTO procedures completed the USTR cannot make a determination of violation, by claiming the US argument before the Panel is defeated by two considerations.

4.558 In the view of the European Communities, the first consideration relates to the time frames in section 304(a)(2) which do not allow the USTR to await the outcome of WTO dispute settlement proceedings in all cases, because the USTR must make the determination under Section 304(a)(1) by the earlier of the expiry of two deadlines, of which only one is related to the completion of the procedures under the DSU. If the completion of these procedures takes more than the time frame stipulated under the alternative provision (18 months after the date on which the investigation under section 302 was initiated), the USTR is not allowed to await the outcome of the dispute settlement procedure under the DSU and thus cannot base her determination on the results of that procedure. The European Communities would recall that the chapeau of Section 304(a)(2) refers back to the "determinations [all of them] under paragraph (1)" of Section 304(a).

4.559 The European Communities presents the second consideration which relates to a situation that arises at a later stage of the procedure, which is described under Section 306 as "Monitoring of foreign compliance". In this context, it must be recalled that the reference to "the proceedings" in Section 304(a)(1) is qualified by the words "if applicable" and by a cross-reference to Section 303. Section 303(2) provides in this context that "the Trade Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement". In other words, the proceedings referred to in Section 303(2) are those which may be requested by the USTR.

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[309] The United States notes that upon a negative determination, the USTR would be free to reinitiate an investigation pursuant to Section 302(b)(1). See Section 302(b)(1), 19 U.S.C. § 2412(b)(1).

[310] See 19 U.S.C. § 2171(a), (b)(1) (1998).

[311] See 19 U.S.C. § 2171(c)(1) (1998); Reorg. Plan No. 3 of 1979, Sec. 1(b)(4), 44 Fed. Reg. 69273 (1979); 19 C.F.R. § 2001.3(a) (1998).

4.560 The European Communities points out that since, in the view of the USTR, in cases of disagreement on the consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB in a prior dispute, the complainant is not required to first resort to the procedure under Article 21.5 of the DSU, but must have immediately recourse to Article 22 in order to comply with the time limits under Article 22.2, the USTR cannot request any proceedings under the formal dispute settlement procedures under the WTO in such situations (under Article 22.6 of the DSU, the procedural right to request arbitration is not available to the original complainant, but only to the original respondent).

4.561 The European Communities then argues that if the US interpretation of Article 21.5 of the DSU were correct (*quod non*), no "proceedings" in the sense of Section 303(2) would be applicable in such situations, and therefore the USTR would be compelled to make determinations under 304(a)(1) of the failure of compliance by another WTO Member without resorting to WTO dispute settlement procedures (and in fact has done so in the *Bananas* case).

4.562 According to the European Communities, in any case, the time frames stipulated in Section 306(b) and Section 304(a)(2) would not allow the conclusion of the multilateral dispute settlement procedures and thus violate Article 23 (and the related provisions under Articles 21 and 22) of the DSU.[312]

4.563 **The United States**, in response to the Panel's question as to how the reference to "proceedings" in Section 304(a)(1) as a basis for determinations under Section 304 is read exclusively to refer to the outcome or result of WTO proceedings and not also include, for example, the conduct and statements of the Member concerned in ongoing WTO procedures, i.e. before the adoption of DSB recommendations, **answered** as follows: The United States is not sure what is meant by "conduct and statements of the Member concerned", or how such statements would be relevant to particular determinations. If this phrase is meant to refer to statements made by a losing party regarding its intentions with respect to implementation, such statements are indeed taken into consideration when determining whether, under Section 301(a)(2)(B)(i), satisfactory measures are being taken to grant US rights. The United States reiterates that the USTR has determined not to take action based only on the "expectation" that another WTO Member would implement DSB rulings and recommendations, without any formal statement from that Member to that effect. A statement by a losing party would thus certainly be considered relevant, and is part of the proceedings. In this connection, the United States notes that the "date on which the dispute settlement procedure is concluded" is the date by which parties state their intention with regard to compliance, i.e. 30 days after DSB adoption (or, in terms of the DSU time frames, 17 months and 20 days after the consultation request).

4.564 The United States goes on to state that on the other hand, if by "conduct and statements" the Panel means an expressed desire to resolve the dispute, the USTR most certainly would take this into account in deciding whether to terminate the Section 302 investigation without a Section 304 determination. Again, as described in US Exhibit 13, the USTR has frequently done this.

4.565 The United States challenges the EC's argument that it reconsidered this position in light of the United States decision not to request Article 21.5 proceedings in the *Bananas* dispute. First, it incorrectly assumes that Article 21.5 proceedings are a prerequisite to

[312] The European Communities notes that this is obvious when taking into account the duration of a procedure under 21.5 of the DSU, given that the Panel procedure alone will take up to 90 days.

requesting suspension under Article 22. Second, it assumes that Section 306 requires a determination of breach, which it does not, and ignores the fact that the action determination which is provided for in Section 306 is to be based on Article 22 procedures. Third, even if, contrary to the conclusion of the *Bananas* arbitrators, it were concluded that Article 21.5 is a prerequisite to requesting suspension under Article 22, this would not explain why US law would not still require that dispute settlement procedures be relied on to make affirmative determinations of breach. Further, as indicated above, if an agreement were reached in the DSU Review by which parties would resort to an amended Article 21.5 process prior to resorting to Article 22 procedures, nothing in Section 306 would prevent the United States from acting consistently with such an agreement.

4.566 **The European Communities emphasises** that while describing the events in the *Bananas* case, the United States misrepresents the facts, and their sequence, as they occurred in reality. On 9 October 1998, while the "reasonable period of time for implementation" granted to the European Communities in order to take measures to comply with recommendations and rulings in the *Banana III* DS procedure was still running (deadline 31 December 1998) and the European Communities had not yet adopted all these measures, the Chief of Staff of US President W. Clinton, M. Erskine Bowles, wrote a letter to the leaders of both the Republican and Democrat parties in the House and in the Senate (submitted on 8 July 1999 by the Commonwealth of Dominica and Saint Lucia as third party). In the name of the President (the *incipit* of the letter is "the Administration shares your view (...)"), Mr. Bowles stated the following:

> "To put maximum pressure on the EU, the Administration is pursuing three separate tracks (1) continuing to indicate our willingness to try to resolve the dispute in a mutually acceptable manner consistent with WTO obligations (2) preserving our rights in the WTO process and (3) proceeding under section 301 of the Trade Act of 1974.
>
> (...)
>
> Then, unless the EU has agreed to suspend implementation of its banana regime and to implement a WTO-consistent regime acceptable to us by January 2, 1999, the Administration will publish a second Federal Register notice on November 10. This notice will request comments on a list of specific retaliatory options and indicate that the administration will announce on December 15 retaliatory action pursuant to section 301 to take effect on February 1, 1999, unless the EU's banana regime is in full compliance with WTO rules".

4.567 The European Communities contends that as these examples show, both the threat and the action violate the text, the object and purpose of Article 23 (and the related provisions of Article 21 and 22) of the DSU. In this perspective, the European Communities argues that the statement made by the United States according to which:

> "the Trade Representative has never once made a section 304 (a)(1) determination that US GATT or WTO agreement rights have been denied which was not based on the results of GATT and WTO dispute settlement proceedings"

is factually incorrect, since the USTR, at least in the *Banana III* case, took a determination under 304 (a)(1) that US WTO agreements rights had been denied after the end of the reasonable period of time without resorting to any WTO DS procedure on the conformity of the

new EC measures which repealed the legislation that an earlier panel had declared incompatible with the WTO. It is also misleading, since the threat of retaliatory action could force upon the targeted WTO Member a "mutually" agreed solution that makes a determination under Section 304 (a)(1) unnecessary (as in the *Japan – Auto Parts* Section 301 procedure).

4.568 **The United States responds** that the European Communities merely asserts that the US response was inaccurate, without introducing any relevant new arguments. The United States reaffirms the accuracy of its response. Moreover, the arguments referred to by the European Communities do not address the points made here by the United States.

(ii) Practice

4.569 **The European Communities further refers** to the resolution of the House of Representatives in the *Japan – Auto Parts* case to which it has referred in its oral statement during the second substantive meeting with the Panel. According to that resolution, the House of Representatives

> "strongly supports the decision by the President to impose trade sanctions on Japanese products in accordance with section 301 of the Trade Act of 1974 unless an acceptable accord with Japan is reached in the interim that renders such action unnecessary",[313]

although it was obvious that no dispute settlement procedure under the WTO had been requested in a situation where trade sanctions in the area of trade in goods had been announced by the President. That resolution was taken only a few months after the adoption by the US Congress of the Uruguay Round Agreements Act and is a clear indication of how the US legislator understood Sections 301-310 in that specific context.

4.570 The European Communities draws the attention of the Panel to the fact that the US claims that the USTR has been following constantly a certain pattern of behaviour is contradicted by the *Japan - Auto Parts* procedure which did not follow that pattern.

4.571 **The United States points out** that no determination relating to WTO Agreement rights was made in the *Japan - Auto Parts* case. As the question notes, the determination in that case involved the issue of whether Japan's acts, practices and policies were "unreasonable", not whether US rights under the WTO had been denied. Any claim in connection with the *Auto Parts* case thus would bear no relationship to any of the EC claims relating to Article 23.

4.572 As a general response to Panel questions relating to the practice under Section 304, the United States notes that it is mindful that the application of Section 301 in particular cases is not within the Panel's terms of reference, and that the Panel therefore will not offer findings with respect to specific Section 302 investigations. Likewise, the practical application of Sections 301-310 is only relevant insofar as it sheds light on the only relevant question in this dispute: do Sections 301-310 mandate (and not merely permit) actions which are inconsistent with specific textual obligations found in DSU Article 23, WTO Article XVI:4 and GATT 1994 Articles I, II, III, VIII and XI.

4.573 With respect to the practice under Section 304, the United States also argues that, as noted elsewhere and as provided at page 365 of the Statement of Administrative Action (US

[313] 104th Congress, 1st session, H.Res. 141.

Exhibit 11), the USTR is required under Section 304(a)(1) to base a determination of whether agreement rights have been denied on the results of WTO dispute settlement proceedings. Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the USTR would not be able to make a determination that US agreement rights have been denied. On this basis, she could determine that dispute settlement proceedings had not yet finished, and that a determination concerning US agreement rights would be made following completion of these proceedings. She could also, for example, terminate the Section 304 investigation on the basis of the fact that information necessary to make her Section 304(a)(1) determination is not available, then reinitiate another case. The USTR has terminated and reinitiated Section 302 investigations before, including in the *Bananas* dispute,[314] and has terminated investigations without making a determination on numerous occasions.[315]

4.574 The United States explained that it is not possible to provide an exhaustive list of the determinations that can be made under Section 304(a)(2)(A) because there is no definition in the statute that constrains the USTR's discretion in this regard. The USTR's determinations under Section 304(a)(2)(A) are provided below. Also listed below are cases in which the USTR terminated an investigation involving trade agreement rights without making a determination. As indicated below, the USTR has never determined that US rights under the GATT 1947 or the WTO Agreement have been denied in the absence of GATT panel findings or adopted DSB rulings and recommendations.

Determinations under Section 304(a)(1)(A)[316]

Section 304(a)(2)(A) refers to determinations under Section 304(a)(1)(A) relating to denial of rights or benefits under a trade agreement. A list of these determination follows. Please note that none of these cases is within the terms of reference of this Panel. Section 304(a)(1)(A) dates to 1988.

WTO Cases:

Canadian Export Subsidies and Market Access for Dairy Products (1999):

> At the 18-month anniversary, the USTR determined that it would not be possible to determine whether US agreement rights had been denied until the DSB had adopted panel and Appellate Body findings. US Exhibit 14 includes a letter from the Trade Representative to Congressional officials explaining this. Dispute settlement proceedings are still in progress.

India's Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (1998):

> Following adoption of panel and Appellate Body reports finding Indian TRIPs Agreement violations, the USTR determined that certain acts, policies and practices of India violate, or otherwise deny benefits to which the United States is entitled under, the TRIPS Agreement.

European Community Banana Import Regime (1998):

> Following adoption of panel and Appellate Body reports finding EC violations of the GATT 1994 and the GATS in response to a US complaint, the USTR determined that certain acts, policies and practices of the EC violate, or otherwise deny benefits to which the United States is entitled under, GATT 1994 and the GATS. The USTR had earlier determined on the 18-month anniversary that it would not be possible to determine whether US agreement rights had been

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[314] The United States cites Termination of Investigation; Initiation of New Investigation and Request for Public Comments: European Union Banana Regime, 60 Fed. Reg. 52026 (1995) (U.S. Exhibit 18).

[315] A list is provided at US Exhibit 13.

[316] US Exhibit 13.

denied until the DSB adopted panel and Appellate Body findings. US Exhibit 14 includes a letter from the USTR to Congressional officials explaining this.

Argentine Specific Duties and Non-Tariff Barriers Affecting Apparel, Textiles, Footwear and Other Items (1998):

Following adoption of panel and Appellate Body reports finding Argentine GATT violations, the USTR determined that Argentina's specific duties on textile and apparel imports violate Argentina's obligations under GATT 1994 Article II and its statistical tax on almost all imports violates GATT Article VIII.

Canadian Practices Affecting Periodicals (1997):

Following adoption of panel and Appellate Body finding Canadian GATT violations, the USTR determined that certain acts, policies and practices of Canada violate, or otherwise deny benefits to which the United States is entitled under GATT 1994.

GATT 1947 Cases:

Canada Import Restrictions on Beer (1991):

Following adoption of a GATT panel report finding Canadian GATT violations, the USTR determined that acts, policies, or practices of Canada violate the GATT.

Thailand Cigarettes (1990):

Following adoption of a GATT panel report finding Thai GATT violations, the USTR determined that US rights under the GATT were violated.

Korea Beef (1990):

Based on a GATT panel report finding Korean GATT violations, the USTR determined that US trade agreement rights were being denied.

EC Oilseeds (1990):

Following adoption of a GATT panel report finding EC GATT violations, the USTR determined that US trade agreement rights were being denied. The USTR had earlier determined on the 18-month anniversary that there was reason to believe that rights under a trade agreement were being denied, but did not determine that a violation had occurred because panel proceedings had not yet finished.

In the following cases, the USTR terminated an investigation involving trade agreement rights without making a determination:

Brazilian Practices Regarding Trade and Investment in the Auto Sector (1998):

Following WTO dispute settlement consultations, Brazil committed not to extend its automotive trade-related measures beyond 1999. As a result, the USTR terminated the investigation.

Turkey's Practices Regarding the Imposition of a Discriminatory Tax on Box Office Revenues (1997):

Following WTO dispute settlement consultations, Turkey agreed to equalize any tax imposed in Turkey on box office receipts from the showing of domestic and imported films. As a result, the USTR terminated the investigation.

Pakistan's Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (1997):

Following WTO dispute settlement consultations, Pakistan established a mailbox system in accordance with the TRIPs Agreement and the USTR terminated the investigation.

Portugal's Practices Regarding Term of Patent Protection (1996):

Following WTO dispute settlement consultations, Portugal implemented its patent related obligations under the TRIPs Agreement and the USTR terminated the investigation.

EU Enlargement (1996):

After an agreement was reached, the USTR terminated the investigation.

EC Enlargement (1990):

Following notification to the GATT contracting parties of the US intention to suspend tariff concessions in response to actions by the EEC under Article XXIV of the GATT, the United States and the European Communities reached agreement and the USTR terminated the investigation.

Norway Toll Equipment (1990):

Following consultations under the GATT Procurement Code, the United States and Norway reached agreement and the USTR terminated the investigation.

Brazil Import Licensing (1990):

Following GATT dispute settlement consultations, the United States informed Brazil of its intention to request panel proceedings. Brazil withdrew the measure and the USTR terminated the investigation.

EC Copper Scrap (1990):

Following the first GATT panel meeting, the United States and the European Communities settled their dispute. The USTR terminated the investigation and withdrew the US complaint from the GATT dispute settlement panel.

4.575 The United States further explains that similarly, in the 1989 dispute between the United States and the European Communities over oilseeds, the USTR delayed action for 180 days pursuant to Section 305(a)(2)(A)(ii) on the basis that substantial progress was being made in GATT dispute panel proceedings which had not yet finished as of the 18-month target date.[317] Moreover, the USTR specifically waited until after panel proceedings had finished before determining that US agreement rights had been denied under Section 304(a)(1)(A)(i), even though this was well after the 18-month target.[318] Thus, it was consistent US practice, even before the conclusion of the Uruguay Round, to rely on dispute settlement results when determining whether US agreement rights were denied.

4.576 The United States then indicates that the USTR and the President thus have broad discretion under Sections 301-310 to dictate the timing of any action, the conditions under which the action will be given effect, and whether the action will be taken at all. The USTR or the President may, for example, specify that any action taken should not become effective until the United States has received formal DSB approval.

4.577 In response to a Panel question as to whether the USTR has made decisions other than affirmative or negative Section 304 determinations, and the legal basis for such determinations, the United States responds that there is no definition of "determination" in the statute which constrains the USTR's discretion to make determinations other than violation/non-violation. Beyond this, the existence of a legal requirement in Section 304(a)(1) to base determinations on dispute settlement proceedings indicates that the law contemplates a determination that it is not possible without DSB rulings and recommendations to determine that US agreement rights have

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[317] See Determinations Under Section 304 of the Trade Act of 1974, as Amended: European Community Policies and Practices With Respect to, Inter Alia, Production and Processing Subsidies on Oilseeds, 55 Fed. Reg. 4294 (1990) (US Exhibit 6)

[318] See ibid. The United States notes that on the 18-month anniversary, the USTR instead concluded that she had reason to believe agreement rights were being denied, and therefore was pursuing such a ruling under GATT dispute settlement procedures.

been denied. Examples of this determination are reflected in the letters in US Exhibit 14. In addition, US Exhibit 6 is a Federal Register notice of the determinations made in *Oilseeds*, including the determination that "there was reason to believe that United States' rights under a trade agreement were being denied".[319]

4.578 The United States adds that other legal bases for making determinations other than violation/non-violation determinations include established US legal principles of statutory construction regarding deference to administering agency interpretations of their statutes and legislative ratification of agency interpretations. US courts may not substitute their interpretations of ambiguous statutory provisions for those of the administering agency. In addition, Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. Having determined that the United States had "reason to believe" agreement rights were being denied in the 1989 *Oilseeds* case, the fact that Congress did not amend the statute to prevent such determinations when other amendments were made in 1994 supports the position that the Administration's interpretation is correct.

4.579 In response to the Panel's question as to the public notice referred to by the European Communities and the 3 March 1999 announcement in respect of the *Bananas* case, the United States contends that the statement does not provide that the United States will act without DSB authorization. For one thing, it specifically states "in the event of an affirmative determination", indicating that the USTR retains discretion to take no action under Section 306, including if DSU proceedings have not yet finished. At most, the notice reflected certain assumptions regarding the progress that DSU proceedings would make by March 3.

4.580 The United States goes on to note that the March 3 announcement was not made pursuant to Section 301. Thus, wholly apart from the fact that no specific application of Section 301 is within the terms of reference of this dispute, the announcement is even further removed from the subject matter of this case. In any event, the announcement is the subject of separate dispute settlement proceedings, and the United States intends to address the EC's specific claims regarding it in that context.

4.581 In response to the Panel's question on the following disputes brought by the United States: *EC – Bananas III, EC - Hormones, Japan - Film, India – Patents (US), EC – Computer Equipment, Indonesia - Autos, Japan – Agricultural Products*, the United States explains that of the listed cases, only *EC – Bananas III, India – Patents (US), Indonesia – Autos* and *Japan – Agricultural Products* involved a situation in which Section 304(a)(2)(A) would have been relevant. The USTR's actions in those cases are explained below. A Section 302 investigation was never initiated in the *EC – Computer Equipment* dispute, highlighting further the ultimate discretion available to the USTR: not to initiate a Section 302 investigation at all. Similarly, in *EC – Hormones*, the USTR's resort to WTO dispute settlement procedures was not taken pursuant to the Section 302 investigation of several years earlier. Thus, no separate determination under Section 304 was required or made as a result of WTO dispute settlement proceedings. Likewise, in *Japan – Film*, the Section 302 investigation was terminated prior to

[319] This determination was originally reflected in Determination Under Section 304 of the Trade Act of 1974, as Amended: European Community's Policies and Practices With Respect to, Inter Alia, Production and Processing Subsidies on Oilseeds and Determination Under Section 305 to Delay Implementation of Any Action Taken Pursuant to Section 301, 54 Fed. Reg. 29123 (1989).

initiation of dispute settlement proceedings; indeed, those proceedings were the action taken in the case.[320]

4.582 The United States further explains that in the *EC – Bananas III* dispute, the determination was initially made at the 18-month anniversary that it would not be possible to determine whether US agreement rights had been denied until the DSB adopted panel and Appellate Body findings. US Exhibit 14 includes a letter from the USTR to a member of Congress explaining this, along with a similar letter recently provided in the *Canada – Dairy Subsidy* dispute. Following adoption of panel and Appellate Body reports finding EC violations of GATT 1994 and the GATS in response to a US complaint, the USTR determined that certain acts, policies and practices of the European Communities violate, or otherwise deny benefits to which the United States is entitled under, GATT 1994 and the GATS.[321]

4.583 The United States goes on to state that in *India – Patents (US),* following adoption of panel and Appellate Body reports finding Indian violations of the TRIPS Agreement in response to a US complaint, the USTR determined that certain acts, policies and practices of India violate, or otherwise deny benefits to which the United States is entitled under, the TRIPS Agreement.[322]

4.584 The United States notes that in *Japan - Agricultural Products*, the DSB adopted panel and Appellate Body reports finding Japanese violations of the SPS Agreement in response to a US complaint. Likewise, in *Indonesia – Autos*, the DSB adopted a panel report finding Indonesian violations of the GATT 1994 and the TRIMs Agreement in response to a US complaint. The USTR followed customary WTO practice and agreed to or arbitrated a reasonable period of time for compliance in each case, but has not yet published formal Section 304 determinations.

4.585 In response to a Panel question, the United States states that the Panel might have misunderstood the timing of two of the four WTO cases in question. It is true that WTO dispute settlement proceedings were not complete at the 18-month anniversary in the *Bananas* and *Indonesia Autos* disputes. However, the Section 302 investigation in *Japan – Agricultural Products* was initiated on October 7, 1997.[323] The 18-month anniversary was thus on April 7, 1999. The DSB adopted the *Japan – Agricultural Products* panel and Appellate Body reports on March 19, 1999, before the 18-month anniversary. In *India Patents (US)*, the Section 302

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[320] The United States notes that in *Japan – Film*, the USTR determined pursuant to Section 304(a)(1)(A)(ii) that certain acts, policies, and practices of the Government of Japan were unreasonable and burden or restrict US commerce and that these acts should be addressed by: (1) seeking recourse to WTO dispute settlement procedures to challenge the Japanese measures; (2)(a) requesting consultations with Japan under a WTO provision for consultations on restrictive business practices; (2)(b) requesting the petitioner to submit information to be provided to Japan's Fair Trade Commission; (2)(c) seeking to cooperate with the JFTC in its review; (2)(d) studying the extent to which Japan's market structure distorts competition in US and third markets. Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30929, 30929-30 (1996)

[321] See Determinations Under Section 304 of the Trade Act of 1974: European Communities' Banana Regime, 63 Fed. Reg. 8248, 8248-49 (1998) (US Exhibit 15).

[322] See Determination Under Section 304 of the Trade Act of 1974: Practices of the Government of India Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals, 63 Fed. Reg. 29053, 29053 (1998) (US Exhibit 16).

[323] See Initiation of Section 302 Investigation and Request for Public Comment: Japan Market Access Barriers to Agricultural Products, 62 Fed. Reg. 53853 (1997) (US Exhibit 8).

investigation was initiated on July 2, 1996.[324] The 18-month anniversary was thus on January 2, 1998. The Appellate Body issued its report on December 19, 1997, and the DSB adopted this report on January 16, 1998. Thus, in *Japan – Agricultural Products*, the DSB adopted findings of WTO violations before the 18-month anniversary, and in *India Patents*, the panel and Appellate Body issued reports finding WTO violations before the 18-month anniversary, findings which were "subject to confirmation" (automatically) by the DSB shortly thereafter.

4.586 The United States explains in response to further Panel questions that in *Japan – Agricultural Products* and *India – Patents (US)*, the United States did not make formal Section 304 determinations by the 18-month anniversary, but should have. However, in neither case did this affect continued US adherence to DSU procedures. In both cases, the USTR decided to pursue and conclude agreements on the reasonable period of time for implementation pursuant to DSU Article 21.3. The United States notes again that no specific application of Sections 301-310 is within the Panel's terms of reference, and the relevance of any such cases is therefore limited to whether they illustrate that the statute does or does not command a violation of DSU Article 23. Moreover, as explained before, if a statute itself is WTO-*consistent*, the fact that a Member does not apply that statute in a specific instance does not make the statute inconsistent with the WTO agreement.

4.587 In response to the Panel's following question regarding *Canada – Dairy Subsidies* and *EC - Bananas III,* where the USTR sent a letter to a member of Congress within the 18 months time-frame, the United States states that the letters reflect determinations by the USTR, just as Federal Register notices of determinations are not themselves the determinations, but reflect them. Federal Register notices are typically signed by the Chairman of the Section 301 Committee and explain that the USTR made a determination on a given date. There usually are no other public documents associated with the USTR's deliberative process.[325] As explained at the hearing, while there is a publication requirement in Section 301(c), there is no deadline for publication provided for in this provision.

4.588 In this connection, the United States disagrees with the following EC statement:

> "The explicit requirements to make a determination within a specified time frame whether the United States' WTO rights are being denied or failure to implement DSB recommendations has occurred would be completely frustrated if they were deemed fulfilled by a decision to postpone the determination".

The United States reiterates that the USTR need not and may not, under Section 304(a)(1), determine that US agreement rights have been denied if there are not adopted panel or Appellate Body findings to that effect. The requirement to make a determination within 18 months is not frustrated by the need to comply with the additional statutory requirement that a determination that agreement rights have been denied must be based on the results of dispute settlement proceedings. The USTR, and not the European Communities, is administering Sections 301-310, and it is not for the European Communities to opine on either the objectives of the statute or whether the USTR is meeting them. From the Panel's perspective, the only relevant question

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[324] See Determination Under Section 304 of the Trade Act of 1974: Practices of the Government of India Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals, 63 Fed. Reg. 29053, 29053 (1998) (US Exhibit 16).

[325] The United States notes the EC's Article 133 Committee appears to operate no differently in this regard.

is whether the statute commands a violation of the DSU Article 23. It is not relevant whether the "objectives" of any US law are being fulfilled.

4.589 In response to the Panel's question, the United States confirmed that the Panel was correct in understanding that in the *Korea - Beef* case – a GATT case but a case conducted also under the same Section 304 provisions as they stand today - the USTR made a determination of violation under Section 304 on 28 September 1989 – i.e. *after* the circulation of the panel report, but before its adoption – even though the USTR subsequently, in the same decision delayed implementation of the planned action under Section 301. The *Korea Beef* case illustrates well the circumstances under which Section 301 was applied under the GATT. As described in US Exhibits 4 and 5, a GATT panel found Korea's import restrictions on beef a violation of GATT Article XI:1. However, at successive meetings of the GATT Council following issuance of the report, Korea declined to join a consensus to adopt the report. In other words, Korea unilaterally refused to agree to comply with multilateral panel findings through the flaw in GATT 1947 dispute settlement procedures which permitted losing parties to unilaterally block panel reports. As described in the Statement of Administrative Action on page 367, this is precisely the type of circumstance in which the United States took, or proposed to take, action under the GATT 1947. Following the US determination, Korea agreed to adoption of the panel report and to resolve the dispute in a mutually satisfactory manner, as contemplated in GATT dispute settlement procedures.

4.590 The United States recalls that there was no DSU, let alone a DSU Article 23, in 1989 and 1990, when the *Korea – Beef* case was taking place. The Section 304 determinations made in that case breached no US GATT obligation, nor, if they had, would that be relevant to the Panel's consideration of whether Sections 301-310 command any DSU or WTO Agreement violations. The *Korea Beef* case does, however, illustrate how strengthened multilateral dispute settlement procedures prevent losing parties from blocking the proper functioning of those procedures, removing the need for complaining parties to seek remedies for the denial of WTO rights outside of dispute settlement procedures.

4.591 In response to the Panel's request for clarification on *Korea – Beef*, the United States explains that there was no DSU, and no DSU Article 23, in 1989-90, when the *Korea Beef* case was taking place. In light of the new obligations found in DSU Article 23, the United States has since January 1, 1995 interpreted its international obligation – and its obligation under Section 304(a)(1) – as requiring it to wait until the DSB adopts panel and Appellate Body reports finding WTO violations before determining that US agreement rights have been denied. Inasmuch as no "determinations to the effect that a violation have occurred" were inconsistent with the GATT 1947, the United States could (but, as US Exhibit 13 illustrates, rarely did) determine that US agreement rights had been denied based on dispute settlement proceedings in which a panel had issued a report, but the losing party was blocking adoption of that report.

4.592 **The European Communities criticises** the following US statement:

> "As explained in response to the previous question, there was no DSU, and no DSU Article 23, in 1989-90, when the *Korea – Beef* case was taking place. In light of the new obligations found in DSU Article 23, the United States has since January 1, 1995 interpreted its international obligation – and its obligation under Section 304(a)(1) – as requiring it to wait until the DSB adopts panel and Appellate Body reports finding WTO violations before determining that U.S. agreement rights have been denied".

4.593 In the view of the European Communities, this statement is contradicted by the adoption by the USTR, after the conclusion of the Uruguay Round, of determinations in the *Japan - Auto Parts* case and in the *EC – Bananas III* case. Moreover, the US omits to mention the *Argentina – Textiles and Apparel (US)* case where the USTR took her determination before the adoption of the panel report by the DSB in violation of the explicit provision of Article 23.2 (a) of the DSU, as the United States itself admits.

4.594 **The United States responds** that the European Communities makes the puzzling and inaccurate argument that the United States "admits" to making a Section 304 determination of a trade agreement violation in *Argentina – Textiles and Apparel (US)* before the DSB adopted findings to that effect. However, the cited portion of the U.S. submission has nothing to do with *Argentina – Textiles and Apparel (US)*.

4.595 The cited U.S. statement only notes that in *India – Patents (US),* the 18-month anniversary in the Section 302 investigation fell two weeks before adoption of panel and Appellate Body findings. As previously explained, Section 301 does not mandate WTO-inconsistent action in such cases. The USTR is free, for example, to determine that dispute settlement proceedings have not yet finished, and that a determination concerning U.S. agreement rights will be made following completion of these proceedings. Likewise, she is free to terminate the investigation and reinitiate it.[326]

4.596 In response to the Panel's question regarding the textual and legal basis on which in *Japan - Film,* WTO dispute settlement proceedings were the action taken in the case, the United States indicates that the action taken in *Japan – Film* was taken pursuant to Section 301(b). Section 301(b)(2) authorizes the USTR to take all "appropriate and feasible action under Section 301(c)", as well as "all other appropriate and feasible action within the power of the President that the President may direct the USTR to take under this subsection, to obtain the elimination of that act, policy, or practice". The USTR did not consider action under Section 301(c) "appropriate and feasible", and therefore took the appropriate and feasible actions within the power of the President described above. A request for panel proceedings is within the President's foreign affairs powers under Article II of the United States Constitution. Pursuant to 24 U.S.C. § 2411(c), the USTR is responsible for such functions as the President may direct, and is responsible for representing the United States at the WTO.

4.597 In response to a Panel question on *Argentina – Textiles and Apparel (US)* suggesting that a Section 304 determination of violation had been made but a Section 302 investigation had not been initiated in that case, the United States states that a Section 302 investigation on Argentina Footwear was initiated on October 4, 1996.[327] The United States note that the Panel's question highlights the fact that the Panel has only a partial picture of how Sections 301-310 were applied in individual cases. Because no such individual cases are within the terms of reference, the United States submitted information on these cases only for its relevance in illustrating what the statute does or does not require. The United States has illustrated that the USTR has adequate discretion under Sections 301-310 to comply fully with DSU and GATT rules, and has done so when making determinations on the denial of GATT and WTO

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[326] The United States further claims that contrary to the EC assertion, the Trade Representative made no section 304 determination that U.S. agreement rights had been denied in *Auto Parts*, nor did she make any such determination in *Bananas* not based on DSB-adopted findings. Further, her determination in *India Patents (US)* followed DSB adoption of panel and Appellate Body findings.

[327] Initiation of Section 302 Investigation and Request for Public Comment: Argentine Specific Duties and Non-Tariff Barriers Affecting Apparel, Textiles, Footwear, 61 Fed. Reg. 53776 (1996).

agreement rights. The European Communities, on the other hand, has referenced these cases not to illustrate whether the statute commands WTO-inconsistent action, but to improperly characterize past actions as violations, in the hope that the Panel will be distracted from its legal analysis and prejudiced in its decision-making. The Panel must reject this approach.

4.598 In response to the Panel's question on the *EC - Oilseeds* case where the USTR, on 5 July 1989 - i.e. before the circulation and adoption of the panel report – "determined that there was reason to believe that United States' rights under a trade agreement were being denied by ... the EC's production and processing subsidies on oilseeds and animal feed proteins but that the USTR "decided to delay implementation of any action to be taken under section 301 not more than 180 days…", because it "determined ... that substantial progress was being made with respect to the dispute …", the United States indicates that this does not imply that the USTR made a determination of violation under Section 304 before the adoption of a panel report. The USTR did not make a determination that US agreement rights had been denied until the GATT Council adopted panel findings to this effect.

4.599 In response to the Panel's question as to the textual or other legal basis allowing the USTR to make multiple determinations in the *EC – Oilseeds* case where "[o]n January 31, 1990, ... the USTR determined under section 304 … that rights of the United States under a trade agreement are being denied" by the same measures of the European Communities, the United States states that there is nothing in the text of Sections 301-310 which prevents the USTR from making two determinations under Section 304 in one and the same case, and the European Communities has not provided any arguments that there is. While the USTR is required to make a determination within the time frames set forth in that section, nothing prevents her from making additional determinations after that time.

4.600 The United States explains that it is an established principle of US statutory construction that the administering agency's interpretation of a statute is entitled to deference if the statute is "silent or ambiguous with respect to [a] specific issue". Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43. In such circumstances, the court must uphold the agency's interpretation as long as it is based upon a "permissible construction" of the statute. Id. The agency's interpretation need not be the "only possible construction", Sullivan v. Everhart, 494 U.S. 83, 89 (1990), nor must it be the construction the court would have selected in the first instance. Chevron, 467 U.S. at 844. A court errs by substituting "its own construction of a statutory provision for a reasonable interpretation made by [the agency]". Id. The court's duty is not to weigh the wisdom of the agency's legitimate policy choices. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir.. 1992). Thus, under US law, the USTR's interpretations of its authority to undertake multiple determinations, determinations other than violation/non-violation determinations, or termination of investigations would receive such deference in a US court – to the extent such determinations would be subject to judicial review at all.[328] Likewise, the USTR's interpretation of Section 304(a)(1) as requiring her to rely on DSB-adopted findings in determining that US WTO agreement rights have been denied would be accorded such deference.

4.601 The United States indicates that it is not merely offering assertions of its legal authority. Rather, these interpretations are reflected in longstanding practice, in investigations predating this case and predating the WTO. Under US law, these interpretations would be entitled to

[328] The United States points out that if, in fact, these determinations were not reviewable, the USTR's interpretations would be definitive.

deference, and, in examining whether the statute commands WTO-inconsistent action, the Panel is required to examine the meaning of the statute as it would be interpreted under US law.[329]

4.602 The United States further argues that another legal basis for US interpretations of statutory provisions is the US principle of statutory construction known as legislative ratification. As the US Supreme Court has stated, this principle provides that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. Lindahl v. Office of Personnel Management, 470 U.S. 768, 783, citing Albemarle paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).

4.603 The United States also states that the multiple determinations in *Oilseeds* predated the WTO, and the fact that Congress did not amend the statute to prevent such determinations when other amendments were made in 1994 supports the view that the Administration's interpretation is permitted. Similarly, the USTR's practice of applying Sections 301-310 to make determinations other than simple "yes/no" determinations on whether agreement rights have been denied, and to terminate Section 302 investigations before making a determination, predates 1994. Exhibit 13 describes examples of this long-standing practice since 1988, though it predates 1988 as well. And, although Congress amended section 301 in 1994, it did not amend it to undermine the USTR's interpretation or application of Sections 301-310, even though it was fully aware of how it was being applied.

4.604 **The European Communities disagrees** with the US introduction of an entirely new defence at this late stage. The European Communities stresses the fact that the new US arguments are very similar to those submitted by India in the *India - Patents (US)* case. They were rejected by the panel and the Appellate Body at the request of the US as a complainant in that case.[330]

4.605 The European Communities further states that the quotation of the AB report in *India - Patents (US)*, paragraph 65 [in fact 66], is incorrect. The Appellate Body did not state that "the Panel is required to examine the meaning of the statute as it would be interpreted under US law". Rather, the correct quotation, which has an entirely different meaning, is the following:

> "... as in the case cited above before the Permanent Court of International Justice, in this case, the Panel was not interpreting Indian law "as such"; rather, the Panel was examining Indian law solely for the purpose of determining whether India had met its obligations under the *TRIPS Agreement*".

4.606 **The United States rebuts** the EC argument that the US response raises a new defense, and that allegedly similar arguments were rejected in *India – Patents (US)*. Both of the EC's contentions are incorrect. First, the United States has not raised a new defense. The US discussion of judicial deference under U.S. law was directly responsive to the Panel's request for the textual or other legal basis which permits the USTR to make multiple determinations – a factual issue in this dispute. While the textual basis for the USTR's interpretation is sufficiently clear, the doctrine of judicial deference would serve as an additional basis under US law were a US court to consider the statutory language ambiguous.

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[329] The United States refers to Appellate Body Report on *India – Patents (US)*, op. cit., para. 65.

[330] Ibid., para. 69, "... like the Panel, we are not persuaded that India's "administrative instructions" would prevail over the contradictory mandatory provisions of the Patents Act".

4.607 The United States also contends that the EC's references to *India – Patents (US)* fail to support its position. The Appellate Body, in paragraphs 65-66 of its report in *India – Patents (US)*, emphasizes that it was necessary in that case to examine Indian law to determine its compliance with India's international obligations. Domestic law consists not only of statutory provisions, but of domestic legal rules concerning the interpretation of those provisions or, in the case of *India – Patents (US)*, domestic rules concerning conflicts between laws. In *India – Patents (US)*, the Appellate Body examined "the relevant provisions of the Patents Act as they relate to the 'administrative instructions'" at issue in that case[331]; in other words, the Appellate Body examined whether there was any support under Indian law for India's assertion that unpublished, unwritten administrative instructions would prevail over a conflicting statute explicitly mandating a WTO violation. India in that case failed to provide sufficient evidence that, under Indian law, the instructions would prevail.

4.608 In the US view, the doctrine of judicial deference to an agency's interpretation of its statute is part of U.S. law, though it would only become relevant in this dispute were the panel to conclude that there was some ambiguity as to whether a particular provision of Sections 301-310 commanded specific actions violating a WTO obligation. In fact, as the U.S. has explained throughout this proceeding, the statute contains no such ambiguity. On its face, the U.S. statute does not command violation determinations in the absence of DSB-adopted findings, and in fact requires that any such determinations be based on the results of WTO proceedings.[332]

4.609 According to the United States, however, should the Panel find the statute ambiguous, the US Executive Branch interpretation of the statute is of great importance under US law. First, many Executive Branch determinations are not subject to judicial review. As already noted, if this were the case with respect to Section 301 determinations, the USTR interpretation would be definitive under US law. Second, even if a US court were to review such determinations, and even if that court were to conclude that the statutory language is ambiguous, it would be required under US law to interpret that language in light of the Chevron standard of judicial deference.

4.610 The United States reiterates that it did not, as the European Communities suggests, raise the doctrine of judicial deference to suggest that the Panel is precluded from examining the WTO-consistency of Sections 301-310. Rather, the United States raised this doctrine because it is part of the U.S. law which the Panel is examining.

4.611 The United States recalls again that the burden in this dispute lies with the European Communities. As already discussed, the European Communities failed to establish that US law commands the USTR to take actions which violate Article 23, failed to establish that US rules of statutory interpretation permit the European Communities and this Panel to interpret "whether" to mean "that", and failed to establish that it is permissible to disregard entire sections of the statute providing the USTR with discretion to delay or not take action. Likewise, in its latest submission, the European Communities failed to establish that the Chevron deference standard may, under US law, be disregarded.

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[331] Appellate Body Report on *India – Patents (US),* op. cit., para. 66.

[332] The United States again states that this US legal requirement goes beyond what the EC asserts are a Member's WTO obligations: "[I]t would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include specific language in their domestic law precluding WTO-inconsistent action".

4.612 **The European Communities also claims** that when dealing with the issue of the publication by the USTR of notices announcing unilateral retaliatory actions raised by Korea as a third party, the United States reports the EC's position as follows "if suspension is proposed, this necessarily includes publication of a list of products".

4.613 The European Communities recalls that the United States insists on the fact that the European Communities "fails to explain why this so, or if it is so, what the timing must be".

4.614 The European Communities indicates that in the *Bananas III* dispute the USTR itself published two notices in the Federal Register (22 October 1998, page 56689 and 10 November, page 63099). The first one, according to which "Section 306 (c) of the Trade Act provides that the USTR shall allow an opportunity for the presentation of views by interested parties prior to the issuance of a determination pursuant to section 306 (b)"; the second notice was published explicitly "in accordance with section 304 (b)". The European Communities then questions who is right, the USTR when publishing notices on the Federal Register or the USTR when representing the US government in these panel proceedings.

4.615 According to the European Communities, in addition and by definition, the publication must be made before any determination or action is adopted.

4.616 The European Communities claims that in neglecting this fundamental albeit obvious element, the US side-steps the most important point of substance raised by Korea, and supported by the EC: the practical effects for the trade of such publication made before and irrespective of any decision taken in the WTO dispute settlement system is the most effective implementation of the "Damocles sword" policy that engenders severe effects on the economic operators on the market (coupled with substantial protectionist benefits for domestic competing goods and services). As this Panel is aware, sometimes a threat of action can be even more effective than the action itself.

4.617 In the view of the European Communities, in order to illustrate better this concept, it would be appropriate to provide the Panel with some examples. In the *Japan - Auto Parts* Section 301 procedure, no dispute settlement procedure was ever requested by the United States against Japan while an announcement that the United States would have resort to retaliatory measures was made by the USTR on 10 May 1995. According to the European Communities, the US representative confirmed during the panel procedure that WTO Members have a positive obligation of putting their legislation into conformity with the obligations under the covered agreements, including the DSU, as from the 1 January 1995 "and [this] could not be delayed".

4.618 The European Communities points out that the *Auto Parts* procedure was eventually closed after an agreement between the United States and Japan was reached under the threat of retaliatory action. Some factual elements could help the Panel clarify the impact of the threat of the US unilateral action enacted under Sections 301-310.

4.619 The European Communities explains that on 27 September 1994, the US President transmitted to Congress legislation to implement the GATT Uruguay Round of multilateral trade negotiations. In the Statement of Administrative Action accompanying the legislation the US President explicitly indicates that:

> "There is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply section 301 sanctions that may be inconsistent with US trade obligations because such sanctions could engender DSU-authorized counter-retaliation.

> Although in specific cases the Unites States has expressed its intention to address an unfair foreign practice by taking action under section 301 that has not been authorized by the GATT, the United States has done so infrequently".

4.620 According to the European Communities, consistently with this (WTO-inconsistent) line, on 13 October 1994 a Section 301 investigation was opened against Japan which was eventually followed by the 10 May 1995 announcement by the USTR that Japanese car market was closed and that a list of Japanese products to be subject to retaliation was to be published by 28 June 1995.

4.621 The European Communities further notes that that announcement had been preceded on 9 May 1995 by a Resolution of the House of Representatives (104th Congress, 1st session, H. Res. 141) which states the following:

> "Whereas President Clinton, stated, on May 5, 1995, that the United States is 'committed to taking strong action' regarding Japanese imports into the United States if no agreement is reached. Now, therefore, be it
>
> *Resolved*, That it is the sense of the House that
>
> (1) ...
>
> (2) the House therefore strongly supports the decision by the President to Impose trade sanctions on Japanese products in accordance with section 301 of the Trade Act of 1974 unless an acceptable accord with japan is reached in the interim that renders such action unnecessary".

4.622 The European Communities recalls once more that no WTO dispute settlement procedure was ever started by the United States against Japan on this issue.

4.623 The European Communities also explains that three years later, on 9 October 1998, while the "reasonable period of time for implementation" granted to the European Communities in order to take measures to comply with recommendations and rulings in the *Banana III* DS procedure was still running (deadline 31 December 1998) and the European Communities had not yet adopted all these measures, the Chief of Staff of US President W. Clinton, M. Erskine Bowles, wrote a letter to the leaders of both the Republican and Democrat parties in the House and in the Senate (submitted on 8 July 1999 by the Commonwealth of Dominica and Saint Lucia as third party). In the name of the President (the *incipit* of the letter is "the Administration shares your view ..."), Mr. Bowles stated the following:

> "To put maximum pressure on the EU, the Administration is pursuing three separate tracks (1) continuing to indicate our willingness to try to resolve the dispute in a mutually acceptable manner consistent with WTO obligations (2) preserving our rights in the WTO process and (3) proceeding under section 301 of the Trade Act of 1974.
>
> ...
>
> Then, unless the EU has agreed to suspend implementation of its banana regime and to implement a WTO-consistent regime acceptable to us by January 2, 1999, the Administration will publish a second Federal Register notice on November 10. This notice will request comments on a list of specific retaliatory

> options and indicate that the administration will announce on December 15 retaliatory action pursuant to section 301 to take effect on February 1, 1999, unless the EU's banana regime is in full compliance with WTO rules".

4.624 In the view of the European Communities, as these examples show, both the threat and the action violate the text, the object and purpose of Article 23 (and the related provisions of Article 21 and 22) of the DSU. In this perspective, the statement made by the United States according to which

> "the USTR has never once made a section 304 (a) (1) determination that US GATT or WTO agreement rights have been denied which was not based on the results of GATT and WTO dispute settlement proceedings"

is factually incorrect, since the USTR, at least in the *Banana III* case, took a determination under 304 (a) (1) that US WTO agreements rights had been denied after the end of the reasonable period of time without resorting to any WTO DS procedure on the conformity of the new EC measures which repealed the legislation that an earlier panel had declared incompatible with the WTO. It is also misleading, since the threat of retaliatory action could force upon the targeted WTO Member a "mutually" agreed solution that makes a determination under Section 304 (a) (1) unnecessary (as in the *Japan - Auto Parts* Section 301 procedure).

4.625 In addition to these contradictory statements, the United States relies on some other arguments that are, in the EC's view, also entirely unconvincing. The European Communities believes it appropriate to briefly elaborate on certain issues raised by the United States.

4.626 In the EC's view, the *Bananas III* case is an example where the USTR has made, in order to take action under Section 301, a determination that "a foreign country [the European Communities] is not satisfactorily implementing a measure or agreement" (cf. Section 306(b)(1)) and in so doing has made a determination that "shall be treated as a determination made under section 304(a)(1)".

4.627 The European Communities argues that it should be noted that this provision in Section 306(b)(1) contains a wholesale reference to Section 304(a)(1). It thus explicitly includes and logically implies that a determination of a denial of US rights under the WTO is required. In fact, it would be quite impossible under the structure of Section 304(a)(1) to proceed immediately to a determination of an action without a prior determination of a denial of US rights.

4.628 The European Communities points out that any other reading would lead to arbitrariness and to an even more serious breach of the provisions of Article 23 of the DSU which, as the European Communities has repeatedly underlined, deals generally with all situations (including the situation described in Article 23.2(a)) where WTO Members "seek redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements". In fact, Article 23 of the DSU deals with all situations described as a "violation" case, a "non-violation" case or "any other situation" under Article XXIII.1 of GATT 1994.

4.629 The European Communities recalls that the fact remains that the EC's complaint is directed against Sections 301-310 as such, and not against the application of these Sections in particular cases. The European Communities then refers once again to the *Japan – Auto Parts* case.

4.630 The European Communities recalls that the United States explained that in that case, no determination of a denial of US rights under the GATT or the WTO was made. If the US statement were to be understood as implying that no determination of denial of US rights was taken by the USTR, on the basis of the 16 May 1995 notice in the US Federal Register, the European Communities would disagree. The public announcements and the decisions taken by the USTR were necessarily based on a substantive determination of denial of US rights.

4.631 In the view of the European Communities, given the subject matter of the *Japan - Auto Parts* case, which clearly is dealing with trade in goods, it is impossible to see how any determination made in that case would not be governed by Article 23 of the DSU.[333] In the view of the European Communities, the United States is under no circumstances entitled to take trade sanctions in the area of trade in goods against another WTO Member without following the requirements of Article 23 of the DSU.

4.632 The European Communities notes that, whatever the precise terms of the determination in the *Japan – Auto Parts* case, there can be no serious doubt that this determination was made in total disregard of the requirements of Article 23 of the DSU. It is also clear that the determination must have been made under Section 304(a)(1). It is logically not possible to make a determination of action under Section 304(a)(1)(B) without a prior determination under Section 304(a)(1)(A).

4.633 In rebutting the EC argument that Section 301 has the "illegitimate goal" of serving as a sword of Damocles, **the United states observes** that the European Communities assumes that Section 301 is being used for an illegitimate purpose. In fact, it has the legitimate purpose to enforce WTO rights, in accordance with WTO procedures. The sword of Damocles is WTO-authorized retaliation under Article 22 when a Member has failed to comply with DSB rulings and recommendations. Section 301 implements this under U.S. law.

4.634 In a question to the parties, the Panel noted its understanding that in *Auto Parts* case, the US determination and action was taken based upon an investigation into the question of whether Japan's act, policy or practice in this respect is "unreasonable or discriminatory and burdens or restricts United States commerce" (referred to in Section 301(b)), not on whether US rights under the WTO are being denied. In response to the Panel's question as to whether the European Communities makes an additional claim that another aspect of Sections 301-310 – authorizing the USTR to make determinations as to whether or not a matter falls outside the scope of the WTO Agreement – violates DSU Article 23, and if so, whether and how this claim is included in the terms of reference of this Panel, as provided in document WT/DS152/11, in particular para. 2 thereof, as a preliminary observation, **the European Communities states** that all the claims it has made before this Panel are exclusively related to the WTO-inconsistency of Sections 301-310 of the Trade Act of 1974 as such. Reference to individual cases in which these provisions were applied is only made as supporting evidence for the way in which these provisions are interpreted by the US authorities, thereby constituting a counter-argument to some US assertions and not a separate claim.

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[333] The European Communities is not aware of, and the United States has not shown, any application of Sections 301-310 to situations not covered *ratione materiae* by one of the WTO Agreements. Even if such a case existed, it would still not be permissible to take retaliatory action in the areas covered by the WTO Agreements against another WTO Member. In addition, Section 304 (a)(1)(A)(ii) no doubt applies to situations covered by the WTO Agreements: the fact that in theory it could also be used for determinations in situations that are not covered by the WTO Agreements does not affect its inconsistency with Article 23 of the DSU as already discussed.

4.635 In this context, the European Communities draws the Panel's attention to the distinction made between claims and supporting arguments in earlier cases. Most recently, the Appellate Body report in the case on *Guatemala – Anti-dumping duties on imports of grey Portland cement from Mexico* stated the following[334]:

> "The *'matter'* referred to the DSB, therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)".

4.636 The European Communities further points out that in the *EC – Bananas III* case, the Appellate Body made the following additional statement:

> "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding".[335]

4.637 The European Communities goes on to state that a supporting argument, particularly when made as a reaction to a contestation by the other party to the dispute, cannot on its own be excluded as not being covered by the terms of reference of the Panel which only deals with claims.

4.638 The European Communities recalls that according to the terms of reference of this Panel as described in WTO document WT/DS152/11 of 2 February 1999, the matter referred to the DSB by the European Communities includes the violation of Articles 3, 21, 22, 23 of the DSU, Article XVI:4 of the Marrakech Agreement and Articles I, II, III, VIII and XI of GATT 1994 by Sections 301-310 of the US Trade Act of 1974.

4.639 The European Communities also draws the Panel's attention to the fact that the Panel itself appeared to consider the *Japan – Auto Parts* case to be relevant when it requested Japan, in the questions asked to the third parties, to submit available documentation on this case. Moreover, the European Communities has relied on this case as a reaction to the US reply to a question of the Panel. The European Communities has moreover already rebutted a US allegation that the situation that was at the basis of the *Japan – Auto Parts* case is not covered by the terms of reference of this Panel.

4.640 The European Communities further indicates that it is important to recall the events in the *Japan – Auto Parts* case. In that case, the United States announced on 16 May 1995[336] that it would withhold the liquidation of customs duties on a number of Japanese luxury cars as of 20 May 1995 and that it would impose prohibitive 100 per cent *ad valorem* duties on these cars by a determination to be taken on 28 June 1995, effective as of 20 May 1995, unless the

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[334] Appellate Body Report on *Guatemala – Anti-dumping duties on imports of grey Portland cement from Mexico* ("*Guatemala – Cement)*, 25 November 1998, WT/DS60/AB/R, para. 72 *in fine*.

[335] Appellate Body Report on *EC – Bananas III*, op. cit., para. 143.

[336] The European Communities notes that the announcement was preceded by public statements by the US President and the USTR to the press. Moreover, as the European Communities indicated in its second oral submission, the US House of Representatives adopted a Resolution on the same subject supporting unilateral action announced by the US President.

governments of the United States and Japan could agree on a solution of their dispute that satisfied the US car industry.[337] As a consequence of the withholding of customs liquidation, all imports in the targeted products were immediately stopped as of 20 May 1995. The United States had not requested a dispute settlement procedure prior to these steps.[338]

4.641 The European Communities notes that the United States announced measures entering into effect on a date certain[339] that a WTO Member may only take vis-à-vis another WTO Member upon completion of a DS procedure pursuant to Article 3.7, last sentence, in conjunction with Article 22 and 23 of the DSU, on the basis of an authorization by the DSB under Article 22.2 or 22.7 of the DSU.

4.642 The European Communities points out that these measures were based on a determination explicitly and specifically taken under Sections 301-310 in flagrant violation of the WTO rules on dispute settlement, so much so that the United States itself felt compelled to make a "pre-filing notification" announcing the "intention to invoke the dispute settlement mechanism of the WTO".[340]

4.643 The European Communities further points out that unless there is an authorization granted by the DSB in accordance with Articles 3.7, last sentence, and 22 of the DSU, which in turn must be based on an earlier multilateral determination by a Panel to the effect that a measure nullifies or impairs the benefits accruing to a WTO Member under a covered agreement, discriminatory trade restrictions of the kind provided for under Sections 301-310 and applied by the United States in the *Japan – Auto Parts* case cannot possibly be considered compatible with WTO rules.

4.644 The European Communities also notes that the United States could have been authorized to apply its domestic legislation as it did in the *Japan – Auto Parts* case only by following the prescripts of Article 23 of the DSU. However, as already mentioned before, the United States stopped short of invoking the dispute settlement procedures of the WTO.

4.645 The European Communities then argues that on the basis of the above and since the European Communities has clearly referred in its request for the establishment of a Panel to all the above-mentioned provisions of the DSU, the European Communities does not see how it could be argued that the Panel would be acting outside its terms of reference by taking legal notice of the way in which Sections 301-310 were applied by the USTR in the context of the *Japan – Auto Parts* case, in flagrant violation of precisely these provisions of the DSU.

4.646 The European Communities indicates that the aforesaid Panel's question seems to have as its starting point the consideration that, in the specific case at hand, a distinction could be made between a determination of whether "Japan's act, policy or practice" in this respect is "unreasonable or discriminatory and burdens or restricts United States commerce" and a determination on "whether US rights under the WTO are being denied".

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[337] Cf. Section 301 (c) (4).

[338] The European Communities notes that the so-called "pre-filing" of the intention to invoke the DS mechanism of the WTO which the United States communicated on 10 May 1995 to the Director-General of the WTO does not meet the requirements under the DSU allowing it to be considered a request for starting such a procedure.

[339] Cf. the press statement of the USTR of 16 May 1995 submitted by Japan as Japan Exhibit 6 ("The final determination will be made on June 28, 1995").

[340] Cf. doc. WT/INF/1 of 17 May 1995, submitted by Japan (in its original form) as Japan Exhibit 4.

4.647 The European Communities first notes that the United States, as any WTO Member, is under no circumstances entitled to take trade sanctions against another WTO Member, in particular in the area of trade in goods, without following the requirements under Article 23 of the DSU, and this irrespective of the reasons that could be invoked as a basis for such unilateral measure. The European Communities would like to draw the Panel's attention to the fact that asserting, as the United States seems to do, that it is possible to interpret Sections 301-310 as allowing the United States to impose unilateral retaliatory measures with respect to products, services or other rights under the covered agreements without pursuing a DS procedure as required by Article 23 (and the related provisions under Articles 21 and 22) of the DSU would amount to transform the unqualified and unconditional obligation under Article 23 of the DSU into no more than a "best endeavours" clause. The Panel should reject such unacceptable consequence of the approach suggested by the United States.

4.648 The European Communities secondly draws the attention of the Panel to a possible misunderstanding of the facts surrounding the *Japan - Auto Parts* case, on the one hand, and to the contents of the notice published on 16 May 1995 in the US Federal Register, on the other hand.

4.649 The European Communities recalls that in accordance with the chapeau of Section 304(a)(1), a determination thereunder "shall" be taken "[O]n the basis of the investigation initiated under section 302".

4.650 The European Communities points out that according to the notice published in the US Federal Register on 13 October 1994,[341] the initiation of the investigation was aimed at "certain acts, policies and practices of the Government of Japan that restrict or deny US auto parts suppliers' access to the auto parts replacement and accessories market ("after-market") in Japan". The issue thus was, in the USTR's own language, a restriction or denial of "US auto parts suppliers' access" to the "after-market". A denial or restriction of market access of products corresponds to the typical violation of obligations under the GATT 1947 and 1994.

4.651 The European Communities contends that this view is confirmed by the USTR itself. Prior to the publication of the 16 May notice, in its 10 May 1995 "pre-filing notification" to the Director-General of the WTO,[342] the USTR wrote: "I am writing you today to give pre-filing notification of the intention of the United States to invoke the dispute settlement mechanism of the WTO to challenge the discrimination against the United States and other competitive foreign products in the market for automobiles and automotive parts in Japan".

4.652 In the view of the European Communities, it would thus simply be beyond reason to claim that that issue could be something separate from matters concerning the violation of GATT/WTO obligations, or, in the Section 304 language, "that rights to which the United States is entitled under any trade agreement are being denied".

4.653 The European Communities further notes that the notice published on 16 May 1995,[343] which is apparently the source of the quotation in the chapeau of this question, should not be taken as the exclusive source for a correct understanding of the legal situation in the *Japan - Auto Parts* case. In the attempt to justify its actions in the WTO context, given the strong

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[341] Japan Exhibit 1. The notice was explicitly based on Section 302.

[342] The European Communities notes that this letter was distributed as WTO document WT/INF/1 on 17.5.1995 to all WTO Members.

[343] Japan Exhibit 7.

criticism to which it was subject as a result of its decision,[344] the United States clearly tried to hide the impact of the violation of the WTO rules, in particular of Article 23 of the DSU.[345] In the 16 May notice, even though reference is made to the investigation under section 302 as it appeared in the 13 October notice, the conclusion is not "based on" that investigation that, as the European Communities just recalled, would have required a determination of denial of rights "to which the United States is entitled under any trade agreement".

4.654 The European Communities argues that the attempt to hide the true nature of the "determination" must fail also on the basis of the text of Section 301 itself, in particular under the definitions contained in Section 301(d).[346] These definitions correspond precisely to what is described as a "violation" case, a "non-violation" case or "any other situation" under Article XXIII.1, (a) to (c), of the GATT 1994 and the consistent practice of the GATT 1947 and the WTO panels. These definitions describe without any doubt also a situation that is objectively covered by Article 23, paragraphs 1 and 2 of the DSU, according to which

> "(1) when Members seek redress
>
> - of a violation of obligations or
>
> - other nullification or impairment or
>
> - an impediment to the attainment of any objective of the covered agreements
>
> (2) 'In such cases, Members shall' follow the prescripts of Article 23.2 (a) to (c)".

4.655 The European Communities considers that the United States itself has confirmed the above-mentioned interpretation when it affirmed that:

> "[I]n *Japan - Film*, the USTR determined pursuant to Section 304(a)(1)(A)(ii) that certain acts, policies, and practices of the Government of Japan were unreasonable and burden or restrict US commerce and that these acts should be addressed by (1) seeking recourse to WTO dispute settlement procedures to challenge the Japanese measures …".

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[344] The European Communities notes that Japan requested consultations under Article XXII of the GATT which included the issue of the compatibility of Sections 301-310 with Article 23 of the DSU (see WTO doc. WT/DS6/5 of 27 June 1995). In an earlier statement, supported by other WTO Members, Japan made clear that "If the USG faithfully follows the WTO dispute settlement procedures, there is no need to announce unilateral measures under Section 301 without recourse to the WTO process. Indeed, the Section 301 statutory deadlines will force action even before the WTO procedures have been genuinely concluded" (WTO document WT/INF/2 of 22 May 1995).

[345] The European Communities notes that the so-called "pre-filing of intention" to consult under the WTO dispute settlement procedures provides already sufficient evidence of this US attitude.

[346] Section 301 (d) provides for definitions of what is "discriminatory" or "unreasonable" practice by a foreign country. Section 301(d)(5) provides that "Acts, policies, and practices that are discriminatory include, when appropriate, any act, policy, and practice which denies national or most-favoured-nation treatment to United States goods, services, or investment". Section 301(d)(3)(A) provides that "an act, policy or practice, is unreasonable if the act, or policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable".

4.656 The European Communities points out that the Panel is aware, the United States decided (correctly in that case) to pursue a DS procedure against Japan based on Article XXIII.1 (b) of GATT 1994 ("non-violation" case).[347] The European Communities does not understand how the United States could claim now that the same Section 304(a)(1)(A)(ii) would allow it to act unilaterally outside the obligatory WTO procedures thus disregarding its unqualified and unconditional obligations pursuant to Article 23 of the DSU.

4.657 The European Communities then concludes that whatever the precise terms of the determination in the *Japan – Auto Parts* case, there can be no serious doubt that this determination was made in total disregard of the requirements of Article 23 of the DSU.

4.658 In the light of the above, the European Communities repeats that it does not make an additional claim in relation to the *Japan - Auto Parts* case, other than those already mentioned. Under these circumstances, there is no need for the European Communities to respond in detail to sub-questions (b) and (c).

4.659 In response to the same Panel's question (whether the European Communities, in referring to the "unreasonableness" determination under Section 301(b) in *Japan – Auto Parts*, was making an additional claim within the terms of reference), **the United States considers** that it is for the European Communities to say whether it is making this claim. If, indeed, its response is that the European Communities is making such a claim, the United States would need an opportunity to respond. However, as question (b) recognises, this claim, if asserted, would raise an issue not within the Panel's terms of reference. Any such claim would, in fact, be additional to those raised by the European Communities in this dispute.

4.660 The United States contends that there the European Communities requests findings concerning alleged violations of DSU Article 23.2(a) and (c) based on arguments that Sections 304(a)(2)(A) and 306(b) require the USTR to make determinations and to implement action regarding and in connection with WTO Agreement rights without DSB-adopted findings or DSB authorization. In paragraph 77, the European Communities also requests a finding that Section 306(b) is inconsistent with "one or more" GATT 1994 provisions for unspecified reasons, and a ruling to be made "on the basis of these findings" that the US has acted inconsistently with WTO Agreement Article XVI:4 "by failing to bring the Trade Act of 1974 into conformity with" DSU Article 23 and the GATT 1994.

4.661 The United States claims that Article 23.2 sets forth requirements on how a Member may make determinations and suspend concessions when that Member is seeking the redress of a "violation of obligations or other nullification or impairment of benefits under the covered agreements".[348] Moreover, Article 23.2(a) by its terms deals only with determinations "to the effect that a violation has occurred". It does not deal with determinations that a violation has not occurred or has not been confirmed, or with determinations unrelated to WTO Agreement rights.

4.662 The United States points out that no determination relating to WTO Agreement rights was made in the *Japan - Auto Parts* case. As the question notes, the determination in that case involved the issue of whether Japan's acts, practices and policies were "unreasonable", not whether US rights under the WTO had been denied. Any claim in connection with the *Auto*

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[347] *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44.

[348] DSU, Article 23.1. The United States notes that Article 23.2 is prefaced with the phrase, "In such cases".

Parts case thus would bear no relationship to any of the EC claims relating to Article 23. In addition, the EC's claim relating to *Auto Parts* does not relate to the EC's claim concerning alleged violations of GATT 1994 by Section 306. The *Auto Parts* case did not involve Section 306 in any way.

4.663 The United States goes on to state that this claim would not be within the Panel's terms of reference, which relate only to the Section 301-310 legislation as such, and not any particular application of that legislation.[349] If the European Communities does take the position that it is asserting this claim, the United States requests a preliminary ruling from the Panel that it is not within the terms of reference. The United States requests that the Panel render such a ruling before addressing the merits of the claim.

4.664 The United States further notes that the EC's panel request provides that, "this legislation does not allow the United States to comply with the rules of the DSU and the obligations of GATT 1994", that "this legislation" is inconsistent with various WTO provisions, and that "this legislation" nullifies and impairs benefits accruing to the European Communities.[350] The European Communities has emphasized over the course of these proceedings that it is the legislation, and not any particular application of that legislation, which is in the terms of reference of this case.[351] As a result, the panel may not examine the *Auto Parts* case or the EC's claim that a decision in the context of that case not to bring a WTO case is somehow WTO-inconsistent.

4.665 In the view of the United States, the Autos 302 investigation is also outside the panel's terms of reference because it does not relate to the aspects of Sections 301-310 which the European Communities describes in its panel request. There it states,

> "By imposing specific, strict time limits within which unilateral determinations must be made that other WTO Members have failed to comply with their WTO obligations and trade sanctions must be taken against such WTO Members, this legislation does not allow the United States to comply with the rules of the DSU and the obligations of GATT 1994 in situations where the Dispute Settlement Body (DSB) has, by the end of those time limits, not made a prior determination that the WTO Member concerned has failed to comply with its WTO obligations and has not authorized the suspension of concessions or other obligations on that basis".[352]

4.666 The United States contends that thus, the aspects of Sections 301-310 within the terms of reference of this dispute are provisions relating to deadlines and how these deadlines allegedly mandate determinations and actions inconsistent with the DSU and GATT 1994 because they are not based on DSB-adopted findings or DSB authorization. Indeed, that is precisely the focus of the European Communities. The EC's *Auto Parts* claim is completely unrelated to the EC's claim that Section 301 deadlines allegedly do not allow determinations and

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[349] The United States notes that indeed, no specific Section 302 investigation is within the Panel's terms of reference.

[350] WT/DS152/11.

[351] The United States points out that the European Communities argues that it is of little importance what the USTR has actually done in [individual cases]". The European Communities makes this point to suggest that even the Trade Representative's exercise of any discretion under the statute is unacceptable, but it more accurately supports the point that how the Trade Representative exercises her discretion in a given case is not conclusive as to what is commanded by the statute).

[352] WT/DS152/11 (emphasis added).

actions to be made with DSB approval, and relates to determinations under Section 301(b), which do not relate to WTO rights and obligations. The mere existence of such determinations in Sections 301-310 is nowhere addressed in the terms of reference.

4.667 The United States further indicates that the introduction of a new claim at the second panel meeting raises serious due process concerns which should, on that basis alone, lead the Panel to reject consideration of the EC's *Auto Parts* claim. The United States notes that not only was the EC's claim raised for the first time at the Second Meeting of the Panel, but it was raised extemporaneously. The opportunity to respond effectively was thus further limited. These due process concerns require that the United State be given an opportunity to respond to this claim, if asserted by the European Communities and if the Panel concludes it is within the terms of reference.

4.668 In the view of the United States, the European Communities has attempted to expand the nature of its arguments beyond the straightforward textual analysis contemplated in its panel request and advanced later. That analysis involved the question of whether the time frames in Sections 301-310 "do not allow" the USTR to make determinations and to take action in accordance with DSU rules. The EC's argument has since expanded to include the notion that the statute's mere existence threatens "security and predictability" and discussions of specific applications of Sections 301-310 not within the terms of reference for the sole purpose of distracting the Panel from its legal analysis. Nevertheless, even these arguments could be addressed to the extent included in submissions prior to the Second Meeting of the Panel. To raise a new issue at the Second Meeting for the first time denies a defending party any effective opportunity to rebut or consider the argument. This is particularly a problem with respect to the EC's new claim, since it is so vague and poorly defined.

4.669 In addition, the United States notes that the evidence submitted in connection with the EC's extemporaneous introduction of its claim must be excluded from the record on the basis of Rule 12 of the Panel's Working Procedures. The panel must abide by the procedures it laid down at the outset of this proceeding. That rule states that, "Parties shall submit all factual evidence to the Panel no later than the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others".[353] The evidence submitted by the European Communities in connection with the EC's new claim is not necessary for rebuttal, for answers to questions or for comments on those questions. It is particularly inappropriate for the European Communities to have introduced this claim and supporting evidence at the second substantive meeting because this information was equally available at the outset of this case and relates to an incident a number of years in the past.

(c) Discretion with respect to the timing of determination and other issues relating to time frames

4.670 **The European Communities considers** that the DSU does not provide Members with the assurance that the DSB will adopt findings on their complaints within that time frame. The DSU allots to each stage in the dispute settlement proceeding a minimum or maximum period of time.[354]

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[353] Working Procedures for the Panel, Rule 12 (19 April 1999).
[354] These time limits are summarised for the convenience of the Panel as EC Exhibit II.

4.671 The European Communities claims that according to Article 5.4 of the DSU, "the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel". The request for the establishment of the panel must be submitted at least 10 days before the meeting of the DSB.[355] Since the DSB normally meets at monthly intervals, the first meeting at which the request for the establishment of the panel can be considered will thus take place between 10 days and one month after the end of the consultation period.

4.672 The European Communities states that Article 6.1 of the DSU provides that, upon request, "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 …" and that "a meeting for this purpose shall be convened for this purpose within 15 days of the request …".

4.673 Further, the European Communities argues that according to Article 20 of the DSU, the maximum period between the establishment of the panel and the adoption of the Appellate Body report is normally 12 months. However, this maximum period is extended by up to three months if the panel makes use of its right under Article 12.9 of the DSU to delay the circulation of its report and by a further period of up to 30 days if the Appellate Body extends its proceedings in accordance with Article 17.5 of the DSU. The total period thus is 15 months plus 30 days, or about 16 months.

Phase	**Months**	**Days**
Consultations		60
From end of consultation period to establishment of a panel	1	15
From establishment of the panel to the adoption of the Appellate Body report	15	30
TOTAL	16	105

4.674 The European Communities then considers that even on the assumption that all the Dispute Settlement organs of the WTO act within the period of time allotted to them under the DSU, a period of 19 ½ months is at the disposal for the normal operation of a given dispute settlement procedure. This is without prejudice to the possibility for the parties, and in particular for the complainant, to extend, at their discretion, these deadlines beyond the 19 1/2 months period allocated to the dispute settlements organs.

4.675 The European Communities then concludes that the USTR is therefore mandated by Section 304(a)(2)(A) to make a determination on the United States' denial of rights under a WTO agreement within a time frame that is shorter than the time frame within which it can reasonably expect DSB findings on that matter.

4.676 The European Communities, however, stresses that this is the most important issue in this respect, a possible delay in the dispute settlement proceedings does not give the United States the right to revert to unilateralism. As a result of the Uruguay Round, the United States

[355] The European Communities refers to Rules 2 and 4 of the rules of procedure of the General Council which are applicable to the DSB pursuant to Rule 1 of the rules of procedure of the Dispute Settlement Body.

has undertaken an unqualified and unconditional international obligation not to revert to unilateral determinations and actions. As was already mentioned in para. 10 above, the deal was struck on the basis of a concession by the European Communities and other Uruguay Round participants allowing for binding dispute settlement against a commitment by the United States to refrain from unilateral determinations and section 301-type trade restrictions without multilateral authorization. By imposing an obligation upon USTR to determine in all cases within 18 months of the request for consultations whether the United States' WTO rights are being denied without awaiting the conclusion of the relevant DS procedures, the United States is clearly in breach of this unconditional obligation, and in particular of Article 23.2(a) of the DSU.

4.677 **The United States responds** that even if the European Communities were permitted to assume that the USTR's determination under Section 304(a)(1) will always be affirmative, its analysis of the time frames under Section 304(a)(2)(A) and whether they conflict with those in the DSU is incorrect. The United States specifically considered DSU time frames when Sections 301 - 310 were amended in 1994, and these time frames are compatible with those in Section 304(a)(2)(A).[356]

4.678 The United States goes on to argue that the European Communities focuses on whether the USTR's determination must, because of the 18-month time frame in Section 304(a)(2), occur before DSB adoption of panel and dispute settlement findings in those instances in which dispute settlement proceedings require the maximum period provided for in the DSU. According to the European Communities, because Section 303 requires that the USTR request consultations on the date a Section 302 investigation is initiated, and because a determination must be made no later than 18 months after the investigation is initiated, the USTR must necessarily make its determination before DSB adoption in some cases.

4.679 In the view of the United States, the EC's claim is based on its conclusion that, under the DSU, the maximum period from a request for consultations until DSB adoption of panel and Appellate Body findings is 19 ½ months. The European Communities assumes not only that the panel and Appellate Body require the maximum time authorized under the DSU for their deliberations and report preparations, but that DSB meetings are held on the final day allowed under the DSU to establish the panel, to adopt the panel report (and thereby establish the deadline for an appeal), and to adopt the Appellate Body report.

4.680 The United States argues that the European Communities has however simply miscalculated the deadlines under the DSU. First, the European Communities has erroneously assumed that the normal period for panel proceedings may be extended by three months pursuant to DSU Article 12.9, rather than the actual figure of two months or less.[357] Thus, even

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[356] The United States refers to Statement of Administrative Action, op. cit., p. 360 (US Exhibit 11), as describing amendments to "section 304 … and section 305 … to ensure that the timetables for investigations and determinations under the enforcement provisions of U.S. trade laws allow DSU dispute settlement proceedings to be completed before trade sanctions may be imposed".

[357] In the US view, the European Communities appears to have incorrectly assumed that the six month figure referred to in the first sentence of Article 12.9 was measured on the same basis as the nine month figure in the second sentence. In fact, the six-month figure in the first sentence is, as indicated in Article 12.8, measured from panel *composition* to issuance of the report *to the parties*, while the nine month figure is measured from *establishment* of the panel to circulation of the report *to the Members*. Since panel composition may require a month (DSU Article 8.7), and, under DSU Appendix 3 guidelines (para. 12(k)), the period between issuance of the report to the parties and circulation to the Members is two to three weeks, the actual extension provided for under Article 12.9 is at most two months (assuming

if the EC's other assumptions were correct, the maximum period for dispute settlement proceedings under Article 20 would be between 17 months and three weeks and 18 ½ months, and not 19 ½ months.[358]

4.681 The United States further claims that even this 18 ½ month time frame is longer than that provided for in the DSU. This is because the European Communities assumes a longer period than it may (1) between the completion of consultations and the DSB meeting at which the panel request first appears on the agenda, and (2) between circulation of the panel report and the DSB meeting at which the report is scheduled for adoption (which establishes the deadline for an appeal). With respect to the DSB meeting at which the panel request first appears on the agenda, the European Communities ignores footnote 5 to DSU Article 6.1, which requires a DSB meeting to be convened to consider panel establishment within 15 days of a request.[359] Thus, the European Communities may not assume that the first DSB meeting after the consultation period will take place 30 days after the conclusion of the consultation period, or that the period for establishment of the panel will require one and a half months, rather than one month.

4.682 The United States considers that likewise, the European Communities ignores the fact that a Member may, at any time, request that a DSB meeting be held.[360] Both for this reason and because DSB meetings generally take place on a monthly basis, the European Communities may not assume that the DSB meeting at which the panel report is scheduled for adoption will take place 60 days after circulation.

4.683 The United States points out that while it is not unreasonable for the European Communities to assume that certain aspects of the dispute settlement schedule are beyond the control of the United States (consultation period under Article 4.7, panel deadline under Article 12.9, Appellate Body deadline under Article 17.5), the European Communities may not assume that the United States would not act to expedite the dispute settlement schedule were this necessary to ensure that US determinations under Section 304 are fully consistent with US DSU obligations.[361] Thus, for purposes of comparing Section 301 time frames with the maximum period provided for dispute settlement proceedings under the DSU, the relevant period is 16 months and 20 days.[362]

4.684 The United States further argues that even if it were assumed that the United States could not expedite the DSB meeting schedule, and that the maximum period under the DSU for dispute settlement proceedings were more than 18 months, the European Communities would still be incorrect in concluding that Section 304(a)(2)(A) precludes the USTR from issuing her determination after DSB adoption of Appellate Body findings. This is because the United

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no time between issuance to the parties and circulation to Members), and arguably 1 month and one week (assuming a three week period before the panel report is circulated to Members).

[358] The United States refers to the above footnote.

[359] DSU Article 6.1 and footnote 5.

[360] The United States claims that Rules 1 and 2 of the rules of procedure of the General Council, which are applicable to the DSB pursuant to Rule 1 of the rules of procedure of the Dispute Settlement Body.

[361] Again, the United States claims that it is not in fact necessary for it to request DSB meetings prior to those normally scheduled because the Trade Representative is not required under Section 304(a)(1) determine that US agreement rights have been denied.

[362] US Exhibit 2.

States may, under US law, request WTO dispute consultations prior to initiating a Section 302 investigation. Nothing in Sections 301-310 prevents this, and the USTR has in fact done so.[363]

4.685 The United States then states that Section 302(a)(2) provides the USTR 45 days from the filing of a petition to determine whether she will initiate an investigation, during which period the USTR is free to request dispute settlement consultations.[364] Moreover, under Section 302(b), the USTR is free to self-initiate an investigation at any time; in such a case, there is nothing preventing the USTR from first requesting dispute settlement consultations.[365]

4.686 The United States emphasises that to meet its burden with respect to Section 304(a)(2)(A), the European Communities must demonstrate that it would not be possible[366] under the 18-month time frame in that section for the USTR to issue a WTO-consistent determination. In addition to the reasons set forth above with respect to the determination itself and the EC's miscalculation of DSU deadlines, the European Communities has failed to meet its burden because it has not established why the USTR could not initiate a Section 301 investigation several weeks after a US request for WTO dispute settlement consultations, thereby allowing for DSB adoption of panel and Appellate Body findings within the 18-month period provided for under Section 304(a)(2)(A).

4.687 The United States further claims that even if it were assumed that Sections 301-310 preclude the USTR from requesting consultations prior to initiating a Section 302 investigation, that the USTR could not expedite the DSB meeting schedule, and that the maximum period for dispute settlement were 18 ½ months, this would still mean that the USTR would always have the benefit of circulated Appellate Body findings when she makes her determination.[367] Moreover, in light of the negative-consensus rule of DSU Article 17.14, the USTR would also know that the DSB would adopt the reports of the panel and/or Appellate Body when it meets, and would also know the date of that meeting.[368]

4.688 In the view of the United States, the goal of Article 23.1 is to ensure that WTO Members resort to multilateral dispute settlement procedures, and it is difficult to understand

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[363] The United States, as an example, Initiation of Section 302 Investigation and Request for Public Comment: Japan Market Access Barriers to Agricultural Products, 62 Fed. Reg. 53853 (1997) (US Exhibit 8) (consultations under DSU requested April 7, 1997, investigation initiated on October 7, 1997); Korea's Restrictions on Imports of High Quality Beef; Notice of Initiation, 53 Fed. Reg. 10995 (1988) (US Exhibit 9) (GATT 1947 Article XXIII:1 consultations held February 19-20, 1988 and March 21, 1988, investigation initiated on March 28, 1988).

[364] Section 302(a)(2), 19 U.S.C. § 2412(a)(2).

[365] Section 302(b)(1)(A), 19 U.S.C. § 2412(b)(1)(A). The United States points out that just as the European Communities has authority under its Article 133 procedures to undertake dispute settlement proceedings without resorting to the procedures set forth in its Trade Barrier Regulation, see Section IV.D below, the Trade Representative and her office have independent authority to act for the United States at the WTO, including activities relating to dispute settlement proceedings such as requesting and holding consultations. See 19 U.S.C. § 2171(c)(1) (1998); Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979); 19 C.F.R. § 2001.3(a) (1998).

[366] The United States cites Panel Report on *US – Superfund*, op. cit., para. 5.2.9; Panel Report on *Thai – Cigarettes*, op. cit., para. 86.

[367] In the US view, assuming a maximum of 18 ½ months from the consultation request to DSB adoption, the Appellate Body report would be issued no later than 17 ½ months after the request for consultations. See DSU Article 17.14.

[368] According to the United States, if a regularly scheduled DSB meeting were not scheduled to take place within 30 days following circulation of the Appellate Body report to Members, such a meeting would be scheduled. DSB Article 17.14 and footnote 8.

how this goal would be frustrated if the United States were to follow such procedures through to their conclusion and state what every WTO Member would already know – that US WTO rights had been denied, and that the DSB would shortly adopt that conclusion. Thus, even if (as is not the case) the USTR were required under US law to make an unqualified affirmative determination under Section 304(a)(1) based on favorable, but unadopted, panel and Appellate Body findings, such a determination would not be inconsistent with the goal of Article 23 – multilateral determinations of violations.

4.689 The United States further stresses that nothing in Sections 301-310 compels the USTR to make a determination that US agreement rights have been denied in the absence of adopted Appellate Body or panel findings, nor do Sections 301-310 compel the USTR to wait until the initiation of a Section 302 investigation to request dispute settlement consultations. Moreover, the European Communities is incorrect in claiming that the time frames for dispute settlement under the DSU are longer than 18 months. The European Communities has therefore not demonstrated that Section 304(a)(2)(A) precludes the USTR from fully complying with the letter and spirit of DSU Article 23.

4.690 In response to the Panel's question on the precise basis under Section 304, or any other legal basis, for the United States to argue that unless WTO procedures are completed, the USTR is precluded from making a determination of violation, the United States argues that Section 304(a)(1) requires that determinations under that section be made "on the basis of the investigation initiated under Section 302 and the consultations (and the proceedings, if applicable, under section 303)". The "proceedings" under Section 303 are dispute settlement proceedings.[369] Moreover, such proceedings would be "applicable" in any case involving a trade agreement, since Section 303 requires that dispute settlement procedures under a trade agreement be invoked in any case involving a trade agreement, if no mutually acceptable resolution has been achieved.[370]

4.691 The United States notes that Section 304(a)(2) specifies the timing of the USTR's determinations under Section 304(a)(1). Under this provision, the USTR must make her determination under Section 304(a)(1) by the earlier of 30 days after the conclusion of dispute settlement proceedings or 18 months after initiation of an investigation. The 18-month time frame permits the USTR to base her determination on adopted panel and Appellate Body findings in all cases.[371] The United States specifically considered DSU time frames when amending Section 304 in 1994 to ensure the compatibility of Section 304 time frames with those in the DSU.[372]

4.692 The United States examines the numerous assumptions on which the EC argument rests. US Exhibit 10 summarizes these assumptions. The United States argues that for each EC claim, all of the EC's assumptions must be correct for it to prevail, but none of them is correct.

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[369] The United States claims that Section 303(a)(2) provides that if dispute settlement consultations under a trade agreement have not resulted in a mutually acceptable resolution, the USTR shall request "proceedings" under the "formal dispute settlement procedures provided under such agreement".

[370] Ibid.

[371] The United States refers to US Exhibit 2. As explained there, the European Communities has, in paragraph 77 of its First Submission, miscalculated the time frames provided for under the DSU.

[372] Statement of Administrative Action at 360, *reprinted in* H.R. Doc. No. 103-316, at 1029 (US Exhibit 3) (describing amendments to "section 304 . . . and section 305 . . . to ensure that the timetables for investigations and determinations under the enforcement provisions of U.S. trade laws allow DSU dispute settlement proceedings to be completed before trade sanctions may be imposed".).

4.693 In the view of the United States, the first set of EC assumptions relates to its claim that Section 304 mandates a violation of DSU Article 23.2(a). The European Communities argues that Section 304 requires the USTR to make a determination that US trade agreement rights have been violated within 18 months of initiation of a Section 302 investigation, while the DSU provides for a longer period for completion and adoption of panel and Appellate Body proceedings in some instances.

4.694 The United States notes that these EC assumptions relate to the time frames in Section 301 and the DSU. However, because Section 304 does not mandate an affirmative determination, these time frames are simply not relevant to the Panel's decision. Nevertheless, even were this not so, the 18-month time frame in the statute would not prevent the USTR from complying to the letter with DSU rules and procedures. The EC's calculation of the time by which a panel may extend its proceedings is incorrect by one month. Moreover, the European Communities ignores the fact that DSB meetings normally are held monthly and instead assumes that DSB meetings would not be held until the final day permitted under the DSU. The European Communities also assumes that the United States would not attempt to affect the schedule of DSB meetings. Finally, the European Communities ignores the fact that Sections 301-310 do not preclude the USTR from initiating dispute settlement proceedings before initiating a Section 301 investigation. Thus, wholly apart from the fact that the European Communities cannot assume that the USTR will always make an affirmative determination, the time frames in the US statute do, in fact, permit the USTR to base her determination on adopted panel and Appellate Body findings. The DSU time frames were negotiated with this 18-month time frame in mind, and the European Communities and others were well aware of this fact during the Uruguay Round.

4.695 **The European Communities notes** that the European Communities and the United States differ on certain timeframes under the DSU.

4.696 The European Communities notes that as to this time frame, the United States claims that the total length is 18 months while the European Communities claims that the total length is 19 ½ months. This difference arises from different assumptions on the length of time it takes to establish and compose Panels.

4.697 The European Communities rebuts the US assumption that all the panels that it requests the DSB to establish are composed as a result of two special meetings of the DSB convened in accordance with Article 6.1 of the DSU. This provision provides that, upon request,

> "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 …". and that "a meeting for this purpose shall be convened for this purpose within 15 days of the request …".

4.698 The European Communities indicates that it interprets the terms "for this purpose" to refer to the second meeting of the DSB at which the panel must be established. This is in conformity with the consistent practice of the WTO Members and of the DSB. The complainant can thus not request two special DSB meetings benefiting from the compulsory reduced time of convocation, as the United States assumes, but only one. Since the DSB normally meets once a month (but not necessarily every month, as during August and at the end of the year DSB meetings are rarely held), the complainant can for these reasons not expect the establishment of the Panel until one month + 15 days have lapsed.

4.699 The European Communities notes that the United States claims that it can at any time request a special meeting of the DSB. However, the United States has a right to a special meeting (i.e. benefiting from the compulsory reduced time of convocation) only in the circumstances foreseen in the DSU and can therefore not count on two special DSB meetings.

4.700 Moreover, the European Communities points out that the United States makes the assumption that it will in all cases request two special meetings in anticipation of later delays. The US assumption is based on a logical *non-sequitur*. The anticipation of the delays would be put in practice without knowing whether any delay at all would appear in the course of the procedure. The panelists in the *EC – Hormones (US)* case, for example, could not have anticipated the duration of the procedure before they actually started it and recognised the need to request expert advice on extremely sensitive and complicated scientific issues brought to their attention. Consequently, the US assumption could only be credible if it could show that it pursued a systematic policy of shortening the procedural deadlines by anticipation. However, the United States has not shown (and cannot show) it pursued such a systematic practice.

4.701 The European Communities further notes that the second source of discrepancy can be found in the different assumptions regarding the length of the extension period under Article 12.9 of the DSU.

4.702 The European Communities recalls that the United States assumes that the composition of the Panel takes one month and that the actual extension provided for under Article 12.9 is therefore only two months.

4.703 The European Communities argues that here it assumed that the Panel is composed shortly after it has been established (for instance, there was no disagreement on the composition between the parties). Under the EC's assumption, the two starting dates for calculating the six-month and the nine-month periods referred to in Article 12.9 are close to one another so that the period of extension available to the Panel effectively remains three months.

4.704 The European Communities is further of the view that the United States' claims are based on a misrepresentation of the discretion available to the United States under the legislation at issue. Under Sections 301-310, the USTR must determine within specified time frames whether United States' rights under a WTO agreement are being denied and whether a failure to implement DSB recommendations has occurred.[373]

4.705 The European Communities challenges the US claim that the USTR has the right not to make any determination at all or to decide to postpone the determination so as to await the completion of WTO proceedings. There is nothing in the text of Sections 301-310 to support this claim. The explicit requirements to make a determination within a specified time frame whether the United States' WTO rights are being denied or a failure to implement DSB recommendations has occurred would be completely frustrated if they were deemed fulfilled by a decision to postpone the determination.

4.706 The European Communities maintains that it is irrelevant whether the USTR has decided in a few individual cases to postpone her determination beyond the deadlines foreseen in Sections 301-310. Both parties agree that the issue in this dispute is the legislation of the United States, not its actual application. The European Communities would like to recall in this

[373] In particular Sections 304(a)(1) and 306 (b).

context the following ruling of the GATT panel on *United States - Measures Affecting Alcoholic and Malt Beverages (Beer II)*:

> "Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply".[374]

4.707 The European Communities recalls the arguments that the United States presented to the WTO panel on *India - Patents (US)*:

> "The mailbox system ... had a rationale common to many other WTO obligations, 'namely to protect expectations of the contracting parties as the competitive relationship between their products and those of other contracting parties'. The *Superfund* report had established clearly the importance of 'creat[ing] the predictability needed to plan future trade.' ... Despite India's claim that it had decided for the moment not to enforce the mandatory provisions of ... its Patent Act ... that 'measure continues to be mandatory legislation, which may influence the decisions of economic operators.' The economic operators in the present case - potential patent applicants - had no confidence that a valid mailbox system had been established ... To paraphrase the *Beer II* panel, a non-enforcement of a mandatory law that violated a WTO obligations did not ensure that the obligation was not being broken".[375]

4.708 The European Communities then argues that the provisions of Sections 301-310 stipulating WTO-inconsistent action would thus remain WTO-inconsistent even if the USTR did not enforce them at all.[376]

4.709 The European Communities agrees that the time limits set out in the DSU are not "legally binding" in the sense that they affect neither the obligations under Article 23 of the DSU nor the validity of the act of the judicial organs subject to the time limits. On this issue, the European Communities would like to draw the Panel's attention to the following.

4.710 The European Communities points out that the arbitrators' decision on the EC banana regime was submitted on 9 April 1999. According to Article 22.6 of the DSU, their work should have been completed on 3 March 1999, that is 60 days after 1 January 1999, the date on which the implementation period accorded to the European Communities expired. The arbitrators explained in their decision that this delay did not have any impact on the validity of that decision:

> "On the face of it, the 60-day period specified in Article 22.6 does not limit the jurisdiction of the Arbitrators *ratione temporis*. It imposes a *procedural*

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[374] Panel Report on *US – Malt Beverages*, op. cit., p. 290 at BISD 39S.

[375] Panel Report on *India – Patents (US)*, op. cit., para. 4.4 (footnotes omitted, underlining added).

[376] In the EC's view, this is the way in which the law was applied in a number of cases (e.g. Japan - Autos and Auto Parts and EC - Bananas). Their non-application in a few other cases, in contradiction with the plain language of the law, cannot demonstrate their WTO-consistency.

> obligation on the Arbitrators in respect of the conduct of their work, not a *substantive* obligation in respect of the validity. In our view, if the time-period of Article 17.5 and Article 22.6 of the DSU were to cause the lapse of the authority of the Appellate Body or the Arbitrators, the DSU would have explicitly provided so. Such a lapse of jurisdiction is explicitly foreseen, e.g. in Article 12.12 of the DSU which provides that "if the work of the Panel has been suspended for more than 12 months, the authority for establishment of the Panel shall lapse".[377]

4.711 The European Communities notes that the Arbitrators thus considered that the DSU provisions imposing time limits relate exclusively to their work and not to the substantive validity of its result. They expected the DSB to authorize the suspension of concessions and other obligations on the basis of their decision even though it had been made available after the time limits foreseen in Article 22.6. The DSB authorized the suspension on 19 April 1999, thereby indicating that its jurisdiction to grant such an authorization is not time-bound.

4.712 The European Communities further argues that in domestic law, a "provision in a statute, rule of procedure, or the like, which is a mere direction or instruction ... involving no invalidating consequences for its disregard ... as in the case of a statute requiring an officer to prepare and deliver a document ... before a certain day" is considered to be a "directory" provision.[378] The case of the arbitration decision on the EC banana regime demonstrates, that the arbitrators, and the DSB perceived the time limits set out in Article 22.6 of the DSU to be of a "directory" nature whose disregard does not change the substantive rights and obligations of Members.

4.713 In the view of the European Communities, the directory nature of the time limits is reflected in the practice under the DSU. The median time period that lapsed between the establishment of the Panels and the adoption of the reports has been 13 months and 28 days, which is well within the target set out in Article 20 of the DSU and the time frame foreseen in Sections 301-310. However, this median covers periods from 11 months and 6 days to 21 months and 5 days.[379] It would be wrong to attribute the delays referred to in the question to inefficiencies in the conduct of the proceedings. In some cases, the issues involved in the proceedings were simply too complex to be resolved within the standard time limits; in other cases, the Panels required more time to obtain expert advice. The delays were thus necessary to ensure due process for the parties to the proceedings.

4.714 **The United States rejects** the EC argument that the non-application of statutory time-frames would render them WTO-consistent because that is not a relevant issue in this dispute. The European Communities has failed first to establish that Sections 301-310 mandate WTO-inconsistent actions, so it is irrelevant whether they are not applied in a given case. The USTR has more than adequate statutory discretion to comply with WTO rules without ignoring the statute.

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[377] Footnote 7 of the Arbitrators' award.

[378] Black's Law Dictionary (Sixth Edition).

[379] The United States refers to the table entitled "WTO Dispute Settlement Timeframes - Panels Established and Composed - 1 January 1995 and 30 April 1999" in the informal Secretariat Note circulated as Job No. 2330 on 22 April 1999.

4.715 The United States further adds that Article 21.4 of the DSU supports the US view that the European Communities has erroneously claimed that panels may extend their proceedings by three, rather than two, months. Article 21.4 provides:

> "Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time *shall not exceed 15 months* unless the parties to the dispute agree otherwise. Where either the panel or Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period, provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time *shall not exceed 18 months*".[380]

4.716 The United States points out that Article 21.4 sets forth the maximum period from panel establishment to determination of the reasonable period of time, a period 90 days longer than the period from panel establishment to adoption of the panel and Appellate Body reports.[381] Subtracting 90 days from each of the time frames in Article 21.4 yields a maximum period from panel establishment to adoption of the panel and Appellate Body reports as 12 months if the panel and Appellate Body have not extended the time for issuing their reports and 15 months if they have. Since Article 17.5 clearly provides 30 days for the Appellate Body to extend the time for issuing its report, this leaves at most two months for the panel to extend the time to circulate its report (assuming no time between issuance and circulation).

4.717 The United States also notes that, with the exception of also erroneously assuming that panels may extend their proceedings by three months, the time frames set forth by Thailand in its oral statement match those described by the United States regarding the maximum period permitted under the DSU. Based on its error, Thailand stated that the period was 19 months, rather than 18 months. However, even this is longer than may be assumed for purposes of this dispute, since regularly held DSB meetings generally occur monthly and since the United States could, if necessary, request DSB meetings to ensure that time frames are met.

4.718 In response to the Panel's question as to the relevance, to the parties' discussion on DSU timeframes, of the following arguments: (1) most DSU timeframes do not seem to be legally binding and are determined case by case not by the claiming party but by the panel, Appellate Body or even the defendant; (2) of the 22 cases were a panel and/or Appellate Body report has been adopted, 12 cases required more than 18 months for reports to get adopted, the United States notes that the time frames in Article 21.4 do appear to be legally binding, since they provide that the time frames "shall not exceed 18 months". The consequences of any failure to meet these time frames is less clear.

4.719 The United States argues that in any event, for purposes of deciding this dispute, the time frames in the DSU are, in the end, not relevant, nor is the fact that these time frames have been exceeded in many cases. Because the USTR is free, under Section 304, not to make a determination that a violation has occurred, she is not required to make a determination inconsistent with Article 23.2(a). Sections 301-310 do not mandate any DSU violations.

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[380] DSU Art. 21.4 (emphasis added).

[381] DSU Art. 21.3 (the period for determining the reasonable period of time through arbitration is 90 days from the adoption of the panel and Appellate Body reports).

4.720 The United States further claims that on the other hand, were it incorrectly assumed that Section 304 actually does mandate a determination that a violation has occurred, the time frames in the DSU would remain relevant, though the actual performance of panels in complying with these time frames would not. This is because this dispute involves an examination of whether the mere existence of Sections 301-310 violates WTO rules. In determining whether the legislation mandates a violation of DSU Article 23, certain assumptions must be made because no specific case applying Sections 301-310 is within the terms of reference of this Panel. For example, the timing of the Section 304(a)(1) determination would be relevant if – contrary to the ordinary meaning of Section 304(a)(1) and the requirement in that provision and the commitment on Statement of Administrative Action page 365 to base the determination on adopted panel and Appellate Body findings – it were assumed that Section 304 actually does mandate a determination that a violation has occurred. The question then would be whether such a determination must be made before panel and Appellate Body findings can be adopted. The European Communities assumed for purposes of this analysis that panels and the Appellate Body will extend their proceedings as authorized under the DSU, and that DSB meetings will be held on the last possible day authorized under the DSU. The United States pointed out that while it is reasonable to assume that panels will extend their proceedings as authorized under the DSU, it is not reasonable to assume that the United States would not take steps to request DSB meetings at earlier times. Moreover, the United States explained above that the EC's calculations of DSU time frames were in error.

4.721 According to the United States, in other words, both the United States and the European Communities assume that panel would comply with DSU time frames. This is a proper assumption for purposes of this dispute. Despite the actual record of panel compliance with DSU time limits, it cannot, for purposes of this dispute, be assumed that these panels will fail to comply with their obligations. It is remarkable enough that the European Communities believes it may establish its *prima facie* case based on adverse assumptions concerning the choices the USTR will actually make in a given case. It should not be permitted to assume that panels as well will disregard their obligations under the DSU.

4.722 The United States claims that nevertheless, the DSU time frames remain relevant to the Panel's analysis. This dispute does not involve the application of Sections 301-310 in the context of a specific WTO dispute. There are therefore no established facts as to when and how the USTR made specific determinations, nor are there established facts as to when and how a panel and Appellate Body issued their reports. Assumptions must be made. It is not appropriate to assume that panels and the Appellate Body will not comply with DSU time frames, any more than it is appropriate to make any other assumption adverse to the United States in this case.

4.723 The United States points out that the European Communities argues at pages 31-32 of its answers to Panel questions that DSU time frames are irrelevant because they are merely "directory" in nature. The European Communities states:

> "In domestic law, a 'provision in a statute, rule of procedure, or the like, which is a mere direction or instruction ... involving no invalidating consequences for its disregard ... as in the case of a statute requiring an officer to prepare and deliver a document ... before a certain day' is considered a 'directory'

provision.[382] . . . [The disregard of time limits] of a 'directory' nature . . . does not change the substantive rights and obligations of Members".

4.724 The United States goes on to state that the European Communities raises this point with respect to DSU time frames, arguing that because they are directory, they are irrelevant to the Panel's analysis in this case. While the United States disagrees that DSU time frames are irrelevant to this dispute, it notes that if the EC's argument were accepted, that argument would apply equally to the time frames in Section 301. The "domestic law" referred to in the EC quotation is US law,[383] and the principle would apply equally to Section 301 time frames. There are no "invalidating consequences" provided for in Sections 301-310 if the USTR misses her deadlines. Nevertheless, like panels, the USTR takes her deadlines seriously. However, if the panel accepts the EC's arguments that DSU time frames are irrelevant, that same conclusion must be applied to those in Section 301. In that case, the EC complaint fails because even if it were incorrectly assumed that Section 304(a)(1)(A) mandates a determination that US agreement rights have been denied, it would not be possible to conclude that the law mandates that such a determination be made prior to DSB adoption of panel and Appellate Body findings to that effect.

4.725 The United States contends that assuming that the Panel chooses to analyze the time frames in Sections 301-310 against those in the DSU (and has not already concluded that Section 304 neither mandates a determination that US agreement rights have been denied, nor precludes any such determination after the DSB has adopted panel and Appellate Body findings), that analysis reveals that Section 301 time frames do not require a determination before the time established in the DSU for adoption of panel or Appellate Body findings. The United States already explained in response to Panel question 9 that Article 21.4 provides further support for the US position that the maximum period from panel establishment to adoption of panel and Appellate Body findings is 15 months. That provision establishes a firm deadline of 18 months from panel establishment to determination of the reasonable period of time, a period which includes 90 days for the determination of the reasonable period.[384]

4.726 The United States argues that the EC's explanation that it "assumed that the Panel is composed shortly after it has been established" ignores the fact that the time limit in DSU Article 12.9 is nine months from panel establishment to circulation to Members. Combining this with the maximum period of 60 days for appeal or adoption of the panel report (DSU Article 16.4), the maximum 90 day period for Appellate Body proceedings (DSU Article 17.5), and the maximum period for DSB adoption of 30 days (DSU Article 17.14), yields a maximum period from panel establishment to adoption of panel and Appellate Body findings of 15 months, as the United States has argued.

4.727 The United States notes that the European Communities disputes the fact that a panel may be established within one month. The United States disagrees with the EC's interpretation of the footnote to Article 6.1 as being limited to the second meeting at which a panel meets to consider establishment, and further notes that Thailand concurs in the US conclusion that a panel may be established within a month of completion of the 60 day consultation period.

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[382] Black's Law Dictionary (Sixth Edition) (citation in original).

[383] Black's Law Dictionary is a US publication, and citations provided in the definition of "directory" are to US court opinions. See Black's Law Dictionary, 5th ed., at 414.

[384] See DSU Art. 21.4.

4.728 In the view of the United States, when the one month period for establishing a panel is added to the 60 day consultation period (DSU Article 4.7) and the maximum fifteen month period from panel establishment to DSB adoption of panel and Appellate Body findings, the total is 18 months, allowing the USTR to make a determination on the date provided for in Section 304(a)(2)(A) based on adopted panel and Appellate Body findings in all cases.

4.729 However, the United States has observed that, even this overstates the amount of time for panel and Appellate Body proceedings that may be assumed for purposes of this dispute. This is because DSB meetings generally occur on a monthly basis, so it may not be assumed that it will take all of 60 or 30 days for an appeal to be filed or an Appellate Body report to be adopted, and because the US may request meetings at earlier times. In response, the European Communities asserts that the Panel may not take into account the fact that the United States may request DSB meetings at a time earlier than those established by time limits, unless the United States can show that the USTR pursues a "systematic policy" of shortening procedural time frames through such requests.

4.730 The United States argues that the European Communities does not explain why it may disregard the "systematic policy" of monthly DSB meetings which can be expected to shorten the time frames from 18 months.[385] Leaving that aside, the European Communities forgets that to meet its burden in this case, it must show that Sections 301-310 "do not allow" the USTR to comply with DSU procedures, that is, that it would not, in a given case, be possible for the USTR to take steps to ensure compliance with the DSU. The European Communities thus may not assume that the USTR will not act to shorten time frames. Further, to establish that it would not be possible for the United States to comply with DSU rules, the European Communities would have to explain why, under US law, it would not be possible for the USTR to request consultations prior to initiating a Section 302 investigation, as she has, in fact, done in the past. The European Communities may not base its claim on adverse assumptions about the choices that the USTR, the panel, the Appellate Body and the WTO Secretariat (in scheduling DSB meetings) will make in a concrete case.

4.731 The United States argues that the time frames in Sections 301-310 are entirely compatible with those in the DSU. Even if the Panel were to ignore the EC's concession that the USTR need not determine that US trade agreement rights have been denied, the USTR may – indeed, must – base her determination on adopted panel and Appellate Body findings in each and every WTO case.

4.732 **The European Communities contends** that in order to hide this fundamental inconsistency in its defence, the United States has engaged in an attempt to play down the importance of this case, even though, in its view, it is more than likely to constitute a turning point in the history of the World Trade Organization. The United States seems rather more interested in distracting the Panel's attention from the central legal issues of this case by alleging unsupported political links with other entirely separate dispute settlement procedures. This attitude is not in line with the explicit prohibition under Article 3.10, last sentence, of the DSU according to which "complaints and counter-complaints should not be linked".

4.733 The European Communities repeats once more that any reference in this case to previous dispute settlement procedures is made only within the limited (but procedurally

[385] Nor does the European Communities explain why it may disregard the Trade Representative's "systematic policy" of basing Section 304 determinations on WTO proceedings. See Statement of Administrative Action at 365-66, *reprinted in* H.R. Doc. No. 103-316, at 1034-35 (US Exhibit 11)

important) purpose of providing evidence in support of the EC's main claim in this case, i.e. that Sections 301-310 are as such in breach of numerous substantive obligations under the WTO Agreements.

4.734 The European Communities further indicates that likewise and in the same spirit, it would continue to abstain from what it perceives as slightly too energetic comments from our US counterparts as, for example, that the logic of the EC's case is "hard to follow" or that interpretations proposed by the European Communities "make up obligations out of thin air and aspirations" or that a given interpretation is based on "fanciful, results driven constructions" or that an assertion is "bold" or that a given claim is "pure fantasy".

4.735 The European Communities rather draws the attention of the Panel to the presentation by the United States of the legal situation of this case, in general, and of its domestic legislation, in particular. The European Communities indicates that it has the impression that, as this Panel procedure advances, the description by the United States of the legal issues under scrutiny of this Panel add up to the "intricate maze" of Sections 301-310 (as Professor Hudec defined them) with the aim of rendering the contours of these issues less and less discernible.

4.736 In order to illustrate this assertion, the European Communities refers to some telling examples from the US arguments:

> "In paragraph 35, when addressing the issue of the relevance of the WTO panel report on *Japan - Varietals* the US states that '[t]he rationale of paragraph 1 of Annex B – publication of SPS measures – cannot be equated with that of WTO Agreement Article XVI:4 – to ensure that domestic laws permit compliance with international obligations'. However, the language of paragraph 1 of Annex A of the SPS Agreement, when combined with the language of the provisions governing SPS measures, is parallel and comparable to the language of Article XVI:4 of the Marrakech Agreement that plainly states that '[e]ach Member shall ensure the conformity of its laws, regulations or administrative procedures …'".

The confusion operated by the United States between the terms "ensure the conformity", one of the fundamental issues of this case, and the terms "ensure that domestic laws permit compliance" seems by no means accidental.

4.737 The European Communities also cites the US assertion that

> "[N]evertheless, the DSU time frames remain relevant to the Panel's analysis. This dispute does not involve the application of Sections 301-310 in the context of a specific WTO dispute. There are therefore no established facts as to when and how the Trade Representative made specific determinations, nor are there established facts as to when and how a panel and Appellate Body issued their reports. Assumptions must be made …".

4.738 The European Communities points out that in answering only 20 days ago to a question from the Panel, the United States expressed an opposite view:

> "In any event, for purposes of deciding this dispute, the time frames in the DSU are, in the end, not relevant, nor is the fact that these time frames have been exceeded in many cases".

4.739 The European Communities points out that the contradiction is further revealed where the United States added:

> "... It is remarkable enough that the EC believes it may establish its *prima facie* case based on adverse assumptions concerning the choices the USTR will actually make in a given case".

4.740 The European Communities argues that the issue here is that, according to the text of Sections 301-310, when the United States seeks redress of a violation of WTO obligations, its determinations and subsequent actions must be made and implemented even when the WTO proceedings on which such a determination or action could be based have not been completed. The mandatory deadlines in Sections 301-310 thus clearly violate Article 23 (and the related Articles 21 and 22) of the DSU.

4.741 The European Communities further recalls the US argument that

> "[T]here are no 'invalidating consequences' provided for in Sections 301-310 if the Trade Representative misses her deadlines. Nevertheless, like panels, the USTR takes her deadlines seriously".

4.742 In the view of the European Communities, while it does not discuss the seriousness of the USTR in this or other matters, this statement needs nevertheless to be compared with the apparently irreconcilable statement made by the United States to the effect that the could not exclude a judiciary control over the way the USTR implements Sections 301-310 in concrete cases.

4.743 The European Communities points out that the text of Sections 301-310, on its face, is clear in the sense that it imposes not only "serious" deadlines, but mandatory deadlines. In practice, the European Communities is still in the dark on what is the official and definitive interpretation of the US government of the text of Sections 301-310 dealing with deadlines, in particular Section 306 (b) (2) and 304 (a) (2).

4.744 The European Communities reiterates that a text of law that imposes WTO-inconsistent behaviours upon the executive by the use of express terms like "shall" and "Mandatory Action" within certain express time-limits defined as "the earlier of" or "no later than" falls within the description of mandatory legislation developed by the GATT 1947 panel practice.

4.745 **The United States responds** that the issue in this dispute is not whether certain actions under Sections 301-310 may be characterized as "mandatory". It is whether the law mandates violations of WTO rules. A law may mandate walks in the park, but unless walks in the park are WTO-inconsistent, this fact would not be relevant in a WTO dispute. The European Communities has the burden of adducing evidence and arguments that Sections 301-310 do, in fact, mandate a violation of WTO rules. The European Communities has claimed that Sections 301-310 mandate violations by requiring determinations that a violation has occurred prior to completion of dispute settlement proceedings and action without DSB authorization. The United States has rebutted those claims. If the European Communities believes that the mere use of the word "mandatory" and "discretionary" in Sections 301-310 violates WTO rules, it should explain why this is so. The United States could then respond.

(d) "Security and Predictability"

4.746 **The European Communities points out** that Professor Robert E. Hudec wrote:

> "Section 301 is an intricate maze of mandatory commands in one place and extremely wide loopholes in the other. One needs a wiring diagram to trace whether mandatory commands given in one part will actually reach their final target without passing through at least one discretionary exit point. Even with the aid of such a diagram, one cannot predict actual outcomes".[386]

4.747 The European Communities also points out that Professor John H. Jackson testified before the Senate Foreign Relations Committee as follows:

> "Although there are plausible ways to interpret the statutory provisions of regular Section 301 so as to give the President discretion to act consistently with the Uruguay Round dispute settlement rules, in a few cases, particularly in Section 301(a) (mandatory provision) the interpretations to do this are a bit strained ...".[387]

4.748 In the EC's view, if the United States' two foremost scholars on international trade law are unable to identify a sound legal avenue in Sections 301-310 permitting the USTR to act consistently with the DSU and the GATT 1994, nobody else can.

4.749 The European Communities notes that the legislative history of the 1988 Omnibus Trade and Competitiveness Act, which is at the origin in particular of the present version of Sections 301-310, demonstrates that the lack of a sound legal avenue was deliberate.

4.750 The European Communities states that the United States now attempts to benefit from the creation of this legal "maze" by claiming that it is for the European Communities to prove that it is not possible to interpret Sections 301-310 as permitting WTO-consistent implementation.

4.751 According to the European Communities, the fundamental objective of the WTO - namely to create security and predictability in international trade relations - could not be achieved if WTO Members were permitted to maintain domestic legislation that fails to provide the executive authorities with a sound legal basis for the measures required to implement their WTO obligations.

4.752 The European Communities is therefore of the view that, in a panel's examination of whether domestic legislation stipulates WTO-inconsistent determinations or action, the defendant should not be able to hide behind legal uncertainties arising from its own law, in particular if these uncertainties have been deliberately created. In accordance with the approach endorsed by the Appellate Body in *India - Patents (US)*, a panel should rule against the defendant if it concludes, on the basis of the evidence before it, that there is an objective (and thus reasonable) uncertainty on whether the domestic law permits WTO-consistent determinations or actions.

4.753 The European Communities considers that if the panel has reasonable doubts, so will economic operators planning their future trade. No legitimate interest would be protected if Members were entitled to retain law lacking such a basis. In fact, as the case before the Panel

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[386] Robert E. Hudec, Thinking About the New Section 301: Beyond Good and Evil, in:. Jagdish Bhagwati and Hugh T. Patrick, Editors, *Aggressive Unilateralism. America's 301 Trade Policy and the World Trading System* (Harvester Wheatsheaf 1990), page 122.

[387] Jackson Testimony, op. cit.

demonstrates, this would be an invitation to Members to restrict trade by exposing it deliberately to legal uncertainties.

4.754 **The United States argues** that the Statement of Administrative Action and accompanying legislation are the definitive congressional materials with respect to the WTO-consistency of Sections 301-310 before the adoption of the Uruguay Round Agreements Act by the Congress. Page 360 of the Statement of Administrative Action (US Exhibits 3 and 11) outlines the changes considered necessary to ensure compliance. In addition, the United States directs the Panel's attention to the testimony on this topic of Professor John Jackson when he appeared before the Senate Finance Committee.[388]

4.755 The United States points out that Professor Jackson concluded that, "There may need to be some alterations to some time limits, or transition measures, but the basic structure of 301 is not necessarily inconsistent with the Uruguay Round results". He also concluded that even when Section 301 is considered "in its current statutory form" (i.e. before the 1994 amendments), "the Executive appears to have the discretion to apply actions under Section 301 in a manner consistent with the proposed new rules of the Uruguay Round dispute settlement understanding".[389] Professor Jackson thus considered that with only minor changes, Section 301 would be clearly consistent with the WTO obligations of the United States. Moreover, his emphasis on the fact that the Executive had adequate discretion to apply Section 301 in a WTO-consistent manner reflects the fact that he took for granted that the reasoning applied in the *Superfund* line of cases would continue to apply under the WTO.

4.756 The United States notes that Professor Jackson believed that sufficient clarity could be provided to the interpretation of the statute through the inclusion of language in the Statement of Administrative Action.[390,391]

4.757 **The European Communities emphasises** that the US arguments are both new and incorrect, as can be seen already from the internal meeting report of 11 November 1993 by the US delegate contained in US Exhibit 23. This exhibit, in particular, shows that several Uruguay Round participants, including the European Communities, worked for a strengthening of Article XVI:4 of the WTO Agreement beyond the "natural obligation under int'l law" which finds its source in Articles 26 and 27 of the Vienna Convention on the Law of Treaties. This "natural obligation" is already incorporated into the WTO by virtue of Article 3.2, second sentence, of the DSU, which provides that "[t]he Members recognise that [the dispute settlement system] serves to … clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The US reply thus appears to be an attempt to go back on the achievements of the Uruguay Round.

4.758 **The United States rebuts** the EC argument that the principles of VCLT Article 26 have already been incorporated into the WTO through DSU Article 3.2, second sentence, and that Article XVI:4 therefore need not serve this purpose. However, DSU Article 3.2 provides for the dispute settlement system to clarify WTO provisions "in accordance with customary rules of interpretation of public international law". Article 26 is not such a customary rule of

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[388] *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Committee on Finance*, 103d Cong. 195 (1994) (statement of Professor John Jackson) (US Exhibit 24). The EC excerpts this testimony.

[389] Ibid. at 200.

[390] Ibid.

[391] See the parties' further arguments contained in Paragraphs 4.340-4.360 above.

interpretation. As the Appellate Body explained in *US – Gasoline* and *Japan – Alcoholic Beverages*, these rules of interpretation are reflected in VCLT Articles 31 and 32, which, indeed, are entitled "General rule of interpretation" and "Supplementary means of interpretation", respectively.[392] Inasmuch as Article 26 is not such a rule of interpretation, DSU Article 3.2, second sentence, may not be read to reference it. Thus, the EC argument fails to undermine the United States point that Article XVI:4 made the principles of VCLT Article 26 binding on all WTO Members, even those Members not parties to the Vienna Convention. It is worth noting that, during negotiations from 1991-1993, the United States negotiator explicitly brought to the attention of other delegations that the United States is not a party to the Vienna Convention.

(e) Article XVI:4 of WTO Agreement

4.759 In the case of Sections 301-310, **the European Communities is of the view** that these provisions are biased against the conformity with the requirements of Article 23 (and the related provisions under Articles 21 and 22) of the DSU and thus in breach of Article XVI:4 of the Marrakech Agreement. This view is supported by the fact that the United States has always given precedence to an Act of Congress in the event of a conflict with an international obligation that the United States had accepted, at least in situations where the acceptance of the international agreement was prior to the adoption of the Act of Congress.

4.760 In this regard, the European Communities refers to an official statement made by the US Attorney-General in a letter of 21 March 1988[393] to the PLO Permanent Observer accredited to the United Nations quoted in the Advisory Opinion of the International Court of Justice on the Headquarters Agreement of the United Nations:

> "I am aware of your position that requiring closure of the Palestine Liberation Organisation ('PLO') Observer Mission violates our obligations under the United Nations ('UN') Headquarters Agreement and, thus, international law. However, among a number of grounds in support of our action, the United States Supreme Court has held for more than a century that Congress has the authority to override treaties and, thus, international law for the purpose of domestic law. Here Congress has chosen, irrespective of international law, to ban the presence of all PLO offices in this country, including the presence of the PLO Observer Mission to the United Nations. In discharging my obligation to enforce the law, the only responsible course of action available to me is to respect and follow that decision".[394]

4.761 The European Communities indicates that its concerns in the present case are based on this description of the legal situation with regard to the relationship between US domestic law and the international obligations of the United States.[395]

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[392] The United States cites Appellate Body Report on *US – Gasoline,* op. cit., pp. 16-17; Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., pp. 10-12.

[393] The European Communities recalls that this is the same year in which the US Trade Act of 1974 was substantially amended by the Omnibus Trade and Competitiveness Act of 1988.

[394] International Court of Justice, Advisory Opinion of 26 April 1988 on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, ICJ-Reports 1988, p. 12, para. 27.

[395] The European Communities claims that this is the main reason why the European Communities is not reassured by the ruling of the US Supreme Court in *Missouri v. Holland,* 252 U.S.

4.762 The European Communities further states that the Uruguay Round Agreements Act 1994, which is the Act by which the United States Congress approved the Marrakech Agreement Establishing the World Trade Organisation, contains the following provisions in Section 102(a):

> "(1) UNITED STATES LAW TO PREVAIL IN CONFLICT. - No provision in any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.
>
> (2) CONSTRUCTION. - Nothing in this Act shall be construed - …
>
> > (B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974,
> >
> > unless specifically provided for in this Act".

4.763 In the view of the European Communities, it clearly follows from these provisions of the Uruguay Round Agreements Act 1994 that none of the provisions contained in any of the Uruguay Round Agreements can override any Act of the US Congress or affect any authority conferred under such an Act, whether adopted before or after the approval of the Uruguay Round Agreements by the US Congress, including in particular Section 301.[396]

4.764 The European Communities claims that on this basis, it is apparent that the approval of the Uruguay Round Agreements by the US Congress in 1994 is not sufficient to bring US domestic legislation, to the extent that it is inconsistent with US obligations under the covered agreements, into conformity with these agreements.

4.765 The European Communities maintains that rather, it is necessary that the United States amend the existing inconsistent legislation in order to fulfil the obligation placed on all WTO Members by the very explicit terms of Article XVI:4 of the WTO Agreement.

4.766 The European Communities points out that the very purpose of Article XVI:4 of the Marrakech Agreement resides in the creation of an obligation to provide certainty and

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416 (1920) in which Mr. Justice HOLMES, in delivering the opinion of the Court, made the following statement: "[B]y Article 6 [of the Tenth Amendment] treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed". The apparent discrepancy between this statement and the statement of the Attorney-General quoted in this paragraph can be explained by the consideration that, under US constitutional law, international treaties concluded in the forms foreseen by the Constitution generally take precedence only on earlier domestic legislation, but not on subsequent Acts of the US Congress. However, because of the specific provisions contained in Section 102 of the Uruguay Round Agreements Act 1994, this general rule does not apply in the case of the Marrakech Agreement Establishing the World Trade Organisation, as we explain in paragraph 52 of our present submission.

[396] Cf. D.W. Leebron, Implementation of the Uruguay Round Results in the United States, in: J.H. Jackson/A. Sykes, Implementing the Uruguay Round, Oxford 1997, p. 175 (at 213); L. Henkin, Foreign Affairs and the US Constitution, 2nd ed., Oxford 1996, p. 209.

predictability in multilateral trade relations by bringing domestic laws into conformity with the requirements under the relevant covered agreement. It is thus not sufficient just to abstain (or to promise to do so) from applying a piece of legislation that is inconsistent with the obligations under the relevant covered agreements since the mere existence of such a piece of legislation creates uncertainty. While not dealing explicitly with the requirements of Article XVI:4 of the Marrakech Agreement, the panels and the Appellate Body in the *India - Patents (US)* case have clearly indicated the need to create a sound and predictable basis for WTO-consistent behaviour of the administration in domestic law and to avoid a situation where domestic legislation destabilises the solidity of WTO rights and obligations.

4.767 **The United States responds** that an analysis of whether Sections 304(a)(1)(A) and 304(a)(2)(A) mandate a violation of DSU Article 23.2(a) must begin with an analysis of the text of DSU Article 23.2(a). Article 23.2(a) provides that Members shall:

> "not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding".

4.768 The United States claims that there can be no violation of Article 23.2(a) unless: (1) there is a determination to the effect that a violation has occurred; and (2) that determination has not been made through recourse to DSU rules and procedures, or is not consistent with adopted panel or Appellate Body findings or an arbitral award. In the absence of a specific determination, the mere existence of legislation may be found inconsistent with Article 23.2(a) only if that legislation mandates a determination which does not meet the requirements of Article 23.2(a).[397] If that legislation may reasonably be read to provide authorities with discretion to comply with DSU Article 23.2(a), then that legislation does not mandate a determination inconsistent with Article 23.2(a).[398] On the other hand, nothing in the language of Article 23.2(a) or its context supports the EC's claim that the "design, structure and architecture" of legislation must be examined to determine whether it is "manifestly intended to encourage violations of WTO law or is otherwise biased against WTO-consistent action".

4.769 **The European Communities recalls** the US claim that the fact that the European Communities in a separate panel procedure[399] affirmed that "implementing measures must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures" should be in some ways inconsistent with the EC's stance in this case aimed at finding that Sections 301-310 structure, design and architecture by mandating actions of the US executive authorities that are incompatible with the US WTO obligations, are biased against compliance with US' WTO obligations.

4.770 The European Communities considers that the core of the US argument is that "[o]ne may not assume that authorities will fail to implement their international obligations in good faith".

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[397] Panel Report on *US – Superfund*, op. cit., para. 5.2.9.

[398] Panel Report on *US – Tobacco*, op. cit., para. 123.

[399] *European Communities - Regime for Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 by the European Communities*, WT/DS27/RW/EC.

4.771 The European Communities points out that while this last US statement is certainly correct, and it agrees with it, it is however not logically linked with the previous US affirmation (the European Communities is inconsistent) and, more importantly, it does not refer to the factual situation before this Panel.

4.772 The European Communities claims that in the specific case of Sections 301-310, the presumption of compliance is not applicable for the simple reason that their text, design structure and architecture are, on their face, clearly biased against compliance.

4.773 In the view of the European Communities, it would therefore be extraordinary to claim, as the United States seems to imply, that a presumption (*iuris tantum*, i.e. rebuttable) of compliance would shield a domestic legislation which on its face defeats such a presumption. Legally, this would mean transforming a presumption *iuris tantum* in a presumption *iuris et de jure* (i.e. non-rebuttable), which is however not foreseen under the WTO Agreements.

4.774 The European Communities then argues that the burden of demonstrating that the text, design, structure and architecture of Sections 301-310 are not what they appear to be from the text published in the US statute books still rests with the United States. Until such evidence is submitted, the onus remains on the United States.

4.775 In response to the Panel's question as to how the United States has dealt with the obligation under Article XVI:4 to review existing legislation and bring it into conformity with the WTO Agreement, if necessary, in respect of Sections 301-310, **the United States responds** that as explained in greater detail in US Exhibits 3 and 11, it dealt with this obligation with respect to Sections 301-310 by adjusting time frames for disputes involving subsidies, the TRIPs Agreement and government procurement to conform with the standard time frames in the DSU.

4.776 The United States also refers to US Exhibit 24, which includes the 1994 testimony of Professor John Jackson cited by the European Communities. In the paragraph immediately prior to that which the European Communities quoted, Professor Jackson states:

> "My basic judgment is that very few statutory changes will be needed to U.S. Section 301, at least the 'regular 301' (compared to Special 301 and other similar statutory provisions, such as those on telecommunications.) *There may need to be some alterations to some time limits, or transition measures, but the basic structure of 301 is not necessarily inconsistent with the Uruguay Round results.* Indeed, I continue to have the opinion that Section 301 appropriately used in its *current* statutory form, is a constructive measure for U.S. trade policy, and for world trade policy. Section 301 calls for cases presented under the 301 procedural framework to be taken to the international dispute settlement process. *Thus the Executive appears to have the discretion to apply actions under Section 301 in a manner consistent with the proposed new rules of the Uruguay Round dispute settlement understanding*".[400]

4.777 The United States explains that with respect to how the Administration more generally applied Article XVI:4 by reviewing existing legislation and bringing it into conformity, the United States notes that precisely such a review was necessary to prepare the Statement of Administrative Action. As described on page 1 of that document (Exhibit 11),

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[400] Jackson Testimony, op. cit., at 200.

> "This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements". (emphasis added.)

4.778 In response to the Panel's question as to whether considering "security and predictability" from a factual dimension, a public announcement in legislation mandating the making of a determination even if WTO proceedings have not yet been completed – albeit not necessarily a determination of violation – does not affect the assurance given to other Members that no determinations of violation can be made before the completion of WTO procedures? Does the very discretion explicitly provided for and publicly announced - allowing the Member to decide either way - not constitute a threat to security and predictability, the United States comments that there is no independent obligation to provide "security and predictability" apart from that provided by compliance with substantive WTO obligations and DSU rules and procedures. A finding that such an obligation exists would run counter to the entire line of reasoning underlying the mandatory/discretionary distinction under which the trading system now operates. However, even if there were such an obligation, from a factual standpoint the circumstances posited in the question most certainly do not threaten "security and predictability".

4.779 In the view of the United States, there is nothing inherently threatening to "security and predictability" in the making of determinations – even determinations that a violation has occurred – or in suspending concessions. If there were, then the only conclusion to be drawn would be that the DSU itself threatens security and predictability, since it provides for findings of violations and for the suspension of concessions. Each and every WTO Member knows that it is possible that another Member may obtain a DSB ruling that a WTO violation has occurred, may make a determination consistent with that ruling, and may suspend concessions in response – and each such Member has agreed to accept this possibility by virtue of its having become a WTO Member. It should therefore come as no surprise when a Member provides in its laws for the possibility of making determinations or suspending concessions. This possibility cannot be considered a threat to security and predictability.

4.780 The United States points out that Members were willing to accept this possibility because they also accepted an obligation to make such determinations of violations and to suspend concessions in accordance with DSU rules and procedures. That binding international obligation is no different in nature than that assumed by the Members with respect to any other WTO obligation. The willingness of WTO Members to enter into these obligations provides the only assurance that any WTO Member has that its fellow Members will not deny their WTO rights. Every WTO Member has the power, and most of their governments have the domestic legal authority, to violate their international obligations. However, the fact that these Members have accepted WTO obligations – and the fact that effective dispute settlement procedures exist – provides assurances that they will respect other Members' rights. The dispute settlement system itself helps to provide security and predictability, as DSU Article 3.2 states.

4.781 The United States notes that these are the only assurances. In fact, the European Communities concedes that there is no independent WTO obligation to limit discretion in

domestic law so as to preclude the possibility of WTO-inconsistent action.[401] According to the European Communities, such an obligation is not found in Article XVI:4.[402] It is an error to assume that the "public warning" that authorities may decide either way on the issue of whether agreement rights have been denied creates any special threat or insecurity beyond that present when authorities have broad, undefined authority to violate their obligations. To the extent a law provides for a determination by a given date – a date consistent with DSU guidelines – but does *not* require the *only* determination proscribed by the DSU (that a violation has occurred), the possibility that the determination will breach that Member's obligations under Article 23.2(a) is no greater than if the law did not exist at all. In either case, WTO Members must rely on the good faith of the Member in question to exercise its discretion in accordance with its binding, international obligations. Good faith, and the security and predictability provided by a dispute settlement system that rules on the basis of law, and which may not be undermined by a losing party, provide all the assurances WTO Members have, and all that they agreed they would have.

4.782 The United States claims that nevertheless, it has provided additional assurances in US law, in the form of the Section 304(a)(1) requirement that determinations that agreement rights have been denied must be based on the results of dispute settlement proceedings, as interpreted in light of the authoritative interpretation of the statute provided in the Statement of Administrative Action at pages 365-66.

4.783 The United States notes that if it were appropriate to examine whether "assurances" have been undermined by a Member because of the possibility of future breaches, it would be impossible to escape the conclusion that a broad, non-specific discretionary authority which has been repeatedly exercised to violate another Member's rights creates a greater possibility of further violations than a statute which explicitly provides discretionary authority to make determinations only one of which might violate another Member's rights,[403] but which has never been used to make that determination in violation of DSU or GATT rules. However, it is not appropriate to examine the likelihood of future breach. It may not be assumed that in the future, the Member in question will act in bad faith. If it may be assumed that a Member will exercise its discretion in bad faith, then, indeed, there would be a threat to the security and predictability of the multilateral trading system, because the rules set forth in the DSU and the other covered agreements will have been reduced to a popularity contest on the question of who can be trusted.

4.784 The United States further argues that because it is the dispute settlement system which provides security and predictability, it is no exaggeration to conclude that a true threat to security and predictability would come from a legal analysis which departs from the text agreed to by the Members in favor of creation of new obligations not found in the text, or which abandons a consistent, logical analysis applied for years before the WTO Agreement entered into affect, and which Members assumed would remain in effect. On this point – the continued applicability of the *Superfund* reasoning – and on the issue of whether Article XVI:4 changed this, the United States wishes to quote the views expressed by Pieter-Jan Kuyper, the legal adviser to the EC's Uruguay Round negotiators, and by Frieder Roessler, the Director of the

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[401] The United States notes the EC statement that "it would be inappropriate to interpret Article XVI:4 of the WTO Agreement so extensively as to require WTO Members to include specific language in their domestic law precluding WTO-inconsistent action".

[402] Ibid.

[403] The United States also notes that then only if the timing of the proceedings does not conform with DSU time frames and if the Member makes specific choices.

Legal Affairs Division of the GATT Secretariat, in a volume reproducing papers from a conference held in October 1994 on the WTO Agreement and dispute settlement. Mr. Roessler stated:

> "The wording of [Article XVI:4] could be interpreted to mean either that domestic law must prescribe that the executive authority act in conformity with WTO law or that domestic law must permit that authority to act in conformity with WTO law. There are similar provisions in the Tokyo Round Agreements on Anti-dumping and Subsidies[404], which have generally been interpreted as requiring the parties to these Agreements to adopt laws, regulations and procedures *that permit* them to act in conformity with their obligations under these Agreements. The main function of these provisions was to permit the committees established under these Agreements to review the law of the parties and not merely the practices followed under that law. Several GATT 1947 panels concluded that legislation mandatorily requiring the executive authority of a contracting party to act inconsistently with the GATT may be found to be inconsistent with that contracting party's obligations under the GATT, whether or not an occasion for its actual application has yet arisen, but that legislation merely giving the executive authorities the power to act inconsistently with the GATT is not, by itself, inconsistent with the GATT.[405] Given this background, *one can expect that the WTO Agreement provision stipulating consistency between domestic law and WTO law will be interpreted to establish the obligation for each WTO Member to ensure that the domestic law is such as to permit the executive authority to act in conformity with the obligations under the WTO Agreement*".[406]

4.785 The United States points out that likewise, Mr. Kuyper in his paper stated that Article XVI:4

> "may turn out to be a very onerous obligation, requiring full conformity of all Community and national laws . . . with the precise provisions of the WTO's annexes. *It may also have hardly any consequences at all, compared to the present situation, if it is interpreted in the light of standing panel case law which determines that a law or regulation is contrary to the GATT only if it is mandatory and as such contrary to GATT terms, but that such is not the case, if the text of the law or regulation permits a GATT conform* [sic] *application of the text.*[407] If conformity to WTO obligations is interpreted in this way - which would not be unreasonable in the light of the succession of the WTO to the

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[404] (footnote in original) Article 16(6) of the Anti-Dumping Code and Article 19(5) of the Agreement on Subsidies and Countervailing Duties.

[405] (footnote in original) See BISD, 39th Suppl., p.197.

[406] Frieder Roessler, *The Agreement Establishing the World Trade Organization, in* The Uruguay Round Results, A European Lawyers' Perspective 67, 80 (Jacques H.J. Bourgeois, Frédérique Berrod & Eric Gippini Fournier eds. 1995) (emphasis added).

[407] (citation in original) See *US - Taxes on Petroleum («Superfund»),* BISD 34S/134, para. 5.2.9. and *EEC - Regulation on imports of parts and components,* BISD 37S/132, para. 5.25-26. The United States notes that no reference is made to the Protocol of Provisional Application, or to cases citing the Protocol of Provisional Application.

> «acquis gattien»[408] – it should be clear that the added value of Article XVI:4 is rather limited".[409]

4.786 The United States further notes that Mr. Kuyper stated in a footnote that the conclusion that the value of Article XVI:4 is "rather limited" is his own view.[410] Mr. Kuyper went on to note that if a more expansive view of Article XVI:4 were adopted, "it must be clear that the European Communities and the Member States have an obligation to maintain their laws and regulations in constant conformity with the terms of the WTO Agreement and its annexes. That is no simple matter".[411] He explained that, in order to prevent WTO panel condemnation, the Commission would frequently be required to aggressively step in and quickly enforce WTO rules domestically through the procedures of Article 169 of the Treaty of Rome, which had been little used with a view to enforcing international treaties.[412] This would mean a fundamental change in the balance between the Community and the Member States.

4.787 The United States then argues that the EC's own legal adviser, writing shortly after the conclusion of the negotiations, took a position contradicting that presented by the European Communities in the context of this dispute, and expressed his view that Article XVI:4 did not in any way change the operation of the principle that laws are WTO-consistent if they provide for discretion to act in a WTO-consistent manner. To the contrary, he, like the United States here, emphasized the great disruption to security and predictability were a different interpretation adopted. He, like the United States, fully expected that the principle in *Superfund* would continue to be applied.

4.788 The United States further points out that Professor Jackson's testimony to Congress makes clear that he also took for granted the continued relevance and applicability of the principle that legislation would not be WTO inconsistent if it provided adequate discretion to act in a WTO-consistent manner. Thus, he emphasized, "the Executive appears to have the discretion to apply actions under Section 301 in a manner consistent with the proposed new rules of the Uruguay Round dispute settlement understanding".[413]

4.789 The United States goes on to state that Professor Jackson's testimony also highlights the fact that, whatever the statute may provide regarding determinations and their timing, additional assurances are provided in US law to counter any insecurities other Members may feel. Referring to the statute before it was amended, he stated:

> "I continue to have the opinion that Section 301 appropriately used in its *current* statutory form, is a constructive measure for U.S. trade policy, and for world trade policy. Section 301 calls for cases presented under the 301 procedural framework to be taken to the international dispute settlement process".[414]

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[408] (citation in original) See Article XVI:1 of the WTO Agreement.

[409] Pieter-Jan Kuyper, *The New WTO Dispute Settlement System: The Impact on the Community*, *in* The Uruguay Round Results, A European Lawyers' Perspective 87, 110 (Jacques H.J. Bourgeois, Frédérique Berrod & Eric Gippini Fournier eds. 1995)(emphasis added).

[410] Ibid. at footnote 46.

[411] Ibid., at 110.

[412] Ibid., at 110-11.

[413] Jackson Testimony, op. cit., at 200.

[414] Ibid. (emphasis added)

4.790 The United States adds that US law also includes assurances in the form of the Section 304(a)(1) requirement that determinations that agreement rights have been denied be based on DSB-adopted panel and Appellate Body findings. Thus, even though the WTO Agreement requires Members to provide no assurances beyond the fact of their good faith and the certainty of effective dispute settlement procedures, the United States has, in fact, included in its laws further legal assurances. The notion that the European Communities or any other Member nevertheless feels "threatened" in the face of these assurances is absurd, and testifies only to a desire to attack a statute not for what it is or commands, but for specific instances of how discretion was exercised in the past – instances not within the Panel's terms of reference, and all of which involved the parallel use of multilateral dispute settlement rules when a US right under a multilateral agreement was at stake.

3. Section 306

(a) Overview

4.791 **The European Communities claims** that Section 306(a) requires the USTR to monitor the compliance of WTO Members with the recommendations of the DSB. Section 306(b)(2) regulates within which time limits the USTR must determine whether there has been compliance:

> "If ... the Trade Representative considers that the foreign country has failed to implement it [a recommendation made pursuant to dispute settlement proceedings under the World Trade Organisation], the Trade Representative shall [determine what further action to take under Section 301(a)] ... no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph [sic] 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ...".

4.792 The European Communities considers that the determination of the USTR that the DSB recommendations were not implemented implies a determination that the WTO Member concerned violates its obligations under a WTO agreement or that it nullifies or impairs benefits accruing to the United States under such an agreement. If there is a dispute on the question of implementation, the United States must therefore take recourse to the DSU to settle the issue, as stipulated in Article 23.1 and 2(a). Article 21.5 establishes a specific obligatory procedure for disputes on the implementation of DSB ruling and recommendations:

> "Where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such disputes shall be decided through recourse to these procedures, including wherever possible resort to the original panel. The Panel shall circulate its report within 90 days after the date of the referral of the matter to it".

4.793 The European Communities further argues that the 30-day limit set out in Section 306(b)(2) makes it impossible for the United States to await the results of such a proceeding before making the determination that the Member concerned has failed to comply with DSB rulings or recommendations.

4.794 The European Communities reiterates that as a result of the Uruguay Round, the United States has undertaken an unqualified and unconditional international obligation not to revert to unilateral determinations and actions. By imposing an obligation upon USTR to determine in

all cases within 30 days from the end of the reasonable period of time that the Member concerned has failed to comply with DSB rulings or recommendations without awaiting the conclusion of the relevant DS procedures, the United States is forced by its own law to act inconsistently with Article 23 of the DSU.

4.795 **In response, the United States points out** that the European Communities argues that Section 306(b) also violates Article 23 because the language of Section 306(b) "implies a determination that the WTO Member concerned violates its obligations under a WTO agreement". The EC's use of the term "implies" highlights the fact that it cannot credibly claim that Section 306(b) mandates such a determination. In its brief discussion of this issue, the European Communities ignores the language and purpose of Section 306(b), as well as the findings of the Article 22.6 arbitrators in the *Bananas* dispute rejecting similar EC claims.

4.796 The United States also stresses that Section 306 provides a procedure in US law by which the United States invokes its right to take action in accordance with DSU Article 22, that is, to take action when a US trading partner fails to implement DSB recommendations. Here again, the time frames in the statute conform with those of the DSU.

4.797 The United States further challenges the EC assumption that the USTR must always conclude that another Member has failed to implement DSB rulings and recommendations. Again, Article 23.2(a) only prohibits certain violation determinations. It does not, for example, preclude a determination that there has been no violation, or a determination consisting of a description of a case's procedural status. Thus, even if the European Communities were justified in "implying" a determination in Section 306(b), the European Communities would have to prove that Section 306 requires the USTR to determine that a violation has occurred. However, the European Communities simply skips over this step in its argument. The European Communities does not even attempt to meet its burden on this point, and, indeed, there is no point in its trying. Nothing in Section 306(b) prevents the USTR from considering that another Member has fully implemented DSB rulings and recommendations and from taking no action at all. This in and of itself undermines the EC's argument that Section 306 mandates a violation determination not meeting Article 23.2(a) requirements.

4.798 The United States contends that Section 306(b) does not command the authorities of the United States of America to violate DSU Article 23.2(a). The European Communities has asked the Panel to find that Section 306(b)

> "is inconsistent with Article 23.2(b) [sic] of the DSU because it requires the USTR to determine *whether* a recommendation of the DSB has been implemented irrespective of whether any proceedings on this issue under Article 21.5 of the DSU have been completed". (emphasis added)

Again, the EC's very use of the word "whether" demonstrates that the European Communities has asked the wrong question. Section 306(b) must first command a determination of breach before the other requirements of Article 23.2(a) become relevant. It does not.

(b) What constitutes "determination" – Relationship between DSU Articles 21.5 and 22

4.799 The United States explains that following DSB adoption of panel or Appellate Body findings that US agreement rights have been denied, the USTR makes her determination of this result pursuant to Section 304(a)(1). Under DSB rules, the defending party must state its intentions with respect to implementation of DSB recommendations and rulings at a DSB

meeting held within 30 days of adoption. If that party states its intention to implement the DSB's recommendations and rulings, the USTR treats this statement as a "satisfactory measure" pursuant to Section 301(a)(2)(B)(i),[415] justifying termination of the Section 302 investigation.[416]

4.800 The United States goes on to state that during the reasonable period of time for implementation provided for in DSU Article 21.3, the USTR monitors implementation pursuant to Section 306(a). Section 306(b) provides for situations in which the USTR believes implementation has not occurred by the conclusion of the reasonable period of time. It states:

> "(1) IN GENERAL.–If, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section 301(a). For purposes of section 301, any such determination shall be treated as a determination made under section 304(a)(1).
>
> (2) WTO DISPUTE SETTLEMENT RECOMMENDATIONS.–If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ...".[417]

4.801 The United States maintains that contrary to the EC's claims, the language of Section 306(b) does not "imply" – let alone state – that the USTR is required to make a determination in violation of Article 23. Section 306(b) sets forth steps the USTR should take to assert US rights under DSU Article 22 when she considers that there has not been full implementation by another WTO Member. The USTR must make this judgment – which is not a "determination" – because the deadlines provided for in DSU Article 22 require that she must.[418]

4.802 The United States notes that under the procedures set forth in DSU Articles 22.2, 22.6 and 22.7, a complaining party wishing to avail itself of the negative-consensus rule must propose to the DSB how it intends to suspend concessions within 30 days of the expiration of the reasonable period of time. Section 306(b) provides the US analogue for this process, requiring the USTR to determine what action she proposes to take within that 30-day period.

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[415] Section 301(a)(2)(B)(ii), 19 U.S.C. § 2411(a)(2)(B)(ii).

[416] The United States cites, for example, Determinations Under Section 304 of the Trade Act of 1974 With Respect to Certain Canadian Practices Affecting Periodicals, 62 Fed. Reg. 50651 (1997) (US Exhibit 7).

[417] Section 306(b), 19 U.S.C. § 2416(b).

[418] The United States points out that Section 306(b) does not call for the Trade Representative to make a definitive or formal determination that the trading partner has, in fact, failed to implement DSB recommendations, nor does it prevent the Trade Representative from either making such a determination, or implementing such action, contingent upon DSB authorization under either Article 22.2, 22.6 or 22.7. Again, the European Communities merely assumes, without demonstrating, that statutory language reflecting broad discretion in fact mandates WTO-inconsistent action.

4.803 The United States considers that DSU Article 22.2 provides that if a Member fails to comply with DSB recommendations by the conclusion of the reasonable period of time determined pursuant to Article 21.3, the Member shall, if requested, enter into compensation negotiations with the complaining party. Where an agreement on compensation has not been reached within 20 days after the end of the reasonable period of time, the complaining party may request DSB authorization to suspend the application of concessions or other obligations to the Member concerned.[419] Under DSU Article 22.6, the DSB is obligated to grant this request in the absence of a negative consensus within 30 days of expiration of the reasonable period of time, unless the Member concerned requests arbitration with respect to the level or nature of suspension proposed. In that case, the matter is referred to arbitration for a decision which must be completed within 60 days of the expiration of the reasonable period of time.[420] If the complaining party then requests authorization to suspend concessions in accordance with the arbitrator's decision, the DSB is, under Article 22.7, obligated to grant this request in the absence of a negative consensus.[421]

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[419] DSU Article 22.2 provides:

"If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements".

[420] DSU Article 22.6 provides:

"When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

[421] DSU Article 22.7 provides:

"The arbitrator [footnote omitted] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek

4.804 The United States then argues that Articles 22.2 and 22.6 presuppose that, by the thirtieth day following the expiration of the reasonable period of time, a complaining party wishing to suspend concessions will already have indicated how it intends to do so. Failing this, the DSB would not be in a position to authorize the action by day 30, nor would the Member concerned be in a position to evaluate the proposal to enable it to challenge the level or nature of proposed suspension. Were the complaining party to wait until after day 30 to propose suspension of concessions, it would lose the benefit of automatic DSB authorization for the suspension (subject to the negative-consensus rule) provided for in Articles 22.6 and 22.7.

4.805 The United States concludes that a determination of proposed action under Section 306(b) is not only permitted under the dispute settlement framework contemplated in the DSU, it is affirmatively required by that framework in cases where a Member wishes to exercise its right to suspend concessions.

4.806 With respect to the EC claim that such a determination "implies" that the USTR is also determining that another Member has violated US agreement rights, the United States first notes that there is no such implication in Section 306(b); nor, if there were, could an implication alone serve as the basis for finding that Section 306(b) violates DSU Article 23.2(a). The European Communities has the burden of demonstrating that Section 306(b) mandates a determination in violation of Article 23.2(a), and that the language of Section 306(b) cannot be interpreted in a manner which does not "imply" such a determination.[422] Section 306(b) only requires a determination of proposed action and, as the United States has seen, this is entirely consistent with the framework set forth in DSU Articles 22.2, 22.6 and 22.7.

4.807 The United States points out that WTO Members wishing to exercise their WTO rights must come to some judgment as to whether other Members are acting consistently with their obligations. If, for purposes of Article 23.2(a), "determinations" of agreement violations may be "implied" from other actions or determinations, the United States must conclude that the EC's decision to bring this case "implies" that the European Communities has, contrary to Article 23.2(a), made a determination that the United States has violated the DSU and the GATT 1994. Likewise, when the European Communities decries "illegal" US actions in the press,[423] may the United States then "imply" that the European Communities has made such a determination? Presumably not, but how then would one distinguish among various "determinations" which may be "implied" from various governmental statements and actions, including actions taken in connection with multilateral dispute settlement proceedings?

4.808 The United States considers that Article 23 is intended to ensure that Members use multilateral dispute settlement rules when they consider that their agreement rights have been violated. The broad interpretation of "determination" which the European Communities proposes is both unnecessary to, and potentially at odds with, the object and purpose of

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a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request".

[422] Panel Report on *US – Tobacco*, op. cit., para. 123.

[423] The United States cites, e.g. "U.S. threatens tariffs on European luxury items", *The Associated Press,* 22 December 1998, PM cycle (in which Sir Leon Brittan states, with respect to section 301: "It is time to take action against the pernicious and *unlawful* effect of this wholly unilateral legislation". (emphasis added)).

Article 23. Obviously, Members will only undertake multilateral dispute settlement proceedings – including a request for suspension of concessions – if they consider that another Member is not meeting its obligations. Section 306(b) says no more than this. If the USTR "considers" that another Member has failed to implement DSB recommendations, the USTR must determine a course of action, as indeed she must in order to have the benefit of the negative-consensus rule. To read into this a "determination" of violation for purposes of Article 23.2(a) would be to preclude, not encourage, resort to multilateral dispute settlement rules.

4.809 The United States alleges that the EC's assumptions with respect to Section 306(b) are, if possible, even more extreme than those relating to Section 304. The European Communities assumes that it may "imply" from the language of Section 306 a violation determination not meeting the requirements of DSU Article 23.2(a). The EC's use of the word "implies" speaks volumes about its inability to meet its burden of establishing that Section 306 mandates such a determination. Section 306 neither mandates, nor may it be said to "imply", a determination that another WTO Member has violated its WTO obligations, and the European Communities may not simply assume that it does.

4.810 The United States explains that under Section 306, the USTR proposes what action she will take when she "considers" that another WTO Member has failed to implement DSB rulings and recommendations. The USTR must propose this action within 30 days of the expiration of the reasonable period of time in order to allow the United States to request and obtain authorization to suspend concessions pursuant to DSU Articles 22.2 and 22.6.

4.811 The United States argues that the US statute's use of the term "considers" makes clear that no formal determination is involved. Indeed, the term "considers" is used in various provisions of the DSU itself, such as Articles 3.3, 4.1, 4.7, 5.4 and 10.4. As in Section 306, these provisions lay out the steps a party may take to assert its WTO rights when it believes these rights have been denied. It is axiomatic that Members invoking dispute settlement procedures are doing so based on a belief that their rights have been denied. The DSU, like Section 306, reflects this concept through use of the term "considers". For example, Article 3.3 provides that "prompt settlement of situations in which a Member considers that any benefits accruing to it . . . 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". Likewise, Article 10.4 provides that a third party to a dispute may have recourse to normal dispute settlement procedures if it "considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement".

4.812 The United States considers that it is difficult to see the logic in concluding that a Member has disregarded DSU rules and procedures based on the very fact that the Member believes it is necessary to invoke those rules and procedures. Yet that is the EC's conclusion. It flies in the face of the very purpose of Article 23.2(a), which is to encourage multilateral determinations. The Panel should therefore reject the EC's claim that the USTR is making an "implied" violation determination when she considers that another Member has not complied with DSB rulings and recommendations.

4.813 The United States reiterates that, in order to meet its burden, the European Communities must demonstrate that Section 306(b) precludes the possibility of US action consistent with its WTO obligations, and that the language of Section 306(b) cannot be read to permit such WTO-consistent action. However, even if one were to accept the EC argument that the USTR makes an "implied" determination for purposes of Article 23.2(a) when she considers that another

Member has failed to implement DSB recommendations and determines a course of action, nothing in Section 306(b) mandates that the USTR must actually "consider" non-implementation to have occurred. Section 306(b) establishes no criteria requiring the Trade Representative to "consider" that non-implementation has occurred for a given set of circumstances. As with her determination under Section 304(a)(1), the USTR has broad discretion in making this decision, and the fact that she may choose not to implement any action in and of itself establishes that Section 306 does not mandate WTO-inconsistent action.

4.814 In the view of the United States, based on its invalid assumptions that Section 306(b) both "implies" a determination for Article 23.2(a) purposes and also requires that the determination always be affirmative, the European Communities then argues that the 30-day time frame in Section 306(b) for this alleged determination precludes the USTR from basing that determination on Article 21.5 panel findings, since Article 21.5 proceedings may require up to 90 days.[424] The European Communities claims that WTO Members are required to pursue a panel under Article 21.5 whenever implementation is at issue. This claim is not correct, as is abundantly clear from the discussions in the ongoing DSU Review, where members are currently struggling with proposals to amend the DSU on this very point.[425] However, even if, for the sake of argument, one were to accept the EC's claim, the 30-day time frame in Section 306(b) would not preclude consideration of Article 21.5 panel findings and making a determination on that basis.

4.815 The United States points out that the European Communities argues that Article 21.5 proceedings are obligatory before a complaining party may request, or the DSB may authorize, suspension of concessions. However, in authorizing US retaliation in the *Bananas* dispute based only on the decision of Article 22.6 arbitrators, the DSB implicitly rejected this argument. Moreover, the Article 22.6 arbitrators themselves explicitly refused to accept the EC position.[426]

4.816 The United States argues that the arbitrators noted the US view that were it not possible to request suspension of concessions within 30 days of expiration of the reasonable period of time, the complaining party would lose the benefit of the negative-consensus rule.[427] Moreover, to the extent a Member believed that it had complied with DSB recommendations, it could request arbitration pursuant to Article 22.6. The arbitrators would address the issue of compliance in determining the extent of nullification or impairment, a prerequisite to fulfilling their mandate under Article 22.7 to determine whether the level of suspension is equivalent to the level of nullification or impairment.[428] The arbitrators also noted that they could address the

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[424] Article 21.5 provides:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, 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".

[425] See Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members – Rev. 3 (12 December 1998).

[426] Arbitration under Article 22.6 of the DSU in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, para. 4.11 (9 April 1999).

[427] Ibid.

[428] Ibid.

issue of nullification and impairment for this purpose even without making a formal determination of nullification or impairment, and emphasized that, "the goal of DSU Article 23 – multilateral determination – is achieved if the issue of nullification and impairment is considered in an arbitration before the original panel".[429]

4.817 The United States claims that the EC's claim that Section 306(b) violates DSU Article 23.2(a) rests on a series of unsupported assumptions – that Section 306(b) "implies" a determination of a violation within the meaning of Article 23.2(a), that the implied Section 306(b) determination would always be affirmative and that WTO Members must always resort to Article 21.5 proceedings before requesting authorization to suspend concessions. These assumptions in no way meet the EC's burden of demonstrating that Section 306(b) mandates action inconsistent with DSU Article 23.2(a).

4.818 The United States challenges that EC assumption that a Member wishing to suspend concessions under DSU Article 22 must first seek a determination under DSU Article 21.5. According to the European Communities, because the USTR must make her "implied" violation determination under Section 306(b) within 30 days of the expiration of the reasonable period of time, it is possible this might precede the conclusion of the 90-day period provided for in Article 21.5. Therefore, the European Communities contends that the USTR's determination would not be authorized under multilateral procedures.

4.819 The United States argues that in light of the other flawed assumptions which the European Communities makes with respect to "implied" violation determinations and whether they must, under Section 306, be affirmative, the Panel need not and should not reach the issue of whether a Member must first invoke Article 21.5 procedures before seeking authorization to suspend concessions under Article 22. The absence of such a requirement is precisely what has prompted intensified negotiations in the DSB during the past five months. While that issue is a proper subject for negotiations to change the DSU, for that reason it is not capable of resolution by a panel. Nevertheless, the United States notes that the arbitrators in the *Bananas* dispute did not accept the EC's arguments. Indeed, Article 22 includes no reference whatsoever to Article 21.5, nor does Article 23.2(c). The time frames in Article 22 for seeking authorization to suspend concessions are measured exclusively against the expiration of the reasonable period of time.

4.820 The United States points out that Article 22.6 explicitly requires the DSB to grant a request to authorize the suspension of concessions within 30 days of the expiration of the reasonable period of time unless there is a consensus to the contrary or a challenge to the level of suspension proposed. The 30 day time frame in Section 306 is thus not only consistent with Article 22, it is required by it. If the United States or another Member were forced to wait until after day 30 to propose and seek authorization to retaliate, it would lose the benefit of the negative consensus rule. One of the principal tools in the DSU to ensure compliance with DSB rulings would be undermined.

4.821 **The European Communities notes** that the European Communities and the United States differ on the interpretation of Articles 21.5 and 22 of the DSU.

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[429] Ibid., paras. 4.12, 4.14. The United States notes that these conclusions shed further light on the proper interpretation of "determination" for purposes of Article 23.2(a), since they emphasise that, in pursuing a multilateral determination of one's agreement rights, it is necessary to make decisions regarding these rights.

4.822 As to this timeframe, the European Communities notes that, according to Article 22.6 of the DSU, the arbitration on the level or nature of the suspension of concession or obligations

> "shall be completed within 60 days after the date of the expiry of the reasonable period of time".

4.823 The European Communities considers that a request to suspend concessions must be consistent with the decision of the arbitrator and must be submitted at least ten days before the meeting of the DSB. Thus, even if the arbitrator's decision is made within the 60-day period, 70 days can elapse between the expiry of the implementation period and the DSB authorization.[430] USTR is nevertheless required under Section 305 to determine unilaterally the level and the nature of the suspension of concessions or other obligations within 60 days. The European Communities notes that the United States has not argued that the EC's assumptions in respect of the 70-day period are incorrect.

4.824 The European Communities points out that the United States contests the EC's claim that WTO Members are required to request the establishment of a Panel under Article 21.5 whenever implementation is at issue. The United States affirms that:

> "This claim is not correct, as is abundantly clear from the discussions in the ongoing DSU Review, where members are currently struggling with proposals to amend the DSU on this very point. … [I]n authorizing US retaliation in the *Bananas* dispute based only on the decision of Article 22.6 arbitrators, the DSB implicitly rejected this argument. Moreover, the Article 22.6 arbitrators themselves explicitly refused to accept the EC position …".

4.825 The European Communities addresses this issue in the framework of the answer to this question since it is related to the issue of the duration of the dispute settlement procedures and the failure of Sections 301-310 to conform to US WTO obligations under the DSU.

4.826 The European Communities firstly contends that it is incorrect to state that the DSB implicitly rejected the EC argument while authorizing the suspension of concessions in the "Banana III" procedure. The DSB authorized by reversed consensus the decision of the Arbitrators concerning the level of suspension in equivalence with the level of nullification or impairment. That was the task of the DSB under Article 22.7 of the DSU, which constitutes the mirror image of the terms of reference of the arbitrator Panel under the same provision. The DSB never adopted the arbitrator's decision,[431] nor explicitly or implicitly warranted its content, with the exception of the authorization of the level of suspension of concessions. In fact, most Members participating in the DSB meeting on 19 April 1999 considered that, when addressing substantive arguments concerning the consistency of the measures adopted by the European Communities to comply with the recommendations and rulings of the DSB, the arbitrator Panel went clearly *ultra vires*. The European Communities considers therefore that part of its decision as taken outside its terms of reference and thus legally non-existent.

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[430] The European Communities understood Japan's third party oral statement read on 30 June, at paragraph 7, as confirming this (straightforward) interpretation of the existing obligatory rules of procedure for meetings of the DSB.

[431] Arbitration under Article 22.6 of the DSU in European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB, 9 April 1999

4.827 The European Communities secondly argues that as was recalled also by Brazil, "the logical way forward adopted in the banana arbitration is not a precedent for the interpretation of the sequence between Articles 21.5 and 22 of the DSU".[432] The statement by the United States according to which the DSB "implicitly rejected" the views of the majority of members of the WTO concerning Article 21.5 misrepresents the reality. As Brazil pointed out, "it would suffice to read the long records of minutes related to the banana dispute to confirm that there never was any implicit rejection of the obligatory sequence".[433]

4.828 Thirdly, the European Communities notes that Article 21.5 of the DSU provides that

> "where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including whenever possible resort to the original Panel. The Panel shall circulate its report within 90 days after the date of referral of the matter to it"

4.829 In the view of the European Communities, this provision, and in particular the terms "shall", "Panel" and "these dispute settlement procedures" must be interpreted in accordance with the principles of the Vienna Convention on the Law of Treaties, i.e. it must 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" (Article 31.1).

4.830 The European Communities states that it is the EC view, supported by the vast majority of WTO Members, that the ordinary meaning of the term "shall" is "expressing a command or duty" (Oxford English Reference Dictionary). In the WTO context, the term "Panel" is defined in Articles 6, 7 and 8 of the DSU. The terms "these dispute settlement procedures" interpreted in "good faith" in the context of Article 21.5 mean nothing else than a dispute settlement procedure under the DSU, which includes a Panel as defined in Articles, 6, 7 and 8 (and thus not an arbitration procedure).

4.831 The European Communities points out that as the Appellate Body stated in the *India - Patents (US)* case, paragraph 45:

> "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".

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[432] The European Communities recalls the statement by Ambassador K. Morjane, Chairman of the DSB, at the meeting held on 29 January 1999: "The solution to the banana matter *would be totally without prejudice* to future cases and to the question of how to resolve the systemic issue of the relationship between Articles 21.5 and 22 of the DSU" (WT/DSB/M/54, page 30 - original emphasis).

[433] See also the Minutes of the General Council meeting held on 15/16 February 1999 in the WTO doc. WT/GC/M/35.

4.832 The European Communities then argues that "where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" there is an obligation (unless the complainant decides not to proceed as it is allowed under Article 3.7, first sentence, of the DSU) to pursue a Panel procedure whose duration is determined by the DSU itself to be at least 90 days. Sections 301-310, and in particular Section 306, unilaterally set time limits and mandate compulsory determinations and actions that are clearly incompatible with this provision. Consequently, they also breach Article 23 of the DSU.

4.833 The European Communities considers that the term "determination" in Article 23.2(a) of the DSU must be interpreted in accordance with the principles of the Vienna Convention on the Law of Treaties, i.e. it must 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" (Article 31.1).

4.834 The European Communities contends that the ordinary meaning of "determination" is "the process of deciding, determining or calculating"; (in a legal context) "the conclusion of a dispute by the decision of an arbitrator"; "the decision reached"; "a judicial decision or sentence"; in the figurative sense: "firmness of purpose, resoluteness". The verb "determine" means "to find out or establish precisely"; "to decide or settle"; "make or cause a person to make a decision", (in a legal context) "bring or come to an end" (Oxford English Reference Dictionary). These explanations of the term "determination" are unequivocally turning around the idea of a formal and definitive decision with legal consequences made in the framework of a formal proceeding.

4.835 The European Communities further argues that the immediate context of this provision is Article 23.1 of the DSU that describes the object and purpose of the more detailed rules in paragraph 2 of the same Article.[434]

4.836 The European Communities points out that Article 23.1 of the DSU starts with the temporal conjunction "when" and establishes a link with a situation in which a Member seeks the

> "redress of a violation of obligations or other nullification or impairments of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements".

4.837 The European Communities then claims that a public statement or a report made outside the context of seeking redress of an alleged violation or other nullification or impairment of benefits or any impediment to the attainment of any objective of the covered agreements would not be relevant in the context of Article 23.1 or 23.2 of the DSU.

4.838 According to the European Communities, the context makes also clear that decisions taken to exercise the rights under the DSU are not determinations covered by Article 23 because the very purpose of this provision is to ensure that Members make use of the DSU. Article 3.7

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[434] The European Communities notes that Article 23.2 of the DSU starts with the words "[i]n such cases, Members shall". This indicates that Article 23.2 is governed by the more general provision contained in Article 23.1 of the DSU.

first sentence of the DSU is also part of the context of Article 23.2 (a). This provision indicates that

> "[b]efore bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful".

4.839 In the view of the European Communities, this provision is complemented by provisions in other covered agreements concerning the initial steps to be taken in case of a dispute.[435]

4.840 The European Communities argues that in these provisions, reference is made to a Member considering that another Member has failed to carry out its obligations under the relevant covered agreement. This type of "consideration" is clearly permissible under WTO law as a prerequisite to starting a dispute settlement procedure under the relevant procedural rules; indeed it is necessary to "play by the rules". It is thus obvious that a distinction must be drawn under WTO law[436] between the terms "determination" and "consideration".

4.841 The European Communities then concludes that a consideration is no more than an allegation, a view expressed by a WTO Member. A mere consideration does not by itself entail any legal consequences, because it forms at best the basis for a further procedural step that must still be taken (by submitting a complaint to an outside adjudicatory body, the so-called "third-party adjudication"). In this sense, it is an expression of an opinion subject to confirmation by the exclusively competent WTO bodies.

4.842 The European Communities notes that a determination by contrast is a formal and final decision with clearly defined legal consequences. It is not subject to confirmation and is meant to have a direct legal consequence under domestic law, e.g. as a step in the process leading to retaliatory action. Since it has legal consequences, it is self-sufficient and is capable of becoming the subject matter of a dispute, both domestically and internationally.

4.843 The European Communities underlines that a determination of the absence of a violation is of course the mirror image of a determination that a violation has occurred. It is not possible to make a determination (in the above-mentioned WTO legal meaning) in one direction without at least the possibility of coming to a different conclusion. A law that requires a determination in all cases *whether* a violation of WTO law has occurred therefore comprises the requirement to determine in certain cases that a violation of WTO law has occurred. Such a law therefore mandates determinations that are inconsistent with Article 23.

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[435] The European Communities refers to Article XXIII:1 GATT: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation ..."; Article XXIII:1 GATS: "If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement ..."; Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994: "If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective under this Agreement is being impeded, by another Member or Members ...".

[436] The European Communities notes that this does not necessarily mean that the corresponding terms in a piece of domestic legislation of a WTO Member must be read as operating a similar distinction.

4.844 The European Communities indicates that it firmly believes that the final word concerning either the presence or the absence of a violation must lie in the hands of the multilateral dispute settlement system. The prohibition contained in Article 23.2(a) of the DSU must be read to outlaw any formal and legally binding decision by a WTO Member regarding the WTO-consistency or otherwise of measures taken by another WTO-Member. The United States effectively argues that, because Members need to take position on the WTO-consistency of a measure adopted by another Member in order to assert their rights under the DSU, they may also adopt determinations for the purpose of deciding whether or not to impose unilateral sanctions. This reasoning turns the requirements of Article 23 on their head.

4.845 According to the European Communities, what a WTO Member can and must legitimately decide upon is whether or not it will submit an alleged WTO-inconsistency to the multilateral dispute settlement system. But this is a matter covered by a different DSU provision, i.e. Article 3.7, first sentence.

4.846 The European Communities considers that it is true that Article 23.2(a) of the DSU was drafted with Sections 301-310 of the 1974 US Trade Act in mind. But this means, of course, that the Uruguay Round participants had also in mind the threat to the security and predictability of the international trade relations created by the text of the Trade Act as it was drafted in the 1988 version. They had therefore in mind the need to insert in the covered agreements language that would constitute the second leg of what the European Communities has proposed in its oral statement of 29 June to call the "Marrakech deal".

4.847 The European Communities then maintains that the terminology used in Sections 301-310 cannot be decisive for the categorisation of the different provisions under WTO law. Quite to the opposite, the amendment of the Trade Act adopted by the US Congress in 1994 should have adjusted the US legislation to the new WTO rules. It is well known that the US Congress failed to do so. Any suggestion that Article 23 of the DSU must be read in the light of section 306 of the 1974 Trade Act as amended in 1994, after the conclusion of the Uruguay Round, would of course amount to an absurdity.

4.848 In the view of the European Communities, the objective of Article 23 of the DSU is ensuring multilateral dispute resolution, as the title of Article 23 of the DSU suggests ("Strengthening of the Multilateral System"). The mere fact that Section 306(b)(2) uses the verb "considers" does not mean that this corresponds to a "consideration" in the sense of WTO law.[437] The distinguishing feature under WTO law is whether the WTO Member takes a formal and final position with regard to the WTO-consistency of another Member's measures, on which substantive legal consequences (e.g. trade action) can be based domestically, without awaiting the final result of the WTO dispute settlement system.

4.849 The European Communities claims that the word "considers" in Section 306(b)(2) falls in this latter category, because of the existence of a "determination" of further action under

[437] The European Communities notes that the publication in the Federal Register of October 22, 1998, states (in the summary) that "The United States Trade Representative is seeking written comments on (1) the measures that the European Communities has undertaken to apply as of January 1, 1999 to implement the WTO recommendations concerning the EC banana regime; and (2) the USTR's proposed affirmative determination under section 306(b) of the Trade Act of 1974, as amended, (Trade Act) (19 U.S.C § 2416), that the measures fail to implement the WTO recommendations. The USTR must make the determination under section 306(b) no later than January 31, 1999" (emphasis added). This quotation confirms that the "consideration" in section 306(b) is in reality a determination in the sense of Article 23 of the DSU.

Section 306(b)(1). In the text of Section 306, this "consideration" leads to further actions (listed under Section 301) within pre-determined time limits irrespective of the conclusion of the dispute settlement procedures under the WTO. This situation occurred, as an example, in the final phase of the "bananas" dispute and led to retaliatory trade action (withholding of customs liquidation and increase of bonds for imports of a large number of items from the EC) before the conclusion of the arbitration procedure under Article 22.6 of the DSU.

4.850 The European Communities claims that the choice of the wording in the US legislation is misleading and should not constitute the standard to interpret Article 23 of the DSU. Rather, the opposite is the correct interpretative approach, which the Panel should follow.

4.851 The European Communities recalls in this context that it drew the Panel's attention to the following discrepancy in the following statements of the USTR. The United States asserts that:

> "Contrary to the EC's claims, the language of Section 306(b) does not 'imply' - let alone state - that the Trade Representative is required to make a determination in violation of Article 23. Section 306 (b) sets forth steps the Trade Representative should take to assert US rights under DSU Article 22 when she considers that there has not been full implementation by another WTO Member ... this judgement ... is not a 'determination' ..."

4.852 The European Communities point out that the public notice requesting comments on the planned 3 March 1999 action contains the following sentence:

> "Given that the reasonable period of time for the EC's implementation of the WTO recommendations concerning the EC banana regime expires on January 1, 1999, the USTR must make the determination required by section 306(b) no later than January 31, 1999, and, in the event of an affirmative determination, must implement further action no later than 30 days thereafter". (emphasis added)

4.853 The European Communities considers that it is thus clear from the above that the USTR describes herself the consideration she must make under Section 306(b) as a determination and the action to be taken as a result of this determination as mandatory.

4.854 **In rebuttal, the United States notes** that the determination referred to in the notice is the determination indicated in Section 306(b) – to propose action to be taken if the USTR considers non-implementation to have occurred. It is not a determination that US agreement rights have been denied. While, under Section 306(b), the USTR must make the determination of proposed action if she considers that another Member has not implemented DSB rulings and recommendations, the USTR has complete discretion on the question of whether she considers non-implementation to have occurred.

4.855 In response to the Panel's question as to the definition of "determination" in the context of Article 23.2(c), the United States contends that it may be difficult to distinguish such determinations on their face.[438] The ordinary meaning of "determination" is: "The settlement of

[438] The United States notes that the European Communities has, for example, stated that: "The decision not to take into account the complete conversion of a territory from a non-market economy into a market economy and the full privatization of the exporting enterprises *is a violation* of the United States'

a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion"; "The settlement of a question by reasoning or argument"; "The action of coming to a decision; the result of this; a fixed intention"; "The action of definitely locating, identifying, or establishing the nature of something; exact ascertainment (of); a fact established, a conclusion or solution reached".[439]

4.856 The United States claims that this ordinary meaning must be read within the context of this term in Article 23 and the DSU and in light of the object and purpose of Article 23.2(a). Article 23 is captioned "Strengthening the Multilateral System", and Article 23.1 emphasises that Members seeking redress of violations shall have recourse to, and abide by, the (multilateral) rules and procedures of the DSU. Read in this light, for purposes of Article 23.2(a), the term "determinations" must not be read so broadly as to frustrate, rather than promote, the goal of multilateral dispute settlement. The Panel's question recognises that Members pursuing multilateral dispute settlement will frequently need to take positions in order to conduct dispute settlement. It would be absurd and at odds with the object and purpose of Article 23 to include the taking of positions necessary to the pursuit of dispute settlement within the definition of "determinations" for purposes of Article 23.2(a).

4.857 In the US view, for this reason, the term "determination" in Article 23.2(a) can not include decisions reflecting a Member's belief that another Member has failed to comply with its obligations, since Members will frequently undertake dispute settlement procedures based on such a belief.

4.858 The United States goes on to explain that notwithstanding the above explanation, for purposes of this dispute, it is not necessary to delineate the precise boundaries of the term "determination". The European Communities has characterized two actions in Sections 301-310 as "determinations": when the USTR issues her "determination" under Section 304, and when the USTR "considers" under Section 306 whether implementation has occurred in order to decide whether to pursue DSB authorization pursuant to Article 22. Even if Section 304 involves a "determination", the European Communities has failed to prove it is a determination in violation of Article 23.2(a) since, among other reasons, it need not be a determination that a violation has occurred. However, Section 306 does not involve a determination for purposes of Article 23.2(a). The United States argues that the use of the term "considers" in Section 306 parallels that in the DSU, and is used in both places to indicate the belief that recourse to multilateral dispute settlement procedures is necessary. In the view of the United States, Article 22 requires that a Member seeking DSB authorization to suspend concessions must propose how it intends to do so no later than 30 days following the expiration of the reasonable period of time, and Section 306 reflects this fact in US law.

4.859 In response to a Panel question concerning statements in annual reports, and whether such statements can be "determinations", the United States considers that the question highlights the fact that only a limited sub-set of statements will constitute "determinations" under Article 23. As discussed earlier, this sub-set cannot include statements merely indicating a belief regarding another Member's practices.

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obligation under Article 11 of the Agreement". (*United States - Anti-Dumping Measures on Imports of Solid Urea from the Former German Democratic Republic*, WT/DS63/1, emphasis added.)

[439] The New Shorter Oxford English Dictionary, at 651 (1993).

4.860 In the view of the United States, it is difficult in the abstract to answer the question of whether statements in annual reports or public statements would rise to the level of determinations without knowledge of the specific context and statements made. Ultimately, a decision on whether a given statement constitutes a "determination" would have to be addressed on a case-by-case basis.

4.861 **In rebuttal, the European Communities notes** that the United States claims that the "consideration" of the USTR under Section 306(b) is not a determination within the meaning of Article 23 of the DSU but a logical pre-condition for the exercise of the rights under Article 22 of the DSU. This would be correct if the only consequence of the "consideration" of the USTR was an invocation of Article 22.

4.862 The European Communities points out that the plain language of the law however shows that this is clearly not the case. If the USTR makes an affirmative determination under Section 306(b), she shall simultaneously determine what further action she will take.

4.863 The European Communities considers that the USTR shall treat the determination on further actions as a determination made under Section 304(a)(1), which is subject to the provisions of Section 305 governing the implementation of sanctions.

4.864 The European Communities then concludes that the "consideration" is thus a formal determination in the framework of a domestic procedure through which the United States seeks redress of a violation of WTO obligations, and that determination must be made and implemented even when the WTO proceedings on which such a determination or action could be based have not been completed.

4.865 The European Communities argues that a mere requirement that the USTR monitors the implementation of DSB recommendations and decides to invoke Article 22 if appropriate would, of course, not be inconsistent with Article 23. However, the "consideration" and the simultaneous determination of further action the USTR is obliged to make under Section 306(b) are inconsistent with Article 23 because they constitute the first step in a domestic proceeding under which sanctions must be imposed even in the absence of a DSB authorization to this effect.

4.866 **The United States further responds** that as with its claim regarding Section 304, it can meet its burden with respect to its Section 306(b) claim only by establishing that Section 306(b) mandates: (1) a determination to the effect that a violation has occurred; (2) which has not been made through recourse to DSU rules and procedures, or is not consistent with adopted panel or Appellate Body findings or an arbitral award.

4.867 The United States argues that the EC's concession that Section 304 allows the USTR to make a determination of consistency must be considered to include an acknowledgement that the USTR is free under Section 306(b) to "consider" that another Member has implemented its commitment to comply with DSB rulings and recommendations. The European Communities reasoned that the language of Section 304(a)(1) provided for an "either/or" determination, including the option of determining that US agreement rights had not been denied. While the United States rejects the EC's conclusion that only two determinations are possible under Section 304, at least these two must be considered possible under Section 306(b). Section 306(b) provides "if the USTR considers [non-implementation to have occurred]", with no constraint whatsoever on what might lead her to consider otherwise, or how she may characterize that belief. This is a purely discretionary decision, and Section 306(b) cannot be read to mandate in any way what the USTR will "consider", let alone a "determination" that a

violation has occurred. The EC's claim regarding Section 306(b) must fail for this reason. Without a determination that a violation has occurred, or a law mandating such a determination, there can be no violation of DSU Article 23.2(a).

4.868 The United States considers that the EC's claim must also fail because what the USTR may "consider" is not a determination. The term "considers" is used throughout the DSU in precisely the same manner as it is used in Section 306(b): to indicate a belief concerning another Member's actions calling for the invocation of multilateral dispute settlement proceedings. To characterise such a belief as a "determination" for purposes of DSU Article 23.2(a) would undermine the objective of multilateral determinations underlying Article 23.

4.869 The United States recalls that the European Communities argues that "the terminology used in Sections 301-310 cannot be decisive for the categorization of the different provisions under WTO law". According to the European Communities, despite the use of these different terms in the DSU, "this does not necessarily mean that the corresponding terms in a piece of domestic legislation of a WTO Member must be read as operating in a similar fashion". This may well be so, but this does not explain why Sections 301-310 themselves include the distinction between "determination" and situations in which the USTR "considers" that DSU procedures must be invoked. US rules of statutory construction differ little, if at all, from those of treaty interpretation. If different terms are used in the statute, there must be a reason that they differ.

4.870 The United States claims that the EC's argument that the use of different terms in the statute "cannot be decisive for the categorization of the different provisions under WTO law" must also be read in light of its argument one paragraph earlier that, "It is true that Article 23.2(a) of the DSU was drafted with Sections 301-310 of the 1974 US Trade Act in mind". Assuming this is true, then the drafters of the DSU were certainly aware of the pre-existing distinction between determinations and situations in which the USTR might "consider" in Sections 301-310, and intended to make the same distinction when these terms were adopted into the DSU. At a minimum, if the drafters of the DSU had Sections 301-310 "in mind" – if it had been their intention to subject mere beliefs to potential discipline under Article 23.2(a) – then they would have included "considerations" in DSU Article 23.2(a). They did not, however, do so, and there is no basis now for subjecting such beliefs to scrutiny as "determinations".

4.871 The United States further states that the European Communities attempts to claim that "determinations" are associated with "clearly defined legal consequences", for example, "as a step in the process leading to retaliatory action". The European Communities offers no textual basis for this claim, and the text and context of Article 23.2(a) in fact contradict it. The text of Article 23.2(a) refers to determinations that a violation has occurred, with no discussion whatsoever of the consequences of those determinations. It is a straightforward obligation of conduct, not an obligation of result.[440] Moreover, Article 23.2(c) deals specifically with suspension of concessions or other obligations, the "retaliatory action" of which the European Communities speaks. That provision makes no reference to violation determinations. If "legal

[440] The United States refers to International Law Commission, *Draft Articles on State Responsibility*, Arts. 20-21, 37 I.L.M. 440, 448 (1998), as stating that: "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation". (Art. 20) "There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation". (Art. 21.1)).

consequences" such as suspension of concessions were a prerequisite for a "determination" under Article 23.2(a), what would be the need for a separate Article 23.2(c)? The determination of violation would have the legal consequence of mandating suspension of concessions and would encompass the situations provided for in both paragraphs (a) and (c). The EC approach would thus collapse two separate DSU provisions into one.

4.872 The United States argues that if the European Communities were to respond that Article 23.2(c) provides for action actually taken, while Article 23.2(a) just provides for first steps that might not actually result in action, then this suggests that the action need not be taken as a result of the determination, that is, that action remains discretionary. Under this formulation, even a decision to initiate an investigation, which might ultimately have "the legal consequence" of action taken, could be drawn into the definition of "determination". Moreover, a Member could avoid liability under Article 23.2(a) simply by explicitly decoupling the violation determination from the action taken, even if the Member retains complete discretion to suspend concessions at any time for any reason.

4.873 The United States further contends that it is also questionable whether the European Communities or other WTO Members would be willing to accept the consequences of the EC's approach. Assume, for example, that a Member has a statute mandating that authorities, without first resorting to WTO dispute settlement proceedings, make definitive, official, published determinations that another Member has violated its WTO obligations. The statute would not otherwise provide for any "legal consequences". Such a clear "determination" would certainly appear to be precisely within the terms of Article 23.2(a), yet under the EC's approach it would be excluded.

4.874 In the view of the United States, the EC's definition of "determination" based on "legal consequences" is not sustainable. The USTR's belief as to whether Article 22 proceedings need be invoked, expressed through the term "considers", is not actionable under DSU Article 23.2(a).

4.875 The United States further maintains that another aspect of the EC's proposed definitions of "considerations" and "determinations" worthy of comment is the fact that it would appear to lead to the conclusion that all Section 304(a)(1) determinations are in fact "considerations". The European Communities states, "the terminology used in Sections 301-310 cannot be decisive for the categorization of the different provisions under WTO law". The European Communities thus allows for the possibility that a "determination" under domestic law may in fact be a "consideration" for WTO purposes. The European Communities explains that a "consideration"

> "does not by itself entail any legal consequences, because it forms at best the basis for the further procedural step that must still be taken (by submitting a complaint to an outside adjudicatory body . . .). In this sense, it is an expression of an opinion subject to confirmation by the exclusively competent WTO bodies".

4.876 The United States considers that because Section 303(a)(1) and (2) require the USTR to initiate WTO dispute settlement proceedings in investigations involving a WTO agreement, the views expressed by the USTR pursuant to Sections 301-310 would, in the EC's definition, be opinions "subject to confirmation by the exclusively competent WTO bodies". Thus, but for the fact that Section 304(a)(1) requires the USTR to base her determinations on adopted panel and Appellate Body findings, the USTR could determine under Section 304(a)(1) that US agreement rights are being denied, and the European Communities would treat this as a "consideration" not subject to Article 23.2(a) because it is an opinion during on-going dispute settlement

procedures. To the EC's likely response that Section 304(a)(1) determinations have legal consequences, the United States notes again that Section 301(a)(2) provides for exceptions to action which include Section 301(a)(2)(B)(i), which covers situations in which the foreign country is taking satisfactory measures to grant US rights under a trade agreement. This exception would be applicable if dispute settlement proceedings were on-going, since, by its participation in those proceedings, the foreign country would be taking satisfactory measures. The determination would thus be no more a step in the chain of events towards suspension of concessions than would initiation of an investigation (which also, under the EC's definition, might be characterized in domestic law as a determination without implicating Article 23.2(a)).

4.877 The United States states that it must, under Section 304(a)(1), base its determinations on the results of WTO dispute settlement and could not, therefore, make the above determination. On the other hand, the USTR could make any of a number of determinations, and this could include a determination that US agreement rights were being denied, "subject to confirmation by the DSB". Presumably this, too, would meet the EC's definition of "consideration". In substance, such a "consideration" would certainly be less definitive than a statement in the press by a trade minister that another Member is violating its WTO obligations.

4.878 The United States recalls that the European Communities also addresses whether Article 21.5 proceedings must first precede Article 22 proceedings. The United States notes at the outset that this Panel need not, and should not, reach this issue. The EC claim would appear to draw the Panel into the heart of a disagreement that is recognised by the WTO Members and is the subject of a separate negotiation in an attempt to resolve it. This is therefore not an area ripe for a Panel. The United States furthermore notes that this issue would only be relevant in this dispute if (1) what the USTR "considers" is deemed an "implied determination", and (2) the law mandates that she always consider that another Member has not complied with its obligations. Again, the EC's burden is to prove that Sections 301-310 do not allow, that is, that they preclude, WTO-consistent action by the USTR. To the extent that she need not make a "determination" that a violation has occurred, the mere existence of a law not precluding that possibility would not violate Article 23.2(a). It is worth recalling that the European Communities now takes the position that Members need not "include explicit language in their domestic law precluding WTO-inconsistent action".

4.879 In rebuttal, the United States claims that assuming that a "consideration" is a "determination", and that it must always be affirmative, the European Communities remains incorrect regarding the relationship between Articles 21.5 and Article 22. The United States first notes that the EC's dismissal of US references to DSU review documents misses the point for which the United States raises them.[441] The United States first noted that the European Communities explicitly acknowledged in a DSU review document the current distinction between mandatory and discretionary legislation. Inasmuch as the European Communities appears to accept the mandatory/discretionary distinction (albeit with a liberally reinterpreted definition of "mandatory"), this reference is no longer necessary. The remaining references were intended to point out that the relationship between Articles 21.5 and 22 is anything but clear and that this fact is generally recognised.

4.880 The United States argues that Article 22 does not by its terms, context or purpose require that a Member first resort to Article 21.5 proceedings. All time frames in Article 22 are measured against the end of the reasonable period of time, and Article 21.5 is not even mentioned once. Likewise, Article 21.5 is not mentioned once in Article 23.2(c), which only

[441] See ibid. at 33.

requires that Article 22 proceedings be pursued before suspension of concessions may be undertaken. Article 22 represents a central element in the credibility and effectiveness of WTO dispute settlement, since it provides that losing Members may no longer block suspension of concessions against them. However, the EC's claim that Article 21.5 proceedings must first be completed would result in the loss of this right to suspend concessions, since Article 22 only applies the negative consensus rule to requests to suspend concessions if such requests are made within 30 days of the conclusion of the reasonable period. Members whose rights have already been found to have been violated, and who have already lived with these violations through the year-and-a-half panel process and additional year of implementation, would find themselves, as they were under the GATT 1947, again at the mercy of the very party that had denied their rights and impaired their trade.

4.881 The United States further contends that in response to the concern that there must first be a multilateral determination of violation, it notes that when Article 22 procedures are invoked, there is already such a determination – in the original, adopted panel and/or Appellate Body reports. Further, as the Article 22 arbitrators found, Article 22 proceedings cannot result in suspension of concessions where a Member has in fact brought its measure into compliance, because the level of nullification and impairment in that case would be zero.[442]

4.882 In the view of the United States, Article 22 thus does not require recourse to Article 21.5 proceedings, and a statutory provision such as Section 306(b) which merely provides a domestic means for resorting to Article 22 proceedings cannot be said to be violate Article 23.2(a) through an "implied determination".

4.883 The United States adds that even if the European Communities were correct that Article 21.5 proceedings must precede Article 22 proceedings, this would not mean that Section 306(b) mandates a violation of Article 23.2(a). The USTR has complete discretion in her assessment, her "consideration" under Section 306(b), of whether another country's implementation status requires that dispute settlement procedures be invoked. If DSU rules actually provided that a Member first undertake Article 21.5 procedures before requesting suspension under Article 22, there would be nothing in Section 306 to prevent the USTR from complying with this requirement. She could for example consider that she needs to pursue Article 21.5 proceedings to ascertain whether there has been full implementation.

4.884 **The European Communities further responds** that Article 23.2 (a), read in the immediate context of Article 23.1 and in the broader context of Article 3.7 of the DSU, is an obligation of conduct and of result: the redress of a violation or other nullification or impairment of benefits must be achieved in substance through the multilateral dispute settlement system or through a mutually agreed solution only.

4.885 In the view of the European Communities, there is no third way. Of course any Member can freely accept to tolerate the consequences of the conduct of another Member in violation of

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[442] See Arbitration under Article 22.6 of the DSU in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, para. 4.11 (9 April 1999).

The United States points out that the European Communities adopts the Brazilian argument that the *Bananas* arbitration represents a "logical step forward" relevant only to that dispute. The "logical step forward" adopted by the *Bananas* arbitrators – simultaneous Article 21.5 and 22 proceedings conducted by the original panel – remains, for the present, the only logical step forward in those cases when an implementing Member uses the full implementation period. This of course could easily change as a result of the efforts now underway in the DSU review.

its WTO obligations. However, abstaining from action, also a hypothesis foreseen in the DSU - Article 3.7 - is outside the realm of Article 23, paragraphs 1 and 2 ("When Members seek redress … In such cases, Members shall …").

4.886 In this legal perspective, the European Communities recalls the US argument that Article 23.2(a) of the DSU "… is a straightforward obligation of conduct, not an obligation of result".

4.887 The European Communities indicates that if this statement were to be understood as meaning that WTO Members do not have a positive obligation to insert in their domestic law a clause expressly obliging the executive authorities to observe Article 23 in all cases, it would not disagree with such an argument.

4.888 The European Communities contends that if, however, the US argument were to imply that Article 23.2(a) is a mere obligation of conduct, it would disagree. If the US approach were followed, a Member would find itself at the conclusion of the process of verification of consistency to discover that a negative result entails that it had not followed the obligation of conduct under Article 23.2(a). One should in fact bear in mind that the outcome of a process of "verification of consistency" cannot be predetermined in advance and, thus, a determination of consistency or inconsistency is achieved at the end of a process of verification.

4.889 The European Communities argues that this unavoidable consideration shows better than anything else that it is not true that the EC's interpretation of Section 304(a)(1)(A) "would have the impermissible consequence of preventing even determinations of consistency, notwithstanding the explicit language of Article 23.2(a), which only addresses certain determinations of inconsistency". Rather, it is the US suggestion of an "obligation of conduct" merely consisting of a formality of a procedure and not of the substance of a multilateral decision within the WTO DS system that gets to the "impermissible consequence of preventing a determination of consistency".

4.890 The European Communities also recalls that the United States has again erroneously denied the obligatory prior application of the "formal dispute settlement proceeding" under Article 21.5 of the DSU where there is disagreement on the conformity of the measures taken to comply with recommendations and rulings of the DSB. The European Communities notes in passing that the United States does not contest the interpretation of the ordinary meaning of the terms of Article 21.5 in their context and in the light of its object and purpose advanced by the European Communities.

4.891 The European Communities further points out that the procedures under Article 22 cannot be defined as "formal dispute settlement proceedings" and are in any case at the request of the defending party and not of the complainant (contrary to the provision of Section 303 (2)). According to the US' own interpretation, when the United States is a complainant, Article 22 procedures are not covered by the "proceedings" within the scope of Section 304 (a)(1).

4.892 According to the European Communities, thus, it is clear from the text of Section 304 that whatever the interpretation of Article 21.5 and Article 22 of the DSU, at least during the phase of "monitoring of compliance", the USTR "shall determine whether the rights to which the United States is entitled under any trade agreement are being denied" exclusively "on the basis of the investigation initiated under section 302".

4.893 The European Communities further maintains that this means in practice that the text of Section 304 does not provide for any real discretion since if the factual findings of the

investigation are negative, pursuant to Section 306 (b) (2) the USTR must ("shall") make the determination no later than 30 days after the expiration of the reasonable period of time. This must be done irrespective of any decision of the DSB.

4.894 The European Communities points out that according to Section 306 (b) (1), the content of USTR's determination is "what further action the USTR shall take under section 301(a)".

4.895 The European Communities notes that Section 301(a) - entitled "Mandatory Action" - provides that:

> "if the USTR determines under section 304 (a) (1) that (A) the rights of the United States under any trade agreement are being denied or (B) an act, policy or practice of a foreign country (i) violates, or is inconsistent with the provisions of or otherwise denies benefits to the United States under any trade agreement or (ii) is unjustifiable and burdens or restricts United States commerce, the Trade representative shall take action authorized in sub-section c)".

4.896 The European Communities further notes that according to Section 301 (d) (4) (A),

> "an act, policy, or practice is unjustifiable if the act, policy or practice is in violation of, or inconsistent with, the international legal rights of the United States".

4.897 The European Communities considers that not only the USTR does not have any discretion in discharging her obligation of making a determination of action, but the law also strictly defines what is "unjustifiable" without any respect whatsoever of the need of going through the dispute settlement procedures under the DSU before such a determination is taken.

4.898 The European Communities notes that Section 301, sub-section (c), spells out in detail "what" action the USTR is authorized to take. The closed list requires either to withdraw concessions or other benefits or to enter into a binding agreement (whose content is pre-determined). The targeted WTO Member then has only two options: it must either bear the consequences of retaliation or sign an agreement acceptable to the United States (as in the "*Japan -Auto Parts*" case). The second option open to the USTR constitutes the only escape for the targeted WTO Member in order to avoid the (explicitly threatened) retaliation.

4.899 **The United States responds** that in contrast to other provisions of the DSU, Article 23.2(a) by its terms deals with "determinations", not beliefs as reflected in what an individual or Member may "consider". Section 306(b) does not command the USTR to make a determination that another Member has violated its WTO obligations. It merely provides for the steps to be taken if she believes, if she considers, that full implementation has not occurred. This belief, the prerequisite to invoking multilateral agreement rules on the suspension of concessions, is not a determination. Nor, if it were, would it by statutory command be limited to a determination that another Member has violated its WTO obligations. Section 306(b) does not command the USTR to consider that another Member has failed to fully implement its commitment to comply with DSB rulings and recommendations.

4.900 The United States recalls that the European Communities has suggested that the very act of determining whether US agreement rights have been denied, or considering whether implementation has occurred, "mandates" a determination that a WTO violation has occurred. There is no rule of grammar or US rule of statutory construction which permits such a reading.

To the contrary, even were the US statutory language considered ambiguous, US and international practice would be to interpret that language so as to avoid a conflict with US international obligations. This practice is reflected in GATT/WTO jurisprudence in the *Tobacco* panel report, which asks whether any reading of a statute permits authorities to comply with their international obligations. The EC's argument ignores this practice and precedent. Moreover, in arguing that it is WTO inconsistent to determine "whether" agreement rights have been denied because such a determination inherently "must" sometimes be affirmative, the European Communities would render any determination a violation of DSU Article 23.2(a), even a determination that no agreement rights have been denied or confirmed, and even those determinations not involving a WTO agreement. No reading of DSU Article 23.2(a) supports this result.

4.901 In response to the Panel's question regarding the relationship between Article 21.5 and Article 22 of the DSU, **the European Communities first underlines** that it has not requested this Panel to "make a decision on the relationship between Article 21.5 and 22" of the DSU. Rather, the European Communities has requested the DSB and obtained the establishment of this Panel in order to make "such findings as will assist the DSB in making the recommendations or giving the rulings provided for in" the provisions of the agreements cited in the WTO document WT/DS152/11 of 2 February 1999.

4.902 The European Communities warns that the Panel, therefore, should not be distracted by the US attempt to curtail or diminish the Panel's terms of reference by creating the (erroneous) impression that this procedure is in some ways overlapping with a parallel procedure in other WTO *fora*. This characterisation of the situation is erroneous and the Panel should resist and reject these US procedural tactics. In the EC's view, this panel procedure should concentrate on its terms of reference: the WTO consistency of Sections 301-310 must be assessed against all the provisions quoted in the Panel's terms of reference, including Article 21.5 of the DSU on its own.

4.903 The European Communities also contends that as the Appellate Body indicated already in its early reports and constantly repeated afterwards, in application of Article 31 of the Vienna Convention on the Law of Treaties, the Panel should concentrate first on the ordinary meaning of the terms of Article 21.5 of the DSU, in their context, and in the light of the object and purpose of the DSU and of the WTO agreements. The interpretation of Article 22 of the DSU is logically and legally a distinct issue to be addressed by the Panel separately, if necessary.

4.904 Pursuant to Article 11 of the DSU, the European Communities expects that the Panel will follow this line of interpretation in order to reach its conclusions aimed at assisting the DSB to make the appropriate recommendations and rulings. The European Communities believes that the notion that a Member of the WTO can somehow curtail another Member's rights under the DSU by introducing a proposal to amend the covered agreement at issue is inconsistent with Article 3.2 of the DSU according to which the DSB rulings cannot diminish the rights of Members under the covered agreements.

4.905 The European Communities is of the view that the mandate of the Panel is to "make an objective assessment of the matter before it" (Article 11, second sentence, of the DSU). Such an objective assessment must be based on the covered agreements as they stand and cannot be based on possible future amendments of these agreements. Of course, panels should give the parties adequate opportunity to develop a mutually satisfactory solution (Article 11, last sentence of the DSU). However, as is stipulated in Article 12.7 of the DSU, "[w]here the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB".

4.906 The European Communities further argues that it is thus clearly stated that the Panel is required to go ahead with the procedure as long as the parties to the dispute have failed to develop a mutually satisfactory solution. As the debate before the Panel has demonstrated, the views of the European Communities and the United States on the relationship between Article 21.5 and 22 of the DSU are as far apart as ever and there does not appear any immediate perspective of a mutually satisfactory solution on this issue at the present time. If the political negotiations on the relationship between Articles 21.5 and 22 of the DSU end with the a solution favourable to the United States, the United States would therefore benefit from that solution irrespective of the rulings of the Panel.

4.907 The European Communities would not wish to speculate on what a negotiated solution on the relationship between Article 21.5 and 22 of the DSU might look like and whether it would put this aspect of the present dispute to rest. In this context, it may be of interest that the DSB has not been in a position to date to come to an agreed conclusion on any of the informal proposals for the review of the DSU.

4.908 However, the European Communities draws the attention of the Panel to the recent developments in the dispute on *Australia – Salmon*,[443] as shown by the sequence of events as follows:

(a) on 15 July 1999, Canada requested authorization for suspension of concessions under Article 22.2 of the DSU[444] based on a unilateral determination of failure to comply by Australia. Canada appeared at that time to follow the (illegal) US approach to this matter;

(b) on 27 July 1999, Australia, while indicating that "[T]he DSB meeting on 27 July (now 28 July) will be the first opportunity for Australia to contest Canada's right to seek authorization on the basis of WT/DS18/12", it requested arbitration "with an abundance of legal caution in regard to safeguarding its WTO right to arbitration accorded by Article 22.6" of the DSU[445];

(c) on 28 July 1999, as a result of the discussions in the DSB on this issue on the same day, Canada requested that the determination of consistency of the implementation measures by Australia be referred to the original panel "pursuant to article 21.5 of the DSU".[446]

4.909 In the view of the European Communities, these events demonstrate that the US position on this essential issue is not only unjustifiable under WTO law but that the United States is also more and more isolated in the DSB in this regard.

4.910 In addition, the European Communities maintains that the time frames provided for under Section 306(b)(2) of the Trade Act 1974 are in any case entirely insufficient to carry out a dispute settlement procedure on the failure of compliance of another WTO Member that would respect the requirements of due process.

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[443] WT/DS18.
[444] WT/DS18/12 of 15 July 1999.
[445] WT/DS18/13 of 3 August 1999.
[446] WT/DS18/14 of 3 August 1999.

4.911 **The United States considers** that the Panel should not decide on the relationship between Article 21.5 and 22. First, it is unnecessary for the Panel to reach the issue of the relationship between Articles 21.5 and 22. This issue is ultimately irrelevant to the Panel's decision because the European Communities has failed to prove several other points necessary to establish its claims with respect to Articles 23.2(a) and 23.2(c).

4.912 In the view of the United States, with respect to its claim regarding Article 23.2(a), the European Communities has failed to meet its burden of demonstrating: (1) that Section 306 involves a "determination" on whether another Member has violated its WTO obligations; and (2) that Section 306 commands that such a determination always be a violation determination. Without a determination to the effect that a violation has occurred, it is not relevant for the Panel to determine whether the other requirements of Article 23.2(a) have been met.

4.913 The United States also considers that with respect to its claim regarding Article 23.2(c), the European Communities has failed to meet its burden of demonstrating: (1) that Section 306 commands the USTR to always consider that non-implementation has occurred; (2) that the USTR must take action involving the suspension of concessions, rather than other alternatives; (3) that the USTR cannot avail herself of the exceptions set forth in Section 301(a)(2)(B); (4) that the President may not condition action or direct that it not be taken; (5) that the USTR cannot delay action until 240 days – eight months – after the reasonable period of time pursuant to Section 305(a)(2), well beyond either or both of the 60 and 90 day periods provided for in Articles 21.5 and 22.

4.914 The United States adds that the Panel should not reach this issue because doing so would preempt the ongoing negotiations and encroach upon the rights of all WTO Members (not just parties to a single dispute) to negotiate the balance of rights and obligations under the WTO Agreement. Only the Members may amend or adopt interpretations of the DSU (WTO Agreement Arts. IX:2 and X), and Panels cannot add to or diminish the rights and obligations provided in the covered agreements (DSU Arts. 3.2 and 19.2). The discussions in the DSU review are likely to lead to amendment or agreement on the relationship of Article 21.5 and 22.

4.915 The United States also claims that as with the analysis of other agreement provisions, the analysis of the relationship between Articles 21.5 and 22 must be based on the text. As already explained in more detail, the text of Article 22 nowhere references Article 21.5 for any purpose. Moreover, by its terms Article 23.2(c) only requires that Article 22 procedures be followed; it makes no reference to Article 21.5. For these reasons and others set forth earlier and in the Article 22 Arbitration report in *Bananas*, the DSU does not presently require that a Member resort to Article 21.5 proceedings before requesting authorization to suspend concessions pursuant to Article 22.

4.916 In response to the Panel's question as to whether the issue would be moot if an agreement were reached on this relationship before the completion of this Panel's proceedings, the United States answers in the affirmative. More importantly, however, if an agreement were reached by which parties would resort to an amended Article 21.5 process prior to resorting to Article 22 procedures, nothing in Sections 301-310 would preclude the United States from acting consistently with such an agreement.

(c) Discretion not to consider that non-implementation has occurred/Discretion with respect to timing of consideration

4.917 **The European Communities argues** that when the USTR "shall" determine "what" action she "shall" take, she is constrained by the closed list under section 301(c). That list

requires either to withdraw concessions or other benefits (and therefore the publication of a "retaliation list") or to enter into a binding agreement (whose content is pre-determined). This second leg of the alternative open for the USTR constitutes the only escape for the targeted WTO Member in order to avoid the (explicitly threatened) retaliation.

4.918 The European Communities notes that in the *Bananas III* case, the USTR published a notice on the Federal Register[447] where, *inter alia*, it explicitly indicated the following

> "Section 306 (c) of the Trade Act provides that the USTR shall allow an opportunity for the presentation of views by interested parties prior to the issuance of a determination pursuant to section 306 (b)" (emphasis added)

4.919 The European Communities also recalls that on 10 November 1998, USTR published a second notice on the Federal Register[448] concerning a proposed "determination of action" with an attached list of selected EC products on which the imposition of prohibitive (100 per cent ad valorem) duties was envisaged. The notice in question was published "in accordance with section 304 (b) of the Trade Act".

4.920 The European Communities considers that there can be no doubt that the Korean statement is correct as it is the immediate consequence of the text, design, structure and architecture of Sections 301-310 in their present form. Moreover, the implementation and the public statements by the USTR concerning the interpretation of Sections 304 and 306 come as further confirmation of the EC's claims, which are supported by Korea and several other WTO Members.

4.921 The European Communities then argues that the mechanics of the mandatory determinations and actions that the US executive authorities are mandated to implement together with the ensuing explicit threat against the other WTO Members resulting from this legal situation is more than sufficient[449] evidence to prove the full disregard that Sections 301-310 have for the US obligations under the WTO Agreements, in particular under Article XVI:4 of the Marrakech Agreement, Article 23 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties.

4.922 **The United States points out** that nothing in Section 306(b) obligates the USTR to conclude that another Member has failed to implement DSB recommendations. This is a purely discretionary decision, and the European Communities has failed to meet its burden of demonstrating why it would not be possible for the USTR to conclude that no action need be taken because implementation has been satisfactory, because adequate progress is being made, or because further dispute settlement proceedings are necessary to achieve satisfactory implementation.

4.923 **In rebuttal, the European Communities recalls** that the United States further claims that the USTR is not required to determine that United States' rights under a WTO agreement are being denied and that a failure to implement DSB recommendations occurred and that,

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[447] Vol. 63, No 204, 22 October 1998, page 56689

[448] Vol. 63, No 217, page 63099

[449] According to G. Schwarzenberger, International Law, 3rd Edition, page 614, "[s]uficient relevant dicta of the World Court exist to permit the conclusion that the mere existence of such legislation may constitute a sufficiently proximate threat of illegality to establish a claimant's legal interest in proceedings for at least a declaratory judgement".

consequently, Sections 301-310 do not mandate determinations inconsistent with Article 23 of the DSU. However, these determinations must be based on the investigation initiated by the USTR under Section 302 or the monitoring conducted by the USTR under Section 306(a).

4.924 In the view of the European Communities, there is nothing in Sections 301-310 that would permit the USTR to make her determinations on any other basis, for instance on the basis of a delay in the WTO dispute settlement proceedings. The United States in effect makes the astonishing claim that the USTR may determine under Sections 301-310 that no denial of rights and no failure to implement DSB recommendation occurred because the WTO dispute settlement have not been completed.

4.925 The European Communities submits that it would not be logical to interpret Sections 301-310 to authorize determinations on the WTO-consistency of measures on the basis of factors that are entirely outside the plain language of the law and, as such, irrelevant to such a determination.

4.926 **The United States argues** that there are no "specified time frames" for "considerations". Inasmuch as a consideration is no more than a belief, the USTR may, at any time – before, during or after the reasonable period of time – consider that another Member has not implemented DSB rulings and recommendations, just as a Member may consider, may believe, that another Member has violated its WTO obligations before, during and after the deadline for submitting a request to establish a panel at a given DSB meeting. Section 306 provides only that if, during the 30 days following the reasonable period, the USTR considers that non-implementation has occurred, she shall determine whether to avail herself of Article 22 procedures. Indeed, as Article 22 is currently drafted, she must avail herself of these procedures within this time frame if the United States is to preserve its WTO rights. However, nothing prevents her from not considering during that 30-day period that non-implementation has occurred.

(d) Practice

4.927 In response to a Panel question, **the United States explains** that to date, the USTR has considered that an agreement was not being satisfactorily implemented in two cases involving the GATT or a WTO agreement. In January 1999, the USTR considered that it would be necessary to pursue Article 22 proceedings in the *Bananas* dispute, and proposed suspension of concessions on certain products. On April 19, 1999 the DSB authorized suspension in accordance with an arbitrator's report. In May 1999, the USTR considered that it would be necessary to pursue Article 22 proceedings in the *EC – Hormones* dispute. Those Article 22 proceedings are now in progress.

4.928 The United States explains that in January 1999, the USTR considered that it would be necessary to pursue Article 22 proceedings in the *Bananas* dispute, and proposed suspension of concessions on certain products. On April 19, 1999 the DSB authorized suspension in accordance with an arbitrator's report. There is no copy of the USTR's decision to pursue Article 22 procedures because it was not a determination. In May 1999, the USTR considered that it would be necessary to pursue Article 22 proceedings in the *EC – Hormones* dispute. Article 22 proceedings are now in progress. There is no copy of the decision to pursue Article 22 procedures because it was not a determination. However, attached please find a notice issued on March 25, 1999 requesting comments on implementation of WTO recommendations in *Hormones* (US Exhibit 17). That notice stated that it likely would be necessary to pursue Article 22 procedures in light of the EC's having indicated at the March

DSB meeting that it did not expect to be in compliance by the end of the reasonable period of time in May.

4.929 In response to the Panel's question as to the *EC – Banana III*, the United States states that it is difficult to respond to the question of when a "consideration" is "actually taken" because it reflects no more than a belief on the part of the USTR. As such it is not "taken". At any given point in time, she may believe that implementation has occurred, that it has not occurred as of that time, or that it may occur if certain steps are taken or commitments made. The first formal written record that the USTR considered that the European Communities had not implemented DSB rulings and recommendations by the end of the reasonable period of time is the January 14, 1999 request of the United States for authorization to suspend concessions.[450]

4.930 The United States explains that the initial determination of what action to take, made on January 14, 1999, was that the United States should, in accordance with Article 22, suspend concessions if authorized at the DSB meeting of January 29, 1999 or, if the European Communities requested arbitration pursuant to Article 22.6 regarding the level of suspension, then to suspend concessions thereafter in accordance with the arbitrators' decision, and upon DSB authorization pursuant to Article 22.7. This determination is reflected in the Federal Register notice of April 19, 1999 announcing DSB authorization to suspend concessions.[451] The domestic legal basis for this determination was: (1) Section 301(c)(1)(A), which provides for suspension of concessions; (2) Section 301(a)(3), which provides that action affecting goods or services will be in an amount equivalent in value to the burden or restriction on US commerce (requiring that the USTR not suspend concessions in an amount in excess of the level of nullification and impairment found by the arbitrators and authorized by the DSB); (3) Section 304(a)(1), requiring that determinations be based on dispute settlement proceedings; (4) Section 301(a)(2)(A)(ii)(II), specifying that the USTR need not take action if dispute settlement proceedings indicate no nullification or impairment; (5) Section 302(a)(2)(B)(i), specifying that the USTR need not take action if the foreign country has taken satisfactory measures, which participation in and compliance with DSU proceedings and rules would constitute.[452]

4.931 The United States argues that the consideration was not a determination, and was not published. The Section 304 determination of action taken under Section 301 is reflected in the Federal Register notice of April 19, 1999. As discussed at the second substantive meeting, the publication requirement in Section 304(c) is not time limited. The United States explained that the determination of action was made within the 30-day time frame.

4.932 In response to the Panel's question on *EC – Hormones*, the United States further explains that the first formal written record that the USTR considered that the European Communities had not implemented DSB rulings and recommendations by the end of the reasonable period of time is the May 18, 1999 request of the United States for DSB authorization to suspend concessions.[453]

4.933 The United States further indicates that the initial determination of what action to take, made on May 18, 1999, was that the United States should, in accordance with Article 22, suspend concessions if authorized at the DSB meeting of January 29, 1999 or, if the European

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[450] WT/DS27/43 (14 January 1999).

[451] Implementation of WTO Recommendations Concerning the European Communities' Regime for the Importation, Sale and Distribution of Bananas, 64 Fed. Reg. 19209 (1999).

[452] See response to Question 33.

[453] WT/DS26/19 (18 May 1999).

Communities requested arbitration pursuant to Article 22.6 regarding the level of suspension, then to suspend concessions thereafter in accordance with the arbitrators' decision, upon DSB authorization pursuant to Article 22.7. This determination is reflected in the Federal Register notice of July 27, 1999 announcing DSB authorization to suspend concessions.[454] The consideration was not a determination, and was not published. The determination is reflected in the Federal Register notice of July 27, 1999. The determination of action was made within the 30-day time frame.

4. Sections 306 and 305

(a) Overview

4.934 **The European Communities claims** that Section 306(b) provides that the USTR shall determine what further action to take under Section 301(a) no later than 30 days after the expiration of the reasonable period of time if in its view the compliance is not satisfactory. The use of the terms "*determine what further action* [will be taken]" (rather than "whether" or "when" further action will be taken) and the reference to the part of Section 301 dealing with "mandatory actions" implies that the USTR is required to announce at this stage which of the retaliatory trade measures that the USTR is authorized to take under Section 301(c) will be applied in response to what the United States unilaterally considers to be unsatisfactory compliance.

4.935 The European Communities argues that Section 305 regulates when the announced action must be implemented. Here again the USTR must observe strict time limits. According to Section 305(a)(1) the action must be implemented in principle "no later than the date that is 30 days after the date on which such determination is made". If the USTR considers that the compliance is unsatisfactory, the USTR must thus determine, at the latest 60 days after the expiration of the reasonable period of time, the level of suspension of concessions or other obligations and the sector to which the suspension shall apply, and impose discriminatory duties, fees or restrictions on the trade of the Member concerned.

4.936 The European Communities further states that in cases where disagreement exists between the parties as to the existence or the conformity of the implementing measures, the procedure of Article 21.5 DSU must be applied before any suspension of concessions can be authorized by the DSB. In such cases, the 60-day time frame of section 306(b) will not normally be sufficient to carry out the dispute settlement procedure, since the procedure of Article 21.5 foresees 90 days for the panel ruling alone. But even where there is no disagreement between the parties to the dispute as to the existence or the conformity of the implementing measures, the 60-day time limit will still be insufficient for the following reasons.

4.937 In the view of the European Communities, Article 23.2(c) of the DSU obliges the United States to follow "the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations". According to those procedures, both the level of suspension and the sector chosen may be challenged and referred to arbitration.

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[454] Implementation of WTO Recommendations Concerning EC-Measures Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 40638 (1999).

4.938 The European Communities considers that under Article 22.6 of the DSU, "concessions or other obligations shall not be suspended during the course of the arbitration".

4.939 The European Communities asserts that Article 22.7 stipulates that the "DSB shall ... upon request grant authorization to suspend concessions or obligations where the request is consistent with the decision of the arbitrator", which implies that the DSB must await the completion of the arbitration proceeding before authorizing a suspension of concessions or obligations.

4.940 The European Communities notes that according to Article 22.6 of the DSU, the arbitration on the level or nature of the suspension of concessions or obligations "shall be completed within 60 days after the date of the expiry of the reasonable period of time".

4.941 The European Communities explains that when an arbitration decision is issued, the request to suspend concessions is subject to two compulsory conditions:

(a) it must be consistent with the decision of the arbitrator; and

(b) pursuant to Rule 1 of the rules of procedure governing the meetings of the DSB referring to the rules of procedure governing the meetings of the General Council, and in particular Rules 2 and 4, it must be submitted at least ten days before the meeting of the DSB.

4.942 The European Communities then considers that after the end of the reasonable period of time, a period of at least 70 days is foreseen to carry out the several actions (i.e. *inter alia*, request for compensation, request for authorization, arbitration on the level of the requested suspension) which must precede the authorization of suspension of concession by the DSB. This period of 70 days is not at the disposal of the party wishing to be authorized to suspend concessions.

4.943 The European Communities argues that the USTR is nevertheless required under Section 305 to determine unilaterally the level and the nature of the suspension of concessions or other obligations within 60 days. This statutory requirement is inconsistent with United States' obligations under Article 23:2(c) of the DSU and Article XVI:4 of the WTO Agreement.

4.944 In the view of the European Communities, the operation of Section 306 can be illustrated by the USTR's determinations and actions in the case of the dispute between the United States and the European Communities on the banana regime.

4.945 The European Communities further maintains that on the basis of a unilateral determination that the European Communities had failed to implement the DSB's recommendations on this regime, the USTR announced on 3 March 1999 that the US Customs Service would begin as of that date withholding liquidation and reviewing the sufficiency of bonds on imports of selected European products covering trade in an amount of $520 million. The arbitration on the level and nature of the announced suspension requested by the European Communities under Article 22.6 of the DSU should have been completed on 2 March 1999, that is 60 days after 1 January 1999 when the period of implementation accorded to the Communities had expired. However, because of the novelty and complexity of the issues involved, the arbitrators' decision was submitted only on 9 April 1999 and the DSB could therefore act on the United States' request for an authorization of sanctions only on 19 April 1999. This authorization covered trade in an amount of US $191.4 million.

4.946 The European Communities considers that the decision to withhold customs liquidation on 3 March 1999 exposed importers of selected European products to a contingent duty liability of 100 percent, while importers of like products of other origins were only exposed to a duty liability corresponding to the normal customs tariff. The bonds on imports from Europe corresponded to that higher contingent duty liability.

4.947 In the EC's view, these discriminatory rules and formalities in connection with the importation of European products are inconsistent with Article I of the GATT 1994. Moreover, the requirement to submit bonds entailed additional costs for importers that constitute "other charges" imposed in connection with importation that are prohibited by Articles II.2(a) and VIII.1 of the GATT 1994. Finally and most importantly, the real purpose and effect of the measure was to deter imports altogether, as importers would logically be very reluctant to accept a risk of having to pay 100% duties retroactively. As the USTR indicated at a press conference held on 3 March, "we retaliated by effectively stopping trade as of March 3 in response to the harm caused by the EC's WTO-inconsistent banana regime".[455]

4.948 The European Communities then concludes that this measure therefore created a *de facto* import prohibition or restriction within the meaning of Article XI of GATT. There can for these reasons be no doubt that the United States suspended on 3 March 1999 its obligations under, *inter alia*, Articles I, II, VIII and XI of the GATT 1994 towards the European Communities without prior authorization by the DSB.

4.949 The European Communities notes that the USTR made clear in a public notice requesting comments on the planned 3 March 1999 action that it was required under Sections 301-310 to implement that action on that date:

> "Given that the reasonable period of time for the EC's implementation of the WTO recommendations concerning the EC banana regime expires on January 1, 1999, the USTR must make the determination required by section 306(b) no later than January 31, 1999, and, in the event of an affirmative determination, must implement further action no later than 30 days thereafter".[456]

4.950 According to the European Communities, the USTR thus considers itself bound to take retaliatory action 60 days after the expiry of the implementation period in response to a perceived failure to implement rulings or recommendations of the DSB. The USTR added "these time frames permit the USTR to seek recourse to the procedures for compensation and suspension of concessions provided in Article 22 of the DSU".[457]

4.951 The European Communities nevertheless argues that when it turned out that the Article 22 procedures were not completed on 3 March 1999 and that the United States could therefore not obtain the necessary DSB authorization at the time required by its domestic legislation, the USTR nevertheless imposed trade sanctions "effectively stopping trade". This course of events confirms what the text of Section 306(b) indicates, namely that the USTR must implement the further action decided upon irrespective of whether that action conforms to the requirements of Article 22 of the DSU.

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[455] Quoted from notes prepared for the press by the staff of the Office of the USTR entitled "March 3 Action on Bananas".

[456] Federal Register, Vol.63. No.204, Thursday, October 22, 1998, pages 56688 and 56689.

[457] Ibid., page 56689.

4.952 In the view of the European Communities, the United States has accepted an unqualified obligation to impose trade sanctions only with DSB approval but has maintained domestic legislation that explicitly requires the unilateral imposition of such sanctions. It is sufficient for the Panel to note these facts and to rule that Sections 306(b) and 305 do not constitute a good faith performance of the obligations under Articles 21.5 and 22 of the DSU and therefore of Article 23 DSU and Article XVI:4 of the WTO Agreement.

4.953 **The United States responds** that Sections 301-310 of the Trade Act provide the USTR and the President with broad discretion both with respect to determinations under those provisions and the timing of any action taken in accordance with those determinations. Nothing in these provisions mandates action inconsistent with US WTO obligations.

4.954 The United States recalls that the European Communities asks the Panel to find that Section 306(b) is inconsistent with Article 23.2(c),

> "because it requires the USTR to determine what further action to take under Section 301 in the case of a failure to implement DSB recommendations and to implement that action, irrespective of whether the procedures set forth in Article 22 of the DSU have been completed and the DSB authorized such action".

4.955 In the US view, the EC case rests entirely on inaccurate and unsupported assumptions regarding whether action need be taken, the nature of the action, and the timing of such action. Section 306(b) commands no action, let alone action inconsistent with Article 23.2(c).

4.956 The United States considers that turning again to the text, Article 23.2(c) requires Members to "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations" when a Member has failed to implement DSB rulings and recommendations. Again, no actual case involving the suspension of concessions is before this Panel. It is thus not possible to determine whether the United States in such a concrete case actually complied with the requirements of Article 22. The only question, then, is whether Section 306(b) commands the USTR not to follow Article 22 procedures or to suspend concessions without DSB authorization.

4.957 The United States indicates that it manifestly does not. Nothing in Section 306(b) or in Section 305(a) prevents the USTR from complying to the letter with Article 22 procedures, including DSB authorization. As the United States has noted before, the EC's arguments rest on a series of unsupported assumptions and unfounded speculation. If the USTR considers that another Member has not implemented DSB rulings and recommendations, and if she disregards Article 22 procedures, and if she decides to take action, and if that action involves the suspension of concessions, and if she or the President choose not to exercise the discretion available to them not to take action, or to await the outcome of Article 22 proceedings, then, the European Communities asserts, there would be a violation of DSU Article 23.2(c). However, Section 306(b) commands none of this, and the European Communities is not entitled to establish its *prima facie* case based on speculation and an assumption of bad faith regarding how the USTR will exercise discretion.

4.958 The United States considers that it has explained the numerous unsupported assumption underlying the EC's Article 23.2(c) claim. The European Communities has failed to rebut these explanations, or otherwise meet its burden in this dispute. Its claim under Article 23.2(c) therefore also fails.

4.959 The United States recalls that the European Communities argues that Sections 306(b) and 305(a) violate DSU Article 23.2(c), which requires that a Member follow the procedures set forth in Article 22 before suspending concessions or other WTO obligations when another Member has failed to implement DSB recommendations.[458] According to the European Communities, the language of Section 306(b) "implies" that the USTR must announce that she will take mandatory retaliatory action when she considers that another Member has not implemented DSB recommendations. The European Communities further contends that the time frames in Sections 306(b) and 305(a) require the USTR to suspend concessions no later than 60 days following the reasonable period of time, while the soonest that the DSB could authorize the suspension of concessions would be 70 days.

4.960 In the view of the United States, the EC argument flagrantly disregards the broad discretion provided for in Sections 306(b), 301(a) and 305(a) both with regard to the nature of any action taken under those provisions and the timing of that action.

4.961 The United States first points out that nothing in Section 306(b) obligates the USTR to conclude that another Member has failed to implement DSB recommendations. This is a purely discretionary decision, and the European Communities has failed to meet its burden of demonstrating why it would not be possible for the USTR to conclude that no action need be taken because implementation has been satisfactory, because adequate progress is being made, or because further dispute settlement proceedings are necessary to achieve satisfactory implementation.

4.962 The United States also notes that even if the USTR were required under Section 306(b) to conclude in all cases that another Member has not complied with DSB recommendations, and to take action in response, the 210-day time frame set forth in Section 305(a) is more than sufficient to allow any such action to reflect the results of completed Article 22 proceedings, and to be implemented after DSB authorization. The European Communities claims that under Section 305(a)(1), the USTR must take action no later than 30 days after its determination under Section 306(b), which itself will follow the expiration of the reasonable period by no more than 30 days.

4.963 According to the United States, this EC argument completely disregards the fact that the 30-day period in Section 305(a)(1) is applicable "[e]xcept as provided in paragraph (2)".[459] Paragraph 2 of Section 305 provides that the 30-day period set forth in paragraph (1) may be extended for an *additional 180 days*:

> "(2) (A) Except as otherwise provided in this paragraph, the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 301 –
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> ....

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[458] Article 23.2(c) provides that Members seeking redress of violations must:

"follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".

[459] Section 305(a)(1), 19 U.S.C. § 2415(a)(1).

> (ii) if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action".[460]

4.964 The United States further explains that Section 305(a)(2)(A)(ii) explicitly authorizes the USTR to delay action by an additional 180 days, among other reasons, in order "to obtain U.S. rights". Thus, the USTR may delay any action pursuant to Section 306(b) until the United States has obtained the right to suspend concessions based upon completion of Article 22 proceedings and receipt of DSB authorization.

4.965 The United States indicates that the USTR has, in fact, exercised her discretion under Section 305(a)(2)(A)(ii) to delay action by 180 days for the specific purpose of obtaining GATT rights. On May 24, 1989, a GATT panel issued a report finding that Korea's import restrictions on beef were inconsistent with Article XI:1 of the GATT 1947.[461] However, at meetings of the GATT Council on June 21 and July 19, 1989, Korea declined to agree to adoption of the panel report. USTR's target date for action pursuant to Section 305(a)(1) was October 28, 1989. Nevertheless, citing Section 305(a)(2), the USTR determined that "a delay in implementation of such action is necessary and desirable to obtain US rights under the General Agreement on Tariffs and Trade".[462] The USTR further explained that the delay in action beyond October 28, 1989 was desirable "to allow additional time for proceedings in the GATT".[463] Korea allowed the panel report to be adopted on November 8, 1989, and the United States and Korea initialed an agreement on implementation on March 21, 1990.[464]

4.966 The United States further explains that when the 180 days is added to the 60 days provided for in Sections 306(b) and 305(a)(1), it is clear that, in all cases, the USTR has more than enough time to await DSB authorization to suspend concessions consistent with an Article 22 arbitrator's award, regardless of whether this would require 60 or 70 days. Moreover, the 240-day time frame for implementation would even allow the USTR to first complete Article 21.5 proceedings (a 90-day process), were this necessary to obtain the US right to suspend concessions. However, the DSU as currently drafted neither requires nor permits[465]

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[460] Section 305(a)(2)(A), 19 U.S.C. § 2415(a)(2)(A).

[461] Panel Report on *Republic of Korea – Restrictions on Imports of Beef* ("*Korea - Beef*"), adopted 7 November 1989, BISD 36S/268.

[462] Determinations Under Section 304 of the Trade Act of 1974, as Amended, Regarding the Republic of Korea's restrictions on Imports of Beef, 54 Fed. Reg. 40769 (1989) (US Exhibit 4).

[463] Ibid.

[464] See Termination of Section 302 Investigation Regarding the Republic of Korea's Restrictions on Imports of Beef, 55 Fed. Reg. 20376 (1990) (US Exhibit 5). The United States notes that similarly, in the 1989 dispute between the United States and the European Communities over oilseeds, the Trade Representative delayed action for 180 days pursuant to Section 305(a)(2)(A)(ii) on the basis that substantial progress was being made in GATT dispute panel proceedings which had not yet finished as of the 18-month target date. Moreover, the Trade Representative made a determination that US agreement rights had been denied under Section 304(a)(1)(A)(i) only after the *Oilseeds* panel report had been adopted, even though this was well after the 18-month target date. See Determinations Under Section 304 of the Trade Act of 1974, as Amended: European Community Policies and Practices With Respect to, Inter Alia, Production and Processing Subsidies on Oilseeds, 55 Fed. Reg. 4294 (1990) (US Exhibit 6).

[465] If a complaining party wishes to have the benefit of the negative consensus rule in Articles 22.6 and 22.7.

completion of the Article 21.5 panel process before seeking and receiving authorization to suspend concessions under Article 22.

(b) USTR's discretion not to take action

4.967 **The United States recalls** that under Section 301(a)(1), upon a determination that US rights under a trade agreement have been denied,

> "the Trade Representative shall take action authorized in subsection (c) of this section, subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.
>
> Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country".[466]

4.968 The United States explains that Section 301(c) authorizes the USTR to act against goods or services or to enter into agreements to eliminate the violation of US agreement rights or to receive compensation for those violations.[467] It does not mandate any particular form of action.

4.969 The United States further states that with respect to action taken under Section 301, the USTR has substantial discretion, including discretion to take no action at all. The USTR is explicitly not required to take action: (1) when the DSB has adopted report findings that US rights have not been violated[468]; (2) when the foreign country "is taking satisfactory measures to grant the rights of the United States under a trade agreement",[469] has agreed to eliminate or phase out the practice which violated US rights,[470] or has agreed to provide compensation[471]; (3) when action would have "an adverse impact on the United States economy substantially out of proportion to the benefits of such action;"[472] (4) or when action would cause "serious harm to [US] national security".[473] The European Communities has acknowledged that when WTO Members commit to implement DSB recommendations within the time period foreseen in DSB Article 21, the United States has considered this a "satisfactory measure " justifying termination of an investigation without further action.

4.970 In response to the Panel's question, the United States explains that Section 301(a)(2)(B)(i) allows the USTR to take no action if the foreign country is taking "satisfactory measures to grant the rights of the United States under a trade agreement". In all of the scenarios presented in the question – DSB recommendations not yet adopted, suspension of concessions not yet authorized, the Member concerned has not expressed an intention to comply and has decided not to do anything before the expiration of the reasonable period of

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[466] Section 301(a)(1), 19 U.S.C. § 2411(a)(1) (emphasis added).
[467] Section 301(c), 19 U.S.C. § 2411(c).
[468] Section 301(a)(2)(A), 19 U.S.C. § 2411(a)(2)(A).
[469] Section 301(a)(2)(B)(i), 19 U.S.C. § 2411(a)(2)(B)(i).
[470] Section 301(a)(2)(B)(ii), 19 U.S.C. § 2411(a)(2)(B)(ii).
[471] Section 301(a)(2)(B)(iii), 19 U.S.C. § 2411(a)(2)(B)(iii).
[472] Section 301(a)(2)(B)(iv), 19 U.S.C. § 2411(a)(2)(B)(iv).
[473] Section 301(a)(2)(B)(v), 19 U.S.C. § 2411(a)(2)(B)(v).

time – the continued participation of the Member concerned in dispute settlement proceedings would constitute satisfactory measures to grant US agreement rights. It is important to recognise that the rights in question would not necessarily be the substantive rights the Member had been denying through its challenged measure, but, rather, US WTO rights under DSU Articles 21 - 23. For example, if the Member concerned had failed to express its intention to implement DSB recommendations, or was choosing not to use the reasonable period of time to implement, this would ultimately result in the United States obtaining the right to compensation or to suspend concessions pursuant to DSU Article 22.2. The United States could on this basis determine not to take action pursuant to Section 301(a)(2)(B)(i).

4.971 In the view of the United States, the European Communities disregards entirely provisions of Section 301(a)(2) which provide the USTR and the President with discretion to limit any action to that authorized by the DSB, or to take no action at all. These include explicit authority not to take action when the DSB adopts findings that US agreement rights are not being denied or that US trade agreement benefits are not being nullified or impaired. In other words, the USTR may limit or take no action depending on the outcome of Article 22 proceedings. In addition, the USTR may choose not to take action for reasons of national security, if the action has an adverse economic impact or if the USTR is satisfied that satisfactory measures are being taken to grant US agreement rights. Finally, actions taken under Section 301(a) are subject to "the specific direction, if any, of the President". The President may also place conditions on any action taken or direct that action not be taken.

4.972 In response to the Panel's question as to whether the sole fact that DSB recommendations have not yet been adopted or that the DSB has not yet authorized the suspension of concessions can mean that USTR action in these circumstances would "have an adverse impact on the United States economy substantially out of proportion to the benefits of such action" or "cause serious harm to the national security of the United States", the United States indicates that given the broad discretion she has under Section 301(a)(2)(B)(i), the USTR might not consider it necessary to rely on these two provisions, though they could be available depending on the particular circumstances of a given case.

4.973 The United States further argues that a third reason the EC's argument fails is that any action the USTR may consider under Section 306(b) is taken pursuant to Section 301(a)(1), and is therefore subject to the exceptions to action set forth in Section 301(a)(2). The most important of these from the perspective of the current proceeding is Section 301(a)(2)(A), which provides that the USTR need not take action in any case in which the DSB has adopted a report or ruling finding that US agreement rights are not being denied or that US trade agreement benefits are not being nullified or impaired.[474] The USTR is therefore free to take no action if an Article 22 arbitrator concludes that there is no nullification or impairment of US agreement benefits (i.e, that the other Member has complied with DSB recommendations), or to reduce the proposed level of suspension if the arbitrator concludes that the proposal exceeds the actual level of nullification or impairment. Other exceptions under Section 302(a)(2) which would ensure a WTO-consistent outcome (since no action would be taken) include exceptions when the USTR finds that action would have an adverse impact on the United States economy or would cause serious harm to national security.[475]

4.974 The United States claims that again, the European Communities case rests on an extensive string of unsupported assumptions. The EC assumption is that the USTR will always

[474] Section 301(a)(2)(A), 19 U.S.C. § 2411(a)(2)(A).
[475] Section 301(a)(2)(B)(iv), (v), 19 U.S.C. § 2411(a)(2)(B)(iv), (v).

conclude that another Member has failed to implement DSB recommendations and rulings and that the United States must therefore take action. There is absolutely no basis in Section 306 for this conclusion. The USTR enjoys more than adequate discretion under Section 306 not to take action either because she considers that there has been full implementation, or because she considers that further dispute settlement proceedings are necessary to achieve such implementation. Section 306(b) therefore does not mandate that action be taken. In the absence of such action, there can be no violation of Article 23.2(c). The time frames in Section 305 never become relevant.

4.975 The United States argues that Section 305(a)(2)(A)(ii) and Section 301(a)(2)(B)(i), (iv) and (v) provide the USTR with broad discretion to delay or not take action, a fact explained in the Statement of Administrative Action on page 360.[476] There it is explained that, "section 301 does not automatically require the imposition of sanctions where the United States wins a dispute settlement case under a trade agreement". The USTR may delay action under Section 305(a)(2)(A)(ii) if she has determined that "substantial progress is being made" or if the delay is necessary to obtain US rights or a satisfactory solution. Likewise, Sections 301(a)(2)(B)(i), (iv) and (v) permit no action to be taken if a foreign country is taking satisfactory measures to grant US agreement rights, if there would be an adverse economic impact, or for reasons of national security. The provisions of Section 305(a)(2)(A)(ii) and Section 302(a)(2)(B)(i) are particularly broad, since they are available based on the USTR's judgment that progress is being made, or that delay is necessary to achieve such progress.

4.976 The United States notes that Section 305(a)(2)(A)(ii) has been used on at least 3 occasions relating to GATT and WTO dispute settlement proceedings. Two of these, involving *Korean – Beef* and *EC – Oilseeds*. In addition, the USTR used Section 305(a)(2)(A)(ii) in December 1991, to delay implementation of action in an investigation involving Canadian import restrictions on beer. Based on an adopted GATT panel report finding Canadian violations, the USTR determined on December 27, 1991 that Canada had denied US rights under a trade agreement, and proposed increased duties on Canadian beer. However, the USTR determined, pursuant to Section 305(a)(2), that "it was desirable to delay implementation of action ... in order to provide Canada with a full opportunity to comply with the recommendations of the GATT panel".[477]

4.977 The United States further points out that Section 301(a)(2)(B)(i) has also been used on several occasions. These include situations in which a WTO Member has stated its intention to comply with DSB rulings and recommendations (*EC – Bananas III*, *Canada – Periodicals*, *India – Patents (US)*, *Argentina – Textiles and Apparel (US)*), situations in which a country has committed to implement GATT panel proceedings (*EC Canned Fruit*, *EC – Oilseeds)*, and situations in which a country has confirmed that it would take measures to implement an earlier agreement (*China Intellectual Property Rights*).

(c) Discretion with respect to timing of action

4.978 **The United States considers** that the European Communities has failed to meet its burden of establishing that Sections 306(b) and 305(a) mandate any violation of DSU Article 23.2(c). The European Communities may not establish its claim that Section 306(b) mandates suspension of concessions without DSB authorization based on unsupported

[476] US Exhibits 3 and 11

[477] The United States cites Notice of Determinations Under Section 304 of the Trade Act of 1974: Canadian Provincial Practices Affecting Imports of Beer, 57 Fed. Reg. 308, 309 (1992).

assumptions concerning how, and when, she will make decisions in a particular case. The European Communities may not meet its burden by assuming or asserting that the USTR must consider non-implementation to have occurred, or that it is permissible under US law to disregard entire statutory provisions which give the USTR and the President broad discretion to delay action, or to take no action at all. Section 306(b) permits the USTR to follow Article 22 procedures in every case.

4.979 The United States argues that there have now been two situations in which the European Communities has failed to implement DSB rulings and recommendations, and the United States as well as other WTO Members are gaining experience in this regard. The United States refers the Panel to US Exhibit 17, a *Federal Register* notice issued in connection with the *Hormones* dispute which describes in detail the manner in which the United States follows Article 22 procedures when exercising its authority under Section 306.

4.980 The United States further argues that even in those cases in which the USTR and President have determined that action will be taken, the time frames provided for in Sections 301-310 ensure that such action may await DSB authorization. Section 305(a)(1) provides,

> (1) Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 304(a)(1)(B) to take under section 301, subject to the specific direction, if any, of the President regarding any such action, by no later than the date that is 30 days after the date on which such determination is made.[478]

4.981 In the view of the United States, Paragraph 2 of Section 305 provides that the 30-day period set forth in paragraph (1) may be extended for an additional 180 days:

> (2) (A) Except as otherwise provided in this paragraph, the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 301 -
>
> . . .
>
> (ii) if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action.[479]

4.982 The United States then concludes that Section 305(a)(2)(A)(ii) thus explicitly authorizes the USTR to delay action beyond the 30 days provided for in Section 305(a)(1) in order "to obtain U.S. rights", among other reasons. This would include rights under international agreements such as the GATT or other WTO agreements. The USTR has, in fact, exercised her discretion under Section 305(a)(2)(A) to delay action for just this purpose. On May 24, 1989, a GATT panel issued a report finding that Korea's import restrictions on beef were inconsistent with Article XI:1 of the GATT 1947.[480] However, at meetings of the GATT Council on June 21

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[478] Section 305(a)(1), 19 U.S.C. § 2415(a)(1).
[479] Section 305(a)(2)(A), 19 U.S.C. § 2415(a)(2)(A).
[480] Panel Report on *Korea – Beef*, op. cit.

and July 19, 1989, Korea declined to agree to adoption of the panel report. USTR's time frame for action pursuant to Section 305(a)(1) was October 28, 1989. Nevertheless, citing Section 305(a)(2), the USTR determined that "a delay in implementation of such action is necessary and desirable to obtain U.S. rights under the General Agreement on Tariffs and Trade".[481] The USTR further explained that the delay in action beyond October 28, 1989 was desirable "to allow additional time for proceedings in the GATT".[482] Korea allowed the panel report to be adopted on November 8, 1989, and the United States and Korea initialed an agreement on implementation on March 21, 1990.[483]

4.983 The United States further explains that similarly, in the 1989 dispute between the United States and the European Communities over oilseeds, the USTR delayed action for 180 days pursuant to Section 305(a)(2)(A)(ii) on the basis that substantial progress was being made in GATT dispute panel proceedings which had not yet finished as of the 18-month target date.[484] Moreover, the USTR specifically waited until after panel proceedings had finished before determining that US agreement rights had been denied under Section 304(a)(1)(A)(i), even though this was well after the 18-month target.[485] Thus, it was consistent US practice, even before the conclusion of the Uruguay Round, to rely on dispute settlement results when determining whether US agreement rights were denied.

4.984 The United States then indicates that the USTR and the President thus have broad discretion under Sections 301-310 to dictate the timing of any action, the conditions under which the action will be given effect, and whether the action will be taken at all. The USTR or the President may, for example, specify that any action taken should not become effective until the United States has received formal DSB approval.

4.985 The United States argues that when a WTO Member has indicated, pursuant to DSU Article 21.3, that it intends to implement the recommendations and rulings of the DSB in a case involving violations of US WTO rights, the USTR has considered this a "satisfactory measure" pursuant to Section 301(a)(2)(B) justifying termination of a Section 302 investigation.[486] In such cases, the USTR continues to monitor the Member's implementation of the DSB rulings and recommendations pursuant to Section 306(a).[487]

4.986 The United States notes that in those cases in which the USTR considers that a WTO Member has not implemented DSB rulings and recommendations by the conclusion of the reasonable period of time provided for in Article 21.3, the USTR determines what further action she will take pursuant to Section 301(a).[488] Contrary to the representation of the European

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[481] Determinations Under Section 304 of the Trade Act of 1974, as Amended, Regarding the Republic of Korea's Restrictions on Imports of Beef, 54 Fed. Reg. 40769 (1989) (US Exhibit 4).

[482] Ibid.

[483] See Termination of Section 302 Investigation Regarding the Republic of Korea's Restrictions on Imports of Beef, 55 Fed. Reg. 20376 (1990) (US Exhibit 5).

[484] See Determinations Under Section 304 of the Trade Act of 1974, as Amended: European Community Policies and Practices With Respect to, Inter Alia, Production and Processing Subsidies on Oilseeds, 55 Fed. Reg. 4294 (1990) (US Exhibit 6)

[485] See ibid. The United States notes that on the 18-month anniversary, the USTR instead concluded that she had reason to believe agreement rights were being denied, and therefore was pursuing such a ruling under GATT dispute settlement procedures.

[486] E.g. Determinations Under Section 304 of the Trade Act of 1974 With Respect to Certain Canadian Practices Affecting Periodicals, 62 Fed. Reg. 50651 (1997) (US Exhibit 7).

[487] Section 306(a), 19 U.S.C. § 2416(a).

[488] Section 306(b), 19 U.S.C. § 2416(b).

Communities, the further action the USTR will take is subject to the specific direction of the President, since that action is taken pursuant to Section 301(a).[489] Moreover, because the action is taken under Section 301(a), it is subject to the exceptions set forth in Section 301(a)(2) relating to, among other things, conformity with DSB-adopted reports, the adverse impact of such action on the US economy or its harm to US national security.[490]

4.987 The United States further argues that just as importantly, because the determination regarding the action to be taken is considered a determination under Section 304(a)(1),[491] the time frames for implementing the action are those set forth in Section 305. As described above, under Section 305, the action must be implemented within 30 days of the determination to take action, unless the USTR,

> "determines that substantial progress is being made, *or that a delay is necessary or desirable to obtain United States rights* or satisfactory solution…".[492]

4.988 The United States maintains that in such cases, the USTR may delay action by a further 180 days. This permits the USTR to delay any action until well beyond the time frames required for DSB authorization for the right to suspend concessions pursuant to DSU Articles 22.6 or 22.7.

4.989 The United States challenges the EC assumption that, under US law, it is permissible to ignore entire statutory provisions. Specifically, in claiming that Section 305(a) requires action to be taken within 60 days of the expiration of the reasonable period of time, the European Communities completely disregards explicit statutory language authorizing the USTR to delay action by 180 days. Section 305(a)(2) authorizes the USTR to implement such a delay to obtain US rights or a satisfactory solution to the dispute. The United States used this provision to delay action until it was able to obtain rights under GATT 1947 dispute settlement procedures, and the European Communities has offered no explanation of why, under US law, the United States would not again be able to use this provision to delay action in order to first obtain DSB authorization.

4.990 The United States recalls that the European Communities has at times argued that the time frames in the DSU and Sections 301-310 are relevant to the above issues, and at other times that they are not. The United States indicates that the time frames in Sections 301-310 comport with those in the DSU, but even if they did not, it would not matter. For example, even if panel proceedings were to exceed 18 months, the USTR would not be obligated to make the one determination that is an absolute prerequisite before any other requirements under Article 23.2(a) become relevant. The USTR is not obligated to determine that US agreement rights have been denied. The record shows that the USTR has never once made a Section 304(a)(1) determination that US GATT or WTO agreement rights have been denied which was not based on the results of GATT and WTO dispute settlement proceedings. Not once.

4.991 The United States recalls that the European Communities now claims that the United States violates "Article 23" by virtue of the "retaliation list" Korea asserts the USTR must publish. The EC's response to this question repeats many of its previous false assumptions, and

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[489] Section 306(b)(1), 19 U.S.C. § 2416(b)(1).
[490] Section 301(a)(2), 19 U.S.C. § 2411(a)(2).
[491] Section 306(b)(1), 19 U.S.C. § 2416(b)(1).
[492] Section 305(a)(2)(ii), 19 U.S.C. § 2415(a)(2)(ii).

adds to them the erroneous assumption that in providing for a determination of "action", Section 304(a)(1) requires publication of a list of products for which the United States is requesting suspension.

4.992 The United States points out that the USTR is not required to publish a "retaliation list" under Sections 301-310, and only Sections 301-310 are within the Panel's term's of reference. In the event of an affirmative determination that US agreement rights have been denied, she is required, pursuant to Section 304(a)(1)(B), to determine what action to take. This need not include publication of a proposed list of products subject to suspension of concessions. The European Communities may not assume that it does.

4.993 The United States considers that public notice concerning which products might be the subject of a suspension of concessions is both good public policy and important to the effective exercise of WTO rights. It is good public policy because importers and the public generally need to understand the actions the US government is proposing so they can comment, and because the government needs to receive public input in order to evaluate whether action is appropriate, if the action is to be taken under Section 301(b), or whether an exception under Section 301(a)(2) is applicable, if the action is to be taken under Section 301(a). The government also needs this information to apply the principles and procedures in DSU Article 22.3. For example, the United States must evaluate whether suspension of concessions within the same sector would be "practicable or effective" for purposes of undertaking the analysis called for in DSU Article 22.3. Public input is required to ensure that officials have the information necessary to make this judgment.

4.994 The United States notes that Canada, as well, publishes lists of products which might be the subject of a suspension of concessions in connection with Article 22 proceedings. US Exhibit 19 includes Canadian press releases describing and reproducing the proposed list of products Canada has published in the *EC Hormones* and *Australia Salmon* disputes. This reinforces the fact that such lists are an integral part of domestic implementation of Article 22. Until its answer to a Panel question, the European Communities had not claimed that such lists are inconsistent with the DSU. In fact, in the DSU Review, it now appears that the European Communities is insisting that such lists be offered at the time suspension is proposed.[493]

4.995 In the view of the United States, the European Communities merely asserts that Section 304 requires publication of a list of products, despite the absence of any textual basis for that assertion. It states that the USTR must either propose suspension of concessions or reach an agreement with the foreign country. According to the European Communities, if suspension is proposed, this necessarily includes publication of a list of products, but it fails to explain why this so, or if it is so, what the timing must be.[494]

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[493] See DSU Review, Discussion Paper from the European Communities dated 30 June 1999, Document No. 3864, para. 16, circulated on 1 July 1999 (US Exhibit 12).

[494] The United States claims that if, in fact, the European Communities and Korea were entitled to assume, on the basis of a statutory requirement to allow the "presentation of views" on proposed determinations, that this necessarily entails publication of a list of products proposed for suspension, then they would have to conclude that Korea's laws include precisely the same requirement. Article 4 of Korea's Foreign Trade Act (the "Act") authorizes the Ministry of Trade, Industry and Resources to "take special measures concerning restrictions on or prohibition of the export and import of goods" if, among other reasons, the trading partner has denied Korean rights under an international convention, or if that partner imposes any "unreasonable burden or restriction" on Korean trade. See Foreign Trade Act, http://www.oomph.net/law/html/15-13.htm (US Exhibit 20). Article 4 of the Enforcement Decree for the

4.996 The United States considers that leaving aside whether a list must be issued when suspension of concessions is proposed, the EC's description of the options available to the USTR (suspension or agreement) itself makes clear that suspension is not the only choice available. It therefore may not be concluded that suspension is mandated. Moreover, the USTR is not obliged to take any action at all. The European Communities again assumes it may ignore Section 301(a)(2), which allows the USTR to take no action if, among other reasons, she believes the foreign country is taking satisfactory measures to grant US trade rights, or if WTO dispute settlement proceedings result in a finding that US agreement rights have not been denied or benefits under a trade agreement have not been impaired. As a result, the USTR is never obligated to take action at odds with the results of WTO dispute settlement panels or arbitrators.

4.997 The United States claims that the USTR considers dispute settlement proceedings to conclude up to 30 days after adoption of the panel and Appellate Body reports, a date which allows defending parties to state their intentions with regard to implementation. Thus, the USTR has typically issued her determination regarding denial of US trade agreement rights together with the determination that the foreign country is taking satisfactory measures.[495] In fact, the USTR has even determined that a foreign country is taking satisfactory measures solely on the basis that she "expected" that country would implement DSB rulings and recommendations – without regard to whether it had actually informed the DSB of its intentions.[496] Thus, the other half of the premise underlying Korea's argument is also incorrect, namely, that the time frames in Section 301 and 304, combined with the alleged requirement to publish a list, means that the list must be published before a losing party has had an opportunity to state its intentions with respect to implementation.

4.998 The United States argues that even were the European Communities permitted to assume that Section 304(a)(1) mandates the publication of a list of products for which the US is proposing suspension, it has failed to explain exactly how this violates Article 23. The European Communities does not even specify which paragraph of Article 23 publication of a list would violate. Instead, it merely characterizes publication as a "unilateral determination" which one must assume violates Article 23. This exemplifies the EC's flight from the text of the DSU in favor of its generalized approach of divining obligations from slogans.

4.999 In the US view, while it is difficult to respond to the EC's vague claims that the publication of a list of products proposed for suspension would violate Article 23, the mere fact that such lists are not mandated under Sections 301-310 (or even mentioned therein) precludes any finding of WTO inconsistency. The EC's arguments in response to Panel question 20

Act requires the Minster of Trade and Industry to "notify publicly the contents of the measure" taken under Article 4 of the Act if the Minister "desires to take a special measure", as well when the measure is actually taken. See Enforcement Decree of the Foreign Trade Act, http://www.oomph.net/law/html/15-9.htm (US Exhibit 21). If anything, the Korean law is very clear in requiring publication of the specifics of its proposed measures. No such requirement is found in Sections 301-310.

[495] See e.g. Determinations Under Section 304 of the Trade Act of 1974 With Respect to Certain Canadian Practices Affecting Periodicals, 62 Fed. Reg. 50651 (1997) (US Exhibit 7); Determinations Under Section 304 of the Trade Act of 1974: European Communities' Banana Regime, 63 Fed. Reg. 8248 (1998) (US Exhibit 15); Determination Under Section 304 of the Trade Act of 1974: Practices of the Government of India Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals, 63 Fed. Reg. 29053 (1998)(US Exhibit 16).

[496] Determinations Under Section 304 of the Trade Act of 1974: Argentine Specific Duties and Non-tariff Barriers Affecting Textiles, Apparel, Footwear and Other Items, 63 Fed. Reg. 25539, 25540 (1998) (US Exhibit 22)

provide yet another example of how the European Communities is asking this Panel to make adverse assumptions concerning how the United States will exercise discretion under Sections 301-310. If the European Communities believes that publication of a list of products proposed for suspension would violate US WTO obligations, the European Communities should wait until the United States actually publishes such a list in a concrete case. Then, it would be in a position to argue from facts, not assumptions.

(d) President's discretion

4.1000 **The European Communities notes** that the President has never given the USTR any general direction to impose trade sanctions only in accordance with the United States' obligations under international law nor has he ever instructed the USTR in specific cases to do so.

4.1001 **The United States recalls** that the European Communities notes that 1988 amendments to Section 301 transferred from the President to the USTR the authority to determine whether agreement violations have occurred and what US action to take in response. However, the European Communities ignores the discretion retained by the USTR in making these determinations, as well as the continued discretion of the President to intervene under the terms of the statute. Indeed, the authors of the very article which the European Communities cites for Section 301's legislative history concluded that the transfer of authority was an "important symbolic statement" but that

> "the change is unlikely to be particularly significant. The Trade Representative still serves at the pleasure of the President, and therefore is unlikely to take actions of which the President disapproves".[497]

4.1002 The United States argues that a fourth reason Section 306(b) does not violate Section 23.2(c) relates to the EC's disregard for the discretion granted the President under Section 301(a)(1) to condition – or cancel – any decision to take action. Section 301(a)(1) states that action taken pursuant to that provision is "subject to the specific direction, if any, of the President regarding any such action".[498] The President may thus dictate the timing of the action, the conditions under which the action will be given effect, or whether the action will be taken at all. Thus, the President may, like the USTR herself, specify that action be conditioned upon DSB approval, or not be taken at all. The United States notes that there is no limitation in the language of Sections 301-310 on how the President may exercise this discretion.

4.1003 The United States recalls that in its discussion of Section 306(b), the European Communities refers to this Presidential discretion, where it states that the President has never given the USTR "any general direction to impose trade sanctions only in accordance with the United States' obligations under international law, nor has he ever instructed the USTR in specific cases to do so". Aside from the fact that this statement assumes that the President would have found it necessary to offer such direction to the USTR, this statement does not

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[497] Judith Hippler Bello and Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 Stanford J. Int'l Law 1, 9-10 (1988). The authors were the USTR General Counsel and Deputy USTR at the time the article was written, and had been deeply involved in the development of the provisions.

[498] Section 301(a)(1), 19 U.S.C. § 2411(a)(1). Section 305(a)(1) also refers to the fact that action under Section 301 is "subject to the specific direction, if any, of the President regarding any such action". Section 305(a)(1), 19 U.S.C. § 2415(a)(1).

change the fact that the President is completely free to provide such direction. Again, to meet its burden, the European Communities must demonstrate that the President *could not* exercise the discretion provided for in the statute to direct a WTO-consistent result; it is not sufficient to assert that the President has not felt the need to do so in the past.[499]

4.1004 The United States considers that the European Communities attempts to dismiss Presidential discretion under Section 301 by claiming that such an interpretation is permitted under the principle set forth in two panel proceedings, *United States – Measures Affecting Alcoholic and Malt Beverages*[500] and *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products.*[501] However, as is clear from the excerpts quoted by the European Communities, the principle which these cases emphasize is that the non-application or non-enforcement of mandatory legislation which otherwise violates trade agreement rules does not excuse that violation.[502] Non-application or non-enforcement is not at issue in this case. Before one reaches the question of whether mandatory legislation is not being applied or enforced, one must first determine that the legislation is mandatory. The European Communities has failed to do, notwithstanding its bald assertions that Sections 301-310 "explicitly stipulat[e]" or "mandate" WTO-inconsistent determinations and actions.

4.1005 In the US view, the European Communities in particular focuses on the *India - Patents (US)* panel report in support of its claim that the "legal uncertainty" at issue in that case is somehow present here. However, that case involved a question whether, under Indian law, an administrative practice could legally take precedence over a law which on its face mandated actions in violation of WTO obligations.[503] That is quite a different matter from the question of whether discretionary language in the statute itself renders it non-mandatory.

4.1006 According to the United States, the European Communities can point to no principle of US domestic law which would permit the European Communities to excise language from a statute to suit its convenience, or to examine a statute's meaning based only on selected clauses. The discretion accorded both the USTR and the President under Sections 301-310 ensures that the United States government may fully comply with its WTO obligations under all circumstances. The European Communities has therefore failed to meet its burden of demonstrating that Sections 306 (b) and 305(a) "do not allow" the European Communities to meet these obligations.

4.1007 Finally, with regard to the "illustration" of the operation of Sections 306(b) and 305(a) which the European Communities purports to provide, the United States reiterates that the EC challenge to Sections 301-310 is to the statute itself, and not to the application of those provisions in any particular case.[504] The European Communities explicitly acknowledges that

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[499] Panel Report on *US – Tobacco*, op. cit., para. 123.

[500] Panel Report on *US – Malt Beverages*, op. cit.

[501] Panel Report on *India – Patents (US)*, as modified by Appellate Body Report on *India – Patents (US)*, op. cit.

[502] In Panel Report on *US – Malt Beverages*, op. cit., for example, the panel explained,

"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, *a non-enforcement of a mandatory law* in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply".

Ibid., para. 5.60. (emphasis added)

[503] See *India - Patents (US)*, op. cit., paras. 7.35-7.37.

[504] See WT/DS152/11.

its complaint does not address the US measures taken in the context of the EC's failure to comply with DSB recommendations in the *Bananas* case, and that those measures are the subject of a separate dispute. The United States fully intends in the context of that dispute to rebut any EC claims that the United States did not act in accordance with its WTO obligations.[505]

4.1008 The United States also confirms that the US President can exercise the discretion granted under Section 301(a)(1) not to take action and under Section 305(a)(1) to direct the USTR not to implement action taken under Section 301, based upon the fact DSB recommendations have not yet been adopted or that the DSB has not yet authorized the suspension of concession.

4.1009 In response to the Panel's question as to whether any "specific directions" have been given so far by the US President under Sections 301 (a)(1) or 305 (a)(1), the United States states that no such specific directions have to date been given, but the specific directions may include a direction to the USTR not to take action.

5. GATT claim

4.1010 **The European Communities claims** that Section 301(c)(1)(b) allows the USTR to target either goods or services when determining the actions to be taken in response to a unilaterally determined failure to implement DSB recommendations. However, according to Article 22.3 of the DSU, the United States must suspend concessions or other obligations with respect to goods, in disputes involving trade in goods, except when this is not practical or effective. This implies that, in disputes involving trade in goods, Sections 306(b) and 305(a) require the USTR to unilaterally impose measures as a consequence of a unilaterally determined failure to implement DSB recommendations that violate basic provisions of the GATT 1994, among them Articles I, II, III, VIII and XI.

4.1011 The European Communities explains that Section 301(c) authorizes the USTR to "suspend, withdraw, or prevent the application of, benefits of trade agreement concessions", and "impose duties or other import restrictions on the goods of, and … services of such foreign country for such time as the Trade Representative determines appropriate".[506] To the knowledge of the Communities, the USTR has not yet made use of the possibility to impose duties or restrictions on services. If the act, policy or practice of the foreign country violates the criteria for duty-free treatment under the United States' Generalised System of Preferences, the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act, the USTR is also authorized to withdraw, limit or suspend such treatment.

4.1012 The European Communities argues that in the case of WTO Members, other than the beneficiaries of these preference schemes, the imposition of duties or restrictions on the goods or services under Section 301(c) is bound to be inconsistent with the United States obligations under the GATT and the General Agreement on Trade in Services (GATS), in particular the

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[505] Having said this, the United States comments on the quotation from a USTR notice of October 22, 1998, quoted by the European Communities. That quotation includes the statement "in the event of an affirmative determination", indicating that the Trade Representative continued to have discretion not to determine to propose any action. Further, while the statement included a description of the 30-day deadline in Section 305(a)(1), the language of that provision – and of Section 305(a)(2) – is the best evidence of its contents.

[506] Section 301(c), 19 U.S.C. §2411(c).

most-favoured-nation provisions of these agreements. Only an authorization by the DSB in accordance with Article 22 of the DSU could possibly justify such measures. However, there is no provision in the Trade Act of 1974 that makes the retaliatory action of the USTR dependent on the authorization of the DSB.

4.1013 The European Communities maintains that given that Sections 304(a)(2)(A) and 306(b), as amended, require the United States to resort to retaliatory trade action within certain time limits irrespective of the result of WTO dispute settlement procedures, the actions taken in the area of trade in goods and not authorized pursuant to Article 3.7 and 22 of the DSU will necessarily be in violation of US obligations under one or more of the following GATT obligations: the Most-Favoured Nation clause (Article I, GATT 1994), the tariff bindings undertaken by the United States (Article II, GATT 1994), the National Treatment clause (Article III, GATT 1994), the obligation not to collect excessive charges (Article VIII, GATT 1994) and the prohibition of quantitative restrictions (Article XI, GATT 1994).

4.1014 **The United States responds** that as in its other claims in this dispute, the European Communities cites discretionary language in Sections 301-310 and then claims it "implies" mandatory action inconsistent with US obligations. In this case, the European Communities states in perfunctory fashion that Section 301(c)(1)(b) "allows the USTR to target either goods or services" and then assumes that this means that USTR must suspend concessions in a manner inconsistent with Article 22.3. The European Communities asserts that this discretion "implies that" Sections 306(b) and 305(a) "require" the USTR to violate GATT Articles I, II, III, VIII and XI.

4.1015 In the view of the United States, for the reasons described in the preceding sections, the USTR and the President have the discretion not to take any action under Section 306(b) or to take only those actions authorized in accordance with adopted panel findings or arbitral awards. The EC's claims with respect to the USTR's discretionary authority in the selection of retaliation targets in no way suggests that any provision of Sections 301-310 requires the USTR to suspend concessions, or to suspend concessions in a manner inconsistent with any WTO obligation.

4.1016 The United States further argues that having looked at the text of Article 23.2(a) and (c), the United States would logically look at the text of GATT Articles I, II, III, VIII and XI. However, the European Communities itself never even refers to the text of these provisions, and there is thus little for the United States to rebut. The European Communities never does more than assert that Sections 304(a)(2)(A) and 306(b) "necessarily" violate these provisions. The EC's only reasoning is that "certain time limits" create this result. Even if the European Communities were entitled to make the incorrect assumption that the statute commands "retaliatory trade action" and that Section 305 is not available to delay such action until receipt of DSB authorization, the European Communities has failed to offer any legal argumentation as to how Sections 304(a)(2)(A) and 306(b) are inconsistent with any of these provisions. Indeed, the European Communities only states that Section 306(b) violates "one or more of these [GATT 1994] provisions". The European Communities thus cannot even say which of these provisions has been violated, let alone how. The European Communities may not establish its *prima facie* case on the basis of mere assertions such as these. With regard to Article 23.1, as well, the European Communities has failed to attempt to make its case, let alone to establish it. Nothing in Sections 301-310 commands that the USTR not abide by the rules and procedures of the DSU in seeking redress of WTO violations.

4.1017 The United States further points out that any actions taken pursuant to Section 301(c)(1)(B) on an MFN basis involving a service sector not subject to a GATS commitment would not be WTO-inconsistent. Likewise, an MFN-based increase in an unbound

tariff, or an applied tariff that is under the bound rate, would not violate GATT 1994. Moreover, action taken pursuant to Section 301(c)(1)(D) would not be WTO-inconsistent. This provision provides for mutually satisfactory agreements and compensation agreements, which are clearly contemplated in DSU Articles 3.7 and 22.2. Finally, the United States refers to the fact that neither Section 305 nor any other provision of Sections 301-310 requires the USTR to suspend concessions without receiving DSB approval. Thus, one cannot conclude that the actions set forth in Section 301(c) are inherently inconsistent with US WTO obligations.

V. THIRD PARTY ARGUMENTS

A. BRAZIL

1. Introduction

5.1 **Brazil welcomes** the opportunity to present its views to the panel requested by the EUROPEAN COMMUNITIES to examine Chapter 1 of Title III (Sections 301-310) of the US Trade Act of 1974, as amended.

5.2 Brazil indicates that its interest in this case derives from the possible effects of this legislation on its rights and obligations as a Member of the WTO, as well as from its wider interest in the integrity of the multilateral trading system itself.

5.3 In Brazil's view, the European Communities makes exception to the operation of Section 306 in the dispute on the implementation of recommended changes to the EC's banana regime. The European Communities, however, has made it clear that it did not request this panel to rule on the measures taken in connection with that specific dispute, but rather on the compatibility of US law as such with US obligations under the WTO Agreements.

5.4 Brazil also takes the view that a law that is inconsistent with the obligations of a Member under the WTO Agreements can be challenged under the dispute settlement procedures. The issue before the panel is not the application of Sections 301-310 in a particular instance, but rather the need to bring the law into conformity with relevant WTO provisions, as provided in Article XVI:4 of the WTO Agreement.

5.5 Brazil recalls that the European Communities bases its claims on three premises:

(a) WTO agreements cannot provide security and predictability unless Members settle all their trade disputes in accordance with the procedures of the DSU;

(b) WTO agreements cannot provide security and predictability unless Members bring their law into conformity with their obligations under those agreements; and

(c) The United States failed to bring Sections 301-310 into conformity with its obligations under the WTO agreements.

5.6 According to Brazil, to these grounds of action, the European Communities applies relevant provisions of the WTO Agreements, supplemented by the legal history and experience under the GATT 1947.[507]

5.7 Brazil also notes that the European Communities concludes that Sections 302(a)(2)(A), 305(a) and 306(b) are inconsistent with Article 23 of the DSU because they require the USTR to make unilateral determinations to the effect that a violation has occurred and to act upon such determination, without regard to the rules and procedures of the DSU. It further concludes that Section 306(b) of the Trade Act of 1974 is inconsistent with Articles I, II, III, VIII and XI of the GATT 1994 because, in the case of disputes involving trade in goods, it requires the USTR to impose duties, fees or restrictions that violate one or more of these provisions. Finally, the European Communities considers that, by failing to bring the Trade Act of 1974 into conformity with those provisions of the WTO Agreements, the US acted inconsistently with Article XVI:4 of the WTO Agreement.

2. Legal Arguments

(a) Article XVI:4 of the WTO Agreement

5.8 Brazil recalls that the European Communities draws a distinction between mandatory and discretionary actions under Sections 301-310. The European Communities then proceeds to claim that those sections which require actions that are in themselves contrary to WTO provisions – unilateral determinations to the effect that a violation has occurred and that benefits have been nullified or impaired, or that measures taken to comply with findings adopted by the DSB are not satisfactory – as well as those actions which the USTR will be required to perform under certain circumstances – "further actions" in cases where a unilateral determination of non-compliance is made – amount to violations of various provisions of the WTO Agreement and thereby nullify or impair benefits accruing to the European Communities under the DSU, the GATT 1994 and the WTO Agreement.

5.9 In Brazil's view, the European Communities has placed undue emphasis on previous GATT practices and decisions, such as the 1987 panel on *United States – Taxes on Petroleum and Certain Imported Substances*,[508] the 1989 panel on *United States – Section 337 of the Tariff Act of 1930*,[509] and the 1992 panel on *United States – Measures Affecting Alcoholic and Malt Beverages*.[510] Under GATT 1947 – and no doubt under the influence of the Protocol of Provisional Application – only mandatory legislation was found liable to a judgement of inconsistency by a panel. It should be noted, however, that even then, a mandatory law that was not enforced was found to constitute a violation of GATT obligations.

5.10 Brazil argues that it would be wrong to assume that this part of GATT 1947 practice was carried into the WTO unchanged. Article XVI:1 of the WTO Agreement, which is the foundation for incorporating the legal history and experience under the GATT 1947 into the WTO,[511] contains a proviso:

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[507] Brazil refers to the GATT *acquis*, as defined by the Appellate Body in *Japan – Alcoholic Beverages II,* op. cit., p. 14

[508] Panel Report on *US – Superfund*, op. cit.

[509] Panel Report on *US – Section 337*, op. cit.

[510] Brazil also refers to the Panel Report on *India – Patents (US)*, op. cit.

[511] Brazil refers to the Appellate Body Report on *Japan – Alcoholic Beverages*, op. cit., p. 14.

> "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the GATT CONTRACTING PARTIES and the bodies established in the framework of GATT 1947". (emphasis added)

5.11 Brazil contends that the adoption of Article XVI:4 should lead to a review of previous practice. It states unequivocally that:

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

5.12 Brazil points out that GATT 1947 had no equivalent provision. To interpret Article XVI:4 in the old spirit would be to deprive it of meaning.

5.13 In Brazil's view, whilst the European Communities may have restrained its claims, it would be clearly out of order to deduct from such restraint new terms of reference for the Panel, as the United States would have it. The task before the Panel still is "to examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS152/11, the matter referred to the DSB in that document and to make such findings and recommendations as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements". The matter referred by the European Communities is whether Sections 301-310 of the US Trade Act of 1974 is inconsistent with various provisions of the DSU, the WTO Agreement and GATT 1994. This is the burden of proof incumbent upon the European Communities. The European Communities did not request a ruling on the consistency of Sections 301-310 with previous GATT practice, let alone with the US interpretation of what such previous practice meant.

5.14 Brazil recalls that the United States bases its rebuttal solely on GATT 1947 practice. According to the United States, previous panels had come to the conclusion that (1) only mandatory legislation may be found inconsistent with WTO obligations and (2) legislation must not only be mandatory, it must preclude a Member from acting consistently with those obligations. The United States then proceeds to claim that in effect the whole of Sections 301-310 is either discretionary or mandates action that may, at times, be WTO consistent.

5.15 Brazil disagrees with the notion that GATT practice was carried unchanged into the WTO. Brazil disapproves even more of the proposition that no law may be found inconsistent unless "it does not allow" a government to act in accordance with its WTO obligations, in particular if "does not allow" is understood as "never allows". If such had been the practice in the past, the argument to the effect that Article XVI:4 of the WTO Agreement has abrogated jurisprudence in this respect becomes even more compelling than it already is. There is no possible interpretation of Article XVI:4, in light of the criteria laid down in Article 31 of the Vienna Convention on the Law of Treaties, that would warrant such an extravagant reading.[512]

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[512] Article 31 of the Vienna Convention on the Law of Treaties establishes that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It is extremely hard to conceive that the "ordinary" meaning of "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" could be construed as merely not precluding a Member from acting in conformity with its obligations at all times, as the Untied States argues, or as

5.16 Brazil argues that it is worth noting that the US First Submission did not reply to the EC's claim of violation of Article XVI:4. The United States invoked "past practice", and claimed that the European Communities has not proven that Sections 301-310 are mandatory in a way that precludes WTO-consistency at all times and "deducts" that Sections 301-310 are therefore consistent with Article XVI:4. Thus, at a stroke, almost extempore, past practice developed in the absence of any provision similar to Article XVI:4 is used to interpret Article XVI:4 of the WTO Agreement, in a way which would render it meaningless. In addition to the questionable validity of the premises, this is a good example of the logical fallacy known as *ignoratio elenchi*: arguing for one thing as if it proved another thing.

5.17 Brazil notes that the European Communities recognizes that "[Article XVI:4] is not a 'best endeavors' clause, applicable only to cases where changes to domestic laws are required, but an unqualified obligation". Article XVI:4 requires that internal law be brought into conformity with obligations under the WTO Agreements.

5.18 Brazil recalls that Article 22 of the Agreement on Implementation of Article VII of the GATT 1994 contains a similar provision:

> "Each Member shall ensure, not later than the date of application of the provisions of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement".

5.19 Brazil contends that if a WTO Member country were to include in its legislation on customs valuation a section "authorizing", but not requiring, Customs "to make a determination, based on an investigation initiated at the request of a private party, determining that the importation of goods below a certain price would be unreasonable and burden or restrict" that Member's commerce, such a provision would be consistent with Article 22 of the Agreement on Customs Valuation and with Article XVI:4 of the WTO Agreement. Or the uncertainty that would ensue from such an "authorization" would not be deemed unacceptable. Yet, the Agreement on Implementation of Article VII of the GATT 1994 is not "a central element providing security and predictability to the multilateral trading system". The DSU, however, is.[513]

5.20 Brazil notes that its argument is far from stating that any law authorizing actions that might result in violations of the WTO Agreements would, in themselves, be inconsistent with obligations under those Agreements. The dichotomy suggested by the United States is a *non sequitur*. What is necessary, is lawful. For example, in the Agreement on the Application of Sanitary and Phytosanitary Measures, one of the basic obligations is that "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without scientific evidence, except as provided".[514] No internal law could, however, be drafted in a manner that would *a priori* ensure conformity with WTO obligations without impinging upon "the right to take sanitary and phytosanitary measures necessary for the protection of

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providing the possibility for authorities to avoid WTO-inconsistent actions, as the United States also argues.

[513] DSU, Article 3.2.

[514] SPS Agreement, Article 2.2.

human, animal or plant life or health".[515] In such cases, conformity must necessarily be assessed in relation to specific measures, on a case by case basis.

5.21 Brazil argues that the distinguishing feature of Section 301(b) is that if any action is ever undertaken under its authority, it will necessarily lead to violations of GATT and GATS, including, *inter alia*, the most-favored-nation provisions of those agreements. In addition to that, there are no legitimate "reserved domain" considerations that might justify it. Legislation whose only possible application is the threat of illegal WTO action can hardly be deemed to be compatible with Article 23 of the DSU and with Article XVI:4 of the WTO Agreement.

5.22 Brazil points out that as regards Section 301(a), the question is not whether it precludes at all times WTO-consistent actions, but rather whether it mandates actions which will eventually result in WTO violations.

5.23 According to Brazil, it has been noted that "arising from the nature of treaty obligations and from customary law, there is a general duty to bring internal law into conformity with obligations under international law … however, in general a failure to bring about such conformity is not in itself a direct breach of international law, and a breach arises only when the state concerned fails to observe its obligations on a specific occasion. … In some circumstances legislation could of itself constitute a breach of a treaty provision and a tribunal might be requested to make a declaration to that effect".[516] Article XVI:4 requires that legislation be brought into conformity, and failure to do so is in itself a breach of the WTO Agreement. There is no need to look at any specific cases, or to the mandatory of discretionary nature of the legislation.

5.24 Brazil further argues that in any event, the *bona fide* argument with regard to the non-violation status of a discretionary law rests solely on its non-utilization.[517] This is not, however, the intention of the United States. To invoke the "discretionary" label as its defense, whilst pronouncing its intention to utilize the law, can hardly be deemed as an act in good faith.

5.25 In Brazil's view, lest there be any doubt, the Statement of Administrative Action which accompanies the Uruguay Round Agreements Act,[518] and which represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round Agreements, both for purposes of US international obligations and domestic laws",[519] gives notice of the "Administration's intent to expand the focus of possible action under Section 301 to areas that are not within the scope of US obligations under the Uruguay Round Agreements".[520]

5.26 Brazil notes that this "expansion of focus" is explained in further detail:

> "The Administration intends to use section 301 to pursue vigorously foreign unfair trade barriers that violate US rights or deny benefits to the United States

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[515] Ibid. Article 2.1.

[516] Brownlie, Ian, "Principles of Public International Law", 5th ed. (Oxford University Press, 1998), pp. 35-36.

[517] Brazil points out that this was the argument invoked by the United States in *US – Superfund* panel (Panel Report on *US – Superfund*, op. cit., para. 3.2.13) and in the *US – Tobacco* panel (Panel Report on *US – Tobacco*, op. cit., para. 45).

[518] Section 101(a)(2)

[519] Statement of Administrative Action, op. cit., Introduction, third paragraph.

[520] Statement of Administrative Action, op. cit., page 358 (Authority under Section 301)

> under the Uruguay Round Agreements. The Administration equally intends to use section 301 to pursue foreign unfair trade barriers that are not covered by those agreements".[521]
>
> "Neither section 301 nor the DSU will require the Trade Representative to invoke DSU dispute settlement procedures if the Trade Representative does not consider that a matter involves a Uruguay Round Agreement. Section 301 will remain fully available to address unfair practices that do not violate US rights or deny US benefits under the Uruguay Round Agreements and, as in the past, such investigations will not involve recourse to multilateral dispute settlement procedures.... For example, with minor exceptions, the Uruguay Round Agreements do not address government measures that encourage or tolerate private, anticompetitive practices..... Section 301 will also remain available to address persistent patterns of conduct by foreign governments that deny basic worker rights and burden or restrict US commerce.... Moreover, the mere fact that the Uruguay Round agreements treat a particular subject matter – such as intellectual property rights – does not mean that the Trade Representative must initiate DSU proceedings in every section 301 investigation involving that subject matter. In the event that the actions of the foreign government in question fall outside the disciplines of those agreements, the section 301 investigation would proceed without recourse to DSU procedures".[522]

5.27 Brazil then recalls the scope of authority available to the US Administration to proceed without recourse to DSU procedures in Section 301(c):

> "For purposes of carrying out the provisions of subsections (a) or (b), the Trade Representative is authorized to –
>
> (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection;
>
> (B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate...".

5.28 Brazil contends that in other words, to pursue the removal of practices that do not violate US rights, the US threatens to violate the rights of WTO Members.

5.29 Brazil argues that it would have been positively anomalous to include a provision in the DSU stating that WTO Members would have to make recourse to a panel and to the DSB to make a determination of non-violation. Yet, the United States seems to use this as a pretext for unilateral action. WTO Members are, of course, entitled to make unilateral determinations of non-violation and of any interests they may have that are not currently covered by the WTO

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[521] Statement of Administrative Action, op. cit., page 364 (Enforcement of US Rights) (emphasis added).

[522] Statement of Administrative Action, op. cit., page 366 (Enforcement of US Rights)(emphasis added).

Agreements. What they may not do in such instances is to take unilateral action equivalent to that foreseen under Article 22 of the DSU.

5.30 Brazil stresses that WTO Members are entitled, in accordance with Article 23 of the DSU, not to be subject to suspension of concessions unless "the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time".[523] *A fortiori*, they are entitled not to be subject to suspension of rights and concessions in the absence of a determination of violation by the DSB.

5.31 Brazil further asserts that along the same lines, it is a well recognized general principle of law that a prohibition to do less encompasses a prohibition to do more. The United States would turn the principle upside down: where the United States has a right, arising from denial of benefits under the WTO Agreements, the Statement of Administrative Action acknowledges the limits for action imposed by the DSU. Yet, it unaccountably comes to the conclusion that in cases where it has no rights, it faces no limits under the DSU.

5.32 According to Brazil, the fact that the USTR is not required to take action in such circumstances at all times should not shield it from a judgement of non-compliance with its WTO obligations. As stated by the European Communities, "a party does not act in good faith if it accepts an obligation stipulating one behavior, but adopts a law explicitly stipulating another. The fact that it might exceptionally apply that law in a way that is not inconsistent with its WTO obligations does not affect the above conclusion, particularly where there is no legal entitlement to obtain such an exceptional 'act of grace'".

5.33 Brazil recalls that in 1988 the United States threatened and then imposed sanctions, in the guise of 100 per cent duties against imports of more than 20 products from Brazil under Section 301, in a determination of "unreasonable measures" related to patent protection for pharmaceuticals. The sanctions remained in place for two years, and were only lifted after Brazil undertook to grant patent protection to pharmaceutical products.

5.34 Brazil emphasizes that the issue before this Panel is not the application of Section 301, but its inherent inconsistency with the WTO obligations of the United States. This example is given as background, which the panel may wish to consider in connection with the US assertion that "it was consistent US practice, even before the conclusion of the Uruguay Round, to rely on dispute settlement results when determining whether US agreement rights were denied". In the case involving Brazil, no US rights under any agreement had been denied. This may have given the USTR a sense of unbounded freedom to act as it did in violation of Brazil's rights under the GATT 1947.

5.35 According to Brazil, the freedom to threaten to negate unilaterally the benefits of WTO Agreements may be effective,[524] but it is not compatible with a rule-based multilateral trading system. The system cannot survive if its most powerful Members wish to enjoy its benefits, but

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[523] DSU, Article 22.2.

[524] According to Brazil, a lawyer is quoted by Jackson as finding the procedure useful: "In practice, a petition filed under Section 301 by a private party carries an effective threat of potential retaliation, combined with the threat of adverse publicity and a general souring of trade relations. These potential ramifications alone may bring the offending government to the bargaining table". John H. Jackson, "The World Trading System", 2nd edition (MIT Press, 1997), p.131.

reject its responsibilities: *qui habet comoda, ferre debet onera*.[525] Brazil recalls the following dictum of the Permanent Court of Justice in *Certain German Interest in Polish Upper Silesia*:

> "The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgement on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".[526]

5.36 Brazil contends that in those cases under the GATT 1947 when a law was found to be inconsistent with GATT obligations, a prospective judgement on the application of the law was made, in contrast with the retrospective judgement made with regard to specific measures. There is nothing to prevent the same prospective judgement of the discretionary sections of a law, specially when the application of that law will necessarily lead to violation of the WTO Agreements.

(b) Distinction between mandatory law and discretionary law

5.37 Brazil further contends that even if the panel were to find incorrectly that the distinction established by previous GATT panels regarding mandatory versus discretionary legislation remains valid, it should flatly reject the US interpretation of such past practice. The United States alleges that "legislation explicitly directing action inconsistent with GATT principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action" and cites, as the basis for this extraordinary conclusion, excerpts of the panel reports on *United States – Taxes on Petroleum and Certain Imported Substances*,[527] *Thailand – Restrictions on importation of and Internal Taxes on Cigarettes*[528] and *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*.[529]

5.38 Brazil argues that none of the panels cited came to the conclusion espoused by the United States. The *US – Superfund* panel gave US authorities the benefit of doubt, pending the completion of the applicable legislation. It did not say that the US tax authorities could retain forever the discretion to deny the equivalence prescribed in Article III:2 of GATT. In fact, the panel recommended that the CONTRACTING PARTIES "take note of the statement by the United States that the penalty rate would in all probability never be applied".[530] WTO Members might take some solace if the United States were to argue, in these panel proceedings, that the WTO-inconsistent provisions of Sections 301-310 would in all probability never be applied. In that case, however, the assertion would have to be pondered against the evidence of the views presented in the Statement of Administrative Action.

5.39 Brazil further alleges that the panel on *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* came to a similar finding. Given that the United States had as yet neither changed the fee structure nor promulgated rules implementing Section 1106(c), it gave the United States the benefit of doubt, in light of its declared intention to promulgate regulations that would be GATT-consistent:

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[525] In Brazil's view, one who has the advantages must also bear the burdens.
[526] PCIJ Rep., Series A, Nº 7, p. 19
[527] Panel Report on *US – Superfund*, op. cit.
[528] Panel Report on *Thai – Cigarettes*, op. cit.
[529] Panel Report on *US – Tobacco*, op. cit.
[530] Panel Report on *US - Superfund*, op. cit., para. 5.2.10.

> "The United States had indicated that it was the intention of the U.S. Government and the requirement of U.S. law that any new inspection fees promulgated by USDA would be commensurate with the cost of services rendered. The United States had further indicated that the amendment requiring the fees for inspecting imported tobacco to be *comparable* to those imposed on domestic tobacco did not require the fees to be identical and did not preclude a fee structure under which the fees for inspection of imports were less than those imposed on domestic products and at the same time commensurate with the cost of services rendered".[531]

5.40 In the view of Brazil, the example of the panel *on Thailand – Restrictions on importation of and Internal Taxes on Cigarettes*[532] is even less appropriate. In this case, regulations had already been issued stipulating that an excise tax would be applied to domestic and imported cigarettes at a single rate of 55 per cent.[533] Thus, in reading the conclusion cited by the United States, it must be borne in mind that whilst the Thai Tobacco Act continued to enable the executive authorities to levy discriminatory taxes, regulations already issued prevented such discrimination.

5.41 According to Brazil, no GATT panel has ever come to the conclusions alleged by the United States. Under GATT 1947, panels made a distinction regarding mandatory and discretionary legislation, but mandatory was never understood as "precluding all possibility of consistency" at all times.

5.42 In Brazil's view, the US arguments therefore attempt to introduce a confusion with regard to the seemingly clear meaning of "mandatory". In addition to that, it also attempts to confuse the meaning of "discretionary". Thus, the United States argues that "the Trade Representative has substantial discretion, including discretion to take no action at all. The Trade Representative is explicitly not required to take action: (1) when the DSB has adopted report findings that US rights have not been violated; (2) when the foreign country "is taking satisfactory measures to grant the rights of the United States under a trade agreement", has agreed to eliminate or phase out the practice which violated US rights, or has agreed to provide compensation; (3) when action would have "an adverse impact on the United States economy substantially out of proportion to the benefits of such action;" (4) or when action would cause "serious harm to [US] national security".

5.43 Brazil further argues that apart from noting that the heading under which these provisions are listed is entitled "Mandatory action", one must also recall that, to the extent that past practice is invoked as relevant to discern the content of treaty obligations, its concepts must also be interpreted in good faith, in accordance with the ordinary meaning of the terms.

5.44 Brazil points out that according to Black's Law Dictionary,[534] "when applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own conscience uncontrolled by the judgement or conscience of others". If a condition must be fulfilled before the effect can follow, the preceding definition is not applicable. If the lack of action is made contingent upon a WTO

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[531] Panel Report on *US - Tobacco*, op. cit., para. 122.
[532] Panel Report on *Thai – Cigarettes*, op. cit.
[533] Ibid. para. 43.
[534] Black's Law Dictionary, Revised 4th edition (West Publishing Co., 1968).

Member, for instance, "agreeing to an imminent solution to the burden or restriction on United States commerce",[535] the "discretion" takes on a very special meaning.

5.45 Brazil concludes that *ex re sed non ex nomine* is a principle of good faith. This principle precludes, *inter alia*, a party from using the form of the law to cover the commission of what in effect is an unlawful act.

(c) Other arguments

5.46 Brazil further argues that there are other elements to be noted. The first is that the "logical way forward" adopted in the bananas III arbitration is not a precedent for the interpretation of the sequence between Articles 21.5 and 22 of the DSU. Brazil also strongly disagrees with the US assertion that the DSB "implicitly rejected" the views of the majority of Members of the WTO concerning Article 21.5. The principle of automaticity prevented the DSB from doing otherwise. It would suffice, nevertheless, to read the long records of minutes related to the bananas III dispute to confirm that there never was any implicit rejection of the obligatory sequence.

5.47 Brazil also notes the concept put forward by Hong Kong, China, concerning third party or multilateral adjudication. This is exactly what Brazil expected from the DSU and why, as Korea, Brazil believed that the single undertaking of the Uruguay Round was a beneficial package for a developing country like Brazil. Brazil did not sign on to the WTO Agreement to be the object of unilateral determinations of non-compliance.

5.48 Brazil points out that the third is related to the impact of the US legislation and the US concern that the Panel is being asked to emit a political declaration.

5.49 Brazil emphasizes that when it discusses this case, although it is not dealing with a specific application of the legislation, it addresses the question of retaliation, and the impact of potential retaliation, and Korea has illustrated this point very clearly. In other words, the US legislation under examination is a unilateral instrument for exerting political and economic pressure. While Brazil agrees that the Panel should not engage in a debate about the popularity of the US law, the Panel should not disregard the impact of Sections 301 to 310 of the Trade Act of 1974 on WTO rights and obligations because of its political connotations.

5.50 Brazil summarises its view as follows: There is an irreconcilable conflict between those provisions of Sections 301-310 of the Trade Act of 1974 which mandate or authorize actions that are illegal under the WTO and Article 23 of the DSU and Article XVI:4 of the WTO Agreement. Brazil believes, therefore, that the panel should affirm that Members have an unqualified obligation to bring their legislation into conformity with WTO provisions.

3. Conclusion

5.51 Brazil recalls that the United States may claim a large part of the merit for the improved dispute settlement procedures of the WTO. In the course of the negotiations, it overcame many objections, included those which were initially held by Brazil. Brazil's reluctance was based on fear that the major trading partners would require compliance by smaller countries, whilst refusing themselves to be bound by the stricter dispute settlement rules.

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[535] Section 301 (a)(2)(B)(ii)(II).

5.52 Brazil also notes that the WTO dispute settlement system may still yield benefits approaching those of a fully binding procedure, without unduly encroaching upon the sovereignty of Members. It would be ironic if the dispute settlement system which the United States fought so hard to establish were to be discredited by the refusal of the United States to apply its provisions in good faith.

5.53 In Brazil's view, there are parts of Sections 301-310 which serve a useful purpose, as a delegation of competence from the United States Congress to the Executive branch and as a procedure for the initiation of citizens' complaints.

5.54 Brazil also considers, however, that there is an irreconcilable conflict between those provisions which mandate or authorize actions that are illegal under the WTO and Article 23 of the DSU and Article XVI:4 of the WTO Agreement. It therefore believes that the Panel should not limit its findings to a restatement of traditional GATT practice, but should affirm that Members have an unqualified obligation to bring their legislation into conformity with WTO provisions.

B. CANADA

1. Introduction

5.55 **Canada welcomes** the opportunity to participate in this Panel established pursuant to the European Commission's request for the establishment of a panel under the Dispute Settlement Body of the World Trade Organization regarding Sections 301-310 of the US Trade Act of 1974. In this context, Canada wishes to highlight its specific concerns with respect to Sections 301-310 of the Trade Act of 1974 (collectively referred to as "301 legislation") in the form of a "third party" submission pursuant to Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

5.56 Canada firmly believes that disputes arising between Members concerning WTO obligations should be addressed within the parameters established by the DSU. In Canada's view, the application of 301 legislation that results in unilateral imposition of retaliatory measures in response to WTO violations, whether alleged or established, without obtaining the requisite authorization for such retaliatory measures from the WTO Dispute Settlement Body violates the DSU specifically and multilateralism in general. This threatened and actual use of unilateral sanctions is fundamentally incompatible with the multilateral trading system and threatens the overall stability and viability of the WTO dispute settlement regime.

5.57 As a preliminary matter, Canada would note that it appreciates that 301 legislation may be applied to situations arising under trade agreements other than the WTO, to countries that are not WTO Members or to situations that are not subject to WTO obligations. Canada appreciates that those situations are not subject to WTO dispute settlement proceedings unless they somehow violate obligations owed to WTO Members. Accordingly, Canada's present submissions are not directed to those situations.

2. Measures at Issue

5.58 Canada explains that Section 301(a)(1) of the Trade Act of 1974 requires the USTR to determine[536] whether an act, policy or practice of a foreign country violates or denies the benefits or rights of the United States under any trade agreement or places an "unjustifiable" burden or restriction on US commerce.

5.59 In Canada's view, the Section 301 legislation combines mandatory and discretionary elements. Actions leading to the imposition of trade sanctions pursuant to section 301 can begin either as the result of a petition filed by an interested person[537] or as a result of an investigation initiated by USTR.[538] USTR is not obliged to initiate an investigation requested by a petitioner but if a decision is made not to do so, USTR must publish a notice in the *Federal Register* that contains a summary of the reasons for not initiating an investigation.[539]

5.60 Canada points out that there are essentially two types of matters that are actionable under section 301(a). The first type is a denial of benefits under, or a violation of a trade agreement,[540] including the WTO Agreements. The other type of matter which is actionable under section 301 is whether an act, policy or practice of a foreign country is unjustifiable and burdens or restricts United States commerce.[541]

5.61 Canada stresses that 301 legislation sets out specific and definitive time frames within which certain actions must occur. Examples of this include the following:

(a) Where an alleged violation of a trade agreement is the subject matter of the investigation and a mutually acceptable resolution cannot be reached within the

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[536] Canada points out that Sections 301 to 310 of the Trade Act of 1974, as amended, calls for the making of numerous "determinations". These represent more than mere statements of policy or negotiating positions. The outcome of these determinations are formal acts of the United States Government and result in the legal consequences set out in the legislation.

[537] Section 302(a)(1) of the Trade Act of 1974, as amended.

[538] Section 302(b)(1)(A) of the Trade Act of 1974, as amended.

[539] Section 302(a)(3) of the Trade Act of 1974, as amended.

[540] Section 301(a)(1)(A) and 301(a)(1)(B)(i) of the Trade Act of 1974, as amended.

[541] Section 301(a)(1)(B)(ii) of the Trade Act of 1974, as amended. Canada notes that, pursuant to Section 301(d)(2), an act, policy or practice that burdens or restricts United States commerce is defined as including acts, policies or practices defined as "unreasonable" under section 301(d)(3)(B) notwithstanding that such matters may not be inconsistent with the international legal rights of the United States. Section 301(d)(3)(B) is not an exclusive definition so it is not possible to determine from it what other actions might subject a country to US trade sanctions notwithstanding that the country is not in violation of international law. Canada further notes that the second type of actionable matters (i.e. acts, policies or practices considered to be unjustifiable and which burdens or restricts United States commerce) includes matters which the United States consider to deny fair and equitable provision of adequate and effective intellectual property rights "notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights ..." negotiated pursuant to the Uruguay Round. Accordingly, 301 legislation exposes foreign countries to US trade sanctions for perceived intellectual property wrongs even though that country is living up to the commitments that WTO Members agreed to in the negotiations leading to the Agreement on Trade-Related Aspects of Intellectual Property Rights.

time frames noted in the legislation,[542] USTR is obligated by the statute to promptly initiate dispute settlement procedures under the trade agreement.

(b) In the case of an investigation subject to dispute settlement procedures under a trade agreement, USTR must make a determination as to whether the matter in issue is "actionable" under section 301 within specific time frames.[543]

(c) Where USTR determines that a matter is actionable under section 301 retaliatory action must normally be implemented no more than 30 days after making that determination.[544]

5.62 Canada explains that in the case of implementation of WTO dispute settlement recommendations, where USTR considers that a WTO Member has failed to implement a recommendation made pursuant to a WTO dispute settlement proceeding, USTR is required within 30 days of the expiration of the reasonable period of time established pursuant to Article 21 of the DSU to determine what further action USTR shall take under section 301(a).[545]

5.63 Canada notes that the provisions in question use the mandatory verb "shall". The burden of demonstrating that any action referred to in these provisions is not mandatory in US law falls upon the United States.

5.64 Canada specifically argues that Section 304(a)(2) of the Trade Act of 1974 requires that the USTR determination of whether US rights are being denied must be made by the earlier of thirty days after the conclusion of formal dispute settlement procedures or eighteen months after the date of the initiation of the Section 301 investigation.

5.65 According to Canada, while it is certainly possible for WTO dispute settlement procedures to be completed within 18 months, WTO practice demonstrates that factors such as delays in panel selection, extension of time frames by panels or the Appellate Body and delays in translation and other logistical matters can and do result in disputes not being determined within a 18 month time frame.

5.66 Canada further points out that an affirmative determination pursuant to section 304(a)(2) requires USTR to impose sanctions set out in section 301(c) which must normally be implemented no later than thirty days after making that determination.[546] Once again Canada notes that the legislation uses the word "shall".

5.67 Canada notes that USTR retaliatory authority under section 301 to (i) suspend, withdraw or prevent the application of benefits of trade agreement concessions; (ii) impose duties or other import restrictions on the goods of the foreign country for such time as USTR

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[542] Canada notes that it is the earlier of (i) the close of any consultation period specified in the trade agreement; and (ii) 150 days after the day on which consultations was commenced. See Section 303(a)(2) of the Trade Act of 1974, as amended.

[543] Canada notes that it is the earlier of (i) thirty days after the conclusion of formal dispute settlement procedures; and (ii) eighteen months after the date of the initiation of the Section 301 investigation. See 304(a)(2) of the trade Act of 1974, as amended.

[544] Canada notes that this can be delayed by a maximum of 180 days where the specific circumstances cited in section 305(2)(A) occurs.

[545] Section 306(b)(2) of the Trade Act of 1974, as amended. Canada notes that it is noteworthy that section 301(a) is entitled "Mandatory Action".

[546] Sections 301(a)(1) and 305(a)(1) of the Trade Act of 1974, as amended. See also footnote 9.

determines appropriate; or (iii) enter into agreements with the foreign country to eliminate the act, policy or practice that is the subject of the determination or provide the United States with compensatory trade benefits[547] is subject to the direction, if any, of the President. While this provision of section 301(a)(1) concerning the direction of the President may create an ability for the President to formally direct the type of sanction applied, it does not remove the legislative requirement for the US executive branch to act. Section 301(b) clearly does remove the requirement to act in the circumstances set out in that section. If the provision that allows the President to make a specific direction concerning the action to be taken was intended to include an ability to override the requirement otherwise imposed by the US Congress that intention would have been expressly stated as was done in section 301(b).

3. Legal Arguments

5.68 Canada contends that the requirement that retaliatory measures be implemented where an affirmative determination is made by the USTR pursuant to section 304 is not contingent in any way on the approval for such action by the WTO's Dispute Settlement Body ("DSB"). Where the statutory deadlines contained in section 304(a)(2) expire prior to authorization by the DSB for retaliation pursuant to Article 22 of the DSU, the USTR is nonetheless required to determine the appropriate retaliatory action to take against the offending Member. While the DSU notes that the "prompt" settlement of disputes between Members is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members, the resolution of a dispute may not be achieved within the deadlines contained in section 304(a)(2).

5.69 According to Canada, where an affirmative determination has been made pursuant to section 304(a)(2), then section 305(a)(1) becomes operative. Under that provision, the action determined to be appropriate under section 304(a)(1) becomes mandatory. That action must occur on or before 30 days of the section 304(a)(1) determination.

5.70 Canada further argues that similarly, the implementation of retaliatory measures directed against a WTO member by means of section 306(b) and 301(a) in the absence of the approval of such measures by the DSB would clearly be in contravention of DSU Article 23. This determination by USTR leads to the implementation of retaliatory measures directed against the foreign country within thirty days regardless of whether or not the other Member has been found under WTO procedures to not be in compliance with the recommendations and rulings adopted by the DSB. The result would be that retaliation that has not been authorized by the DSB.

5.71 In Canada's view, the plain language of Article 23 contains an obligation by WTO Members to refrain from unilateral action. Article 23(1), entitled *Strengthening the Multilateral System*, states:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they *shall* have recourse to, and abide by, the rules and procedures of this Understanding". (emphasis added)

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[547] Section 301(c) of the trade Act of 1974, as amended.

5.72 Canada further alleges that Article 23 of the DSU obligates Members to employ the procedures contained in the DSU to remedy alleged or established WTO obligations. Retaliatory action taken pursuant to Section 301 legislation prior to the approval of the DSB violates DSU Article 23(2)(a) which states that WTO Members "shall not make a determination to the effect that a violation has occurred ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding". A Member that makes a determination unilaterally that a measure of another Member is inconsistent with WTO obligations is in clear violation of DSU Article 23. A Member that makes a determination unilaterally that a another Member has failed to bring a measure found to be inconsistent with a covered agreement into compliance with that agreement also violates Article 23 in that the DSU establishes a procedure for determining the consistency of the measure. Such a unilateral determination of non-compliance without recourse to the DSU procedures amounts to a determination that that a violation has occurred other than through recourse to DSB dispute settlement procedures.

5.73 Canada notes that it too has legislative authority to suspend concessions in response to measures of other countries. Section 13(1) of the World Trade Organization Agreement Implementation Act[548] provides the Government of Canada with the legislative authority to take retaliatory measures under federal law to suspend rights or privileges granted by Canada to a WTO Member. However, unlike Section 301, the Canadian government is expressly authorized to do so for the purpose of suspending in accordance with the WTO Agreement the application to a WTO Member of concessions or obligations of equivalent effect pursuant to Article 22 of the DSU. Accordingly, Canadian law requires that the exercise of this authority must occur in accordance with Canada's WTO obligations. In particular, the authority permits action to suspend concessions pursuant to Article 22 of the DSU. As there is a presumption in Canadian law that a statute does not operate retrospectively so as to affect rights unless an intention to do so is clearly expressed or arises by necessary implication,[549] suspension of concessions can only apply subsequent to the DSB authorizing a suspension of concessions or other obligations pursuant to Article 22.

5.74 Canada would distinguish 301 legislation from the type of matter at issue in *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes.*[550] In that case, the panel was concerned with an enabling provision which allowed executive authorities to impose discriminatory taxes. The panel concluded that the possibility that the Act in question could be applied in a manner contrary to the GATT, was not sufficient to make the Act inconsistent with

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[548] S.C. 1994, c. 47. Subsection 13 (1) reads as follows:

"13 (1) The Governor in Council may, for the purpose of suspending in accordance with the Agreement the application to a WTO Member of concessions or obligations of equivalent effect pursuant to Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes set out in Annex 2 to the Agreement, by order, do any one or more of the following:

(a) suspend rights or privileges granted by Canada to that Member or to goods, service providers, suppliers, investors or investments of that Member under the Agreement or any federal law;

(b) modify or suspend the application of any federal law with respect to that Member or to goods, service providers, suppliers, investors or investments of that Member;

(c) extend the application of any federal law to that Member or to goods, service providers, suppliers, investors or investments of that Member; and

(d) take any other measure that the Governor in Council considers necessary".

[549] E.A. Dreidger, "The Composition of Legislation" (Second Edition); Department Of Justice: Ottawa, Ontario; 1976.

[550] Panel Report on *Thai – Cigarettes*, op. cit.

the General Agreement. In this case the legislation requires a determination regarding the consistency of a country's measures to be made in a thirty day time frame following the conclusion of dispute settlement procedures. The United States' publication "The Uruguay Round Agreements Act: Statement of Administrative Action" appears to indicate that the United States regards the conclusion of Uruguay Round dispute settlement procedures to be the conclusion of the reasonable time to implement the panel or Appellate Body's report.[551] Canada would be interested to know whether the United States has a different interpretation of when WTO dispute settlement procedures conclude. Unlike Thailand's excise tax regime on cigarettes which was totally discretionary until such time as the Thai authorities imposed the tax, 301 legislation has mandatory elements which can require the United States to make an unilateral determination of the WTO consistency of another country's measures and impose trade sanctions in response. The Thai Cigarette panel recognized that legislation mandatorily requiring the executive to act inconsistent GATT obligations was a violation "…whether or not an occasion for its actual application had yet arisen;…".[552]

5.75 In response to the US inquiry, Canada states that as a preliminary matter prior to responding to the questions of the United States, it would note that the measures in question are those of the United States and not those of any other Member. Accordingly, the practices of any other Member and their consistency with WTO obligations are not germane to the issues before the Panel. Nonetheless, and without prejudice, Canada would provide the following responses in the interests of being helpful in resolving the broad systemic matters before the Panel.

5.76 Canada emphasizes that its legislative authority to suspend concessions in response to measures of other countries is found at subsection 13(1) of *the World Trade Organization Agreement Implementation Act*, Statutes of Canada, 1994, c.47. Although subsection 13(2) of the Act is not relevant to WTO Members, Canada reproduces below section 13 in its entirety.

"Orders

13(1) Orders re suspension of concessions

13. (1) The Governor in Council may, for the purpose of suspending in accordance with the Agreement the application to a WTO Member of concessions or obligations of equivalent effect pursuant to Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes set out in Annex 2 to the Agreement, by order, do any one or more of the following:

(a) suspend rights or privileges granted by Canada to that Member or to goods, service providers, suppliers, investors or investments of that Member under the Agreement or any federal law;

(b) modify or suspend the application of any federal law with respect to that Member or to goods, service providers, suppliers, investors or investments of that Member;

(c) extend the application of any federal law to that Member or to goods, service providers, suppliers, investors or investments of that Member; and

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[551] Statement of Administrative Action, op. cit., pp. 365-366.
[552] Panel Report on *Thai – Cigarettes*, op. cit., para. 84.

(d) take any other measure that the Governor in Council considers necessary.

13(2) Suspension of concessions to non-WTO Members

(2) The Governor in Council may, with respect to a country that is not a WTO Member, by order, do any one or more of the following:

(a) suspend rights or privileges granted by Canada to that country or to goods, service providers, suppliers, investors or investments of that country under any federal law;

(b) modify or suspend the application of any federal law with respect to that country or to goods, service providers, suppliers, investors or investments of that country;

(c) extend the application of any federal law to that country or to goods, service providers, suppliers, investors or investments of that country; and

(d) take any other measure that the Governor in Council considers necessary.

13(3) Period of order

(3) Unless repealed, an order made under subsection (1) or (2) shall have effect for such period as is specified in the order.

13(4) Definition of 'country'

(4) In this section, "country" includes any state or separate customs territory that may, under the Agreement, become a WTO Member".

5.77 Canada explains that pursuant to section 10 of the *Department of Foreign Affairs and International Trade Act*, Revised Statutes of Canada, 1985, as amended, chapter E-22, the powers, duties and functions of the Minister of Foreign Affairs extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to the conduct of the external affairs of Canada, including international trade and commerce and international development. The Minister for International Trade is appointed pursuant section 3 of the *Department of Foreign Affairs and International Trade Act* to assist the Minister of Foreign Affairs in carrying out his responsibilities relating to international trade. Canada has signed the WTO Agreement and the Agreement was approved by the Parliament of Canada by means of section 8 of the *World Trade Organization Agreement Implementation Act* (see previous paragraph for citation). These authorities give Canada its authority to exercise its rights pursuant to the WTO Agreement.

5.78 Canada further points out that prior to requesting consultation or a panel pursuant to the DSU, Canada will have concluded that a dispute exists between itself and another WTO Member with respect to one of the WTO covered agreements or a Plurilateral Trade Agreement to which both Canada and the other WTO Member are party. Prior to proceeding with such

action, Canada will have satisfied itself that it has a legitimate claim and that the matter is justicible under the DSU.

5.79 Canada argues that Article 23(a) expressly notes that recourse to dispute settlement in accordance with the DSU is permitted. Canada, in requesting consultations or panels under the DSU is acting in accordance with the DSU and therefore in conformity with Article 23(a). Canada notes that it is interesting that the drafters of the DSU specifically chose the word "determination" in drafting Article 23 as that happens to be the exact language used in the Trade Act of 1974.

5.80 Canada states that its measures are fully consistent with its international obligations and in particular its obligations under the *WTO Agreement*. If any measures are determined pursuant to the DSU to be inconsistent with Canada's obligations, Canada will take the appropriate actions to eliminate the inconsistency or remedy the nullification and impairment of benefits determined to accrue to other Members.

5.81 In the view of Canada, past GATT practice[553] has clearly established that to the extent that legislation is mandatory it is no defence to claim that it has not been applied or enforced in a manner contrary to the WTO Agreements. The very existence of mandatory legislation influences decisions of economic operators and, as such, has a "chilling" economic effect.

5.82 In response to the Panel's question as to whether DSU Article 23.2 prohibits any determination on WTO consistency or any determination to the effect that a violation has occurred, Canada states that Article 23(a) of the DSU prohibits determinations of non-consistency with WTO obligations or the existence of nullification or impairment or any impediment of the objectives of WTO covered agreement except through recourse to DSU procedures. The Article does not prohibit determination of consistency with WTO norms. Any such prohibition would be counterproductive to the objectives of Article 3.7 of the DSU which states that "(a) solution mutually acceptable to the parties to the dispute and consistent with the covered agreements is clearly to be preferred".

5.83 Canada further argues that the answer to this question must necessarily be speculative, as the question does not set forth the basis of the reasoning that would apply to the finding of inconsistency. The DSU is applicable to measures of WTO Members that impair any benefits accruing to other WTO Members under any covered agreement. Depending upon the reasoning underlying a finding that Sections 301 to 310 are WTO inconsistent, a measure of the United States, enforceable pursuant to DSU procedures, that those sections could only be applied in a manner consistent with the DSU would remove the WTO inconsistency and provide a remedy for non-compliance.

4. Conclusion

5.84 Canada claims that the mandatory nature of section 301 legislation is clear even if there are a number of instances where a determination could occur which would terminate the application of the legislation. Canada emphasises its recognition that 301 legislation combines mandatory and discretionary elements. Those opportunities for self-control do not alter the fact that section 301 legislation can culminate in a situation where retaliatory actions are mandated notwithstanding the status of such matters pursuant to the DSU.

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[553] Panel Report on *US – Malt* Beverages, op. cit.

5.85 Canada further argues that the facts surrounding the timing of the arbitrators' decision in the arbitration under article 22.6 of the DSU between the European Communities and the United States concerning the validity of the EC's implementation of the DSB's recommendations concerning the EC's banana import regime are well known. Canada does not intend to add to the EC's narrative on this point. Those facts demonstrate that DSB dispute settlement procedures do not necessarily coincide with the time frames set out in US 301 legislation in which the United States took the actions noted by the European Communities. This panel should clearly indicate to WTO Members that such an application of domestic legislation to suspend WTO benefits and concessions without DSB authorization results in a violation of a Members obligations under the DSU.

5.86 Canada submits that the Panel should find that where the statutory language contained in Sections 301-310 of the US Trade Act of 1974 results in an unilateral determination that a WTO violation by another Member has occurred or in the implementation of retaliatory measures against another Member without DSB authorization, such actions and mandatory provisions requiring such actions are inconsistent with the United States' obligations under the Dispute Settlement Understanding.

C. CUBA

1. Introduction

5.87 **Cuba indicates** that it has a substantial systemic interest in this dispute, which is important for the entire system of trading relations among Members of the Organization. The principle of multilateral decision-making which is the cornerstone of the WTO and on which its functioning is based is the crux of this case.

2. Legal Arguments

5.88 Cuba recalls that all WTO Members have freely accepted to belong to a multilateral system based on rules which must be respected. To that end, they are obliged to ensure that their domestic legislation is adapted to and meets those rules. Without the security that all Members will abide by the rules, there can be no certainty of a genuine multilateral system meeting the interests of all.

5.89 Cuba considers that the conflicts stemming from the actions of Members in their mutual relations must be resolved multilaterally and in accordance with the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Any unilateral action taken by a country is harmful to the predictability and stability of, and confidence in, the dispute settlement mechanism, as well as being a blatant violation of the WTO principles, objectives and rules and of the commitments entered into in the multilateral negotiating framework. Various ministerial declarations adopted in this forum bear this out. Recourse to unilateral measures encourages unilateral responses, which heightens and extends conflicts rather than helping to resolve them.

5.90 Cuba notes that the DSU is the applicable set of rules for making determinations as to whether a Member's law, policy or practice is incompatible with the covered WTO Agreements. It also establishes provisions governing the application of sanctions against Members that infringe the multilateral rules.

5.91 Cuba argues that Sections 301-310 of the United States Foreign Trade Act of 1974 establish a unilateral procedure for applying sanctions against other States, including WTO

Members, where the United States considers that its trade interests are affected. The time-limits provided for carrying out this procedure are different from, and incompatible with, those laid down in the DSU. The measures in question are adopted on the basis of unilateral determinations, outside the Dispute Settlement Body, and without its prior authorization. Their duration is also a matter for unilateral decision by the United States. The latter thus becomes both judge and party in international trade conflicts.

5.92 Cuba further claims that the WTO system of rules is based on the principles of public international law, of which it is a specialized sub-system. In this connection, the above-mentioned provisions of the Foreign Trade Act of 1974 violate the principle of sovereign equality of States, one of the central pillars of public international law, according to which in the full exercise of their sovereignty all States enjoy equal rights and at the same time are equally obliged to respect the rules governing their mutual relations. They also infringe the "*pacta sunt servanda*" principle governing the implementation of treaties, whereby the signatories to an international agreement must fulfill the agreed provisions.

5.93 Cuba also points out that in the dispute with which Cuba is concerned, another important factor is the particularity of the United States legal system in which national law has primacy over international law in cases where there is a conflict of provisions, regardless of the time at which one was adopted in comparison with the other. By making domestic law prevail over multilateral law, the United States limits the complete fulfilment of the obligations entered into under international agreements, thereby reducing confidence in its undertakings.

5.94 Cuba further contends that as far as this Organization is concerned, pursuant to Article XVI:4 of the Agreement Establishing the WTO, Members have the responsibility to ensure the conformity of their domestic laws and administrative procedures with their obligations under the covered agreements. The Foreign Trade Act of 1974 is a violation of this provision.

5.95 In the view of Cuba, the above-mentioned Act ignores the procedures provided for in the DSU, to which all of Members entrust the guardianship of their rights and obligations. It disregards the undertaking to comply with the principles set out in Article 3, as well as the provisions on surveillance of implementation of recommendations and rulings of the Dispute Settlement Body and compensation or suspension of concessions contained in Articles 21 and 22 of the DSU.

5.96 Cuba argues that by adopting these unilateral measures, the United States weakens the multilateral trading system and disregards Article 23 of the DSU, which provides that Members shall not make a determination as to the existence of a violation or nullification or impairment of benefits, or the attainment of the objectives of the covered agreements, except through recourse to dispute settlement in accordance with the procedures of the DSU. The above-mentioned legislation also encourages recourse to practices that lie outside the international trade rules, and creates a situation of uncertainty and disrespect for the multilaterally agreed provisions.

5.97 Cuba further alleges that this is a question not only of the existence of the violation caused by the above-mentioned legislation, but also of the ensuing nullification or impairment of legitimate benefits accruing to Members directly or indirectly from the GATT 1994 and membership of the WTO, within the meaning of Article XXIII of the GATT 1994.

5.98 In the opinion of the Republic of Cuba, Sections 301-310 of the Foreign Trade Act of 1974 contribute to establishing a power-based policy in international economic relations, creating an atmosphere of insecurity and unpredictability.

5.99 Cuba notes that in practice, it has seen how far the friction among Members as a result of the application of this Act can lead, and the danger it represents for the stability of the Organization at a time when it is essential to preserve balance and security in order to achieve the objectives that Members have agreed upon multilaterally.

5.100 Cuba then urges the Panel to find that Sections 301-310 of the Foreign Trade Act of 1974 are inconsistent with the WTO rules and at the same time to recommend that the United States Government bring its legislation into line with the obligations imposed upon it as a Member of the Organization.

D. DOMINICA AND ST. LUCIA

1. Introduction

5.101 **Dominica and St. Lucia jointly indicate** that the interest of the Commonwealth of Dominica and St Lucia in this case derives from the indirect impact of Section 301 procedures on their rights, and the attainment of the legitimate objectives of the WTO Agreements. It also stems from the important systemic issues raised in the case which threaten the multilateral system on which those without the power either to threaten unilateral measures or to defend themselves against them must depend.

2. Legal Arguments

5.102 Dominica and St. Lucia claim that the actions taken by the United States in the *Bananas case* are not the subject of the present proceedings. Their interventions on the clear violation of WTO rules with respect to US actions in that regard will be made before another panel. The initial EC complaint, on which this panel is expected to rule, is limited to the compatibility of US law as such with the obligations imposed on the United States by the WTO Agreements. The recent actions of the USTR in the *Bananas* dispute, however, are instructive in so far as they highlight US administrative practice and show that the strict timetables imposed by Section 301 procedures are in fact mandatory and can lead to conflict with US obligations in the WTO.

5.103 Dominica and St. Lucia argue that the "discretion" given to the USTR to delay action in certain limited circumstances and the never used Presidential discretion are in fact a legal nicety with no bearing on reality. The expectations of economic actors in the market place are not built upon the technical distinction between "compulsory" and "mandatory" in US domestic law.

5.104 Dominica and St. Lucia note that the USTR announcement on March 3rd, of the immediate withholding of customs liquidation and possible retroactive imposition of 100% duties on targeted EC imports, in spite of the "Initial Decision" of the Arbitration Panel that it required further time to make a determination in the case, is clear evidence of the USTR's interpretation of the legislation that precedence must be accorded to US domestic timetables over international rules of due process.

5.105 Dominica and St. Lucia claim that the trade measures taken by the United States in the *Bananas* dispute have clearly shown that US domestic law will not be constrained by WTO timetables.

5.106 Dominica and St. Lucia contend that the pressures imposed on WTO dispute settlement procedures and the complexities of particular cases have led the Dispute Settlement Body to adopt a flexible approach to time limitations specified in the DSU. Section 301 procedures, however, do not provide sufficient flexibility for upholding the multilateral system. They do not allow the United States to comply with the rules of the DSU and other WTO obligations in situations where the DSB has, by the end of those time limits, not made a prior determination that the WTO Member concerned has failed to comply with its WTO obligations and has not authorized the suspension of concessions or other obligations on that basis.

5.107 In the view of Dominica and St. Lucia, the strengthened multilateral system and judicialisation of the dispute settlement process were designed to promote the 'international rule of law'. The rule of international law requires that governments act under that law.

5.108 For Dominica and St. Lucia, Article XVI:4 of the Marrakesh Agreement requires each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed [WTO] agreements". The US domestic implementing legislation, the Uruguay Round Agreements Act of 1994 (URAA), explicitly states (in section 102(a)) that the Act shall not be construed to limit Section 301 authority. Section 301 procedures were not designed to promote the security and predictability of the multilateral trading system. Given the economic and political power of the United States, Section 301 procedures are in effect a sword of Damocles hanging over us all.

5.109 Dominica and St. Lucia recall that the basic notion behind the multilateral approach to retaliation was espoused half a century ago by the drafters of the Havana Charter. It was designed to "tame retaliation, to discipline it, to keep it within bounds ..., to convert it from a weapon of economic warfare to an instrument of international order". (UN Doc. E/PC/T/A/PV6, page 4) In the *Bananas dispute* at every step of the way there was the veiled threat of US unilateral action.

5.110 In support of this argument, Dominica and St. Lucia contend that the use of Section 301 procedures is widely associated with the threat of WTO-illegal action.[554] Dominica and St. Lucia note that "veiled threats" are, by very definition, usually not documented. In light of this, Dominica and St. Lucia provided two letters as primary evidence of their assertion and further supplemental background materials on the *Bananas* crisis and the threat posed to the multilateral system by USTR rigid adherence to Section 301 timetables.[555]

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[554] Dominica and St. Lucia cite, e.g. David Palmeter, "A Few - Very Few - Kind Words for Section 301", in Philip Ruttley, Ian Mac Vay & Carol George, eds., *The WTO and International Trade Regulation* (London: Cameron May, 1998) 123, indicating at 124: "Section 301 was, and to many, still is, notorious. It is the vehicle by which the United States is perceived, with an extremely high degree of accuracy, to pursue whatever threat advantage it possessed. Section 301,it is safe to say, embodies few principles of justice, Rawlsian or otherwise".

[555] Dominica and St. Lucia submitted WT/DSB/M/54, p. 4; WT/GC/M/37, pp. 3-4; WT/DSB/M/53; WT/DSB/M/59; Guy de Jonquieres, "Bananas and beef take trade conflict to the brink", *Financial Times*, 22/10/98, p.8; Frances Williams, "US steps up banana battle with EU", *Financial Times*, 22/10/98, p.8; Guy de Jonquieres, "Nerves are taut as leaders hint at an EU-US trade war", *Financial Times*, 9/11/98, p.3; Guy de Jonquieres, "Trade war edges closer as US plans action against EU exports", *Financial Times*, 9/11/98, p.22; "The US and EU go Bananas", *Financial Times*, 11/11/98, p.19; Neil Buckley, "Brussels rejects US banana peace offer", *Financial Times*, 20/11/98, p.5.

5.111 In the view of Dominica and St. Lucia, Article 22.6 of the DSU clearly states that "[c]oncessions or other obligations shall not be suspended during the course of the arbitration". A deadline for retaliation which precedes the completion of arbitration proceedings is evidence of 'aggressive unilateralism'.

5.112 In response to the Panel's question regarding the relevance of a specific case under Section 301, Dominica and St. Lucia state that a panel has a duty to review all relevant evidence. As such, this Panel must take legal notice of US actions leading to the suspension of concessions in the *Bananas* case to the extent that it is evidence germane to the 'matter' referred to it by the DSB.

5.113 Dominica and St. Lucia recall that the "matter" referred to the Panel consists of two elements: "the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)".[556] Taken together these elements constitute the dispute which is properly before the panel as defined in its terms of reference: "A panel's terms of reference are important for two reasons. First, terms of reference fulfil 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".[557]

5.114 Dominica and St. Lucia point out that although measures not explicitly mentioned in a complaint may nevertheless be covered by a panel's terms of reference, "it seems clear that a 'measure' not explicitly described in a panel request must have a clear relationship to a 'measure' that is specifically described therein, so that it can be said to be 'included' in the specified 'measure'".[558] Similarly, claims which a panel is entitled to consider should also be stated in the panel request. A distinction is made, however, between "actions", on the one hand, and "measures" and "claims", on the other.[559]

5.115 According to Dominica and St. Lucia, it is one thing to submit to a panel the examination of a particular measure claiming that that measure does not conform to the WTO obligations of a Member. It is another, completely different thing to submit to a panel the existence of a specific action of a Member as evidence supporting the claims with respect to the "matter" which is properly before the panel. The first hypothesis is the case of the "Import Measures" panel. The second, is the "Section 301" panel procedure.

5.116 Dominica and St. Lucia argue that there should be no question of confusion, or overlap or even divergence. This Panel may take legal notice of the US actions leading to the suspension of concessions in the *Bananas* case as pertinent evidence for the interpretation of Sections 301-310 as such. Whether US actions in this regard are themselves in conformity with US

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[556] *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico*, adopted on 25 November 1998,WT/DS60/AB/R, para. 72. See also DSU, Article 6.2.

[557] Appellate Body Report on *Brazil – Measures Affecting Dessicated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R, p. 21.

[558] Panel Report on *Japan - Measures Affecting Consumer Photographic Film and Paper*, adopted on 22 April 1998, WT/DS/44/R, para. 10.8. Dominica and St. Lucia also cite, e.g. Appellate Body Report on *EC – Bananas III*, op. cit., para. 142; Appellate Body Report on *Australia – Measures Affecting the Importation of Salmon* ("*Australia – Salmon*"), adopted 6 November 1998, WT/DS18/AB/R, op. cit., paras. 90-105; Panel Report on *Argentina – Safeguard Measures on Imports of Footwear*, circulated 25 June 1999, WT/DS121/R, paras. 8.23-8.46.

[559] Dominica and St. Lucia cite e.g. Appellate Body Report on *Guatemala - Cement*, op. cit., paras. 69-73, 84-86.

obligations under the WTO Agreements will be addressed by another panel and it is not required that this Panel rule on that issue.

5.117 Dominica and St. Lucia argue that the terms of reference of this Panel call for an examination of the specific claims stated by the complainant in WT/DS152/11. The EC complaint is limited to the compatibility of US law as such with the obligations imposed on the United States by the WTO Agreements. Where municipal law is examined as evidence of compliance or non-compliance with international obligations, it is within the competence of an international tribunal to review evidence on whether or not, in applying that law, the Executive is acting in conformity with its obligations under international law.[560] In such a case, legislation cannot be assessed in abstract.

5.118 Dominica and St. Lucia note that the European Communities refers to US actions leading to the suspension of concessions in the *Bananas* case as confirming "what the text of Section 306(b) indicates, namely that the USTR must implement the further action decided upon irrespective of whether that action conforms to the requirements of Article 22 of the DSU". Dominica and St. Lucia assert that US actions in the *Bananas* dispute highlight US administrative practice and show that the strict timetables imposed by Section 301 procedures are in fact mandatory and can lead to conflict with US obligations in the WTO. The mere fact that certain of these actions are now subject to review by another panel does not preclude this Panel from taking legal notice of all relevant evidence.

5.119 In response to the US inquiry, Dominica and St. Lucia state that a series of reports to Congress on 'Section 301' developments as required by section 309(a)(3) of the Trade Act of 1974 chronicle the implementation of Section 301 mandates in the *Bananas* case. The term "Section 301" is generally used as shorthand for Chapter 1 of Title III of the Trade Act of 1974, as amended, which covers Sections 301-310, the subject of the EC complaint.

5.120 Dominica and St. Lucia point out that with regard to the March 3rd announcement, the USTR made clear in a public notice requesting comments on anticipated US action as required under Sections 301-310 that:

> "Given that the reasonable period of time for the EC's implementation of the WTO recommendations concerning the EC banana regime expires on January 1, 1999, the USTR must make the determination required by section 306(b) no later than January 31, 1999, and, in the event of an affirmative determination, must implement further action no later than 30 days thereafter".[561]

5.121 Dominica and St. Lucia argue that although the March 3rd announcement does not explicitly refer to Section 301 authority, this does not infer that the March 3rd announcement "did not involve Section 301".

5.122 Dominica and St. Lucia note that a number of GATT/WTO panels have examined complaints by different contracting parties involving the same or similar measures of a responding party. To the extent that there is overlap in the scope of review panels have taken into account the reasoning in previous panel and Appellate Body reports. Additionally, the

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[560] Dominica and St. Lucia refer to Appellate Body Report on *India – Patents (US)*, op. cit., paras. 65-66, citing Certain German Interests in Polish Upper Silesia [1926], PCIJ Rep., Series A, No.7, p.19.

[561] Federal Register, Vol. 63, No.204, Thursday, 22 October 1998, pp. 56688 and 56689.

Appellate Body has been mindful of its role in providing security and predictability to the multilateral system through ensuring consistency and coherence in WTO jurisprudence.

5.123 Dominica and St. Lucia claim that the task of this Panel is to make an objective assessment of the matter before it, including an objective assessment of the facts of the case.[562] Even where there are multiple complaints related to the same matter the DSU does not circumscribe the jurisdiction of any panel(s) established to examine the complaints. Article 9 of the DSU on 'Procedures for Multiple Complainants' is "a code of conduct for the DSB because its provisions pertain to the establishment of a panel, the authority for which is exclusively reserved for the DSB".[563] Neither Article 9 nor any other provision of the DSU authorizes a panel to retroactively redefine the scope of its review simply because another panel has been established to examine related issues. The jurisdiction of a panel is defined at the moment at which it becomes seised of a 'matter'. Events occurring subsequent to this should not be presumed to exclude from a panel's consideration evidence which would otherwise be deemed relevant.[564]

5.124 Dominica and St. Lucia then conclude that the establishment of a panel to review certain US actions leading to the suspension of concessions in the *Bananas* case involves procedural considerations which do not diminish the responsibility of this Panel to make an objective assessment of the matter before it, including an objective assessment of all relevant evidence adduced in the case.

5.125 Dominica and St. Lucia further contend that WTO/GATT jurisprudence suggests that the GATT and the GATS covers both *de jure* and *de facto* breaches; *viz.* the issue is not whether regulations on the face of it comply with WTO rules but whether as administered they in fact do.

5.126 Dominica and St. Lucia note that when one's livelihood and survival depends on something, it is impossible to ignore the frightening ramifications of a situation in which what a powerful country "considers" to be WTO-compatible or incompatible may be even more important than what the multilateral system determines.

5.127 Dominica and St. Lucia then respectfully request the Panel to find that the challenged Section 301 procedures are inconsistent with US obligations under the WTO Agreements and recommend that the DSB request the United States to bring its Trade Act of 1974 into conformity with its WTO obligations.

5.128 In response to the Panel's question as to whether DSU Article 23.2 prohibits any determination on WTO consistency or any determination to the effect that a violation has occurred, Dominica and St. Lucia state that Article 23.2(a) of the DSU prohibits WTO Members from making "a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding". The preambular words of Article 23.2 refer to "such cases"

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[562] See DSU, Article 11.

[563] Panel Report on *India – Patents (EC)*, op. cit., para. 7.14.

[564] Dominica and St. Lucia note that GATT/WTO jurisprudence affirms the legitimacy of using updated information concerning the same measures to inform an assessment of the substantive complaint before a panel, *e.g.* Panel Reports on *Korea - Beef*, all adopted on 7 November 1989 (BISD 36S/202, 234 and 268), paras. 99-101, 115-117, 121-123).

as addressed in Article 23.1. Article 23.1 concerns actions taken to redress measures which violate WTO rules or otherwise impede the attainment of any objective of the WTO agreements.

5.129 Dominica and St. Lucia further argue that Article 23, read in its context,[565] suggests that the strengthened multilateral system proscribes any unilateral determination on WTO consistency which has consequences for other WTO Members without respect for due process.

5.130 In the view of Dominica and St. Lucia, a multilateral determination on WTO consistency is a necessary and central element in providing security and predictability in the implementation of WTO rules. The Appellate Body Report on the *EC – Bananas III* case emphasizes that "with the increased interdependence of the global economy, which means that actions taken in one country are likely to have significant effects on trade and foreign direct investment flows in others, Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly".[566] If every Member has a stake in enforcing WTO rules then no unilateral determination on WTO consistency which in any way prejudices the rights of other Members is permissible, except through recourse to the rules and procedures of the DSU.[567]

5.131 Dominica and St. Lucia contend that Article 3.7 of the DSU exhorts a Member before bringing a case to exercise its judgement as to whether action under dispute settlement procedures would be fruitful. This is likely to entail an assessment of the WTO-consistency of measures taken by another Member. Such a preliminary determination *per se* would not be a "determination" on WTO consistency in violation of Article 23 as it should not preclude other Members from challenging the legitimacy of the measures in question.

5.132 Dominica and St. Lucia are of the view that legislation merely facilitating such a "determination", however, must be distinguished from legislation which triggers retaliatory action where one "considers" non-implementation to have occurred. The "threat advantage" of WTO-illegality undermines the fundamental objectives of Article 23 of the DSU. The very fact that a determination must be made whether or not WTO rules are being infringed holds other WTO Members to ransom.

5.133 Dominica and St. Lucia then argue that the strengthened multilateral system requires that Members have recourse to, and abide by, the rules and procedures of the DSU. The

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[565] Dominica and St. Lucia point out that for example, Article 3 of the DSU also underscores the precedence of the multilateral system over the positions adopted by individual Members. Article 3.6, for example, provides that where the parties to a dispute achieve a mutually agreed solution to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, this shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto. As such, even where there is a mutually agreed solution between parties to a dispute this is subject to multilateral review.

[566] Appellate Body Report on *EC – Bananas III*, op. cit., para. 7.50.

[567] Dominica and St. Lucia note that the Uruguay Round Agreements essentially deny a right of auto-interpretation in the multilateral trading system. Article IX:2 of the Marrakesh Agreement complements Article 23 of the DSU; see also DSU, Article 3.9. The strengthened multilateral system empowers the collective will to make "determinations" not individual Members. Significantly, the Appellate Body report on *Japan - Alcoholic Beverages*, op. cit., Section E states: "The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere".

principle of 'automaticity' ensures that the strengthened multilateral system will function. The wheels of justice may, at times, turn slowly but the multilateral determination on WTO consistency should be, at all times, all important. If the unilateral determinations of a WTO Member are viewed as of greater significance, then the multilateral system is threatened.

5.134 In the view of Dominica and St. Lucia, Article 23.2(a) of the DSU effectively prohibits Members to take any determination on WTO consistency with consequences for the multilateral system without recourse to dispute settlement in accordance with the rules and procedures of the DSU.

5.135 Dominica and St. Lucia, in response to the Panel's question as to whether an official US statement binding in international law that the US government will not exercise its discretion in a way contrary to WTO rule remove the WTO inconsistency of Sections 301-10 on the assumptions that the USTR and the President have the discretion to avoid determinations and actions contrary to WTO rules in all circumstances, and that, nevertheless, Sections 301-310 were found inconsistent with WTO rules, state that such an official US statement, whether or not binding in international law, would not remove the WTO inconsistency. The binding nature of unilateral declarations is a matter of wide jurisprudential debate. Article 38 of the Statute of the International Court of Justice (ICJ) refers to international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; general principles of law; and other subsidiary means for the determination of rules of law. It does not mention unilateral declarations.

5.136 Dominica and St. Lucia explain that Article 38 of the ICJ Statute, arguably, is not an exhaustive statement of the sources of international law. The *Nuclear Test* cases[568] and *Frontier Dispute* case[569] suggest that in certain limited circumstances an official statement, if given publicly, with the clear intent of binding a State to a particular course of conduct will be upheld by an international tribunal. Appellate Body reports increasingly refer to general international law principles as applied in the case law of the ICJ. This 'cooperation among international courts' and 'cross-fertilization' of legal systems enhances the legitimacy, consistency and political acceptability of WTO dispute settlement rulings.[570] The *Nuclear Test cases* and *Frontier Dispute case*, however, stand as the exception rather than the rule. It is widely believed that, "States don't mean what they say, and don't say what they mean". It therefore seems questionable whether the existing degree of legal insecurity surrounding Section 301 procedures would be removed by an official US statement.[571]

5.137 Dominica and St. Lucia recall that Article 3.7 of the DSU suggests that "[t]he aim of dispute settlement mechanism is to secure a positive solution to a dispute". A positive solution is one which promotes the security and predictability of the multilateral trading system. An official statement that the US government will not exercise its discretion in a way contrary to WTO rules seems hardly adequate in light of the clear pressure which may be applied on the Executive in individual cases. The "threat advantage" of WTO-illegality is further bolstered by

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[568] *(Australia v. France; New Zealand v. France)* ICJ Rep. 1974, pp.253, 457, esp. paras. 43-45; but see Sir Garfield Barwick J., diss. op. See also *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933) PCIJ Rep., Series A/B, No. 53, Anzilotti J., diss. op.

[569] ICJ Rep. 1986, p.554 at p.573.

[570] Dominica and St. Lucia cite Ernst-Ulrich Petersmann, "Dispute Settlement in International Economic Law - Lessons for Strengthening International Dispute Settlement in Non-Economic Areas" (1999) 2 J.I.E.L. 189 at 209.

[571] Dominica and St. Lucia also cite Panel Report on *India – Patents (US)*, op. cit., paras. 63-71 on the need to provide a sound legal basis for implementing WTO obligations.

section 102(a) of the Uruguay Round Agreements Act of 1994 (URRA), which explicitly provides that the Act shall not be construed to limit Section 301 authority. The debates on the legislation which evidence Congressional intent further reinforce this view. Statements of the USTR at the time show the Executive's clear concurrence:

> "Just as the United States may now choose to take Section 301 actions that are not GATT-authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round Agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking actions in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone-treated beef".[572]

5.138 Dominica and St. Lucia then argue that a positive solution is one which removes the "threat advantage" in the administration of Section 301 procedures. It is one which provides the secure basis on which those without the power either to threaten unilateral measures or to defend themselves against them must depend.

5.139 Dominica and St. Lucia state that the suggestion that an official statement may be sufficient to comply with the mandates imposed in Article XVI:4 of the Marrakesh Agreement that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", indeed, could create an even more fundamental problem than the one this Panel is now addressing.

5.140 Dominica and St Lucia add that both of them are parliamentary democracies with dualist legal systems. No legislation has been passed specifically directing Executive action on making determinations regarding WTO rights and obligations before panel and Appellate Body reports have been adopted. Additionally, the Commonwealth of Dominica and St Lucia have not been a complainant or respondent in WTO dispute settlement proceedings, nor initiated consultations under the DSU. Where the Commonwealth of Dominica and St Lucia have requested to be joined in consultations they have sought to protect their interests through recourse to the rules and procedures of the DSU.

E. DOMINICAN REPUBLIC

1. Introduction

5.141 **The Dominican Republic welcomes** this opportunity to participate as Third Party in these proceedings in order to add its voice in support for a single multilateral procedure for the settlement of trade disputes.

2. Legal Arguments

5.142 Like Brazil, the Dominican Republic is of the view that "a law that is inconsistent with the obligations of a Member under the WTO Agreements can be challenged under the dispute settlement procedures. The issue before the Panel is … the need to bring the law into conformity with relevant WTO provisions, as provided in Article XVI:4 of the WTO Agreement".

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[572] SSA, 367, 1994 USCCAN at 4321.

5.143 Like the European Communities, the Dominican Republic is of the view that "WTO Agreements cannot provide security and predictability unless Members settle all their trade disputes in accordance with the procedures of the Dispute Settlement Understanding (DSU)".

5.144 Like Japan, the Dominican Republic is of the view that "WTO Members are prohibited from unilaterally suspending concessions or other obligations under the WTO Agreement".

5.145 Like Brazil, the Dominican Republic is of the view that, given "the scope of authority available to the US Administration to proceed without recourse to DSU procedures in Section 301 (c)", the United States seeks "to pursue the removal of practices that do not violate US rights" by threatening "to violate the rights of WTO Members". This clearly contradicts Article 23 of the DSU.

5.146 Like India, the Dominican Republic agrees with the relevance of US views expressed in other Panel proceedings, where it stated that "the domestic law of a Member must not only be such as to enable it to act consistently with its WTO obligations but the domestic law must also not create legal uncertainty by prescribing WTO-inconsistent measures".

5.147 Like Hong Kong, China, the Dominican Republic is of the view that "good faith implementation of international obligations should not be accidental, nor merely the outcome of exercise of discretion by a Member government".

5.148 Like the Republic of Korea, the Dominican Republic believes firmly that the publication of retaliation lists "clearly affect the competitive relationship between the targeted products and similar products from all other countries".

5.149 The Dominican Republic then requests respectfully to the Panel to rule along the lines proposed by the European Communities and by Brazil, Japan, Hong Kong, China, India and Korea, and that it also give due consideration to two additional concerns:

(a) Section 301(c)(1)(C) establishes a number of eligibility criteria for the continued market access under preferential trading conditions. In addition, Section 301(d)(3)(B) defines:

> "(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy or practice, or any combination of acts, policies or practices, which–
>
> (i) denies fair and equitable–
>
> (I) opportunities for the establishment of an enterprise,
>
> (II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement of Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act.
>
> (III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market",

(b) In none of the cases listed it is required that the US person that is deemed to be affected by the "unreasonable" conditions subject the act, policy or practice in question to a judicial review. Rather, "watch", "priority watch" and other types of country lists are elaborated based solely on petitions (section 302(a)) or requests of petitions in the Federal Register (section 302(b)) with a disproportionate effect on the viability of the activities concerned, whether or not these are beneficiaries of preferential trading conditions.

5.150 The Dominican Republic requests the Panel that it consider:

(a) examining the consistency of these criteria with the provisions on non-discrimination in the "Habilitation Clause" (adopted by the CONTRACTING PARTIES on 28 November 1979) and the Generalized System of Preferences (as described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of 'generalized non-reciprocal and non-discriminatory preferences beneficial to the developing countries');

(b) as suggested by Brazil, examining whether it is WTO-consistent to deny any WTO Member its rights because of non-violation of the rights of the United States under the WTO agreements. Specifically, section 301 (d)(B)(3)(B)(i)(I) refers to the right of establishment for an enterprise, which is not covered automatically by any WTO agreement, except in the form of a specific commitment under the General Agreement of Trade in Services (GATS); section 301 (d)(B)(3)(B)(i)(II) refers to non-violation of the provisions of the TRIPS Agreement, but the relevant article of this agreement (66.2) has yet to enter into force because a significant number of developed and developing country WTO Members have requested additional time to study the implications of carrying to the intellectual property area the provisions on non-violation devised for trade in goods; and section 301 (d)(B)(3)(B)(i)(III) refers to the toleration of anticompetitive activities, but these have yet to be disciplined by the WTO; and

(c) examining the standard of review utilized to enforce these WTO-unrelated criteria.

5.151 In response to the Panel's question as to the relevance of "two additional concerns" in light of the terms of reference of the Panel, the Dominican Republic states that Article 7.1 of the DSU states that the Panel has to work on the basis of terms of reference. The matter at issue is "to analyze if the Sections 301-310 of the Trade Act of 1974 of the United States are inconsistent with the US international obligations under the WTO Agreements". If in the course of the process additional elements are found that can help to clarify the matter at issue, then these elements should be taken into account.

5.152 The Dominican Republic further states that the two "additional concerns" of the Dominican Republic are clear examples of how specific provisions in Section 301 of the Trade

Act of 1974 are inconsistent with the US international obligations under the WTO Agreements. They provide further evidence to the statement by Brazil that "the scope of authority available to the US Administration to proceed without recourse to DSU procedures in Section 301(c)", the United States seeks "to pursue the removal of practices that do not violate US rights" by threatening "to violate the rights of WTO Members".

5.153 The Dominican Republic emphasizes that this clearly contradicts Article 23 of the DSU.

5.154 The Dominican Republic considers that it is its right as a beneficiary of trade preferences that these be awarded in compliance with the "Habilitation Clause", that is, on a non-discriminatory basis. By conditioning trade preferences to compliance with other criteria such as the ones listed in Section 301(d)(3)(B) (criteria that are unrelated to any nation's multilateral rights), the United States threatens to violate the rights of Dominican exporters.

5.155 Further, by constantly reviewing compliance with such criteria without subjecting "interested party petitions" to established procedures of judicial review, the United States places Dominican exporters in a situation of continued juridical risk, which is what WTO Members sought to avoid by adopting a single, multilateral procedure for the settlement of trade disputes after the Uruguay Round.

5.156 Therefore, the Dominican Republic respectfully reiterates to the Panel that it should analyze also the issues of its "two additional concerns".

F. HONG KONG, CHINA

1. Overview

5.157 **Hong Kong, China indicates** that it decided to participate in the current proceedings as third party in view of the systemic importance of the dispute. It is our firm belief that the cornerstone of the WTO legal regime – the principle of multilateral determination of the WTO consistency of measures – shall not be undermined by domestic legislation that mandates unilateral action. We consider that Members' compliance with this principle is essential in order to ensure the security and predictability of the multilateral trading system, and to preserve Members' rights and obligations under the WTO Agreements.

5.158 Hong Kong, China does not question the right of WTO Members to enact domestic legislation to protect their legitimate trade interests, but such legislation must not detract from their obligations under the WTO. By virtue of their WTO membership, Members have subscribed to the WTO Agreements including the Dispute Settlement Understanding (DSU), and agreed to settle their trade disputes in accordance with the rules and procedures provided therein. In other words, they have agreed to refrain from adopting any unilateral measures against alleged inconsistencies of their trading partners. In this perspective, Hong Kong, China submits that Sections 304(a)(2)(A), 305(a) and 306(b) of the US Trade Act of 1974, to the extent that they oblige the United States Trade Representative (USTR) to have recourse to unilateral actions without respecting the multilateral framework for resolution of disputes as laid down in the DSU, violate the WTO obligations of the United States under the DSU.

5.159 Hong Kong, China summarises its arguments as follows: First, Hong Kong, China places the DSU in the realm of public international law. Hong Kong, China demonstrates that, through the enactment of the DSU, WTO Members have agreed to refrain from taking unilateral actions and to resort to the WTO exclusively to determine the consistency or otherwise of measures with WTO Agreements. In other words, the WTO is the exclusive forum for

determination of the WTO consistency of trade measures. Second, Hong Kong, China discusses the US legislation in question relating to adjudication of trade disputes. Adopted GATT panel reports suggest that only mandatory legislation can be found to be in violation of WTO law. We argue that the legislation being challenged in the present dispute is mandatory in nature. Third, Hong Kong, China advances some arguments, inspired by public international law, as to whether the distinction between mandatory and discretionary legislation in GATT jurisprudence is justified. Hong Kong, China essentially submits that even potential deviation from an international obligation (where a competent national authority has discretion allowing it to disrespect its international obligations) amounts to a violation of WTO rules and obligations.

2. Legal Arguments

(a) Nature of the Dispute Settlement Mechanism under the GATT 1947 and the WTO

5.160 Hong Kong, China argues that by becoming a party to an international agreement, a country voluntarily assumes obligations which impose disciplines on its behaviour, in exchange for the other parties agreeing to abide by the same disciplines. In other words, rights and obligations must go together as a party's rights are derived from the obligations of the other parties. The GATT 1947, the WTO and their provisions for dispute settlement are meaningful only when appreciated in this context.

5.161 In the view of Hong Kong, China, to ensure the security of rights in a multilateral agreement, third party adjudication is a necessary feature. The injured party would tend to see wrong when it may not exist; and where it exists, there could be pressure to exaggerate the extent of the wrong. Conversely, the offending party may perceive its actions in an entirely different light. It would tend to regard its action as permissible under the agreement; or where it concedes violation, would have every incentive to downplay the degree of injury that others suffer as a result. For an agreement where rights and concessions are multilateralised, it is unthinkable to regard the offending or injured party as being competent to adjudicate on its own the legality of a measure, to determine on its own the extent of the wrong when illegality is found, or to authorize counter-measures on its own. Were such allowed in the agreement, an escalation of counter-measures would likely result, as every time counter-measures are taken, the affected party might conclude that they are disproportionate and consequently retaliate to some extent (which might in turn be regarded as disproportionate by the affected party which will retaliate further).

5.162 Hong Kong, China contends that problems relating to the proportionality of retaliatory and countermeasures can be avoided if the privilege to qualify a measure as unlawful under public international law is removed from the injured party. This is precisely why states have through conventional means always sought to give effect to the maxim *nemo in re sua (in sua propria causa) judex esse potest* (nobody should be the judge of his/her own cause). The Statute of the International Court of Justice (ICJ) also provides for compulsory third party adjudication - Article 59 St. ICJ provides the possibility for states to grant *ante hoc* consent to see all disputes against them adjudicated by the ICJ.

5.163 Hong Kong, China further argues that in the post-World War II era, states were eager to agree to the principle of third party adjudication in a functional manner for settlement of their investment-related or trade-related disputes. The Special Rapporteur of the International Law Commission (ILC) concluded in his report on "State Responsibility" that for illegal acts *de lege lata* (the law as it is) and not *de lege ferenda* (the law as it should be), there is world-wide recognition of the principle of third party adjudication and that consequently recourse to unilateral countermeasures should be lawful only in cases where the state authorizing the illegal

act refuses an invitation by the injured state to negotiate. The ILC report, which has been heralded by expert commentators, provides an authoritative indication that in the general field of public international law, the world community is moving towards compulsory third party adjudication.

5.164 Hong Kong, China notes that third-party adjudication had also been a feature of the GATT. After the GATT 1947 came into being, GATT Contracting Parties resorted to procedures laid down in Articles XXII and XXIII of GATT to resolve their trade disputes. Building on Article 92 of the Havana Charter, the two GATT Articles provided a basis for multilateral adjudication of disputes, whereby Contracting Parties undertook to refer their disputes to the GATT which would investigate the matter and make appropriate recommendations/rulings. The system served to prevent recourse to unilateral measures against alleged inconsistencies of trade measures. However, the dispute settlement procedures under the GATT were constrained by a number of factors, e.g. the parties to the dispute were allowed to block consensus on the establishment of panels and the adoption of panel reports. Notwithstanding the deficiencies of the system however, GATT Contracting Parties resorted to resolving their disputes through Articles XXII and XXIII of the GATT, rather than by resorting to unilateral adjudication and actions.

5.165 According to Hong Kong, China, the deficiencies of the GATT dispute settlement system have to a large extent been rectified under the WTO Dispute Settlement Mechanism (DSM). The DSU provides for the automatic establishment of panels upon request and the automatic adoption of panel reports, unless the Dispute Settlement Body (DSB) decides by consensus against such establishment or adoption. With this new rule of "negative consensus", the possibility of one Member blocking the establishment of panels or the adoption of panel reports no longer exists. The improvements made to the dispute settlement mechanism convey two messages. These are: parties to the GATT reaffirmed third-party adjudication as a means to resolve disputes between them, and their collective intention to make dispute resolution more effective in the WTO.

5.166 Hong Kong, China argues that the improvements secured in the Uruguay Round have indeed made the DSU a more effective-mechanism than the GATT system in resolving disputes concerning WTO agreements. In the recent DSU review, the general view has been that the DSM has been working satisfactorily and that only fine-tuning in certain respects is required. Further efforts to make the DSU work better are a reaffirmation of Members' recognition of multilateral adjudication as the way to resolve disputes between them.

5.167 Hong Kong, China states that the conclusion to be drawn is that the DSU is the exclusive forum for adjudication of trade-related disputes among WTO Members. Article 23 of the DSU further strengthens the multilateral adjudication system by obliging Members to have recourse to, and abide by, the rules and procedures of the DSU to resolve their trade disputes. All WTO Members, including the United States, have accepted this obligation.

5.168 Hong Kong, China further argues that the legal and logical consequence of the preceding analysis is that WTO Members must always seek redress of their complaints under the WTO DSU.

5.169 Hong Kong, China goes on to state that WTO law intervenes and performs its multilateral adjudication role when a WTO Member decides to complain formally about the trade policies and practices maintained by another Member. From this point onward, the WTO Member is under the obligation to have recourse exclusively to the WTO dispute settlement procedures (Article 23.2 of the DSU). It must consult with the Member concerned and, if

within the time-limits laid down in the DSU no amicable solution has been reached, may request the establishment of a dispute settlement panel. Following panel (and eventually Appellate Body) proceedings, and provided no action has been taken by the losing party to implement the DSB rulings within the reasonable period of time laid down in Article 21.3 of the DSU, the Member can request DSB's authorization to adopt counter-measures, and the DSB has to grant such authorization unless rejected by consensus.

5.170 Hong Kong, China concludes that in a nutshell, with the entry into force of the DSU, recourse to unilateral counter-measures by WTO Members is forbidden under the WTO. It is up to the WTO adjudicating bodies to pronounce the legality of measures maintained by a WTO Member and to authorize, upon request, the adoption of counter-measures. From the moment that a WTO Member has decided to complain about the trade policies and practices of another Member, it must follow the substantive and procedural obligations laid down in the DSU. To do otherwise will violate its obligations under the WTO.

5.171 In response to the Panel's question as to whether DSU Article 23.2 prohibits any determination on WTO consistency or any determination to the effect that a violation has occurred, Hong Kong, China states that the answer is in Article 23.2(a) of the DSU itself. Article 23.2(a) specifically prohibits determinations "to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been implemented".

5.172 In the view of Hong Kong, China, the object and purpose of the DSU are also relevant. The DSM is the exclusive forum for adjudication of trade disputes among WTO Members. Even if bilateral consultations reach a result, the result has to be WTO consistent (Article 3.5 of DSU) and it has to be notified to the DSU where multilateral control will ensure its consistency with the applicable WTO rules (Article 3.6 of DSU).

5.173 Hong Kong, China further argues that the negotiating history of the DSU, and Article 23 more specifically, confirm this interpretation: it was negotiated with a view to ensure that recourse to unilateralism would not be an option for WTO Members.

(b) Application

5.174 Hong Kong, China argues that Section 303 of the Trade Act of 1974 prescribes that on the date on which an investigation under Section 302 is initiated, the USTR shall request consultations with its trading partner in accordance with Article 4.3 of the DSU. Section 304(a)(2)(A) requires the USTR to determine whether the rights of the United States are being denied on or before the earlier of (i) 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated. According to Section 306(b), if the USTR considers that its trading partner has failed to implement the DSB rulings, he/she shall make a determination, no later than 30 days after the expiry of the reasonable period of time provided for in Article 21.3 of the DSU, what further (retaliatory) action must be taken under Section 301(a). Finally, according to Section 305(a), the USTR shall implement the (retaliatory) action no later than 30 days after he/she made the determination. In this connection, Hong Kong, China notes that Section 305(a)(2)(A) provides that implementation of the (retaliatory) action may be delayed by no more than 180 days if the USTR considers, *inter alia,* that substantial progress is being made, or that a delay is necessary or desirable to obtain US rights or a satisfactory solution. However, it should be noted that in exercising his/her discretion to delay implementation, the USTR is not obliged to observe the rules and procedures stipulated in the DSU.

5.175 Hong Kong, China considers that as the European Communities mentioned, the timeframe stipulated by the cited sub-sections of the US Trade Act is shorter than that within which one can reasonably expect DSB findings on that matter. In such a case though, Section 304(a)(2)(A) mandates the USTR to make a determination of whether the US rights have been denied, independently of the still missing multilateral determination on the same issue.

5.176 Hong Kong, China points out that the USTR of course has discretion as regards the determination that he/she will make. This does not at all annihilate the mandatory character of the US legislation in question. What counts is not the eventual content of the USTR's determination. What counts is the very fact that the USTR is mandated to make such a determination, notwithstanding the clear and unambiguous provision of DSU Article 23.2(a) that Members shall not make a determination to the effect that a violation has occurred or that benefits have been nullified or impaired, except through recourse to dispute settlement in accordance with the rules and procedures of the DSU.

5.177 Hong Kong, China further states that the same is true with respect to the determination made under Section 306(b). In case the USTR determines that the US rights have been denied, he/she must make a determination on the (retaliatory) action that needs to be taken within 30 days following the expiration of the reasonable period of time for implementation of the DSB rulings. The very fact that such a determination has to be taken is incompatible with the timeframe stipulated in Article 21.5 of the DSU and amounts to a substitution of the procedures laid down therein.

5.178 Hong Kong, China asserts that Article 21.5 of the DSU provides that, in case there is disagreement between the parties on the compliance of implementing measures, the dispute should be decided through recourse to the dispute settlement procedures, including resort to the original panel where possible. The panel shall circulate its report within 90 days. As the USTR has to make a determination on the compliance question long before the Article 21.5 panel has issued its report, Section 306(b) makes Article 21.5 redundant and violates Article 23 of the DSU. The provision is also incompatible with the principle of "effective treaty interpretation" as laid down in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which requires that interpretation must give meaning to each and every provision of the treaty in its context and in the light of its object and purpose. Here the United States, in interpreting its obligations under the DSU, opted for an interpretation which effectively disregards Article 21.5 of the DSU.

5.179 Hong Kong, China further explains that Section 305(a) ensures the timely implementation of the retaliatory actions pursuant to the USTR's determinations under Section 306(a) and (b). This amounts to unilateral retaliation which bypasses Members' obligations prescribed in Article 22 of the DSU to request DSB's authorization for imposing counter-measures. Being a unilateral retaliatory measure, Section 305(a) also violates Article 23.2 of the DSU.

5.180 Hong Kong, China then concludes that, by obliging the USTR to determine whether the US rights have been denied and to ensure that retaliatory action(s) is taken in accordance with his/her unilateral determination, the US legislation in question violates DSU Article 23. Furthermore, the requirements to make the determination and implement the action within a specified period of time are incompatible with the timeframes stipulated in Articles 21.5 and 22 of the DSU and hence render the provisions redundant.

5.181 In the view of Hong Kong, China, the United States has insisted that for there to be a violation of Article 23.2(a) of the DSU, the European Communities must show that (a) a determination that a WTO agreement violation has occurred, and (b) such determination is inconsistent with the panel or Appellate Body rulings or an arbitration award. This cannot be the standard of proof adopted for Article 23.2(a). In Hong Kong, China's view, the mere possibility of having a unilateral determination of WTO agreement violation is inconsistent with Article 23.2(a), which stipulates that determination of violation of obligations should not be made except through recourse to the rules and procedures of the DSU. The US's interpretation is tantamount to arguing that a Member can demonstrate that a violation of Article 23.2(a) has occurred only in cases where a Member (a) makes a (unilateral) determination before the WTO adjudicating body has pronounced on the issue; or (b) makes such a determination after the adjudicating body has pronounced on the issue but reaches a conclusion inconsistent with the WTO body's findings. In doing so, the United States is trying to avoid interpreting the crucial Article 23.2(a) in good faith.

5.182 Hong Kong, China further notes that the question remains in a case where a unilateral determination as described above has been made but no action is taken to implement the determination. Hong Kong, China considers that this would constitute a violation of Article 23.2. This is because Article 23.2(a) outlaws all unilateral determinations to the effect that a violation occurred regardless of whether it is accompanied by subsequent implementing action.

5.183 Hong Kong, China answered in the negative in response to the Panel's question as to whether an official US statement binding in international law that the US government will not exercise its discretion in a way contrary to WTO rule removes the WTO inconsistency of Sections 301-310 on the assumption that the USTR and the President have the direction to avoid determinations and actions contrary to WTO rules in all circumstances, and that, nevertheless, Sections 301-310 were found to be inconsistent with WTO rules. Its answer is dictated by the ambiguity in public international law surrounding the legal value of unilateral declarations. Although the International Court of Justice had on two occasions pronounced in favour of the binding character of unilateral declarations *(Ihlen,* 1933; *Nuclear Tests,* 1974), both findings were very narrowly constructed and were taken in a particular context. Moreover, the ICJ's decisions on both occasions pay particular attention to the circumstances surrounding the declarations and it is not clear whether *mutatis mutandis* such circumstances can find application in the present dispute.

5.184 Hong Kong, China moreover argues that attempts in literature to extrapolate these decisions in other spheres of international activity (like for example, the UN resolutions) often met with scepticism. Hence, even though it may be possible to advance good arguments in favour of the under specific circumstances binding nature of unilateral declarations, the situation in public international law is unclear in this respect.

5.185 In the view of Hong Kong, China, in an area like dispute settlement, one should always aim for maximum clarity and precision. There is no room for ambiguity. A modification of the contentious aspects of the relevant provisions of the US legislation along the lines suggested in our answers to the Panel's questions and in our submission eliminates ambiguities. A unilateral declaration does not.

(c) Distinction between mandatory legislation and discretionary legislation

5.186 Hong Kong, China recalls that in the *US – Superfund*[573] case, the panel report stated that mandatory, as opposed to discretionary, national legislation can form the subject matter of a claim brought before the GATT independently of its application in a particular case. In particular, the panel stated that:

> "Both articles (Articles XI and III of GATT 1947) are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade".[574]

5.187 Hong Kong, China argues that the language of the cited sub-Sections of the Trade Act of 1974 makes it plain that the legislation in question is mandatory. Consequently, following the *Superfund* ruling, the sub-Sections can be proclaimed illegal as such, independently of any practice or enforcement of the legislation.

5.188 Hong Kong, China points out that the United States argued that nothing in its legislation mandates actions inconsistent with its WTO obligations. Hong Kong, China submits that even when legislation is not mandatory and simply allows WTO-inconsistent action to be taken, it should still be found to be WTO-inconsistent. Our argument is based on, in our view, an appropriate interpretation of the "good faith" principle enshrined in the VCLT.

5.189 Hong Kong, China notes that Article 26 of the VCLT states that :"(E)very treaty in force is binding upon the parties to it and must be performed by them in good faith". This means that, where domestic legislation is needed in accordance with domestic constitutional procedures in order to implement international obligations, such domestic legislation must be a good faith implementation of the international obligations assumed by the signatory.

5.190 Hong Kong, China argues that in the WTO regime, Article XVI:4 of the WTO Agreement requires Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Parties to an international regime should always honour their obligations as long as they remain parties to the said regime. This obligation stems unequivocally from Article 70 of VCLT. The question is consequently raised as to how international obligations can be implemented in good faith if the possibility of deviation exists in a domestic legislation. In the view of Hong Kong, China, there is no expectation that the international obligations will be observed and not impaired when the possibility of deviation is *expressis verbis* provided for in a domestic legislation. The predictability, necessary to plan future trade as the *Superfund* panel acknowledged, is affected when trading partners know *ex ante* that their partners have enacted legislation which allows them to disregard their international obligations.

5.191 Hong Kong, China is of the view that good faith implementation of international obligations should not be accidental, nor merely the outcome of exercise of discretion by a member government. Good faith implementation of international obligations suggests that parties to an international treaty should always honour their obligations as long as they remain

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[573] Panel Report on *US – Superfund*, op. cit., p.160
[574] Ibid.

parties to the said treaty. Thus, a Member maintaining discretionary legislation which allows deviation from international obligations (independently of the eventual application of such legislation) falls foul of the good faith principle.

5.192 Hong Kong, China notes that the United States claims that in the present case the European Communities has to demonstrate that the US legislation in question "precludes any possibility of action consistent with the Member's WTO obligations" and that none of the interpretations of the legislation permits WTO-consistent action. Hong Kong, China does not agree with these arguments. The mere existence of legislation that mandates or allows WTO-inconsistent action to be taken by a WTO Member already poses a serious threat to the good faith principle and to the certainty and predictability of the WTO regime.

5.193 Hong Kong, China also notes that the United States has pointed out that eventually any action undertaken in the context of Section 301 depends on the discretion of the President. Hong Kong, China further notes that while Presidential discretion is provided for in Section 301(a) and 305(a) of the US legislation, the legislation makes it plain that the USTR shall take specific action as a result of a determination to the effect that the US' rights have been denied. Indeed, according to Section 301(a), the USTR does not have to revert to presidential discretion in order to make such determinations. Such determinations have to be made by the USTR within the time limits specified in the legislation in question.

5.194 Hong Kong, China acknowledges that it is true that the President has discretion as to whether specific action should be taken. It is also true that in case discretion is exercised and a WTO Member thinks the outcome of such discretion amounts to a WTO violation, this Member can attack the specific measure but not the legislation giving rise to the specific measure. This is because GATT jurisprudence has held that Members may only attack legislation if such legislation is mandatory. But this is not good law. Such a distinction between mandatory and discretionary legislation, leaving the possibility to WTO Members to attack only the former but not the latter, is clearly inconsistent with public international law for the reasons explained above.

5.195 Hong Kong, China adds that its basic point is that a national legislation which implements an international obligation must do so in good faith *(bona fides)*. This is essentially what Article 26 of the VCLT is all about (*pacta sunt servanda)*.

5.196 Hong Kong, China argues that the good faith obligation actually kicks in before the entry into force of an international agreement: Article 18 of VCLT imposes on signatories an obligation to respect the spirit of the agreement they signed until the point in time when they definitively decide to either become part of it or not. In the former case (and provided that the agreement at hand enters into force) they are bound by Article 26 of VCLT as of the moment of the entry into force of the agreement; in the latter, they do not have to respect Article18 of VCLT anymore and they will never have to respect Article 26 of VCLT either.

5.197 Hong Kong, China goes on to state that on the other hand, the obligation to implement and perform in good faith the agreement is active for the time-period during which a state is part of an international agreement. Article 70 of VCLT makes this point plain. From the moment it decides to abandon such an agreement, a state is no longer bound by Article 26 of VCLT (provided of course, that the agreement at hand does not codify rules of *jus cogens)*. It remains liable though, for any violation of the agreement that it committed during the time-period when it was part of it.

5.198 Hong Kong, China considers that the good faith obligation is severely damaged if an implementing legislation leaves the door open to violations. The very notion that a state by its implementing legislation allows for behaviour which is inconsistent with international law 0runs afoul the principle of good faith which requires performance of the agreement at all times.

5.199 Hong Kong, China further alleges that compensation (in the wide sense of the term) for failure to perform should not be accepted as (and indeed is not) equivalent to performance. This stems clearly from a careful examination of the primary and secondary obligations of states when entering into international commitments:

(a) the primary obligation to perform treaty (Article 26 of VCLT);

(b) the secondary obligations, which come into play if an internationally wrongful act is committed, comprise an obligation to stop the illegal act (cessation of the illegal act) and an obligation of reparation for any damage caused as a result of the commission of the internationally wrongful act.[575]

5.200 In the view of Hong Kong, China, state authors of an illegal act are under an unambiguous obligation to stop the illegal act (even in cases where no such request has been made by the affected party, as the wording of Article 41 of the Draft on State Responsibility and the constant jurisprudence of the ICJ in this respect – Chorzow Factories – make it plain). By definition, they have to perform in good faith. This in turn means that reparation for an illegal act and performance of international obligations should not be understood to be two equivalent forms of behaviour in the sense that a state can alternatively have recourse to either and be deemed to be consistent with its international obligations. Rather, our analysis above supports the view that good faith performance of the treaty in all times is what is requested from states when they adhere to an international regime.

5.201 Hong Kong, China contends that a domestic instrument which allows for deviations severely undermines this basic international obligation, since deviation from the obligation to always perform the international obligations adhered to becomes an option available to the state alongside the option to perform the treaty. As stated above though, the two options are of no equivalent value.

5.202 The overall conclusion of Hong Kong, China therefore is that, in the event parties to an international agreement have to implement their obligations in a domestic instrument in order to fulfil domestic constitutional requirements, they should ensure that their implementing legislation allows no deviations. In any other case, states have failed to perform in good faith their international obligations.

5.203 Hong Kong, China is of the view that the US legislation under challenge fails to guarantee a good faith performance of the US international obligations at all times.

3. Conclusion

5.204 Hong Kong, China contends that it attaches much importance to the current proceedings. Trade disputes will inevitably occur in the future as they have in the past. The

[575] Hong Kong, China notes that there is, however, some disagreement in literature as to the nature of cessation. Some authors do accept that cessation is a primary obligation in the sense that it goes hand in hand with the obligations to perform the treaty.

DSU has been the cornerstone of the WTO and an important achievement of the Uruguay Round. The multilateral dispute settlement system, as opposed to unilateralism, must be preserved and strengthened.

5.205 In the view of Hong Kong, China, the cited sub-sections of the US Section 301-310 of the US Trade Act of 1974 constitute a violation of the obligations imposed by Article 23 of the DSU that all WTO Members should resort to WTO adjudication bodies to resolve disputes arising from the operation of the WTO agreements. Hong Kong, China requests the Panel to recommend that the United States bring, in this very important respect, its legislation into compliance with its WTO obligations.

G. INDIA

1. Introduction

5.206 **India recalls** that in its meeting on 2 March, 1999, the Dispute Settlement Body established the Panel on United States-Sections 301-310 of the Trade Act of 1974. India had signalled its substantial interest as third party in the matter before this Panel. The following is the written submission of India in accordance with paragraph 2 of Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

5.207 India considers that the essential matter at issue before the Panel relates to Sections 301-310 of the Trade Act of 1974. The European Communities has contended that Sections 301-310 explicitly mandate the US administration to proceed unilaterally on the basis of determinations reached independently of the DSB and without its authorization especially once specified time periods have lapsed. The European Communities therefore believes that Sections 301-310 must be amended to make it clear that the US administration is required to act in accordance with the US' obligations under the WTO agreements in all circumstances and at all times.

2. Measures at issue

5.208 India explains that Section 301(a) describes situations where the rights of the United States under any trade agreement are being denied or an act, policy or practice of a foreign country that denies benefits to the United States and is unjustifiable and burdens or restricts US commerce. If the USTR determines (and such determination is unilateral) that one of the above situations has occurred, then the USTR "shall take" retaliatory action. Section 301(a)(2) (A) and (B) do talk of exceptions where action is not required to be taken by USTR and these relate to situations where there is a DSB report which states that the action is not a violation of or inconsistent with the rights of the United States or does not deny, nullify or impair benefits to the United States, or where the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement or where the national security of the United States is at stake.

5.209 India goes on to state that Section 301(b) applies to an act, policy or practice which while not denying rights or benefits of the United States under a trade agreement is nevertheless "unreasonable or discriminatory and burdens or restricts US commerce". It goes on to provide examples of unreasonable acts, such as failure to protect intellectual property rights, toleration of anti-competitive practices by private firms or denial of worker rights. If the USTR determines that an act, policy or practice is actionable under this Section and determines that action by United States is appropriate then the USTR shall take retaliatory action subject to the specific direction, if any, of the President regarding such action.

5.210 India adds that the scope of retaliatory action is set out in Section 301(c) which authorizes the USTR to suspend, withdraw or prevent the application of benefits of trade agreement concessions and impose duties or other import restrictions on the goods and services of such foreign country for such time as the USTR determines appropriate.

5.211 India points out that in the United States itself, no domestic court could pronounce Section 301 inconsistent with WTO because Section 102 (a)(1) provides that "no provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States shall have any effect". Also, the same section provides that nothing in the Uruguay Round Agreements Act shall be construed to limit any authority conferred under any law of the United States including Section 301 of the Trade Act of 1974.

5.212 India further explains that Sections 302 to 310 deal with questions such as who can initiate investigations under Section 301, the various time limits for action, monitoring of measures taken by foreign country etc.

5.213 In the view of India, the central feature of the US legislation, it will be observed therefore, is that the USTR can make a unilateral determination concerning a foreign country's act, policy or practice vis-à-vis the rights and benefits of United States and its effects on US commerce and then decide on trade retaliatory measures for as long as it (USTR) deems fit.

5.214 India contends that Sections 301-310 of the Trade Act of 1974 is both legally indefensible and morally unacceptable. From a legal point of view, it is clear that inasmuch as it embodies unilateralism, Sections 301-310 violate all canons of International Law. From a moral point of view, it is unacceptable because it implies that might is right and that the strong can prevail over the weak.

5.215 India points out that it has had a long history of being subjected to Sections 301-310 of the Trade Act on grounds of alleged unfair trade practices. These Sections put pressure on countries like India to conform to what the United States believes is "fair trading practices". As will be shown below, the determination of what constitutes " unfair trading practices" or "unreasonable acts" is done solely by United States and hence is unilateral; besides, there are no objective criteria to determine those unfair practices making the whole process therefore completely arbitrary.

5.216 India notes that in sum, Sections 301-310 of the Trade Act of 1974 is an instrument of unilateralism used by the United States to force its trading partners to offer market access for American goods and services beyond the scope of commitments undertaken in multilateral trade negotiations. Consequently, these Sections undermine the multilateral trading system.

3. Legal Arguments

(a) Drafting History of WTO Agreement

5.217 India considers that any scrutiny of the drafting history of the Uruguay Round Agreements in general and the DSU in particular, would reveal that a number of countries, chiefly developing ones, accepted the strengthening of the dispute settlement mechanism including the controversial provision of cross retaliation because they were given to understand that in return they need no longer fear the threat of unilateralism. Indeed, many developing countries such as India accepted the dispute settlement system with its provisions relating to

automaticity and cross retaliation in the expectation that under the new system there would be no scope for unilateral action by trading entities.

5.218 India argues that the fact that this has not happened and statutes such as Section 301 have still remained on the statute books of the United States is a matter of profound regret for those who believe in a rule-based multilateral trading system.

(b) Article XVI:4 of the WTO Agreement

5.219 India contends that the WTO Agreement in paragraph 4 of Article XVI clearly states that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5.220 India explains that in the discussions of the Legal Drafting Group during the Uruguay Round, this provision was objected to by the United States and with good reason. It was believed, correctly, by US negotiators that acceptance of this provision would pose a serious problem for Section 301. Hence, the US negotiators tried to water down this provision but with little success. Finally, the language was couched in strong terms so as to make it a binding obligation on Members.

5.221 India also notes that GATT jurisprudence has a long history of cases where a law requiring the executive to impose a measure inconsistent with a provision of the GATT can be challenged under the dispute settlement procedure whether or not it had been applied to the trade of the complaining party. Thus, the 1987 Panel on *United States – Taxes on Petroleum and Certain Imported Substances* said that the very existence of mandatory legislation providing for an internal tax without it being applied to a particular imported product should be regarded as falling within the scope of Article III. Similarly, the famous 1992 Panel on *United States -- Measures Affecting Alcoholic and Malt Beverages* examined legislation in the state of Illinois which the United States argued that it was not giving effect. Again, the Panel ruled that the Mississippi legislation was inconsistent with Article III whether or not it was given effect to. More recently, in the proceedings of the WTO Panel on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, the United States claimed that the "mailbox system" for patent applications which India had established by administrative action did not meet the requirements of Article 70.8 of the TRIPs Agreement because mandatory provisions of the India Patents Act prohibited grant of product patents in pharmaceutical and agricultural chemical products.. India cited provisions of its Constitution on the distribution of authority between its legislative and executive branch and court rulings on the non-binding nature of the statutes requiring administrative actions by a specified date to argue that a mailbox system could be established by administrative action notwithstanding the mandatory provisions of the Patents Act. In response, the United States argued that GATT jurisprudence on mandatory legislation made clear that India was obliged to eliminate what it called legal uncertainty created by the fact that its administrative practices were inconsistent with mandatory provisions of the Patents Act. In effect, the United States argued that the domestic law of a Member must not only be such as to enable it to act consistently with its WTO obligations but the domestic law must also not create legal uncertainty by prescribing WTO-inconsistent measures. The Panel accepted this argument of the United States and ruled that the current administrative practice creates a certain degree of legal insecurity in that it requires Indian officials to ignore certain mandatory provisions of the Patents Act.

5.222 In India's view, the verdict is therefore clear: a law that, by its terms, mandates behaviour inconsistent with a provision of a WTO Agreement violates that provision irrespective of whether and how the law is or could be applied. This principle is a reflection of

the fact that a law with such terms creates uncertainty adversely affecting the competitive opportunities for the goods or services of other Members.

5.223 India states that Article XVI:4 turns this principle into a specific and binding legal obligation. In the light of the above, it is sufficient for the Panel to examine whether Sections 301-310 mandate determinations and actions by the USTR that are inconsistent with the US' obligations under the WTO Agreement.

(c) Article 23 of the DSU

5.224 India contends that Article 23 clearly states that all WTO Members shall have recourse to and abide by the rules and procedures of the DSU to seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements. Specifically, it is stated that Members shall not make a unilateral determination about nullification and impairment of benefits except through recourse to DSU. And yet, Sections 301-310 seek to do precisely that. Sections 301-310 do not follow the procedures or the rules of DSU; indeed, they seek to do just the opposite by threatening the foreign country that is allegedly causing impairment and nullification for the United States. As amply demonstrated by the European Communities, the USTR is required to proceed unilaterally when the results of the WTO dispute settlement procedures are not available within the time limits set out in Sections 301-310. For example, the USTR is mandated by Section 304(a) (2) (A) to make a determination within a time frame that is shorter then the time frame within which it can reasonably expect DSB findings on that matter. In effect, Section 304 mandates the USTR to make a determination 18 months after the request for consultations on the United States denial of rights under a WTO Agreement even if the DSB has not adopted a report with findings on the matter within that time frame.

5.225 India concludes that for this reason, the US Sections 301-310 are inconsistent with the time limits given in the DSU and in particular violate Article 23 of the DSU.

(d) Articles I, II, III, VIII and XI of GATT 1994

5.226 India contends that again, Section 306 (b)(2) sets out a 30-day limit from the end of the reasonable period of time at which the USTR has to determine that the Member concerned has failed to comply with the DSB recommendations without waiting for the conclusion of the relevant DSU procedures. The operation of Section 306 can best be illustrated by the USTR's determinations and actions in the Banana dispute. On the basis of a unilateral determination that the European Communities had failed to implement the DSB's recommendations, the USTR announced on 3 March 1999 that the US Customs Service would begin as of that date withholding liquidation and reviewing the sufficiency of bonds on imports of selected European products amounting to $520 million. The arbitrators decision came only on 9 April 1999 and US request for retaliation was granted only on 19 April 1999. And the amount granted was $191.4 million. It is clear that the United States had on 3 March 1999 suspended its obligations under, inter alia, Articles I, II, III,VIII and XI of GATT 1994 towards the European Communities without prior authorization by the DSB. In retrospect, it is obvious that the USTR was obliged to take action on 3 March 1999 because of Section 306 regardless of whether or not there was DSB authorization under Article 22 of the DSU.

4. Conclusion

5.227 India concludes as follows: Firstly, it is clear that Sections 301-310 are a case of United States reneging on its commitments undertaken in the Uruguay Round. Secondly, regardless of

whether or not it is applied in practice, GATT/WTO jurisprudence is that a law, which, by its terms mandates behaviour that is inconsistent with a WTO provision, does violate that provision. Thirdly, Sections 301-310 fall foul of Article 23 of the DSU; specifically, they also contravene the time limits and other procedures of the DSU. Fourthly, Sections 301-310 violate Articles I, II, III, VIII and XI of GATT 1994 as evidenced in the *Bananas* dispute.

5.228 For the above reasons, India requests the Panel to find that Sections 301-310 are violative of the DSU, GATT 1994 and the WTO Agreement and to recommend that the DSB request the United States to bring its Trade Act of 1974 into conformity with its obligations under the WTO Agreements.

H. JAMAICA

1. Introduction

5.229 **Jamaica first states** that its Government has taken the decision to seek the third party status in this case because, as a small developing country, it places great emphasis on the rule of international law and the honouring of international treaty obligations in accordance with the principle of *"pacta sunt servanda"*.

2. Legal Arguments

5.230 It is Jamaica's contention that by maintaining recourse to unilateral action, under Sections 301-310 of the Trade Act of 1974, the United States is acting in breach of its obligations under the WTO Dispute Settlement Understanding, which unequivocally commits Members not to resort to such actions.

5.231 Jamaica further argues that underpinning this contention is the fact that the WTO DSU is fully consistent with agreed rules on the principle of the peaceful settlement of Disputes between States enshrined in Article 1(1) of the United Nations Charter and various resolutions and declarations of the United Nations General Assembly.

5.232 Jamaica contends that the WTO Dispute Settlement mechanism is linked to the historical effort to prevent resort to unilateral action which undermines the credibility of the multilateral trading system. As was observed by the Panel in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the adoption of unilateral measures by Members could "threaten the security and predictability of the multilateral trading system".

5.233 Jamaica points out that it is generally accepted that the WTO Dispute Settlement System is the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy. However, the confidence behind this derives from the Organization's ability to ensure that Members will comply with the rules. The integrity of the WTO would suffer a great deal if Members were able to adopt unilateral actions in defiance of their obligations under the WTO Agreement.

5.234 Jamaica also notes that it is accepted that the fundamental principle of treaty law is "*pacta sunt servanda*" whether based on customary law or the Vienna Convention on the Law of Treaties, Article 26.

5.235 In the view of Jamaica, this fundamental concept has been given effect in Articles 3.1, 21.5, 23.1, 23.2 of the WTO Dispute Settlement Understanding in requiring Members to subject themselves to the rules agreed thereto.

5.236 Jamaica also contends that Article XVI:4 of the Agreement Establishing the WTO clearly requires domestic action to incorporate the entirety of WTO obligations:

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements". (emphasis added).

5.237 Jamaica further argues that the Dispute Settlement Understanding is an integral part of the WTO Agreement, and Article III:3 of the latter confers authority on the WTO to administer the DSU.

5.238 Jamaica points out that the United States actively participated in the negotiation of the WTO Agreements and made a substantial contribution in the drafting of the dispute settlement rules. Further, the United States was party to the Marrakesh Declaration of 15 April 1994, in which the Ministers welcomed, *inter alia*:

> "the stronger and clearer legal framework they have adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism".

5.239 Jamaica concludes that as signatory to the Uruguay Round Agreements, the United States and other Members of the WTO therefore undertook to resolve disputes in accordance with the agreed multilateral rules enshrined in the DSU.

5.240 Jamaica also considers that by virtue of Sections 102(a)(1) and 102(c) of its Uruguay Round Agreements Act, the United States has decreed that no provision in the WTO Agreement should prevail over any law of the United States to the extent of inconsistency. There is nothing in the Uruguay Round Agreements Act of the United States which should be construed as limiting "any authority conferred under any law of the United States, including section 301".

5.241 Jamaica points out that the effect of these Sections is that provisions in the WTO Agreement which run contrary to the law of the United States are declared to be void and to have no effect, *ab initio*.

5.242 Jamaica states that it does not dispute a Member's right to seek redress for breaches of contractual obligations under the WTO Agreement. However, while actions under Section 301(a) are subject to the final authority of the DSB, there resides a discretionary right to take action under Section 301(b) the process of which is outside the scrutiny of an external and impartial judicial authority. The result of Section 301(b), therefore, is to provide the United States with an alternate procedure through which to achieve a result favourable to its own interests, which it feels that it could not probably get from the DSB

5.243 Jamaica argues that while the retention of a competing system for dispute settlement may not *per se* be contrary to international law, the subsequent reliance on that rival process as a substitute for an agreed multilateral mechanism for the settlement of disputes could constitute a violation of treaty obligations. Indeed, as was stated by the panel in *United States – Taxes on Petroleum and Certain Imported Substances*,[576] a Member would be in violation of its WTO obligations, if it has enacted a law which mandates it to take certain measures in the future

[576] Panel Report on *US – Superfund*, op. cit.

which are not justified under the WTO Agreement, even if those measures are not specifically applied. The possibility of having an alternative mechanism for seeking redress under Sections 301(a) and (b) undermines the integrity of the WTO dispute settlement mechanism.

5.244 Jamaica further argues that it is also a breach of good faith by the United States towards the other Members who have brought their domestic legislation in line with commitments undertaken in the WTO.

5.245 Jamaica points out that the single undertaking approach which was adopted by Members during the Uruguay Round means that it is no longer possible for Members to pick and chose which agreements they want to adhere to. As the DSU is an integral part of the WTO Agreement, the United States is obliged to respect all its provisions including Article 23 which commits Members to refrain from making unilateral determinations as to whether or not a Member has violated its obligations under the WTO Agreement.

5.246 According to Jamaica, the integrity of the WTO is as strong as its membership's demonstrated commitment to its principles. The Members provide their own checks and balances against the actions of other Members who deviate from the agreed rules and obligations.

5.247 In the view of Jamaica, given the importance of the dispute settlement system of the WTO as a central element in providing security and predictability of market access conditions in the multilateral trading system, the WTO cannot, through a recommendation nor a finding of this Panel, condone the adoption of unilateral action by a Member State on the basis of its domestic legislation. Should this occur, Members themselves would be party to the undermining of the authority of the dispute settlement mechanism. If Members are thereby encouraged to act unilaterally in the settlement of trade disputes, there would be no incentive for continued adherence to the agreed processes of the DSU.

5.248 Jamaica argues that the United States has on many occasions reiterated its commitment to building and maintaining confidence in the WTO. The United States Trade Representative to the WTO in a recent statement in March 1999 reaffirmed that an open trading system which is essential to global prosperity cannot be maintained unless there is adherence to the rules. This will be difficult to achieve if Members of the WTO are constantly confronted with domestic legislation of a Member which authorizes it to impose unilateral sanctions in defiance of agreed multilateral rules.

5.249 Jamaica then requests the Panel to find that unilateral actions taken by the USTR in pursuance of Sections 301- 310 of the 1974 Trade Act are contrary to the obligations of the United States under the WTO Agreement.

5.250 Jamaica also requests the Panel to recommend that the United States bring its Trade Act of 1974 in conformity with its obligations under the WTO Agreement.

5.251 In response to the Panel's question as to whether DSU Article 23.2 prohibits any determination on WTO consistency or any determination to the effect that a violation has occurred, Jamaica states that in order to answer this question on how Article 23(2)(a) is to be interpreted, one has examine the context in which Article 23 (2)(a) applies.

5.252 Jamaica points out that the primary rule for interpretation of treaty provisions, codified in the Vienna Convention on the Law of Treaties, Article 31, requires that,

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

5.253 Jamaica argues that Article 23.2(a) should therefore be read in conjunction with paragraph (1) of the same Article which puts the entire Article in context. The title of Article 23 is "Strengthening the Multilateral System" and Article 1 sets the overall focus of the Article by stating that,

> "when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreement or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding". (emphasis added)

5.254 Jamaica goes on to state that the obligation on Members to utilise the DSU provisions is emphasised in the sub-sections of paragraphs 2(a), (b) and (c) which spell out the steps to be undertaken by Members "in such cases", that is, in cases where Members seek redress for breaches of obligations.

5.255 In the view of Jamaica, Article 23(2)(a) states that Members shall "not make a determination ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding..." and the determinations relate not only to the occurrence of violations, but also to benefits which have been nullified or impaired or impediments to the attainment of any objective of the covered agreements.

5.256 Jamaica is of the view that Article 23 does not prohibit the making of a determination *per se* that a violation has occurred, or benefits have been nullified etc., as certainly, a Member which has brought a dispute to the DSB must have made a "determination" of some degree that another Member's practices/policies are WTO inconsistent, hence seeking the DSB's opinion of this preliminary "determination".

5.257 Jamaica contends that the prohibition which is the focus of Article 23(2)(a) , and in effect the entire Article 23, however, relates to determinations executed in the context of seeking redress for breached obligations. Such a "determination" by a Member would be akin to a finding or recommendation by the DSB, on the WTO consistency of a matter, as this "determination" would, of necessity, give rise to redress by the affected party. This exercise would amount to usurping the rights of the DSB to make such decisions. Only the DSB has the right to make determinations affecting the rights and obligations of Members.

5.258 Jamaica further argues that paragraph (a) of Article 23(a) supplements its prohibition on determinations outside of the DSB by concluding that,

> "[any] such determinations shall be made consistent with the findings contained in the panel or Appellate Body reports adopted by the DSB ...".

5.259 Jamaica, in response to the Panel's question as to whether an official US statement binding in international law that the US government will not exercise its discretion in a way contrary to WTO rule remove the WTO inconsistency of Sections 301-10 on the assumption that the USTR and the President have the discretion to avoid determinations and actions contrary to WTO rules in all circumstances, and that, nevertheless, Sections 301-310 were found inconsistent with WTO rules, states that the United States is a signatory to the Final Act

embodying the results of the Uruguay Round of Multilateral Trade negotiations, which includes the Marrakesh Agreement and the Understanding on Rules and Procedures governing the Settlement of Disputes.

5.260 Jamaica draws the Panel's attention to the text of Article XVI:4 of the Marrakesh Agreement and Article 23 of the DSU.

5.261 Jamaica contends that having signed onto this legally binding multilateral instrument, the United States thereby solemnly undertook to abide by its rules including, the rules and procedures of the DSU. However, this legally binding undertaking did not prevent the United States from acting contrary to its obligations, which has infringed the rights of other Members.

5.262 Jamaica is of the view that a statement made by a government which contradicts legislation is not a sound basis on which to conduct international treaty relations. The US statement does not therefore constitute and effective restraint on its discretionary action contrary to the obligation which should be enshrined in law.

5.263 Jamaica is of the view that the discretionary latitude given to the US President and the USTR, under Sections 301 and 302, whether exercised or not, leaves the way open for the exercise of that discretion.

5.264 Jamaica states that it can find no justifiable grounds on which the United States holds itself to be exempt from complying with the rules of the WTO. In fact, should the United States be permitted to retain inconsistent domestic legislation, this will pave the way for the "exception to become the rule" as more WTO Members may be inclined to retain non-conforming legislation while conveniently making unilateral undertakings of compliance.

5.265 Jamaica recalls the decision of the panel in *United States - Taxes on Petroleum and Certain Imported Substances*,[577] where it was held that a Member would be in violation of its WTO obligations, if it has enacted a law which obliges it to take certain measures in the future which are not justified under the WTO Agreement, even if those measures are not specifically applied. Thus, the very fact that the United States legislation requires the President to take certain actions upon the fulfilment of certain requirements, it could be said by way of analogy, that this law violates the letter and spirit of the WTO Agreement.

5.266 Accordingly, Jamaica urges the Panel to insist on full compliance with the established rules of the WTO, and thus to rule that, Sections 301-310 be amended accordingly to bring the United States into compliance with the undertaking it made in 1994. Jamaica is confident hat the full Membership will accept no less than a complete revision of the offending domestic law of the United States which is the subject of this dispute..

I. JAPAN

1. Introduction

5.267 **Japan points out** that as this case presents the extremely important issue of unilateral determination within the scope of the WTO dispute settlement, it has some substantial systemic interest in the matter. The findings of the Panel will be of acute importance, and it sincerely hopes that the Panel will thoughtfully consider the matter at hand.

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[577] Panel Report on *US – Superfund*, op. cit.

2. Legal Arguments

5.268 Japan is of the view that the renunciation of unilateral trade measures in the WTO Dispute Settlement is one of the most important rules of the WTO. WTO Members are prohibited from unilaterally suspending concessions or other obligations under the WTO Agreement. Moreover, Article 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes clearly requires WTO Members to follow the rules and procedures under the DSU and stipulates that they shall not make a determination such that measures taken by another Member violate the provisions of the WTO Agreement, except through recourse to the dispute settlement in accordance with the rules and procedures of the DSU.

5.269 Japan notes that at the entry into force of the WTO Agreement, the United States announced that it had amended its Trade Act of 1974 in order to respect the procedures in accordance with the enhanced Dispute Settlement system. The amendment, however, has proved to be insufficient. The United States claims that the Trade Act of 1974 can be implemented in compliance with the WTO Agreement by utilising the discretion provided for therein through the USTR when determining whether or not there is violation of WTO Agreement by another Member and what further actions are to be taken and when implementing the determined actions, as well as through the specific direction of the President. Nonetheless, it is doubtful whether the Trade Act of 1974 is truly discretionary. For instance, despite the United States describing that the USTR is free to make a negative determination and then to reinitiate a second investigation in order to make a definitive determination of a violation to the WTO Agreement upon DSB adoption of panel and Appellate Body findings, such discretion does not appear to be explicit from the provisions of the Trade Act of 1974. On the contrary, the Trade Act of 1974 is considered to oblige the United States to determine whether another Member denies the rights or benefits of the United States under the WTO Agreement without following the necessary procedures under the Dispute Settlement Mechanism and, in that case, is inconsistent with Article 23 of the DSU.

5.270 Japan contends that even assuming that the United States can implement the Trade Act of 1974 in compliance with the WTO Agreement with broad discretion, it is very unlikely that such discretion is exercised consistently with the WTO Agreement.

5.271 Japan considers that the facts indeed show that the United States has repeatedly made determinations that actions, policies or practices of another WTO Member were inconsistent with the WTO Agreement, or unreasonable, and has determined further actions, including a suspension of concessions or other obligations under the WTO Agreement, without abiding by the Dispute Settlement procedures.

5.272 In Japan's view, the following cases demonstrate that the United States has used to its advantage unilateral measures under the Trade Act of 1974 as an instrument for settling trade disputes against Japan.

5.273 Japan explains that in October 1994, the United States initiated an investigation on Japan's market regarding the replacement auto parts and automotive accessories under the Trade Act of 1974. In May 1995, it determined that the acts, policies and practices of the Government of Japan were unreasonable and burdensome and that they restricted commerce in the United States. Subsequently, it announced the implementation of sanctions under which the imports of Japanese luxury cars would be subject to duties of 100% *ad valorem*. Following this announcement, the US Customs Service withheld the liquidation of the entry of vehicles on the sanction list, and the exports of those vehicles from Japan was actually halted. Japan requested consultations under Article XXII of the GATT against such unilateral action taken by the United

States. This matter was finally settled through political means conducted independently from the Dispute Settlement process. However, this incidence was a clear example that the United States acted in violation of its obligations under the DSU in favour of the procedures under the Trade Act of 1974.

5.274 Japan emphasizes that it does not claim that the initiation of investigation under Section 302 constitutes a violation of the WTO Agreement. Japan, however, considers that the announcement of affirmative "determination" and the announcement of a list of products that could be subject to increased tariffs, which were made on May 16, 1995, are inconsistent with the obligations of the Government of the United States under Article 23 of the DSU.

5.275 Japan argues that based on the past experience, despite the US claim that the Trade Act of 1974 can be implemented consistently with the WTO Agreement through the broad discretion given to the USTR and the specific instruction of the President, the Trade Act of 1974 has the following major problems in relation to the WTO Agreement.

5.276 Japan further contends that the language of Section 304(a)(2) of the Trade Act of 1974 mandatorily requires the USTR to determine whether the rights of the United States under the WTO are being denied or whether any act, policy or practice of another WTO Member violates or is inconsistent with the WTO, or is unjustifiable, within 18 months after initiation of the investigation of a case. In accordance with the DSU, the Dispute Settlement process normally requires a period of 18.5 months and, as a matter of fact, there have been several cases that have taken longer. This clearly demonstrates that, at least in cases in which the necessary procedures are not completed within the 18 months provided for, the USTR is obligated to act under Section 304(a) 2 in conflict with the DSU. It must also be noted that the discretion mentioned therein is not explicit enough with regard to the given provisions of the Trade Act of 1974. Section 304(a)(2) can, therefore, be considered as obliging the USTR to determine, prior to the adoption of the panel or Appellate Body report, whether another Member denies rights or benefits under the WTO Agreement and, thereby, is inconsistent with Article 23 of the DSU. Even assuming that the United States can implement the Trade Act of 1974 in compliance with the WTO Agreement with broad discretion, there is no guarantee that such discretion is exercised consistently with the WTO Agreement.

5.277 Japan also alleges that Section 306(b)(2) of the Trade Act of 1974 requires the USTR to determine what further action to take within 30 days after completion of the reasonable period of time, if the USTR determines that a recommendation of the Dispute Settlement Body has not been implemented. According to the DSU, where there is disagreement as to the existence or consistency of the measures taken to comply with the recommendations and rulings, such dispute shall be settled through the dispute settlement procedures under Article 21.5 of the DSU. Japan is of the view that if it is assumed that the drafter of the DSU supposed the dispute settlement procedures under Article 21.5 of the DSU to be completed before the date of expiry of the reasonable period of time, the relationship between Article 21 and Article 22 of the DSU would be well explained. It could also ensure the WTO consistency of Section 306(b). However, there is no consensus on such interpretation on Article 21.5 and it is generally understood that the dispute over the existence of implementation of the recommendation shall be referred to the procedure under Article 21.5 after the expiry date of reasonable period of time. Article 21 provides that the panel shall circulate its report within 90 days after the date of referral of the matter to it. Therefore, it is normally difficult to complete the necessary procedures under Article 21.5. Under Section 306(b)(2), the USTR is more than likely to determine that a recommendation of the DSB has not been implemented, as well as to determine further action, including a suspension of concessions or another obligation, to be taken prior to

the completion of the necessary procedures under Article 21.5 and such determination is inconsistent with Article 23 of the DSU.

5.278 Japan adds that when the dispute over the existence or consistency with a covered agreement is referred to the procedure under Article 21.5 after the expiry date of the reasonable period of time, the panel shall circulate its report within 90 days after the date of referral of the matter to it.

5.279 In Japan's view, notwithstanding such a period of 90 days defined in this Article, Section 306(b)(2) requires the determination to be made only within 30 days after the expiration of the reasonable period of time. When the panel determination under Article 21.5 is made on a date beyond the deadline which Section 306(b)(2) requires, the USTR is more than likely to make a determination that a recommendation of the DSB has not been implemented, as well as make a determination on further actions including suspension of concessions pursuant to Section 306(b)(2), prior to the completion of the procedures under Article 21.5 of the DSU.

5.280 Japan notes that in the *EC - Banana III* case, it was not until 19 April 1999, the date on which the DSB authorized the suspension of the concession based on the decision of the arbitrators, that the multilateral determination was made as to the consistency/ inconsistency of the measures taken by the European Communities in response to the recommendations and rulings of the panel and the Appellate Body. In defiance of the WTO rules for determination of compliance, the United States made a decision on 3 March 1999, to the effect of taking customs actions in the form of withholding of liquidation as well as imposition of a contingent liability for 100% duties. In its press release, it was stated that "we must conclude that it is time for the European Communities to bear some of the consequences for its complete disregard for its GATT and WTO obligations". The said press release is attached herewith.

5.281 Japan further argues that Sections 306(b) and 305(a) of the Trade Act of 1974 require the USTR to implement further action within 30 days of the date of determination of such further action (i.e. within 60 days after the expiry date of the reasonable period of time). Even if it is assumed that the procedures under Article 21.5 of the DSU are supposed to be completed before the expiry of the reasonable period of time, and if the suspension of concessions or other obligation is referred to arbitration according to Article 22.6 of the DSU and if the arbitration requires the maximum period of 60 days, it will not be possible to meet the deadline stipulated under the relevant Sections of the Trade Act of 1974, unless a DSB meeting is requested 10 days before the arbitration is awarded. This will be against the current practice, which has also been accepted by the United States. Thus, it is normally difficult to complete the necessary procedures until obtaining authorization from the DSB. When Sections 306(b) and 305(a) require the USTR to implement a suspension of concessions and other obligations as further action prior to the DSB authorization, such suspension is inconsistent with the basic provisions of the GATT (Articles I, II, III, VIII and XI) and GATS (Articles II, XVI, XVII, XVIII), depending on respective measures.

5.282 Japan also asserts that Sections 304(a) and 305(a) require the USTR to determine whether an act, policy or practice of a foreign country is unreasonable even when it does not deny the US rights on the WTO Agreement or is not inconsistent with the WTO Agreement. They also require the USTR to determine what further actions to be taken and then to implement them without following the dispute settlement procedure under the WTO Agreement. Even in such cases where the USTR determines that the act, policy or practice of a foreign country does not deny the US rights under the WTO Agreement but that it is unreasonable, simply implementing further actions which are not consistent with the WTO Agreement including suspensions of concessions or other obligations is inconsistent with the basic provisions of the

GATT (Articles I, II, III, VIII and XI) and the GATS (Articles II, XVI, XVII and XVIII), depending on the respective measures.

5.283 Japan concludes that in the above considerations, the Trade Act of 1974 is considered to oblige the United States to act inconsistently with its obligations under the WTO Agreement. Even assuming that the United States can implement the Trade Act of 1974 in compliance with the WTO Agreement with broad discretion, it is very unlikely that such discretion is exercised in consistence with the WTO Agreement. It also seriously damages the Dispute Settlement Mechanism within the framework of the WTO. Therefore, the United States should amend its Trade Act of 1974 to ensure that it fully complies with its obligations under the DSU.

5.284 Japan also states that on the basis of the above points, whereby the United States unilaterally applies its own rules and regulations by way of the Trade Act of 1974, such action can seriously damage the Dispute Settlement Mechanism within the framework of the WTO. Although the United States claims that the Trade Act of 1974 can be implemented in compliance with the WTO Agreement by utilising discretion, the degree of such discretion contained in the provisions of the Trade Act of 1974 is far from being explicit. Any such ambiguity is also against the spirit of GATT Article X. In conclusion, Japan strongly requests the Panel to request the United States to amend its Trade Act of 1974 in order to ensure its full compliance with its obligations under the DSU.

5.285 Lastly, Japan expresses its concern on the US reinstitution of the Super 301 from March of this year. Under the Super 301, the United States regularly identifies foreign actions, policies and practices as a priority foreign country practice, which would lead the United States to initiate a Section 301 investigation, thus promoting the mechanism under Section 301 of the Trade Act of 1974, thereby leading to unilateral measures. This indicates that the United States has not changed its attitude towards its trading partners, including Japan, to conduct trade disputes to its advantage through the threat of using unilateral trade measures. Japan is greatly concerned that such US policy will seriously damage the WTO framework.

5.286 In response to the Panel's question as to whether DSU Article 23.2 prohibits any determination on WTO consistency or any determination to the effect that a violation has occurred, Japan states that Article 23.2(a) of the DSU should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms that it prohibits Members to determine to the effect that a violation has occurred.

5.287 Japan, in response to the Panel's question as to whether an official US statement binding in international law that the US government will not exercise its discretion in a way contrary to WTO rule removes the WTO inconsistency of Sections 301-10 on the assumption that the USTR and the President have the discretion to avoid determinations and actions contrary to WTO rules in all circumstances, and that, nevertheless, Sections 301-310 were found inconsistent with WTO rules, states that the assumption provided in this question entails a contradiction. That is, generally speaking, laws are not inconsistent with WTO rules when such discretion as is described above is given to administrators under the laws. Moreover, it is not clear how an official statement could be "binding in international law". An "official statement" alone cannot remove the WTO inconsistency from the WTO inconsistent law. In order to remove the inconsistency in law, such removal must be enacted with a legal instrument which is binding in law. Furthermore, it is highly unlikely that a government would announce that it will not exercise its discretion under the WTO inconsistent law in accordance with WTO rules, which would mean that the government would always deviate from the law.

5.288 In response to the US question as to the consistency of the third parties' domestic legal system to proceed with the dispute settlement under the WTO Agreement, Japan explains that Article 98.2 of the Constitution of Japan stipulates that the treaties concluded by Japan and established laws of nations shall be faithfully observed. When requesting for consultations or establishment of panels, the Government of Japan presents its view that another Member's measure concerned is inconsistent with its WTO obligations. Such a view, however, does not constitute a determination in the specific sense under Article 23 of the DSU, and the Government of Japan strictly follows the dispute settlement procedures under the DSU and does not unilaterally make a determination and take actions without observing the rules of the DSU.

J. KOREA

1. Introduction

5.289 **Korea recalls** that on March 2, 1999, pursuant to the request made by the European Communities, the Dispute Settlement Body established a panel to consider whether Sections 301-310 of the United States' Trade Act of 1974 comply with the United States' GATT/WTO obligations. In accordance with Article 10 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the Republic of Korea reserved its rights as a third party to the dispute by notification to the DSB.[578]

5.290 Korea goes on to state that as a frequent target of United States threats and actions under Sections 301-310, Korea has a substantial interest in the challenge brought by the European Communities to this aspect of US trade law. Although Korea was only the United States' ninth largest trading partner in mid-1998,[579] Korea has been the third most frequent target of Section 301 actions, behind the European Union and Japan.[580] In total, as of June 4, 1998, at least ten Section 301 cases had been initiated against Korea.[581]

5.291 In response to the Panel's request, Korea provided the following table showing the cases where the United States took actions against Korea under Section 301.

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[578] Korea refers to *United States – Sections 301-310 of the Trade Act of 1974*, Note by the Secretariat, Constitution of the Panel Established at the Request of the European Communities, 6 April 1999, WT/DS152/12, para. 5 (noting countries that have reserved rights as third parties).

[579] Central News Agency (Taiwan), *US Deficit with Tigers Grow in Leaps and Bounds*, June 19, 1998.

[580] Thomas O. Bayard & Kimberly Ann Elliott, Reciprocity and Retaliation in U.S. Trade Policy 57-58 (1994), *cited in* Raj Bhala, International Trade Law: Cases and Materials 1096 (1996).

[581] United States Trade Representative, *Section 301 Table of Cases* (as of 4 June 1998) http://www.ustr.gov/reports/301report/act301.htm.

CASES OF US UNILATERAL SECTION 301 MEASURES ON KOREA

A. US Unilateral Section 301 Measures under the GATT system (1980-)

#	NAME OF THE CASES	SECTION 301 MEASURES AND THE BILATERAL NEGOTIATIONS	AGREEMENT
1	**Insurance**	According to the petition filed by the US industry on Nov. 5, 1979, USTR initiated an investigation on Dec. 19, 1979. On Nov. 26, 1980, USTR invited public comments on, inter alia, proposals for retaliation. Beginning in June 1980, several rounds of consultations were held.	Korea committed to promote more open competition in the Korean insurance market. The industry withdrew the petition on Dec. 19, and the USTR terminated the investigation on Dec. 29, 1980.
2	**Insurance**	On Sept. 16, 1985, the USTR self-initiated an investigation of Korea's insurance services. This was one of the first cases USTR self-initiated the investigation. Five consultations were held - in Nov. and Dec. 1985 and Feb., March and July 1986 – concerning the opening of the Korean insurance market.	On July 21, 1986, Korea agreed to increase US firms' access to the Korean insurance market by enabling them to underwrite both life and non-life insurance. (Exchange of Letter on Insurance) The US thus terminated the investigation on Aug. 14.
	Amendment		The 1986 Agreement was amended on Sept 10, 1987, setting forth more detailed requirements regarding insurance operations through joint ventures. (Exchange of Letters on Insurance) In January, 1988, the US and ROK further clarified the Sept. 10 amendment to specify the terms under which some Korean firms could participate in joint ventures. (Exchange of Letters on Life Insurance Joint Venture)
3	**Non-Rubber Footwear Import Restrictions**	Petition was filed by the Footwear Industries of America, Inc. et al. on Oct. 25, 1982, alleging import restrictions on non-rubber footwear by the EC and other countries, including Korea.	Korea consulted with the US on Feb. 5, 1983. In August, Korea reduced tariffs on footwear items and removed leather items from the import surveillance list.
4	**Intellectual Property Rights**	On Nov. 4, 1985, USTR self-initiated an investigation over Korea's intellectual property rights protection system. Korea held bilateral consultation with the US in November and December 1985 and throughout February-July 1986. The US requested Korea to protect not only patents, copyrights, and trademarks, but also demanded to consider protection of compiled data bases.	On July 21, 1986, Korea agreed to improve protection of intellectual property rights in Korea, and the agreements were signed on Aug. 28, 1986. (Record of Understanding on Intellectual Property Rights, Exchange of letters on Process Patents, and Explanatory Letter on Administrative Guidance) - Korea agreed to lengthen the patent protection and protect US pipeline products, patented in the US after Jan. 1980 for 10 years from 1987-1997. - Korea agreed to increase period of copyrights protection from 30 to 50 years. - Korea enacted a computer software protection law. The US terminated the investigation on Aug. 14, 1986. Korea agreed on the retroactive protection of copyrights even when it was not a contracting party to the Berne Convention.

5	**Cigarettes**	Pursuant to petition by the US industry on Jan. 22, 1988, the USTR initiated an investigation and requested consultations with the Korean Government on Feb. 16, 1988 over market access for foreign cigarettes.	Korea agreed on May 27, 1988, to allow "full" national treatment and 0% tariff. (ROU on Market Access for Cigarettes) The investigation was terminated on May 31, 1988.
6	**Beef**	Petition by related industry was filed on Feb. 16, 1988. The petition alleged that Korea maintains a restrictive licensing system on imports of all bovine meat, in violation of GATT Article XI. Korea and US held GATT consultations on Feb. 19-20 and March 21. While the GATT dispute settlement process was ongoing, USTR initiated an investigation on March 28. On May 4, 1988, GATT Council established a panel under Art. XXIII:2. The first panel meeting was November 28, 1988; the second meeting was January 20, 1989. The panel issued a report favorable to the US on May 27. Korea twice rejected to adopt the panel report at GATT Council meetings in June and July 1989. The USTR announced on Sept. 27 that it will delay its retaliatory action for up to 180 days, but will publish a retaliation list by mid-November if "substantial movement toward resolution of the issue in the GATT has not occurred by that time". After bilateral consultations in Aug. And Nov, Korea adopted the GATT panel report on Nov. 7.	Following several rounds of negotiations, Korea concluded on agreement with US on March 21, and exchanged letters on April 26-27, 1990. On April 26, 1990, the section 302 investigation was terminated. However, Korea remains subject of monitoring of its implementation of the commitments.
7	**Wine**	On April 27, 1988, the US industry filed a petition complaining of policies and practices of the Korean Government on the Korean wine market. On June 11, 1988, USTR initiated an investigation and requested consultations with the Korean Government. Consultations were held October 11-12 in Washington and October 25 in Seoul.	Further consultations finally resulted in an agreement, reached on January 18, 1989, in which Korea agreed to provide foreign manufacturers of wine and wine products non-discriminatory and equitable access to the Korean market.(Exchange of Letters on Imported Wine and Wine Products) Korea also agreed to lower the tariff to 50%. The investigation was terminated on January 18,1989.

B. US Unilateral special 301 measures

#	NAME OF THE CASES	SPECIAL 301 MEASURES AND THE BILATERAL NEGOTIATIONS	AGREEMENT
1	**Intellectual Property Rights under Special 301**	On June 13, 1988, the USTR formed an interagency task force to examine Korean patent system. In May 1989, USTR included Korea in the Priority Watch List (PWL). The US still monitors implementation of the agreement through annual consultation, and leaves Korea subject of "Special 301 procedure" to this date.	The ROU provided consultative mechanism, which was used to review Korea's implementation of the agreement. Under the threat of Special 301, Korea exchanged letters on the protection of pipeline products which specified products subject to pipeline protection and procedures to follow. (Exchange of Letters on the Protection of Pipeline Products)
2	**Telecommunications under Telecommunications Trade Act of 1988**	On Feb. 1989, USTR designated Korea as Priority Foreign Countries (PFC) under Section 1374 of the 1988 Trade Act, requested liberalization of Korea's telecommunications market. From Sept. 1989-Jan. 1992, nine consultations were held.	On Feb. 24, 1992, Korea agreed to provide national treatment to US firms and joint ventures, and to implement liberalization of telecom market. USTR withdrew its designation of Korea as a PFC on March.
		According to 1992 ROU, US requested annual consultations bet. 1993-1995 to review implementations of the agreement, and to yield further concession by threatening to designate Korea again as PFC. Early 1996, USTR requested amendment of 1992ROU, and pronounced that it will designate Korea as PFC by Jul. 1 if talks on market access of telecom fails. USTR threatened to take Super 301 retaliation measures within 1 months if Korea does not amend 92ROU and further open Korea telecom market. Series of consultations held bet. May-July failed, and on July 26, 96, USTR again designated Korea as PFC. Meetings were held in Sept. Oct. Dec. 96, Feb. Mar. and June 97.	On June 17-18, 97, Korea and US finally ended the trade conflicts. Korea refused to amend/conclude a new agreement, but instead agreed to put on the official gazette "information and communications policy statement". USTR withdrew its designation of Korea as a PFC on July 23, 1997.

C. US Unilateral 301 measures under the WTO Regime

#	NAME OF THE CASES	SECTION 301 MEASURES AND THE BILATERAL NEGOTIATIONS	AGREEMENT
1	**Agricultural Market Access Restrictions**	On Nov. 18, 1994, the US Industry filed a petition with respect to Korean practices regarding the importation of certain US agricultural products. On Nov. 22, 1994, USTR initiated an investigation and invited public comment. Korea offered concessions at the April trade sub-group meeting, that it will introduce voluntary-based shelf-life system beginning 1998. The US requested earlier implementation, however. On May 3, 1995, the US requested consultations with Korea under the WTO dispute settlement procedure. The first consultation was held on June 5-6, 1995.	Korea and US reached a solution on July 20, 1995, which was notified to the WTO the following day. The USTR terminated investigation following the agreement. USTR still monitors Korea's implementation of the agreement pursuant to section 306 of the Trade Act.
2	**Barriers to Auto Imports**	On Oct. 1, 1997, the USTR determined to designate Korea as Priority Foreign Country Practices, according to the Super 301 measure, and initiated on October 20, 1997, an investigation on Korean auto market. On October 28, 1997, the USTR invited public comment. Series of consultations were held. On Sept 7, 1998, US sent a letter to President of Korea reminding of the Oct 19 deadline for Super 301 investigation, requesting "real market opening concessions to resolve the Super 301 investigation".	On Oct. 20, 1998, Korea concluded MOU to improve market access of US and other foreign motor vehicles to the Korea market, and the USTR accordingly terminated the investigation. The MOU established conditions for market operation in Korean motor vehicle sector, touching on Korea's tax regime, public perception, mortgage system, and type-approval procedure.

2. Overview

(a) The Importance of the DSU

5.292 Korea argues that under the 1947 General Agreement on Trade and Tariffs ("GATT 1947"), binding dispute settlement was almost impossible to achieve. In the first place, dispute settlement proceedings were quite lengthy and easily delayed. Even more problematic, however, was the fact that the dispute settlement procedures of GATT 1947 Article XXIII required consensus, such that a "defendant" Contracting Party could effectively block retaliatory suspension of GATT obligations or concessions by the "complainant" Contracting Party.

5.293 Korea also notes that the shortcomings of the dispute settlement system under GATT 1947 occasionally led to unilateral retaliation and counter-retaliation as states exercised their self-determined rights under customary international law to suspend GATT concessions as a response to perceived GATT violations by other states. These costly rounds of unregulated suspensions of trade concessions were destabilizing to the international economic system, particularly as they often devolved into downward-spiralling trade wars. For example, the so-called "chicken war" that took place in the early 1960s between the United States and the European Economic Community ("EEC") grew from a dispute over application of the EEC's Common Agricultural Policy to broiler chickens to a trade war involving threats by the United

States to retaliate against products ranging from wine and Roquefort cheese to scissors and electric shavers.[582] The GATT 1947 system proved largely incapable of checking or preventing such trade wars, and indeed the failure of the system was used by some states as a justification for initiating unilateral action. The United States, in particular, frequently resorted to unilateral trade measures inconsistent with GATT 1947 when dispute settlement under the existing procedures was ineffective, explaining that: "If such action was considered unilateral, it should be nevertheless recognised as perfectly justifiable, responsive action necessitated by the failure of bilateral or multilateral efforts to address a problem. The way to minimise or avoid unilateralism was to create a credible multilateral system – by strengthening the existing system".[583]

5.294 In the view of Korea, the DSU was designed to be just such "a credible multilateral system". The DSU remedied the chief weaknesses of the GATT 1947 dispute settlement system by establishing a predictable timetable for resolving trade disputes and, where appropriate, imposing trade sanctions, and also by eliminating the paralysing requirement that the country targeted by those sanctions agree to them.

5.295 Korea further contends that the DSU's unambiguous prohibition against acts of unilateralism was a critical component of the multilateral bargain represented by the agreements negotiated in the Uruguay Round. These agreements dramatically expanded the mutual obligations of WTO Members to reduce or remove trade barriers. The Uruguay Round led not only to further reductions in barriers to trade in goods but also to new disciplines in areas such as trade in services and protection of intellectual property rights. This expanded substantive scope of the GATT/WTO system—one of the United States' chief objectives in the Uruguay Round negotiations—was achieved partly in exchange for a new commitment in the DSU to effective multilateral, rather than unilateral, resolution of disputes arising under the GATT and associated agreements. The parties to the Uruguay Round instruments would never have agreed to this expansion of their trade-related commitments had they believed that they would remain subject to unilateral suspensions of commitments by other parties.

5.296 According to Korea, reducing unilateralism was a particular concern of smaller countries such as Korea. Smaller countries are far more susceptible to unilateral denials of trade benefits than are larger countries because the impact of the unilateral action on the small country and the impact of any possible retaliation against the large country are disproportionate.[584] For example, in 1997, Korea's Gross Domestic Product ("GDP") was approximately $631.2 billion;[585] the United States' GDP, at $8,110.9 billion,[586] was nearly 13 times larger. As a result, equivalent trade sanctions have an impact on Korea's economy that is 13 times greater than their impact on the United States' economy.[587]

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[582] Korea cites, for a fuller discussion of the "chicken war", Abram Chayes *et al.*, "International Legal Process: Materials for an Introductory Course", (1968), 249-306.

[583] GATT document C/163, 16 March 1989, page 4.

[584] Korea cites O. Thomas Johnson, Jr., *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. Rev. 2175, 2176-78 (1993) (analyzing phenomenon among NAFTA parties).

[585] Matt Rosenberg, *South Korea* (last visited 8 June 1999) <http://geography.about.com/library/cia/blcsouthkorea.htm?COB=home&terms=south+korea+gdp>.

[586] Economic Report of the President Transmitted to the Congress February 1999, Table B-1, Gross Domestic Product, at 326.

[587] In the view of Korea, for example, a Section 301 action concerning $10 billion in trade would threaten trade sanctions affecting Korean products worth almost two percent of Korea's GNP. Equivalent

5.297 Korea notes that the DSU of course does not do away with nations' rights to suspend GATT concessions or to take other retaliatory trade measures. But by regulating when and in what manner such measures may be used, the DSU benefits smaller countries like Korea by ensuring that trade sanctions are not imposed suddenly or arbitrarily, but only when they are found to be warranted pursuant to an orderly multilateral process and after the nation affected has had a reasonable opportunity to bring its practices into conformity with its GATT undertakings.

5.298 Korea states that it is nevertheless unfortunate that the United States still maintains the statute that allows the USTR to exercise its self-determined right to take retaliatory measures in response to perceived violations by other states. The history and effect of Sections 301-310 are clearly and comprehensively spelled out in the submission of the European Communities. Therefore, Korea will not repeat them here today. Korea would only like to mention one important aspect of Sections 301-310 that is overlooked by the European Communities: the USTR's publication of a retaliation list.

5.299 Korea argues that the USTR is required by Section 304(c) to publish in the Federal Register "any determination made under subsection (a)(1)", which includes the mandatory determination of what action the USTR proposes to take in retaliation against a denial of United States rights under a trade agreement. Publication of this "determination" provides the United States with great negotiating power because of the real-world impact that publication of a retaliation list has on trade flows. In the vast majority of Section 301 cases, the threat of sanctions alone led to a bilateral negotiated solution. The threat posed by Section 301 sanctions is thus aptly described as an effective tool to "extract unilateral concessions from weaker trading partners".

5.300 In Korea's view, this impact is magnified where the US government moves to "suspend liquidation" of customs entries for merchandise on the retaliation list. "Liquidation" is the final computation of the duties accruing on a customs entry. When liquidation is "suspended", the importer's legal liability with respect to the payment of the duties and other fees associated with the entry remains open. In other words, the importer may be required to pay additional customs duties if the retaliation list takes effect at a later date. This open-ended liability adds a level of uncertainty that can dramatically affect trade flows.

(b) Measures at issue

5.301 Korea states that the history and effect of Sections 301-310 are clearly and comprehensively spelled out by the European Communities and will not be repeated here, except to emphasize that:

(a) Under Section 304(a)(2), the USTR "shall", in the event of a determination that a trade agreement has been violated, "determine what action, if any, the Trade Representative should take" in retaliation for that violation "on or before ... the earlier of — (i) the date that is 30 days after the date on which the [WTO]

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retaliatory action by Korea would affect US products representing little more than one tenth of one percent of the United States' GDP.

dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the [Section 301] investigation is initiated";[588] and

(b) Under Section 306 (b)(2), the USTR must determine whether a WTO Member has failed to implement a recommendation of a dispute settlement panel or the Appellate Body within 30 days of the expiration of the reasonable period of time provided for such implementation under Article 21.3 of the DSU. The USTR also must determine within this 30-day period what further action to take against the supposedly noncompliant WTO Member, again irrespective of the status of any related WTO dispute-resolution procedure.[589]

5.302 Korea states that one aspect of Sections 301-310 that is overlooked by the European Communities bears mentioning: the USTR's publication of a retaliation list. The USTR is required by Section 304(c) to publish in the Federal Register "any determination made under subsection (a)(1)", which includes the mandatory determination of what action the USTR proposes to take in retaliation against a denial of United States rights under a trade agreement. Publication of this "determination" provides the United States with great negotiating power because of the real-world impact that publication of a retaliation list has on trade flows. Between 1974 and 1994 the United States initiated nearly 100 investigations under Section 301.[590] Unilateral retaliatory measures were actually imposed in only eight of those cases, although they were announced in many more. In the vast majority of 301 cases, the threat of sanctions alone led to a bilateral negotiated solution. The threat posed by Section 301 sanctions is thus aptly described as an effective tool to "extract unilateral concessions from weaker trading partners".[591]

5.303 In the view of Korea, as previously discussed, the mere publication of a retaliation list in the Federal Register can materially affect trade. This impact is magnified where the US government moves to "suspend liquidation" of customs entries for merchandise on the retaliation list.[592] "Liquidation" is the final computation of the duties accruing on a customs entry.[593] When liquidation is "suspended", the importer's legal liability with respect to the payment of the duties and other fees associated with the entry remains open. In other words, the importer may be required to pay additional customs duties if the retaliation list takes effect at a later date. This open-ended liability adds a level of uncertainty that can dramatically affect trade flows.

3. Legal Arguments

5.304 Korea states that it generally concurs with the arguments made by the European Communities. Nevertheless, and without prejudice to any additional available arguments that Sections 301-310 are inconsistent with GATT 1994, the DSU, and/or other Uruguay Round

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[588] 19 U.S.C. § 2414(a)(2).

[589] See ibid. § 2416(b)(2).

[590] United States Trade Representative, 1995 Trade Policy Agenda and 1994 Annual Report 96 (1994), *cited in* Bhala, op. cit. note 2, at 1096 and footnote 1.

[591] Jagdish Bhagwati, The World Trading System at Risk 53 (1991).

[592] See e.g. *Regime for the Importation, Sale and Distribution of Bananas*: Notice of United States Suspension of Tariff Concessions, 64 Fed. Reg. 19,209 (1999) (liquidation suspended with respect to entries of selected European products as of March 2, 1999, even though arbitrators' final decision on damages not adopted by DSB until April 19, 1999).

[593] See 19 Code of Federal Regulations § 159.1 (1999).

instruments, in this independent submission Korea only emphasizes two particularly troubling aspects of Sections 301-310.

5.305 Korea first emphasises that threats of retaliation manifested by publication of a retaliation list and suspension of liquidation under Sections 301-310 themselves violate Articles I and XIII of GATT 1994. The publication of a retaliation list by USTR—whether the list calls for increased tariffs or quantitative restrictions—clearly affects the competitive relationship between the targeted products and similar products from all other countries.

5.306 Korea argues that it has long been recognized that GATT/WTO disciplines serve to protect the expectations of the parties as to the competitive relationship between their products and those of the other parties; "[t]he protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle".[594] Accordingly, several provisions of GATT 1994 guard against measures by one WTO Member that have a detrimental effect on the competitiveness of imported products.

5.307 Korea points out that among these provisions pertinent to the present dispute is Article I of GATT 1994, which provides that:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports and exports, ... any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

This most-favoured-nation requirement has been read to invalidate measures that upset the expectations of WTO Members concerning the competitiveness of their products vis-à-vis the products of other Members. It was on this basis that the panel considering measures by Ontario, Canada affecting the sale of gold coins determined that those measures denied coins imported from South Africa both national treatment (Article III) and most-favoured-nation treatment.[595]

5.308 Korea further notes that in a similar vein, Article XIII of GATT 1994 provides, with respect to quantitative restrictions, that: "No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party ..., unless the importation of the like product of all third countries ... is similarly prohibited or restricted". Like the requirement of most-favoured-nation treatment, this provision aims to prevent measures that competitively disadvantage the products of one WTO Member vis-à-vis other Members where quantitative restrictions are involved.[596]

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[594] Panel Report on *India—Patent (US)*, op. cit., para. 7.20. See also Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948*, 31 Common Market L. Rev. ___, 1178-79 (1994). *Cf.* Panel Report on *US – Superfund*, op. cit., para. 5.2.2 (applying principle in connection with Article III national treatment obligation).

[595] Panel Report on *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, para. 70.

[596] Korea refers to Panel Report on *India – Patents (US)*, op. cit., para. 7.20; Panel Report on *US – Superfund*, op. cit., para. 5.2.2; Panel Report on *US – Section 337*, op. cit., para. 5.13.

5.309 Korea argues that the publication of a retaliation list by USTR — whether the list calls for increased tariffs or quantitative restrictions — clearly affects the competitive relationship between the targeted products and similar products from all other countries. Targeting particular imported products for retaliation can have several effects on trade in those products. Faced with the risk of higher duties or restricted supplies, importers will often choose to shift their orders to producers in other countries immediately, thus eliminating the possibility that they will have to pay an exorbitant duty when the ordered goods actually arrive. On the other hand, in cases where ordered goods may be imported promptly, importers actually might increase their purchases of targeted goods in an effort to increase inventories before the threatened retaliation goes into effect, thus harming imports from non-target countries. (For this reason, products with short lead-times between order and importation are probably not good candidates for USTR retaliation lists.) A third possibility is that importers will immediately increase prices in anticipation of future cost increases or shortages caused by implementation of the retaliation list. In any of these cases, the mere publication of a retaliation list changes the competitive relationship between the targeted products from the target country and all competing products. Accordingly, publication of a retaliation list violates Article I of GATT 1994, and, when the proposed retaliatory measures include quantitative restrictions, Article XIII of GATT 1994. Moreover, as is explained below, the USTR is required to publish a retaliation list within 30 days of the adoption of the panel or Appellate Body report or within 18 months from the date on which the USTR's investigation was initiated, whichever is earlier. USTR is also required to publish retaliation lists within 30 days of the expiration of the reasonable period of time for implementation provided under the DSU.

5.310 No matter where in the process they come, the effect of these measures on smaller countries like Korea is magnified by the overwhelming size of the United States' economy and by the relative insignificance to the United States of trade with any one small economy. This pervasive inequality of bargaining power is one thing that the GATT/WTO dispute settlement system was designed to ameliorate. However, in addition to disrupting the worldwide balance of trade for all WTO Members, threats of retaliatory action outside the GATT/WTO framework further magnify this disproportion to the special disadvantage of smaller countries.

5.311 Korea secondly stresses that Sections 301-310 mandate measures that violate Articles 21 and 23 of the DSU. It should be noted, as the European Communities convincingly establish in their first submission, that legislation requiring governmental action inconsistent with a WTO Member's obligations under the Uruguay Round instruments constitutes a measure that can be brought to a WTO dispute-resolution body even if the authority granted under that legislation has not yet been exercised in a manner inconsistent with GATT 1994 or any related agreement.[597] Sections 301-310 mandate action by the USTR that cannot be reconciled with the United States' obligations under Articles 21 and 23 of the DSU, thus Sections 301-310 themselves violate the DSU. It is no defense to the present challenge to the US law that the USTR might comply with DSU procedures by ignoring the requirements of Sections 301-310.[598]

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[597] Korea refers to Panel Report on *US - Superfund,* op. cit., para. 5.2.2; Panel Report on *US – Malt Beverages*, op. cit., pages 281-282 and 289-90; and Panel Report on *India – Patents (US)*, para. 7.35.

[598] Korea cites Panel Report on *US – Malt Beverages*, op. cit., as recognising at 290 that "[e]ven if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators" Also, Korea cites Panel Report on *India—Patents (US)*, at para. 7.35.

5.312 Korea argues that Sections 301-310 not only authorize the GATT-inconsistent measure of publishing a retaliation list, the statute mandates that the USTR take these actions unilaterally within 30 days of a panel or Appellate Body report being adopted. Specifically, Section 304(a)(2)(A)(i) requires the USTR not only to determine unilaterally whether another country is violating the WTO rights of the United States[599] but also, if such a violation is found, to determine what she proposes to do about it by "30 days after the date on which the dispute settlement procedure is concluded". According to Section 304(c), this determination must be published in the Federal Register. And even before she makes this determination, the USTR must generally "provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person".[600] Thus, the USTR must formulate and publicize a threat of retaliation at the very latest within 30 days of the date of adoption of a panel or Appellate Body report. In formulating her threat, the USTR may choose among retaliatory measures, including the decision to:

> "(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions …; [or] (B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate".[601]

5.313 Korea contends that under the timetable in Section 304(a)(2), this mandatory announcement of retaliatory measures comes, at the latest, on the last day for a Member adjudged by a panel or the Appellate Body not to be in compliance with its GATT/WTO obligations to "inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB".[602] If the USTR is satisfied with the opposing Member's stated "intentions in respect of implementation", she will of course not need to announce any retaliation, but if she is not so satisfied, she must, under Section 304(a)(2)(A)(i), announce retaliatory measures. This requirement forces the USTR to act contrary to Article 21.5, which requires resort to the dispute settlement procedures of the DSU whenever there is a disagreement as to "the consistency with a covered agreement of measures taken to comply with recommendations and rulings" of a panel or the Appellate Body. Inasmuch as Article 21.5 allows 90 days (or possibly longer) for such a proceeding, the USTR finds herself in the position of being required by a provision of United States law to *effectively* retaliate against the noncompliant Member three months (or more) before a DSU panel has had a chance to rule on whether the remedial measures proposed by the noncompliant Member are or are not satisfactory. To be sure, implementation of the threatened measures can then be held in abeyance for up to 180 days,[603] but the threat has already been made, and, as elaborated above, much damage has already been done.

5.314 Korea further argues that Article 21.5 proceedings may also arise at the conclusion of the agreed reasonable period for a noncompliant Member to implement the recommendations of a panel or Appellate Body report. The USTR may have been satisfied with the proposed

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[599] Korea cites the EC argument that the provisions of DSU Article 23 "oblige the United States to refrain from unilaterally determining whether another Member has denied rights or benefits under a WTO agreement to the United States".

[600] Section 304(b)(1)A), *codified at* 19 U.S.C. § 2414(b)(1)(A).

[601] Section 301(c), *codified at* 19 U.S.C. § 2411(c).

[602] DSU, Article 21.3.

[603] Section 305(a)(2)(A), *codified at* 19 U.S.C. § 2415(a)(2)(A).

implementation in the period immediately following the adoption of the panel or Appellate Body report, but it may become clear by the end of the implementation period that the implementing Member has not lived up to its promises. In such a case, under the DSU, arbitration under Article 21.5 is the next step. But Sections 301-310 do not allow the USTR to wait for Article 21.5 proceedings to conclude before determining and announcing retaliatory action. Section 306(b)(2) requires that:

> "If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) [respecting further retaliatory action] no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ...".[604]

As with the determination of a violation, governed by the schedule in Section 304(a)(2), the determination of unsatisfactory implementation contemplated by Section 306(b)(2) must be published in the Federal Register,[605] and the USTR must provide public notice and an opportunity for comment thereon.[606] These provisions ensure that the scope and content of any retaliation list will be well known long before the list is formally implemented.

5.315 Korea alleges that the timing requirements of Sections 304 and 306 thus squarely conflict with Article 21.5 of the DSU, which sets forth a detailed procedure for handling disputes relating to implementation. Sections 304 and 306 require unilateral threats of retaliation at times when Article 21.5 provides for a multilateral arbitration process:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, 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".

Thus, if the United States objects to the manner in which another WTO Member is proposing to implement the recommendations contained in a panel or Appellate Body report, the DSU requires that the United States have recourse to 90 days (or more) of arbitration before taking any further action, including specific threats of retaliation.

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[604] 19 U.S.C. § 2416(b)(2). Korea notes that Section 305(a) requires that the actions described in this determination be implemented within 30 days unless "the Trade Representative determines that substantial progress is being made, or that delay is necessary or desirable to obtain United States rights or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action". 19 U.S.C. § 2415(a).

[605] Section 304(c), *codified at* 19 U.S.C. 2414(c).

[606] Section 304(b), *codified at* 19 U.S.C. § 2414(b).

5.316 Korea argues that the United States unaccountably takes issue with this obvious interpretation of Article 21.5, denying "that WTO Members are required to pursue a panel under Article 21.5 whenever implementation is at issue". Indeed, the United States argues that "the DSB implicitly rejected this argument" by authorizing US retaliation in the *Bananas* dispute based only on the decision of Article 22.6 arbitrators.

5.317 In the view of Korea, this argument suffers from several serious flaws. In the first place, it is inconsistent with the United States' own prior interpretation of Article 21.5 as the vehicle for resolving implementation disputes. In the Statement of Administrative Action accompanying transmission of the Uruguay Round agreements to the United States Congress for approval, President Clinton indicated that:

> "Current GATT procedures do not provide a method for resolving disagreements over implementation of the report's recommendations. Paragraph 5 of Article 21 addresses this problem by providing that such disputes will be decided under DSU procedures. Wherever possible, the panel convened to consider the disagreement will be the one that reviewed the original complaint. Panels normally must issue decisions in these cases within 90 days of referral".[607]

5.318 Korea moreover states that the document cited by the United States, a Compilation of Comments on the DSU by WTO Members,[608] discloses no dissent from this fundamental understanding of Article 21.5; although several Members make suggestions about how to strengthen or improve Article 21.5, there seems to be no dispute that Article 21.5 prescribes the process for handling disputes about implementation.

5.319 Korea also points out that the US argument runs against the statement made by the Chairman of the DSB at the January 29, 1999 meeting. The DSB chairman stated that "the solution to the banana matter would be totally without prejudice to future cases and to the question of how to resolve the systemic issue of the relationship between Article 21.5 and 22 of the DSU".[609] Similarly, the panel in the *Bananas* case did not hold that recourse to Article 21.5 procedures was optional any time a Member viewed measures proposed by a noncompliant party as inconsistent with a covered agreement. The decision in *Bananas* concerning Article 21.5 was quite explicitly limited to the unique situation presented in that case.

> "*In the special circumstances of this case* . . . it is necessary to find a logical way forward that ensures a multilateral decision, subject to DSB scrutiny, of the level of suspension of concessions".[610]

The special circumstances of the *EC – Bananas III* case were that the United States did not object to the EC's compliance measures until the "reasonable period" had expired, thus making

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[607] Message from The President of the United States transmitting The Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, September 27, 1994, at 1016.

[608] Review of the DSU, Note by the Secretariat, Compilation of Comments Submitted by Members—Rev. 3 of 12 December 1998, cited by the United States.

[609] Minutes of DSB Meeting of 25, 28 and 29 January and 1 February 1999, WT/DSB/M/54, p. 31.

[610] Arbitration under Article 22.6 of the DSU in *European Communities - Regime for the Importation, Sale and Distribution of Bananas,* dated 19 April 1999 (WT/DS27/ARB), para. 4.15. (emphasis added).

it impossible for the United States to comply with Article 21.5 while at the same time completing its Article 22 proceeding concerning suspension of concessions within the time specified in Article 22.6. These circumstances will not be present in all cases and cannot be present in cases, such as those described above, in which effective retaliation must occur long before the expiration of the "reasonable period".

5.320 Korea also stresses that finally, and most importantly, the interpretation now advocated by the United States would have the impermissible effect of reading Article 21.5 out of the DSU altogether. If this Article does not govern "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of a panel or Appellate Body report, what possible effect could it have? If, as the United States contends, the panel in the *Bananas* dispute intimated that Article 21.5 need not serve this function, the panel was simply wrong and need not be followed by this Panel.[611] Such an interpretation of the DSU cannot be reconciled with the most fundamental principles of treaty interpretation as codified in the Vienna Convention on the Law of Treaties. Article 31 of that treaty teaches that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The ordinary meaning of 21.5 is that it prescribes 90 days of arbitration in the event of a dispute over implementation. An interpretation that denies this plain meaning—and in the process renders the entire clause superfluous and meaningless—as does the position the United States advocates, cannot be called a "good faith" interpretation.

5.321 In the view of Korea, rather, in the DSU, WTO Members have agreed upon a mechanism for resolving disputes about implementation of panel or Appellate Body recommendations. Article 21.5 is that mechanism. Sections 301-310, and in particular Sections 304 and 306, outline timetables that mandate the USTR to announce retaliatory measures in the event of an implementation dispute before the procedures contemplated by Article 21.5 can possibly be completed. Thus, Sections 301-310 deny to the United States' trading partners, including Korea and the European Communities, the benefits of DSU Article 21.5.

5.322 Korea further goes on to state that Article 23.1 of the Dispute Settlement Understanding obligates the United States to "have recourse to, and abide by, the rules and procedures of this Understanding" in "seek[ing] the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements". As elaborated above, Sections 301-310 require the USTR to act inconsistently with DSU procedures. By requiring the USTR to decide upon and publicize unilateral retaliatory action before there has been time to conclude the arbitration contemplated in DSU Article 21.5, the aggressive timetable set forth in Sections 301-310, and in particular Sections 304 and 306, prevents the USTR from living up to the United States' promise. This aspect of Sections 301-310 is clearly inconsistent with Article 23.1 of the DSU, and the United States should be required to amend its law accordingly.

4. Conclusion

5.323 Korea concludes that for the foregoing reasons, it respectfully requests this Panel to determine that unilateral threats of retaliation under Sections 301-310 of the United States Trade

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[611] Panel Report on *India – Patents (US)*, op. cit., para. 7.30 ("[P]anels are not bound by previous decisions of panels or the Appellate Body even if the subject matter is the same".).

Act of 1974 deny Korea and other WTO Members the benefits of Articles I and XIII of GATT 1994 and Article 21 of the DSU, and violate Article 23 of the DSU.

K. THAILAND

1. Introduction

5.324 **Thailand states** that as Member of the World Trade Organization and trade partner of the United States, it has substantial systemic interest in the present case.

5.325 In Thailand's view, the crux of the systemic issue here is multilateralism as basis of international trade, a principle all Members of this Organization adhered to. This principle is embodied in the preamble of the Agreement Establishing the World Trade Organization (WTO Agreement), defining its very object and purpose, which is to "develop an integrated, more viable and durable multilateral trading system".[612]

5.326 Thailand goes on to state that in addition to this serious systemic concern, it has been in the past target of decisions and determinations made under Sections 301-310 of the Trade Act of 1974. In 1989, Thailand was placed by the US Government on the "Priority Watch List" (PWL), and in 1991 was named "Priority Foreign Country" (PFC) pursuant to the "Special 301" procedure. In 1994, after some intense negotiations and changes in Thai domestic laws and regulations, Thailand was moved back to the PWL. Thailand was subject in 1990 to a GATT litigation[613] brought pursuant to a petition filed under Section 301 procedure. Also, In December 1991 and in March 1992, the USTR determined under Sections 301-310 that Thailand's acts, policies and practice related to copyright and patent protection were "unreasonable" and "a burden on US commerce". The matters were dropped by the United States only after Thailand agreed to carry out changes to the relevant Thai legislation.

5.327 In response to the Panel's question, Thailand states that its experience serves to illustrate Thailand's interest in the case at hand. The fact that these events took place in the context of the GATT does not affect Thailand's legal arguments in the present case, which is valid for both the GATT and the WTO contexts.

5.328 Thailand underlines the situation where the United States made determinations and/or took actions under the Trade Act of 1974 independently from the GATT dispute settlement procedure. This pattern of US unilateral acts can still happen under the WTO system, since the provisions of the Trade Act 1974 mandating the US Government to do so are still in force after the United States became Party to the WTO Agreement.

5.329 Thailand argues that the US Government has moreover indicated, upon becoming WTO Member, its intention to use its authority under the Trade Act of 1974 to enforce US rights vis-à-vis the other WTO Members out of the WTO, if it unilaterally considers that the matter at hand does not "involve a Uruguay Round Agreement".[614] This has been confirmed in 1999 by

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[612] Preamble of the WTO Agreement, para. 5.

[613] Panel Report on *Thai – Cigarettes,* op. cit.

[614] Statement of Administrative Action, op. cit., 2(b) Enforcement of US rights, pp. 364-367. Thailand notes that this Statement represents the US Administration's views regarding the interpretation and application of the WTO Agreement both for the purpose of international law and the US domestic laws.

the US President's Executive Order re-instituting the "Super 301 authority" and "Title VII authority".[615]

5.330 Thailand reiterates that these cases of US unilateral acts establish a pattern of violation of the US obligations under the WTO Agreement, and should be taken into account by the Panel in its deliberation.

5.331 Thailand strongly believes that, in a true multilateral trading system, no WTO Member can be judge and jury in its own dispute. The Dispute Settlement Body (DSB) must be the exclusive forum for settling disputes between WTO Members relating to their WTO rights and obligations, and the DSU must provides the exclusive rules and procedures for such settlement.

2. Legal Arguments

5.332 Thailand submits, on the basis of the following, that the United States has acted inconsistently with Article XVI:4 of the WTO Agreement, by failing to ensure the conformity of its Trade Act of 1974 with its obligations as provided in Articles 1, 3, 22 and 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU); and that consequently the panel should recommend that the DSB request the United States to bring its Trade Act of 1974 into conformity with its obligations under the WTO Agreement.

5.333 Thailand reserves its rights with regard to any other points at issue which are not discussed herein.

5.334 Thailand argues that under Section 304(a)(2)(A), in the case of investigation involving a trade agreement, the USTR is required to determine whether the rights to which the United States is entitled under the trade agreement are being denied on or before *the earlier* of (i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated. Under Section 303(a)(1), the USTR is required to request consultations with the foreign country concerned on the date on which an investigation is initiated under Section 302. The combined effect of these two provisions is that the USTR is required to make the determination at the latest 18 months after the request for consultations made by the United States.

5.335 In the view of Thailand, under the DSU, WTO dispute settlement proceedings can take under normal circumstances as long as 19 months (9 months and 300 days) from the beginning of the consultation process to be concluded. This breaks down as follows:

Consultations	60 days	(DSU Article 4.7)
Establishment of panel (From date of request to date of establishment)	30 days	(DSU Article 6.1)
Determination of panel composition	30 days	(DSU Article 8.7)
Panel proceedings	9 months	(DSU Article 12.9)

[615] USTR Press Release of 26 January 1999, (Thai Ex. 2).

(from establishment to circulation of report)		
Adoption of panel report/Notice of appeal	60 days	(DSU Article 16)
Appellate Review	90 days	(DSU Article 17.5)
(From notification of appeal to AB report circulation)		
Adoption of AB report by DSB	30 days	(DSU Article 17.14)

Note: In this scenario, the period from the date of establishment of the panel to the date of the adoption of the AB report is 9 months and 210 days, and does not exceed the maximum time frame as provided in DSU Article 20.

5.336 Thailand contends that both Sections 304(a)(2) and 303(a)(1) use the term "shall". They mandate the USTR to determine whether the US WTO rights are being denied before the conclusion of the normal WTO dispute settlement proceedings. The USTR is thus required to act inconsistently with DSU Article 23.2(a).

5.337 Thailand challenges the US allegation that the USTR may request WTO dispute consultations prior to initiating a Section 302 investigation, "thereby allowing for the DSB adoption of panel and Appellate Body findings within the 18-month period provided for under Section 304(a)(2)(A)". This argument, however, must be rejected. The term used by Section 303(a)(1) leave no room for any other understanding or interpretation: WTO consultations must ("shall") be requested by the USTR on the same date as that on which the relevant investigation is initiated under Section 302.[616] The USTR simply cannot violate this US domestic law provision.[617]

5.338 Thailand also rebuts the US further allegation that the USTR has "broad discretion to issue any of a number of determinations which would not remotely conflict with article 23.2(a)". Thailand submits, on the contrary, that the content of the determination is secondary. What counts is the possibility, on the domestic legal plane, for the USTR to determine the WTO inconsistency of another Member. This possibility is in itself a violation of DSU Article 23.2(a). Such determination, moreover, is mandatory for the USTR. Sections 304(a)(2)(A) and 303(a)(1), consequently, are inconsistent with DSU Article 23.2(a).

5.339 Thailand further argues that where an Arbitration under DSU Article 22.6 determines that there is no nullification or impairment of US benefits under the WTO Agreement or that the US-proposed retaliation measure exceeds the actual level of nullification or impairment, Sections 306(b) and 305(a) still mandate the USTR to take action inconsistent with DSU Articles 22.7 and 23.2 (c).

5.340 Thailand contends that Section 306(b)(2) mandates the USTR to determine, within 30 days after the expiration of the reasonable period of time under the DSU, what retaliatory action "the US shall take under Section 301(a)" against a Member implementing a recommendation

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[616] Thailand notes that the 60 day consultation period under DSU Article 4.7 begins on the date of receipt of such request. In practice, this means that a further delay may be added to the normal 19 month period of proceedings.

[617] Thailand notes that the United States indicated that the USTR "has in fact done so" in many cases.

made pursuant to the DSU. Section 305(a)(1) requires the USTR to implement such action within 30 days after the determination is made.

5.341 Thailand further alleges that Section 306(b)(2) and Section 305(a)(1) remain mandatory[618] for the USTR even in the case that an arbitration is appointed under DSU Article 22.6 to consider the level of suspension of concessions or other obligations proposed, and that such arbitration determines that there is no nullification or impairment of US benefits under the WTO Agreement, or that the US-proposed retaliation measure exceeds the actual level of nullification and impairment. In this case, the USTR is required by Section 305(a)(1) to implement the action already determined under Section 306(b)(2), notwithstanding the content of the arbitrator's decision.[619]

5.342 Thailand adds that it has supplied the Panel with the rationale supporting its legal opinion. Thailand, however, is not in a position, nor is it entitled, to give the Panel the rationale or the motive behind the USTR's reduction of the level of retaliation into conformance to the Arbitrators' decision in *Banana III* case..

5.343 Thailand contends that the legality of the said USTR's act, vis-à-vis the US Trade Act of 1974, depends on the meaning of the relevant provisions of the legislation, which under the US constitutional system can only be ascertained through an authoritative, judicial, interpretation of those provisions.

5.344 In the view of Thailand, if, in accordance with an authoritative interpretation under the US legal system, the USTR's act mentioned above is found to be inconsistent with the Trade Act of 1974, then it is the Act itself that is in violation of the WTO Agreement.

5.345 According to Thailand, since it is the United States that invokes the exceptions under Section 301(a)(2) to justify its claim, the onus of proof rests with the United States.

5.346 Thailand further argues that Section 306(b)(2) and Section 305(a)(1) therefore violate DSU Article 22.7 which provides that suspension of concessions and other obligations must be "consistent with the decision of the arbitrator". They also violate DSU Article 23.2(c) which requires the retaliating party to "follow the procedures set forth in Article 22 to determine the level of suspensions of concessions or other obligations".

5.347 Thailand recalls the US allegation that the exceptions set forth in Section 301(a)(2) allow the USTR to act consistently with an Article 22.6 Arbitrators' decision. Section 301(a)(2)(A) provides that the USTR is not required to take action in any case in which "the Dispute Settlement Body … has adopted a report …" (emphasis added) that the rights of the United States under a trade agreement are not being denied or that US trade agreement benefits are not being denied, nullified or impaired.

5.348 In the view of Thailand, Section 301(a)(2)(A), however, is not applicable to the case at hand. The decision of an arbitrator appointed under DSU Article 22.6 is not, and cannot be considered as, a "report" in the sense of Section 301(a)(2)(A); and the DSU does not require such arbitrator's decision to be "adopted" by the Dispute Settlement Body. This has been confirmed by the recent WTO practice in the *EC – Bananas III* case, where the DSB agreed to

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[618] Thailand notes that both provisions use the term "shall".

[619] Thailand points out that in the *EC – Bananas III* case, the USTR nevertheless reduced the level of retaliation in order to conform to the Arbitrators' decision. See WT/DS27/49, dated 9 April 1999.

grant, pursuant to the US request, authorization to suspend concessions and related obligations under GATT 1994, consistent with the decision of the Arbitrators, without adopting the said decision.[620]

5.349 Thailand recalls that the United States also invokes other exceptions under Section 301(a)(2) to justify its claim that the USTR may act consistently with an Article 22.6 Arbitrators' decision reducing the level of US-proposed retaliation or denying the US the right to retaliate. These are exceptions when the USTR finds that action would have an adverse impact on the US economy or would cause serious harm to national security.[621] The United States, however, fails to establish that, according to the authoritative (judicial) interpretation of these provisions under the US legal system, these exceptions are applicable to the case (of a decision by an Article 22.6 arbitrator reducing the level of US-proposed retaliation or denying the United States the right to retaliate). The US claim is merely based on an interpretation by the US Government of Section 301. In the US domestic legal system, as in any known legal system, the Judiciary is by no means bound by the Executive Branch interpretations of legal provisions. The applicability of these provisions is all the more questionable here because of their imprecise terms. Section 301(a)(2)(B)(iv), in particular, is limited to "extraordinary cases" only.

5.350 Thailand adds that ascertaining the meaning of the Trade Act of 1974 provisions, in accordance with the authoritative interpretation under the US legal system,[622] is not only within the mandate of the Panel, but also fundamental for carrying out this mandate, which is to determine the conformity, or non-conformity, of this legislation with the US obligations under the WTO Agreement.

5.351 Thailand further argues that the Trade Act of 1974 is a legislation that empowers and mandates the US Government to act in a certain manner within the limits and scope provided therein. Because its terms are vague as to the extent of the power given the US Executive, one must be all the more cautious about its interpretation. In particular, the panel should not base its deliberation on the US Executive's own interpretation of this legislation, at least to the extent involving judgment of the legality of US Government's acts vis-à-vis the legislation itself. In any State of law, a power conferred to State officials is not without limit or purpose. It is impossible to prevent *Abus de pouvoir* or *exces de pouvoir* if one is judge of one's own acts. *Nemo jus sibi dicere potest* - No one can declare the law for himself/herself.

5.352 In the view of Thailand, in the absence of authoritative interpretation, i.e. if the United States fails to establish what it claims, there is a doubt as to whether the Trade Act of 1974 is consistent with the WTO Agreement. In view of the vagueness of this Legislation's terms, doubts deprive the other Members from predictability and security, the very objective of the DSU,[623] and cannot be permitted under the WTO system.

5.353 Thailand further states that the same argument is valid for rejecting the US claim regarding the discretion granted the US President under Section 301(a)(1) to "direct" the USTR action. Again, the United States fails to establish that, according to an authoritative

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[620] Dispute Settlement Body, Minutes of the Meeting held on 19 April 1999, WT/DSB/M/59, 3 June 1999, p.11

[621] Thailand points out that these exceptions are provided for in Section 301(a)(2)(B)(iv) and (v).

[622] Thailand alternatively points out "to use the US wording, 'as interpreted in accordance with the domestic law of the Member'."

[623] DSU Article 3.2

interpretation of this provision under the US law, the discretion granted the US President allows him or the USTR to act inconsistently with Section 306(b)(2) and 305(a)(1).

5.354 Thailand also contends that it would be insufficient for the United States to invoke in this respect Section 305(a)(2) regarding the possibility for the USTR to delay, in certain cases, the implementation of action by up to 180 days. What is violating the US obligations here is not the timing of such implementation, but the action to be implemented itself.

5.355 Thailand further contends that the Trade Act of 1974 provides for determinations to be made and actions to be taken against a WTO Member without recourse by the United States to the DSU rules and procedures. This is the case when the US Government unilaterally considers that the matter at issue falls outside the scope or the disciplines of the WTO Agreement.[624]

5.356 In the view of Thailand, the WTO dispute settlement system is a "central element in providing security and predictability to the multilateral system", and "serves to preserve the rights and obligations of Members" under the WTO Agreement.[625] The rules and procedures of the DSU "shall apply to consultations and the settlement of disputes between Members concerning their rights and obligations" under the WTO Agreement.[626] Members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO Agreement "shall have recourse to, and abide by, the rules and procedures" of the DSU.[627] The ordinary meaning of these provisions in their context is clear: the DSU provides the *exclusive* rules and procedures for settling all disputes concerning the rights and obligations of WTO Members.

5.357 Thailand notes that in accordance with the above provisions, any dispute between WTO Members regarding a determination whether a matter concerns the rights and obligations of a WTO Members falls under the scope of the DSU, and must be settled in accordance with the DSU rules and procedures. Sections 301, 304 and 305, however, mandate[628] the USTR to determine unilaterally that a matter does not involve WTO rights and obligations, and mandate action to be taken by the USTR on that basis irrespective of the rules and procedures of the DSU.

5.358 Thailand argues that Sections 301, 304 and 305 consequently deprive the WTO Members of any security or predictability they might legitimately expect from a rules-based multilateral trading system. This leads to a paradoxical situation: for a unilaterally alleged non-violation of WTO obligations, a Member may see their WTO rights violated by the most powerful Member of the WTO on the basis of a domestic legislation of the latter, without the protection of the DSU rules and procedures. A protection that would have been available had the concerned Member been in violation of their WTO obligations. In this case, the Member will have no alternative but to challenge the US sanction measure before the DSB. The process is, however, time-consuming, and in any case much damage will have already been done.

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[624] Thailand cites Statement of Administrative Action, Uruguay Round Agreements Act: Enforcement of US Rights.

[625] DSU, Article 3.2.

[626] DSU, Article 1.1.

[627] DSU, Article 23.1.

[628] Thailand points out that Sections 304(a)(1), 305 (a)(1) and 301(a)(1) all use the term "shall".

5.359 Thailand concludes that the Trade Act of 1974 is thus not only inconsistent with DSU Articles 1.1, 3.2 and 23.1, but also at variance with the very object and purpose of the WTO Agreement

5.360 Thailand emphasizes that the types of action prescribed by Section 301(c) constitute violations of the WTO rights of the target country. In the case of disputes involving trade in goods, in particular, the USTR is mandated by Sections 301, 304 and 305 to impose duties, fees or restrictions that violate the GATT 1994 provisions, including Articles I, II, III, VIII and XI thereof. As already demonstrated above, where the United States unilaterally determines that the matter falls outside the scope or the disciplines of the WTO Agreement, Sections 301, 304 and 305 mandate the USTR to implement these WTO-inconsistent actions irrespective of the DSU proceedings, and in the absence of an authorization by the DSB. Sections 301, 304 and 305 are therefore inconsistent with Articles 22.6, 22.7 and 23.2(c) of the DSU.

5.361 Thailand, in response to the Panel's question as to whether an official US statement binding in international law that the US government will not exercise its discretion in a way contrary to WTO rule remove the WTO inconsistency of Sections 301-10 on the assumption that the USTR and the President have the direction to avoid determinations and actions contrary to WTO rules in all circumstances, and that, nevertheless, Sections 301-310 were found inconsistent with WTO rules, states that in this scenario, Sections 301-310 are "found to be inconsistent with WTO rules". Since these provisions are of legislative nature, an official US Government statement will not remove the inconsistency. As Member of the WTO, the US must, under international law, bring Sections 301-310 into conformity with the WTO Agreement by either amending them or abolishing them.

VI. INTERIM REVIEW

6.1 Our interim report was sent to the parties on 12 October 1999. On 26 October 1999 both the European Communities ("EC") and the United States ("US") requested us to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report. Neither the EC nor the US requested a further meeting.

6.2 What follows is a discussion of the arguments made at the interim review stage as required by Article 15.3 of the DSU.

6.3 The EC made two comments. First, it submitted that the findings part of the interim report did not contain a clear description of the legal claims and arguments of the EC that were before the Panel. The EC referred to a summary of the main legal grounds supporting its claims that was incorporated in the EC rebuttal submission. The EC believed that it is necessary for the clarity and the better understanding of the Panel Report that these main legal arguments be inserted at the appropriate place in the findings part of our Report. We did so by adding what are now paragraphs 7.4-7.6 of our Report.

6.4 Second, in respect of what is now footnote 707 of our Report, the EC pointed out that while it is correct that it did not request the Panel to make a decision on the relationship between Articles 21.5 and 22 of the DSU, the EC has clarified in the second paragraph of its response to Panel Question 23 that

> "the WTO consistency of Sections 301-310 must be assessed against all the provisions quoted in the Panel's terms of reference, including Article 21.5 of the DSU on its own".

The EC submitted that the Panel's terms of reference included, together with Article 23, also *inter alia* Article 21 of the DSU and that the EC claim of violation by Section 306 of Article 21.5 is inextricably related to the issue of compliance with Article 23.2(c), which in turn is, as the Panel itself has recognised in what is now paragraph 7.44 of the Report, "specifically linked to, and has to be read together with and subject to, Article 23.1". The EC further referred to the fact that it also stated in its response to Panel Question 23 that

> "[t]he interpretation of Article 22 of the DSU is logically and legally a distinct issue to be addressed by the Panel separately, if necessary".

6.5 On these grounds, the EC pointed out that the earlier version of what is now footnote 707 of our Report does not fully reflect the EC's position before the Panel and that as a matter of fact, the EC has clearly requested the Panel to rule on the compatibility of the deadlines contained in Section 306 with Article 21.5 of the DSU.

6.6 We added the elements referred to by the EC in footnote 707 and also addressed them there. We slightly redrafted paragraph 7.169 of our Report. On the deadlines in Section 306 and Articles 21.5 and 22, we recall that we addressed those in paragraphs 7.145, 7.180 and footnote 720 of our Report. They fall within our mandate as elements relevant for an assessment of the EC claims under Article 23.

6.7 The US expressed the view that the Panel's ultimate finding on the WTO-consistency of Sections 301-310 is correct and also generally agreed with the Panel's factual findings and its reasoning.

6.8 The US had concerns, however, with certain aspects of the Panel's legal reasoning, in particular with respect to the Panel's treatment of the mandatory/discretionary distinction in GATT/WTO jurisprudence. The US requested that the Panel reconsider and modify its legal reasoning on the fundamental question of whether there may be a violation of Article 23 by a measure which does not preclude WTO-inconsistent action, but which does not actually command a WTO violation. The US reiterated its view that there is no credible and coherent means of drawing legal distinctions among measures which do not preclude a WTO violation, and that it could create substantial unpredictability in the interpretation of a Member's WTO obligations if there is a blurring of the heretofore firm line drawn in the jurisprudence that only legislation mandating a violation of a WTO obligation actually violates that obligation. On that ground, the US asked the Panel to find that the statutory language of Sections 304 and 306, when considered in isolation, does not create a *prima facie* violation of Article 23.2(a) because that language does not preclude a determination of inconsistency.

6.9 As a result of this US comment, we added the last four sentences of what is now paragraph 7.54 of our Report and slightly reworded paragraph 7.93. We also added two new footnotes: footnote 658 and footnote 675. We stress once again that our Report does not overturn the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, can, as such, violate WTO provisions. On the contrary, we have followed this traditional distinction and found that the statutory language of Section 304 precludes consistency with Article 23.2(a), the way we read it. The resulting *prima facie* violation of legislation that "merely" reserves the right for WTO inconsistent action in a given dispute is specific, first, to Member obligations under Article 23 -- and its pivotal role in the DSU as an element strengthening the wider multilateral trading system – and, second, the many case-specific circumstances we referred to in our Report, peculiar to Section 304 and the US more generally.

6.10 The US also asked us to reconsider our finding, in what is now paragraph 7.146, that Section 306 "considerations" are "determinations" for purposes of Article 23.2(a). The US did so on the ground that Article 22 of the DSU affirmatively requires Members to request suspension of concessions within 30 days of the expiry of the reasonable period of time, and that the USTR must therefore make a judgment – must "consider" – whether implementation has taken place as a prerequisite to exercising its rights under Article 22. The US submits that the Section 306 "consideration" represents no more than a belief necessary to the pursuit of dispute settlement procedures. For these reasons, the US requested the Panel to find that Section 306 does not violate Article 23.2(a) because it does not provide for a "determination" within the meaning of Article 23.2(a).

6.11 In response to this US comment, we revised the part of footnote 657 dealing with the requirement that there be a "determination" of WTO inconsistency. We also expanded the reasoning in paragraph 7.146.

6.12 Finally, in reply to a US comment that the US-Australia agreement in the *Australia – Leather* case was made with reference to footnote 6 of Article 4 of the SCM Agreement, we added such reference in footnote 709.

VII. FINDINGS

A. CLAIMS OF THE PARTIES

7.1 The claims of the parties may be summarised as follows.

7.2 The EC claims that by adopting, maintaining on its statute book and applying Sections 301-310 of the 1974 Trade Act after the entry into force of the Uruguay Round Agreements, the US has breached the historical deal that was struck in Marrakech between the US and the other Uruguay Round participants. According to the EC, this deal consists of a trade-off between, on the one hand, the practical certainty of adoption by the Dispute Settlement Body ("DSB") of panel and Appellate Body reports and of authorization for Members to suspend concessions – in the EC's view, an explicit US request – and, on the other hand, the complete and definitive abandoning by the US of its long-standing policy of unilateral action. The EC submits that the second leg of this deal, which is, in its view, the core of the present Panel procedure, has been enshrined in the following WTO provisions: Articles 3, 21, 22 and, most importantly, 23 of the DSU and Article XVI:4 of the WTO Agreement.

7.3 The EC claims, more particularly, that

(a) inconsistently with Article 23.2(a) of the DSU:

- Section 304 (a)(2)(A) requires the US Trade Representative ("USTR") to determine whether another Member denies US rights or benefits under a WTO agreement irrespective of whether the DSB adopted a panel or Appellate Body finding on the matter; and

- Section 306 (b) requires the USTR to determine whether a recommendation of the DSB has been implemented irrespective of whether proceedings on this issue under Article 21.5 of the DSU have been completed;

(b) inconsistently with Article 23.2(c) of the DSU:

- Section 306 (b) requires the USTR to determine what further action to take under Section 301 in case of a failure to implement DSB recommendations; and

- Section 305 (a) requires the USTR to implement that action,

and this in both instances, irrespective of whether the procedures set forth in Articles 21.5 and 22 of the DSU have been completed; and

(c) Section 306 (b) is inconsistent with Articles I, II, III, VIII and XI of GATT 1994 because, in the case of disputes involving trade in goods, it requires the USTR to impose duties, fees or restrictions that violate one or more of these provisions.

7.4 The EC submits that Sections 301-310, on their face, mandate unilateral action by the US authorities in breach of Article 23 of the DSU and consequently of Articles I, II, III, VIII and XI of the GATT 1994. According to the EC, this is true both under the former GATT 1947 standards concerning mandatory versus discretionary legislation and the present standards under the GATT 1994 and the WTO Agreement which the EC considers the relevant sources of law applicable after the entry into force of the WTO agreements. The EC arguments on the issue of the standards applicable to determine whether legislation is genuinely discretionary are contained in the descriptive part of this Report.[629]

7.5 In addition, the EC argues that Sections 301-310 -- even if they could be interpreted to permit the USTR to avoid WTO-inconsistent determinations and actions -- cannot be regarded as a sound legal basis for the implementation of the US obligations under the WTO. For the EC, the lack of this "sound legal basis" produces a situation of threat and legal uncertainty against other WTO Members and their economic operators that fundamentally undermines the "security and predictability" of the multilateral trading system.

7.6 The EC submits, furthermore, that Sections 301-310 are not in conformity with US obligations under the WTO since they are an expression of a deliberate policy creating a pattern of executive action which is biased against WTO-conformity. According to the EC, even if Sections 301-310 could be interpreted to provide the USTR with a legal basis for the implementation of US obligations under the WTO, they could not be considered to be in conformity with WTO law within the meaning of Article XVI.4 of the WTO Agreement.

7.7 On these grounds, the EC requests us to rule that the US, by failing to bring the Trade Act of 1974 into conformity with the requirements of Article 23 of the DSU and Articles I, II, III, VIII and XI of the GATT 1994, acted inconsistently with its obligations under those provisions and under Article XVI:4 of the WTO Agreement and thereby nullifies or impairs benefits accruing to the EC under the DSU, GATT 1994 and the WTO Agreement.

7.8 The EC, finally, asks us to recommend that the DSB request the US to bring its Trade Act of 1974 into conformity with its obligations under the DSU, GATT 1994 and the WTO Agreement.

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[629] See paras. 4.196-4.214, 4.233-4.244, 4.250-4.263 and 4.295-4.299 of this Report.

7.9 The US responds that the EC has brought a political case that is in search of a legal argument. It submits that the EC is not entitled to prevail in this dispute on the basis of a series of assumptions adverse to the US, assumptions both with respect to the decisions the USTR can make under Sections 301-310 and with respect to panel, Appellate Body and DSB meeting schedules. According to the US, Sections 301-310 permit the US to comply with DSU rules and procedures in every case: Section 304 permits the USTR to base his or her determinations on adopted panel and Appellate Body findings in every case; and Sections 305 and 306 permit the USTR, in every case, to request and receive DSB authorization to suspend concessions in accordance with Article 22 of the DSU. The US concludes that it fully meets its WTO obligations in this respect.

B. PRELIMINARIES

1. Relevant Provisions of the WTO and of Sections 301-310 of the US trade Act

7.10 In Annex I of this Report we reproduce for the convenience of the reader the provisions of Sections 301-310 as they were submitted to us in Exhibit 1 to the US submissions, as well as those provisions of the WTO to which frequent reference is made in this Report.

2. The Panel's Mandate

7.11 The political sensitivity of this case is self-evident. In its submissions, the US itself volunteered that Sections 301-310 are an unpopular piece of legislation. In addition to the EC, twelve of the sixteen third parties expressed highly critical views of this legislation.[630]

7.12 Our function in this case is judicial. In accordance with Article 11 of the DSU, it is our duty to "make 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".[631]

7.13 The mandate we have been given in this dispute is limited to the specific EC claims set out in Section VII.A above. We are not asked to make an overall assessment of the compatibility of Sections 301-310 with the WTO agreements. It is not our task to examine any aspects of Sections 301-310 outside the EC claims. We are, in particular, not called upon to examine the WTO compatibility of US actions taken in individual cases in which Sections 301-310 have been applied. Likewise, we have not been asked to address the WTO consistency of those provisions in Section 301-310 relating to determinations and actions taken by the USTR that do not concern the enforcement of US rights under the WTO Agreement, including the provisions authorizing the USTR to make a determination as to whether or not a matter falls outside the scope of the WTO agreements.[632]

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[630] See Section V of this Report. Four third parties expressed no opinion in respect of this dispute.

[631] Hereafter we refer to the "covered agreements" as those WTO agreements at issue in this dispute.

[632] Answering Panel Question 43, the EC explicitly confirmed these limitations on the claims before us. See para. 4.634 of this Report.

3. Fact Finding: Rules on Burden of Proof and Interpretation of Domestic Legislation

(a) Burden of Proof – General

7.14 Part of our task in accordance with Article 11 of the DSU is to make factual findings. We are guided in this matter, as well as others, by the jurisprudence of the Appellate Body. In accordance with this jurisprudence, both parties agreed that it is for the EC, as the complaining party, to present arguments and evidence sufficient to establish a *prima facie* case in respect of the various elements of its claims regarding the inconsistency of Sections 301-310 with US obligations under the WTO. Once the EC has done so, it is for the US to rebut that *prima facie* case. Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party.

7.15 We note, in addition, that the party that alleges a specific fact – be it the EC or the US – has the burden to prove it. In other words, it has to establish a *prima facie* case that the fact exists. Following the principles set out in the previous paragraph, this *prima facie* case will stand unless sufficiently rebutted by the other party.

7.16 The factual findings in this Report were reached applying these principles. Of course, when it comes to deciding on the correct interpretation of the covered agreements a panel will be aided by the arguments of the parties but not bound by them; its decisions on such matters must be in accord with the rules of treaty interpretation applicable to the WTO.

(b) Examination of Domestic Legislation

7.17 In respect of the examination of domestic law by WTO panels, both parties referred to the *India – Patents (US)* case. There the Appellate Body stated that "[i]t is clear that an examination of the relevant aspects of Indian municipal law … is essential to determining whether India has complied with its obligations under Article 70.8(a) [of the TRIPS Agreement]. There was simply no way for the Panel to make this determination without engaging in an examination of Indian law".[633]

7.18 In this case, too, we have to examine aspects of municipal law, namely Sections 301-310 of the US Trade Act of 1974. Our mandate is to examine Sections 301-310 solely for the purpose of determining whether the US meets its WTO obligations. In doing so, we do not, as noted by the Appellate Body in *India – Patents (US)*[634], interpret US law "as such", the way we would, say, interpret provisions of the covered agreements. We are, instead, called upon to establish the meaning of Sections 301-310 as factual elements and to check whether these

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[633] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R (complaint by US), adopted 16 January 1998, para. 66.

[634] Ibid.

factual elements constitute conduct by the US contrary to its WTO obligations. The rules on burden of proof for the establishment of facts referred to above also apply in this respect. [635]

7.19 It follows that in making factual findings concerning the meaning of Sections 301-310 we are not bound to accept the interpretation presented by the US. That said, any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law.

7.20 We note, finally, that terms used both in Sections 301-310 and in WTO provisions, do not necessarily have the same meaning. For example, the word "determination" need not always have the same meaning in Sections 304 and 306 as it has in Article 23.2(a) of the DSU. Thus, conduct not meeting, say, the threshold of a "determination" under Sections 304 and 306, is not by this fact alone precluded from meeting the threshold of a "determination" under Article 23.2(a) of the DSU. By contrast, the fact that a certain act is characterized as a "determination" under domestic legislation, does not necessarily mean that it must be construed as a determination under the covered agreements. [636]

4. Rules of Treaty Interpretation

7.21 Evaluating the conformity of Sections 301-310 with US obligations under the WTO requires interpretation of several provisions of the covered agreements. Article 3.2 of the DSU directs panels to clarify WTO provisions "in accordance with customary rules of interpretation of public international law". Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention") have attained the status of rules of customary international law. In recent years, the jurisprudence of the Appellate Body and WTO panels has become one of the richest sources from which to receive guidance on their application. The principal provision of the Vienna Convention in this respect provides as follows:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". [637]

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[635] In this respect, the International Court of Justice ("ICJ"), referring to an earlier judgment by the Permanent Court of International Justice ("PCIJ") noted the following: "Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)" (*Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62).

[636] See footnote 657 and para. 7.146 below.

[637] Articles 31 and 32 of the Vienna Convention read as follows:

> "Article 31
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

7.22 Text, context and object-and-purpose correspond to well established textual, systemic and teleological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. For pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose. However, the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the "raw" text. In reality it is always some context, even if unstated, that determines which meaning is to be taken as "ordinary" and frequently it is impossible to give meaning, even "ordinary meaning", without looking also at object-and-purpose.[638] As noted by

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> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion 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 together 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.
>
> Article 32
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable".

[638] As noted by the International Law Commission (ILC) – the original drafter of Article 31 of the Vienna Convention – in its commentary to that provision:

> "The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All

the Appellate Body: "Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: 'interpretation must be based above all upon the text of the treaty'". It adds, however, that "[t]he provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions".[639]

5. General Description of the Operation of Sections 301-310

7.23 It is difficult to appreciate the claims and counterclaims of the parties without a general understanding of the operation of Sections 301-310. Consequently, in Annex II we provide a brief overview as an aid to the readers of this Report. This overview is of a non-binding nature and does not have the status of a factual finding by this Panel. It was prepared following consultations with the parties as part of the descriptive part of this Report.

6. The Measure in Question and the Panel's General Methodology

7.24 Our mandate in this case is to evaluate the conformity of Sections 301-310 with the relevant WTO provisions as outlined in the terms of reference. When evaluating the conformity of national law with WTO obligations in accordance with Article XVI:4 of the WTO Agreement[640] account must be taken of the wide-ranging diversity in the legal systems of the Members. Conformity can be ensured in different ways in different legal systems. It is the end result that counts, not the manner in which it is achieved. Only by understanding and respecting the specificities of each Member's legal system, can a correct evaluation of conformity be established.

7.25 Sections 301-310 display some features, common in several jurisdictions, that are typical of much modern complex economic and regulatory legislation. Frequently the Legislator itself does not seek to control, through statute, all covered conduct. Instead it delegates to pre-existing or specially created administrative agencies or other public authorities, regulatory and supervisory tasks which are to be administered according to certain criteria and

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> the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule" (Yearbook of the ILC, 1966, Vol. II, pp. 219-220).

See also, Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd Edition, Manchester University Press, 1984, p. 116:

> "Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The conclusion which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation".

[639] Appellate Body report on *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, adopted 1 November 1996, pp. 11-12.

[640] Article XVI:4 provides as follows: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

within discretionary limits set out by the Legislator. The discretion can be wide or narrow according to the will of the Legislator. Sections 301-310 are part of such a legislative scheme.

7.26 In evaluating the conformity of Sections 301-310 with the relevant WTO provisions we must, thus, be cognizant of this multi-layered character of the national law under consideration which includes statutory language as well as other institutional and administrative elements.[641] For convenience we will hereafter refer to Sections 301-310 comprising all of these elements as "the Measure in question".

7.27 The elements of this type of national law are, as is the case here, often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations. For example, even though the statutory language granting specific powers to a government agency may be *prima facie* consistent with WTO rules, the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation.[642] The opposite may be equally true: though the statutory language as such may be *prima facie* inconsistent, such inconsistency may be lawfully removed upon examination of other administrative or institutional elements of the same law.

7.28 Accordingly, in examining the relevant provisions of Sections 301-310 we first look at the statutory language itself, severed from all other elements of the law. We then look at the other elements of Sections 301-310 which, in our view, constitute an integral part of the Measure in question and make our final evaluation based on all elements taken together.

C. THE EC CLAIM THAT SECTION 304 IS INCONSISTENT WITH ARTICLE 23.2(A) OF THE DSU

1. Claims and Arguments of the Parties

7.29 The EC claims that Section 304 mandates the USTR to make a "unilateral" determination on whether another WTO Member has violated US rights under the WTO. The EC submits that this determination by the USTR has to be made within 18 months after the initiation of an investigation under Section 302, a date that normally coincides with the request for consultations under the DSU. According to the EC, DSU procedures can, however, be assumed to take 19 ½ months. The EC submits that, as a result of the 18 months deadline, the

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[641] The meaning of the term "laws" in Article XVI:4 of the WTO Agreement must accommodate the very broad diversity of legal systems of WTO Members. For present purposes, we are of the view that the term "laws" is wide enough to encapsulate as one single measure the multi-layered Sections 301-310. In the alternative – i.e. in case the term "laws" should be said to cover statutory language only – we would consider the non-statutory elements of Sections 301-310 that are of an institutional or administrative nature to fall under the terms "regulations and administrative procedures" also referred to in Article XVI:4. Under this alternative approach as well, we would view it necessary – given the special nature of the national law in question – to examine all elements under Sections 301-310 as one measure in order to correctly assess its overall conformity with WTO rules.

[642] Similarly, the Appellate Body in *US – Import Prohibition of Ceratin Shrimp and Shrimp Products* ("*US – Shrimp*", WT/DS58/AB/R, adopted 6 November 1998, at paras. 160 and 186) first examined the US measure itself and found that it was provisionally justified under Article XX(g) of GATT 1994. However, it then found that the *application* of that very same measure, pursuant to administrative guidelines and practice, constituted an abuse or misuse of the provisional justification made available by Article XX(g) in the light of the *chapeau* of Article XX. On these grounds it concluded that the US measure read in this sense was in violation of GATT 1994.

determination under Section 304 is required even if the DSB has not yet adopted a report with findings on the matter, contrary to Article 23.2(a) of the DSU.

7.30 The US responds that nothing in Section 304 compels the USTR to make a specific determination that US rights have been denied in the absence of panel or Appellate Body findings, adopted by the DSB. In its second submission, the US goes even further and submits that since Section 304 determinations have to be made on the basis of WTO dispute settlement proceedings pursuant to Section 304 (a)(1), a determination that US rights have been denied before the adoption of DSB findings is *precluded*. According to the US, Section 304 only requires the USTR to "determine *whether*" – not to determine *that* – US rights have been denied. In the US view, the USTR has the discretion to determine that no violation has occurred, that no violation has been confirmed by the DSB, that a violation will be confirmed on the date the DSB adopts panel or Appellate Body findings or that the ongoing investigation must terminate. The US also argues that the relevant period for DSU procedures to be completed – from the request for consultations to the adoption of reports by the DSB – is not 19 ½ months, as claimed by the EC, but 16 months and 20 days.

2. Preliminary Panel Findings in respect of the Statutory Language of Section 304

7.31 As regards the statutory language of Section 304, we consider it sufficient to make the following findings based upon examination of the text itself, the evidence and arguments submitted to us in this respect as well as interpretation, where applicable, of the relevant provisions of the WTO.

(a) First, as a matter of fact, we find that under the statutory language of Section 304 (a)(2), the USTR is mandated, i.e. obligated in law, to make a determination on whether US rights are being denied within 18 months after the request for consultations.[643] This is a mandatory feature of Section 304 in which the Legislature left no discretion to the Executive Branch.[644]

(b) Second, as a matter of law, since most of the time-limits in the DSU are either minimum time-limits without ceilings[645] or maximum time-limits that are, nonetheless, indicative only,[646] DSU proceedings – from the request for

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[643] For purposes of this dispute, we assume that the 18 months time-limit is the earlier of the two time-limits mentioned in Section 304, i.e. falls before the lapse of "30 days after the date on which the dispute settlement procedure is concluded".

[644] The US agrees that it cannot postpone the making of this determination. In respect of *Japan – Measures Affecting Agricultural Products* ("*Japan – Agricultural Products*"), adopted 19 March 1999, WT/DS76/AB/R and *India – Patents (US)*, for example, the US – answering Panel Question 24 a) (as reflected in para. 4.586 of this Report) – stated that "the United States did not make formal Section 304 determinations by the 18-month anniversary, *but should have*" (emphasis added).

[645] Article 4.7 of the DSU, for example, provides for a minimum period of 60 days for consultations, unless there is agreement to the contrary or urgency in accordance with Article 4.8.

[646] Article 12.8 refers to six months "as a general rule" for the timeframe between panel composition and issuance of the final report to the parties. Article 12.9 provides that "[i]n no case *should* the period from the establishment of the panel to the circulation of the report to the Members exceed nine months" (emphasis added). Article 17.5 states that "[a]s a general rule, the proceedings [of the Appellate Body] shall not exceed 60 days". It adds, however, that "[i]n no case shall the proceedings exceed 90 days". However, even this seemingly compulsory deadline has been passed in three cases so far (*United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/AB/R, 91 days; *European Communities – Measures Concerning Meat and Meat Products (Hormones)* ("*EC –*

consultations to the adoption of findings by the DSB[647] – may take longer than 18 months and have in practice often led to time-frames beyond 18 months.[648] As a result, the USTR could be obligated in certain cases brought by the US – and indeed in certain cases has already been so obligated – to make a unilateral determination as to whether US rights are being denied before the completion of multilateral DSU proceedings.

(c) Third, as a matter of fact, we find that even though the USTR is obligated to make a determination within the 18 months time-frame, under the broad discretion allowed under Section 304 there are no circumstances which would compel him or her to make a determination to the effect that US rights under the WTO Agreement have been denied – hereafter referred to as a "determination of inconsistency" – before the exhaustion of DSU proceedings.

Section 304 (a) requires the USTR to determine *whether* US rights are being denied within 18 months. It does not require the USTR to determine *that* US rights are being denied at the 18 months deadline. The criteria referred to in Section 304 (a) on which the USTR has to base its determination – "the investigation initiated under section 302 … and the consultations (and the proceedings, if applicable) under section 303" – allow the USTR to exercise wide discretion in all cases concerning the actual content of the determination he or she has to make.

As will be seen below, however, this discretion does not necessarily absolve Section 304 from a breach of the DSU.

(d) Fourth, as a matter of fact, we find that even though the USTR is not *obligated*, under any circumstance, to make a Section 304 determination of inconsistency

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Hormones"), WT/DS26/AB/R and DS48/AB/R, 114 days; and *US – Shrimp*, op. cit., 91 days). Finally, Article 20 refers to 9 months – 12 months in case of an appeal – "as a general rule" for the period between panel establishment and adoption of report(s) by the DSB.

[647] When we refer hereafter to the exhaustion of DSU proceedings, we mean the date of adoption by the DSB of panel and, as the case may be, Appellate Body reports on the matter.

[648] In 17 cases out of the 26 cases which so far led to DSB recommendations, more than 18 months lapsed between the request for consultations and the adoption of reports. Eleven of these 17 cases were brought by the US either as the sole complainant or a co-complainant: *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC - Bananas III*", WT/DS27), *EC – Hormones* (op. cit.), *Japan – Measures Affecting Consumer Photographic Film and Paper* (WT/DS44), *India – Patents (US)* (op. cit.), *European Communities/United Kingdom/Ireland – Customs Classification of Certain Computer Equipment* (WT/DS62, 67 and 68), *Indonesia – Certain Measures Affecting the Automobile Industry* (WT/DS54, 55, 59 and 64), *Japan – Agricultural Products* (op. cit.), *Korea – Taxes on Alcoholic Beverages* (WT/DS75 and 84), *Australia – Subsidies Provided to Producers and Exporters of Automobile Leather* (WT/DS106), *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90) and *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103, US complaint and WT/DS113, complaint by New Zealand). The six other cases were: *US – Shrimp* (op. cit.), *Australia – Measures Affecting the Importation of Salmon* (WT/DS18), *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* (WT/DS60), *US – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or above from Korea* (WT/DS99), *Brazil- Export Financing Programme for Aircraft* (WT/DS46) and *Canada- Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft*", WT/DS70).

> prior to exhaustion of DSU proceedings, it is not *precluded* by the statutory language of Section 304 itself from making such a determination.[649] We find that the broad discretion given to the USTR allows him or her to do exactly what the statutory language suggests: to determine *whether* US rights have been denied, i.e. to determine that they have *not* been denied but also to determine that they *have* been denied. [650]

7.32 In conclusion, the statutory language of Section 304 *mandates* the USTR in certain cases to make a unilateral determination on whether US rights have been denied even *before* the adoption by the DSB of its findings on the matter. However, the statutory language of Section 304 neither *mandates* the USTR to make a determination of inconsistency nor *precludes* him or her from making such a determination.

7.33 Critically, the statutory language of Section 304 reserves to the USTR when exercising his or her mandatory duty after 18 months, the right to make a unilateral determination of inconsistency even prior to exhaustion of DSU proceedings.

3. The Statutory Language of Section 304 and Member Obligations under Article 23 of the DSU

7.34 The statutory language of Section 304 reserves, then, to the USTR when exercising his or her mandatory duty after 18 months, the right to make a unilateral determination of inconsistency even prior to exhaustion of DSU proceedings. As noted, it does not impose on the USTR the duty to make such a determination. What is at issue, then, is whether – given, on the one hand, the duty in some cases to make a unilateral determination prior to exhaustion of multilateral proceedings and, on the other hand, the full discretion as to the content of that determination – Section 304 violates, in and of itself rather than with reference to any particular instance of its application, the obligations assumed by Members under Article 23.2(a) of the DSU. We must, thus, turn to the interpretation of Article 23 of the DSU.

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[649] The US argued in its second submission that the USTR is precluded from making such a determination of inconsistency. To the extent this US argument is based on the statutory language of Section 304 alone, we reject the argument for the reasons given in this Report.

[650] Section 304 (a) refers to WTO "proceedings, if applicable" as a basis of the determination to be made. This statutory language is not sufficiently precise to construe it as curtailing the USTR's discretion to make a determination of inconsistency before the adoption of findings by the DSB. The reference to "proceedings" as a basis for the determination allows WTO proceedings to be taken into account but does not, in our view, preclude a determination of inconsistency before the final outcome of WTO proceedings, i.e. before the adoption of DSB recommendations. We note that whereas the first time-limit under Section 304 (a)(2) explicitly refers to the conclusion of dispute settlement procedures ("30 days after the date on which the dispute settlement procedure is concluded"), the second time-limit does not refer to any proceedings, let alone to the completion of WTO proceedings ("18 months after the date on which the investigation is initiated"). Section 304 (a)(2) mandates the making of a determination "the earlier of" these two time-limits. We note, finally, that the US itself had first argued that Section 304 does not "compel" the making of a determination of inconsistency which seems to imply that although not compelled, the USTR is permitted to make such a determination. Only in its second submission did the US argue that the USTR is actually "precluded" from making such determination.

(a) The dual nature of obligations under Article 23 of the DSU

7.35 Article 23 of the DSU deals, as its title indicates, with the "Strengthening of the Multilateral System". Its overall design is to prevent WTO Members from unilaterally resolving their disputes in respect of WTO rights and obligations. It does so by obligating Members to follow the multilateral rules and procedures of the DSU.

7.36 Article 23.1 provides as follows:

> *"Strengthening of the Multilateral System*
>
> When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, *they shall have recourse to, and abide by*, the rules and procedures of this Understanding" (emphasis added).

7.37 Article 23.2 specifies three elements that need to be respected as part of the multilateral DSU dispute settlement process. It provides as follows:

> "In such cases [referred to in Article 23.1, i.e. when Members seek the redress of WTO inconsistencies], Members shall:
>
> (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
>
> (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
>
> (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".

7.38 On this basis, we conclude as follows:

(a) It is for the WTO through the DSU process – not for an individual WTO Member – to determine that a WTO inconsistency has occurred (Article 23.2(a)).

(b) It is for the WTO or both of the disputing parties, through the procedures set forth in Article 21 – not for an individual WTO Member – to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings (Article 23.2(b)).

(c) It is for the WTO through the procedures set forth in Article 22 – not for an individual WTO Member – to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed as a result of a WTO inconsistency, as well as to grant authorization for the actual implementation of these suspensions.

7.39 Article 23.2 clearly, thus, prohibits specific instances of unilateral conduct by WTO Members when they seek redress for WTO inconsistencies in any given dispute. This is, in our view, the first type of obligations covered under Article 23.

7.40 It is not, however, our task in these proceedings to assess the WTO conformity of specific determinations made under Section 304 in a given dispute but to determine, instead, whether Section 304 as such violates Article 23 of the DSU. This leads us to the second type of obligations covered under Article 23.

7.41 As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the WTO Agreement and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations:

(a) In GATT jurisprudence, to give one example, legislation providing for tax discrimination against imported products was found to be GATT inconsistent even before it had actually been applied to specific products and thus before any given product had actually been discriminated against.[651]

(b) Article XVI:4 of the WTO Agreement explicitly confirms that legislation as such falls within the scope of possible WTO violations. It provides as follows:

> "Each Member shall ensure the conformity of its *laws, regulations and administrative procedures* with its obligations as provided in the annexed Agreements" (emphasis added).

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[651] See, for example, Panel Reports on *United States – Taxes on Petroleum and Certain Imported Substances* ("*US – Superfund*"), adopted 17 June 1987, BISD 34S/136, para. 5.2.2 (where the legislation imposing the tax discrimination only had to be applied by the tax authorities at the end of the year after the panel examined the matter) and *United States – Measures Affecting Alcoholic and Malt Beverages* ("*US – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206, paras. 5.39, 5.57, 5.60 and 5.66 (where the legislation imposing the discrimination was, for example, not being enforced by the authorities). See also Panel Reports on *EEC – Regulation on Imports of Parts and Components* ("*EEC – Parts and Components*"), adopted 16 May 1990, BISD 37S/132, paras. 5.25-5.26, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thai – Cigarettes*"), adopted 7 November 1990, BISD 37S/200, para. 84 and *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* ("*US – Tobacco*"), adopted 4 October 1994, BISD 41S/131, para. 118.

> The three types of measures explicitly made subject to the obligations imposed in the WTO agreements – "laws, regulations and administrative procedures" – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under WTO agreements, expands the type of measures made subject to these obligations.[652]

(c) Recent WTO panel reports confirm, too, that legislation as such, independently from its application in a specific case, can be inconsistent with WTO rules.[653]

7.42 Legislation may thus breach WTO obligations. This must be true, too, in respect of Article 23 of the DSU. This is so, in our view, not only because of the above-mentioned case law and Article XVI:4, but also because of the very nature of obligations under Article 23.

7.43 Article 23.1 is not concerned only with specific instances of violation. It prescribes a general duty of a dual nature. First, it imposes on all Members to "have recourse to" the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call "exclusive dispute resolution clause", is an important new element of Members' rights and obligations under the DSU. Second, Article 23.1 also prescribes that Members, when they have recourse to the dispute settlement system in the DSU, have to "abide by" the rules and procedures set out in the DSU. This second obligation under Article 23.1 is of a confirmatory nature: when having recourse to the DSU Members must abide by all DSU rules and procedures.

7.44 Turning to the second paragraph under Article 23, Article 23.2 – which, on its face, addresses conduct in specific disputes – starts with the words "[i]n such cases". It is, thus, explicitly linked to, and has to be read together with and subject to, Article 23.1.

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[652] Article XVI:4 goes a step further than Article 27 of the Vienna Convention. Article 27 of the Vienna Convention provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Article XVI:4, in contrast, not only precludes pleading conflicting internal law as a justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations.

[653] Panel Reports on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel (US)*"), WT/DS56/R (complaint by US), adopted 22 April 1998, paras. 6.45-47 (see also Appellate Body Report, WT/DS56/AB/R, paras. 48-55); *Canada – Aircraft*, op. cit., paras. 9.124 and 9.208, *Turkey – Restrictions on Imports of Textile and Clothing Products,* WT/DS34/R, circulated to Members on 31 May 1999 (appealed on other grounds), para. 9.37.

7.45 Indeed, two of the three prohibitions mentioned in Article 23.2 – Article 23.2(b) and (c) – are but egregious examples of conduct that contradicts the rules and procedures of the DSU which, under the obligation in Article 23.1 to "abide by the rules and procedures" of the DSU, Members are obligated to follow.[654] These rules and procedures clearly cover much more than the ones specifically mentioned in Article 23.2.[655] There is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2.[656]

7.46 Article 23 interdicts, thus, more than action in specific disputes, it also provides discipline for the general process WTO Members must follow when seeking redress of WTO inconsistencies. A violation of the explicit provisions of Article 23 can, therefore, be of two different kinds. It can be caused

(a) by an *ad hoc*, specific action in a given dispute, or

(b) by measures of general applicability, e.g. legislation or regulations, providing for a certain process to be followed which does not, say, include recourse to the DSU dispute settlement system or abide by the rules and procedures of the DSU.

(b) Legislation which violates Article 23 of the DSU

7.47 What kind of legislation would constitute a violation of Article 23?

7.48 Surely, to give an extreme example, legislation mandating the making of a determination of inconsistency as soon as a WTO panel has issued its report – without awaiting the result of a possible appeal and the adoption of DSB recommendations – would violate Article 23.2(a).

7.49 How, then, should we evaluate Section 304 the statutory language of which mandates in some cases the making of a determination prior to exhaustion of DSU proceedings and which reserves to the USTR the right when exercising this mandatory duty to make a unilateral determination of inconsistency?

7.50 We first find that if the USTR were to exercise, *in a specific dispute*, the right thus reserved for him or her in the statutory language of Section 304 and make a determination of

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[654] Article 23.2(a), in contrast, prohibiting Members from making certain determinations, is not covered elsewhere in the DSU.

[655] One could refer, for example, to the requirement to request consultations pursuant to Article 4 of the DSU before requesting a panel under Article 6.

[656] Not notifying mutually agreed solutions to the DSB as required in Article 3.6 of the DSU or not abiding by the requirements for a request for consultations or a panel as elaborated in Articles 4 and 6 are some other examples of conduct that would be contrary to DSU rules and procedures but is not mentioned specifically in Article 23.2.

inconsistency, the US conduct would meet the different elements required for an individual breach under Article 23.2(a).[657] However, Section 304 does not mandate the USTR to make a

[657] We consider that if the USTR were to exercise, in a specific dispute, the right reserved to him or her under the statutory language of Section 304 to make a determination of inconsistency before exhaustion of DSU procedures, the US conduct would meet the different elements required for a breach of Article 23.2(a) in a specific instance. This conclusion is of crucial importance since it shows that the statutory language of Section 304 reserves the right to the USTR to breach at least the first type of obligations in Article 23.2(a) in a specific instance. Four elements must be satisfied for a specific act in a particular dispute to breach Article 23.2(a):

(a) the act is taken "in such cases" (*chapeau* of Article 23.2), i.e. in a situation where a Member "seek[s] the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", as referred to in Article 23.1;

(b) the act constitutes a "determination";

(c) the "determination" is one "to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded";

(d) the "determination" is either *not* made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]" or *not* made "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the DSU]". The two elements of this requirement are cumulative in nature. Determinations are only allowed when made through recourse to the DSU *and* consistent with findings adopted by the DSB or an arbitration award under the DSU.

Applying these four elements to the specific determination allowed under the statutory language of Section 304, namely a determination of inconsistency before exhaustion of DSU procedures we note, first, the parties' agreement that all Section 304 determinations are made in cases where the US is seeking the redress of WTO inconsistencies, in the sense of the first element outlined above. We agree. Obviously, when pursuing a matter of US rights under the WTO through Section 302 investigations, WTO consultations and procedures, and making a decision on whether US rights under the WTO are being denied under Section 304, the US is seeking redress of what it considers to be WTO inconsistencies.

Both parties also agree that determinations under Section 304 meet the second of the four elements, a determination in the sense of Article 23.2(a). We agree. Some of the relevant dictionary meanings of the word "determination" in the context of Article 23.2(a) are: "the settlement of a suit or controversy by the authoritative decision of a judge or arbiter; a settlement or decision so made, an authoritative opinion … the action of coming to a decision; the result of this; a fixed intention" (*The New Shorter Oxford English Dictionary*, Ed. Brown, L., Clarendon Press, Oxford, Vol. 1, p. 651). Without there being a need precisely to define what a "determination" in the sense of Article 23.2(a) is, we consider that – given its ordinary meaning – a "determination" implies a high degree of firmness or immutability, i.e. a more or less final decision by a Member in respect of the WTO consistency of a measure taken by another Member.

Given that Article 23.2(a) only deals with "determinations" in case a Member is seeking redress of WTO inconsistencies, we are of the view that a "determination" can only occur *subsequent* to a Member having decided that, in its preliminary view, there may be a WTO inconsistency, i.e. only once that Member has decided to seek redress of such inconsistency. Mere opinions or views expressed before that stage is reached, are not intended to be covered by Article 23.2(a). However, once a Member does

determination of inconsistency in violation of Article 23 in each and every specific dispute; it merely sets out in the statutory language itself that the USTR has the power and right to do so. The question here is whether this constitutes a breach of the second type of obligations under Article 23, namely a breach by measures of general applicability such as a general law.

7.51 The parties focused much of their arguments on the kind of legislation which could be found to be inconsistent with WTO obligations. The US submitted forcefully that only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, can, as such, violate WTO provisions. This was at the very heart of the US defence. On this US reading it followed that since Section 304 never mandates a specific determination of inconsistency prior to exhaustion of DSU proceeding nor, in the US view, precludes the US from acting consistently with its WTO obligations in all circumstances, the legislation, in and of itself could not be in violation of Article 23.2(a) of the DSU.

7.52 The EC submitted with equal force that also certain types of legislation under which a WTO inconsistent conduct is not *mandated* but is *allowed*, could violate WTO obligations. The EC considered that Section 304 is of such a nature.

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bring a case under the DSU, in particular once it requests the establishment of a panel, one can assume that this preliminary stage has been passed and the threshold of a "determination" met. Such reading of the term "determination" is confirmed by the exception provided for "determinations" made "through recourse to dispute settlement in accordance with" the DSU, an exception that explicitly allows for the "determination" implicit in pursuing a case before a panel. In any event, what is decisive under Article 23.2(a) is not so much whether an act constitutes a "determination" – in our view, a more or less formal requirement that needs broad reading -- but whether it is consistent with DSU rules and procedures, the fourth element discussed below.

On that basis, we find that USTR determinations under Section 304 – made *subsequent* to internal investigations, WTO consultations and proceedings, if applicable; and, in the case of determinations of inconsistency, automatically and as a *conditio since qua non* leading to a decision on action under Section 301 – meet the threshold of firmness and immutability required for a "determination" under Article 23.2(a).

The third element under Article 23.2(a) as applied to the specific determination under examination is also satisfied. We recall that this determination would be one finding that US rights under the WTO have been denied, i.e. a determination "to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded", thus meeting the third element under Article 23.2(a).

The fourth element under Article 23.2(a) is likewise satisfied. We recall that the specific determination under examination here would be one made *before* DSB findings on the matter have been adopted. It would thus *not* be made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]" *nor* made "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB". Indeed, such determination made *before* exhaustion of DSU procedures, would not be required, referred to or relevant for any of the steps or procedures in the DSU. On the contrary, it would be a determination that, at face value, prejudices and could even contradict the outcome of DSU procedures. Moreover, any such determination could not be consistent with DSB findings, since no such findings would, as yet, be adopted.

In conclusion, if the USTR were to exercise, in a specific dispute, the right reserved for it in Section 304 to make a determination of inconsistency before exhaustion of DSU procedures, the US conduct would meet all four elements required for a breach of Article 23.2(a).

7.53 Despite the centrality of this issue in the submissions of both parties, we believe that resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation?[658] Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23.

7.54 We can express this view in a different way:

(a) Even if we were to operate on the legal assumption that, as argued by the US, only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, can violate WTO provisions; and

(b) confirm our earlier factual finding in paragraph 7.31(c) that the USTR enjoys full discretion to decide on the content of the determination,

we would still disagree with the US that the combination of (a) and (b) *necessarily* renders Section 304 compatible with Article 23, since Article 23 may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. In other words, rejecting, as we have, the presumption implicit in the US argument that no WTO provision ever prohibits discretionary legislation does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions.[659] Indeed that is the very test we shall apply in our analysis. It simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO. If, for example, it is found that the specific obligations in Article 23 prohibit a certain type of legislative discretion, the existence of such discretion in the statutory language of Section 304 would presumptively preclude WTO consistency.

7.55 What, then, does such an examination of Article 23 yield?

7.56 We have already found that under the statutory provisions of Section 304 each time the USTR exercises the mandatory duty to make a determination, the statutory language gives him or her discretion and reserves to him or her the right to make a determination of inconsistency even in cases where DSU proceedings have not been exhausted.

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[658] Imagine, for example, legislation providing that all imports, including those from WTO Members, would be subjected to a customs inspection and that the administration would enjoy the right, at its discretion, to impose on all such goods tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned. Would the fact that under such legislation the national administration would not be mandated to impose tariffs in excess of the WTO obligation, in and of itself exonerate the legislation in question? Would such a conclusion not depend on a careful examination of the obligations contained in specific WTO provisions, say, Article II of GATT and specific schedule of concessions?

[659] See paras. 4.173 ff. and 7.51 of this Report.

7.57 In our view, the ordinary meaning of the provisions of Article 23, even when read in abstract, supports the position that this aspect of Section 304 constitutes a *prima facie* violation of DSU rules and procedures. This interpretation of Article 23 is amply confirmed when we consider, as is our duty under the Vienna Convention, the good faith provision in the general rule of interpretation in Article 31 of that Convention, and when we evaluate the terms of Article 23 not in abstract, but in their context and in the light of the DSU's and the WTO's object and purpose.

4. Article 23.2(a) of the DSU interpreted in accordance with the Vienna Convention Rules on Treaty Interpretation

(a) "A treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty ..."

7.58 First, then, the raw text of Article 23.

7.59 The text of Article 23.1 is simple enough: Members are obligated generally to (a) have recourse to and (b) abide by DSU rules and procedures. These rules and procedures include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings. As a plain textual matter, therefore, could it not be said that statutory language of a Member specifically authorizing a determination of inconsistency prior to exhaustion of DSU procedures violates the ordinary meaning of Members' obligations under Article 23?

7.60 Put differently, cannot the raw text of Articles 23.2(a) and 23.1 be read as constituting a mutual promise among WTO members giving each other a guarantee enshrined in an international legal obligation, that certain specific conduct will not take place? Does not the text of Article 23.1 in particular suggest that this promise has been breached and the guarantee compromised when a Member puts in place legislation which explicitly allows it to do that which it promised not to do?

7.61 On this reading, the very discretion granted under Section 304, which under the US argument absolves the legislation, is what, in our eyes, creates the presumptive violation. The statutory language which gives the USTR this discretion on its face precludes the US from abiding by its obligations under the WTO. In each and every case when a determination is made whilst DSU proceedings are not yet exhausted, Members locked in a dispute with the US will be subject to a mandatory determination by the USTR under a statute which explicitly puts them in that very danger which Article 23 was intended to remove.[660]

7.62 It could be said that this is a danger which can never be entirely removed. After all, even those Members which do not have any internal "trade legislation" can any day of the week decide to violate their WTO obligations including the obligations under Article 23.

7.63 In our view, when a WTO Member has *not* enacted specific legislation providing for procedures to enforce WTO rights, normally only the first type of violation of Article 23 can

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[660] We reject the notion that this danger is removed by virtue of the international obligation alone. Even in the EC where EC norms may produce direct effect and thus give far greater assurance, an EC Member State is not absolved by this fact from its duty to bring national legislation into compliance with its transnational obligations under, say, an EC directive (*Commission v. Belgium*, Case 102/79, [1980] European Court Reports 1473 at para. 12 of the judgment).

occur, i.e. a breach of the promise not to make determinations of inconsistency before the adoption of DSB findings in *specific* disputes. Certain WTO Members, however, including the US and the EC, *have* enacted legislation for seeking redress of WTO inconsistencies. There can be very good reasons related to norms of transparency, democracy and the rule of law which explain why Members may wish to have such legislation. However, when a Member adopts any legislation it has to be mindful that it does not violate its WTO obligations. Trade legislation, important or positive as it may be, which statutorily reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1.

(b) "A treaty shall be interpreted in good faith ..."

7.64 It is notoriously difficult, or at least delicate, to construe the requirement of the Vienna Convention that a treaty shall be interpreted in good faith in third party dispute resolution, not least because of the possible imputation of bad faith to one of the parties. We prefer, thus, to consider which interpretation suggests "better faith" and to deal only briefly with this element of interpretation. Applying the good faith requirement to Article 23 may not lead to a conclusive result but impels us in the direction suggested by our examination of the ordinary meaning of the raw text.

7.65 Imagine two farmers with adjacent land and a history of many disputes concerning real and alleged mutual trespassing. In the past, self help through force and threats of force has been used in their altercations. Naturally, exploitation of the lands close to the boundaries suffers since it is viewed as dangerous terrain. They now sign an agreement under which they undertake that henceforth in any case of alleged trespassing they will abjure self help and always and exclusively make recourse to the police and the courts of law. They specifically undertake never to use force when dealing with alleged trespass. After the entry into force of their agreement one of the farmers erects a large sign on the contested boundary: "No Trespassing. Trespassers may be shot on sight".

7.66 One could, of course, argue that since the sign does not say that trespassers *will* be shot, the obligations undertaken have not been violated. But would that be the "better faith" interpretation of what was promised? Did they not after all promise *always and exclusively* to make recourse to the police and the courts of law?

7.67 Likewise, is it a good faith interpretation to construe the obligations in Article 23 to allow a Member that promised its WTO partners – under Articles 23.1 and 23.2(a) – that it will generally, including in its legislation, have recourse to and abide by the rules and procedures of the DSU which specifically contain an undertaking not to make a determination of inconsistency prior to exhaustion of DSU proceedings, to put in place legislation the language of which explicitly, *urbi et orbi*, reserves to its Executive Branch the right to make a determination of inconsistency – that which it promised it would not do? This Panel thinks otherwise.

7.68 The good faith requirement in the Vienna Convention suggests, thus, that a promise to have recourse to and abide by the rules and procedures of the DSU, also in one's legislation, includes the undertaking to refrain from adopting national laws which threaten prohibited conduct.

7.69 We do not wish to argue that this reading of Article 23 based on the raw text and the good faith consideration referred to in Article 31 of the Vienna Convention, but not yet read in the light of the DSU's and the WTO's object and purpose, is necessarily compelling. It is,

however, in our view a perfectly plausible reading. Whilst we reject the US argument which would construe the interdiction in Article 23.2(a) to refer exclusively to actual determinations of inconsistency or legislation mandating such determinations, we do not think that it, too, based on the raw text alone, is implausible.

7.70 Any doubts one might have, however, between these two possible interpretations are dispelled when we consider the other interpretative elements found in Article 31 of the Vienna Convention. For presentational and narrative reasons we will deal with object-and-purpose before we deal with context.

(c) "... the ordinary meaning ... in the light of [the treaty's] object and purpose"

7.71 What are the objects and purposes of the DSU, and the WTO more generally, that are relevant to a construction of Article 23? The most relevant in our view are those which relate to the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system.

7.72 Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the EC but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.[661] Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.

7.73 However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.

7.74 The very first Preamble to the WTO Agreement states that Members recognise

> "that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and

[661] We make this statement as a matter of fact, without implying any judgment on the issue. We note that whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute (see Eeckhout, P., *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, Common Market Law Review, 1997, p. 11; Berkey, J., *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, European Journal of International Law, 1998, p. 626). The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue.

> a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services".[662]

7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself. Article 3.2 of the DSU provides:

> "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 …".[663]

7.76 The security and predictability in question are of "the multilateral trading system". The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

7.77 Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it. Sections 301-310 themselves recognize this nexus. One of the principal triggers for US action to vindicate US rights under covered agreements is the impact alleged breaches have had on, and the complaint emanating from, individual economic operators.

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[662] See also similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that the activity of economic operators can flourish is also reflected in the object of many WTO agreements, for example, in the non-discrimination principles in GATT, GATS and TRIPS and the market access provisions in both GATT and GATS.

[663] The importance of security and predictability as an object and purpose of the WTO has been recognized as well in many panel and Appellate Body reports. See the Appellate Body report on *Japan – Alcoholic Beverages*, op. cit., p. 31 ("WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system"). It has also been referred to under the TRIPS Agreement. In the Appellate Body Report on *India – Patents (US)*, op. cit., it was found, at para. 58, that "India is obliged, by Article 70.8(a), to provide a legal mechanism for the filing of mailbox applications that provides *a sound legal basis* to preserve both the novelty of the inventions and the priority of the applications as of the relevant filing and priority dates" (italics added). See also the WTO Panel Report on *Argentina – Textiles and Apparel (US)*, op. cit., para. 6.29 and the GATT Panel Reports on *United States Manufacturing Clause*, adopted 15/16 May 1984, BISD 31S/74, para. 39; *Japan – Measures on Imports of Leather* ("*Japan – Leather*"), adopted 15/16 May 1984, BISD 31S/94, para. 55; *EEC – Imports of Newsprint*, adopted November 20 1984, BISD 31S/114, para. 52; *Norway – Restrictions on Imports of Apples and Pears*, adopted 22 June 1989, BISD 36S/306, para. 5.6.

7.78 It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.

7.79 Apart from this name-of-convenience, there is nothing novel or radical in our analysis. We have already seen that it is rooted in the language of the WTO itself. It also represents a GATT/WTO orthodoxy confirmed in a variety of ways over the years including panel and Appellate Body reports as well as the practice of Members.

7.80 Consider, first, the overall obligation of Members concerning their internal legislation. Under traditional public international law a State cannot rely on its domestic law as a justification for non-performance.[664] Equally, however, under traditional public international law, legislation under which an eventual violation could, or even would, subsequently take place, does not normally in and of itself engage State responsibility. If, say, a State undertakes not to expropriate property of foreign nationals without appropriate compensation, its State responsibility would normally be engaged only at the moment foreign property had actually been expropriated in a given instance. And yet, even in the GATT, prior to the enactment of Article XVI:4 of the WTO Agreement explicitly referring to measures of a general nature, legislation as such independent from its application in specific instances was considered to constitute a violation. This is confirmed by numerous adopted GATT panel reports and is also agreed upon by both parties to this dispute. Why is it, then, that legislation as such was found to be inconsistent with GATT rules? If no specific application is at issue – if, for example, no specific discrimination has yet been made – what is it that constitutes the violation?

7.81 Indirect impact on individuals is, surely, one of the principal reasons. In treaties which concern only the relations between States, State responsibility is incurred only when an actual violation takes place. By contrast, in a treaty the benefits of which depend in part on the activity of individual operators the legislation itself may be construed as a breach, since the mere existence of legislation could have an appreciable "chilling effect" on the economic activities of individuals.

7.82 Thus, Article III:2 of GATT 1947, for example, would not, on its face, seem to prohibit legislation independently from its application to specific products. However, in light of the object and purpose of the GATT, it was read in GATT jurisprudence as a promise by contracting parties not only that they would abstain from actually imposing discriminatory taxes, but also that they would not enact legislation with that effect.

7.83 It is commonplace that domestic law in force imposing discriminatory taxation on imported products would, in and of itself, violate Article III irrespective of proof of actual discrimination in a specific case.[665] Furthermore, a domestic law which exposed imported products to future discrimination was recognized by some GATT panels to constitute, by itself, a violation of Article III, even before the law came into force.[666] Finally, and most tellingly, even where there was no certainty but only a risk under the domestic law that the tax would be

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[664] See Article 27 of the Vienna Convention.

[665] A change in the relative competitive opportunities caused by a measure of general application as such, to the detriment of imported products and in favour of domestically produced products, is the decisive criterion.

[666] In the Panel Report on *US – Superfund* (op. cit., paras. 5.2.1 and 5.2.2) tax legislation as such was found to violate GATT obligations even though the legislation had not yet entered into effect. See also the Panel Report on *US - Malt Beverages* (op. cit., paras. 5.39, 5.57, 5.60 and 5.69) where the legislation imposing the tax discrimination was, for example, not being enforced by the authorities.

discriminatory, certain GATT panels found that the law violated the obligation in Article III.[667] A similar approach was followed in respect of Article II of GATT 1994 by the WTO panel on *Argentina – Textiles and Apparel (US)* when it found that the very change in system from *ad valorem* to specific duties was a breach of Argentina's *ad valorem* tariff binding even though such change only brought about the potential of the tariff binding being exceeded depending on the price of the imported product.[668]

7.84 The rationale in all types of cases has always been the negative effect on economic operators created by such domestic laws. An individual would simply shift his or her trading patterns – buy domestic products, for example, instead of imports – so as to avoid the would-be taxes announced in the legislation or even the mere risk of discriminatory taxation. Such risk or

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[667] See Panel Report on *US – Tobacco*, op. cit., para. 96:

> "The Panel noted that an internal regulation which merely exposed imported products to a risk of discrimination had previously been recognized by a GATT panel to constitute, by itself, a form of discrimination, and therefore less favourable treatment within the meaning of Article III. The Panel agreed with this analysis of risk of discrimination as enunciated by this earlier panel".

A footnote to this paragraph refers to the Panel Report on *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Protein*, adopted 25 January 1990, BISD 37S/86, para. 141, which reads as follows:

> "Having made this finding the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4. The Panel found for these reasons that the payments to processors of Community oilseeds are inconsistent with Article III:4".

[668] Op. cit., paras. 6.45-6.47, in particular para. 6.46: "In the present dispute we consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has *the potential to violate its bindings, thus undermining the security and the predictability of the WTO system*" (emphasis added). This was confirmed by the Appellate Body (op. cit., para. 53):

> "In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the DIEM [a regime of Minimum Specific Import Duties] is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent".

On that basis, the Appellate Body found that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994. In this respect, see also the Panel Report on *United States – Standards for Reformulated and Conventional Gasoline,* adopted 20 May 1996, WT/DS2/R, para. 6.10.

threat, when real, was found to affect the relative competitive opportunities between imported and domestic products because it could, in and of itself, bring about a shift in consumption from imported to domestic products: This shift would be caused by, for example, an increase in the cost of imported products and a negative impact on economic planning and investment to the detriment of those products. This rationale was paraphrased in the *Superfund* case as follows:

> "to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both articles [GATT Articles III and XI] are not only to protect current trade but also to create the predictability needed to plan future trade".[669]

Doing so, the panel in *Superfund* referred to the reasoning in the *Japanese Measures on Imports of Leather* case. There the panel found that an import quota constituted a violation of Article XI of GATT even though the quota had not been filled. It did so on the following grounds:

> "the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g. it would lead to increased transaction costs and would create uncertainties which could affect investment plans".[670]

7.85 In this sense, Article III:2 is not only a promise not to discriminate in a specific case, but is also designed to give certain guarantees to the market place and the operators within it that discriminatory taxes will not be imposed. For the reasons given above, any ambivalence in GATT panel jurisprudence as to whether a risk of discrimination can constitute a violation should, in our view, be resolved in favour of our reading.[671]

7.86 Similarly, Article 23 too has to be interpreted in the light of these principles which encapsulate such a central object and purpose of the WTO. It may have been plausible if one considered a strict Member-Member matrix to insist that the obligations in Article 23 do not

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[669] Op. cit., para. 5.2.2.

[670] Panel Report on *Japan – Leather*, op. cit., para. 55. In this respect, see also Panel Report on *US – Malt Beverages* (op. cit., para. 5.60), where legislation was found to constitute a GATT violation even though it was not being enforced, for the following reason:

> "Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, *the measure continues to be mandatory legislation which may influence the decisions of economic operators.* Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply" (emphasis added).

[671] As a result, we do not consider that the general statements made in certain GATT panels are correct in respect of all WTO obligations and in all circumstances, for example, the statement in Panel Report on *EEC – Parts and Components* (op. cit., para. 5.25) that "[u]nder the provisions of the [GATT] which Japan claims have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures" and in Panel Report on *Thai – Cigarettes* (op. cit., para. 84), the statement that "legislation merely giving the executive the possibility to act inconsistently with Article III:2 [of GATT] could not, by itself, constitute a violation of that provision". In respect of this ambivalence in GATT jurisprudence, see Chua, A., *Precedent and Principles of WTO Panel Jurisprudence*, Berkeley Journal of International Law, 1998, p. 171, in particular at p. 193.

apply to legislation that threatens unilateral determinations but does not actually mandate them. It is not, however, plausible to construe Article 23 in this way if one interprets it in the light of the indirect effect such legislation has on individuals and the market-place, the protection of which is one of the principal objects and purposes of the WTO.

7.87 To be sure, in the cases referred to above, whether the risk materialised or not depended on certain market factors such as fluctuating reference prices on which the taxation of the imported product was based by virtue of the domestic legislation. In this case, whether the risk materializes depends on a decision of a government agency. From the perspective of the individual economic operator, however, this makes little difference. Indeed, it may be more difficult to predict the outcome of discretionary government action than to predict market conditions, thereby exacerbating the negative economic impact of the type of domestic law under examination here.

7.88 When a Member imposes unilateral measures in violation of Article 23 in a specific dispute, serious damage is created both to other Members and the market-place. However, in our view, the creation of damage is not confined to actual conduct in specific cases. A law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may – as is the case here – constitute an ongoing threat and produce a "chilling effect" causing serious damage in a variety of ways.

7.89 First, there is the damage caused directly to another Member. Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.[672]

7.90 Second, there is the damage caused to the market-place itself. The mere fact of having legislation the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behaviour in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. The damage thus caused to the market-place may actually increase when national legislation empowers individual economic operators to trigger unilateral State action, as is the case in the US which allows individual petitioners to request the USTR to initiate an investigation under Sections 301-310. This in itself is not illegal. But the ability conferred upon economic operators to threaten their foreign competitors with the triggering of a State procedure which includes the possibility of illegal unilateral action is another matter. It may affect their competitive economic

[672] In this respect, see the statements made by third parties to this dispute in Section V of our Report.

relationship and deny certain commercial advantages that foreign competitors would otherwise have. The threat of unilateral action can be as damaging on the market-place as the action itself.

7.91 In conclusion, the risk of discrimination was found in GATT jurisprudence to constitute a violation of Article III of GATT – because of the "chilling effect" it has on economic operators. The risk of a unilateral determination of inconsistency as found in the statutory language of Section 304 itself has an equally apparent "chilling effect" on both Members and the market-place even if it is not quite certain that such a determination would be made. The point is that neither other Members nor, in particular, individuals can be reasonably certain that it will not be made. Whereas States which are part of the international legal system may expect their treaty partners to assume good faith fulfillment of treaty obligations on their behalf, the same assumption cannot be made as regards individuals.

7.92 It is a circumspect use of the teleological method to choose that interpretation of Article 23 of the DSU that provides this certainty and eliminates the undesired "chilling effects" which run against the object and purpose of the WTO Agreement.

(d) "...in their context..."

7.93 Construing a WTO obligation as prohibiting a domestic law that "merely" exposes Members and individual operators to risk of WTO inconsistent action should not be done lightly. It depends on the specific WTO obligation at issue, the measure under consideration and the specific circumstances of each case. We are, however, confirmed in our view that Article 23 contains such an obligation not only by textual and teleological considerations but also by systemic ones, namely the context of Article 23 and the DSU in the overall WTO system.[673]

7.94 The more effective and quasi-automatic dispute settlement system under the WTO has often been heralded as one of the fundamental changes and major achievements of the Uruguay Round agreements. Because of that, the relevance of Article 23 obligations for individuals and the market-place is particularly important since they radiate on to all substantive obligations under the WTO. If individual economic operators cannot be confident about the integrity of WTO dispute resolution and may fear unilateral measures outside the guarantees and disciplines which the DSU ensures, their confidence in each and every of the substantive disciplines of the system will be undermined as well. The overall systemic damage and the denial of benefits would be amplified accordingly. The assurances thus given under the DSU may, in our view, be of even greater importance than those provided under substantive WTO provisions. For that reason, the preservation of the specific guarantees provided for in Article 23 is of added importance given the spill-over effect they have on all material WTO rights and obligations.

[673] We realise that the possibility for a Member to breach its obligations under Article 23.2(a) will always remain. In that sense, guarantees can never be completely assured. However, remote possibilities that obligations may be breached, i.e. normal risks to be accepted in all trade relations, should be distinguished from explicit risks or threats created by statute, i.e. where a Member makes it known to all its trade partners that they may be subjected to an internal procedure under which the right to breach WTO obligations is reserved.

5. Preliminary Conclusion after the Panel's Examination of the Statutory Language of Section 304

7.95 Our textual interpretation of Article 23.2(a) is thus confirmed when taking account also of the other elements referred to in Article 31 of the Vienna Convention.[674] Under this reading the duty of Members under Article 23 to have recourse to and abide by the rules and procedures of the DSU and to abstain from unilateral determinations of inconsistency, is meant to guarantee Members as well as the market-place and those who operate in it that no such determinations in respect of WTO rights and obligations will be made.

7.96 Consequently, the statutory language of Section 304 – by mandating a determination *before* the adoption of DSB findings and statutorily reserving the right for this determination to be one of inconsistency – must be considered presumptively to be inconsistent with the obligations in Article 23.2(a). The discretion given to the USTR to make a determination of inconsistency creates a real risk or threat for both Members and individual economic operators that determinations prohibited under Article 23.2(a) will be imposed. The USTR's discretion effectively to make such determinations removes the guarantee which Article 23 is intended to give not only to Members but indirectly also to individuals and the market place. In this sense, the USTR's discretion under Section 304 does not – as the US argued – ensure the consistency of Section 304. On the contrary, it is the core element of the *prima facie* inconsistency of the statutory language of Section 304.

7.97 Therefore, pursuant to our examination of text, context and object-and-purpose of Article 23.2(a) we find, at least *prima facie*, that the statutory language of Section 304 precludes compliance with Article 23.2(a). This is so because of the nature of the obligations under Article 23. Under Article 23 the US promised to have recourse to and abide by the DSU rules and procedures, specifically not to resort to unilateral measures referred to in Article 23.2(a). In Section 304, in contrast, the US statutorily reserves the right to do so. In our view, because of that, the statutory language of Section 304 constitutes a *prima facie* violation of Article 23.2(a).[675]

6. The Non-Statutory Elements of Section 304

(a) Introduction and Summary of the Panel's Analysis

7.98 In the previous analysis we have deliberately referred to the "statutory language" of Section 304 and likewise we have deliberately concluded that the statutory language creates a

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[674] Since an examination of the elements referred to in Article 31 does not leave the meaning of Article 23.2(a) "ambiguous or obscure" nor leads to a result which is "manifestly absurd or unreasonable" in the sense of Article 32 of the Vienna Convention, we do not need to evaluate the supplementary means of interpretation referred to in Article 32.

[675] We would like to emphasize again that this finding does not require the wholesale reversing of earlier GATT and WTO jurisprudence on mandatory and discretionary legislation. The classical test under previous jurisprudence was that only legislation *mandating* a WTO inconsistency or *precluding* WTO consistency, could, as such, violate WTO provisions (see paras. 4.173 ff. and 7.51 of this Report). The methodology we adopted was to examine first and with care the WTO provision in question and the obligation it imposed on Members. It could not be presumed, in our view, that the WTO would never prohibit legislation under which a national administration would enjoy certain discretionary powers. If it were found upon such examination that certain discretionary powers were in fact inconsistent with a WTO obligation, then legislation allowing such discretion would, on its face, fail the classical test: it would preclude WTO consistency.

prima facie violation. We did not conclude that a violation has been confirmed. This is so because of the special nature of the Measure in question. The Measure in question includes statutory language as well as other institutional and administrative elements.[676] To evaluate its overall WTO conformity we have to assess all of these elements together.

7.99 Therefore, although we found above that the statutory language of Section 304 creates a *prima facie* violation of Article 23.2(a), this does not, in and of itself, establish a US violation. There is more to Section 304 than statutory language. Consequently, we have to examine the impact of the other elements on the overall conformity of the Measure in question with the relevant WTO provisions.

7.100 To do this, we should recall first the nature of the *prima facie* violation created by the statutory language. The *prima facie* violation was created by the possibility under the statute of the USTR making a determination of inconsistency which negates the assurances that WTO partners of the US and individuals in the market place were entitled to expect under Article 23.

7.101 One can imagine different ways to remove the *prima facie* violation. If, for example, the statutory language itself were modified so that the USTR were not under an obligation to make a determination within the 18 months time-frame, but could, for example, await the making of any determination until such time as DSU procedures were completed the guarantee that Article 23 was intended to create would remain intact and the *prima facie* inconsistency would not exist.[677] Likewise, if, by a change in the statutory language, the USTR's discretion to make a determination of inconsistency prior to exhaustion of DSU proceedings were curtailed, once again the *prima facie* inconsistency would no longer exist.

7.102 Changing the statute is not the only way to remove the *prima facie* inconsistency. If the possibility of the USTR making a determination of inconsistency prior to exhaustion of DSU proceedings were lawfully curtailed in a different manner, the same legal effect would be achieved. The obligation on Members to bring their laws into conformity with WTO obligations is a fundamental feature of the system and, despite the fact that it affects the internal legal system of a State, has to be applied rigorously. At the same time, enforcement of this obligation must be done in the least intrusive way possible. The Member concerned must be allowed the maximum autonomy in ensuring such conformity and, if there is more than one lawful way to achieve this, should have the freedom to choose that way which suits it best.

7.103 Critically, the offending discretionary element has to be *lawfully* curtailed since, as found in WTO case law, conformity with WTO obligations cannot be obtained by an administrative promise to disregard its own binding internal legislation, i.e. by an administrative undertaking to act illegally.[678]

7.104 For the following reasons we find that the *prima facie* violation has in fact in this case been lawfully removed and no longer exists.

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[676] See paras. 7.25-7.28 of this Report.

[677] On this issue, the statutory language is, however, conclusive in that, as we found in para. 7.31(a), the USTR is obligated to make a determination within the 18 months time-frame under Section 304.

[678] Appellate Body Report on *India – Patents (US)*, op. cit., paras. 69-71.

7.105 The Trade Act in general and Sections 301-310 in particular are part of US legislation which covers the broad range of US trade relations including relations with States that are not WTO Members and including relations with Members that are not covered by WTO obligations.

7.106 The statutory language of Section 304 gives the USTR the broad discretion we outlined above as regards the entire scope of US trade relations, only a part of which comes within the orbit of WTO obligations. Within the discretion allowed, the statutory language leaves it to the USTR to apply the provisions of the Trade Act which relate to the entire gamut of US trade relations in a manner which is consistent with US interests and obligations. The interests and obligations can be different from one group of States to another.

7.107 We find, as a matter of fact, that it is within that broad discretion afforded to the US Administration, notably as regards the content of determinations pursuant to Section 304, lawfully to set out different regimes for the application of Section 304 depending on whether or not it concerns WTO covered situations.

7.108 The language of Section 304 allows the existence of multilateral dispute resolution proceedings to be taken into account.[679] It also allows for determinations of inconsistency to be postponed until after the exhaustion of DSU proceedings.[680] This language surely permits the Administration to limit the discretion of the USTR so that no determination of inconsistency would be made before the exhaustion of DSU proceedings. The wide discretion granted as to the content of the determination to be made should be interpreted as including the power of the US Administration to adopt an administrative decision limiting the USTR's discretion in a manner consistent with US international obligations.[681]

7.109 For reasons we explain below, we find that this is precisely the situation in the present case. Briefly, the US Administration has carved out WTO covered situations from the general application of the Trade Act. It did this in a most authoritative way, *inter alia*, through a Statement of Administrative Action ("SAA") submitted by the President to, and approved by, Congress. Under the SAA so approved "... it is the expectation of the Congress that future administrations would observe and apply the [undertakings given in the SAA]". One of these undertakings was to "base any section 301 determination that there has been a violation or

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[679] Section 304 states that the determination is to be based on "the investigation initiated under section 302 ... and the consultations (*and proceedings, if applicable*) under section 303" (emphasis added). See, in this respect, footnote 649 above.

[680] As the US noted in its answer to Panel Question 32(b), "[t]here is nothing in the text of Sections 301-310 which prevents [the USTR from making two determinations in one and the same case] ... While the Trade Representative is required to make a determination within the time frames set forth in that section, nothing prevents her from making additional determinations after that time". See para. 4.599 above.

[681] We reach this conclusion not least because of the US constitutional principle of construing US domestic law, where possible, in a way that is consistent with US obligations under international law. We accept the US submissions that "[i]n U.S. law, it is an elementary principle of statutory construction that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, 'ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States'. *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988)".

denial of US rights ... on the panel or Appellate Body findings adopted by the DSB".[682] This limitation of discretion would effectively preclude a determination of inconsistency prior to exhaustion of DSU proceedings.[683] The exercise of discretion under the statutory scheme is in the hands of the Administration and it is the Administration which has given this undertaking. We recognize of course that an undertaking given by one Administration can be repealed by that Administration or by another Administration. But this is no different from the possibility that statutory language under examination by a panel be amended subsequently by the same or another Legislator.[684] The critical question is whether the curtailment of discretion is lawful and effective. This Panel finds that it is.

(b) The Internal Dimension: US Statement of Administrative Action

7.110 The limitation on the USTR's discretion under Section 304, outlined above, was contained in the US Statement of Administrative Action ("SAA") that accompanied the US legislation implementing the results of the Uruguay Round submitted by the President to Congress. The SAA provides, in its own terms, as follows:

> "This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements....
>
> ... this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority".[685]

7.111 The SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely.

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[682] The SAA, as is often the case in trade policy and trade law circles, uses "section 301" as a generic term referring to enforcement procedures under Sections 301-310 more generally. Thus, when referring to "section 301 determinations", we understand this to mean any determination made under Sections 301-310.

[683] The US, in its answer to Panel Question 25 (as reflected in paras. 4.121 and 4.534 of this Report), unambiguously confirmed this construction. It noted in particular that "[t]he SAA must, by law, be treated as the authoritative expression concerning the interpretation of the statute in any judicial proceedings" and that with reference to all elements under Section 304 "under U.S. law, it is required to base an affirmative determination that U.S. WTO agreement rights have been denied on adopted panel and Appellate Body findings. That is to say, U.S. law precludes such an affirmative determination not based on adopted panel or Appellate Body findings".

[684] Of course, it is easier to change administrative decisions than it is to change legislation. However, as noted in para. 7.133, in the event the US administration were to repeal its undertaking in respect of US domestic law, it would not only go against express expectations held by Congress set out in the SAA. The US would also expose itself to a finding of inconsistency with its WTO obligations.

[685] SAA, p. 1.

7.112 In the SAA the US Administration indicated its interpretation of Sections 301-310 as well as the manner in which it intends to use its discretion under Sections 301-310, as follows (emphases added):

> "Although it will enhance the effectiveness of section 301, the DSU does not require any significant change in section 301 *for investigations that involve an alleged violation of a Uruguay Round agreement or the impairment of U.S. benefits under such an agreement*. In such cases, *the Trade Representative will*:
>
> - invoke DSU dispute settlement procedures, as required under current law;
>
> - base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB;
>
> - following adoption of a favourable panel or Appellate Body report, allow the defending party a reasonable period of time to implement the report's recommendations; and
>
> - if the matter cannot be resolved during that period, seek authority from the DSB to retaliate" (emphasis added).[686]

This official statement in the SAA – in particular, the commitment undertaken in the second bullet point – approved by the US Congress in the expectation that it will be followed by future US Administrations, is a major element in our conclusion that the discretion created by the statutory language permitting a determination of inconsistency prior to exhaustion of DSU proceeding has effectively been curtailed. As we already noted, we find that this decision of the US Administration on the manner in which it plans to exercise its discretion, namely to curtail it in such a way so as never to adopt a determination of inconsistency prior to the adoption of DSB findings, was lawfully made under the statutory language of Section 304.[687]

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[686] SAA, pp. 365-366.

[687] In this respect, the EC refers to Section 102(a) of the US Uruguay Round Agreements Act 1994, the Act by which the US Congress approved the WTO Agreement. Section 102(a) of this Act provides

> "(1) UNITED STATES LAW TO PREVAIL IN CONFLICT. - No provision in any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.
>
> (2) CONSTRUCTION. - Nothing in this Act shall be construed - …
>
> (B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974 unless specifically provided for in this Act".

We note, however, that even if one were to hold that, pursuant to Section 102(a), the WTO agreements and the Uruguay Round Act itself could not, and did not, curtail the USTR's discretion under Section 304, in our view, the US Administration itself could do so, and did so, *inter alia*, in the SAA. It did so validly by means of exercising discretion granted to it under the statutory language of Section 304.

7.113 The EC refers to subsequent paragraphs in the SAA that allegedly contradict the above quoted statement in the SAA.[688] We are persuaded, however, and so find, that these other paragraphs, read in their context, do not contradict the decision to apply Sections 301-310 in a manner consistent with US obligations under the WTO. Some of the disputed language clearly does not cover the issues considered here, i.e. involving WTO Members and an alleged denial of US rights under the WTO Agreement. Those paragraphs deal rather with cases involving WTO Members but not involving US rights under the WTO Agreement, i.e. where the subject-matter is not covered by the WTO. Admittedly, some of the language in the SAA appears ambivalent. We note however that, following US constitutional law, cases of ambiguity in the construction of legal instruments should, where possible, always be resolved in a manner consistent with US international obligations. We find that it is possible to do so in this case.

(c) US Statements before this Panel

7.114 The international elements of the SAA, though clearly present[689] were not at its centre. The SAA was made in a domestic context, before Congress on the occasion of the implementation by the US of the results of the Uruguay Round negotiations. Since the alleged violation at issue is domestic legislation, in principle, internal elements legally relevant to the construction of the legislation should be determinative.

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[688] SAA, pp. 366-367:

> "There is no basis for concern that the Uruguay Round agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply section 301 sanctions that may be inconsistent with U.S. trade obligations because such sanctions could engender DSU-authorized counter-retaliation. Although in specific cases the United States has expressed its intention to address an unfair foreign practice by taking action under section 301 that has not been authorized by the GATT, the United States has done so infrequently. In certain cases, the United States has taken such action because a foreign government has blocked adoption of a GATT panel report against it.
>
> Just as the United States may now choose to take section 301 actions that are not GATT authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking action in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone-treated beef".

It may be possible to construe these two paragraphs in the SAA as in fact indicating that the conditions which explain an abusive use of Section 301 in the past – in particular, the blocking of adoption of a panel report – no longer prevail under the WTO (see US Answer to Panel Question 38 reflected in paras. 4.134-4.140 of this Report). We decided to put the worst possible construction on these paragraphs in the SAA concluding that there is a tension between these paragraphs and the undertakings in the bullet points. As indicated in the body of the Report, this tension ought to be resolved following US constitutional law principles in favour of a construction which upholds compliance with international legal obligations. We were brought to that solution also when considering, in addition, the solemn undertakings of the US to the Panel confirming the Administration's view set out in the bullet points that in the light of the SAA the USTR is precluded from applying Sections 301-310 in a manner inconsistent with WTO obligations.

[689] As noted earlier, the SAA is explicitly said to represent an authoritative expression "both for purposes of U.S. international obligations and domestic law", see para. 7.110 of this Report.

7.115 The international legal relevance of the US commitments in the SAA were confirmed and amplified also in the context of the very proceedings before this Panel. In response to our very insistent questions, the US explicitly, officially, repeatedly and unconditionally confirmed the commitment expressed in the SAA namely that the USTR would "… base any section 301 determination that there has been a violation or denial of U.S. rights under the relevant agreement on the panel or Appellate Body findings adopted by the DSB".[690]

7.116 The US confirmed this for the record during the first meeting with the parties before the Panel. Subsequently, answering Panel Question 14, the US stated the following:

> "With regard to determinations under Section 304, as noted in paragraphs 12 and 41 of the U.S. First Submission, and as provided at page 365 of the Statement of Administrative Action (U.S. Exhibit 11), the Trade Representative is required under Section 304(a)(1) to base a determination of whether agreement rights have been denied on the results of WTO dispute settlement proceedings. Thus, in the event that a dispute settlement panel were to fail to complete its proceedings within the time frames provided for in the DSU and Section 304(a)(2)(A), the Trade Representative would not be able to make a determination that U.S. agreement rights have been denied".[691]

7.117 Whilst we have rejected the view that the statutory language of Section 304 itself precludes a determination of inconsistency, we fully accept the power of the US Administration to determine that it is its duty to exercise the discretion given to it by the statutory language in a way consistent with WTO obligations, to make this duty, through the SAA, official US policy for future Administrations, and, in turn, for the USTR, as part of the US Administration, to perceive it as its legal duty to follow such a policy.

7.118 Attributing international legal significance to unilateral statements made by a State should not be done lightly and should be subject to strict conditions. Although the legal effects we are ascribing to the US statements made to the DSB through this Panel are of a more narrow and limited nature and reach compared to other internationally relevant instances in which legal effect was given to unilateral declarations, we have conditioned even these limited effects on the fulfilment of the most stringent criteria. A sovereign State should normally not find itself legally affected on the international plane by the casual statement of any of the numerous representatives speaking on its behalf in today's highly interactive and inter-dependant world[692]

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[690] SAA, p. 366.

[691] See also footnote 683 above.

[692] In the *Nuclear Test* case (Australia v. France), the ICJ held that France was legally bound by publicly given undertakings, made on behalf of the French Government, to cease the conduct of atmospheric nuclear tests. The criteria of obligation were: the intention of the state making the declaration that it should be bound according to its terms; and that the undertaking be given publicly:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding".

nor by a representation made in the heat of legal argument on a State's behalf. This, however, is very far from the case before us.

7.119 At this juncture, it is also worth recalling that under Article 11 of the DSU it is our duty to "… make an objective assessment of the facts of the case … *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" (emphasis added).

7.120 As regards these statements we find, thus, as follows:

7.121 The statements made by the US before this Panel were a reflection of official US policy, intended to express US understanding of its international obligations as incorporated in domestic US law.[693] The statements did not represent a new US policy or undertaking but the bringing of a pre-existing US policy and undertaking made in a domestic setting into an international forum.

7.122 The representations and statements by the representatives of the US appearing before us were solemnly made, in a deliberative manner, for the record, repeated in writing and confirmed in the Panel's second hearing. There was nothing casual about these statements nor were they made in the heat of argument. There was ample opportunity to retract. Rather than retract, the US even sought to deepen its legal commitment in this respect.[694]

7.123 We are satisfied that the representatives appearing before us had full powers to make such legal representations and that they were acting within the authority bestowed on them. Panel proceedings are part of the DSB dispute resolution process. It is inconceivable except in extreme circumstances that a panel would reject the power of the legal representatives of a Member to state before a panel, and through the panel to the DSB, the legal position of a Member as regards its domestic law read in the light of its WTO obligations. The panel system would not function if such a power could not be presumed.

(ICJ Reports (1974), p. 253 at pp. 267-271, quoted above from para. 43; see also *Nuclear Test* case (New Zealand v. France), ICJ Reports (1974), p. 457, at pp. 472-475; *Legal Status of Eastern Greenland* case, PCIJ Reports, Series A/B, No. 53, where a statement was found to have legal effects even though it was not made publicly but in the course of conversations with the Norwegian Foreign Minister; *Nicaragua* case (Merits), ICJ Reports (1986), p. 14, at p. 132; *Case Concerning the Frontier Dispute*, ICJ Reports (1986), p. 554, at pp. 573-574).

In this case, the legal effect of the US statements does not go as far as creating a new legal obligation. Nonetheless we have applied to them the same, and perhaps even more, stringent conditions. Subsequent to the *Nuclear test* case, some authors criticised giving legal effect to declarations not directed to a specific State or States but expressed *erga omnes* (see Rubin, A., *The International Legal Effects of Unilateral Declarations*, American Journal of International Law, 1977, p. 1 and Franck, T., *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, American Journal of International Law, 1975, p. 612). In this case the US statements had explicit recipients and were made in the context of a specific dispute settlement procedure.

[693] See paras. 7.110 and 7.114 of this Report.

[694] In its first submission the US argued forcefully that Section 304 did not ever require the USTR to make a determination of inconsistency before exhaustion of DSU proceedings (see paras. 4.527-4.530 of this Report). In its second submission the US went further and argued that the correct interpretation of Section 304 is that the USTR is legally precluded from making such determination (see paras. 4.536-4.537 of this Report).

7.124 We are equally satisfied, as a matter of fact, that the statements made to us were intended to be part of the record in the full knowledge and understanding that they could, as any other official submission, be made part of our Report; that they were made with the intention not only that we rely on them but also that the EC and the third parties to the dispute as well as all Members of the DSB – effectively all WTO Members – place such reliance on them.

7.125 Accordingly, we find that these statements by the US express the unambiguous and official position of the US representing, in a manner that can be relied upon by all Members, an undertaking that the discretion of the USTR has been limited so as to prevent a determination of inconsistency before exhaustion of DSU proceedings. Although this representation does not create a new international legal obligation for the US – after all the US was already bound by Article 23 in becoming a WTO Member – it clarifies and gives an undertaking, at an international level, concerning aspects of domestic US law, in particular, the way the US has implemented its obligations under Article 23.2(a) of the DSU.

7.126 The aggregate effect of the SAA and the US statements made to us is to provide the guarantees, both direct to other Members and indirect to the market place, that Article 23 is intended to secure. Through the SAA and the US statements, as we have construed them, it is now clear that under Section 304, taking account of the different elements that compose it, the USTR is precluded from making a determination of inconsistency contrary to Article 23.2(a). As a matter of international law, the effect of the US undertakings is to anticipate, or discharge, any would-be State responsibility that could have arisen had the national law under consideration in this case consisted of nothing more than the statutory language.[695] It of course follows that should the US repudiate or remove in any way these undertakings, the US would incur State responsibility since its law would be rendered inconsistent with the obligations under Article 23.

(d) USTR Practice under Section 304

7.127 It is not our task to examine the individual conduct of the US in specific cases. We did, however, examine the practice of the USTR in specific cases as a means of shedding light on the meaning of Sections 301-310. We also considered that the USTR record could be of limited probative value in evaluating the veracity and significance of the SAA and the policy it articulated.

7.128 In support of its position the US made the following submission to the Panel:

> "The record shows that the Trade Representative has never once made a Section 304(a)(1) determination that U.S. GATT or WTO agreement rights have been denied which was not based on the results of GATT and WTO dispute settlement proceedings. Not once".[696]

7.129 Given the intense criticism of Sections 301-310 articulated in the submissions of third parties before this Panel, we expressly invited the EC and all third parties to submit to us any evidence of WTO inconsistent conduct by the US corresponding to the complaints of the EC – and, thus, within our terms of reference – that took place since the entry into force of the WTO.

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[695] Below we also canvass another hypothesis, see para. 7.133 of this Report. In that alternative hypothesis the effect of the undertaking is actually to discharge State responsibility that the statutory language may have given rise to.

[696] US oral statement, second meeting, para. 16 (see para. 4.990).

One such alleged case was submitted by one of the third parties (*Japan – Auto Parts*[697]) to which the EC joined two other cases (*EC – Bananas III* and *Argentina – Textiles and Apparel (US)*).

7.130 It is not for us to make a conclusive finding in relation to any of these cases, not least *Bananas III* which is the subject of proceedings before another panel.[698] However, on the face of the record before us, we do not find the evidence submitted to us in this connection sufficient to overturn the US claim of a consistent record of compliance of Section 304 with Article 23.2(a) as invoked by the EC. In any event, we do not consider the evidence before us sufficient to overturn our conclusions regarding Section 304 itself.[699]

7. Summary of the Panel's Analysis and Finding in respect of the EC claim under Section 304

7.131 The overall result of our analysis may be summarized as follows. We found that the statutory language of Section 304 constitutes a serious threat that determinations contrary to Article 23.2(a) may be taken and, in the circumstances of this case, is *prima facie* inconsistent with Article 23.2(a) read in the light of Article 23.1. We then found, however, that this threat had been removed by the aggregate effect of the SAA and the US statements before this Panel in a way that also removes the *prima facie* inconsistency and fulfils the guarantees incumbent on the US under Article 23. In the analogy described in paragraph 7.65, the sign "No

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[697] This dispute is explained in paras. 5.273-274 of this Report. As a result of the US action in this respect, see also *United States – Imposition of Duties on Automobiles from Japan under Section 301 and 304 of the Trade Act of 1974* ("*Japan – Auto Parts*"), WT/DS6 (complaint by Japan), settlement notified to the DSB.

[698] See documents under WT/DS165.

[699] In *Japan – Auto Parts* the US was not seeking redress of inconsistencies under the WTO, it was examining, *inter alia*, whether Japanese acts or policies in this respect were "unreasonable" under Section 301 (b). We consider that even if conduct inconsistent with Article 23.2(a) occurred – a matter on which we express no opinion – the kind of inconsistency implicated would be outside our terms of reference since it covers issues not raised in the EC claims before us.

Whether the US violated Article 23 in the *Bananas III* case is one of the claims subject to separate panel proceedings. Even if the US conduct in response to the alleged implementation of DSB findings by the EC was inconsistent with Article 23.2(a), we note that any determinations made by the US in this respect were made under Section 306 – i.e. were determinations on whether implementation of DSB findings took place – not under Section 304 at issue here, i.e. determinations on whether US rights are being denied prior to the issue of implementation arising. The fact that determinations under Section 306 have to be considered, for purposes of, e.g. publication and subsequent action under Section 301, as determinations under Section 304, pursuant to Section 306 (b)(1), does not alter our conclusion. We deal with the EC claim of inconsistency of Section 306 in Section VII.D below.

Finally, in *Argentina – Textiles and Apparel (US)*, the USTR determination was published subsequently to both the lapse of the 18 months time-period referred to in Section 304 and the adoption of DSB findings on the matter. The determination explicitly states that it is based on the findings of the DSB on the matter. We do not consider the fact that the determination was retroactively dated back to 3 April 1998, i.e. the day before the lapse of the 18 months time-period and thereby also a date prior to the adoption of DSB findings on the matter (22 April 1998), to be relevant on the international plane. In our view, when it comes to examining Article 23.2(a), the actual date of the determination and, especially, the basis of the determination's finding are the critical elements. In terms of US obligations to other WTO Members, this case shows that the US waited until the end of DSU procedures before it publicly announced its determination and that the USTR effectively based her findings on the result of the DSU process. The outcome of the DSU process conditioned the content of the USTR determination.

Trespassing. Trespassers may be shot on sight" was construed by us as going against the mutual promise made among the neighbours always and exclusively to have recourse to the police and the courts of law in any case of alleged trespassing. Continuing with that analogy, we would find in this case that the farmer has added to the original sign which was erected for all to read another line stating: "In case of trespass by neighbours, however, immediate recourse to the police and the courts of law will be made". We would hold – as we did in this case – that with this addition the agreement has been respected.

7.132 This conclusion is based on our reading of Section 304 as part of a multi-layered law containing statutory, institutional and administrative elements. We did, however, for prudential reasons, consider Section 304 on an alternative hypothesis which would regard our task as limited to an examination of statutory elements only. Even on this hypothesis, our overall conclusion of conformity would remain intact albeit by virtue of slightly different methodologies.

7.133 First, the SAA could be considered not as an autonomous measure of the Administration determining its policy of implementing Section 304, but as an important interpretative element in the construction of the statutory language of Section 304 itself. Whereas the statutory language read on its own does not preclude a determination of inconsistency, as we found above in paragraph 7.31(d), following this alternative methodology, the statutory language read in the light of the SAA would have that effect.

7.134 Second, assuming that examination of the statutory language of Section 304 led us to conclude that, because of the broad discretion it gives to the USTR, the statute is in violation of Article 23, we would then need to consider an appropriate remedy, i.e. to consider how the US could restore to its WTO partners the guarantees embodied in Article 23. In our view, any lawful means by which the US Administration could curtail the discretionary element would be sufficient to achieve that goal. In the case at hand, we would then find that the SAA and statements of the kind made by the US to the DSB through this Panel effectively provide, for the reasons we explained above, such a remedy. Therefore, any violation we would thus have found on the basis of the statutory language of Section 304, under this second alternative, would have been remedied.

7.135 For the reasons outlined above we find that Section 304 is not inconsistent with US obligations under Article 23.2(a) of the DSU.

7.136 Should the undertakings articulated in the SAA and confirmed and amplified by the US to this Panel be repudiated or in any other way removed by the US Administration or another branch of the US Government[700], this finding of conformity would no longer be warranted.

D. THE EC CLAIM THAT SECTION 306 IS INCONSISTENT WITH ARTICLE 23.2(A) OF THE DSU

1. Claims and Arguments of the Parties

7.137 Section 306 concerns the follow-up by the USTR to a determination under Section 304 that US rights under the WTO were being denied. When applied to WTO covered situations referred to in the EC claim it presupposes the completion of panel and, as the case may be,

[700] When we refer to the "US Government" in this Report we mean to include legislature, executive and judiciary.

Appellate Body proceedings and a ruling by the DSB in favour of the US. Section 306 sets out the procedures under the Trade Act for obtaining DSB authorization for the suspension of concessions when, in the view of the US, another Member has failed adequately to implement the original ruling of the DSB.

7.138 The EC claims that Section 306 (b) requires the USTR to "consider" whether a WTO Member has implemented the recommendations of the DSB and, in the event of non-implementation, to determine what further action to take. The EC claims that this "consideration" constitutes a "determination" in the sense of Article 23 by the USTR on whether the Member concerned has violated US rights under the WTO Agreement. According to Article 23, determinations of inconsistency may not be made prior to exhaustion of DSB proceedings. However, the EC contends, according to Section 306 this specific determination has to be made no later than *30 days* after the expiration of the reasonable period of time granted to the losing WTO Member to implement DSB recommendations. In the EC view, any dispute on the question of implementation has to be settled under Article 21.5 of the DSU which provides for referral of the matter to the original panel for a decision within *90 days*. Since such referral can take place at the end or even after the lapse of the reasonable period of time, the EC contends, Section 306 (b) requires a unilateral determination on compliance without awaiting the results of a WTO proceeding under Article 21.5 in violation of Article 23.2(a).

7.139 The US responds that Section 306 does *not* require the USTR to make a "determination" in violation of Article 23.2(a) of the DSU. In the US view, for the USTR to assert US rights under Article 22 of the DSU, the USTR is not only permitted, but is affirmatively required to make a judgment on – i.e. to "consider", the word used in Section 306 (b) itself – whether implementation of DSB recommendations has taken place. According to the US, a Member wanting to suspend concessions under Article 22 has to request authorization from the DSB within 30 days after the lapse of the reasonable period of time. If not, it loses the right to obtain such authorization by negative consensus. Since, therefore, a winning Member has to formulate its request for authorization within 30 days – even if, subsequently, the matter is referred to arbitration and authorization is only granted thereafter – the US argues that Article 22 itself presupposes that the USTR indicate how it intends to suspend concessions within this 30 day deadline. This 30 day deadline has been transposed into Section 306 (b) and is, therefore, in the view of the US, consistent with Article 23.2(a).

7.140 In respect of the possible conflict between the 30 day period in Section 306 (b) and the 90 day time-limit for a ruling on implementation under Article 21.5, the US argues that recourse to and completion of Article 21.5 proceedings is *not* a prerequisite for a *request* for authorization to suspend concessions to be made whenever disagreement arises on implementation.

7.141 Article 21.5 of the DSU provides as follows:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, 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".

Article 22.6 states:

> "When the situation described in paragraph 2 occurs ["if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21"], the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be ... completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration".

2. Preliminary Panel Findings in respect of the Statutory Language of Section 306

7.142 We propose to adopt here a similar methodology as the one we employed in our examination of Section 304 and examine first the statutory language of Section 306 in the light of US obligations under Article 23.2(a) read in the light of Article 23.1.[701]

7.143 To facilitate the understanding of our subsequent findings, it may be useful to read Section 306 as consisting of two phases. A first phase deals with a "consideration" by the USTR that "a foreign country is not satisfactorily implementing a measure or agreement" (Section 306(b)(1)) or, as repeated in Section 306(b)(2), a "consideration" that "the foreign country has failed to implement". A second phase addresses the "determination" by the USTR on "what further action the Trade Representative shall take under section 301" (Section 306(b)(1)).

7.144 The second phase contains a mandatory element: the determination on the proposed action has to be made, according to Section 306, no later than 30 days after the expiration of the reasonable period of time given to the other WTO Member to implement DSB findings. This second phase can only be activated when the "consideration" in the first phase is made, i.e. when the USTR considers that implementation has failed. *Ipso facto*, the first phase as well has to take place within the 30 day time-frame prescribed for the second phase. We find, therefore, as a matter of fact, that Section 306 mandates the USTR to "consider" whether or not the WTO Member concerned has implemented DSB recommendations within 30 days after the lapse of the reasonable period of time.

7.145 We also find that the EC is correct in claiming that in certain circumstances this "consideration" by the USTR will necessarily take place *before* the completion of Article 21.5 procedures on implementation. The usual deadline for completion of procedures under Article 21.5 is 90 days after referral of the matter to the original panel. Article 21.5 does not further specify when and how such referral has to take place nor does it include a deadline for parties to invoke Article 21.5. On these grounds, it is reasonable to assume that situations can occur where Article 21.5 is invoked later than 60 days before the expiration of the reasonable period of time. As a result, the deadline for completion of the panel's work under Article 21.5 could fall later than the 30th day after the lapse of the reasonable period of time, the trigger

[701] See Section VII.B.6.

referred to in Section 306 (b). In that event, the "consideration" required under Section 306 would thus need to be taken *before* the completion of Article 21.5 procedures.

7.146 We further find that USTR "considerations" under the first phase of Section 306 – made *subsequent* to, and based on, internal monitoring by the USTR pursuant to Section 306 (a); and, in the case of a "consideration" that implementation failed, automatically and as a *conditio sine qua non* leading to a decision on action under Section 301 – meet the threshold of firmness and immutability required for a "determination" under Article 23.2(a).[702] Hereafter we thus refer to these "considerations" as "determinations".[703] The US argument that the first phase of Section 306 is affirmatively required under Article 22 and represents no more than a belief necessary to the pursuit of dispute settlement procedures is, in our view, relevant not so much to the question of whether there is a "determination" but to the question of whether such "determination" is allowed under Article 23.2(a) since made "through recourse to dispute settlement in accordance with the rules and procedures" of the DSU, another element under Article 23.2(a) discussed below. We recall also that the USTR view under Section 306 that implementation failed is not a preliminary one that requires further confirmation by a panel but one referred to the DSB for immediate authorization to suspend concessions (unless an objection is raised against the level of suspension or the principles or procedures followed in considering what concessions to suspend).[704]

7.147 We further find, as a matter of fact, that although the USTR is obligated to make this determination within the 30 day time-frame, it has wide discretion as to the content of this determination. Specifically, we find that there do not exist any circumstances which would compel the USTR under the statutory language of Section 306 to determine that implementation has *failed,* i.e. to make a determination of inconsistency, whilst Article 21.5 procedures are still pending. In other words, it would always be open to the USTR under the Trade Act to determine that implementation has not failed so long as DSB procedures have not been exhausted. However, as in the case of Section 304, within the discretion created by the statutory language the USTR is not precluded by the statute from making such a determination.

7.148 It is important to note, however, that the determination at issue here, in WTO covered situations, is only a preliminary step under Section 306 to seek DSB authorization for the suspension of concessions or other obligations The result of this determination is not the suspension of concessions without DSB authorization but a request – albeit, according to the EC, a premature one – for authorization from the DSB to impose such suspension.

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[702] In this respect, see para. 7.20 and footnote 657 above.

[703] Recalling the four elements required for there to be a breach of Article 23.2(a) in respect of specific acts taken in a given dispute, outlined above in footnote 657, we thus find that "considerations" under Section 306 are "determinations" in the sense of the second element under Article 23.2(a). We also find that determinations under Section 306 meet the first element under Article 23.2(a). The US is obviously seeking redress of WTO inconsistencies when it monitors the implementation of DSB findings under Section 306. The third element concerns the question as to whether the determination under Section 306 is one "to the effect that a violation has occurred …". Examining specifically the determination at issue here, the one statutorily reserved in Section 306, i.e. the determination that implementation did *not* take place, in other words, that implementing measures are not consistent with WTO rules even though Article 21.5 procedures have not yet been completed, we hold the view that such determination is one of inconsistency meeting the third element under Article 23.2(a).

[704] See footnote 657 above.

3. US obligations under Article 23.2(a) of the DSU as applied to Section 306

7.149 We recall that our mandate is to examine the conformity of Section 306 as such with Article 23.2(a), rather than any specific application of Section 306 in a given dispute.

7.150 In relation to Section 304 it was clear that a determination of inconsistency made in a specific case prior to the completion of panel or Appellate Body proceedings and the adoption of a ruling by the DSB was a violation of Article 23.2(a).[705] It was on this premise that we concluded that statutory language merely reserving the right to make such a determination was also a *prima facie* violation.

7.151 In the case of Section 306 we have already found that here, too, the statutory language reserves the right to the USTR to consider that implementation has failed, i.e. to make a determination of inconsistency prior to termination of Article 21.5 proceedings. However, before we conclude that statutory language which reserves this right amounts to a *prima facie* violation we need to decide whether such a determination in a specific case amounts to a violation. Unlike Section 304, in the case of Section 306 this issue is highly contentious and far from clear. Only if we find, as a matter of law, that Article 23.2(a) is violated when the USTR determines, in a specific case, that implementation has failed in the sense of Section 306 *before* the completion of Article 21.5 proceedings – as a prelude to seeking DSB authorization for the suspension of concessions – will we be able to find that statutory language in and of itself, which reserves the right to make such a determination, is WTO inconsistent.

7.152 Reading Section 306 in the light of US obligations under Article 23.2(a), the question arises, more particularly, whether determinations under Section 306 are made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]" and made "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the DSU]".[706] These two elements referred to in Article 23.2(a) are cumulative in nature. Determinations are only allowed when made through recourse to the DSU *and* consistent with findings adopted by the DSB or an arbitration award under the DSU.

7.153 In our view, this question goes to the core of the EC claim under Section 306. As noted earlier, the US maintains that determining that implementation has failed as a prelude to a request for authorization to suspend concessions even prior to the completion of Article 21.5 proceedings is mandated by Article 22. The EC contests this.

7.154 In accordance with our terms of reference, our mandate is to examine whether Section 306 conforms with Article 23.2(a). If we are able to discharge this mandate without seeking to resolve the altogether separate dispute on the correct interpretation of Articles 21.5 and 22 and the relationship between them, the subject of negotiations in the context of the DSU

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[705] See para. 7.50 and footnote 657.

[706] As outlined in footnote 698, the determination statutorily reserved in Section 306 meets the first three elements for there to be a breach of Article 23.2(a) in a given dispute. The crucial question to be dealt with here remains, however, whether such determination also meets the fourth element under Article 23.2(a). In this respect see footnote 657.

review, we should do so.[707] Thus, this Panel should decide on the correct interpretation of Articles 21.5 and 22 and the relationship between them, only if it is legally indispensable.

7.155 We will, therefore, examine the conformity of Section 306 with Article 23.2(a) on the assumption, first, that the US view on Articles 21.5 and 22 is correct and, then, on the alternative assumption that the EC view in this respect is the correct one.

(a) Assuming the US view is correct

7.156 The US maintains that a proposal for suspension of concessions has to be submitted to the DSB within a 30 days time-frame and that, consequently, the US is obligated to determine that implementation has failed within that time-frame. The US view is based on the following reading of Article 22.

7.157 Article 22.6 states that the DSB "*shall grant authorization* to suspend concessions or other obligations *within 30 days* of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request" (emphasis added) or an objection to such request is raised and referred to arbitration. Article 22 thus provides an explicit time-limit for DSB authorization to be requested and granted, at least by virtue of negative consensus. Article 22 and Article 23 do not explicitly refer to Article 21.5. *A fortiori* nowhere is reference to Article 22 explicitly limited to cases where Article 21.5 has *not* been invoked.

7.158 Under this reading the US would effectively be obligated under Article 22 to make a determination on whether implementation took place within the time-frame prescribed in Section 306 if it is to benefit from the negative consensus rule. If not, the practice of positive consensus being reactivated, DSB authorization would only be obtained in case all Members, including the defending Member, agree.

7.159 Following the US approach, any determination made under Section 306 in the circumstances referred to in the EC claim would be consistent with Article 23.2(a) since it would be made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]", in particular Article 22 thereof. The determination would then not be made as a unilateral act in pursuit of redress, but as an act required when seeking multilateral authorization for the suspension of concessions as provided for in the DSU itself.

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[707] As noted in the EC response to Panel question 23, "the EC has not requested this Panel to 'make a decision on the relationship between Article 21.5 and 22' of the DSU. Rather, the EC has requested the DSB and obtained the establishment of this Panel in order to make 'such findings as will assist the DSB in making the recommendations or giving the rulings provided for in' the provisions of the agreements cited in the WTO document WT/DS152/11 of 2 February 1999" (see para. 4.901 of this Report). We note that the EC added to its response that "the WTO consistency of Sections 301-310 must be assessed against all the provisions quoted in the Panel's terms of reference, including Article 21.5 of the DSU on its own" and that "[t]he interpretation of Article 22 of the DSU is logically and legally a distinct issue to be addressed by the Panel separately, if necessary". However, nowhere did the EC substantiate any specific claim of violation of Article 21.5 or Article 22. These provisions are only relevant in this case as elements for an assessment of the EC claims under Article 23. If such assessment does not require a decision on the relationship between Articles 21.5 and 22, we do not consider it necessary – the word referred to by the EC -- nor within our mandate as set out in Section VII.A of this Report, to solve this controversy.

7.160 On this reading, the question then arises whether the determination of non-implementation made through recourse to the DSU is also one "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under [the DSU]", in the sense of the second phrase of Article 23.2(a). If we consider this to be a reference to the findings of the panel or Appellate Body in the original dispute, then also this requirement would be met. The USTR determination of non-implementation would, indeed, follow and be based on the original findings of inconsistency with WTO rules as adopted by the DSB in respect of the original complaint.

7.161 Could the findings referred to in Article 23.2(a) be regarded, in the specific circumstances under the EC claim, as the findings of the panel examining implementation in the pending Article 21.5 procedures rather than the findings of the original panel? If this were so, one would have to conclude that – since Article 21.5 procedures would still be pending – no such findings would have been adopted. The determination would then be contrary to Article 23.2(a). In our view this does not constitute a plausible interpretation of Article 23.2(a) if we assume the US reading of Article 22 is correct.

7.162 As noted earlier, the determination would be one *required* under Article 22 in order to maintain the reversed consensus rule. Because of that, it would also be conduct required or at least authorized under Article 23.2(c), obliging Members to "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization". There would then be a conflict between Article 23.2(a) and Article 23.2(c). Such conflict could be avoided by adopting the interpretation that the findings referred to in Article 23.2(a) are those of the original panel, not those of the Article 21.5 panel. For these reasons, and assuming the US approach is correct, we do not find that, in the circumstances at hand, the findings referred to in Article 23.2(a) are those of the panel under Article 21.5.

7.163 On these grounds, we find that if the US reading of Article 22 is correct, a determination, in a specific case, that implementation has failed pursuant to Section 306 as a prelude to a request for suspension of concessions in the circumstances referred to in the EC claim, could not be found to be inconsistent with Article 23.2(a) of the DSU. Consequently, the legislation authorizing such a determination would not be in violation either.[708]

(b) Assuming the EC view is correct

7.164 The EC view that Article 22 can only be activated once Article 21.5 procedures have been completed is based on the following reading of the relevant provisions. Article 21.5 states that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply" – and in the circumstances referred to under the EC claim there is such disagreement – "such dispute shall be decided through recourse to these dispute settlement procedures". This arguably implies that in case of disagreement on implementation, Article 21.5 must be pursued, not Article 22. Moreover, Article 22.6 only applies "[w]hen the situation described in paragraph 2 occurs", i.e. in the event "the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance". Since, in the circumstances under examination, an Article 21.5 procedure is pending to make a decision on this very issue, it could be argued that as long as that procedure has not been completed, the conditions for a request for suspension of concessions under Article 22.6 are not

[708] See para. 7.151 of this Report.

fulfilled. Following this line of reasoning, pending Article 21.5, Article 22 cannot be invoked.[709]

7.165 Thus, following the EC approach, a Section 306 determination of non-implementation made, in a specific case, before the completion of Article 21.5 proceedings would be contrary to Article 23.2(a) because it would, in the EC view, not be made "through recourse to dispute settlement in accordance with the rules and procedures of [the DSU]", more particularly, made inconsistently with Articles 21.5 and 22. However, as we have already found, the statutory language of Section 306 mandates the USTR to make a determination within 30 days even if Article 21.5 procedures have not been completed and reserves for the USTR the discretion to make determinations of non-implementation that are – on EC reading – contrary to Article 23.2(a). As a result we consider that – assuming the EC position is correct and for the reasons explained in our examination of the EC claim under Section 304[710] – the statutory language of Section 306, independently from its application in specific disputes, would *prima facie* violate US obligations under Article 23.2(a).

7.166 As explained earlier, this would be so because of the nature of the US obligations under Article 23. Under Article 23 the US promised not to resort to unilateral measures referred to in Article 23.2(a). However, in Section 306 – assuming that the reading of the EC of Articles 21.5 and 22 is correct – the US statutorily reserved the right to do exactly that.

7.167 However, even if we were to find such *prima facie* violation, it would be removed after consideration of the other elements under Section 306. For the reasons given above[711], we would then find that the cumulative effect of the US undertakings in the SAA and the statements made by the US to the DSB through this Panel,[712] is effectively and lawfully to curtail the discretion under Section 306 which would be at the source of the *prima facie* violation of Article 23.2(a).[713] These undertakings would, indeed, fulfill the guarantees received by other WTO Members and, through them, economic operators in the market-place under Article 23.

7.168 Whatever the outcome of other pending panel proceedings, on which we have no view, the fact that the USTR did make a determination of non-implementation before the completion of Article 21.5 procedures in *Bananas III*, even if it turns out eventually that this was illegal, is not, in our view, an act of bad faith. It was based on the US interpretation given to Articles 21.5

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[709] In this respect, we note that in another dispute, *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* ("*Australia –Leather*", WT/DS126/R, adopted 16 June 1999, not appealed), the US invoked Article 21.5 but agreed with the defending party, Australia, to await completion of Article 21.5 proceedings before requesting authorization to suspend concessions. With reference to footnote 6 to Article 4 of the SCM Agreement both parties agreed "that the deadline for DSB action under the first sentence of Article 22.6 of the DSU shall be 60 days after the circulation of the review panel report under Article 21.5 of the DSU, and that the deadline specified in the third sentence of Article 22.6 of the DSU for completion of arbitration shall be 45 days after the matter is referred to arbitration" (WT/DS126/8, p. 2).

[710] See Section VII.C.3 and 4.

[711] See Section VII.C.6.

[712] See para. 7.112, second bullet point, paras. 7.114 ff. as well as footnotes 680 and 681.

[713] In this respect, we recall that we found earlier that the statutory language of Section 306 allows the USTR to await the completion of DSU procedures, including Article 21.5 procedures, before making a determination of inconsistency under Section 306 (see para. 7.146 above). As to the lawfulness of taking account of result of Article 21.5 proceedings, Section 306 determinations have to be made "on the basis of the monitoring carried out" under Section 306 (a). Such monitoring may include reference to Article 21.5 proceedings.

and 22, an interpretation shared by other Members and now subject to negotiation. It seems to this Panel that the US attitude in this respect was due in large measure to the contradictory drafting of Articles 21.5 and 22 and may, as a result, be defensible as an act taken in order to safeguard its right to obtain DSB authorization to suspend concessions by negative consensus.[714] This Panel has no basis on which it could doubt that if as a result of these negotiations or the *Bananas III* dispute resolution procedures, the EC view in relation to Articles 21.5 and 22 turns out to be correct, the US would honour its undertakings to respect DSU procedures also under Section 306. Indeed, once US obligations on this matter would thus be clear and the EC view in this respect be confirmed, the overriding commitment made by the US Administration to follow and await the completion of DSU procedures before making determinations under Section 306 would be activated.

4. The Panel's Finding in respect of the EC claim under Section 306

7.169 Based on the above, irrespective of whether we accept the US or the EC approach to Articles 21.5 and 22, our conclusion on the compatibility of Section 306 with Article 23.2(a) is the same. In these circumstances, since we are able to discharge our mandate without seeking to resolve the altogether separate dispute on the correct interpretation of Articles 21.5 and 22 and the relationship between them, we shall refrain from examining further the Article 21.5 versus Article 22 controversy. To do otherwise would fall outside our mandate as set out in Section VII.A of our Report.[715]

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[714] We note that at least one other WTO Member recently acted in a similar way. In *Australia – Salmon*, Canada as well requested DSB authorization to suspend concessions within the 30 days framework even though there was disagreement as to whether Australia had implemented DSB recommendations and a panel under Article 21.5 is now examining this disagreement. In *Australia – Salmon*, Canada took an approach similar to that of the US in order to preserve its rights under Article 22. At the DSB meeting of 28 July 1999, Canada stated the following:

> "in the context of the DSU review, both Australia and Canada had taken the same position on the interpretation of Articles 21.5 and 22: i.e. where there was a disagreement about implementation, a multilateral determination of inconsistency should precede the authorization to suspend concessions. Canada had tabled a detailed proposal to amend the DSU provisions with a view to ensuring such sequence. Since no agreement had yet been reached on this issue, Canada had to pursue its rights in accordance with the existing provisions of the DSU. At this stage, it was not possible for Canada to proceed with the Article 21.5 panel proceedings only, because such proceedings would be concluded after the expiry of the 30-day period provided for in Article 22, within which Canada had the right to request suspension of concessions by negative consensus" (WT/DSB/M/66, pp. 4-5).

On the other hand, see the sequence and procedures agreed upon in *Australia – Leather*, set out in footnote 709.

[715] We realize that as a result it is still unclear whether the USTR is now (1) as the US argues, *required* to make determinations of inconsistency under Section 306 even pending Article 21.5 procedures in order to preserve US rights under Article 22 or (2) as the EC argues, *prohibited* under Article 23.2(a) to make such determinations until the completion of Article 21.5 procedures. We stress, however, that our task was to examine the compatibility of US law as such and not its application in a specific dispute, i.e. not whether in a given dispute the USTR is allowed to make this or that determination. Under either hypothesis – the US or the EC approach – we found that Section 306 is not inconsistent with Article 23.2(a). This is now clearly established. Only the way Section 306 should be applied in a specific dispute – an issue not falling within our mandate – is left open.

7.170 On these grounds, we find that Section 306, in the circumstances referred to in the EC claim, is not inconsistent with Article 23.2(a) of the DSU. The same *caveats* made in our findings as regards Section 304 also apply here.[716]

E. THE EC CLAIM THAT SECTIONS 305 AND 306 ARE INCONSISTENT WITH ARTICLE 23.2(C) OF THE DSU

1. Introduction

7.171 The EC claims that Section 306 (b) is inconsistent with Article 23.2(c) of the DSU because it requires the USTR to determine within 30 days after the expiration of the reasonable period of time what further action to take under Section 301 in case of a failure to implement DSB recommendations. The EC also claims that Section 305 (a)(2) is inconsistent with Article 23.2(c) of the DSU because it requires the USTR to implement the action determined earlier under Section 306 within 60 days after the expiration of the reasonable period of time.

7.172 As noted earlier, Article 23.2(c) provides that in cases where WTO Members seek redress of WTO inconsistencies, Members shall

> "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time".

Article 23.2(c) thus includes two cumulative obligations:

(a) the US has to "follow the procedures set forth in Article 22 to *determine* the level of suspension of concessions or other obligations" (emphasis added); and

(b) the US has to "obtain DSB authorization in accordance with those procedures before *suspending* concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time" (emphasis added).

7.173 After considering the submissions of the parties in relation to this claim, detailed exhaustively in the descriptive part of this Report, we reach the following conclusions.

2. The EC claim in respect of Determinations on Action under Section 306 (b)

7.174 Whereas the previous EC claim dealt with the "consideration" that implementation had failed under Section 306, this claim concerns the subsequent determination on action following such a determination of non-implementation. At issue here is the second phase of Section 306 as outlined above.[717] We recall that this determination has to be made within 30 days after the expiry of the reasonable period of time and that, in the circumstances referred to by the EC, it may, indeed, be mandated before the completion of Article 21.5 procedures on implementation.

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[716] See paras. 7.131-7.136 above.
[717] See paras. 7.142-7.143 above.

7.175 We find, as a matter of fact, that this determination on what action to take under the second phase of Section 306 is only mandated if the USTR has determined under the first phase that implementation failed.

7.176 As we did in respect of the previous claim, we will examine the conformity of Section 306 with Article 23.2(c) on the assumption, first, that the US view on Articles 21.5 and 22 is correct and, then, on the alternative assumption that the EC view in this respect is the correct one.

7.177 We recall that if one were to accept the US view on the relationship between Articles 21.5 and 22, then the US would effectively be obligated, or at least authorized, under Article 22 – in the event it determines that implementation failed – to make a determination on what action to take within 30 days after the expiry of the reasonable period of time. If not, it would lose the right to obtain DSB authorization by negative consensus. In that event, any determination on action made under Section 306 in the circumstances referred to in the EC claim would "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations" and thus be consistent with Article 23.2(c).

7.178 Turning now to the EC view on Articles 21.5 and 22, we found in examining the first phase of Section 306 that – if one were to accept the EC view – discretion to make a determination of non-implementation before the completion of Article 21.5 procedures would be *prima facie* inconsistent with Article 23.2(a). If such discretion were maintained, it would spill over to the second phase of Section 306 as well. However, we have already found that – assuming the EC view is correct – the discretion afforded to the USTR to make a determination that implementation has failed prior to the exhaustion of DSU proceedings under Article 21.5 would be effectively curtailed by the undertakings given by the US Administration both internally and internationally. So long as the US undertakings are in place, the trigger for the determination of action under the second phase of Section 306 would thus be disabled and any potential violation also of Article 23.2(c) eliminated.[718] Indeed, in these circumstances, any determination on action under the second phase of Section 306 would – as the determination on consistency under the first phase – take place subsequent to the completion of Article 21.5 procedures in accordance with the EC view on Article 22. Any such determination on action would thus "follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations" and be consistent with Article 23.2(c).

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[718] We note that – in addition to the discretion granted to the USTR under the first phase of Section 306 allowing it to delay a determination of non-implementation – the USTR has also been granted a certain discretion under the second phase of Section 306, as well as under Section 301, allowing it not to determine what action to take until the completion of Article 21.5 procedures. The determination mandated in Section 306 on what action to take refers to "mandatory action" under Section 301 (a). Section 301 (a) itself provides for several exceptions where the USTR is not required to take action. Under this provision, action is not required, *inter alia*, if the DSB has adopted a report or ruling finding that US rights have not been denied; if the Member concerned is taking satisfactory measures to grant the US rights at issue under the WTO Agreement, including an expression of intention to comply with DSB recommendations; or if, in extraordinary cases, action would have a disproportionate adverse impact on the US economy or cause serious harm to the national security of the US. An additional discretionary element – allowing the USTR to determine that no action is to be taken – is that action under Section 301(a) is subject to "the specific direction, if any, of the President regarding any such action". Even if the existence of the discretion under both phases of Section 306 and under Section 301 were to constitute a *prima facie* violation, the undertakings given by the US would remove these.

7.179 For the reasons outlined above, we find that Section 306 – irrespective of whether we accept the US or the EC approach in respect of Articles 21.5 and 22 – is not inconsistent with US obligations under Article 23.2(c). The same *caveats* made in our findings as regards Section 304 also apply here.[719]

3. The EC claim in respect of Implementation of Action under Section 305

7.180 Similar reasoning applies to the EC claim in respect of Section 305. Any action the USTR determined to take pursuant to Section 306, constituting the suspension of concessions or other obligations under the WTO, has to be implemented within "30 days after the date on which such determination is made" in accordance with Section 305(a)(1). In other words, if the USTR determines to take action within 30 days after the expiry of the reasonable period of time as referred to in Section 306, it will be obligated to implement such action within 60 days after the expiry of the reasonable period of time. We agree with the EC that Article 21.5 and even Article 22.6 arbitration procedures on the level of suspension may not be over within this 60 days period.[720] As a result, Section 305(a)(1) read in isolation may, in certain circumstances, mandate the implementation of action before receiving DSB authorization to do so.

7.181 However, under Section 305 (a)(2) there is discretion to suspend any implementation of action for up to 180 days beyond the 60 days after the expiration of the reasonable period of time. The USTR may do so if it determines, for example, that a delay is "necessary or desirable to obtain United States rights", for example, DSB authorization to suspend concessions.[721] In addition, implementation of action under Section 305 is also subject to "the specific direction, if any, of the President regarding any such action".[722]

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[719] See paras. 7.131-7.136 above.

[720] In respect of Article 21.5 procedures, see para. 7.145 above. Since Article 21.5 procedures may seemingly start on or about the date of expiry of the reasonable period of time and, as a general rule, take 90 days, it is likely that such procedures would not be completed within the 60 day deadline of Section 305. In respect of Article 22.6 arbitration procedures, we note that Article 22.6 provides that the arbitration has to be completed within 60 days after the expiry of the reasonable period of time, i.e. the time-limit in Section 305. However, even if the arbitration is completed by then, it may take some more time for the DSB to actually authorize the suspension of concessions consistent with the arbitration report. Considering footnote 7 in the *Bananas III* arbitration report (WT/DS27/ARB), even the completion of arbitration procedures within 60 days is not a certainty: "On the face of it, the 60-day period specified in Article 22.6 does not limit or define the jurisdiction of the Arbitrators *ratione temporis*. It imposes a *procedural* obligation on the Arbitrators in respect of the conduct of their work, not a *substantive* obligation in respect of the validity thereof. In our view, if the time-periods of Article 17.5 and Article 22.6 of the DSU were to cause the lapse of the authority of the Appellate Body or the Arbitrators, the DSU would have explicitly provided so. Such lapse of jurisdiction is explicitly foreseen, e.g. in Article 12.12 of the DSU which provides that 'if the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse' ".

[721] Thus, even if the US view on the relationship between Articles 21.5 and 22 were correct, the USTR could – after having made determinations on WTO consistency and Section 301 action *before* the completion of Article 21.5 procedures as required, or at least authorized, under its reading of Article 22 – still delay the implementation of any such action it may have determined to take until it has obtained DSB authorization to implement such action consistently with Article 23.2(c).

[722] We note also that activation of Section 305 is dependent on a determination of action under Section 306 (second phase) and that the determination of action under Section 306 (second phase) is dependent on a "consideration" that implementation has not taken place under Section 306 (first phase). Since the initial trigger of determining that implementation has not taken place would – following the EC

7.182 The requirement to implement action within 60 days – unless exceptions are made – even in cases where DSB authorization has not yet been obtained, may constitute a *prima facie* violation of the US obligation under Article 23.2(c) to "obtain DSB authorization in accordance with [Article 22] procedures before suspending concessions or other obligations". The fact that implementation can be delayed does not, in our view, necessarily meet the US guarantee granted under Article 23.2(c) to all WTO Members and, through them, economic operators in the market-place, that determinations contrary to Article 23.2(c) will not be made.

7.183 However, even if the existence of such discretion were to constitute a *prima facie* violation, the undertakings given by the US would remove it and no violation of Article 23.2(c) could be found. We note, in particular, that under the SAA the USTR is obligated to do the following:

> "if the matter cannot be resolved during that period [the reasonable period of time], seek authority from the DSB to retaliate".[723]

7.184 As a result, after evaluation of all elements relevant to Section 305, we come to the conclusion that the USTR under US law is precluded from exercising his or her discretion under Section 305 in a way that results in implementation of action before DSB authorization has been obtained.[724] We note that USTR discretion in this respect has been lawfully curtailed. Section 305 (a)(2)(ii), in particular, allows the USTR to delay action when "necessary or desirable to obtain United States rights", in this case, the right to be obtained from the DSB to suspend concessions or other obligations.[725]

7.185 For the reasons set out above, we find that Section 305, in the circumstances referred to in the EC claim, is not inconsistent with US obligations under Article 23.2(c). The same *caveats* made in our findings as regards Section 304 also apply here.[726]

F. THE EC CLAIMS UNDER GATT 1994

7.186 The EC submits, finally, that in disputes involving goods, Section 306 requires the USTR "unilaterally" to impose measures as a consequence of a "unilaterally" determined failure to implement DSB recommendations, not authorized under the DSU, that necessarily violate Article I, II, III, VIII or XI of GATT 1994. Therefore, the EC concludes, also Section 306 itself violates the said GATT provisions.

7.187 We note, first, that these GATT claims depend on acceptance of the EC claims under the DSU.[727] If action is explicitly allowed under the DSU, it can arguably not be prohibited

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view on the relationship between Articles 21.5 and 22 – be removed the consequent implementation of action would also be delayed at least until completion of Article 21.5 procedures.

[723] SAA, p. 366, fourth bullet point.

[724] We agree with the US that if the maximum delay were imposed, the total of 240 days subsequent to the lapse of the reasonable period of time – the original 60 day time-frame combined with the 180 days delay – should be sufficient for the USTR to await in all cases the completion of both Article 21.5 and Article 22.6 procedures as well as DSB authorization to suspend concessions.

[725] By so finding, we explicitly leave open the question of how DSB authorization to suspend concessions is to be applied *ratione temporis*, a question that is subject to another panel proceeding.

[726] See paras. 7.131-7.136 above.

under the more general GATT 1994. Since we have found that Section 306 is not inconsistent with Article 23 of the DSU, we can presume also that the dependent claim under GATT should be rejected.[728]

7.188 Moreover, on the substance of its argument, the EC did not further develop this claim.[729] It did not even refer to the text of the GATT provisions invoked.

7.189 On these grounds, we find that the EC has not met its burden of proving that Section 306 as such constitutes a violation of GATT 1994.

VIII. CONCLUSIONS

8.1 In the light of the statutory and non-statutory elements of Sections 301-310, in particular the US undertakings articulated in the Statement of Administrative Action approved by the US Congress at the time it implemented the Uruguay Round agreements and confirmed and amplified in the statements by the US to this Panel, we conclude that those aspects of Sections 301-310 of the US Trade Act brought before us in this dispute are not inconsistent with US obligations under the WTO. More specifically we conclude that

(a) Section 304 (a)(2)(A) of the US Trade Act of 1974, is not inconsistent with Article 23.2(a) of the DSU;

(b) Section 306 (b) of the US Trade Act of 1974, irrespective of whether we accept the US or the EC approach in respect of Articles 21.5 and 22 of the DSU, is not inconsistent with either

- Article 23.2(a) of the DSU; or

- Article 23.2(c) of the DSU;

(c) Section 305 (a) of the US Trade Act of 1974, is not inconsistent with Article 23.2(c) of the DSU;

(d) Section 306 (b) of the US Trade Act of 1974 is not inconsistent with Articles I, II, III, VIII and XI of GATT 1994, as they have been referred to by the EC.

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[727] The EC seems to agree with this when it states, in para. 11 of its rebuttal submission, that "Section 301-310, on their face, mandate unilateral action by the US authorities in breach of Article 23 of the DSU (*and consequently* of Articles I, II, III, VIII and XI of the GATT 1994)" (emphasised added).

[728] In this respect we note, in addition, that action under Section 301 can also be consistent with GATT provisions even when it is not explicitly allowed under the DSU. This could be the case, for example, when the action consists of a rise in applied tariffs to a level within the bound rate, implemented on an MFN basis.

[729] In its rebuttal submission, at p. 22, the EC only stated the following on this claim: "Given that Sections 304(a)(2)(A) and 306(b), as amended, require the United States to resort to retaliatory trade action within certain time limits irrespective of the result of WTO dispute settlement procedures, the actions taken in the area of trade in goods and not authorised pursuant to Article 3.7 and 22 of the DSU will necessarily be in violation of US obligations under one or more of the following GATT obligations: the Most-Favoured Nation clause (Article I GATT 1994), the tariff bindings undertaken by the United States (Article II GATT 1994), the National Treatment clause (Article III GATT 1994), the obligation not to collect excessive charges (Article VIII GATT 1994) and the prohibition of quantitative restrictions (Article XI GATT 1994)". See para. 4.1013 of this Report.

Significantly, all these conclusions are based in full or in part on the US Administration's undertakings mentioned above. It thus follows that should they be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.

Signed in the original this 8th of November 1999 by:

David Hawes
Chairman

Terje Johannessen
Member

Joseph Weiler
Member

ANNEX I

A. SECTIONS 301-310 OF THE TRADE ACT OF 1974

SEC. 301. ACTIONS BY UNITED STATES TRADE REPRESENTATIVE.

(a) MANDATORY ACTION.—

(1) If the United States Trade Representative determines under section 304(a)(1) that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice.

Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

(2) The Trade Representative is not required to take action under paragraph (1) in any case in which—

(A) the Dispute Settlement Body (as defined in section 121(5) of the Uruguay Round Agreements Act) has adopted a report, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that—

(i) the rights of the United States under a trade agreement are not being denied, or

(ii) the act, policy, or practice—

(I) is not a violation of, or inconsistent with, the rights of the United States, or

(II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or

(B) the Trade Representative finds that—

(i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement,

(ii) the foreign country has—

(I) agreed to eliminate or phase out the act, policy, or practice, or

(II) agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative,

(iii) it is impossible for the foreign country to achieve the results described in clause (i) or (ii), as appropriate, but the foreign country agrees to provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative,

(iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this chapter, or

(v) the taking of action under this subsection would cause serious harm to the national security of the United States.

(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.

(b) DISCRETIONARY ACTION.—If the Trade Representative determines under section 304(a)(1) that—

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice.

Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

(c) SCOPE OF AUTHORITY.—

(1) For purposes of carrying out the provisions of subsection (a) or (b), the Trade Representative is authorized to—

(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection;

(B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate;

(C) in a case in which the act, policy, or practice also fails to meet the eligibility criteria for receiving duty-free treatment under subsections (b) and (c) of section 502 of this Act, subsections (b) and (c) of section 212 of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2702 (b) and (c)), or subsections (c) and (d) of section 203 of the Andean Trade Preference Act (19 U.S.C. 3202 (c) and (d)), withdraw, limit, or suspend such treatment under such provisions, notwithstanding the provisions of subsection (a)(3) of this section; or

(D) enter into binding agreements with such foreign country that commit such foreign country to—

(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b),

(ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or

(iii) provide the United States with compensatory trade benefits that—

(I) are satisfactory to the Trade Representative, and

(II) meet the requirements of paragraph (4).

(2)(A) Notwithstanding any other provision of law governing any service sector access authorization, and in addition to the authority conferred in paragraph (1), the Trade Representative may, for purposes of carrying out the provisions of subsection (a) or (b)—

(i) restrict, in the manner and to the extent the Trade Representative determines appropriate, the terms and conditions of any such authorization, or

(ii) deny the issuance of any such authorization.

(B) Actions described in subparagraph (A) may only be taken under this section with respect to service sector access authorizations granted, or applications therefor pending, on or after the date on which—

(i) a petition is filed under section 302(a), or

(ii) a determination to initiate an investigation is made by the Trade Representative under section 302(b).

(C) Before the Trade Representative takes any action under this section involving the imposition of fees or other restrictions on the services of a foreign country, the Trade Representative shall, if the services involved are subject to regulation by any agency of the Federal Government or of any State, consult, as appropriate, with the head of the agency concerned.

(3) The actions the Trade Representative is authorized to take under subsection (a) or (b) may be taken against any goods or economic sector—

(A) on a nondiscriminatory basis or solely against the foreign country described in such subsection, and

(B) without regard to whether or not such goods or economic sector were involved in the act, policy, or practice that is the subject of such action.

(4) Any trade agreement described in paragraph (1)(D)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b), or benefit the economic sector as closely related as possible to such economic sector, unless—

(A) the provision of such trade benefits is not feasible, or

(B) trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits.

(5) If the Trade Representative determines that actions to be taken under subsection (a) or (b) are to be in the form of import restrictions, the Trade Representative shall—

(A) give preference to the imposition of duties over the imposition of other import restrictions, and

(B) if an import restriction other than a duty is imposed, consider substituting, on an incremental basis, an equivalent duty for such other import restriction.

(6) Any action taken by the Trade Representative under this section with respect to export targeting shall, to the extent possible, reflect the full benefit level of the export targeting to the beneficiary over the period during which the action taken has an effect.

(d) DEFINITIONS AND SPECIAL RULES.—For purposes of this chapter—

(1) The term "commerce" includes, but is not limited to—

(A) services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and

(B) foreign direct investment by United States persons with implications for trade in goods or services.

(2) An act, policy, or practice of a foreign country that burdens or restricts United States commerce may include the provision, directly or indirectly, by that foreign country of subsidies for the construction of vessels used in the commercial transportation by water of goods between foreign countries and the United States.

(3)(A) An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which—

(i) denies fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 101(d)(15) of the Uruguay Round Agreements Act,

(III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market,

(ii) constitutes export targeting, or

(iii) constitutes a persistent pattern of conduct that—

(I) denies workers the right of association,

(II) denies workers the right to organize and bargain collectively,

(III) permits any form of forced or compulsory labor,

(IV) fails to provide a minimum age for the employment of children, or

(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

(C)(i) Acts, policies, and practices of a foreign country described in subparagraph (B)(iii) shall not be treated as being unreasonable if the Trade Representative determines that—

(I) the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country (including any designated zone within the foreign country) the rights and other standards described in the subclauses of subparagraph (B)(iii), or

(II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country.

(ii) The Trade Representative shall publish in the Federal Register any determination made under clause (i), together with a description of the facts on which such determination is based.

(D) For purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate.

(E) The term "export targeting" means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.

(F)(i) For the purposes of subparagraph (B)(i)(II), adequate and effective protection of intellectual property rights includes adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such country to secure, exercise, and enforce rights and enjoy commercial benefits relating to patents, trademarks, copyrights and related rights, mask works, trade secrets, and plant breeder's rights.

(ii) For purposes of subparagraph (B)(i)(IV), the denial of fair and equitable nondiscriminatory market access opportunities includes restrictions on market access related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property rights in protected works or fixations or products embodying protected works.

(4)(A) An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States.

(B) Acts, policies, and practices that are unjustifiable include, but are not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favoured-nation treatment or the right of establishment or protection of intellectual property rights.

(5) Acts, policies, and practices that are discriminatory include, when appropriate, any act, policy, and practice which denies national or most-favoured-nation treatment to United States goods, services, or investment.

(6) The term "service sector access authorization" means any license, permit, order, or other authorization, issued under the authority of Federal law, that permits a foreign supplier of services access to the United States market in a service sector concerned.

(7) The term "foreign country" includes any foreign instrumentality. Any possession or territory of a foreign country that is administered separately for customs purposes shall be treated as a separate foreign country.

(8) The term "Trade Representative" means the United States Trade Representative.

(9) The term "interested persons", only for purposes of sections 302(a)(4)(B), 304(b)(1)(A), 306(c)(2), and 307(a)(2), includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken under subsection (a) or (b).

SEC. 302. INITIATION OF INVESTIGATIONS.

(a) PETITIONS.—

(1) Any interested person may file a petition with the Trade Representative requesting that action be taken under section 301 and setting forth the allegations in support of the request.

(2) The Trade Representative shall review the allegations in any petition filed under paragraph (1) and, not later than 45 days after the date on which the Trade Representative received the petition, shall determine whether to initiate an investigation.

(3) If the Trade Representative determines not to initiate an investigation with respect to a petition, the Trade Representative shall inform the petitioner of the reasons therefor and shall publish notice of the determination, together with a summary of such reasons, in the Federal Register.

(4) If the Trade Representative makes an affirmative determination under paragraph (2) with respect to a petition, the Trade Representative shall initiate an investigation regarding the issues raised in the petition. The Trade Representative shall publish a summary of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing—

(A) within the 30-day period beginning on the date of affirmative determination (or on a date after such period if agreed to by the petitioner) if a public hearing within such period is requested in the petition, or

(B) at such other time if a timely request therefor is made by the petitioner or by any interested person.

(b) INITIATION OF INVESTIGATION BY MEANS OTHER THAN PETITION.–

(1)(A) If the Trade Representative determines that an investigation should be initiated under this chapter with respect to any matter in order to determine whether the matter is actionable under section 301, the Trade Representative shall publish such determination in the Federal Register and shall initiate such investigation.

(B) The Trade Representative shall, before making any determination under subparagraph (A), consult with appropriate committees established pursuant to section 135.

(2)(A) By no later than the date that is 30 days after the date on which a country is identified under section 182(a)(2), the Trade Representative shall initiate an investigation under this chapter with respect to any act, policy, or practice of that country that—

(i) was the basis for such identification, and

(ii) is not at that time the subject of any other investigation or action under this chapter.

(B) The Trade Representative is not required under subparagraph (A) to initiate an investigation under this chapter with respect to any act, policy, or practice of a foreign country if the Trade Representative determines that the initiation of the investigation would be detrimental to United States economic interests.

(C) If the Trade Representative makes a determination under subparagraph (B) not to initiate an investigation, the Trade Representative shall submit to the Congress a written report setting forth, in detail—

(i) the reasons for the determination, and

(ii) the United States economic interests that would be adversely affected by the investigation.

(D) The Trade Representative shall, from time to time, consult with the Register of Copyrights, the Commissioner of Patents and Trademarks, and other appropriate officers of the Federal Government, during any investigation initiated under this chapter by reason of subparagraph (A).

(c) DISCRETION.— In determining whether to initiate an investigation under subsection (a) or (b) of any act, policy, or practice that is enumerated in any provision of section 301(d), the Trade Representative shall have discretion to determine whether action under section 301 would be effective in addressing such act, policy, or practice.

SEC. 303. CONSULTATION UPON INITIATION OF INVESTIGATION.

(a) IN GENERAL.—

(1) On the date on which an investigation is initiated under section 302, the Trade Representative, on behalf of the United States, shall request consultations with the foreign country concerned regarding the issues involved in such investigation.

(2) If the investigation initiated under section 302 involves a trade agreement and a mutually acceptable resolution is not reached before the earlier of—

(A) the close of the consultation period, if any, specified in the trade agreement, or

(B) the 150th day after the day on which consultation was commenced,

the Trade Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement.

(3) The Trade Representative shall seek information and advice from the petitioner (if any) and the appropriate committees established pursuant to section 135 in preparing United States presentations for consultations and dispute settlement proceedings.

(b) DELAY OF REQUEST FOR CONSULTATIONS.—

(1) Notwithstanding the provisions of subsection (a)—

(A) the United States Trade Representative may, after consulting with the petitioner (if any), delay for up to 90 days any request for consultations under subsection (a) for the purpose of verifying or improving the petition to ensure an adequate basis for consultation, and

(B) if such consultations are delayed by reason of subparagraph (A), each time limitation under section 304 shall be extended for the period of such delay.

(2) The Trade Representative shall—

(A) publish notice of any delay under paragraph (1) in the Federal Register, and

(B) report to Congress on the reasons for such delay in the report required under section 309(a)(3).

SEC. 304. DETERMINATIONS BY THE TRADE REPRESENTATIVE.

(a) IN GENERAL.—

(1) On the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303, the Trade Representative shall—

(A) determine whether—

(i) the rights to which the United States is entitled under any trade agreement are being denied, or

(ii) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 301 exists, and

(B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade Representative should take under subsection (a) or (b) of section 301.

(2) The Trade Representative shall make the determinations required under paragraph (1) on or before—

(A) in the case of an investigation involving a trade agreement, the earlier of—

(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or

(ii) the date that is 18 months after the date on which the investigation is initiated, or

(B) in all cases not described in subparagraph (A) or paragraph (3), the date that is 12 months after the date on which the investigation is initiated.

(3)(A) If an investigation is initiated under this chapter by reason of section 302(b)(2) and the Trade Representative does not consider that a trade agreement, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (referred to in section 101(d)(15) of the Uruguay Round Agreements Act), is involved or does not make a determination described in subparagraph (B) with respect to such investigation, the Trade Representative shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 6 months after the date on which such investigation is initiated.

(B) If the Trade Representative determines with respect to an investigation initiated by reason of section 302(b)(2) (other than an investigation involving a trade agreement) that—

(i) complex or complicated issues are involved in the investigation that require additional time,

(ii) the foreign country involved in the investigation is making substantial progress in drafting or implementing legislative or administrative measures that will provide adequate and effective protection of intellectual property rights, or

(iii) such foreign country is undertaking enforcement measures to provide adequate and effective protection of intellectual property rights,

the Trade Representative shall publish in the Federal Register notice of such determination and shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 9 months after the date on which such investigation is initiated.

(4) In any case in which a dispute is not resolved before the close of the minimum dispute settlement period provided for in a trade agreement, the Trade Representative, within 15 days after the close of such dispute settlement period, shall submit a report to Congress setting forth the reasons why the dispute was not resolved within the minimum dispute settlement period, the status of the case at the close of the period, and the prospects for resolution. For purposes of this paragraph, the minimum dispute settlement period provided for under any such trade agreement is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement at any stage.

(b) CONSULTATION BEFORE DETERMINATIONS.—

(1) Before making the determinations required under subsection (a)(1), the Trade Representative, unless expeditious action is required—

(A) shall provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person,

(B) shall obtain advice from the appropriate committees established pursuant to section 135, and

(C) may request the views of the United States International Trade Commission regarding the probable impact on the economy of the United States of the taking of action with respect to any goods or service.

(2) If the Trade Representative does not comply with the requirements of subparagraphs (A) and (B) of paragraph (1) because expeditious action is required, the Trade Representative shall, after making the determinations under subsection (a)(1), comply with such subparagraphs.

(c) PUBLICATION.— The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1), together with a description of the facts on which such determination is based.

SEC. 305. IMPLEMENTATION OF ACTIONS.

(a) ACTIONS TO BE TAKEN UNDER SECTION 301.—

(1) Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 304(a)(1)(B) to take under section 301, subject to the specific direction, if any, of the President regarding any such action, by no later than the date that is 30 days after the date on which such determination is made.

(2)(A) Except as otherwise provided in this paragraph, the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 301 —

(i) if—

(I) in the case of an investigation initiated under section 302(a), the petitioner requests a delay, or

(II) in the case of an investigation initiated under section 302(b)(1) or to which section 304(a)(3)(B) applies, a delay is requested by a majority of the representatives of the domestic industry that would benefit from the action, or

(ii) if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable to obtain United States rights or satisfactory solution with respect to the acts, policies, or practices that are the subject of the action.

(B) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 301 with respect to any investigation to which section 304(a)(3)(A) applies.

(C) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 301 with respect to any investigation to which section 304(a)(3)(B) applies by more than 90 days.

(b) ALTERNATIVE ACTIONS IN CERTAIN CASES OF EXPORT TARGETING.—

(1) If the Trade Representative makes an affirmative determination under section 304(a)(1)(A) involving export targeting by a foreign country and determines to take no action under section 301 with respect to such affirmation determination, the Trade Representative—

(A) shall establish an advisory panel to recommend measures which will promote the competitiveness of the domestic industry affected by the export targeting,

(B) on the basis of the report of such panel submitted under paragraph (2)(B) and subject to the specific direction, if any, of the President, may take any administrative actions authorized under any other provision of law, and, if necessary, propose legislation to implement any other actions, that would restore or improve the international competitiveness of the domestic industry affected by the export targeting, and

(C) shall, by no later than the date that is 30 days after the date on which the report of such panel is submitted under paragraph (2)(B), submit a report to the Congress on the administrative actions taken, and legislative proposals made, under subparagraph (B) with respect to the domestic industry affected by the export targeting.

(2)(A) The advisory panels established under paragraph (1)(A) shall consist of individuals appointed by the Trade Representative who—

(i) earn their livelihood in the private sector of the economy, including individuals who represent management and labor in the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 304(a)(1)(A), and

(ii) by education or experience, are qualified to serve on the advisory panel.

(B) By no later than the date that is 6 months after the date on which an advisory panel is established under paragraph (1)(A), the advisory panel shall submit to the Trade Representative and to the Congress a report on measures that the advisory panel recommends be taken by the United States to promote the competitiveness of the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 304(a)(1)(A).

SEC. 306. MONITORING OF FOREIGN COMPLIANCE.

(a) IN GENERAL.—The Trade Representative shall monitor the implementation of each measure undertaken, or agreement that is entered into to provide a satisfactory resolution of a matter subject to investigation under this chapter or subject to dispute settlement proceedings to enforce the rights of the United States under a trade agreement providing for such proceedings.

(b) FURTHER ACTION.—

(1) IN GENERAL.—If, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section 301(a). For purposes of section 301, any such determination shall be treated as a determination made under section 304(a)(1).

(2) WTO DISPUTE SETTLEMENT RECOMMENDATIONS.— If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade

Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes that is referred to in section 101(d)(16) of the Uruguay Round Agreements Act.

(c) CONSULTATIONS.—Before making any determination under subsection (b), the Trade Representative shall—

(1) consult with the petitioner, if any, involved in the initial investigation under this chapter and with representatives of the domestic industry concerned; and

(2) provide an opportunity for the presentation of views by interested persons.

SEC. 307. MODIFICATION AND TERMINATION OF ACTIONS.

(a) IN GENERAL.—

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 301 if—

(A) any of the conditions described in section 301(a)(2) exist,

(B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or

(C) such action is being taken under section 301(b) and is no longer appropriate.

(2) Before taking any action under paragraph (1) to modify or terminate any action taken under section 301, the Trade Representative shall consult with the petitioner, if any, and with representatives of the domestic industry concerned, and shall provide opportunity for the presentation of views by other interested persons affected by the proposed modification or termination concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate.

(b) NOTICE; REPORT TO CONGRESS.—The Trade Representative shall promptly publish in the Federal Register notice of, and report in writing to the Congress with respect to, any modification or termination of any action taken under section 301 and the reasons therefor.

(c) REVIEW OF NECESSITY.—

(1) If—

(A) a particular action has been taken under section 301 during any 4-year period, and

(B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action,

such action shall terminate at the close of such 4-year period.

(2) The Trade Representative shall notify by mail the petitioner and representatives of the domestic industry described in paragraph (1)(B) of any termination of action by reason of paragraph (1) at least 60 days before the date of such termination.

(3) If a request is submitted to the Trade Representative under paragraph (1)(B) to continue taking a particular action under section 301, the Trade Representative shall conduct a review of—

(A) the effectiveness in achieving the objectives of section 301 of—

(i) such action, and

(ii) other actions that could be taken (including actions against other products or services), and

(B) the effects of such actions on the United States economy, including consumers.

SEC. 308. REQUEST FOR INFORMATION.

(a) IN GENERAL.—Upon receipt of written request therefor from any person, the Trade Representative shall make available to that person information (other than that to which confidentiality applies) concerning—

(1) the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or intellectual property rights, to the extent that such information is available to the Trade Representative or other Federal agencies;

(2) United States rights under any trade agreement and the remedies which may be available under that agreement and under the laws of the United States; and

(3) past and present domestic and international proceedings or actions with respect to the policy or practice concerned.

(b) IF INFORMATION NOT AVAILABLE.—If information that is requested by a person under subsection (a) is not available to the Trade Representative or other Federal agencies, the Trade Representative shall, within 30 days after receipt of the request—

(1) request the information from the foreign government; or

(2) decline to request the information and inform the person in writing of the reasons for refusal.

(c) CERTAIN BUSINESS INFORMATION NOT MADE AVAILABLE.—

(1) Except as provided in paragraph (2), and notwithstanding any other provision of law (including section 552 of title 5, United States Code), no information requested and received by the Trade Representative in aid of any investigation under this chapter shall be made available to any person if—

(A) the person providing such information certifies that—

(i) such information is business confidential,

(ii) the disclosure of such information would endanger trade secrets or profitability, and

(iii) such information is not generally available;

(B) the Trade Representative determines that such certification is well-founded; and

(C) to the extent required in regulations prescribed by the Trade Representative, the person providing such information provides an adequate nonconfidential summary of such information.

(2) The Trade Representative may—

(A) use such information, or make such information available (in his own discretion) to any employee of the Federal Government for use, in any investigation under this chapter, or

(B) may make such information available to any other person in a form which cannot be associated with, or otherwise identify, the person providing the information.

SEC. 309. ADMINISTRATION.

The Trade Representative shall—

(1) issue regulations concerning the filing of petitions and the conduct of investigations and hearings under this subchapter,

(2) keep the petitioner regularly informed of all determinations and developments regarding the investigation conducted with respect to the petition under this chapter, including the reasons for any undue delays, and

(3) submit a report to the House of Representatives and the Senate semiannually describing—

(A) the petitions filed and the determinations made (and reasons therefor) under section 302,

(B) developments in, and the current status of, each investigation or proceeding under this chapter,

(C) the actions taken, or the reasons for no action, by the Trade Representative under section 301 with respect to investigations conducted under this chapter, and

(D) the commercial effects of actions taken under section 301.

SEC. 310. IDENTIFICATION OF TRADE EXPANSION PRIORITIES.

(a) IDENTIFICATION.—

(1) Within 180 days after the submission in calendar year 1995 of the report required by section 181(b), the Trade Representative shall—

(A) review United States trade expansion priorities,

(B) identify priority foreign country practices, the elimination of which is likely to have the most significant potential to increase United States exports, either directly or through the establishment of a beneficial precedent, and

(C) submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives and publish in the Federal Register a report on the priority foreign country practices identified.

(2) In identifying priority foreign country practices under paragraph (1) of this section, the Trade Representative shall take into account all relevant factors, including—

(A) the major barriers and trade distorting practices described in the National Trade Estimate Report required under section 181(b);

(B) the trade agreements to which a foreign country is a party and its compliance with those agreements;

(C) the medium- and long-term implications of foreign government procurement plans; and

(D) the international competitive position and export potential of United States products and services.

(3) The Trade Representative may include in the report, if appropriate—

(A) a description of foreign country practices that may in the future warrant identification as priority foreign country practices; and

(B) a statement about other foreign country practices that were not identified because they are already being addressed by provisions of United States trade law, by existing bilateral trade agreements, or as part of trade negotiations with other countries and progress is being made toward the elimination of such practices.

(b) INITIATION OF INVESTIGATIONS.—By no later than the date which is 21 days after the date on which a report is submitted to the appropriate congressional committees under subsection (a)(1), the Trade Representative shall initiate under section 302(b)(1) investigations under this chapter with respect to all of the priority foreign country practices identified.

(c) AGREEMENTS FOR ELIMINATION OF BARRIERS.—In the consultations with a foreign country that the Trade Representative is required to request under section 303(a) with respect to

an investigation initiated by reason of subsection (b), the Trade Representative shall seek to negotiate an agreement that provides for the elimination of the practices that are the subject of the investigation as quickly as possible or, if elimination of the practices is not feasible, an agreement that provides for compensatory trade benefits.

(d) REPORTS.—The Trade Representative shall include in the semiannual report required by section 309 a report on the status of any investigations initiated pursuant to subsection (b) and, where appropriate, the extent to which such investigations have led to increased opportunities for the export of products of the United States.

B. RELEVANT WTO PROVISIONS

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

...

Article 21

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

...

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be ...

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the

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[11] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, 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.

...

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

...

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the

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[15] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

[16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

...

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

...

ANNEX II

GENERAL DESCRIPTION OF THE OPERATION OF SECTIONS 301-310[730]

A. INVESTIGATION BY THE USTR UNDER SECTIONS 302-303

1. Sections 301-310 provide an important avenue to enforce US rights under the WTO Agreement. The USTR can also start WTO proceedings outside the framework of Sections 301-310, as she did, for example, in the *EC – Hormones* and *EC – LAN* cases. Sections 301-310 are also used in the context of other trade agreements.

2. If Sections 301-310 are used, an investigation needs to be carried out by the USTR under Sections 302-303. Such investigation can be initiated by the USTR either after the filing of a petition by any interested person or at the initiative of the USTR him or herself.

3. If an interested person files a petition to request that action be taken under Section 301, the USTR has to first review the allegations in the petition. Not later than 45 days after receipt of the petition, the USTR has to determine whether to initiate an investigation. If the USTR makes an affirmative determination, he or she must initiate an investigation.

4. On the date an investigation is initiated – or within maximum 90 days thereafter -- the USTR also has to request consultations with the other WTO Member concerned under DSU procedures (Section 303(a)(1)). If no mutually acceptable solution is reached before the 60 day consultation period provided in the DSU, the USTR has to "promptly request proceedings on the matter under the formal dispute settlement procedures provided" in the DSU (Section 303(a)(2)). The US is thus obliged to initiate consultations and, as the case may be, panel proceedings, before concluding its investigation. At the same time, the USTR is free to terminate an investigation at any time, including before the initiation of panel proceedings.

B. "DETERMINATION" ON DENIAL OF US RIGHTS UNDER SECTION 304

5. Section 304 then mandates the USTR to "determine whether the rights to which the United States is entitled under [the WTO Agreement] are being denied". The USTR has to do this "[o]n the basis of the investigation initiated under section 302 and the consultations (and the proceedings, if applicable) under section 303".

6. This determination under Section 304 has to be made within the following timeframe: "the earlier of (i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or (ii) the date that is 18 months after the date on which the investigation is initiated".

7. Section 304 further provides that "if the determination made ... is affirmative, [the Trade Representative shall] determine what action, if any, the Trade Representative should take under subsection (a) or (b) of section 301".

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[730] This overview is of a non-binding nature and does not have the status of a factual finding by this Panel. It was prepared following consultations with the parties as part of the descriptive part of this Report.

8. Section 301(a) – entitled "Mandatory action" and the relevant provision in respect of determinations under the WTO Agreement – provides that "[i]f the United States Trade Representative determines under section 304(a)(1) that ... the rights of the United States under any trade agreement are being denied ... the Trade Representative shall take action authorized in section 301(c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights".

9. Section 304(c) mandates the USTR to "publish in the Federal Register any determination made under section 304(a)(1), together with a description of the facts on which such determination is based".

C. "CONSIDERATION" ON IMPLEMENTATION UNDER SECTION 306

10. As noted above, following the investigation under Section 302, the related request for WTO consultations and, as the case may be, the completion of panel or Appellate Body proceedings and an affirmative determination under Section 304, Section 304(a)(1) requires the USTR to determine what action, if any, to take under Section 301.

11. Section 301(c) defines the scope of the USTR's authority, i.e. the actions he or she can take, under Section 301. Section 301(a)(2) provides for certain exceptions where the USTR "is not required to take action under section 301(a)(1)". One of these exceptions is provided for cases where the USTR finds that "the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement". In practice, the USTR has interpreted this exception to include situations where the WTO Member concerned expresses the intention -- within 30 days after the date of adoption of the panel or Appellate Body report, pursuant to Article 21.3 of the DSU -- to comply with the recommendations and rulings of the DSB.

12. Nevertheless, in such cases were no action is taken -- because a measure is undertaken or an agreement is entered into to provide a satisfactory resolution -- the USTR is obliged, under Section 306(a) to

> "monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution of a matter subject to investigation under this subchapter or subject to dispute settlement proceedings to enforce the rights of the United States under a trade agreement providing for such proceedings".

13. If the measure – including a statement by the WTO Member concerned that it will comply – or agreement concerns the implementation of DSB recommendations *and* the USTR "considers that the foreign country has failed to implement it", the USTR shall determine what further action he or she shall take under Section 301 "no later than 30 days after the expiration of the reasonable period of time provided for such implementation" in Article 21 of the DSU (Section 306 (b)). In other words, the USTR's obligation to monitor a Member's intention to comply with DSB recommendations allows him or her to await the lapse of the reasonable period of time granted to the Member concerned to implement the panel or Appellate Body report.

14. Since Section 306(b)(1) provides that any determination under Section 306(b) is to be treated as a determination made under Section 304(a)(1), the effect of a Section 306 determination is identical to that of Section 304 determinations in terms of the action the USTR

has to take – or is allowed not to take – under Section 301. As a result, the USTR also has to publish any Section 306 determination in the Federal Register, together with a description of the facts on which such determination is based pursuant to Section 304(c).

D. "DETERMINATION" ON ACTION TO TAKE UNDER SECTION 306 AND IMPLEMENTATION OF ACTION UNDER SECTION 305

15. As noted earlier, in case the USTR considers under Section 306(b) that implementation failed, he or she has to determine what further action to take under Section 301(a). He or she has to do so no later than *30 days* after the expiration of the reasonable period of time. Section 301(a)(2) provides for exceptions where the USTR is not required to take action.

16. In case the USTR decides to take action under Section 301, Section 305(a)(1) states:

> "Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 304(a)(1)(B) to take under section 301, subject to the specific direction, if any, of the President regarding any such action, by no later than the date that is 30 days after the date on which such determination is made".

Unless exceptions apply, a determination of action made within 30 days after the expiry of the reasonable period of time would thus be implemented no later than *60 days* after the expiration of the reasonable period of time.

17. Section 305(a)(2)(A), in turn, provides for certain exceptions to this 60 day rule. The exception most relevant to this case is contained in Section 305(a)(2)(A)(ii):

> "the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 301 ... if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action".