

**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.

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. Dominican 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 ISSUE¹

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

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

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

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.

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

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.

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.

⁶²⁹ See paras. 4.196-4.214, 4.233-4.244, 4.250-4.263 and 4.295-4.299 of 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

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.

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.

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 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

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.*

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)" (*Eletronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62).

⁶³⁶ See footnote 657 and para. 7.146 below.

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

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:
 - (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

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 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

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 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.

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 Agreement⁶⁴⁰ 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 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

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".

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.

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 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.

⁶⁴² Similarly, the Appellate Body in *US – Import Prohibition of Certain 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.

- (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 ceilings⁶⁴⁵ or maximum time-limits that are, nonetheless, indicative only,⁶⁴⁶ DSU proceedings – from the request for consultations to the adoption of findings by the DSB⁶⁴⁷ – 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 –

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 – 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).

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 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

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.

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.

(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).

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.

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

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.

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 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).

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.

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

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 prejudice 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.

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

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

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

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

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.

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

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.

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 denial of US rights ... on the panel or Appellate Body findings adopted by the DSB".⁶⁸² This

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)".

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

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.

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

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 present⁶⁸⁹ 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.

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

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.

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 world⁶⁹²

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.

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

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 Government⁷⁰⁰, 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. *Ipsa 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.

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 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.

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.

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

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.

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

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.

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 fulfilled. Following this line of reasoning, pending Article 21.5, Article 22 cannot be invoked.⁷⁰⁹

⁷⁰⁸ See para. 7.151 of this Report.

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

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 304⁷¹⁰ – 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 above⁷¹¹, 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 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

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.

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

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.

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).

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

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

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.

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