

WORLD TRADE ORGANIZATION

Dispute Settlement Reports

1999

Volume II

Pages 519-947



## **THE WTO DISPUTE SETTLEMENT REPORTS**

The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish. Starting with 1999, the first volume of each year contains a cumulative index of published disputes.

*This volume may be cited as DSR 1999:II*



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**UNITED STATES - ANTI-DUMPING DUTY ON DYNAMIC  
RANDOM ACCESS MEMORY SEMICONDUCTORS  
(DRAMS) OF ONE MEGABIT OR ABOVE FROM KOREA**

**Report of the Panel**

WT/DS99/R

*Adopted by the Dispute Settlement Body  
on 19 March 1999*

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## I. INTRODUCTION

### A. Background

1.1 On 14 August 1997, Korea requested consultations with the United States regarding "the failure of the United States to revoke the anti-dumping duty order on *DRAMs from Korea*" (WT/DS99/1). Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU), Article XXIII:1 of the General Agreement and Article 17.3 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the AD Agreement).

1.2 Pursuant to this request, Korea consulted with the United States in Geneva on 9 October 1997. No mutually satisfactory solution was reached.

1.3 On 6 November 1997, Korea requested the establishment of a panel with the standard terms of reference provided by Article 7 of the DSU (WT/DS99/2). Korea made this request pursuant to Article 6 of the DSU, Article XXIII:2 of the General Agreement and Article 17.5 of the AD Agreement.

### B. Establishment and Composition of the Panel

1.4 At its meeting on 16 January 1998, the Dispute Settlement Body (the DSB) established a panel pursuant to Korea's request (WT/DS99/3). The Panel's terms of reference are:

To examine, in the light of the relevant provisions of the covered agreements cited by Korea in document WT/DS99/2 the matter referred to the DSB by Korea 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. (WT/DS/99/3.)

1.5 Pursuant to a request by Korea, and as provided in paragraph 7 of Article 8 of the DSU, on 19 March 1998, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Crawford Falconer  
Members: Mr. Meinhard Hilf  
Ms. Marta Lemme

### C. *Panel Proceedings*

1.6 The Panel met with the Parties on 18/19 June 1998 and on 21/22 July 1998.

1.7 On 18 September 1998, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months of the composition and establishment of the terms of reference of the Panel. The reasons for the delay are set out in WT/DS99/4.

1.8 The Panel submitted its interim report to the parties on 23 October 1998. On 6 November 1998 both parties submitted written requests for the Panel to review precise aspects of the interim report, no further meeting with the Panel was requested. The Panel submitted its final report to the parties on 4 December 1998.

## II. FACTUAL ASPECTS

### A. *The Original Anti-Dumping Duty Investigation*

2.1 On 22 April 1992, Micron Technologies, Inc. ("Micron")<sup>1</sup> filed an anti-dumping duty petition with the International Trade Commission ("ITC") and the Department of Commerce ("DOC") against imports of DRAMs of one megabit or above, whether assembled or unassembled, from the Republic of Korea.

2.2 On 10 May 1993 pursuant to an investigation, the DOC issued an Anti-Dumping Duty Order and Amended Final Determination for *DRAMs from Korea*.<sup>2</sup> The notice corrected certain clerical errors and found anti-dumping margins of 0.82 percent for Samsung Electronics Co., Ltd ("Samsung"), 4.97 percent for LG Semicon Co., Ltd ("LG Semicon"), 11.16 percent for Hyundai Electronics Co., Ltd (Hyundai) and 3.85 percent for all others. The parties appealed the DOC's Final Determination to the U.S. Court of International Trade, which remanded the case to the DOC to correct certain errors. In its 24 August 1995 Redetermination on Remand, the DOC found corrected dumping margins of 0.22 percent for Samsung (*de minimis*), 4.28 percent for LG Semicon, 5.15 percent for Hyundai and 4.55 percent for all others.

### B. *The First Administrative Review*

2.3 The DOC initiated the first annual review of *DRAMs from Korea* on 15 June 1994 and investigated whether the Korean companies made sales of

<sup>1</sup> Micron later changed its name to Micron Technology, Inc.

<sup>2</sup> 58 Fed. Reg. 27520 (10 May 1993)

DRAMs less than normal value, (i.e. dumped) during the period of review. In its 6 May 1996 Final Results, the DOC found that LG Semicon and Hyundai had not dumped during the period of review.<sup>3</sup>

*C. The Second Administrative Review*

2.4 The DOC initiated the Second Administrative Review on 15 June 1995<sup>4</sup> and then investigated whether Hyundai and LG Semicon made sales of DRAMs less than normal value during the period of review. The DOC published its Final Results on 7 January 1997, and found that Hyundai and LG Semicon had not dumped during the period of review.<sup>5</sup>

*D. The Third Administrative Review*

2.5 On 8 May 1996, the DOC published a Notice of Opportunity to Request Administrative Review for the period of 1 May 1995 to 30 April 1996.<sup>6</sup> On 29 and 31 May 1996, LG Semicon and Hyundai, respectively, asked the DOC to conduct an administrative review and to revoke the anti-dumping duty order. On 25 June 1996, the DOC initiated the Third Annual Review of *DRAMs from Korea*, covering the period of 1 May 1995 to 30 April 1996. At the same time the DOC initiated a revocation review pursuant to a request from the respondents under section 353.25(a)(2) of the DOC regulations to revoke the *DRAMs from Korea* order in part.<sup>7</sup>

2.6 On 24 July 1997, the DOC issued its Final Results and Determination Not to Revoke Order in Part ("*Final Results Third Review*").<sup>8</sup> The DOC found that Hyundai and LG Semicon had not dumped during the period of review.

*E. The US Anti-dumping Legislation and Regulation Regarding Revocation*

2.7 The relevant US legislation concerning revocation is set forth in Section 751(d) of the Tariff Act of 1930, as amended, which reads :

The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order or finding, or terminate a suspended investigation, after review under subsection (a) or (b) of this section. The administering authority shall not revoke, in whole or in part, a countervailing duty order or terminate a suspended investigation on the basis of any export taxes, duties, or other charges levied on the export of the subject

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<sup>3</sup> 61 Fed. Reg. 20216 (6 May 1996)

<sup>4</sup> 60 Fed. Reg. 31447 (15 June 1995)

<sup>5</sup> 62 Fed. Reg. 965 (7 January 1997)

<sup>6</sup> 61 Fed. Reg. 20791 (8 May 1996)

<sup>7</sup> 61 Fed. Reg. 32771 (25 June 1996)

<sup>8</sup> 62 Fed. Reg. 39809 (24 July 1997)

merchandise to the United States which are specifically intended to offset the countervailable subsidy received.

2.8 The relevant DOC regulations concerning revocation are set forth in the DOC's Regulations, Section 353.25(a)(2):

The Secretary [of Commerce] may revoke an order in part if the Secretary concludes that:

- (i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;
- (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and
- (iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

### III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

#### A. *Korea*

3.1 **Korea** requests the Panel to find that: the United States is not in conformity with its obligations under Articles I, VI and X of the General Agreement of Tariffs and Trade 1994 ("GATT 1994") and Articles 2, 3, 5.8, 6, 11.1 and 11.2 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement"). Korea also requests the Panel to suggest that the United States take the following actions: (i) revoke the anti-dumping duty order on *DRAMs from Korea*; (ii) alter the *de minimis* standard for reviews of anti-dumping duty orders; and (iii) eliminate the "no likelihood/not likely" criterion provided for in section 353.25(a)(2)(ii) of the DOC regulations, and otherwise conform its revocation scheme to the requirements of Article 11 of the AD Agreement.

#### B. *United States*

3.2 The **United States** requests the Panel to find that:

- (a) Korea's claims under Articles 1, 2, 3 and 17 of the AD Agreement are inadmissible (with the exception of claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1);
- (b) Korea's claims concerning the 1993 final determinations by the DOC and the ITC on *DRAMs from Korea* are inadmissible;
- (c) The DOC's *Final Results Third Review* is not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;
- (d) The United States anti-dumping statute and regulations are not inconsistent with Article 11 of the AD Agreement or any other provision of the AD Agreement or GATT 1994;
- (e) The above measures do not nullify or impair benefits accruing to Korea under the AD Agreement or GATT 1994.

#### IV. MAIN ARGUMENTS OF THE PARTIES

##### A. *Preliminary Objections*

4.1 The **United States** raises preliminary objections concerning the admissibility of certain claims made by Korea.

4.2 **Korea** asserts that all claims are properly before the Panel, and that all of the United States' preliminary objections should be rejected.

##### 1. *Admissibility of Korea's Claims Concerning Articles 1, 2, 3, and 17 of the AD Agreement*

###### (a) Objection of the United States

4.3 The following are the arguments of the **United States** in support of its preliminary objection:

4.4 The United States argues that the Panel must reject as inadmissible Korea's claims concerning Articles 1, 2, 3, and 17 of the AD Agreement. In its request for consultations, Korea did not identify these provisions. Therefore, claims based on these provisions did not constitute part of the "matter" for which consultations were requested under Article 17.3 of the AD Agreement. As a result, the claims based on these provisions also did not constitute part of the "matter" that, under Article 17.4 of the AD Agreement, Korea was entitled to refer to the Dispute Settlement Body ("DSB").

4.5 Article 17.3 of the AD Agreement permits a Member to request consultations concerning a "matter." Article 17.4 of the AD Agreement further permits a Member to refer "the matter" to the DSB - that is, to request the establishment of a panel. Article 17.5 directs the DSB to establish a panel to examine "the matter." In light of the language used, it is clear that the "matter" for which consultations is requested under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under

Article 17.5, is the *same* matter. These provisions constitute special or additional rules and procedures. As such, under Article 1.2 of the DSU, they prevail over any inconsistent provisions in the DSU.<sup>9</sup>

4.6 A "matter" as used in these provisions consists of the specific claims identified by a Member.<sup>10</sup> A "claim," in turn, consists of an identification of the provision of the specific agreement alleged to have been violated.<sup>11</sup> Accordingly, because the "matter" to be examined by a panel must be the same "matter" for which consultations were requested, a panel may only consider "claims" that were identified in the request for consultations by means of an identification of the provisions of the specific agreements alleged to have been violated.

4.7 In its request for consultations, Korea identified Article VI of GATT 1994 and Articles 6 and 11 of the AD Agreement. Korea did not identify Articles 1, 2, 3, or 17 of the AD Agreement. Therefore, claims based on these provisions did not, and could not, constitute part of the matter that Korea properly could refer to the DSB under Article 17.4, nor could claims based on these provisions properly constitute part of the matter to be examined by a panel under Article 17.5.<sup>12</sup>

#### (b) Response by Korea

4.8 In its letter dated 17 June 1998, **Korea** made the following arguments:

4.9 The U.S. objection rests, in large part, on a tortured discussion of the relationship between the terms "matter" and "claim." The United States correctly notes that a "matter" is composed of the "claim(s)" that make up that matter and that each claim consists of a challenged measure and the WTO provision the complainant claims the measure violates. But this explication, far from supporting the U.S. objection, confirms Korea's position. Between a matter and the claims that compose it, the matter is the more general. Thus, a requirement that a matter be identified is far *less* demanding than a requirement that the claims that make it up be identified. The United States attempts to obscure this truth with a circuitous ramble suggesting that since a matter is composed of claims, any requirement to identify the matter can be met only by identifying each claim it subsumes. But, had

<sup>9</sup> Appendix 2 to the DSU expressly identifies Articles 17.4 and 17.5 as special or additional rules. Because Article 17.3 is incorporated by reference into Article 17.4, Article 17.3 also must prevail over any inconsistent provisions in the DSU.

<sup>10</sup> *Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, Report of the Appellate Body adopted 20 March 1997, DSR 1997:I, 167, at 186 (hereinafter "*Desiccated Coconut*").

<sup>11</sup> *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 25 September 1997, para. 141.

<sup>12</sup> In this regard, it is irrelevant that Korea did not cite Article 17.4 in its request for the establishment of a panel (WT/DS99/2). A complainant cannot circumvent the requirements of the AD Agreement and the DSU by omitting in its request for a panel the provision that imposes the requirements.

Moreover, putting aside the special or additional rules of the AD Agreement, Korea's claim concerning Article 1 of the AD Agreement is inadmissible because Korea's request for the establishment of a panel did not include a claim under Article 1 (WT/DS99/2). Thus, this claim is not within the Panel's terms of reference and must be rejected.

the negotiators intended to require a complainant to identify all claims composing its as-yet undrafted complaint in its consultation request, Articles 17.3 and 17.4 would refer to "claims" not "matters." The Panel should reject this baseless attempt to equate the specific with the general, contrary to the obvious intent of the negotiators as shown in the text of the relevant provisions.

4.10 The United States cited the Appellate Body report in *Brazil-Measures Affecting Dessicated Coconut (Dessicated Coconut)* to support its objection. However, the passage from that report quoted below confirms that the panel request, not the consultation request, defines the terms of reference:

A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.<sup>13</sup>

4.11 Korea agrees with the approach taken in previous adopted reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference.

4.12 The Panel should reject the attempt by the United States to exclude Korea's claims concerning Articles 2, 3 and 17 of the AD Agreement on the ground that Korea did not specifically identify these articles in its request for consultations. The Appellate Body and WTO panels uniformly have rejected similar attempts, declaring that the legally relevant question is whether a claim was raised in the request for establishment of a panel. That is because the panel request is the document that generally sets a panel's terms of reference. These holdings are based on the language of the Dispute Settlement Understanding (the DSU)-a request for consultations must contain merely "an indication of the legal basis for the complaint," but a panel request must provide a "summary of the legal basis of the complaint." The ordinary meaning of these terms is confirmed by the context, object and purpose of the consultation request and the panel request. As the United States itself argued in *Japan-Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*<sup>14</sup>, a Member cannot know before consultations, when it makes its request, precisely what the scope of a Respondent's possible violations of WTO measures might be.<sup>15</sup> The consultative process, thus, serves two functions: it allows the complainant to

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<sup>13</sup> WT/DS22/AB/R (21 February 1997) DSR 1997:I, 167, at 186.

<sup>14</sup> WT/DS44/R (22 April 1998), para. 3.14.

<sup>15</sup> Korea notes, however, that in this case, it raised Articles 2 and 3 of the AD Agreement during the WTO consultations with the United States. See, e.g., Questions Submitted by the Republic of Korea to the United States, Questions C-9, C-9-1 and D-2. In regard to the other articles cited by the United States, the standards of Article 17 apply to this dispute as a matter of course and although Korea mentioned Article 1 in its First Submission, it advanced no argument based on that Article.

develop a better understanding of the precise nature of the possible violations while, at the same time, it allows the Respondent to develop a better understanding of the complaint and, of course, it provides an opportunity to settle the dispute. Based on the consultations, a complainant must set out the legal basis of its complaint with precision in its panel request. That is what Korea did, and so the Panel should dismiss the US preliminary objection.

(c) Clarification by the United States

4.13 Pursuant to written questions posed by the Panel,<sup>16</sup> the **United States** clarified its preliminary objections concerning the admissibility of Korea's claims under Articles 1, 2, 3, and 17 of the AD Agreement.

4.14 The United States is of the view that a claim that was actually raised during consultations may be referred to the DSB. This view was recently confirmed in the *Guatemala Cement* case, in which the panel concluded that "the 'matter' consulted about under Article 17.3, the 'matter' referred to the DSB under Article 17.4, and the 'matter' to be examined by a panel under Article 17.5, is in each instance the same matter ..."<sup>17</sup>

4.15 It is the experience of the United States that the investigating authorities of the various WTO Members adhere to the transparency requirements of the AD Agreement with varying degrees of rigor. In the case of those authorities that adhere rigorously to these requirements, such as the US authorities, it would not be unreasonable to expect that a complaining Member would be able to identify its claims with precision in its written request for consultations. However, in the case of authorities that adhere with less rigor to the transparency requirements of the AD Agreement, a Member requesting consultations may not be in a position, as a practical matter, to identify with precision its claims in its written request for consultations. It may be that only during the course of the consultations will the complaining Member be able to identify with precision the alleged violations committed by the investigating authorities in question. Therefore, a Member should be permitted to refer a claim to a panel if it was actually raised during consultations, even though it may not have been included in the written request for consultations.

4.16 The United States is aware that an identification of the claims on which the parties actually consulted may raise an issue of fact. Normally, there should be documents from the consultations (typically in the form of written questions

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<sup>16</sup> The Panel recalls that the questions were: "The United States' preliminary objections state that certain provisions were not identified in Korea's request for consultations. (a) Could the United States please state whether it considers that a claim which was actually raised during consultations, but was not identified in the request for consultations, is part of a matter which may be referred to the DSB? (b) Could the United States please state whether Korea and the United States in fact consulted with respect to Korea's claims under Articles 1, 2, 3 and 17 of the ADP Agreement?"

<sup>17</sup> *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, Report of the Panel issued 19 June 1998, para. 7.15.

presented by the complaining Member to the responding Member) that identify the claims actually raised. In the absence of such documentation, a panel should rely on the written request for consultations itself.

4.17 The United States and Korea consulted with respect to claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1. Although, Korea did not identify Article 5.8 by name, in consultations, Korea did refer to "the 2 percent *de minimis* margin threshold of the AD Agreement."

4.18 The United States and Korea did *not* consult with respect to claims under Article 1 or Article 17. Moreover, as previously noted by the United States, Article 1 was not included in Korea's request for the establishment of a panel.

(d) Clarification by Korea:

4.19 Pursuant to a question posed by the Panel,<sup>18</sup> **Korea** states that:

4.20 Korea and the United States consulted regarding Articles 2 and 3 of the AD Agreement. Korea intended to advance no arguments under Article 1. Article 17.6 is a procedural provision that applies to this Panel proceeding as a matter of course.

4.21 **Korea** further clarified its position in response to another question by the Panel:<sup>19</sup>

4.22 Korea does not take the position that the United States "violated" Article 17.6 in the same sense that it violated Articles 2, 5.8, 6, 11.1 and 11.2 of the Anti-Dumping Agreement and Articles I, VI and X of the General Agreement.

2. *Admissibility of Claims Regarding the Scope of the US Anti-Dumping Order*

(a) Objection of the United States

4.23 The following are the arguments of the **United States** in support of its preliminary objection:

4.24 The Panel must dismiss Korea's claim because the original anti-dumping investigation on *DRAMs from Korea* simply is not subject to the AD Agreement. Article 18.3 of the AD Agreement provides:

Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made

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<sup>18</sup> The Panel recalls that the question was: "Could Korea please state whether Korea and the United States in fact consulted with respect to Korea's claims under Articles 1, 2, 3 and 17 of the ADP Agreement?"

<sup>19</sup> The Panel recalls that the question was: "Korea argues that the United States has violated certain substantive obligations under Article 17.6 of the ADP Agreement. Could Korea please explain the nature of that violation in concrete terms?"

on or after the date of entry into force for a Member of the WTO Agreement.

4.25 The application ("petition" in US terminology) for anti-dumping duties in the instant case was made on 22 April 1992, and resulted in a final determination by the DOC on 23 March 1993. As noted previously, the DOC issued an anti-dumping order (definitive duties) on 10 May 1993. Thus, the investigation began and finished well before 1 January 1995, the date on which the WTO Agreement entered into force for the United States. Therefore, determinations made by US authorities in the course of that investigation are not subject to the provisions of the AD Agreement and may not be reviewed by this Panel.

4.26 The Appellate Body reached a similar conclusion in the *Desiccated Coconut* case. That case dealt with the transition provision for countervailing duties contained in Article 32.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), a provision that the Appellate Body found to be "identical" to Article 18.3 of the AD Agreement.<sup>20</sup> The Appellate Body described Article 32.3 (and, thus, Article 18.3) as follows:

The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. Article 32.3 has limited application only in specific circumstances where a countervailing duty proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*. This does not mean that the *WTO Agreement* does not apply as of 1 January 1995 to all other acts, facts and situations which come within the provisions of the *SCM Agreement* and Article VI of the GATT 1994. However, the Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a line had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect.<sup>21</sup>

4.27 By challenging a determination made before the WTO Agreement came into effect, Korea is attempting to undo the sharp line drawn by the drafters and

<sup>20</sup> WT/DS/22/AB/R, Report of the Appellate Body adopted 20 March 1997, DSR 1997:I, 267 at 182 n. 23.

<sup>21</sup> *Ibid.* at 19 (footnotes omitted).

generate the very uncertainty, unpredictability, and unfairness that the drafters sought to avoid. The Panel should reject this attempt by dismissing Korea's claim regarding the determination made by the DOC and the ITC during the original anti-dumping investigation.

(b) Response by Korea

4.28 In a letter to the Panel dated 17 June 1998, **Korea** made the following arguments in response to the US preliminary objection:

4.29 The Panel has the authority and is obliged to examine Korea's claims regarding the scope of the US anti-dumping order because: (i) not reviewing the claim would allow the United States to act inconsistently with the AD Agreement; and (ii) reviewing the claim would be consistent with the Vienna Convention on the Law of Treaties ("*Vienna Convention*").

4.30 When the WTO Agreement entered into force for the United States, the United States assumed the obligation not to act after that date in a manner inconsistent with the AD Agreement regardless of when the application for anti-dumping duties was made. The United States' continued imposition of the flawed scope decision made in the original investigation and each instance of the United States' bringing within the proceeding a higher density chip constitute action inconsistent with the AD Agreement. According to Article 18.3 of the AD Agreement, the provisions of the AD Agreement apply to reviews of existing measures made on or after the date of entry into force of the WTO Agreements. The Third Review in this proceeding was initiated on 8 May 1996, thus Korea's claim regarding the continuing flawed scope determination would be properly before the Panel.

4.31 The application of the AD Agreement in this case would not constitute retroactive application of the AD Agreement. According to Article 28 of the *Vienna Convention*:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation *which ceased to exist* before the date of the entry into force of the treaty with respect to that party. (Emphasis added by Korea.)

4.32 The United States' continued imposition of the flawed scope decision has not "ceased to exist" and, thus, is subject to the AD Agreement. The United States' continued imposition of the flawed scope decision subject to the AD Agreement is an act occurring after 1 January 1995, as is each instance of the United States' bringing within the proceeding a higher density chip.

(c) Rebuttal arguments made by the United States

4.33 At the second meeting of the Panel, the **United States** made the following additional arguments:

4.34 Korea's claims under Articles 2 and 3 are vulnerable to attack on all fronts. In its first written submission, Korea complained about two, and only two, decisions by the United States. First, Korea alleged that the Commission, in its original investigation, failed to include DRAMs with densities of less than one megabit in its injury analysis. Second, Korea alleged that the DOC, by issuing an anti-dumping order that covered DRAMs of one megabit *or above*, improperly included products that were not in existence at the time of the original investigation. According to Korea's first submission, the scope of the order "includes products such as 64 megabit DRAMs that were not even shipped to the United States until 1996 ..." These statements and others in Korea's first submission establish, without doubt, that Korea seeks to overturn determinations made before the WTO entered into force. Such challenges are prohibited by the express terms of Article 18.3 of the AD Agreement. If Korea or the respondents thought these determinations were wrong, they should have challenged them back in 1992-93. Now is too late and beyond the authority of this Panel to entertain.

4.35 In its rebuttal submission, Korea attempts to make it appear that it is challenging determinations made after 1 January 1995, when the WTO entered into force for the United States. However, Korea never identifies which determinations it is challenging or the basis for its challenge. Is it challenging the questionnaire that the DOC sent out in the third administrative review of the anti-dumping order on *DRAMs from Korea*? If it is, it has provided no evidence for its claim that respondents reported data for an allegedly new product, 64 megabit ("Meg") DRAM, or that the DOC calculated a dumping margin based on that data. Korea also seems to believe 64 Meg DRAMs were not "in existence" when the original investigation was conducted; were 16 Meg in existence when the original investigation was conducted? And how does Korea define "in existence" - must the DRAM be produced or shipped, and shipped on a commercial basis or is a trial basis good enough? These and other questions are never addressed by Korea and the Panel has no way of answering them largely because the evidence that was before the investigating authorities when they made their original determinations on scope and like product is not before this Panel.

4.36 In response to a question from the Panel,<sup>22</sup> the **United States** made the following clarification concerning the application of Article 18.3 of the AD Agreement in the context of administrative reviews:

4.37 The United States considers reviews under section 751(a) of the Tariff Act of 1930, as amended (the "Act"), and section 353.22 of the regulations promulgated by the DOC (commonly referred to as "administrative reviews") to constitute "reviews of existing measures" within the meaning of Article 18.3 of the Agreement on Implementation of Article VI of the General Agreement on

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<sup>22</sup> The Panel recalls that the question was: "Does the United States consider that 'administrative reviews' constitute 'reviews of existing measures' within the meaning of Article 18.3 ADP. Why or why not? Please address the relevance, if any, of footnote 21 and Article 18.3.1 to your answer."

Tariffs and Trade 1994 (the "AD Agreement"). Administrative reviews contain elements of both an Article 9.3 assessment proceeding (because they determine, *inter alia*, final liability for duties) and an Article 11.2 review (because they alter the cash deposit rate and may lead to revocation). Accordingly, the relevance of Article 18.3.1 to this case is unclear.

4.38 In the instant case, the third administrative review of the anti-dumping duty order on *DRAMs from Korea* (for purposes of determining the amount of duties to be assessed on prior entries, the estimated cash deposit to be required on future entries, and whether the order should be revoked pursuant to section 353.25(a)) is subject to the AD Agreement by virtue of Article 18.3. Korea's scope challenge, however, is not directed at the administrative review but, rather, at the original investigation. Indeed, Korea is challenging not a new decision on scope in the administrative review, but an immutable aspect of the order which was adopted before the WTO Agreement took effect for the United States.

4.39 Finally, the United States wishes to emphasize that Article 18.3 is an entry-into-force provision. It is not intended to override the language of the other 17 articles by making all provisions that apply to investigations applicable to reviews. Thus, Article 18.3 does not preempt the AD Agreement's distinction between investigations and other administrative proceedings.

3. *Admissibility of Claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement*

(a) *Objection of the United States*

4.40 The **United States** in its oral statement at the second meeting of the Panel with the Parties raised a preliminary objection questioning the admissibility of Korea's claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement. The following are the US arguments in support of its preliminary objection:

4.41 In its 10 July 1998 rebuttal submission, Korea raises several new claims to which the United States objects. Korea's claims regarding Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement are entirely new. These new claims (i) were not consulted on, (ii) were not included in Korea's panel request, and (iii) heretofore, have not made an appearance in this dispute settlement proceeding. The dispute settlement process under the AD Agreement and the DSU cannot (and does not) condone these types of actions by Korea. It is settled law under the Appellate Body decisions in *Bananas III* and the *India Patents* decisions that claims not raised in the request for the establishment of a panel are not within the Panel's terms of reference and must be dismissed.

## (b) Response by Korea

4.42 In answer to a question by the Panel<sup>23</sup> and during the second meeting of the Panel with the Parties, **Korea** made the following arguments in response to the US preliminary objection:

4.43 Korea is not making a separate claim because a Member automatically violates Article 18.4 whenever a Member violates another provision of the AD Agreement. Korea takes the same position with respect to claims under Article XVI.4 of the Marrakesh Agreement Establishing the World Trade Organization.<sup>24</sup>

*B. Standard of Review**(a) Submission by the United States*

4.44 The **United States** submits that Korea seeks to retry the factual issues that were before the DOC in the underlying administrative proceeding. The following are the arguments of the United States in support of this submission:

4.45 Panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of factual issues. In describing the role of panels when reviewing factual issues, the panel in the *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korean resins)* case stated, in part:

The Panel . . . should [not] substitute its own judgment for that of the KTC as to the relative weight to be accorded to the facts before the KTC. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the KTC to determine whether there was material injury to the industry in Korea but to review the determination as made by the KTC for consistency with the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts.<sup>25</sup>

4.46 The standard of review to be applied by this Panel is set forth in Article 17.6 of the AD Agreement. In sub-paragraph "(i)," panels are instructed not to substitute their judgment for that of the national investigating authorities:

<sup>23</sup> The Panel recall that the question was: "In response to a from the Panel, (Ex. ROK-84), Korea states that the US "has violated Article 18.4" AD Agreement . Is Korea raising a separate claim under Article 18.4? If so, please specify where this claim is identified in Korea's request for establishment (WT/DS99/2)."

<sup>24</sup> The Panel notes that Korea made this last statement orally during the second meeting of the Panel with the Parties.

<sup>25</sup> *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, BISD 40S/205, para. 227.

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned ...<sup>26</sup>

4.47 Moreover, when applying this standard, Article 17.5(ii) directs the Panel to limit its review to the facts that were before the DOC when it made its determination (*i.e.*, the evidence contained in the administrative record).

4.48 In reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, sub-paragraph "(ii)" of Article 17.6 states:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>27</sup>

4.49 Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many). If it does, then this Panel must uphold the determination.

4.50 The **United States**, in its oral presentation at the first meeting of the Panel with the Parties, further argued as follows:

4.51 Both Korea and the United States agree that the applicable standard of review in this dispute is Article 17.6 of the AD Agreement. This standard of review governs the Panel's review of determinations by administrative agencies such as the DOC in this case. It relates to both *factual* establishment and evaluation of the facts of the matter, as well as *legal interpretation* of the AD Agreement.

(i) Article 17.6(i)

4.52 With respect to its assessment of *factual* matters before the administrative authorities, Article 17.6(i) provides that the Panel shall do the following:

First: "determine whether the authorities' establishment of the facts was proper"

This means that the Panel should determine whether the authorities followed procedures for collecting, evaluating, and processing

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<sup>26</sup> AD Agreement, art. 17.6(i).

<sup>27</sup> *Ibid.*, art. 17.6(ii).

facts during their investigation which were consistent with the requirements of the AD Agreement.

Second: determine whether the authorities' "evaluation of those facts was unbiased and objective"

This provision means that the Panel must evaluate whether (a) the authorities examined all of the relevant facts before it, including facts which might detract from an affirmative determination, (b) whether adequate explanation has been provided of how the determinations made by the authorities are supported by facts in the record, and (c) whether the authorities based their determinations on an examination of factors required by the AD Agreement.

4.53 In making this evaluation, Article 17.6(i) directs the Panel not to substitute its judgement of the facts for those of the authorities. There may be situations where the facts in a hotly-contested case such as the one presented in this dispute could lead to more than one conclusion. Thus, there may well be some facts lending support to Korea's arguments that dumping is not likely. However, there are also many facts - indeed it is argued, the bulk of the evidence in this case - supporting the conclusion that dumping is likely. The significance of Article 17.6(i) is that it prohibits the Panel from overturning the evaluation of the authorities as long as the "establishment of the facts was proper" and the "evaluation was unbiased and objective." Thus, if the process by which the domestic authorities established the facts is consistent with the AD Agreement, and the authorities assessed all of the evidence in the record, then the authorities' determination must be upheld by the Panel if it is supported by a factual basis in the record.

4.54 This interpretation of Article 17.6(i) is consistent with its text, as well as its object and purpose, as well as with decisions of numerous GATT 1947 panels.

(ii) Article 17.6(ii)

4.55 Another important aspect of the standard of review is Article 17.6(ii) which addresses procedures for assessing the interpretation of the relevant portions of the AD Agreement. The first sentence of Article 17.6(ii) directs the panel to interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law. In the context of practice developed by the Appellate Body and panels, such a direction has meant the application, *inter alia*, of the provisions of the *Vienna Convention*. In the typical case, a panel or the Appellate Body has used the *Vienna Convention* as a tool for determining a *single* meaning for a particular WTO text. However, Article 17.6(ii) reveals that the negotiators anticipated that it may well be possible for Members' authorities to interpret the text of provisions of the AD Agreement in more than one "permissible" way. In making the assessment whether there is more than one permissible way to interpret an AD text, the panel could make use of the *Vienna Convention* to determine whether an interpretation

of a particular authority - such as the United States in this dispute - is permissible. If the panel finds that the text is susceptible to more than one permissible meaning, then Article 17.6(ii) provides that "the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

4.56 Accordingly, Article 17.6(ii) is intended to provide a certain flexibility - where the language was undefined or otherwise ambiguous - for authorities to establish (or maintain) implementing procedures. This is particularly the case such as the instant dispute where the key terms are undefined, such as the terms "necessary" and "warranted" in Article 11.2.

4.57 The DOC's decision not to revoke the anti-dumping duty order on *DRAMs from Korea* rests upon a "permissible" interpretation of Article 11 of the AD Agreement that is based upon both the ordinary meaning of the terms of Article 11, as well as their context and the general object and purpose of the AD Agreement. Moreover, in considering whether the DOC's determination rests upon a "permissible" interpretation of the relevant WTO provisions, the Panel will discover that the agency assembled a voluminous record. In fact, the DOC compiled an extensive record. The agency then conducted a painstaking, fact-intensive review of that record, including all arguments presented by Hyundai and LG Semicon, before deciding not to revoke the anti-dumping order on *DRAMs from Korea*. Consistent with Article 17.6(i) of the AD Agreement, the facts of this case were properly established and reasonably supported the determination made by the DOC. Pursuant to Article 17.6(i), the only question is whether the DOC's establishment of the facts was "proper" and whether its "evaluation of those facts was unbiased and objective." If it was, then Article 17.6(i) of the AD Agreement requires the Panel to uphold this determination.

(b) *Rebuttal response by Korea*

4.58 **Korea** makes the following arguments in rebuttal to the United States submission on standard of review:

4.59 Unlike the other WTO agreements, the AD Agreement prescribes a standard of review. With regard to review of facts, there is no significant difference in the views of Korea and the United States regarding the appropriate standard of review. However, with regard to review of legal interpretations, the standard proposed by the United States—that the Panel must uphold US interpretations unless Korea proves that they are "forbidden"-finds no support in the text or interpretive assessments of Article 17.6(ii) of the AD Agreement.

- (i) In Reviewing Facts, the Panel Should Determine Whether a Reasonable, Unprejudiced Person Would Have Found, Based on the Evidence Before the DOC, That the Facts Reasonably Supported the Conclusions of the DOC.

4.60 The standard of review regarding assessment of facts is set out in Article 17.6(i) of the AD Agreement:

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

4.61 This standard was interpreted by the panel in the recent decision in *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico*.<sup>28</sup> There, at paragraphs 7.54 through 7.57, the Panel cited as sensible and consistent with the standard of review under Article 17.6(i) the approach spelled out by the Panel in *United States - Measures Affecting Softwood Lumber from Canada*.<sup>29</sup> As set forth by the *Guatemala - Cement* panel:

[W]e are to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation.<sup>30</sup>

4.62 There is no significant dispute between Korea and the United States regarding this standard, but there is total disagreement as to its application in this dispute. Korea establishes that the DOC based its determination not to revoke on unverified information and mere conjecture from the US petitioner, while failing to consider fairly and objectively verified and verifiable information submitted by the Korean Respondent companies. Korea is confident that the Panel will share its view that, given the evidence in the DOC's record, an unbiased and objective person would have concluded that, even assuming that DOC's criteria for revocation were consistent with the United States' WTO obligations, the Korean Respondent companies satisfied them. Korea does not accept that the DOC's revocation criteria are permissible under the WTO, but even assuming for the sake of argument that they are, the United States made a determination that is not supportable under the Article 17.6(i) standard of review.

<sup>28</sup> WT/DS60/R (dated 19 June 1998).

<sup>29</sup> BISD 40S/358, page 490, para. 335 (27 October 1993).

<sup>30</sup> WT/DS60/R at para. 7.57 (footnote omitted).

- (ii) In Reviewing Legal Interpretations, the Panel Should Follow the Interpretive Rules of the Vienna Convention; There is no Basis for virtually total deference to the DOC, as Argued by the United States.

4.63 The standard of review regarding legal interpretation is set out in Article 17.6(ii) of the AD Agreement:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

4.64 The United States, focusing on the second sentence of this provision, argues that the legal interpretation of the United States regarding Article 11 of the AD Agreement must be upheld unless it is "forbidden."

4.65 The United States ignores the first sentence of Article 17.6(ii), which mandates the Panel in the first instance to interpret Article 11 (and the other provisions of the AD Agreement at issue in this dispute) "in accordance with customary rules of interpretation of public international law" (*i.e.*, in accordance with Articles 31 and 32 of the *Vienna Convention*).

4.66 One of the world's leading GATT/WTO scholars, Professor John Jackson, has analyzed Article 17.6(ii) in depth.<sup>31</sup> He decisively rejects the extremely deferential standard of review advocated by the United States, based on a thorough review of Article 17, the *Vienna Convention* and the reasons cited in support of a deferential review standard. First, he establishes that the purpose of the *Vienna Convention* is to resolve ambiguities in the text of an agreement. Thus, after Article 31 (and, where appropriate, Article 32) is applied, there will be no lingering ambiguities. The second sentence of Article 17.6(ii) will rarely come into play because there usually will not be "more than one permissible interpretation" of Article 11 (or any other provision of the AD Agreement).

4.67 Second, Professor Jackson demolishes the intellectual underpinnings for application of a deferential standard of review. At pages 202 through 211 of his article, he critiques the applicability in the WTO context of the US court decision that is widely recognized as the model used by the US negotiators in proposing what became Article 17.6(ii)-*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>32</sup> Professor Jackson demonstrates that none of the three bases for deference to administrative agencies that may apply to domestic legal

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<sup>31</sup> See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996) (Ex. ROK-88).

<sup>32</sup> 467 US 837 (1984) (Ex. ROK-89).

proceedings is relevant in the context of WTO panel reviews. First, unlike domestic legal proceedings, in which an administrative agency has "expertise" regarding its particular regulatory area, no WTO Member has any greater expertise relative to other WTO Members regarding the interpretation and application of provisions of the WTO agreements. In Professor Jackson's words:

Countries party to an anti-dumping dispute are not delegates whose technical expertise specially qualifies them to make authoritative interpretive decisions. They are, rather, interested parties whose own (national) interests may not always sustain a necessary fidelity to the terms of international agreements.<sup>33</sup>

4.68 Next, Professor Jackson demonstrates that the so-called "democracy" rationale is inapplicable. (This is based on the principle that because federal judges in the United States are not elected, judicial deference to agency decisions, which flow from decisions taken by elected presidents and legislators, enhances the legitimacy of administrative decisionmaking.) National authorities are not accountable to the WTO Membership at large; indeed, WTO panels are the Members' delegates. Thus, the concept of deference to those accountable to the populace has no counterpart in the WTO context.

4.69 Finally, Professor Jackson dissects and rejects the "efficiency" rationale of *Chevron*-that a single interpretation by the agency charged to administer a law is preferable to the potential of multiple interpretations by different courts. At page 210 of his article he shows that, in the WTO context, deference to national authorities would lead to the very multiplicity of interpretations that the "efficiency" rationale was meant to prevent:

Whereas in the US administrative law setting there is typically little danger of multiple interpretations of the statutory language by several different agencies, in the GATT/WTO setting multiple interpretations of agreement provisions is precisely one of the problems that panel review is designed to ameliorate.<sup>34</sup>

4.70 This extensive analysis of Professor Jackson's article proves the intellectual deficiencies of the deferential standard of review advocated by the United States. Because the virtually total deference advocated by the United States, in addition to not being mandated by the text of Article 17.6(ii), is intellectually unsound, the Panel should reject it. The Panel should, as commanded by the first sentence of Article 17.6(ii), apply the interpretive rules of the *Vienna Convention* to the legal interpretations involved in this dispute. When the Panel does so, Korea is confident that it will agree with Korea that the United States has violated its obligations under Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement.

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<sup>33</sup> 90 AM. J. INT'L L. at 209.

<sup>34</sup> *Ibid.* at 210.

(c) *Rebuttal response by the United States*

4.71 The **United States** made the following arguments in its second oral statement before the Panel:

4.72 With one possible exception, there seems to be agreement between Korea and the United States over the standard of review to be applied by this Panel to factual issues. That exception concerns the panel's report in the *Guatemala Cement* case, which Korea quotes with approval in its rebuttal submission. At paragraph 57 (Findings) and elsewhere, the panel in the *Guatemala Cement* case articulates the standard as "whether an unbiased and objective investigating authority evaluating that evidence could *properly* have determined ..." (emphasis added by the United States). While the panel purports to be following the standard in *Lumber*, which it quotes in the preceding paragraph, we believe the panel inserts the word "*properly*" which suggests a higher degree of second-guessing on the part of the panel than either *Lumber* or Article 17.6(i) would seem to contemplate. The panel may have thought it was simply incorporating the word "proper" from the phrase "establishment of the facts was proper" in 17.6(i); however, if that was the intention, we respectfully submit that this was a mistake because that phrase deals with questions like whether the authorities improperly refused to allow certain information to be on the record.

4.73 With respect to the assessment of *factual* matters before an investigating authority, Article 17.6(i) directs panels to, first, "determine whether the authorities' establishment of the facts was proper." This means that the Panel should determine whether the DOC followed procedures for collecting, evaluating, and processing facts during its administrative proceeding which were consistent with the requirements of the AD Agreement. Second, panels must determine whether the authorities' "evaluation of those facts was unbiased and objective." This provision means that the Panel must evaluate whether (a) the DOC examined all of the relevant facts before it, including facts which might detract from the challenged determination, (b) whether adequate explanation has been provided of how the determination made by the DOC is supported by facts in the record, and (c) whether the DOC based its determination on an examination of factors required by the AD Agreement.

4.74 It must be emphasized, that Article 17.6(i) directs the Panel not to substitute its judgment of the facts for those of the investigating authority. There may be situations where the facts in a hotly contested case, such as the one here, could lead to more than one conclusion. Thus, there may be some facts lending support to Korea's arguments. However, there are also many facts - indeed, we would argue, the bulk of the evidence - which support the determination made by the DOC in this case. The significance of Article 17.6(i) is that it prohibits the Panel from overturning the evaluations of the DOC as long as the "establishment of the facts was proper" and the "evaluation was unbiased and objective." The United States respectfully submits that this interpretation of Article 17.6(i) is consistent with its text (as well as its object and purpose), and with the decisions of numerous GATT 1947 panels.

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C. *Burden of Proof*

(a) *Submission by the United States*

4.75 The **United States** submits that Korea has the burden of establishing a violation of a provision of a WTO agreement. The following are the arguments of the United States in support of this claim:

4.76 The fact that the complainant has the burden of proof has been made clear by the Appellate Body in the *Wool Shirts* case when it stated:

[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the Respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>35</sup>

4.77 This principle is not affected by Korea's incorrect assertion that anti-dumping measures constitute "derogations" from alleged free-trade principles of the WTO.<sup>36</sup> To the contrary, the right conferred by Article VI and the AD Agreement to impose anti-dumping measures forms part of the carefully constructed balance of rights and obligations that make up the WTO free-trade regime. To diminish this right, as suggested by Korea, by characterizing Article VI and the AD Agreement as "derogations" would constitute an impermissible failure to respect this balance.

4.78 Even if anti-dumping measures could be described as a derogation from, or an "exception" to, such alleged free-trade principles, this would not affect the assignment of the burden of producing evidence of a violation. As the Appellate Body stated in the *Hormones* case:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a prima facie case of inconsistency with a provision of the SPS Agreement before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the

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<sup>35</sup> WT/DS33/AB/R, DSR 1997:I, 323, at 335 (footnote omitted).

<sup>36</sup> The Panel notes that this argument by Korea is set out at paragraph 4.90 of this report.

ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.<sup>37</sup>

4.79 More generally, there simply is no justification for treating anti-dumping measures as derogations or exceptions. The case typically cited by proponents of this view is the *Pork from Canada* case, in which the panel characterized Article VI:3 of GATT 1947, which authorized the imposition of countervailing duties, "as an exception to basic principles of the General Agreement had to be interpreted narrowly and that it was up to the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI:3."<sup>38</sup> However, the panel's statement was conclusory in nature, and the panel cited no authority for the proposition that Article VI was an "exception." Moreover, this aspect of the panel's decision was *dicta*, because nothing in the remainder of the panel report indicates that the panel's characterization of Article VI:3 as an "exception" influenced the panel's analysis of the matter.

4.80 Perhaps more significantly, other than *Pork from Canada*, of the fourteen panel reports following the *Wine and Grape Products* case that addressed Article VI of GATT 1947 or the Tokyo Round agreements based on Article VI, none of the panels (1) found that Article VI was an exception, (2) imposed the "burden of proof" on the party imposing anti-dumping or countervailing duties, or (3) expressly indicated a requirement to interpret Article VI in a narrow manner. In all of these disputes, the complaining party complied with its burden of producing *prima facie* evidence of a violation, and the defending party responded with argument and other evidence.

4.81 Moreover, in the only case thus far to consider Article VI of GATT 1994, both the panel and the Appellate Body refrained from treating Article VI as an "exception." In the *Desiccated Coconut* case, the Philippines made the "Article VI-as-exception" argument in support of its claim that it could challenge Brazil's countervailing duty order as a violation of Article VI of GATT 1994.<sup>39</sup> Brazil, in turn, argued that Article VI could not be applied independently of the SCM Agreement, and that under the transition rules of the SCM Agreement, the Brazilian determination was not subject to the SCM Agreement. If the Philippines were correct that Article VI is an exception, then both the panel and the Appellate Body presumably would have focused on the violation of the "core rules" of GATT 1994 (Articles I and II) that allegedly occurred *after* 1 January 1995, and they would have placed the burden on Brazil to establish that its

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<sup>37</sup> *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104.

<sup>38</sup> *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R, Report of the Panel adopted 11 July 1991, BISD 38S/30, para. 4.4.

<sup>39</sup> WT/DS22R, Report of the Panel, as modified by the Appellate Body, adopted 20 March 1997, para. 73 and 85.

determination was not subject to Article VI. However, neither the panel nor the Appellate Body accepted the Philippines' "Article VI-as-exception" argument.<sup>40</sup>

4.82 Article VI and the AD Agreement do not constitute derogations or exceptions from the rest of the WTO framework. Even if they did, they would be subject to the same rules of interpretation as any other provision of the WTO agreements, and the burden of producing evidence of a violation still would rest with Korea as the complaining party.

(b) *Rebuttal response by Korea*

4.83 **Korea** makes the following arguments in rebuttal to the US position on burden of proof:

4.84 Korea's view of the burden of proof in this case is reasonable, balanced and accurate. It is firmly rooted in the decision of the Appellate Body in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.<sup>41</sup> First, Korea initially bears the burden of showing the US violations-it is for Korea "to submit a *prima facie* case of violation."<sup>42</sup> In response, the United States must rebut Korea's presentation-it is "for the United States to convince the Panel that, at the time of its determination it had respected" its WTO obligations.<sup>43</sup> (The United States has chosen not to directly counter Korea's Article 11 arguments.) Second, Korea need only demonstrate that the United States violated a specific provision. In doing so here, Korea need only present an interpretation of the specific provision, *e.g.*, Article 11, that shows the precise nature of the US violation. Contrary to the assertions of the United States, Korea is not obliged to set forth a "Treatise on the Law of" each of the provisions Korea has demonstrated that the United States has violated. In this case, neither Korea, nor the Panel, need to define precisely the location of the "line of violation" which the United States obviously has crossed. Rather, a demonstration that the United States has crossed that line is sufficient. If a prosecutor can prove that a defendant murdered the victim, does the defendant go free because the prosecutor cannot prove the precise moment in time that the defendant murdered the victim? Certainly not. The violation is established, and that is sufficient for a finding of guilt.

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<sup>40</sup> WT/DS22R, Report of the Panel, as modified by the Appellate Body, adopted 20 March 1997, para. 73 and 85.

<sup>41</sup> WT/DS33/AB/R (25 April 1997), pages 15-20.

<sup>42</sup> *Ibid.*, page 16 (quoting *United States - Measure Affecting Imports of Woolen Shirts and Blouses from India* (6 January 1997), WT/DS33/R, para. 6.7).

<sup>43</sup> *Ibid.*

D. *Claims under Article 11 of the AD Agreement and Article VI of GATT 1994*

I. *Limitations Imposed by Article VI of GATT 1994 and Article 11 of the AD Agreement*

(a) Claim raised by Korea

4.85 **Korea** claims that by virtue of Article VI of GATT 94 and Article 11 of the AD Agreement, a Member may impose a duty only to offset dumping that is causing injury and may maintain a duty only as long and as to the extent necessary to offset dumping that is causing injury. The following are Korea's arguments in support of this claim:

4.86 Article VI of the General Agreement sets forth the general restrictions and procedures regarding the ability of a Member to impose and maintain anti-dumping duties. Paragraph 1 of Article VI defines and condemns dumping that is causing or threatening material injury to a domestic industry. Paragraph 2 allows a Member to offset or prevent dumping that is causing or threatening injury by imposing a duty in the amount of the margin of dumping. And Paragraph 6(a) establishes the following limitation on a Member's ability to impose or maintain a duty, stressing that the prohibition of dumping is limited to dumping that is causing or threatening injury:

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

4.87 Article 11 of the AD Agreement further specifies requirements to achieve the goal of limiting the duration of anti-dumping duties.

4.88 According to Paragraph 1:

An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

4.89 To maintain an anti-dumping duty, a Member must establish three elements: that the responding company (i) is dumping and (ii) thereby causing (iii) injury to a domestic industry. A GATT panel reached a similar conclusion regarding Article 9 of the Tokyo Round Anti-Dumping Code, the predecessor of Article 11 of the AD Agreement. In *Swedish Stainless Steel Plate*, the panel found that "anti-dumping duties were temporary and remedial in nature," and rejected the US argument to the contrary.<sup>44</sup> Specifically, the panel concluded: "Article 9.1 obliged Parties to the Agreement not to maintain anti-dumping

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<sup>44</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 231 (see also para. 232) (unadopted).

duties when such duties were no longer necessary to counteract [i] dumping which was [ii] causing [iii] injury."<sup>45</sup> The United States refused to allow the adoption of this decision; however, the panel's interpretation is unassailable.

4.90 The panel's conclusion is the clearest statement imaginable of the limits of a Member's authority to impose anti-dumping duties. It demonstrates, in clear, certain terms, that anti-dumping duties are a derogation from the main thrust of the WTO regime-which is to promote free trade-by clearly defining the temporal limits of anti-dumping duties.<sup>46</sup> In other words, when injurious dumping ends, so must the duty.

4.91 Paragraph 2 of Article 11 of the AD Agreement further specifies the application of the general rule set forth at Paragraph 1. It provides:

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

4.92 The first sentence of Paragraph 2 requires authorities to conduct reviews both: (i) "where warranted" "on their own initiative"; or (ii) "upon request" supported by positive information. The second sentence *requires* authorities to provide parties the right to request examination of whether dumping is occurring, whether injury would continue if the duty were removed or varied or both. The third sentence *requires* authorities to terminate *immediately* any duty that is no longer warranted.

4.93 Each of the three sentences that compose Paragraph 2 is a directive commanding certain conduct by administering authorities<sup>47</sup> to effect the general rule set forth in Paragraph 1. Paragraph 1 is the basic or primary provision of Article 11. It states a general rule limiting the maintenance of anti-dumping duties. Paragraph 2 then sets forth specific administrative requirements to achieve the general directive of Paragraph 1. Thus, the provisions of Paragraph 2

<sup>45</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 231 (see also para. 232) (unadopted).

<sup>46</sup> See *Ibid.* at para. 232.

<sup>47</sup> Korea notes that Footnote 22 to Article 11.3 does grant authorities the quite limited discretion in "sunset" reviews to maintain a duty if, based on the most recent retrospective assessment, no margin is found. The footnote is not relevant to this proceeding, because this is not a "sunset" review covered by Article 11.3 and, even if it were, the U.S. authorities found no margins for three consecutive years.

must be interpreted as further establishing and specifying the requirements of Paragraph 1 and Paragraph 2 must be interpreted so as to give life to Paragraph 1.<sup>48</sup> Accordingly, in light of Paragraph 1, Paragraph 2 provides a set of procedures to be followed to ensure that a duty is not applied when it is no longer necessary to offset dumping that is causing injury, *e.g.*, where, as in this case, a Respondent is found not to have been dumping.

4.94 Under Paragraph 1 of Article 11, to maintain the anti-dumping duties in this case, the US Government would have had to establish three elements: (i) that a product was still being dumped and (ii) that the dumping was causing (iii) injury to the domestic industry.

4.95 However, the United States, itself, determined for over three consecutive years that the product was not being dumped.<sup>49</sup> No dumping existed; and no dumping means no injury due to dumping and obviously, no causal relationship between the two non-existent conditions.

4.96 Nonetheless, the DOC followed its regulations in this case and maintained the anti-dumping duties after it found for three consecutive reviews that no dumping was occurring. Therefore, as applied in this case, the DOC's regulations and practices violated the obligations of the United States under Article VI of the General Agreement and Article 11.1 of the AD Agreement.

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<sup>48</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 224 (unadopted).

Korea notes that the WTO Appellate Body and GATT panels have found that Paragraph 1 of Article III of the General Agreement is the primary provision of Article III and, thus, guides the interpretation and application of the remaining paragraphs of Article III. For example, the Appellate Body in *Japan-Taxes on Alcoholic Beverages* stated: "Consequently, the Panel is correct in seeing a distinction between Article III:1, which 'contains general principles', and Article III:2, which 'provides for specific obligations regarding internal taxes and internal charges'. Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III." WT/DS8/AB/R, pp. 17-18 (4 October 1996) (citation omitted). Relevant GATT precedent includes the Report of the Panel in *United States-Measures Affecting Alcoholic and Malt Beverages*, which stated: "The basic purpose of Article III is to ensure, *as emphasized in Article III:1*, 'that internal taxes and other charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products . . . should not be applied to imported or domestic products so as to afford protection to domestic production'." BISD 39S/206, 276, para. 5.25 (19 June 1992) (emphasis added). Because Article III:1 states the purpose of Article III, all other provisions of Article III must be interpreted according to Article III:1. The Panel in *United States-Measures Affecting Alcoholic and Malt Beverages* "considered that the . . . purpose of Article III has to be taken into account in interpreting the term 'like products'" in terms of Article III:2. *Ibid.* The Panel in *United States-Section 337 of the Tariff Act of 1930* rejected an interpretation of Article III:4 that would "defeat the purpose of Article III, which is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production' (Article III:1)." BISD 36S/345, 385, para. 5.10 (7 November 1989).

<sup>49</sup> See the three Final Results-61 Fed. Reg. 20216 (6 May 1996) (Ex. ROK-18) (amended by 61 Fed. Reg. 51410 (2 October 1996) and 62 Fed. Reg. 2654 (17 January 1997) (Ex. ROK-51)); 62 Fed. Reg. 965 (7 January 1997) (Ex. ROK-20) (amended by 62 Fed. Reg. 18742 (17 April 1997) (Ex. ROK-52)); 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3).

4.97 The United States also violated Paragraph 2 of Article 11. Paragraph 2 provides that an administering authority must conduct a review upon request by an interested party after a reasonable time elapses and must revoke the duty "immediately" if continued imposition of the duty is not necessary to offset dumping that is causing injury. For three consecutive years, the DOC found that Hyundai and LG Semicon were not dumping. No dumping having been found, the continued imposition of the duty was not "necessary to offset dumping." But, nonetheless, the DOC, following its regulations, failed to terminate the duties immediately. Thus, on their face and as applied, the DOC's regulations and practices violate Article 11.2 of the AD Agreement and Article VI of the General Agreement.

4.98 Paragraph 2 of Article 11 requires Members to find that "the continued imposition of the [anti-dumping] duty is necessary to offset dumping." However, the DOC maintained the duty without making this finding.

4.99 The DOC's regulations depart from the requirements of Article 11. Under its regulations the DOC may revoke only if a Respondent meets three requirements, one of which is the "no likelihood/not likely" requirement. In the Third Annual Review, the DOC found that Respondents had not met the "no likelihood/not likely" requirement, but this finding cannot serve as the basis for refusing to revoke under Article 11. The DOC failed to find that "the continued imposition of the duty is necessary to offset dumping," as Article 11 requires. Thus, the DOC violated the second sentence of Article 11 (and the third sentence, which requires termination where the Member does not find that continuation is necessary and, thus, finds that the duty is "no longer warranted").<sup>50</sup>

#### (b) Response by the United States

4.100 The following are the **United States'** arguments in response to Korea's claim:

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<sup>50</sup> The Panel notes that Korea does not claim any inconsistencies concerning Section 353.25(a)(2)(i) of the DOC regulations (the three years of no dumping requirement). At the first meeting of the Panel with the Parties the Panel asked: "Does Korea consider that a finding of no-dumping for a three-year period is significant for the purpose of its interpretation of Article 11.2 of the ADP Agreement, or would Korea adopt the same interpretation if no-dumping had been found for only e.g. one or two years?" Korea responded to this question as follows:

In Korea's view, 3.5 years is not a clear dividing line. Rather, 3.5 years of no dumping (no injury and no causation) is far beyond whatever line is established by Paragraphs 1 and 2 of Article 11. Thus, in the Government's view, it is not necessary for either Korea or the Panel to determine precisely where the line is, but merely to know and hold that maintaining a definitive duty after finding no dumping for 3.5 years is beyond the pale.

4.101 Korean producers have a history of dumping DRAMs in the United States.<sup>51</sup> The principal issue in this case is whether the DOC was required to revoke the anti-dumping order maintained by the United States on *DRAMs from Korea* when Respondents stopped dumping for three consecutive years.

4.102 Korea believes this obligation can be found in Article 11 of the AD Agreement and Article VI of GATT 1994. This belief is not grounded in an analysis of these agreements which relies upon customary international rules of treaty interpretation.

4.103 The United States agrees that WTO Members may not assess (or "levy") anti-dumping duties on imports if they are not dumped. This explains why the United States did not assess anti-dumping duties on merchandise produced by Respondents that entered during the period covered by the third administrative review (or during the period covered by the first two administrative reviews, for that matter). In fact, the so-called "retrospective" assessment system maintained by the United States, under which duties are not collected upon importation but only after a determination of dumping, seeks to guarantee this result. Hence, this is not the issue presented by Korea's submission. The fundamental point on which the United States and Korea differ is whether Article 11 and Article VI required the DOC to revoke the anti-dumping *order* on *DRAMs from Korea* as soon as Respondents went three consecutive years without dumping. The United States believes that Korea has failed to meet its burden of producing evidence of a violation because there is no evidence. Nothing in Article VI or the AD Agreement supports Korea's argument. Indeed, a proper analysis of Article 11 leads to exactly the opposite conclusion.

4.104 Dumping is a pernicious trade practice which is to be "condemned" if it causes or threatens material injury to an industry in the importing country.<sup>52</sup> In 1955, a Working Party report adopted by the CONTRACTING PARTIES to GATT 1947 instructed signatories to "refrain from encouraging dumping ... by [their] private commercial enterprises."<sup>53</sup>

4.105 The purpose of Article VI and the AD Agreement is to ensure that relief is made available to producers adversely affected by dumping. Under these provisions, a broad framework of rights and obligations has been created which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, WTO Members are free to adopt national standards governing the determination of dumping and the application of anti-dumping duties, as long as such measures rest upon a "permissible" interpretation of the AD Agreement.<sup>54</sup>

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<sup>51</sup> See Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea, 58 Fed. Reg. 15467(1993) ("DRAM LTFV") (Ex. USA-4).

<sup>52</sup> GATT 1994, Article VI:1.

<sup>53</sup> GATT, adopted on 3 March 1955, 3d Supp. BISD 223, para. 4.

<sup>54</sup> AD Agreement, art. 17.6(ii).

4.106 Anti-dumping duties are not meant to be permanent measures. The 1959 Report of the Group of Experts on Anti-dumping and Countervailing Duties provided: "[i]t was generally agreed that anti-dumping duties should remain in place only so long as they were genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry."<sup>55</sup>

4.107 In the 1979 AD Agreement, Article 9 contained two paragraphs which described the obligation of signatories regarding the duration of anti-dumping duties. The first paragraph established the fundamental proposition that "anti-dumping duties shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury."<sup>56</sup> The second paragraph provided a procedural mechanism by which signatories were to ensure the temporary and remedial character of anti-dumping duties as expressed in Article 9:1. Specifically, Article 9:2 provided:

The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.<sup>57</sup>

4.108 The only case ever to turn on an interpretation of Article 9 was *Plate from Sweden* which involved a challenge by Sweden to a 1987 decision by the ITC not to review (pursuant to section 751(b) of the Act) a determination of material injury made in 1973.<sup>58</sup> In that case, the panel determined that Article 9:1, by itself, did not constitute an independent legal ground pursuant to which a signatory was obliged to review the continued need for anti-dumping duties.<sup>59</sup> This followed, the panel reasoned, from:

The silence of Article 9:1 regarding the means by which a Party was to determine when an anti-dumping duty was no longer necessary within the meaning of that provision, together with the mandatory review procedure specifically provided for in Article 9:2, the purpose of which could only be understood in light of the requirement embodied in Article 9:1, contradicted the view that Article 9:1 by itself obliged Parties to take specific procedural steps to satisfy themselves as to the continued need for the imposition of an anti-dumping duty distinct from those required under Article 9:2.<sup>60</sup>

4.109 In the Uruguay Round of multilateral trade negotiations, the basic outline of Article 9 was preserved. Renumbered as Article 11 of the AD Agreement, the first paragraph of the new article is identical to Article 9:1 of the 1979 AD

<sup>55</sup> Adopted 13 May 1959, BISD 8S/151-152, para. 23.

<sup>56</sup> 1979 AD Agreement, art. 9:1.

<sup>57</sup> *Ibid.* art. 9:2.

<sup>58</sup> *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, Report of the Panel issued 24 February 1994 (unadopted), ("Plate from Sweden").

<sup>59</sup> *Ibid.* para. 228.

<sup>60</sup> *Ibid.* para. 226.

Agreement. Paragraph one continues to state a "general rule" regarding the duration of anti-dumping duties.

4.110 Paragraph 2 (in new Article 11) has been expanded. It still provides the "specific obligation" to examine whether the continued imposition of anti-dumping duties is "necessary" within the meaning of Article 11.1. However, now, paragraph 2 sets forth in greater detail the administrative procedures needed to fulfill this objective. In addition, the paragraph concludes with a new sentence which states that "[i]f, as a result of *the* review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately."<sup>61</sup>

4.111 Perhaps the biggest change occasioned by the Uruguay Round in this area is the addition of a third paragraph to Article 11. This is the so-called "sunset" provision which requires WTO Members to revoke all anti-dumping measures after five years unless "the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."<sup>62</sup>

4.112 Korea never explains how the language of Article 11, or for that matter any other aspect of the AD Agreement, supports its argument. Instead, it simply repeats that if there is no dumping there can be no injury, and if there is no injury, there can be no duty. This can not substitute for a reasoned analysis of Article 11 which is based upon the customary international rules of treaty interpretation prescribed by Article 17.6(ii) of the AD Agreement.

4.113 In the *Reformulated Gasoline* case, the Appellate Body concluded that the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention* has "attained the status of a rule of customary or general international law."<sup>63</sup> In the *Japan Taxes* case, the Appellate Body said the same thing about the supplementary means of treaty interpretation set forth in Article 32 of the *Vienna Convention*.<sup>64</sup>

4.114 Article 31 of the *Vienna Convention* provides that the words of a treaty must form the starting point for the process of interpretation. In this regard, words must be interpreted according to their "ordinary meaning" taking into account their "context" (*i.e.*, other provisions of the treaty) and the "object and

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<sup>61</sup> *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, Report of the Panel issued 24 February 1994 (unadopted), ("Plate from Sweden") (emphasis added by the United States).

<sup>62</sup> AD Agreement, art. 11.3.

<sup>63</sup> *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, at 17.

<sup>64</sup> *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, at 10.

purpose" of the agreement.<sup>65</sup> While recourse to a treaty's object and purpose is permissible, it may not override the clear meaning of the text. As the Appellate Body in the *Japan Taxes* case recognized, a "treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."<sup>66</sup>

4.115 When the text of a treaty either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, Article 32 of the *Vienna Convention* authorizes recourse to further means of interpretation, including a treaty's negotiating history. "Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach."<sup>67</sup>

4.116 As previously noted, nothing in the text of Articles 11.1 or 11.2 mandates revocation of an anti-dumping order as soon as a Respondent stops dumping. First, as the panel in *Plate from Sweden* found, the obligation to review the continued need for an anti-dumping order finds expression in the language of Article 11.2, not Article 11.1.<sup>68</sup> Secondly, footnote 22 to Article 11.3 expressly states that an anti-dumping duty order may be maintained beyond the initial five-year period even when a Respondent has not dumped during the "most recent assessment proceeding."<sup>69</sup> Thirdly, this interpretation of Article 11 is supported by the express requirement in Article 11.2, which did not appear in Article 9 of the 1979 AD Agreement, that interested parties wait "a reasonable period of time" before requesting a revocation review.<sup>70</sup> This change in language suggests that national investigating authorities may require, before initiating a revocation review, a "reasonable period of time" to elapse during which no dumping is taking place. Finally, this construction of Articles 11.1 and 11.2 comports with the object and purpose of the AD Agreement, which is to provide a framework within which Members may address injurious dumping through remedial duties.

4.117 Korea also cannot interpret the language of Article 11 to amount to a requirement that anti-dumping orders must be revoked whenever a Respondent goes three years without dumping. While the first two paragraphs do discuss the "need" for an order and whether an order is "necessary" or "warranted," these

<sup>65</sup> See, e.g., *Competence of the General Assembly for the Admission of a State to the United Nations (Second Admissions Case)*, [1950], ICJ Rep., at 8 ("The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they are occur.")

<sup>66</sup> WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 97, at 105-106, n. 20.

<sup>67</sup> I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 630 ("Brownlie").

<sup>68</sup> *Plate from Sweden*, ADP/117, para. 224-26. (arguing that "The United States Violated Paragraph 1 of Article 11").

<sup>69</sup> *Ibid.*, art. 11.3 n. 22. Moreover, if zero dumping margins do not require revocation under Article 11.3's sunset provisions (which require revocation unless national authorities find a likelihood of dumping and injury), then zero dumping margins should not *require* revocation under Article 11.2 (where there is no such requirement).

<sup>70</sup> AD Agreement, art. 11.2.

words are never defined, and dictionary definitions are not instructive.<sup>71</sup> Article 11 simply does not provide that investigating authorities must revoke an order solely because there have been three years of no dumping. Inserting such a requirement into the text would be an impermissible interpretation of Article 11. Moreover, consulting the AD Agreement's negotiating history confirms this result. This history reveals that Korea and several other Members, including Japan and India, strongly supported a "sunset provision" in the AD Agreement which would have required the automatic revocation (or "termination") of all anti-dumping measures within as little as three years.<sup>72</sup> These types of proposals were rejected in favor of the sunset provision now found in Article 11.3, which requires the sunset process to commence after five years, not three. Indeed, if, as argued by Korea, revocation were required as soon as an exporter ceased dumping, Article 11.3 would be superfluous insofar as a consideration of dumping (as opposed to injury) is concerned.

4.118 In short, Korea's interpretation of Article 11 is strained and without support. Rather than prescribe the specific circumstances that must lead to revocation, the drafters of Article 11 chose instead to impose upon Members an obligation to "review," under certain circumstances, the "need for the continued imposition" of the anti-dumping order. Once that review is completed, and only if the investigating authority "determine[s] that the anti-dumping duty is no longer warranted" based upon one or more of the reviews described in Article 11.2, must a Member revoke the anti-dumping order.<sup>73</sup>

4.119 In the instant case, Respondents asked the DOC to revoke the anti-dumping order on *DRAMs from Korea* pursuant to section 353.25 of the agency's regulations. Under this regulation, the DOC does not examine "whether the injury would be likely to continue or recur if the duty were removed or varied."<sup>74</sup> Pursuant to section 353.25, the DOC examines whether the "continued imposition of the [anti-dumping] duty [order] is necessary to offset dumping." The DOC does this by examining all of the evidence before it, especially: (i) whether the Respondent has sold the subject merchandise in the United States at not less than normal value for at least three consecutive years; (ii) whether a resumption of less-than-normal-value sales is not likely; and (iii) whether the Respondent has agreed not to resume sales at less than normal value.<sup>75</sup>

4.120 Once the Respondents in *DRAMs from Korea* provided "positive information" (in the form of three years without dumping) substantiating the need for a determination under section 353.25, the United States undertook a

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<sup>71</sup> For example, "warranted" is defined in the dictionary as "to justify or call for." Webster's II New Riverside University Dictionary, 1302 (1984).

<sup>72</sup> See, e.g., MTN.GNG/NG8/3, circulated 20 May 1987, at 5; MTN.GNG/NG8/W/10, circulated 30 September 1987, at 10; MTN.GNG/NG8/W/30, circulated 20 June 1988, at 13 (Ex. USA-77).

<sup>73</sup> AD Agreement, art. 11.2. Of course, to withstand scrutiny by a WTO panel, the national investigating authority must render a determination that satisfies the standard of review prescribed by Article 17.6 of the AD Agreement.

<sup>74</sup> Under US law, this task is performed by the ITC.

<sup>75</sup> 19 C.F.R. § 353.25(a) (1997) (Ex. USA-24).

factual examination of whether "the continued imposition of the [anti-dumping] duty [order] is necessary to offset dumping." By any measure, the United States satisfied this obligation. The DOC engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that the order on *DRAMs from Korea* was necessary to offset dumping.<sup>76</sup>

4.121 The **United States**, in response to a question from the Panel,<sup>77</sup> subsequently further argued as follows:

4.122 Section 353.25 of the DOC's regulations sets forth three independent criteria that the agency applies with equal force in every case under the regulation.

4.123 While the DOC always applies the same criteria in every revocation case under section 353.25(a), the agency must conduct a case-by-case analysis of the evidence in the administrative record to determine if the three criteria have been satisfied. As the United States explained in its first written submission and during the first meeting of the Panel, the DOC has a long history of considering the satisfaction of the first and third criteria to be relevant to whether the second criterion (*i.e.*, the "not likely" criterion) has been satisfied. Indeed, as the DOC explained in the *Final Results Third Review*:

In evaluating the "not likely" issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent's certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in

<sup>76</sup> At one point in its submission, Korea suggests that the DOC's determination was contrary to Article 11.2 because instead of finding that the continued imposition of the order is "necessary to offset dumping," the DOC found an absence of future dumping "not likely." For the following reasons, this assertion is groundless. First, toward the end of its notice, the DOC expressly found "that there is a need for the order to remain in place." *Final Results Third Review*, 62 Fed. Reg. at 39819 (Ex. USA-1). Second, the AD Agreement establishes a broad framework which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, WTO Members are free to adopt national standards governing the determination of dumping and the application of anti-dumping duties. No panel has ever held that national anti-dumping standards must mirror verbatim the language of Article VI or the AD Agreement (or the predecessors to the AD Agreement).

<sup>77</sup> The Panel recalls that the question was as follows: "Article 11.2 of the ADP Agreement refers to an examination by the investigating authorities as to "whether the continued imposition of the duty is necessary to offset dumping". The United States suggests that the DOC conducts this examination by applying the three criteria contained in section 353.25(a)(2) of the DOC regulations ((i) three years without dumping; (ii) dumping "not likely" in the future; and (iii) acceptance of immediate reinstatement ). Could the United States clarify how it sees each of these criteria relate to the concept of necessity under this Article?"

evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>78</sup>

4.124 Second, all three criteria relate to the concept of necessity because they all bear on whether a Respondent, for which no dumping margins have been found for a three-year period, is likely to resume dumping if the order is revoked. In this regard, it cannot be denied that the imposition of an anti-dumping order is intended to alter the behavior of companies exporting merchandise subject to the order. If the remedy works as intended, the imposition of an anti-dumping order should make dumping less likely to occur than in the absence of the order. However, once the disciplines of an anti-dumping order are terminated (*i.e.*, revoked), a Respondent may resume dumping. Under section 353.25, the DOC seeks to determine, based upon evidence, whether the dumping which had occurred in the past, and which led to the imposition of the order, is likely to recur if the order is revoked. The DOC does this by looking at the Respondent's past and expected behavior. The Respondent's past behavior is relevant to the first and second criteria under section 353.25(a). Its expected behavior is relevant to the second and third criteria. If a resumption of dumping is likely should the order be terminated, then a plain reading of the terms of Article 11 indicate that the "continued imposition of the duty is necessary to offset dumping."

(c) Rebuttal arguments made by Korea

4.125 **Korea** makes the following arguments in rebuttal to the United States responses:

4.126 In an attempt to interpret the nature of the obligations imposed by Article 11, the United States asserts:

While the first two paragraphs [of Article 11] do discuss the "need" for an order and whether an order is "necessary" or "warranted," these words are never defined and dictionary definitions are not instructive.<sup>79</sup>

This amounts to avoidance of interpretation. As they appear in Paragraphs 1 and 2, "need," "necessary" and "warranted" are not terms requiring dictionary interpretation in the first place.

4.127 Paragraph 1 of Article 11 imposes a clear, substantive obligation upon *all* Members that use anti-dumping duties:

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<sup>78</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted) (Ex. USA-1).

<sup>79</sup> The United States avoids the clear meaning of the English language again when it states that the terms "not likely" and "no likelihood" have the same meaning as a *matter of English* (as a matter of law, they arguably *might*, but certainly not as a matter of English); *Wieland-Werke AG v. United States*, Customs Bulletin and Decisions, 32(16), Ct. No. 96-10-02297, Slip Op. 98-23 (22 April 1998), at pages 35-36 (Ex. ROK-85).

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An anti-dumping duty *shall* remain in force *only* as long as and to the extent *necessary* to counteract dumping which is causing injury. (Emphasis added by Korea.)<sup>80</sup>

4.128 Moreover, Paragraph 1, on its face, clearly states that a Member shall not maintain a duty where a Respondent *is dumping*, but is causing no injury. The Panel, then, should reject the United States' argument that Article 11 allows a Member to maintain a duty on a Respondent which the Member itself has found, for three-and-one-half consecutive years, is not dumping.

4.129 The fact that Paragraph 1 does not prescribe specific circumstances requiring revocation (or detail factors to be considered) is inapposite. It establishes a rule of general application - like the vast majority of legal requirements-which Members must follow. Paragraph 2 then establishes procedural guidelines for implementing the Paragraph 1 rule.

4.130 The United States suggests that the fact that the rule is general means it has no force. This is incorrect. Indeed, the fact that it is general means that it has greater force. Thus, the US assertion that the rule, being "broad-based," gives "wide latitude" to Members is incorrect. The negotiators wisely left the rule in its general form, knowing they could not specify each and every example in which a Member would be required to revoke. They presumably also knew that, if they tried to do so, they would create a "blueprint for avoidance" that would allow the most recalcitrant authorities to maintain duties in ways not specifically prohibited, but nonetheless contrary to the general principles of the AD Agreement. Paragraph 1 is a crystal clear statement of the limits of a Member's ability to impose antidumping duties.

4.131 Paragraph 2 also is instructive. It provides for a review of "whether the continued imposition of the duty is necessary to offset dumping." The words "is" and "offset" are the keys to this inquiry. The negotiators chose the *present-tense* verb "is" and tied it to another *present-tense* verb, "offset." They did not select either "will be" for "is" or "prevent" for "offset." Nor did they permit a forward-looking "likely" analysis. Thus, the forward-looking analysis used by the United States is an impermissible interpretation of this provision.

4.132 Also, "offset" has a specific meaning in the anti-dumping context. It means to impose a duty on the imported product to re-establish competitive equilibrium or to "offset" the competitive advantage the Respondent has obtained in the Member's market through low prices. Thus, the word "offset" presumes that dumping is occurring.

4.133 In sum, contrary to the United States' assertions,<sup>81</sup> the text of Paragraphs 1 and 2 require revocation in this case. The analysis above further establishes that the United States is in violation of its Article 11 obligations.

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<sup>80</sup> The Panel should look to the text of a provision to determine its nature. The text of Paragraph 1 is strongly worded and establishes that the drafters meant to confine anti-dumping duties to certain limited situations.

4.134 Paragraph 3 Article 11, including Footnote 22, confirm Korea's position on paragraphs 1 and 2. The relevant portions of Paragraph 3 of Article 11, including Footnote 22, are:

Notwithstanding the provisions of paragraphs 1 and 2,<sup>82]</sup> any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . , unless the authorities determine, in a review initiated before that date . . . , that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22/</sup>

<sup>22/</sup> When the amount of the anti-dumping duty is assessed on a retrospective basis [as in the US system], a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

4.135 A number of aspects of Paragraph 3 and its relationship to Paragraphs 1 and 2 illuminate the issues Korea has raised in this case. First, there is no basis to the US claim that Korea's interpretation of Paragraphs 1 and 2 renders Paragraph 3 superfluous. To the contrary, the US reading of Paragraphs 1 and 2 would render Paragraph 3 surplusage. Paragraphs 2 and 3, interpreted in light of Paragraph 1, impose two very distinct sets of obligations on Members. Korea has demonstrated that after a Member has found that a Respondent has not dumped for three-and-one-half consecutive years, Paragraphs 1 and 2 require revocation. Paragraph 3, in contrast, requires Members either to revoke a duty or re-establish that dumping is causing injury through sunset (or expiry) reviews within five years of the most recent dumping, injury and causation findings. Importantly, this provision applies even where a Member has found that a Respondent has engaged in significant dumping in every single review period leading up to the sunset (or expiry) review. Thus, Korea's demonstration of the US violations does not even encroach upon Paragraph 3, much less render it superfluous.<sup>83</sup>

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<sup>81</sup> Korea also notes that according to the United States, "the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping." Indeed, the United States has not revoked hundreds, or even dozens, of orders based on the absence of dumping where it has conducted a full-blown "no likelihood/not likely" analysis. The United States applies the full analysis where it wishes to block revocation. This exercise of unfettered discretion violates Paragraphs 1 and 2 of Article 11. The Panel notes that this argument by the United States is reflected in Paragraph 4.180.

<sup>82</sup> Korea notes that this introductory clause establishes that Paragraph 3 is an exception to Paragraphs 1 and 2. However, an analysis of Paragraph 3 nonetheless is instructive.

<sup>83</sup> Indeed, the Panel should reject the United States' position, which focuses on Paragraph 3, because that position would reduce Paragraphs 1 and 2 to "inutility." See *United States - Standards for Reformulated and Conventional Gasoline* (20 May 1996), WT/DS2/AB/R, DSR 1996:I, 3, at 21.

The United States also asserts that the AD Agreement's negotiating history indicates that Korea and several other Members supported a sunset or expiry review position with a three-year threshold, instead of a five-year threshold. Because the texts of Paragraphs 1 and 2 are quite clear, this point is not admissible under Article 32 of the *Vienna Convention*. But, even if it were admissible, it is irrelevant. A three-year sunset or expiry review provision would apply even where dumping was occurring and in the context of a retrospective regime would serve to ensure that a Member was not maintaining a duty absent injury and causation.

4.136 Second, even though Paragraph 3 addresses sunset (or expiry) reviews, an analysis of its provisions may illuminate the meaning and scope of Paragraphs 1 and 2. Paragraph 3 contains language indicating that the negotiators could have, but decided not to, expand a Member's authority to conduct a forward-looking "likely" analysis in conducting dumping reviews under Paragraph 2. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the Member conducts injury and dumping reviews and determines "that the expiry of the duty would be *likely* to lead to continuation or recurrence of *dumping and injury*." In contrast, Paragraph 2 allows a similar inquiry regarding injury only. Paragraph 2 limits dumping reviews to an examination of "whether the continued imposition of the duty is necessary to offset dumping." The use of present-tense language (e.g., "offset dumping" vs. "prevent dumping"), coupled with the omission of the "likely to continue or recur" provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking "likely to continue or recur" analysis both for dumping and injury (and that Paragraph 2 provides for a "likely" analysis for injury, but not dumping) demonstrates that the negotiators could have chosen to extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to and, instead, expressly limited the analysis. The United States should not be permitted to add a requirement to the plain language of Paragraph 2, especially after the negotiators chose not to.

4.137 Finally, Footnote 22 does not support the US position in any way. Instead, it further confirms Korea's interpretation of Article 11.

4.138 The United States would have the Panel believe that Footnote 22 operates as a blanket, fully insulating Members with retrospective regimes from having to revoke a definitive duty after finding no dumping. First, the footnote establishes an exception only under Paragraph 3 (which, of course, is an exception to Paragraphs 1 and 2). Second, the exception applies only to those Members with retrospective regimes. Third, the limit is set at *one year* ("the most recent assessment proceeding"). Finally, Footnote 22 is discretionary in operation.

4.139 Most significantly, though, Footnote 22 has nothing to do with this proceeding. The obvious implication is that the exception of Footnote 22 is limited to one year and that, if in the most recent assessment proceedings, the Member repeatedly has found no dumping, the Member's conduct no longer falls within the special terms of Footnote 22 and the Member must revoke because "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Thus, Footnote 22, which in any case applies only to Paragraph 3, not to Paragraphs 1 and 2, cannot insulate the US conduct at issue here.

4.140 In any event, the Panel should not countenance the US attempt to: (i) export Footnote 22 from Paragraph 3 and import it into Paragraphs 1 and 2; and then (ii) expand it so as to allow the United States to refuse to revoke (or even conduct an injury investigation) where Respondents were found to have small dumping margins in the six-month period of the original investigation

(1992), but have been found not to have dumped in every subsequent review, covering some 42 months.

4.141 In *Swedish Stainless Steel Plate*, the panel examined, among other things, Sweden's claim that the procedures employed by the United States in deciding not to review an injury determination, *i.e.*, a decision not to initiate an injury review, violated Paragraphs 1 and 2 of Article 9 of the 1979 AD Agreement (the predecessors of Paragraphs 1 and 2 of Article 11).<sup>84</sup> As the United States concedes by citing this report, although the panel's conclusions are not part of the WTO *acquis* (it was not adopted), the panel's analysis provides useful guidance and its conclusions are well-founded.<sup>85</sup> However, the United States has not accurately presented the findings of the panel with respect to Article 9.1/11.1 and 9.2/11.2.

4.142 According to the United States, "the panel concluded that paragraph 1 did not impose an independent legal obligation upon GATT signatories." This mischaracterizes the panel's conclusion. Sweden had argued that the United States had breached *procedural* obligations under both paragraphs 1 and 2.<sup>86</sup> In contrast to the US account, the panel actually found that Paragraph 1 imposes a far-reaching substantive obligation and that Paragraph 2 imposes a procedural obligation:

223. The panel noted that under Article 9:1 "An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Accordingly, *Article 9:1 obliged Parties to the Agreement not to maintain anti-dumping duties when such duties were no longer necessary to counteract dumping which was causing injury.* However, the text of Article 9:1 did not provide an express obligation regarding *the steps to be taken* by Parties to the Agreement in order to make a determination on whether the continued imposition of an anti-dumping duty was necessary to counteract dumping which was causing injury.

224. In contrast, Article 9:2 provided for a specific obligation to "review" the need for the continued imposition of the duty, on the initiative of investigating authorities, or upon a duly substantiated request by any interested party. In the Panel's view, *the purpose of the review procedure under Article 9:2 could only be understood if Article 9:2 was read in the light of Article 9:1.* The references in

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<sup>84</sup> In *Swedish Stainless Steel Plate*, unlike here, the DOC never found that the Respondent had stopped dumping.

<sup>85</sup> See *Japan - Taxes on Alcoholic Beverages* (1 November 1996), WT/DS8, 10 & 11/AB/R, DSR 1996:I, 97, at 108 and *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (15 May 1998), WT/DS58/R, para. 7.16, note 623, for discussions of the relevance of adopted and unadopted panel reports.

<sup>86</sup> See *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), APD/117, para. 221 (unadopted).

Article 9:2 to "the need for the continued imposition of the duty" and "the need for review" could only be interpreted in a meaningful manner *when read in conjunction with the obligation in Article 9:1*. Thus, a review under Article 9:2 of "the need for the continued imposition of the duty" was a review of whether that duty continued to be "necessary to counteract dumping which is causing injury". Similarly, "positive information substantiating the need for review" in Article 9:2 necessarily meant information relevant to the issue of whether the anti-dumping duty remained "necessary to counteract dumping which is causing injury."

225. *The Panel thus read Article 9:1 as requiring Parties not to maintain anti-dumping duties longer than necessary to counteract dumping which was causing injury, and Article 9:2 as setting forth an obligation of Parties regarding the undertaking of a factual examination of whether the continued imposition of anti-dumping duties was necessary within the meaning of Article 9:1.*<sup>87</sup>

4.143 Thus, Paragraph 1 of Article 11 does impose substantive legal obligations. Moreover, contrary to the United States' assertion, it constitutes an independent legal ground obligating revocation in certain cases, including this one. Finally, paragraph 224 of the Panel Report confirms that Paragraph 1 establishes the legal obligation that guides the application and interpretation of Paragraph 2.

4.144 The United States violated Article 11 of the AD Agreement not only because of the way it applied its revocation scheme in the *DRAMs from Korea* case, but also because the regime on its face is inconsistent with Article 11 of the AD Agreement.

4.145 Article 11.1 permits imposition of anti-dumping duties "only as long as and to the extent necessary to counteract dumping which is causing injury." Where the duty is no longer warranted under this standard, Article 11.2 requires that "it shall be terminated immediately."

4.146 Contrary to the dictates of Article 11, which require revocation when duties are not necessary to counteract dumping which is causing injury, the US revocation scheme permits duties to continue indefinitely except where the Secretary of Commerce, on the basis of unfettered discretion rather than objective criteria, decides to revoke. In addition to the lack of objective criteria and the concomitant existence of unfettered discretion, the US revocation regime also mandates proof of no likelihood of resumption of dumping and forces Respondents, as a condition of revocation, to agree to forgo their rights to an injury determination if the DOC concludes that Respondent has resumed dumping.

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<sup>87</sup> See *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), APD/117, para. 221 (unadopted).

4.147 Thus, this case is *not* analogous to situations in which legislation permits, but does not mandate, action inconsistent with a WTO obligation. This is not like *US Superfund*, in which the law directed imposition of a tax inconsistent with Article III of the General Agreement, but provided for the possibility of regulations setting out requirements under which this penalty tax would not be applied.<sup>88</sup> Nor is it like *Thai Cigarettes*, in which a Thai law authorized the imposition of discriminatory excise taxes, but regulations promulgated under the law taxed imported and domestic cigarettes at the same rate.<sup>89</sup>

4.148 Unlike *US Superfund*, *Thai Cigarettes* and similar disputes, in this case the Secretary of Commerce *cannot* act in conformity with the obligations of Article 11. Inclusion of the "no likelihood/not likely" criterion and the mandatory cession of the right to an injury review (embedded in a Respondent's agreement to immediate reinstatement in the anti-dumping duty order), on their face, require action that is inconsistent with the dictates of Article II.1.

4.149 Thus, the first, not the second, principle set out in the *US Tobacco* decision applies:

[T]he Panel recalled that panels had consistently ruled that *legislation which mandated action inconsistent with the General Agreement could be challenged as such*, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.<sup>90</sup>

The US revocation scheme mandates action inconsistent with the WTO AD Agreement and so it can be challenged as such.

4.150 The US revocation scheme also breaches both of Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization, which requires each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements," and of Article 18.4 of the AD Agreement, which mandates that "[e]ach Member shall take all necessary steps... to ensure ... the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement . . . ."

4.151 Thus, the US revocation scheme, on its face, by allowing the US to maintain duties in situations in which Article 11 requires revocation, violates not

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<sup>88</sup> See *United States - Taxes on Petroleum and Certain Imported Substances* (17 June 1987), BISD 34S/136, pages 163-64, para. 5.2.9, ("US - Gasoline").

<sup>89</sup> See *Thailand - Restrictions on Importation and Internal Taxes on Cigarettes* (7 November 1990), BISD 37S/200, page 227, para. 86, ("Thailand - Cigarettes").

<sup>90</sup> See *United States - Measures Affecting the Importation, Sale and Use of Tobacco* (4 October 1994), DS44/R, para. 118, ("*US - Tobacco*") (emphasis added by Korea).

only Article 11 itself, but also Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement.<sup>91</sup>

(d) Rebuttal arguments made by the United States

4.152 The **United States** makes the following arguments in rebuttal:

4.153 Article 11.1 does not impose, as Korea seems to suggest, an independent obligation on WTO Members to: (i) revoke anti-dumping orders as soon as dumping stops, and/or (ii) examine dumping *and* injury as part of every review under Article 11.2.<sup>92</sup> With respect to the first point, the plain terms of Article 11.1 simply do not direct a Member to take any action to implement the general principle contained in Article 11.1. There certainly is no language in Article 11.1 which requires WTO Members to revoke (*i.e.*, "terminate") anti-dumping orders as soon as dumping stops.<sup>93</sup> With respect to the second point, Article 11.2 cannot be given its full meaning, as it must, if Korea's interpretation of Article 11.1 is correct (*i.e.*, if Article 11.1 requires an examination of dumping *and* injury in every review under Article 11). Article 11.2 provides for several different types of reviews. For example, under Article 11.2, investigating authorities are directed to review, in certain instances, whether the "continued imposition of the duty is necessary to offset dumping." These provisions would be a nullity if Korea's interpretation of Article 11.1 were correct.<sup>94</sup>

4.154 The better view of Article 11.1, and the one which comports with the ordinary meaning of its terms, is that Article 11.1 states a general rule which informs the rest of Article 11. The specific obligations established in Article 11 are set forth in Articles 11.2 through 11.5.<sup>95</sup> Of these provisions, only Article 11.2 is directly at issue in this case.

<sup>91</sup> The Panel notes that the United States raised a preliminary objection with regards to Korea's claims under Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization and Article 18.4 of the AD Agreement. The arguments of the Parties on this matter can be found in Section IV.A.3 of this report.

<sup>92</sup> In its first written submission, Korea appeared to concede that Article 11.1 merely states a general rule which is implemented by, *inter alia*, Articles 11.2 and 11.3. However, at various times since then, including in its oral statement before the Panel, Korea seems to suggest that Article 11.1 creates a legal obligation, quite apart from Articles 11.2 and 11.3, which the United States is claimed to have violated.

<sup>93</sup> Indeed, a prior panel recognized that Article 9.1 of the Tokyo Round Anti-Dumping Code (which is virtually identical to Article 11.1 of the AD Agreement) calls for a prospective analysis. *Plate from Sweden*, ADP/117, para. 233.

<sup>94</sup> Korea's interpretation of Article 11 would violate the principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of "effectiveness." Under this rule, courts and panels should interpret treaty provisions so as to give full effect to their ordinary meaning. As the Appellate Body has stated: "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, WT/DS4/AB/R, Report of the Appellate Body adopted 20 May 1996, DSR 1996:1, 3, at 21.

<sup>95</sup> A similar type of framework was identified by the Appellate Body in the Japan Taxes case which had before it Article III of GATT 1994. In ruling that Japan's Liquor Tax Law violated provisions of

4.155 If the terms of Article 11 are given their ordinary meaning in the context within which they occur, it becomes manifestly apparent that Article 11.2 does not *require* revocation after one year (or even three years) of no dumping. First, footnote 22 to Article 11.3, disposes of any suggestion that revocation is mandated whenever a Respondent stops dumping. Second, Article 11.2 simply does not prescribe the specific circumstances that must lead to revocation. It certainly does not contain language which mandates revocation in the event that a Respondent goes three years without dumping. Third, a review of the negotiating history of Article 11 reveals that Korea and several other WTO Members supported a provision in the AD Agreement which would have required the automatic revocation (or "termination") of all anti-dumping orders after three years. These types of proposals were rejected in favor of the "sunset" provision now found in Article 11.3, which requires the sunset process to commence after five years. Thus, far from contradicting the plain-text interpretation advanced by the United States, the negotiating history of Article 11 confirms the views of the United States.

4.156 Finally, Korea's interpretation of Article 11.2 is at odds with Article 11.3, footnote 22. Under Article 11.3, once every five years, investigating authorities must review, *inter alia*, whether revocation of the "duty would be likely to lead to continuation or recurrence of dumping ... ." According to footnote 22, however, "a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." Yet, under Korea's construction of Article 11.2, any time a Respondent ceases dumping, investigating authorities must immediately terminate (*i.e.*, revoke) the duty. Thus, under Korea's construction, footnote 22 never can come into play, because a finding of no dumping must result in the immediate revocation of an order. In other words, footnote 22 is superfluous.<sup>96</sup>

4.157 In sum, Korea is asking the Panel to go far beyond an interpretation of the AD Agreement and to prescribe the circumstances under which an anti-dumping order must be revoked. As discussed, Korea's "interpretation" of Article 11 is contrary to the "customary rules of interpretation of public international law" prescribed by Article 17.6(ii) of the AD Agreement and Article 3.2 of the DSU.

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Article III, the Appellate Body stated that Article III:1 articulates the general rule that "internal measures should not be applied so as to afford protection to domestic production." *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, DSR 1996:I, 97, at 115-116. This rule, the Appellate Body stated, "informs" the rest of Article III, including Article III:2, which "'provides for specific obligations regarding internal taxes and internal charges.'" *Ibid.*

<sup>96</sup> Hence, Korea's interpretation of Article 11.2 would, once again, violate the rule of "effectiveness." In this regard, in the recently issued report in the Indonesia Autos case, the panel rejected an argument by Indonesia that, if accepted, would have reduced Article III:2 of GATT 1994 to inutility. *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel issued 2 July 1998, para. 14.40 (unadopted).

Furthermore, if Korea's position were embraced by the Panel and adopted by the Dispute Settlement Body ("DSB"), it would create, contrary to Articles 3.2 and 19.2 of the DSU, a right or obligation where none currently exists.

4.158 In response to a question by the Panel,<sup>97</sup> the **United States** further argued:

4.159 In *U.S. - Tobacco* and the *Superfund* case, the panels recognized that legislation mandatorily requiring authorities to impose GATT-inconsistent measures, whether or not such legislation has been applied, may constitute a violation of the General Agreement. However, in both of those cases, there existed legislation or regulations providing the authorities with the possibility of avoiding the need to apply the GATT-inconsistent legislation. As a result, the panels concluded that the mere existence of the mandatory, GATT-inconsistent legislation did not, by itself, constitute a violation of the General Agreement.<sup>98</sup>

4.160 Thus, where legislation which, "on its face" (or as a matter of law), mandates action inconsistent with Article 11.2, but additional legislative or regulatory provisions permit action consistent with Article 11.2, a Member may not challenge the mandatory piece of legislation until it (or some other enactment) is applied in a manner that violates Article 11.2.

4.161 In the instant case, section 353.25(a) does not mandate action inconsistent with Article 11.2. and even if it does, other legislative avenues for revocation exist. First, on its face and as applied, section 353.25(a) rests upon a permissible interpretation of Article 11.2. Second, section 353.25(a) is not "mandatory" in the sense that it requires WTO inconsistent action. Indeed, Korea has often said in this proceeding that the regulation allegedly confers upon the Secretary of Commerce "unfettered discretion." As the United States explained at the second meeting of the Panel, the Secretary cannot have the "unfettered discretion" to revoke an anti-dumping order and, at the same time, be required to apply the regulation in a mandatory fashion. The two arguments are mutually exclusive. Finally, even assuming *arguendo* that section 353.25(a) mandates action inconsistent with Article 11.2, respondents are free to pursue revocation through an Article 11.2-type review under section 751(b) of the Act (and sections 353.22(f) and 353.25(d) of the DOC's regulations).

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<sup>97</sup> The Panel recalls that the question was as follows: "In *US - Tobacco*, the panel recalled 'that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority ... to act inconsistently with the General Agreement could not be challenged as such...' In the event that a particular review provision does not allow a Member to terminate a duty in circumstances where such termination is required by Article 11.2, is this in and of itself sufficient for a finding of 'mandatory' legislation inconsistent with the ADP Agreement, *i.e.*, if other legislative avenues exist whereby termination of an anti-dumping duty through an Article 11.2-type review could be sought, is this relevant? Why or why not?"

<sup>98</sup> *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (adopted 7 November 1990) at paras. 84-86; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136 (adopted 17 June 1987) at paras. 5.2.9-5.2.10.

(2) *Secretary of Commerce's Discretion*

(a) Claims raised by Korea

4.162 **Korea** claims that the DOC's regulations, including the "no likelihood/not likely" criterion, give the Secretary of Commerce unreasonably broad discretion in making revocation determinations and allow the Secretary to maintain the duty in an arbitrary and unjustifiable manner in violation of Article 11. The following are Korea's arguments in support of this claim:

4.163 Under US law, the Secretary *may, but is not required to*, revoke an order if a Respondent meets the three requirements above. Thus, a Respondent has the burden of establishing each of these elements, but even if the Respondent meets this burden, the Secretary nonetheless has the discretion to refuse to revoke the order. Also, the statute and regulations contain *absolutely* no standards or factors governing the "not likely" determination.

4.164 The DOC has concurred with this analysis. According to the DOC, this scheme is permitted by the enabling legislation:

*DOC's Position:* The applicable statutes and regulations grant the DOC broad discretion in determining whether to revoke an anti-dumping finding. The only relevant statutory provision states: "The administering authority may revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order \* \* \* after a review under this section." 19 U.S.C. section 1675(c) (emphasis supplied). Therefore, *except for the requirement for conducting an administrative review, Congress has not specified any procedure that the DOC must follow or any criteria that it must consider in determining whether to revoke a particular anti-dumping duty order. The applicable Commerce regulation, contained in 19 CFR 353.25, preserves the broad discretion granted by Congress, by providing in pertinent part: "[T]he Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that \* \* \*"* *In short, the regulation like the governing statute, vests a great deal of discretion in the Secretary to determine the propriety of revocation.*<sup>99</sup>

4.165 That the Secretary's discretion not to revoke is utter and complete under US law has been confirmed by the US courts. According to the US Court of International Trade:

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<sup>99</sup> *Frozen Concentrated Orange Juice from Brazil*, 56 Fed. Reg. 52510, 52513 (Response of the DOC to Comment 3) (21 October 1991) (emphases added by Korea) (Ex. ROK-4).

- "The language of the regulations indicates that the Secretary is not compelled to grant revocation even when plaintiffs satisfy the requirements for revocation";<sup>100</sup>
- "The regulation does not present objective criterion for determining whether there is "no likelihood" of resumption of LTFV sales. Instead, the petitioner [the Respondent before the DOC] must establish this fact to the satisfaction of the Secretary";<sup>101</sup>
- "[The regulation] vests a great deal of discretion in the Secretary to determine the propriety of revocation . . . ."
 

"[T]he language employed indicates that Commerce is not compelled to grant revocation, as the above noted sections refer to what the Secretary *may* do when acting on an application for revocation . . . ."

"[E]ven if the administrative reviews reveal that plaintiffs have not been dumping for the periods in question, Commerce may exercise its discretion not to grant revocation";<sup>102</sup> and
- "[E]ven assuming the plaintiffs had, as they claim, satisfied all of the requirements for revocation contained in [the regulation], the ITA was not required to grant their request."<sup>103</sup>

4.166 These excerpts confirm that the Secretary's discretion not to revoke an order is unfettered.

4.167 Finally, the US anti-dumping law and all of the Secretary's determinations that follow it are completely insulated from domestic claims that the US law (or the Secretary's determination) violates a US obligation under any of the WTO agreements, including the AD Agreement. Section 102(a)(1) of the Uruguay Round Agreements Act (the legislation implementing the WTO Agreements) provides:

(1) United States Law to Prevail in Conflict - No provisions of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

4.168 Thus, even where the Secretary follows a US law that a reviewing court later finds is inconsistent with a US obligation under a WTO agreement, the court is required by US law to find that the WTO Agreement provision has no effect.

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<sup>100</sup> *Toshiba*, 15 C.I.T. at 599 (citation omitted) (denying plaintiff/Respondent's challenge to the DOC's determination not to revoke) (Ex. ROK-5).

<sup>101</sup> *Ibid.* at 600.

<sup>102</sup> *Matsushita*, 688 F. Supp. at 623 (citations omitted) (denying plaintiff/Respondent's challenge to the DOC's determination not to revoke), aff'd, 861 F.2d 257 (Fed. Cir. 1988) (Ex. ROK-6).

<sup>103</sup> *Manufacturas Industriales*, 666 F. Supp. at 1565 (denying plaintiff/Respondent's challenge to the DOC's determination not to revoke) (Ex. ROK-7).

4.169 The United States' revocation scheme completely ignores the requirements of Article 11 of the AD Agreement. It fails to recognize that in certain situations, such as that presented here, the AD Agreement *requires* the Secretary to revoke an order. This is the purpose-the very essence, if you will-of Article 11. Moreover, as applied in the Third Annual Review of *DRAMs from Korea*, the US scheme violated Article 11.

4.170 In contrast, the US regime *never requires* the Secretary to revoke an order. No matter what the circumstances are, the Secretary always has the discretion to refuse to revoke an order. A step-by-step review of the US revocation scheme shows the absolute discretion bestowed on the Secretary.

4.171 First, the US regulations impose three requirements on a Respondent before revocation will even be considered. In brief they are:

1. three consecutive years of no or *de minimis* margins<sup>104</sup>;
2. a showing that dumping is "not likely" to recur (or, that there is "no likelihood" that dumping will recur);
3. a written agreement that the duty/order will be reinstated if dumping does recur.<sup>105</sup>

The key requirement here is the second-the "no likelihood/not likely" requirement-because the DOC found that Respondents met the first and third requirements, but not the second requirement.

4.172 Under US law, the Respondent bears the burden of establishing that future dumping is "not likely,"<sup>106</sup> and this shifting of the burden of proof is, by itself, a violation of Article 11. However, it is exacerbated by the fact that the "no likelihood/not likely" requirement has no "objective criterion" according to the US court that reviews challenged anti-dumping determinations of the DOC:

The regulation does not present an objective criterion for determining whether there is "no likelihood" of resumption of LTFV sales. Instead, the petitioner [the Respondent company seeking revocation] must establish this fact to the satisfaction of the Secretary.<sup>107</sup>

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<sup>104</sup> The United States limits application of the two percent *de minimis* threshold required by Article 5.8 of the AD Agreement to the investigation stage of proceedings. For administrative reviews, the United States maintains its pre-WTO *de minimis* threshold of 0.5 percent. See 19 C.F.R. § 351.106(c) of the DOC's anti-dumping regulations; 62 Fed. Reg. 27296, 27382-83 (19 May 1997) (Ex. ROK-49).

<sup>105</sup> See 19 C.F.R. § 353.25(a)(2) (1996).

<sup>106</sup> See *Sanyo Electric*, 15 C.I.T. 609, 1991 C.I.T. LEXIS 441 (Ex. ROK-50); *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5); *Manufacturas Industriales*, 666 F. Supp. at 1566 (Ex. ROK-7).

<sup>107</sup> See *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5).

Thus, the Secretary makes the determination as to whether the Respondent has met the second requirement and, conducts the analysis without consistent reference to transparent and established standards.<sup>108</sup>

4.173 Second, even in those cases where the Secretary finds that a Respondent has satisfied all three requirements, the Secretary still has the discretion to not revoke the order. This is because the regulation states only that "[t]he Secretary *may* revoke" an order where he finds that the three criteria have been met to his satisfaction.<sup>109</sup>

4.174 Finally, the Secretary's exercise of discretion is virtually unrestrained. This is due primarily to US federal court holdings that the decisions of the Secretary are subject to "tremendous deference"<sup>110</sup> by the reviewing courts (the CIT and the CAFC), and also to the use of the word "may" in the statute and the regulation.

4.175 In sum, the "no likelihood/not likely" requirement grants the Secretary unbounded discretion and, even where the Secretary finds that a Respondent has met each of the three requirements, the Secretary can, by executive fiat, refuse to revoke the duties. Because revocation is not a matter of discretion under the WTO, the United States has turned Article 11 on its head. In the United States, revocation is *always* a matter of discretion, without any regard to WTO requirements, and, as exercised in this case, the US discretion violated Article 11 of the AD Agreement.

#### (b) Response by the United States

4.176 The following are the **United States'** arguments in response to Korea's claim:

4.177 The Congress of the United States has given the DOC broad discretion in administering the anti-dumping law, in general, and in the revocation of orders, in particular.<sup>111</sup> Section 751(d) of the Act states, in part:

. . . The administering authority *may* revoke, in whole or in part, a countervailing duty order or an anti-dumping duty order . . . after [an administrative] review . . .<sup>112</sup>

4.178 Therefore, except to impose a requirement that revocation occur after a review under section 751 of the Act, Congress has not specified the procedures that the DOC must follow, or the criteria that it must consider, in determining

<sup>108</sup> The Secretary apparently considers many factors, but a review of past practice shows that there is no consistent method or means of analysis.

<sup>109</sup> See also 19 U.S.C. § 1675(d)(1) ("The administering authority *may* revoke . . . an anti-dumping duty . . ." (emphasis added by Korea)).

<sup>110</sup> See, e.g., *Manufacturas Industriales*, 666 F. Supp. at 1567 (quoting *Smith-Corona v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983)) (Ex. ROK-7).

<sup>111</sup> *Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541, 1544 (Fed. Cir. 1988) (Ex. USA-68); *Toshiba Corp. v. United States*, 15 CIT 597, 599 (1991) (Ex. USA-69).

<sup>112</sup> 19 U.S.C. § 1675(d)(1) (1997) (emphasis added by the United States) (Ex. USA-19).

whether to revoke an outstanding anti-dumping duty order.<sup>113</sup> Instead, like legislatures around the world, Congress delegated to an administrative agency (here, the DOC) the responsibility for working out the details.

4.179 This is not to say, however, that the DOC can do whatever it wants, as Korea suggests. The agency's discretion, vis-à-vis interested parties, is limited by its regulations, administrative practice, and relevant administrative law doctrines.<sup>114</sup> In the exercise of the authority conferred on it by the Congress, the DOC has promulgated section 353.25 of its regulations which sets out the criteria for revocation.<sup>115</sup> This regulation limits the DOC's discretion to an examination of the issues surrounding the established criteria. Furthermore, in applying the regulation, the DOC has developed an administrative practice, from which it may not deviate unless it provides an explanation.<sup>116</sup> For the courts of the United States to uphold a deviation from past practice, the explanation must be consistent with a reasonable interpretation of the law and be supported by substantial evidence on the record of the underlying administrative proceeding.<sup>117</sup> Even then, the DOC's discretion may be further constrained by the legal doctrines of "collateral estoppel"<sup>118</sup> and the "law of the proceeding."<sup>119</sup>

4.180 In fact, over the years, the DOC's administrative practice regarding revocation has been exceedingly consistent. The "no likelihood"/"not likely" standard first appeared in the DOC's regulations in 1980.<sup>120</sup> Since then, the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping.

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<sup>113</sup> In fact, the statute provides several means by which an anti-dumping duty order may be revoked. For example, section 751(d) of the Act provides that an order may be revoked following a "changed circumstances" review pursuant to section 751(b) of the Act. 19 U.S.C. § 1675(d)(1) (1997) (Ex. USA-19). The principal issue in this case, however, is whether the United States acted in accordance with its international obligations when it did not revoke, in part, the anti-dumping duty order on *DRAMs from Korea* following an "administrative" review pursuant to section 353.25(a) of the DOC's regulations.

<sup>114</sup> *Manufacturas*, 666 F. Supp. at 1565 (the DOC's discretion is not "unbounded") (Ex. USA-60).

<sup>115</sup> See 19 C.F.R. § 353.25(a) (1997) (Ex. USA-24).

<sup>116</sup> *UAW v. NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) (Ex. USA-70); see also *Ipsco v. United States*, 687 F. Supp. 614 (Ct. Int'l Trade 1988) (although the DOC needs discretion to formulate and adjust methodologies to new factual situations, it cannot avoid explaining the basis for departing from administrative precedent by pointing to an arbitrary standard not adopted by formal rule-making) (Ex. USA-71).

<sup>117</sup> 19 U.S.C. § 1516a (1998) (Ex. USA-62).

<sup>118</sup> Under United States law, an administrative agency, such as the DOC, may be collaterally estopped from departing from past determinations of fact where a party has detrimentally relied on those determinations and where the party has been given insufficient notice of the change. See, e.g., 4 Davis, *Administrative Law* § 20:12 (1983) (Ex. USA-72).

<sup>119</sup> Under the "law of the proceeding" doctrine, a well-established administrative practice which has gone unchallenged for some time and upon which the parties have reasonably come to rely may acquire the status of a regulation, such that an administrative agency may not change that practice without an explanation that justifies the change. See, e.g., *Shikoku Chemicals v. United States*, 795 F. Supp. 417 (Ct. Int'l Trade 1992) (Ex. USA-73).

<sup>120</sup> *Anti-dumping Duties*, 45 Fed. Reg. 8182 *et seq.* (1980) (section 353.54(a)) (Ex. USA-74).

4.181 Lastly, while Korea is presenting its claim before this Panel that the DOC's discretion is "unfettered," the Respondents are currently prosecuting a lawsuit in the CIT challenging the DOC's failure to revoke in the *Final Results Third Review*.<sup>121</sup> If the DOC's discretion truly was incapable of being checked or regulated by the courts, then Respondents' lawsuit would be pointless.

4.182 Korea claims, quite apart from the *Final Results Third Review*, that the DOC's regulations confer upon the Secretary of Commerce a level of discretion that violates Article 11 of the AD Agreement. According to Korea, the "not likely" standard in section 353.25(a) of the DOC's regulations has no "objective criterion." Therefore, the DOC allegedly conducts its analysis "without consistent reference to transparent and established standards."<sup>122</sup>

4.183 First, the DOC's discretion is not "unbounded." The DOC's discretion is limited by its regulations, administrative practice, and administrative law doctrines.

4.184 Secondly, while the statute uses the term "may revoke," and the term "not likely" is not defined further in the DOC's regulations, no panel has ever demanded that a regulation which implements a GATT or WTO obligation must be drafted in such a way as to define each element of the regulation. Indeed, discretionary legislation which arguably permits, but does not require, an administrative agency to promulgate regulations or take other action that is WTO-inconsistent does not, as such, violate the WTO agreements.<sup>123</sup> A complaining party must show that the agency actually took WTO-inconsistent action.<sup>124</sup>

4.185 Finally, it is hard to understand how the "not likely" standard can be condemned for lacking so-called "objective criteria," when Article 11, itself, lacks such criteria. For example, there is nothing in the AD Agreement that fleshes out the terms "necessary" or "warranted." If these terms lack "objective criteria," is each WTO Member which considers treaties self-executing under its legal and constitutional systems guilty of violating the AD Agreement if it fails to promulgate regulations that further define these terms?

4.186 The **United States**, in response to a question from the Panel,<sup>125</sup> subsequently further argued as follows:

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<sup>121</sup> *Hyundai Electronics Industries Co., Ltd., et al. v. United States*, Consol. Ct. No. 97-08-01409, Ct. Int'l Trade (Before: Judge Richard Goldberg).

<sup>122</sup> Korea also argues that section 751(d) of the Act confers a level of discretion on the Secretary that violates Article 11 when it uses the words "may revoke." *Ibid.* para. 4.26 n. 85.

<sup>123</sup> See generally GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), 645-48.

<sup>124</sup> *Ibid.*

<sup>125</sup> The Panel recalls that the question was as follows: "Article 11.2 of the ADP Agreement states that an anti-dumping duty "shall be terminated immediately" if the investigating authorities determine that the duty is 'no longer warranted'. In this regard, could the United States explain why section 353.25(a)(2) of the DOC regulations provides that the Secretary of Commerce 'may' revoke if the three criteria set forth therein are met, rather than specifying that the Secretary of Commerce

4.187 The discretion granted to the Secretary under section 353.25(a)(2) is subject to legal/judicial control. The DOC's discretion is limited by its regulations, administrative practice, and relevant administrative law doctrines. In addition, in order for a determination by the DOC under section 353.25(a)(2) to be sustained by the US courts, the determination must be consistent with a reasonable interpretation of the law and be supported by substantial evidence on the record of the underlying administrative proceeding.

4.188 Indeed, the US courts themselves have best explained the legal/judicial controls on the DOC's discretion. The US Court of International Trade ("CIT") in *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1565 (Ct. Int'l Trade 1987), declared that the DOC's discretion is not "unbounded." In addition, the US Court of Appeals for the Federal Circuit, which reviews decisions of the Court of International Trade, has stated:

The Secretary of Commerce (Secretary) has been entrusted with responsibility for implementing the anti-dumping law. The Secretary has broad discretion in executing the law. While the law does not expressly limit the exercise of that discretion with precise standards or guidelines, some general standards are apparent and these *must* be followed. The Secretary *cannot*, under the mantle of discretion, violate these standards or interpret them out of existence.<sup>126</sup>

4.189 As the United States has discussed, the "general standards" to which the court refers include the expectation that the DOC will examine only those issues related to the criteria set forth in its regulation, the requirement to adhere to prior administrative practice, and the necessity that each decision be based upon substantial evidence contained in the administrative record.<sup>127</sup>

4.190 Based upon the manner in which the question has been framed, there is apparent interest by the Panel in whether section 353.25(a)(2) properly reflects the obligations contained in Article 11. The United States maintains that section 353.25(a)(2) actually tracks the obligations contained in Article 11. In this regard, Article 11 requires Members to review whether the continued imposition of a definitive anti-dumping duty is warranted. Similarly, section 353.25(a)(2) requires the DOC, upon proper request, to review whether revocation of an anti-dumping order is appropriate. Moreover, Article 11 requires a Member to terminate the anti-dumping duty if, as a result of a review under Article 11.2, the authorities determine that the anti-dumping duty is no longer warranted. Likewise, section 353.25(a)(2) imposes an obligation on the DOC to revoke the

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'shall' revoke if those criteria are met? Is the exercise of the Secretary's discretion under section 353.25(a)(2) subject to legal / judicial control?"

<sup>126</sup> *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (1983), cert. denied, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed. 2d 679 (1984) (emphasis added by the United States)(footnote omitted).

<sup>127</sup> *See Ibid.*

anti-dumping order if the three criteria related to the need for the continued imposition of the order are satisfied.

4.191 The fact that section 353.25(a)(2) contains the term "may," as opposed to the term "shall," is merely a reflection of the discretion accorded to the DOC by the United States Congress. This discretion is embodied in section 751(d) of the Tariff Act, which states that "the administering authority may revoke, in whole or in part, . . . an anti-dumping duty order or finding . . . after review . . ." The DOC, in promulgating section 353.25(a)(2), determined that revocation of an order will occur if the three criteria set forth in that provision are satisfied. Therefore, the use of the term "may" does not connote an ability to deviate from its practice of revoking an anti-dumping order whenever those three criteria are satisfied.

4.192 In its second oral statement before the Panel, the **United States** further argued:

4.193 Korea also asserts that the United States has misled the Panel by claiming that the DOC has revoked literally hundreds of anti-dumping measures based upon an absence of dumping. The United States has not misled the Panel. First of all, the representation made by the United States is absolutely true and Korea does not present evidence to the contrary. What Korea has done is to recast the statement to cover a *different* universe of cases - that is, cases where the DOC received and examined evidence directly bearing on the no likelihood/not likely criterion. This universe of cases, Korea asserts, shows that the DOC only applies the not likely criterion when it wants to "block revocation." However, the United States has already shown that the depth of the agency's analysis under section 353.25 depends, almost exclusively, upon the arguments of the parties and the evidence on the record of the administrative proceeding - not the whim of the DOC. Secondly, a review of the cases over the past 19 years where the DOC has examined the no likelihood/not likely standard reveals that in a substantial number of cases, the United States revoked the subject order. Now, if the United States only applied the not likely criterion when it wanted to "block revocation," as Korea asserts, wouldn't one expect all, or at least most, of these cases to result in maintenance of the order - not revocation?

### 3. *Speculative Analysis of Future Dumping*

#### (a) Claim raised by Korea

4.194 **Korea** claims that by imposing a "no likelihood/not likely" recurrence of dumping criterion which must be met for an order to be revoked, the United States is in violation of Article 11.2 which does not allow a forward looking analysis in the case of dumping. The following are Korea's arguments in support of that claim:

4.195 The "no likelihood/not likely" criterion focuses on whether dumping will recur in the future.<sup>128</sup> Speculation as to whether *dumping* will recur is not permitted by Paragraph 2 of Article 11 of the AD Agreement.

4.196 The relevant sentence of Paragraph 2 is the second:

Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

First, this sentence provides rights to interested parties, thus imposing requirements on Members. Second, it limits Members' discretion as to the type of analysis they can conduct. Although the sentence allows Members to conduct a forward-looking analysis of whether *injury* would be likely to continue or recur,<sup>129</sup> it does not call for or allow a prospective analysis of whether dumping "would be likely to continue or recur." As revealed in the plain language of the sentence, the negotiators did not extend the "likely to" concept to the dumping context and doing so by implication is impermissible. Rather, regarding dumping, the Member is permitted only to examine "whether the continued imposition of the duty is necessary to offset dumping."<sup>130</sup> Where, as here, no dumping has occurred for three consecutive years, the duty is not "necessary to offset dumping" because there is no dumping (much less injury).

4.197 This analysis is confirmed by a review of Paragraph 3 of Article 11, the so-called "sunset provision." Paragraph 3 requires a Member to revoke a duty no later than five years from its imposition. The only exception to this rule is where a Member conducts a review and determines "that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping and injury*" (footnote omitted; emphasis added by Korea). The fact that the negotiators specifically provided for a forward-looking analysis of dumping and applied the word "likely" to cover both dumping and injury in Paragraph 3, but not in Paragraph 2, confirms that such an analysis is not permitted under Paragraph 2 of Article 11.

4.198 **Korea**, in response to a question from the Panel<sup>131</sup>, subsequently further argued as follows:

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<sup>128</sup> See 19 C.F.R. § 353.25(a)(2)(ii) (1996).

<sup>129</sup> Korea notes, in this regard, that the United States has failed to comply with this requirement as well. Under US law, when the ITC examines whether a duty should be revoked for changed circumstances, it is *required* to presume that future sales will be dumped, absent a review of the matter and contrary conclusion by the DOC. See *Matsushita Elec. Indus. Co. v. United States*, 569 F. Supp. 853, 856 (C.I.T. 1983), *rev'd on other grounds*, 750 F.2d 927 (Fed. Cir. 1984) (Ex. ROK-55); *American Permac, Inc. v. United States*, 656 F. Supp. 1228 (C.I.T. 1986), *aff'd*, 831 F.2d 269, *cert. denied*, 485 U.S. 901, 108 S. Ct. 1067 (Ex. ROK-56).

<sup>130</sup> This analysis complies with the directive of the *Vienna Convention*, Article 31.1 ("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.").

<sup>131</sup> The Panel recalls that the question was as follows: "The Panel notes that Article 11.1 of the ADP Agreement provides that 'an anti-dumping duty shall remain in force only as long as and to the extent *necessary* to counteract dumping which is causing injury', whereas the penultimate sentence of

4.199 First, as a matter of textual interpretation, there is no relationship between "necessary" in Article 11.1 and "likely" in Article 11.3, and thus a finding of "likelihood" under Paragraph 3 can neither satisfy nor fail to satisfy the "necessary" requirement in Paragraph 1. Paragraph 3 begins: "Notwithstanding the provisions of paragraphs 1 and 2, . . . ." Thus, this Paragraph is an exception from Paragraphs 1 and 2 that is segregable from them and should not be used to interpret those Paragraphs.

4.200 Second, this point is confirmed by an examination of the differing requirements and standards of Paragraphs 2 and 3. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the Member conducts injury and dumping reviews and determines "that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping *and* injury." In contrast, Paragraph 2 limits *dumping* reviews to an examination of "whether the continued imposition of the duty is necessary to offset dumping." The use of present-tense language, coupled with the omission of the "likely to continue or recur" provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking "likely to continue or recur" analysis both for dumping and injury, while Paragraph 2 provides for a "likely" analysis only for injury, demonstrates that the negotiators were aware that they could extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to do so. For purposes of Article 11.2, then, the question of whether a duty is "necessary to counteract dumping," as set out in Paragraph 1, is answered by reference to whether "continued imposition of the duty is necessary to offset dumping."

4.201 The negotiators: (i) chose a "likely" standard for Paragraph 3; (ii) did not change the Paragraph 2 dumping standard; and (iii) included at the start of Paragraph 3 the phrase, "Notwithstanding the provisions of paragraphs 1 and 2." These facts confirm that the United States violated its Article 11 obligations when it conducted a forward-looking analysis of dumping in this case.

4.202 After finding for three consecutive reviews that no dumping was occurring, the United States should have revoked on that basis alone. Having failed to revoke (in violation of Article 11), the United States should have conducted only the present-tense dumping examination provided for by Paragraph 2; the United States violated Paragraph 2 by conducting a forward-looking analysis. But, even assuming, for the sake of argument, that Paragraph 2 (or, somehow, Paragraph 3) permits the United States to conduct a forward-looking review, the United States violated those provisions: (i) by devolving the likely criterion to "no likelihood/not likely" (which enables the United States to maintain anti-dumping duties years after dumping and any resulting injury have

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Article 11.3 provides for the continued application of an anti dumping duty if its expiry 'would be *likely* to lead to continuation or recurrence of dumping and injury.' What is the relationship between the concept of necessity in Article 11.1 and the concept of likelihood in Article 11.3? How does a finding of 'likelihood' under Article 11.3 satisfy the "necessity" requirement of Article 11.1?"

ceased); (ii) by shifting the burden of proof to Respondents; and (iii) by setting the standard so that, in this case at least, it simply could not be met. And the United States took all of these actions and created these insurmountable barriers after finding for three-and-one-half consecutive years that Respondents had not dumped (and, thus, had not caused injury).

(b) Response by the United States

4.203 The following are the **United States** arguments in response to Korea's claim:

4.204 Korea focuses on the time period that the DOC examined when it determined that an absence of dumping by Respondents was "not likely" in *Final Results Third Review*. In particular, Korea contends that Article 11.2 of the AD Agreement does not permit investigating authorities (i) to examine whether dumping will recur, and (ii) to conduct a "forward-looking analysis." These arguments fail.

4.205 The United States demonstrated that Article 11 does not require Members to revoke anti-dumping orders as soon as a Respondent stops dumping. Thus, if an order may cover an exporter or reseller that was found not to be dumping during the most recent assessment period, it is only logical that the inquiry under Article 11.2 may, when appropriate, look at whether "dumping will recur." There certainly is nothing in Article 11.2 or the context of the AD Agreement which precludes this type of examination.

4.206 There also is nothing in Article 11 which defines the time period that investigating authorities must examine when deciding if an order is "necessary to offset dumping." In the instant case, the DOC conducted an extensive analysis of the entire record which included Respondents' past conduct (*e.g.*, three years of no dumping), as well as data regarding the first part of 1997, which Respondents characterized as a market upturn.<sup>132</sup> In describing the temporal scope of its review, the DOC stated, in part:

Common sense, however, dictates that the DOC should, as always, base its determination on all record evidence.

In this revocation proceeding the DOC considered all publicly available data and information placed on the record by all parties ...<sup>133</sup>

4.207 Korea seeks to pick and choose the information in the record that it thinks is most helpful to Respondents. In doing so, however, it never provides any authority for its position nor explains why an investigating authority should not be allowed to rely on the most current information available when making a determination under Article 11.2.

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<sup>132</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

<sup>133</sup> *Ibid.*

4.208 Finally, Korea's construction of Articles 11.2 and 11.3 and, in particular, its discussion of the term "likely," is flawed. Article 11.2 articulates a relatively broad standard regarding the revocation (or "termination") of anti-dumping duties that implements the "general rule" set forth in Article 11.1. Article 11.3, on the other hand, articulates a very specific standard. It requires WTO Members to revoke all anti-dumping measures after five years unless "the authorities determine ... that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping and injury."<sup>134</sup> While it is true that Article 11.3 (but not Article 11.2) uses the term "likely" in the dumping context, this does not mean the specific standard does not (or cannot) fit within the more general standard. It simply means the "likely" standard is mandatory in the context of Article 11.3 and a "permissible" interpretation of the AD Agreement in the context of Article 11.2. Indeed, it is impossible to imagine how section 353.25, when it uses a term found in Article 11.2 *and* Article 11.3, could be anything *other* than a permissible interpretation of the AD Agreement.

4.209 The **United States**, in response to a question from the Panel<sup>135</sup>, further argued as follows:

4.210 Article VI and Article 11 address different questions. Article VI asks whether an anti-dumping duty needs to be imposed because an industry currently is being injured by dumped imports. Article 11, on the other hand, takes as a given that the imposition of the definitive anti-dumping duty was necessary to offset injurious dumping. It, therefore, asks whether the "*continued imposition* of the duty is necessary to offset dumping" or whether the injury originally found would be likely to "*continue or recur* if the duty were removed or varied" (emphasis added by the United States).

4.211 The Appellate Body has affirmed, on more than one occasion, that the principles of treaty interpretation laid down in the *Vienna Convention* should guide panels when they seek to discern the meaning of WTO agreements.<sup>136</sup> Article 31 of the *Vienna Convention* provides that the terms of a treaty must form the starting point for the process of interpretation. In this regard, terms must be interpreted according to their "ordinary meaning" taking into account, *inter alia*, their "context" (*i.e.*, the other provisions of the agreement).

<sup>134</sup> AD Agreement, art. 11.3 (emphasis added by the United States).

<sup>135</sup> The Panel recalls that the question was: "Article 11.1 of the ADP Agreement provides that an anti-dumping duty may only remain in force as long as it is necessary to counteract dumping which 'is' causing injury. Article VI:1 of GATT 1994 condemns dumping if it 'causes' or 'threatens' material injury. The verbs quoted from these provisions are expressed in the present tense. Does the United States consider that the use of the present tense suggests that anti-dumping measures should only remain in place to the extent that present dumping is presently causing or presently threatening to cause material injury? If not, why not?"

<sup>136</sup> See, e.g., *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, DSR 1996:I, 3, at 16; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, Report of the Appellate Body adopted 1 November 1996, DSR 1996:I, 97, at 104.

4.212 If this approach is followed with respect to the language in Article 11 of the AD Agreement, it becomes quite clear that the provisions of Article 11 do not condition the maintenance of definitive anti-dumping duties (*i.e.*, anti-dumping orders) upon a finding that present dumping is presently causing (or presently threatening to cause) material injury. Specifically, Article 11.2 states that, in conducting a review, authorities must examine, *inter alia*, "whether the injury would be likely to continue or recur if the duty was removed or varied." This indicates that "recurrence" of injury is reason to keep an order in effect. In other words, that injury may have ceased does not warrant revocation of an order if the revocation is likely to cause injury to recur. Similarly, Article 11.3 allows maintenance of anti-dumping duties beyond five years when "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The "recurrence" language indicates that anti-dumping orders can be maintained when dumping and/or injury do not currently exist, but is likely to recur upon revocation of the order. In sum, it would be inconsistent with Articles 11.2 and 11.3 of the AD Agreement to construe Article 11.1 as requiring that an order be kept in effect only if there is present dumping which is presently causing or presently threatening to cause material injury.

4.213 In this regard, the panel in the *Swedish Plate* case found that Article 9.1 of the Tokyo Round Anti-Dumping Code called for a prospective analysis.<sup>137</sup> But for the deletion of a comma, Article 9.1 is identical to Article 11.1 of the AD Agreement.

(c) Rebuttal arguments made by Korea

4.214 **Korea** makes the following arguments in rebuttal to the United States' response:

4.215 Paragraph 2 provides for a review of "whether the continued imposition of the duty is necessary to offset dumping." The words "is" and "offset" are the keys to this inquiry. The negotiators chose the *present-tense* verb "is" and tied it to another *present-tense* verb, "offset." They did not select either "will be" for "is" or "prevent" for "offset." Nor did they permit a forward-looking "likely" analysis. Thus, the forward-looking analysis used by the United States is an impermissible interpretation of this provision.

4.216 Paragraph 3 contains language indicating that the negotiators could have, but decided not to, expand a Member's authority to conduct a forward-looking "likely" analysis in conducting dumping reviews under Paragraph 2. Paragraph 3 requires revocation of a duty no later than five years after its imposition, unless the Member conducts injury and dumping reviews and determines "that the expiry of the duty would be *likely* to lead to continuation or recurrence of *dumping and injury*." In contrast, Paragraph 2 allows a similar inquiry regarding

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<sup>137</sup> *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117 and Corr. 1, Report of the Panel issued 24 February 1994 (unadopted), para. 233.

injury only. Paragraph 2 limits dumping reviews to an examination of "whether the continued imposition of the duty is necessary to offset dumping." The use of present-tense language (*e.g.*, "offset dumping" vs. "prevent dumping"), coupled with the omission of the "likely to continue or recur" provision, indicates that a forward-looking analysis is not permitted in regard to Paragraph 2 dumping reviews. The fact that Paragraph 3 specifies a forward-looking "likely to continue or recur" analysis both for dumping and injury (and that Paragraph 2 provides for a "likely" analysis for injury, but not dumping) demonstrates that the negotiators could have chosen to extend a forward-looking analysis to dumping as well as to injury under Paragraph 2, but decided not to and, instead, expressly limited the analysis. The United States should not be permitted to engraft a specious requirement on to the plain language of Paragraph 2, especially after the negotiators chose not to.

(d) Rebuttal arguments made by the United States

4.217 The **United States** makes the following arguments in rebuttal:

4.218 The purpose of the AD Agreement is to ensure that relief is made available to producers adversely affected by dumping. The agreement accomplishes this goal by establishing a broad framework of rights and obligations which regulates the determination of dumping and the application of remedial anti-dumping duties. Within this framework, Article 11 seeks to ensure that anti-dumping measures do not become permanent fixtures that take on a life of their own. In particular, Article 11.1 states the general principle that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."<sup>138</sup>

4.219 Article 11 does not pursue this principle by stating a *per se* rule which mandates revocation whenever a Respondent goes three years without dumping. Indeed, as the United States has stated repeatedly throughout this dispute settlement proceeding, Article 11 does *not* prescribe the specific circumstances that must lead to revocation or the factors that an administering authority must consider when deciding if an order is "necessary to offset dumping." The drafters of Article 11 chose instead to impose upon Members an obligation to "review," under certain circumstances, the "need for the continued imposition" of the anti-dumping duty. Once that review is completed, and *only if* the investigating authority "determine[s] that the anti-dumping duty is no longer warranted" based upon one or more of the reviews described in Article 11.2, must a Member revoke an anti-dumping order.

4.220 Korea's allegation that Article 11 somehow proscribes a prospective (or "forward-looking") analysis under Article 11.2 is completely without merit. First, Article 11, as discussed, does not define the time period that an investigating authority must examine when deciding if the "continued imposition of the duty is

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<sup>138</sup> AD Agreement, art. 11.1.

necessary to offset dumping." Second, Article 11.3, footnote 22, clearly permits a Member with a retrospective assessment system, such as the United States, to maintain an anti-dumping duty (*i.e.*, an order) even though the most recent assessment period may have revealed an absence of dumping. Given this fact, it is only logical that the inquiry under Article 11.2 may involve a prospective analysis of whether dumping is likely to resume. Finally, the ordinary meaning of the expression "continued imposition," in Article 11.2, suggests an analysis that goes beyond the immediate question of whether a Respondent is presently dumping. Rather, it suggests a broad inquiry into the anti-dumping order's continuing necessity - necessity based upon past and expected behavior. This is precisely the type of inquiry that is provided for under section 353.25(a) of the DOC's regulations.

4.221 The **United States**, in response to a question from the Panel,<sup>139</sup> further argued as follows:

4.222 Article 11 does not indicate what time period should be considered when determining whether the continued imposition of the duty is necessary to offset dumping. In most cases under section 353.25(a), the arguments of the parties determine which time period will be important to the DOC's analysis. In this regard, the DOC examines current trends that may have some bearing on the foreseeable future (*e.g.*, within the coming year). For example, the existence of inventories and capacity utilization may offer some indication about what is likely to happen in the next few months. Still, high inventories for different industries may have different implications on the period of time which is relevant. Similarly, different industries may have business cycles of different lengths. Therefore, the experience of the United States in administering the anti-dumping duty law suggests that the specific business cycles and trends of the industry in question are relevant. The appropriate time period depends on the facts of each case.

4.223 With regard to when the relevant time period is set, it is the parties themselves that provide evidence deemed relevant to the inquiry. Thus, the DOC does not "establish" a time period under section 353.25(a). The DOC may conclude as it did in *DRAMs from Korea*, that, of all the evidence, some is more probative of likelihood of future dumping than others. However, even in this context, the DOC still did not "establish" a time period in the sense of declaring evidence related to a particular time period as irrelevant or inadmissible.

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<sup>139</sup> The Panel recalls that the question was: "At what point during the revocation review proceeding is the time period for examining the 'not likely' criterion determined and notified to the parties? Has it always been the same point? If not, why not?"

#### 4. *Burden of Proof*

##### (a) Claim raised by Korea

4.224 **Korea** claims that by applying a revocation requirement that the company subject to an anti-dumping duty prove that it is "not likely" to dump in the future, the United States has shifted the burden of proof away from the Member imposing the duty in violation of Article 11 of the AD Agreement. The following are Korea's arguments in support of this claim:

4.225 The regulations applied by the DOC in this case allow the Secretary to revoke the anti-dumping duties if it finds that, among other things, "[i]t is not likely that [Respondents will] in the future" dump.<sup>140</sup> US courts reviewing these regulations have found that the Respondent bears the burden of proving that it is "not likely" to dump in the future (or, alternatively, that there is "no likelihood" of future dumping).<sup>141</sup>

4.226 This formulation unjustifiably shifts the burden of proof from the Member imposing the duty, which must justify continuing the duty, to the responding companies.<sup>142</sup> This is contrary to the text and structure of Article 11.

4.227 First, the "no likelihood/not likely" criterion is inconsistent with the text of Paragraph 2 of Article 11. In Paragraph 2 (unlike Paragraph 3), the word "likely" does *not* apply to dumping, but only to injury. However, even assuming that it did apply to dumping, the United States has pushed the text of Paragraph 2 still further without support. The United States has turned the "likely" standard on its head, transmogrifying it to "not likely," and requiring Respondents to bear the burden of proving the standard even though Paragraph 2 clearly imposes the burden on Members.

4.228 Moreover, each sentence of Paragraph 2 either: (i) imposes an obligation on a Member that is maintaining anti-dumping duties (the first and third sentences); or (ii) grants a right to a Respondent company subject to such duties (the second sentence). In doing so, Paragraph 2 sets forth procedures to implement the general directive of Paragraph 1 that anti-dumping duties may be imposed by a Member *only* to offset dumping that is causing injury. Paragraph 2 does not allow, and cannot reasonably be interpreted to allow, a Member to impose such substantial obligations on Respondents seeking revocation.<sup>143</sup>

<sup>140</sup> See 19 C.F.R. § 353.25(a)(2)(ii) (1996).

<sup>141</sup> See, e.g., *Sanyo Electric Co. v. United States*, 15 C.I.T. 609 (Ex. ROK-50); *Toshiba*, 15 C.I.T. at 600 and 603 (Ex. ROK-5); *Manufacturas Industriales*, 666 F. Supp. at 1566 (Ex. ROK-7).

<sup>142</sup> As the CIT has stated: "The regulation does not present an objective criterion for determining whether there is no likelihood of resumption of LTFV sales. Instead, the petitioner [the Respondent before the DOC] must establish this fact to the satisfaction of the Secretary." See *Toshiba*, 15 C.I.T. at 600 (Ex. ROK-5).

<sup>143</sup> This is particularly true where, as here, the authority found in three consecutive years that Respondents were not dumping (and, thus, perforce were not causing injury). Moreover, where, for three years, a Respondent has been found not to be dumping, Article 11 requires the Member to revoke the anti-dumping duties.

4.229 Second, the DOC's shifting of the burden of proof, both in general and in *DRAMs from Korea*, is inconsistent with the structure of Article 11 and with US obligations under the AD Agreement. As a derogation from the general principle of free trade the WTO regime protects, the right to impose anti-dumping duties is granted, but is tightly circumscribed, by the text of the AD Agreement.<sup>144</sup> Where a party has been found to be dumping and thereby injuring a domestic industry, a Member may impose duties. However, this is the limit of the Member's discretion.

4.230 Paragraph 1 of Article 11 prohibits a Member from maintaining a duty where no dumping is occurring (or has occurred). And, if a Member is not allowed to impose or maintain a duty absent dumping, it certainly cannot do so *and*, then, condition revocation on a Respondent's meeting the burden of proving to the satisfaction of the Member that dumping is "not likely" to recur. Thus, where a Member's own authorities have concluded-for three consecutive years-that a Respondent has not dumped, the Member is obliged by Article 11 to revoke the duty. On its face, Article 11 does not permit a Member to force a Respondent to bear the burden of proving some speculative "fact."

4.231 The DOC's regulations, on their face and as applied, permit the DOC to shift the burden of proof to a Respondent and to employ the "no likelihood/not likely" criteria in a biased fashion. Therefore, the United States has violated and is violating Article 11 of the AD Agreement.

(b) Response by the United States

4.232 The following are the **United States'** arguments in response to Korea's claim:

4.233 Under section 353.25(a)(2) of the DOC's regulations, an absence of dumping for three years does not *entitle* a Respondent to revocation.<sup>145</sup> The agency must also be satisfied that a resumption of less-than-normal-value sales to the United States by the Respondent is not likely.

4.234 The DOC's likelihood determination is case-specific. It engages in a fact-intensive, case-by-case analysis of all of the information on the record in order to determine if a resumption of less-than-normal-value sales to the United States is "not likely."<sup>146</sup>

4.235 In administrative proceedings in which the parties do not submit evidence or argument concerning the likelihood of resumption of dumping, the fact that a Respondent has not dumped for three consecutive years and certified that it will not dump in the future may constitute the only evidence in the administrative

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<sup>144</sup> See *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117 (unadopted).

<sup>145</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24). In its first submission, Korea mistakenly claims that three consecutive years of no dumping "satisfied the requirements for revocation set out in 19 C.F.R. § 353.25(a)(2) (1996)."

<sup>146</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24).

record on the likelihood issue.<sup>147</sup> In such cases (which constitute the vast majority since 1980), the DOC has generally found that a resumption of dumping is not likely based upon the un-controverted record evidence.<sup>148</sup> Over the years, this practice has evolved into a *de facto* presumption that if a Respondent has not dumped within the prior three-year period, it is not likely to resume dumping in the future.<sup>149</sup>

4.236 In contrast, in cases in which the parties raise concerns and submit evidence about the likelihood of resumption of dumping, the DOC analyzes the arguments and evidence, and decides whether or not to revoke based upon a review of all of the record evidence. Sometimes this process produces a result favorable to the petitioning industry in the United States,<sup>150</sup> and sometimes it does not.<sup>151</sup>

<sup>147</sup> *Tatung Co. v. United States*, 18 CIT 1137, 1144 (1994) (Ex. USA-37).

<sup>148</sup> See, e.g., *Red Raspberries From Canada; Final Results of the Anti-dumping Duty Administrative Review, and Revocation in Part of the Anti-dumping Duty Order*, 57 Fed. Reg. 49686, 49686-88 (1992); *Final Results of Anti-dumping Duty Administrative Reviews: Fishnetting of Man-made Fibers From Japan*, 56 Fed. Reg. 49456, 49457 (1991); *Elemental Sulphur From Canada; Final Results of Anti-dumping Duty Administrative Review and Revocation In Part*, 56 Fed. Reg. 16068 (1991) ("*Sulphur from Canada*"); *Spun Acrylic Yarn From Japan; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part*, 52 Fed. Reg. 43781, 43782 (1987); *Clear Sheet Glass From Japan; Final Results of Administrative Review and Revocation of Anti-dumping Finding*, 47 Fed. Reg. 14506 (1982). These administrative determinations appear in the order cited at Ex. USA-38 through Ex. USA-42.

<sup>149</sup> See *New AD Regulations*, 62 Fed. Reg. at 27326 (Ex. USA-43). But see, e.g., *Certain Circular Welded Carbon Steel Pipes and Tubes from Taiwan; Final Results of an Anti-dumping Duty Administrative Review and Determination not to Revoke in Part*, 56 Fed. Reg. 8741, 8742 (1991) (Ex. USA-44); and *Final Results of Anti-dumping Duty Administrative Review; Large Power Transformers From Italy*, 53 Fed. Reg. 29367, 29370 (1988) (Ex. USA-45). In both of these cases, the DOC was not satisfied that future dumping was unlikely, despite the apparent absence of any comment or argument from the petitioning industry.

<sup>150</sup> See, e.g., *Brass Sheet and Strip From Germany; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 61 Fed. Reg. 49727, 49732 (1996) ("*Brass Sheet from Germany*"); *Television Receivers, Monochrome and Color, From Japan; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35517, 35518-19 (1989) ("*Televisions from Japan*"); *Impression Fabric of Man-Made Fiber From Japan; Final Results of Anti-dumping Duty Administrative Review*, 52 Fed. Reg. 41601, 41602 (1987); *High Power Microwave Amplifiers and Components Thereof From Japan; Final Results of Anti-dumping Duty Administrative Review*, 51 Fed. Reg. 43402, 43403 (1986); *Cadmium From Japan; Final Results of Administrative Review of Anti-dumping Finding and Determination Not To Revoke*, 46 Fed. Reg. 50815, 50816 (1981); *Canned Bartlett Pears From Australia; Final Results of Administrative Review of Anti-dumping Finding and Determination Not to Revoke*, 46 Fed. Reg. 43224, 43224-25 (1981). These administrative determinations appear in the order cited at Ex. USA-46 through Ex. USA-51.

<sup>151</sup> See, e.g., *Steel Wire Rope From the Republic of Korea; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 62 Fed. Reg. 17171, 17173-74 (1997) ("*Steel Rope from Korea*"); *Certain Forged Steel Crankshafts From the United Kingdom; Final Results of Anti-dumping Duty Administrative Review and Revocation of Anti-dumping Duty Order*, 62 Fed. Reg. 16768, 16771 (1997); *Fresh Cut Flowers From Mexico; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 61 Fed. Reg. 63822, 63825 (1996) ("*Flowers from Mexico*"); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Anti-dumping Duty*

4.237 US courts have held that the burden is on the party seeking revocation to come forward with "real evidence"<sup>152</sup> to persuade the DOC to revoke the order.<sup>153</sup> However, once the factual record closes, all such burdens evaporate and it falls to the DOC to make a determination that is in accordance with law and based upon substantial evidence.<sup>154</sup>

4.238 The DOC closed the administrative record to new factual information on 2 May 1997. It gave all parties to the proceeding a full and fair opportunity to comment in writing upon the facts in the record. The DOC held a public hearing on 5 May 1997 which was attended by Respondents and Micron. Once all the facts and arguments were identified, the DOC analyzed everything in the administrative record which bore on the likelihood issue. It then summarized its conclusions in memoranda which contain very detailed evaluations of company-specific, confidential information provided by Respondents and several of their OEM customers.<sup>155</sup> Among other things, the DOC examined the nature of the

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*Administrative Reviews and Revocation In Part of an Anti-dumping Duty Order*, 60 Fed. Reg. 10959, 10967 (1995); *Flowers From Colombia*, 59 Fed. Reg. at 15167 (Ex. USA-30); *Final Results of Anti-dumping Duty Administrative Review and Revocation in Part: Titanium Sponge From Japan*, 57 Fed. Reg. 557, 557 (1992) ("*Sponge from Japan*"); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31); *Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results*, 55 Fed. Reg. 47093, 47097 (1990); *Printed Vinyl Film From Brazil; Final Results of Administrative Review of Anti-dumping Finding and Revocation in Part*, 49 Fed. Reg. 33158, 33158 (1984).

These administrative determinations appear in the order cited at Ex. USA-52 through Ex. USA-58. In *Sponge from Japan*, the notice states that "[t]he petitioner indicated that they had no objection to this revocation." 57 Fed. Reg. at 557. However, in an earlier, related notice, the petitioner's objection to revocation on various grounds was made evident. See *Titanium Sponge From Japan; Final Results of Anti-dumping Duty Administrative Review and Tentative Determination To Revoke in Part*, 54 Fed. Reg. 13403, 13405 (1989) (comment 9) (Ex. USA-59).

<sup>152</sup> *Sanyo Elec. Co. v. United States*, 15 CIT 609, 614 (1991) ("the investigation was conducted at Sanyo's request, and it was for Sanyo to come forward with real evidence to persuade Commerce to revoke the order"), citing *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1566 (Ct. Int'l Trade 1987) (hereinafter "*Manufacturas*") (Ex. USA-60).

<sup>153</sup> The DOC, in practice, actually places the burden initially on the petitioning US industry to come forward with evidence relevant to the "not likely" issue. It is only after the petitioner has satisfied this requirement that the burden, in effect, switches to the Respondent to come forward with evidence which indicates that a resumption of dumping is "not likely."

This is not to say, however, that the DOC must deny revocation under these circumstances if a Respondent fails to put evidence on the record (beyond three years of no dumping) regarding the likelihood issue. The ultimate question in every proceeding is whether the weight of the evidence justifies maintenance of the order. In this regard, under US law, it is incumbent upon the DOC to render a decision that is based upon substantial evidence and in accordance with law. 19 U.S.C. § 1516a (1998) (Ex. USA-62). Moreover, the DOC may, quite apart from evidence introduced by the parties, exercise its investigatory powers (as it did in the instant case) to collect public information on its own to help it decide the "not likely" issue. See, e.g., *Televisions Receivers, Monochrome and Color, From Japan; Determination Not To Revoke in Part*, 55 Fed. Reg. 11420, 11422 (1990) (Ex. USA-61).

<sup>154</sup> 19 U.S.C. § 1516a (1998) (Ex. USA-62). See also 2 Charles H. Koch, Jr. *Administrative Law and Practice* § 5.51 at 169 (2d ed. 1997) ("In reality then the burden of persuasion always rests with the agency.") (Ex. USA-63).

<sup>155</sup> See, e.g., *Charts from Agency Analyst to File ("Prelim. Analysis")* (Ex. USA-13); *Analysis Memorandum from Program Manager to Deputy Assistant Secretary of Import Administration*, 16 July 1997 ("*Final Analysis*") (Ex. USA-34).

subject merchandise, trends in the domestic and home market industries, and currency movements. The agency also conducted extensive analyses of supply and demand, price trends during all phases of the business cycle, and the importance of the US market to the Respondents.

4.239 This type of fact-intensive, case-by-case analysis was (and is) fully consistent with the DOC's long-standing practice of examining all relevant economic factors and other information on the record in a particular case.<sup>156</sup> In the instant case, it led to a determination not to revoke the order that was based upon facts which were properly established, and whose evaluation was unbiased and objective

4.240 Korea argues that the DOC's regulations, "on their face" and as applied in *Final Results Third Review*, permit the DOC to shift the burden of proof to a Respondent to show that a resumption of dumping is "not likely." Korea also contends that the DOC employs the "not likely" standard in its regulations in a "biased fashion." Both situations, Korea asserts, violate Article 11 of the AD Agreement.

4.241 The AD Agreement does not prevent importing countries from requiring Respondents to come forward with evidence which indicates that a resumption of dumping is "not likely." Article 11 does not prescribe the specific factors that an investigating authority must consider when determining whether anti-dumping duties are "warranted." It also does not prescribe the specific procedural steps that must be followed when conducting a review under Article 11.2. Within this framework, the "not likely" standard is a reasonable exercise of the United States' legitimate interest in ensuring that relief to those domestic industries that have been adversely affected by dumping is not withdrawn earlier than is "necessary."

4.242 Whether it is "not likely" that dumping will resume is an issue that directly and logically relates to whether anti-dumping duties continue to be necessary or warranted. The fact that an exporter revises its prices to eliminate dumping while the anti-dumping remedy is in place does not necessarily mean that the exporter will not resume dumping once the remedy is removed. By considering such factors as trends in costs and prices, along with Respondents' pricing practices over the prior three-year period, the DOC is able to evaluate whether the anti-dumping order remains "necessary to offset dumping." In this respect, there is nothing facially invalid about the DOC's revocation standard, in general, or the "not likely" standard, in particular. The DOC's standard, therefore, reflects a "permissible" interpretation of Article 11 of the AD Agreement.

4.243 Lastly, Korea's position, if taken to its logical extreme, would preclude importing countries from imposing any type of evidentiary burden on

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<sup>156</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173-74 (Ex. USA-52); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-32 (Ex. USA-46); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31).

Respondents during the course of a proceeding under Article 11. This would be inconsistent with numerous provisions in the AD Agreement. For example, Article 6 of the agreement reflects the long-standing practice of national investigating authorities to solicit information on sales and costs by means of a questionnaire and to allow interested parties otherwise to submit information on the record in support of their positions regarding the issue of dumping.<sup>157</sup> The solicitation of comparable information in the context of a proceeding under section 353.25(a) of the DOC's regulations is by no means unfair or unusual. Finally, in the instant case, the DOC did not demand that Respondents prove a negative (or the impossible) - that they would not dump if the order was revoked. Instead, the DOC established a procedure "at the request of the parties" for the submission of factual information regarding market conditions, coincidence of dumping with downturns, and related matters.<sup>158</sup>

(c) Rebuttal arguments made by Korea

4.244 **Korea** makes the following arguments in rebuttal to the United States responses:

4.245 The US revocation scheme, on its face and as applied, violates Article 11 of the AD Agreement. Because the US revocation regime, on its face and as applied, shifts the burden of proof to Respondents, the Panel should find that the United States has violated Article 11.

4.246 The US first submission ostensibly takes issue with Korea's demonstration, but actually contains several statements that confirm that the US regime does, indeed, place the burden of proof on Respondents. For example, the United States declares:

The agency must also be satisfied that a resumption of less-than-normal-value sales to the United States by the Respondent is not likely.

The use of the word "satisfied" indicates that the burden of proof is on the Respondent, and not on the agency or the petitioner.<sup>159</sup> Later, at paragraph 77, the United States actually agrees with Korea that "US courts have held that the burden is on the party seeking revocation to come forward with 'real evidence' to persuade the DOC to revoke the order."

4.247 Thus, by its own admission, the United States' revocation regime shifts the burden of proof to respondents. The United States improperly imported the "likely" standard from injury reviews under Paragraph 2 to dumping reviews, thereby expanding the burden of proof applied in dumping reviews. Then, the United States turned the standard on its head, transmogrifying it to "not likely,"

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<sup>157</sup> AD Agreement, art. 6.

<sup>158</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>159</sup> For example, instead of "must also be satisfied," the United States could have used "must determine" or "must conclude" or "must find."

and requiring Respondents to bear the burden of proving the standard even though Paragraph 2 clearly imposes the burden on Members. This extension and shifting of the burden of proof violates Article 11 of the AD Agreement, which places the burden squarely on the administering authorities.

4.248 The United States several times has stated that there will be dire consequences if the Panel accepts Korea's interpretation of Article 11. For example, the United States asserts that Korea's position, "if taken to its logical extreme," would preclude a Member from imposing any evidentiary burden on a Respondent seeking revocation. This *might* be true if one took Korea's position to its illogical extreme, but nothing which Korea has advanced even suggests this.

4.249 Under the US system, the Korean Respondents demonstrated for three consecutive reviews that they were not dumping. That is an *exceedingly* substantial evidentiary burden. It required Respondents to comply with US dumping laws and to submit voluminous data, all of which the DOC verified, to demonstrate their compliance.

4.250 But, having done so, the United States was required to revoke the definitive duty, unless it initiated reviews under Paragraph 2 and found that "continued imposition of the duty is necessary to offset dumping" and that the "injury would be likely to continue or recur if the duty were varied."

(d) Rebuttal arguments made by the United States

4.251 The **United States** makes the following arguments in rebuttal:

4.252 In its first written submission, Korea states that section 353.25(a) of the DOC's regulations, "on its face and as applied," improperly requires Respondents to bear the burden of showing that a resumption of dumping is "not likely." At no time since then has Korea ever explained how section 353.25(a), "on its face," places the burden of proof on Respondents to show anything. Korea *does* try to elicit support for its position by emphasizing the negative phraseology of the not-likely standard, and even characterizing the standard as "transmogrified." However, whether the standard is "transmogrified", it is still just a standard and nothing on "the face" of the regulation speaks to allocation of the burden of proof.

4.253 In its first written submission, the United States demonstrated that the DOC did not place the burden of proof (in the sense of a burden of persuasion) on the Korean Respondents. At the first meeting of the Panel, Korea attempted to rebut this demonstration by pointing to the fact that in the *Final Results Third Review*, the DOC cited to several court decisions that, according to Korea, stand for the proposition that a party seeking revocation of an anti-dumping order in the United States bears the burden of proving that a resumption of dumping is "not likely." The answer to Korea's arguments is that (i) the court decisions do not stand for the proposition claimed by Korea, and (ii) the DOC's reliance on the court decisions was appropriate.

4.254 Unfortunately, the term "burden of proof" is often used with imprecision in GATT/WTO jurisprudence. It tends to carry with it excess baggage that more often than not creates confusion on the part of observers and practitioners, alike.

4.255 In general, "burden of proof" is used to describe two different concepts. The first is the "burden of persuasion" (otherwise know as the necessity of establishing a fact) which never shifts from one party to the other at any stage of a proceeding in which the relevant rules establish such a burden. The second concept is the "burden of going forward with the evidence," which may shift back and forth between the parties as a proceeding progresses.<sup>160</sup> The DOC imposed a burden of proof on the Respondents in the sense of a burden of going forward with the evidence once the US industry (represented by Micron Technology, Inc. ("Micron")) came forward with evidence suggesting that dumping would recur if the anti-dumping order were revoked. Korea, however, asserts that the DOC imposed a burden of proof in the sense of a burden of persuasion.

4.256 Turning to the court decisions referred to by Korea and cited by the DOC in *Final Results Third Review*, a review of these decisions establishes that the courts did not impose a burden of persuasion on exporters seeking the revocation of an order.<sup>161</sup> Instead, the courts were discussing the "burden of proof" in the sense of the burden of coming forward with evidence. This fact can best be understood by discussing the decisions in reverse chronological order.

4.257 The most recent cases were *Sanyo* and *Toshiba*, which were issued within a few weeks of each other.<sup>162</sup> In both decisions, the US Court of International Trade ("CIT") stated that it was for the party seeking revocation to come forward with real evidence to persuade the DOC to revoke the order.<sup>163</sup> In both decisions, the court cited to *Manufacturas Industriales De Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1566 (Ct. Int'l Trade 1987) (Ex. USA-60). *Manufacturas Industriales*, in turn, cited to the decision of the US Court of Appeals for the Federal Circuit ("Federal Circuit") in *Matsushita Electric Industrial Co. v. United States*, 750 F.2d 927 (Fed. Cir. 1984) (additional views of Nichols, J.), for the proposition that it was for the proponent of revocation to come forward with real evidence to persuade the DOC to revoke an order.<sup>164</sup>

4.258 In *Matsushita*,<sup>165</sup> the ITC conducted a review of an anti-dumping order and determined that injury was likely to recur if the order were revoked. The CIT

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<sup>160</sup> See, e.g., *Black's Law Dictionary*, 6<sup>th</sup> ed. (West Publishing Co., 1990), p. 196 ("burden of proof" describes two different concepts) (Ex. USA-85).

<sup>161</sup> The court decisions in question are cited in *Final Results Third Review*, 62 Fed. Reg. at 39812 (Ex. USA-1).

<sup>162</sup> *Sanyo Elec. Co. v. United States*, 15 CIT 609 (1991) (Ex. USA-60); *Toshiba Corp. v. United States*, 15 CIT 597 (1991) (Ex. USA-69).

<sup>163</sup> *Sanyo*, 15 CIT at 614 (Ex. USA-60); *Toshiba*, 15 CIT at 603 (Ex. USA-69).

<sup>164</sup> 666 F. Supp. at 1566 (Ex. USA-60).

<sup>165</sup> In the judicial hierarchy of the federal court system in the United States, the Federal Circuit is superior to, and reviews the decisions of, the CIT. In this particular instance, Judge Nichols' views were issued separately as an appendix to the decision (rather than as a concurring opinion) because,

overturned the ITC's determination, ruling that the ITC had inappropriately placed the burden of proof (as in burden of persuasion) on the parties seeking revocation. On appeal, the Federal Circuit reversed the decision of the lower court, thereby sustaining the ITC's determination. Among other things, the Federal Circuit held that the ITC had not placed the burden of proof on the parties seeking revocation:

Finally, we do not discern that the ITC imposed a "burden of proof" on the Japanese importers to prove no injury was likely to occur. The ITC's decision does not depend on the "weight" of the evidence, but rather on the expert judgment of the ITC based on the evidence of record. On review, the question is whether there was evidence which could reasonably lead to the ITC's conclusion, that is, does the administrative record contain substantial evidence to support it and was it a rational decision?<sup>166</sup>

In his separate views, Judge Nichols elaborated on this point:

The CIT judge said this lament reflected an impermissible throwing of the "burden of proof" on the proponents of lifting the order. I do not agree. There is a subtle but recognizable difference between the burden of proof and the burden of going forward. This investigation was conducted at all because these attorneys had requested on behalf of their clients that it should be. If they did not intend to waste [ITC] resources, it would be reasonable to think they would be in possession of information which, if believed and not controverted, would constitute a prima facie case ...<sup>167</sup>

4.259 Thus, *Matsushita* distinguished between the burden of persuasion and the burden of coming forward with evidence, finding that it was permissible for the ITC to impose a burden of coming forward on the proponent of revocation. *Manufacturas Industriales* relied on this proposition, as did *Sanyo* and *Toshiba*, in turn, through their reliance on *Manufacturas Industriales*. Thus, when the DOC cited to *Matsushita*, *Sanyo*, and *Toshiba* in its discussion of the evidentiary burden placed on the Korean Respondents in the *Final Results Third Review*, it was referring only to the burden of coming forward with evidence and not, as asserted by Korea, the ultimate burden of persuasion.<sup>168</sup>

4.260 Further support for this view can be found in the DOC's practice under section 353.25(a) of its regulations. The DOC actually places the burden initially on the petitioning US industry to come forward with evidence relevant to the

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according to the court, "they read so well as separately stated." *Matsushita*, 750 F.2d at 936, n. 14 (Ex. USA-60).

<sup>166</sup> *Ibid.* at 933 (citations omitted).

<sup>167</sup> *Ibid.* at 937.

<sup>168</sup> The DOC could not have been referring to the burden of persuasion, as claimed by Korea, because the cited court decisions dealt with the burden of proof in the sense of the burden of coming forward with evidence.

"not likely" issue. If the petitioning industry fails to present evidence, the DOC typically revokes the underlying anti-dumping order even though the concerned Respondent(s) may have presented *no* evidence directly bearing on the "not likely" criterion. If, as Korea asserts, the burden of proof (as in the burden of persuasion) truly were on the Respondent to show that a resumption of dumping was "not likely," the DOC could not revoke an order if the Respondent did not present *any* evidence directly bearing on the not-likely criterion. As a matter of law, a party that bears the burden of persuasion cannot prevail if that party presents *no* evidence.

4.261 In sum, Korea is wrong, as a factual matter, when it claims that the DOC imposed a burden of persuasion on the Korean Respondents.<sup>169</sup> Once Micron presented a *prima facie* case against revocation, the burden effectively shifted to Respondents to come forward with evidence to rebut Micron's evidence. However, the ultimate burden of persuasion always remained with the DOC.<sup>170</sup>

4.262 With the facts thus clarified as to what the DOC actually did, the United States does not understand Korea to be complaining about the fact that the Korean Respondents were required to present evidence relating to the likelihood of future dumping once Micron had submitted evidence establishing a *prima facie* case against revocation. If Korea is complaining of such a requirement, then the United States simply notes that the imposition of such a burden is reasonable and is not precluded by anything in the AD Agreement.

## 5. *Impossibility to Meet the DOC's Revocation Standard*

### (a) Claim raised by Korea

4.263 **Korea** claims that the DOC's revocation standard was impossible to meet in this proceeding and, thus, both on its face and as applied, is inconsistent with Article 11 of the AD. The following are Korea's arguments in support of this claim.

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<sup>169</sup> Thus, Korea has failed to meet the burden placed on it by customary international law to prove, before this Panel, the truth of the fact asserted. *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses From India*, WT/DS33/AB/R, Report of the Appellate Body adopted 23 May 1997, DSR 1997:I, 323, at 335 (hereinafter "*Wool Shirts*"). It is an accepted principle of public international law that municipal law and practice is a *fact* to be proven before an international tribunal, such as the present one. *Case Concerning Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, at 19 (Ex. USA-6); *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, [1929], PCIJ Rep., Series A, No 15, at 124-25 (hereinafter "*Brazilian Loans*") (Ex. USA-7). See also Brownlie, pp. 40-42 (Ex. USA-8).

<sup>170</sup> Although the DOC did not impose a burden of persuasion on the Korean Respondents, it must be noted that nothing in the AD Agreement prevents an investigating authority from imposing such a burden on a Respondent. Indeed, the very fact that Article 11.2 does not require revocation of an anti-dumping order unless and until an investigating authority makes certain findings, and given the broad standard set forth in Article 11.2 (which only requires revocation if the relief provided by an order is no longer "warranted"), it is hard to imagine how the imposition of such a burden could rest upon an impermissible interpretation of Article 11.

4.264 Article 11.1 of the AD Agreement requires Members to apply anti-dumping duties only for as long as they are "necessary to counteract dumping which is causing injury." Article 11.2 of the AD Agreement requires that, if "the anti-dumping duty is no longer warranted, it shall be terminated immediately." In the Third Administrative Review (the Review), the United States failed to determine objectively and fairly "whether the continued imposition of the duty is necessary to offset dumping."<sup>171</sup> Therefore, the United States violated its obligations under the AD Agreement. The DOC attempted to camouflage its departure from its normal revocation practice (in which it revokes solely on the basis of three years of no dumping, plus a promise not to dump in the future) and imposed a subjective and unnecessary "no likelihood/not likely" requirement, based on speculation and conjecture of future dumping, that was impossible for Respondents to satisfy.

4.265 The DOC erroneously supported its departure from its normal revocation practice by declaring that DRAM producers routinely dump during cyclical downturns.<sup>172</sup> As precedents for its "conclusion," the DOC cited the antidumping proceedings against the Japanese DRAM producers in the mid-1980's<sup>173</sup> and against the Korean DRAM producers in 1992.<sup>174</sup> The DOC supported its reliance on these past proceedings by surmising that, because DRAMs are commodity products, any company from any country is likely to dump in any cyclical downturn. On this basis, the DOC concluded that it must examine a downturn period and determine that Respondents would not dump in that period, before it could revoke the order.<sup>175</sup>

4.266 All of the parties accept that the DRAM industry is characterized by upturns and downturns. However, as Respondents established during the many phases of the proceeding, prices of imports in economic downturns are not necessarily "dumped" prices. Indeed, during the last two severe downturns in the DRAM market, the DOC found that neither Respondent had dumped. The first downturn occurred during 1993, a period which the First Administrative Review covered. As Figure 1<sup>176</sup> shows, the book-to-bill ratio<sup>177</sup> consistently declined during 1993. Yet, the DOC found that Respondents were not dumping. The

<sup>171</sup> Anti-Dumping Agreement, Article 11.2.

<sup>172</sup> *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part; DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>173</sup> *See, e.g., 64K Dynamic Random Access Memory Components (64K DRAMs) from Japan; Final Determination of Sales at Less than Fair Market Value*, 51 Fed. Reg. 15943 (29 April 1986) (64K DRAMs from Japan) (Ex. ROK-53).

<sup>174</sup> *Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 15467 (23 March 1993) (Ex. ROK-9).

<sup>175</sup> *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part; DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>176</sup> *See Case Brief of LG Semicon*, Case No. A-580-812 (21 April 1997) at 19 (Ex. ROK-2).

<sup>177</sup> The book-to-bill ratio is a measure designed by the U.S. Semiconductor Industry Association and used by market experts to track market cyclicalities. It represents the value, month by month, of new orders (book) to deliveries (bill).

second downturn occurred in late 1995 and early 1996, during the period of the Third Administrative Review. Again, the book-to-bill ratio declined (even more precipitously than in 1993). Yet, still, the DOC found Respondents had not dumped. Thus, contrary to its conclusions *en route* to denying revocation in the Third Annual Review, the DOC, itself, previously had found that Respondents had not dumped during a variety of market conditions, including the last two cyclical downturns.

4.267 The explanation for the DOC's findings of no dumping during the previous two downturns is quite simple. DRAM production costs constantly decrease and, thus, downward price pressure, whether due to "supply/demand cyclicity" or another cause, does not inexorably lead to dumping, as the DOC claims in the Final Results.<sup>178</sup>

4.268 By determining that a future downturn must be examined because of an alleged history in the DRAM industry of dumping during cyclical downturns, and coupling this with the "no likelihood/not likely" criterion, the DOC set an impossible, completely subjective standard for revocation. Moreover, to make this determination, the Department used speculative price and cost scenarios proffered by the U.S. petitioner of what *might* occur in the future. An authority will *always* find that dumping *may* occur in the future *if* the variables of its analysis are biased by speculation and conjecture masquerading as data proffered by a petitioner. The DOC's use of this test of whether dumping *may* occur in the future if certain economic variables *might* be realized was an unnecessary and unsupported exercise leading to a foregone conclusion.

4.269 In addition, the DOC's reliance on the earlier Japanese and Korean DRAM dumping cases to establish the necessity for conducting a speculative analysis in a cyclical downturn was biased and unsound. The economic conditions, analytical variables and results of the earlier Japanese and Korean DRAM investigations are dissimilar. Thus, the Japanese investigation is not analogous and, in any case, this proceeding is about Korean DRAM manufacturers, not Japanese DRAM manufacturers.

4.270 First, in the *DRAMs from Japan* investigation, the DOC found that *all* of the respondents had dumped.<sup>179</sup> In contrast, as discussed above, in the 1992 *DRAMs from Korea* investigation, the largest producer, Samsung Electronics, was *excluded* from the investigation because it was found not to have dumped (Samsung accounted for *over 70 percent* of Korea's imports). Second, in contrast to the *DRAMs from Japan* investigation, where the "all others" margin was 39.68 percent, the "all others" margin in the *DRAMs from Korea* case was only 4.55 percent.<sup>180</sup> Third, although the DOC found that the Japanese producers had

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<sup>178</sup> See 62 Fed. Reg. 39809, 39810 and 39817 (24 July 1997) (Ex. ROK-3).

<sup>179</sup> See, e.g., *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan: Preliminary Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9475, 9477 (19 March 1986) (DRAMs from Japan) (Ex. ROK-54).

<sup>180</sup> "All others" rates are generally representative of the average dumping margins for an investigation. The actual average dumping margin for the investigation is less than two percent when

dumped in a cyclical downturn, the DOC has found that the Korean DRAM manufacturers have not dumped during cyclical downturns. Finally, the two Korean DRAM manufacturers remaining subject to the anti-dumping duty order have not dumped in three consecutive administrative reviews and have filed with the DOC the requisite statement affirming that they will not dump in the future (and will submit to reinstatement in the order if they do).

4.271 Because there was no reliable evidence on the record that Korean DRAM manufacturers will dump in the next downturn or any future downturns, the DOC's premise for departing from its normal revocation practice of examining historical data to make its "likelihood" determination is unsupported and an abuse of discretion. Even if one assumes that the DOC's examination of whether there is a likelihood of dumping in the future by Korean DRAM manufacturers was acceptable under Article 11 (it was not), the examination should be based on actual verified data on the record - no dumping or insignificant margins in the investigation, no dumping by the two remaining Respondents for three consecutive years and a pledge not to dump in the future.

4.272 The AD Agreement envisions a decision-making process based on fact, not speculation. The facts in this case indicate that the Korean manufacturers have not dumped since the investigation and that the two Respondents remaining in the investigation have a multi-year record of trading at or above normal value. These two Respondents have provided the statements required by the DOC that they will not dump in the future and will submit to reinstatement in the order if they do. This pledge and the empirical data before the DOC clearly indicate that the DOC was required to revoke the order. The DOC's failure to do so violates Article 11 of the AD Agreement.

4.273 In deciding not to revoke the duty, the DOC focused on the period immediately following the Third Administrative Review and rejected Respondents' requests that it examine a more recent - and therefore more relevant - period (assuming, for the sake of argument, that it should conduct such an analysis in the first place).<sup>181</sup> As Respondents pointed out during the Third Administrative Review :

the issue before the Department is not what may or may not have happened last year. It is what is likely to happen in the future if the order is revoked. In order to make a reasonable prediction of the

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Samsung's *de minimis* margin of 0.22% is included. A peculiar twist of "all others" calculations omits zero or *de minimis* margins from the "all others" rate calculation. Therefore, even though each Respondent's dumping margin decreased when the Department amended its final results, the "all others" rate increased. A more realistic comparison would include Samsung's results and would yield an "all others" or average rate of less than two percent. Thus, in *DRAMS from Korea*, the weighted average margin for all Respondents met the current *de minimis* standard of the Anti-Dumping Agreement.

<sup>181</sup> See 62 Fed.Reg. 39809, 39813-14 (24 July 1997) (Ex. ROK-3).

future, the Department's decision must be based on the most recent information available<sup>182</sup>.

4.274 The Department failed to correct this deficiency in its Final Results<sup>183</sup>. It violated Article 11.2 by failing to conduct a forward-looking analysis (assuming, for the sake of argument, it was not simply required to revoke the order).

(b) Response by the United States

4.275 The following are the **United States'** arguments in response to Korea's claim:

4.276 Korea tries to convince this Panel that: (i) downturns in the DRAM market occurred during the first and third administrative reviews; (ii) respondents were found not to be dumping during these periods; therefore, (iii) the Department erred when it determined that market downturns "inexorably" lead to dumping. This flaw in the DOC's thinking, Korea argues, also led to a legal standard for revocation that allegedly is impossible for producers in cyclical industries to meet. For the following reasons, these arguments are without merit and should be rejected by the Panel.

4.277 To begin with, the periods covered by the first and third reviews (*i.e.*, 1993 to 1995) were, as discussed above, unusually robust.<sup>184</sup> According to every important measure (*e.g.*, prices, revenues, and profits), the DRAM industry was not in a "downturn" during this time period. Korea stumbles on this point because it appears to focus exclusively on "book-to-bill" data prepared by the U.S. Semiconductor Industry Association ("SIA"). However, evidence on the record establishes that the SIA stopped publishing this data around the end of 1996 because its utility to market forecasters was limited.<sup>185</sup>

4.278 Secondly, Korea ignores the lag that tends to exist between highs and lows in the book-to-bill ratio, and turning points in sales growth. Put another way, even if the book-to-bill ratio is an accurate indicator of market cycles for DRAMs, Korea overlooks the fact that a downturn in the market may not manifest itself for many months following a low point in the book-to-bill ratio. For example, according to data compiled by Merrill Lynch (which covers all semiconductors and not just DRAMs), the lowest point in the 1990-1991 downturn occurred in April of 1990, eight months after the low point in the book-to-bill ratio.<sup>186</sup> The same phenomenon manifested itself in the 1996 downturn. There, the low point in the book-to-bill ratio occurred in April of 1996, but the downturn in the market did not reach its lowest point until

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<sup>182</sup> Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 17 (Ex. ROK - 35).

<sup>183</sup> See 62 Fed.Reg. 39809, 39813-14 (24 July 1997) (Ex.ROK-3).

<sup>184</sup> See Case Brief of LG Semicon, Ex. B (Paine Webber) ("1993-1995 boom period") (Ex. USA-15).

<sup>185</sup> LGS Ltr.-1, Ex. 1 (Lawrence Fisher, *Index of Demand for Chips Soars to High for This Year*, N.Y. Times, 12 Nov. 1996, at D11) (Ex. USA-21).

<sup>186</sup> Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

December of 1996 - eight months *after* the period covered by the third administrative review.<sup>187</sup>

4.279 Lastly, the DOC did *not* determine that downturns in the DRAM market "inexorably" lead to dumping. The United States agrees with Korea's claim that the "prices of imports in economic downturns are not necessarily 'dumped' prices."<sup>188</sup>

4.280 The DOC also did not apply a legal standard for revocation that is "impossible" for producers in cyclical industries to meet. First of all, the administrative determination being challenged in this case did not cover any product or any industry other than *DRAMs from Korea*. Thus, broad statements about the alleged implications of this case for other markets that may or may not be "cyclical" in nature are without foundation.

4.281 Secondly, the DOC did *not* presume that dumping occurred during the 1996 downturn. The agency engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that "dumping may have taken place during the 1996 downturn."<sup>189</sup> In a different case, involving a different cyclical industry, such evidence may not exist and the DOC may find that a resumption of dumping would not be likely if the order in question were revoked.

4.282 Lastly, the fundamental flaw in Korea's claim is perhaps best captured by the simple fact that the DOC has revoked anti-dumping duty orders covering producers within cyclical industries. Examples of such cases include *Carbon Steel Bars and Structural Shapes From Canada*, 51 Fed. Reg. 41364, 41364 (1986) (Ex. USA-28), and *Steel Reinforcing Bars From Canada; Final Results of Antidumping Duty Administrative Review and Revocation in Part*, 51 Fed. Reg. 6775, 6775 (1986) (Ex. USA-29). The DOC has also revoked anti-dumping duty orders that covered products within "seasonal" industries. *See, e.g., Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review, and Notice of Revocation of Order (in Part)*, 59 Fed. Reg. 15159, 15167 (1994) ("*Flowers from Colombia*") (Ex. USA-30); *Frozen Concentrated Orange Juice From Brazil; Final Results and Termination In Part Of Antidumping Duty Administrative Review; Revocation In Part of Antidumping*

<sup>187</sup> Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

<sup>188</sup> Indeed, the DOC determined that Samsung did not dump DRAMs in the United States during the 1990-91 downturn.

<sup>189</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 & 39817 (Ex. USA-1). Later in the notice, the DOC expanded on this conclusion:

. . . in light of the market conditions during the downturn and the fact that the months actually examined during the POR did not include the lowest point in the downturn, we find that the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is suggestive of deteriorating market conditions that often give rise to dumping. *Ibid.* at 39817

*Duty Order*, 56 Fed. Reg. 52510, 52511 (1991) ("*FCOJ From Brazil*") (Ex. USA-31). In both instances, prices, costs, and sales vary widely over the course of the business or seasonal cycle.<sup>190</sup>

## 6. *Certification Regarding Future Dumping*

### (a) Claim raised by Korea

4.283 **Korea** claims that by imposing a revocation requirement on exporters to certify that they will not dump in the future the United States violates Article 11 of the AD Agreement. The following are Korea's arguments in support of this claim.

4.284 The United States has maintained the anti-dumping duties even though it has failed to meet the requirements of Paragraphs 1 and 2 of Article 11 for maintaining an order. The United States' violation does not end here, however. The United States refused Respondents' direct request to revoke the duties in spite of the fact that, in addition to three years without dumping (and thus no injury due to dumping), the two companies formally certified that they would not dump in the future, and agreed to the immediate reinstatement of the duties in the event that they resumed dumping.<sup>191</sup>

4.285 This is an abuse of discretion and violates US obligations under Article 11 of the AD Agreement. First, the limited authority granted Members under Article 11 to impose and maintain anti-dumping duties does not extend so far as to permit a Member to impose a certification requirement for revocation.

4.286 Second, the certification requirement of the US revocation regime<sup>192</sup> requires a Respondent to forgo its right under Paragraph 2 of Article 11 to an injury finding. If the DOC concludes that the Respondent has resumed dumping, the US Government does not conduct any injury analysis, but simply reinstates its collection of deposits or duties. This violates Paragraph 2 of Article 11 of the AD Agreement, which requires Members to impose duties only where dumping exists and is causing injury and obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty.

4.287 Far from complying with Article 11, the US regime is so biased that even where, as here, the responding companies have not dumped for three years *and* have agreed to allow the US Government to re-impose the duties on a moment's notice, the United States nonetheless refused to revoke the duties. Moreover, before it will even consider revocation, the US regime requires a Respondent to

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<sup>190</sup> See, e.g., *Frozen Concentrated Orange Juice from Brazil; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 8324, 8330 (1987) (respondent argued that FCOJ was a "seasonal product") (Ex. USA-32); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (The DOC acknowledged that "sharp price fluctuations are frequent occurrences in the FCOJ industry") (Ex. USA-31).

<sup>191</sup> See 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3).

<sup>192</sup> 19 C.F.R. § 353.25(a)(2)(iii) (1996).

forgo rights granted under Article 11. These are violations of Article 11 of the AD Agreement.

(b) Response by the United States

4.288 The following are the **United States'** arguments in response to Korea's claim:

4.289 None of the parties involved in this dispute, including Korea, deny that Respondents had several options under United States law when it came to revocation of the anti-dumping duty order on *DRAMs from Korea*. For example, they could have pursued a "changed circumstances" review before the DOC and/or the ITC pursuant to section 751(b) of the Act.<sup>193</sup> Either or both of these options could have led to the revocation of the order. Instead, Respondents chose to proceed under section 353.25(a) of the DOC's regulations.

4.290 One of the criteria the DOC is required to consider when deciding whether to revoke an anti-dumping order under section 353.25 is whether the Respondents at issue have "agree[d] in writing to their immediate reinstatement in the order ... if the Secretary concludes under § 353.22(f) [of the DOC's regulations] that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value."<sup>194</sup> In the instant case, Hyundai and LG Semicon voluntarily submitted the appropriate certifications,<sup>195</sup> which were, in turn, accepted by the DOC.

4.291 Before this Panel, Korea argues that Article 11 does not "permit a Member to impose a certification requirement for revocation." According to Korea, the certification provided for in section 353.25 of the DOC's regulations is an "abuse of discretion" because it allows the United States to impose duties "on a moment's notice" without a new finding of injury. For the following reasons, Korea's comments lack merit.

4.292 In the nearly twenty years since section 353.25 has been in existence (in one form or another), the DOC has never used the certification provision to reinstate an anti-dumping order. Hence, Korea's sweeping declarations about "bias" and an "abuse of discretion" lack any foundation in fact. These claims also ignore the principle, that discretionary legislation which permits, but does not require, administrative agencies to promulgate WTO-inconsistent regulations, does not, as such, violate GATT 1994 or any of the covered agreements.<sup>196</sup> A

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<sup>193</sup> Section 751(d) of the Act provides that an order may be revoked following a "changed circumstances" review pursuant to section 751(b) of the Act. 19 U.S.C. § 1675(d)(1) (1997) (Ex. USA-19).

<sup>194</sup> 19 C.F.R. § 353.25(a)(2) (1997) (Ex. USA-24).

<sup>195</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>196</sup> See generally GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), 645-48.

complaining party must show that the agency actually took WTO-inconsistent action.<sup>197</sup> In the instant case, that proof is lacking.

4.293 Secondly, Korea ignores the explicit language in section 353.25 which requires a finding of dumping under section 353.22(f) of the DOC's regulations before reinstatement may occur. Paragraph (f) in section 353.22 describes the standards and procedures associated with a changed circumstances review pursuant to section 751(b) of the Act.<sup>198</sup> Thus, far from permitting duties to be re-imposed "on a moment's notice," the DOC's regulations prescribe a review on the record in accordance with the United States' established anti-dumping methodology.

4.294 Finally, Korea argues that the certification provided for in section 353.25 of the DOC's regulations is contrary to Article 11 because paragraph 2 requires Members to "conduct investigations of dumping and injury before imposing (or maintaining) any duty." In point of fact, the obligation to conduct investigations of dumping and injury before imposing (or maintaining) an anti-dumping duty is found in Articles 1 and 5 of the AD Agreement. Article 11 says nothing about conducting dumping or injury *investigations*.

4.295 More importantly, Article 11.2 establishes a broad based standard under which revocation is warranted if national investigating authorities determine that an order is no longer "necessary to offset dumping." Article 11 does not prescribe the specific factors that an investigating authority must consider when determining whether anti-dumping duties are "warranted." It also does not prescribe the specific procedural steps that must be followed when conducting a review under Article 11.2. Within this framework, the certification provision in the DOC's regulations is a permissible exercise of the United States' legitimate interest in ensuring that relief to those domestic industries that have been adversely affected by dumping is not withdrawn earlier than is "necessary."

4.296 The **United States**, in response to a question from the Panel,<sup>199</sup> further argued as follows:

4.297 Section 353.25(a) conditions the reinstatement of duties upon a finding of dumping under section 353.22(f) of the DOC's regulations. Section 353.22(f) sets forth in full the rights and obligations attendant to a review under section 751(b) of the Act (*i.e.*, a "changed circumstances" review). Among the rights and obligations contained in section 353.22(f) is the opportunity for "notice and comment." In other words, section 353.22(f) guarantees to every interested party, *inter alia*, the right to review and comment upon the DOC's determination. This

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<sup>197</sup> See generally GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6<sup>th</sup> Edition (1995), 645-48.

<sup>198</sup> 19 C.F.R. § 353.22(f) (1997) (Ex. USA-24).

<sup>199</sup> The Panel recalls that the question was: "Could the United States explain the purpose of the certification requirement, whereby respondents agree to their immediate reinstatement in an anti-dumping order if they dump subsequent to revocation. If respondents agree to their immediate reinstatement in the order, why is it necessary to determine whether or not it is 'not likely' that respondents will dump in the future?"

process, from start to finish, typically takes between six and nine months to complete. If one adds to this the time between revocation (or "termination") of the anti-dumping duty order and the initiation of a review pursuant to the reinstatement provision in section 353.25(a), a year or more may have passed before duties are once again applied to the Respondent that resumed dumping merchandise subject to the order.

4.298 The "not likely" criterion performs, therefore, an important function. It seeks to provide some assurance to the DOC that the Respondent which has stopped dumping for at least three years (section 353.25(a)(2)(i)), and agreed to reinstatement in the order if it resumes dumping (section 353.25(a)(2)(iii)), will not dump during the period immediately after revocation (section 353.25(a)(2)(ii)). It is not a perfect system. No investigating authority, including the DOC, can ever be completely certain that an exporter will not resume injurious dumping the minute an order is lifted. However, it is a "permissible" approach, within the meaning of Article 17.6(ii) of the AD Agreement, which seeks to ensure that the anti-dumping relief obtained by the injured domestic industry is terminated only when it is no longer warranted.<sup>200</sup>

## 7. *Need for Injury Finding*

### (a) Claim raised by Korea

4.299 **Korea** claims that by failing to initiate *ex officio* an injury review where evidence showed that it was warranted the United States violates Article 11 of the AD Agreement. The following are Korea's arguments in support of this claim:

4.300 Sales at less than normal value (dumping), alone, are not prohibited by the WTO agreements; rather, the WTO agreements prohibit only dumping that is causing injury.<sup>201</sup> A Member must establish that a Respondent is dumping and also that the dumping is causing injury before it can impose or maintain a duty.<sup>202</sup> Thus, even assuming for the sake of argument that the DOC's finding that renewed dumping was likely was correct (and that the DOC's imposition of the various criteria was permissible), the US Government failed to make any determination that dumping which is *causing injury* was likely.

4.301 The provisions of the AD Agreement establish three requirements on Members that would impose or maintain a duty: dumping, injury and causation. First, the Member must establish that a product is being *dumped*, *i.e.*, "introduced

<sup>200</sup> Moreover, the DOC has never reinstated an anti-dumping order pursuant to section 353.25(a)(iii) of its regulations. Therefore, as a practical matter, the "not likely" criterion and the reinstatement requirement are not redundant.

<sup>201</sup> See General Agreement, Article VI; AD Agreement, Articles 11:1 and 11:2. See also *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, para. 231 (see also para. 232) (unadopted).

<sup>202</sup> *Ibid.*

into [its] commerce . . . at less than its normal value."<sup>203</sup> The methodology for establishing dumping is set out in Article 2. Second, the Member must establish that its domestic industry is *materially injured*. The methodology for establishing injury is set out in Article 3. Finally, the Member must establish that the dumping is *causing* the material injury. Guidelines for establishing causation are set forth in Article 3.5. Absent any one of these three elements, a Member shall not impose or maintain an anti-dumping duty.

4.302 In regard to maintaining a duty, Paragraph 2 of Article 11 of the AD Agreement requires a Member, on its own initiative, to conduct a review of injury to the domestic industry (as well as of dumping) "where warranted." According to the first sentence of Paragraph 2:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative . . .<sup>204</sup>

According to the third sentence of Paragraph 2:

If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

4.303 In *DRAMs from Korea*, circumstances clearly "warranted" an injury review by the US Government. For three consecutive years, the US Government, itself, had found that no dumping existed. The logical consequence of this finding is that no injury caused by dumping could have occurred during this same three-year period-if there is no dumping, there is no injury and, of course, the duty is not necessary. But, even if the authorities had been justified in concluding that a resumption of dumping was likely, they made no determination as to whether a resumption of injury-after three years of no injury-was likely. After concluding that for three years no injury was occurring as a result of dumping, the authorities had an obligation on their own initiative (it was "warranted") to investigate whether injury as well as dumping would be likely to resume if the order were revoked. Paragraph 2 of Article 11 required a separate determination regarding injury and the US Government failed to comply with this requirement and thereby violated Article 11.

4.304 Furthermore, the ITC, the US agency that conducts injury investigations, does not even have the authority to conduct such a review so as to be able to meet its obligation under Paragraph 2 of Article 11. Quite simply, the United States has failed to implement this requirement of Paragraph 2 of Article 11 and this, too, is a violation of the AD Agreement.

4.305 **Korea**, in response to a question from the Panel,<sup>205</sup> further argued as follows:

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<sup>203</sup> AD Agreement, Article 2:1.

<sup>204</sup> See also *United States-Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, paras. 251-252 (unadopted).

4.306 The Korean Government's understanding is that the Respondents requested revocation under Section 353.25(a)(2) and not Section 207.45(a) for a number of reasons. In the United States, after the original investigation is complete, the procedure shifts away from the ITC. The DOC is the entity that conducts the administrative reviews. Having been found not to be dumping by the Department for three consecutive reviews, covering three-and-one-half years, the Respondents presumably thought that revocation pursuant to the DOC's regulation was basically a formality, as it is in most cases.

4.307 In any case, as the title of Section 353.25(a) is "Revocation based on absence of dumping," this regulation is the more appropriate regulation. The ITC, of course, does not have a regulation providing for revocation based upon an absence of dumping. Instead, Section 207.45(a) is the ITC's "changed circumstances" review regulation-it presumes that dumping is occurring, but allows a respondent to demonstrate that market circumstances have changed such that the dumping no longer is causing injury. (The DOC also has a changed circumstances regulation, at Section 353.25(d).)

4.308 The United States suggests that the Respondents should have pursued a changed circumstances review at the DOC and/or the ITC. The United States thus continues to attempt to improperly burden the Respondents. The United States implies that the fact that they did not seek such a review somehow undermines Korea's case. But this is not true. The DOC's regulations provide specifically for "Revocation based on absence of dumping," and, as Korea has demonstrated, even if that regulation complied with the AD Agreement (which it does not), the Respondents met its requirements and were denied revocation only because of bias and the Secretary of Commerce's unfettered discretion in these matters. The implication of the United States that, had Respondents requested changed circumstances reviews, the United States would have revoked the order, is baseless given the DOC's conduct in this case. Also, it is another attempt by the United States to shirk its Article 11 obligations to self-initiate where warranted.

4.309 Finally, in its response to Korea's claims that the United States improperly failed to initiate a changed circumstances injury review (or dumping review), which clearly was warranted, the United States apparently is attempting improperly to conflate two of the obligations of Article 11.2-the obligation to self-initiate where warranted and the obligation to provide for initiation upon request under certain circumstances. As stated above, the Government supposes that the companies did not request an ITC review because they understood that the ITC injury provision applies where a company *is* dumping, but nonetheless is

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<sup>205</sup> The Panel recalls that the question was: "At para. 4.4, Korea states that 'the United States...failed to conduct an injury review, which clearly was warranted in this case'. At para. 4.55, Korea states that Art. 11.2 'obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty'. Could Korea please explain why the respondents requested revocation under section 353.25(a)(2) of the DOC regulations, and why they did not request revocation under section 207.45(a) of the ITC regulations?"

seeking revocation on the basis that, due to "changed circumstances" in the market, the dumping no longer is injuring the domestic industry. Thus, this provision is not appropriate here. (Moreover, based on U.S. procedure, Respondents would have had no cause to do so until after the DOC denied revocation.)

4.310 The U.S. position on this point demonstrates, in general, the poverty of the U.S. position. In this case, what would the ITC have examined? Korea's argument is not changed circumstances but revocation based on no dumping and no injury caused by dumping. In this context, what is the relevance of a change in market conditions?

4.311 Also, the United States conveniently fails to note that its suggestion would have imposed on the Korean companies the burden of establishing "changed circumstances sufficient to warrant the institution of a review investigation." 19 C.F.R. § 207.45(a). In other words, simply to obtain a review that might, possibly, result in revocation, the companies would have had to meet a burden of proof that Article 11 does not allow a Member to assign to a company to obtain revocation itself. The companies then, of course, would have had to meet an even greater and more improper burden to obtain revocation. Thus, even the procedure for simply requesting an injury review under 19 C.F.R. 207.45(a) violates Article 11.2.

4.312 With this argument, the United States apparently has conceded that Korea is correct that the United States improperly places the burden of proof on the responding companies. Perhaps more importantly, under Article 11.2, the United States was required to self-initiate an injury investigation "where warranted," a standard that certainly was met here, where for over 3 years the Department found no dumping, and thus the injury finding from the original investigation was stale and no longer applicable.

4.313 **Korea**, in response to another question from the Panel,<sup>206</sup> also made the following arguments:

4.314 If the Department fails to revoke, the ITC must self-initiate, because three consecutive reviews of no dumping is the strongest possible evidence that, at the very least, the ITC's original finding of injury by reason of dumping is no longer valid and that an injury review is necessary.

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<sup>206</sup> The Panel recalls that the question was: "Under Article 11.2 of the AD Agreement, investigating authorities are to 'review the need for the continued imposition of the duty, where warranted'. At para. 4.60 of its first submission, Korea asserts that the United States was required to self-initiate an injury review in this case. Does Korea argue that the ITC should self-initiate an injury review as soon as the DOC finds that respondents have not dumped for three consecutive years, or does Korea consider that additional conditions should also be met before the ITC must self-initiate? If so, what other conditions were met in the present case?"

## (b) Response by the United States

4.315 The following are the **United States'** arguments in response to Korea's claim:

4.316 Korea argues that the United States was obligated to conduct an "injury review" pursuant to Article 11.2 of the AD Agreement. According to Korea, an inquiry into whether a "resumption of injury ... was likely" was "warranted" because Respondents had gone three years without dumping. Korea also asserts that the United States lacks the ability to comply with Article 11.2 because the ITC lacks the authority under United States law to conduct this type of review. As with Korea's other claims, these too fail.

4.317 First, the ITC's authority to self-initiate a review of its injury determination is expressly provided for in section 751(b) of the Act<sup>207</sup> and section 207.45(c) of its regulations.<sup>208</sup> Secondly, Respondents never asked the ITC to exercise its authority in this regard. No one, including Korea, ever raised this issue until *after* the DOC issued the *Final Results Third Review*. As a result, this Panel lacks an adequate factual and legal record to review under Articles 17.5 and 17.6 of the AD Agreement. Lastly, as the complaining party, Korea bears the burden of coming forward with evidence to support its claim. To support its claim that a review of the injury question was "warranted," Korea must present evidence which shows: (i) that injury to the domestic industry in the United States was not likely "to continue or recur if the duty were removed or varied," and (ii) that the responsible investigating authority in the United States was in possession of this information a reasonable period of time before Korea instituted the present action.<sup>209</sup> Korea has done neither. All it has done is cite to the fact that Respondents were found not to be dumping during a three-year period when the order was in existence.<sup>210</sup>

4.318 The **United States**, in response to a question from the Panel,<sup>211</sup> further argued as follows:

<sup>207</sup> 19 U.S.C. § 1675(b) (1997) (Ex. USA-19).

<sup>208</sup> 19 C.F.R. § 207.45(c) (1997) (Ex. USA-78).

<sup>209</sup> See AD Agreement, art. 11.2 .

<sup>210</sup> Korea's argument also glosses over an important fact. At the time the DOC initiated the challenged (third) administrative review in June of 1996, only *one* administrative review had been completed which revealed zero or *de minimis* margins for Respondents. See *First Review* 61 Fed. Reg. 20216 (Ex. USA-22). Presumably, Korea does not believe that a single year without dumping "warrants" a review of the injury issue.

<sup>211</sup> The Panel recalls that the question was: "The United States argues that the respondents never asked the ITC to 'self-initiate' a review of its injury determination, that Korea did not raise this issue until after the final results of the third administrative review were issued, and that, as a result, the Panel lacks an adequate factual and legal record to review under Articles 17.5 and 17.6 of the AD Agreement. Is it the view of the United States that the obligation of a Member to review the need for the continued imposition of an anti-dumping duty *on its own initiative* can only be challenged in WTO dispute settlement if such a 'self-initiation' comes in response to a request from an interested party?"

4.319 A Member is required to self-initiate a review only "where warranted." In this case, Korea has not asserted that anything, other than an absence of dumping for three years, indicated that an injury review was "warranted" within the meaning of Article 11.2.

4.320 Evidence that dumping has stopped does not, in and of itself, indicate that an injury review is "warranted" under Article 11.2. For one thing, a lack of current dumping does not necessarily indicate a change in the relevant market conditions. Rather, a Respondent may simply have changed its pricing practices in response to the issuance of the anti-dumping order or may even have ceased or curtailed its exports because of an inability to compete at a fairly traded price.

4.321 It also is not enough to claim, as Korea does, that injury has stopped subsequent to the issuance of an order. First of all, the AD Agreement recognizes that this may be the case in a particular situation; that is why Article 11.2 calls for evidence that the injury is not likely to "recur." It also explains why the test turns on what will happen if the "duty were removed or varied." In other words, the drafters of Article 11.2 assumed that in some, but not necessarily all cases, maintenance of the order will remedy injury.

4.322 In short, a self-initiated review of injury is "warranted" within the meaning of Art. 11.2 when a Member is in possession of information which bears on what the condition of the industry would be *after* an anti-dumping order is "removed or varied." Evidence limited exclusively to a Respondent's pricing practices *during* the existence of the order misses the mark because it says next to nothing about the condition of the industry if the duty is removed or varied. Under section 751(b), interested parties also have the opportunity to *request* a review of the ITC's injury determination.

(c) Rebuttal arguments made by Korea

4.323 **Korea** makes the following arguments in rebuttal to the United States responses:

4.324 The United States asserts that for a self-initiated review to be warranted:

Korea must present evidence which shows that injury to the domestic industry in the United States was not likely "to continue or *recur* if the duty were removed or varied."

4.325 As this statement demonstrates, even in the context of the standard for simply *initiating* a *self*-initiated review, the United States seeks to impose on a Respondent the burden of "show[ing] that injury . . . was not likely to continue or recur . . ."

4.326 This is not a permissible interpretation of the requirement of Paragraph 2 of Article 11. Paragraph 2 does not allow a Member to impose on a Respondent a burden equal to proving that a duty should be revoked merely to obtain initiation of a *self-initiated* review.

4.327 A self-initiated review is just that-self-initiated. It is not initiated because a Respondent has made a certain showing-that is termed a "review upon request"

in Paragraph 2. The two are quite distinct. The provision of a review upon request is contingent on an interested party having submitted "positive information substantiating the need for review." The United States, however, would import this requirement from the "review upon request" provision to the self-initiated review provision. In doing so, it would completely undercut the reason for having a separate self-initiated review provision in the first place. Thus, the US "criticism" that "Respondents never asked the ITC to exercise its authority in this regard" misses the point entirely.

4.328 This is not the first time that the United States has sought to avoid its Article 11.2 responsibilities regarding injury reviews.<sup>212</sup> In *Swedish Stainless Steel Plate*, the panel concluded that the predecessor of Article 11.2 established two distinct sets of obligations regarding injury reviews—one set relating to self-initiated reviews and one set relating to reviews upon request.<sup>213</sup> Moreover, the panel found that, in the context of a self-initiated review, a Member cannot impose on the Respondent a burden drawn from thin air in order to protect the Member's market. Rather, the Member must self-initiate an injury review, where warranted, including in situations where the data warranting the review are possessed only by the Member.<sup>214</sup> As the panel aptly noted:

[T]here could be situations in which information indicating that initiation of a review was warranted was more readily available to investigating authorities than to interested parties.<sup>215</sup>

4.329 In sum, the United States imports the burden of proof from "review upon request" into a self-initiated review, in an attempt to deflect Korea's demonstration in its first submission that the United States violated the Article 11.2 obligation to self-initiate an injury review.

4.330 Self-initiation by the United States of an injury review clearly was warranted in this case. Apart from any evidence which the United States had regarding the state of the US market and the impact of Japan- and EC-based competitors on the domestic DRAM industry, Korea demonstrated to the US Government for a period of more than three consecutive years that it was not dumping. Three-and-one-half years of no dumping means three-and-one-half years of no injury and three-and-one-half years of no causation. Thus, for over three years, Korea demonstrated that not one of the three prerequisites for imposing an anti-dumping duty was met. What, possibly, could the ITC have examined? There was no dumping. Therefore, even if there was injury, there was no causation.<sup>216</sup>

<sup>212</sup> See, e.g., *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden* (24 February 1994), ADP/117, paras. 247-52 (unadopted).

<sup>213</sup> *Ibid.* at para. 251.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid.*

<sup>216</sup> The United States cites as "important" the fact that at the time the DOC initiated the Third Review, only one administrative review had been completed. But, Korea's injury argument, does not depend upon all of the reviews having been completed at the *start* of the Third Review. Rather,

(d) Rebuttal arguments made by the United States

4.331 The **United States** makes the following arguments in rebuttal:

4.332 Korea has not cited to any evidence which "warranted" a review under Article 11.2 of whether injury to the US DRAM industry would be likely to continue or recur if the duty were removed or varied. All Korea has done is cite to the Respondents' lack of dumping during a three-year period. However, as the United States discussed during the Panel meeting, evidence limited exclusively to a Respondent's pricing practices *during* the existence of an order says next to nothing about the condition of the industry if the duty is "removed or varied."<sup>217</sup>

4.333 Nor is it correct that the ITC lacks the authority to initiate, on its own initiative, an injury review if there are no current dumping margins. Briefly, the ITC has previously conducted such reviews (pursuant to section 751(b) of the Act) both when the most recent dumping margins have been zero, *see Electric Golf Carts from Poland*, Inv. No. 751-TA-1, USITC Pub. 1069 (June 1980) (Ex. USA-86), and when there are current dumping margins, *see Salmon Gill Fish Netting of Manmade Fiber from Japan*, Inv. No. 751-TA-7, USITC Pub. 1387 (June 1983) (Ex. USA-87). That the ITC's conduct of a section 751(b) review is dependent on neither the presence or absence of a current dumping margin is illustrated by the pending injury review concerning *Titanium Sponge from Japan, Kazakstan, Russia, and Ukraine*, Inv. No. 751-TA-17-20, in which the imports from Japan have been subject to a zero duty rate for the past three years, but current duties are in effect with respect to imports from the other three subject countries.

4.334 Next, Korea accuses the United States of conflating the standard for initiating reviews upon request with the standard for self-initiated reviews. To buttress its argument, though, Korea misconstrues the statement made by the United States at the first meeting of the Panel. The United States was not referring to an evidentiary showing applicable to *respondents* before the *investigating authorities* in the United States. Rather, the United States was discussing the showing that *Korea*, before this *Panel*, must make in order to establish that a self-initiated injury review was "warranted" within the meaning of Article 11.2.

8. *Respondents Met the Criteria for Revocation*

(a) Submission by Korea

4.335 **Korea** submits to the Panel that the record evidence supported revocation, even applying the US scheme (which it deems improper), and that in support for

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Korea's argument is based upon the fact that the United States itself, *after* completing three reviews, effectively determined that there had been 3.5 years of no injury, and did not determine that a recurrence of injury was likely (even assuming that a recurrence of dumping was likely), as required by Paragraph 2 of Article 11.

<sup>217</sup> See AD Agreement, art. 11.2.

its failure to revoke the United States mischaracterized the facts on the administrative record. Korea presents the following arguments in support of this submission:

(i) The Record Evidence Supported Revocation, Even Applying the US Scheme.

4.336 Even assuming for the sake of argument, that the US revocation scheme complies with the WTO agreements. Korea will demonstrate once again that the Panel should find that the DOC's establishment of the facts was improper and that its evaluation of the facts was biased and not objective.

4.337 In this regard paragraph 56 of the US first submission states:

56. In its rebuttal submission, Korea will undoubtedly argue that one of the ways the market could have "changed" at this time was for the better. It will cite passages in the administrative record where various investment bankers and industry experts predict higher prices and better times for the DRAM industry in 1997. What it will ignore, is roughly the same number of experts who were not sure which way the market was headed and who openly expressed concerns about its future.<sup>218</sup>

4.338 In this passage, the United States concedes that the import of the record evidence regarding the market was *at least* 50-50 in support of revocation.<sup>219</sup> In other words, at least half the record evidence supported the conclusion that the market was getting healthier and, in the words of the United States, "roughly the same number of experts . . . were not sure which way the market was headed and . . . openly expressed concern about its future." So, actually, 50 percent of the experts said the market was getting healthier and 50 percent said they were not sure which way the market would go. The United States therefore concedes that the split is not 50-50, but that 50 percent predicted a recovery and 50 percent were not sure and, thus, the evidence is strongly in favor of recovery and revocation. Thus, even if these forecasts were the *only* evidence on the record, it could not support a "no likelihood/not likely" finding even under the DOC's own regulations.

4.339 But this was not the only evidence on the record. During the 18-19 June 1998 Panel meeting, the United States stated that three consecutive reviews of no dumping (the first criterion) and certification not to dump and to submit to

<sup>218</sup> The Panel notes that this argument is set forth in Paragraph 4.412 of this report.

<sup>219</sup> Elsewhere, the United States concedes that a recovery was underway, noting its opinion that the recovery "was, at best, bumpy."

reinstatement of the order (the third criterion) also bore on the "not likely" issue (the second criterion).<sup>220</sup>

4.340 So, the United States admits that the record evidence in favor of a finding of "not likely" and revocation was, at a minimum:

1. three consecutive reviews (three-and-one-half years) of no dumping by Respondents;
2. a certification by Respondents that they would not dump in the future and would submit to reinstatement if they were to do so; and
3. the considered opinion of at least 50 percent of the experts on the record that the DRAM market would continue to strengthen or, in the words of the United States, that the future would bring "higher prices and better times for the DRAM industry."<sup>221</sup>

And, in favor of rejecting revocation, the United States points to:

1. a number of experts "who were not sure which way the market was headed and who openly expressed concern"; and
2. a fiction that the companies had dumped during the "last downturn" (in the original investigation) and, thus, would do so again.<sup>222</sup>

4.341 This summary of the record evidence and US admissions demonstrate that there was not a 50-50 split in the record evidence; to the contrary, the record evidence was and is *strongly* in Respondents' favor. Thus, even accepting all of the United States' assertions, the United States' basic argument must fall.

4.342 The AD Agreement does not permit the United States to maintain a definitive duty where only a minimal portion of the evidence, *at most*, supports doing so. In this case, the Korean producers overwhelmingly demonstrated, through their past conduct, through their certification and through expert economic opinion and analysis, that they would not resume dumping if the DOC were to revoke the order. By refusing to revoke, the United States has abused the

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<sup>220</sup> The United States thus effectively concedes that it is in violation of its GATT Article X obligations, because the relevant US regulation (19 C.F.R. § 353.25(a)) does not reflect this methodology. Korea also notes that the US imposition of the certification and "no likelihood/not likely" requirements is incoherent. To test the likelihood of future dumping after obtaining a certification makes no sense—the certification is legally binding on the Respondents and, thus, is definitive, but the likelihood test is based largely on speculation.

<sup>221</sup> There were other facts on the record supporting revocation, including the fact that the Korean producers had weathered two downturns without dumping.

<sup>222</sup> The United States has misstated a number of facts, including the condition of the market during the First and Third Reviews and Respondents' production cutbacks, in order to try to buttress its failure to revoke.

limited right to impose and maintain anti-dumping remedies granted by the AD Agreement.

4.343 Moreover, the language chosen by the United States to discuss its findings indicates its lack of certainty and shows that it was speculating as to what was "likely" or "not likely" to occur. For example, in the Final Results of the Third Review, the DOC discusses the 1996 downturn and concludes that revocation should be denied, in part, because the pricing pattern it saw was "*suggestive* of deteriorating market conditions that *often* give rise to dumping."<sup>223</sup> The DOC did not find that the pricing pattern "showed" or even "indicated" deteriorating conditions that, *e.g.*, always give rise to dumping. This type of speculation appears throughout the Final Results and, also, the first US submission. For example, according to the United States:

The agency engaged in a painstaking analysis of voluminous data on the administrative record and only then did it determine that "dumping *may* have taken place during the 1996 downturn.

First, how "painstaking" could an analysis be that found only that dumping "may" have occurred? In any case, even if the analysis was painstaking, that is not the point. The DOC did not make the finding Article 11 requires. Second, each of the DOC's stated rationales for failing to revoke are speculative: "may," "suggestive," "often."

4.344 This, Korea submits, is not a permissible way to regulate dumping. The United States clearly has violated its WTO obligations under Article 11 of the AD Agreement and Article VI of the General Agreement.

(ii) The United States Has Mischaracterized the Facts on the Administrative Record.

4.345 Korea asks the Panel to examine four core facts in detail should it conclude that the United States has not otherwise violated Article 11. The following are discussed in turn:

- the United States continues to ignore the downturns that occurred during the First and Third Review Periods;
- the United States ignores the fact that although the 1996 downturn was severe, prices already had begun to recover in 1997;
- the United States selected and analyzed record data in an improper, biased and not objective fashion to avoid the implications of the 1996-1997 recovery; and
- Respondents did, in fact, cut production, but while the United States conveniently recognized Respondents' production cutbacks for one purpose, it then ignored them when it refused to revoke.

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<sup>223</sup> See *DRAMS from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1994) (emphasis added by Korea) (Exh. ROK 3).

(1) *The United States Continues to Ignore the Downturns That Occurred During the First and Third Review Periods.*

4.346 The United States refused to recognize that the DRAM industry suffered downturns during 1993 and during 1995. The record evidence *cited by the United States* in its first submission demonstrates that industry downturns occurred during the second half of 1993 and during the latter part of 1995 and into early 1996. These periods were covered by the First and Third Administrative Reviews.

4.347 Korea has never argued, as the United States implies, that the semiconductor industry did not experience net positive growth from the end of 1993 through the middle of 1995, *i.e.*, Korea agrees that the book-to-bill ratio indicated that the market was larger and more robust in the middle of 1995 than it was at the end of 1993. However, Korea has demonstrated that a closer look at the ratios shows that downturns in the industry occurred during the second half of 1993 and from the latter part of 1995 into the second half of 1996, periods that fell within the First and Third Administrative Reviews, respectively.

4.348 The book-to-bill ratio was produced for years by the US Semiconductor Industry Association (SIA) and was universally accepted as an indicator of DRAM market conditions. It was relied upon by industry leaders and analysts studying market trends. SIA abandoned the statistic, not because it was inaccurate, but because: (i) it reflected only the conditions of the US market—the key market in this case (and the DRAM market increasingly was perceived as a global market); and, more importantly, (ii) it was thought to be having an unduly strong and negative impact on the prices of stocks in the industry.<sup>224</sup>

4.349 In the Final Results of the Third Administrative Review, the United States noted that "[t]he DRAM industry is highly cyclical in nature with periods of sharp upturn and downturn in market prices."<sup>225</sup> But, the United States attempts to cloud the cyclical nature of the DRAM market by quoting completely out of context a passage from Dr. Flamm's economic analysis regarding the alleged stability of prices during 1993, 1994 and 1995. In fact, the study directly contradicts the US position.

4.350 Dr. Flamm's study rests on a quarter-by-quarter analysis of annual pricing data for 1993 through 1996.<sup>226</sup> Dr. Flame concludes that from the fourth quarter of 1992 through the first quarter of 1996, prices for DRAMs declined in 6 out of 14 quarters (or nearly half of the time). Of course, during this time, the DOC found that neither Hyundai nor LG Semicon were dumping. This led Dr. Flame

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<sup>224</sup> See "Bye-Bye B:B Oct's Rebound," *Electronic Buyer's News*, 18 November 1996 (Ex. ROK-86). (The *Electronic Buyer's News* article not only demonstrates that market analysts widely accepted the book-to-bill ratio as an accurate indicator of market conditions and shows the real reasons SIA abandoned it, but also shows that the end of 1996 coincided with an upturn in the market.)

<sup>225</sup> See *DRAMs from Korea*, 62 Fed. Reg. 39809, 39810 (24 July 1994) (Ex. ROK-3).

<sup>226</sup> See Dr. Kenneth Flamm, *Economic Analysis of 16 Megabit DRAM Costs and Pricing: Projections for 1997 and 1998 (Revised and Supplemented)*, April 1997, Figure 3 (Ex. ROK-35, Attachment 2).

to conclude that "even in an environment of falling prices (and falling by quite a lot in the first half of 1996) [Respondent] was not dumping, as verified by the DOC."<sup>227</sup>

4.351 Moreover, these quarterly pricing data fully support the downturns indicated in the book-to-bill ratios. Thus, regardless of whether the DRAM industry experienced overall growth between 1993 and 1995, that same time period also was marked by at least two clear and distinguishable downturns during which the DOC found that LG Semicon and Hyundai were not dumping.

4.352 The United States also relies on a Merrill Lynch report to claim that "Korea overlooks the fact that a downturn in the market may not manifest itself for many months following a low point in the book-to-bill ratio." But the United States ignores the fact that the same Merrill Lynch report uses quarterly sales data that demonstrate that downturns occurred in 1993 and 1995.

4.353 All of the relevant data-including those cited by the United States in this proceeding-demonstrate that downturns occurred during periods covered by the First and Third Administrative Reviews. The DOC found Respondents did not dump during these periods. So, contrary to the DOC's assertion in this proceeding, Respondents did demonstrate that they do not dump during downturns.

(2) *The United States Ignores the Fact That Although the 1996 Downturn Was Severe, Prices Already Had Begun to Recover in 1997.*

4.354 The 1996 downturn was more severe than the 1991 downturn. However, the 1996 downturn began in late 1995 (during the Third Review period) and Respondents showed that the market conditions improved in early 1997.

4.355 The United States attempts to extrapolate from the 1991 downturn to the 1996 downturn. However, the United States would have the Panel ignore, first, that although some analysts remained uncertain or hesitant about the future of the DRAM market in 1997, many analysts confidently asserted that because, unlike the 1991 downturn, the 1996 downturn did not occur during an economic recession in the United States, but, to the contrary, occurred during an unprecedented period of growth, the recovery would be swifter and well underway by 1997.

4.356 Second, the United States would have the Panel ignore that, in any event, because the 1996 downturn began at the end of 1995, it was covered by the Third Review, during which the United States found that LG Semicon and Hyundai were not dumping. The United States can not have it both ways. If it insists that the end of 1996 was characterized as a downturn, it also must acknowledge that

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<sup>227</sup> See Dr. Kenneth Flamm, Economic Analysis of 16 Megabit DRAM Costs and Pricing: Projections for 1997 and 1998 (Revised and Supplemented), April 1997, Figure 3 (Ex. ROK-35, Attachment 2) at page 6.

the Third Review covered a downturn and, thus, that the DOC had found that Respondents did *not* dump during the most recent downturn.

(3) *The United States Selected and Analyzed Record Data in an Improper, Biased and Not Objective Fashion to Avoid the Implications of the 1996-1997 Recovery.*

4.357 In discussing DRAM market conditions from 1996 and projecting them into 1997, the United States continued its pattern of selectively choosing and omitting portions of the administrative record in order to create a biased and inaccurately negative market assessment. For example, the United States quotes out of context a passage from a De Dios & Associates report, which states that in regard to the recovery in the DRAM market "[w]hat we have here is a temporary situation that will change."

4.358 When read in context, however, the passage has an altogether different meaning. In particular, it does not support, but, in fact, contradicts the US position:

What we have here is a temporary situation that will change. *But change does not necessarily mean a plunge in prices similar to last year's behaviour.* Many other analysts are too quick to offer this as the only other alternative. How it will change requires a deeper understanding of the market forces that affect price.<sup>228</sup>

The De Dios analysis then goes on to consider the impact of various market forces, concluding that prices should continue to increase.<sup>229</sup>

4.359 In short, the United States has selected fragments from the De Dios and other analyses. A careful reading of those analyses, however, reveals that the vast majority of the evidence on the record indicated the market had strengthened and was continuing to strengthen.<sup>230</sup>

4.360 Finally, the administrative record overwhelmingly supports the fact that the predicted recovery for 1997 would not be due entirely to reports of cutbacks in production by Korean producers. Again, the United States misleadingly cites

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<sup>228</sup> See Ex. ROK-35, Attachment 5 at 3 (emphasis added by Korea).

<sup>229</sup> *Ibid.* at 3-5.

<sup>230</sup> According to the US First Submission, the DOC determined that: (i) contract prices follow the direction of spot market prices; and (ii) Respondents' contract prices fell below spot market prices in February 1997. These assertions are not supported. Moreover, though the United States implies that they are correct, for the reasons presented below, they are not. First, contract and spot prices obviously correlate. But this most certainly does not mean that contract prices fell below fair value (or fell faster than costs). Second, un rebutted evidence on the record shows that the gap between Respondent's contract and spot market prices was quite large during the period of review and remained large. Finally, the United States claims that the DOC determined that "contract and spot market prices were rapidly trending below Respondents' reported costs of production throughout the period that immediately followed the third administrative review." Again, the DOC's determination is incorrect. Even worse, the DOC's sole support for this determination was a chart that showed that Respondent's prices actually remained *well above* its falling costs of production.

to the De Dios analysis. But, one need only review the multiple analyses on the administrative record, including the De Dios analysis, to understand that many market forces were driving the market upward. These factors included, in addition to the strong US economy and many other factors, increases in the production and memory content of PCs.<sup>231</sup>

(4) *Respondents Did, in Fact, Cut Production, But While the United States Conveniently Recognized Respondents' Production Cutbacks for One Purpose, It Then Ignored Them When It Refused to Revoke.*

4.361 According to the United States, "a careful reading of the administrative record casts a large shadow of doubt over the 'production cutbacks' announced by the Korean producers."<sup>232</sup> Actually, a "careful reading" of the record reveals that eight days before issuing its Final Results, the DOC acknowledged that Respondents had, indeed, cut production. In order to undercut Dr. Flamm's study so as to provide a rationale for rejecting its conclusions, the DOC stated in its internal decision memorandum, "in light of the announced cutbacks in DRAM production, and the recent announcements of actual factory shutdowns, it is difficult to accept the [confidential data omitted] scenario."<sup>233</sup>

4.362 Now the United States argues before this Panel, as it did in the Final Results, that Respondents did *not* cut production. But, if the administrative record allegedly proves that Respondents did not reduce production, why did the DOC acknowledge the opposite just a few days before issuing the Final Results? The United States apparently reached the conclusion that cutbacks *had* occurred to criticize and reject the results of the Flame study, and then, eight days later, claimed that cutbacks had not occurred in order to create a negative picture of the DRAM market and to reject revocation. The Panel should not accept this transparently biased and not objective assessment of the record evidence.

(b) Response by the United States

4.363 The **United States** made the following arguments in response to Korea's submission:

4.364 DRAMs are a type of semiconductor.<sup>234</sup> They are used in computers and many other electronic devices that require high-density, random access memory.<sup>235</sup>

<sup>231</sup> See Case Brief of Hyundai, Case No. A-580-812 (21 April 1997), at Attachments 5, 12 and 13 (Ex. ROK-35).

<sup>232</sup> The Panel notes that this argument is set forth in Paragraph 4.422 of this report.

<sup>233</sup> See Analysis of Data, *DRAMs from Korea*, US DOC of Commerce, Case No. A-580-812 (16 July 1997) (Ex. ROK-87).

<sup>234</sup> *Final Results Third Review*, 62 Fed. Reg. at 39809 (Ex. USA-1)

<sup>235</sup> *Ibid.*

4.365 The first commercial shipment of a DRAM occurred in 1971.<sup>236</sup> Back then, the technology was primarily 16 kilobits ("K"). By 1990, the technology was transitioning from its fifth generation (4 megabits ("Meg")) to its sixth (16 Meg).<sup>237</sup>

4.366 As technology and industry standards have matured, DRAMs have become a commodity product.<sup>238</sup> Thus, customers tend to distinguish between products primarily on the basis of price. During significant downturns in the market, the pressure on prices can become acute, forcing producers/resellers to price aggressively in order to stay competitive and maintain their customer base.<sup>239</sup> An examination of historical data on DRAM pricing reveals that foreign producers often dump (*i.e.*, sell at "less than normal value" within the meaning of the AD Agreement) during significant market downturns. For example, various producers were found to have dumped DRAMs in the United States during the dramatic downturn that occurred in the mid-1980s.<sup>240</sup>

4.367 The DRAM industry experienced another, although milder, downturn in 1990 which lasted well into 1991.<sup>241</sup> Faced with what it believed were injurious imports at unfair prices, Micron, a U.S. manufacturer of DRAMs, filed an anti-dumping petition on behalf of the U.S. industry covering imports of DRAMs from Korea. The petition, which was properly filed with the DOC and the Commission, alleged that Korean manufacturers were dumping DRAMs in the United States.<sup>242</sup> The petition also contained information which indicated that unfairly priced imports from Korea were causing material injury to the DRAM industry in the United States.<sup>243</sup>

4.368 Both the ITC and the DOC conducted investigations into the allegations presented by Micron. Hyundai and LG Semicon participated in those

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<sup>236</sup> Case Brief of Hyundai, 21 Apr. 1997, Ex. 2 at 4 (Ex. USA-12).

<sup>237</sup> Case Brief of Hyundai, Ex. 2 at 16-17.

<sup>238</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1).

<sup>239</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (Ex. USA-1); *see also* Charts from Agency Analyst to File at 34-35 (hereinafter "*Prelim. Analysis*") (Ex. USA-13). During upturns in the market, prices stabilize or rise. The length and intensity of these business "cycles" is influenced by a variety of factors, including customer demand, overall economic growth, and technological developments. A similar phenomenon occurs in the agricultural industry where "seasonal" cycles are influenced by a variety of factors, including weather and crop disease. *See* Letter from LG Semicon Co., Ltd. and LG Semicon America, Inc. to Secretary of Commerce, 15 Jan. 1997, at 13-14 (hereinafter "LGS Ltr.-2") (Ex. USA-14)

Korea concedes that DRAMs is a cyclical industry. The "cyclicity" of the industry was also a point repeatedly made by the respondents before the DOC in the underlying administrative proceeding. *See, e.g.*, Case Brief of LG Semicon, 21 Apr. 1997, at 16-17 (Ex. USA-15).

<sup>240</sup> *See, e.g.*, *64K Dynamic Random Access Memory Components (64K DRAM's) From Japan: Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 15943 (1986) (Ex. USA-16); Case Brief of LG Semicon, Ex. B (VLSI Research) (Ex. USA-15).

<sup>241</sup> *Prelim. Analysis* at 27 & 34 (Ex. USA-13); Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

<sup>242</sup> *Initiation of Antidumping Duty Investigation: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 57 Fed. Reg. 21231 (1992) (Ex. USA-17).

<sup>243</sup> *Ibid.*

investigations.<sup>244</sup> The DOC's investigation examined a six-month period in accordance with section 353.42(b)(1) of its regulations (19 C.F.R. § 353.42(b)(1) (1991)) which began on 1 November 1991.<sup>245</sup>

4.369 In its final determination published on 23 March 1993, the DOC found that Hyundai and LG Semicon had been making less-than-normal-value sales in the United States. For Hyundai, the DOC determined a dumping margin of 11.16 percent.<sup>246</sup> For LG Semicon, the margin was 4.97 percent.<sup>247</sup> An affirmative injury determination by the ITC led to the publication of an anti-dumping duty order on 10 May 1993.<sup>248</sup>

4.370 In 1994 and 1995, during the anniversary months of the order, the DOC received requests from the respondents to conduct administrative reviews of the order in accordance with section 751(a) of the Tariff Act of 1930, as amended ("the Act").<sup>249</sup> The request made in 1994 covered sales between 1 May 1993 and 30 April 1994. The request made in 1995 covered the twelve months ending 1 May 1995.

4.371 Contrary to Korea's assertion, the 1993-1995 period was a good one for DRAM producers. "DRAMs prices stabilized in mid-1992, and the industry experienced growth until late 1995."<sup>250</sup> Some industry observers have even described 1995 as "incredibl[y]" good.<sup>251</sup> Indeed, the economic consultant retained by Hyundai, Kenneth Flame (author of the "Flame Study"), characterized 1993-95 as an "unusual period of relatively stable prices"<sup>252</sup> and at one point marveled at its "unprecedented string of near zero or slightly positive price changes."<sup>253</sup> Within this environment, Hyundai and LG Semicon were able to ship to the United States without dumping.<sup>254</sup> Accordingly, they were not

<sup>244</sup> See, e.g., *DRAM LTFV*, 58 Fed. Reg. 15467 (Ex. USA-4).

<sup>245</sup> *Ibid.*

<sup>246</sup> *DRAM Order*, 58 Fed. Reg. 27520 (Ex. USA-2). This amount was subsequently reduced to 5.18 percent as a result of municipal judicial proceedings in *Micron Technology, Inc. v. United States*, 893 F. Supp. 21 (Ct. Int'l Trade 1995) (Ex. USA-18).

<sup>247</sup> *DRAM Order*, 58 Fed. Reg. at 27520 (Ex. USA-2).

<sup>248</sup> *Ibid.* As the United States noted above, Samsung eventually was found not to be dumping during the period covered by the DOC's original investigation. Therefore, it was (and is) excluded from the anti-dumping order..

<sup>249</sup> 19 U.S.C. § 1675 (Ex. USA-19).

<sup>250</sup> *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order*, 62 Fed. Reg. 12794, 12796-97 (1997) (hereinafter "*Preliminary Results Third Review*") (Ex. USA-20).

<sup>251</sup> See, e.g., Letter from LG Semicon Co., Ltd. and LG Semicon America, Inc. to Secretary of Commerce, 2 Jan. 1997 (hereinafter "LGS Ltr.-1"), at App. 1 (article on history of semiconductors by T. J. Rodgers for *Austin American-Statesman*) (Ex. USA-21).

<sup>252</sup> LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15); Hyundai Case Br., Ex. 2 at 5 and Fig. 3 ("*Flamm Study*") (Ex. USA-12).

<sup>253</sup> *Ibid.* at 5.

<sup>254</sup> *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 20216 (1996) (final results first review) (hereinafter "*First Review*") (Ex. USA-22); *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of*

levied any duties on their DRAM imports and the cash deposit rate for future shipments was set at zero.<sup>255</sup>

4.372 The 1995-1996 period was the subject of a request for an administrative review by respondents on 29 and 31 May 1996.<sup>256</sup> In addition, the DOC was asked by LG Semicon and Hyundai to revoke (in part) the order on *DRAMs from Korea* pursuant to section 353.25(a)(2) of its regulations. That regulation provided the DOC with the authority to revoke an order, in part, whenever:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years; (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and (iii) ... the producers or resellers agree in writing to their immediate reinstatement in the order ... if the Secretary concludes under § 353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.

19 C.F.R. § 353.25 (a)(2) (1997) (Ex. USA-24).<sup>257</sup>

4.373 As a result of respondents' request, the DOC initiated a review pursuant to section 751(a) of the Act on 25 June 1996.<sup>258</sup> During the review, the DOC compiled an extensive factual record which contained, in the words of Korea, "reams of current data regarding pricing trends, inventory levels and various other aspects of market conditions for DRAMs." The DOC issued the

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*Antidumping Duty Administrative Review*, 62 Fed. Reg. 965 (1997) (final results second review) (Ex. USA-23). The *First Review* was amended on October 2, 1996. See *Dynamic Random Access Memory Semiconductors From the Republic of Korea; Amended Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 51410 (1996).

<sup>255</sup> Under United States law and practice, anti-dumping duty *orders*, in and of themselves, do not result in the levying (or "assessment") of anti-dumping duties. They also do not, as a rule, delay the entry of imports into the United States. The only thing the United States Customs Service typically holds are the entry documents and a cash deposit or bond covering the potential liability for anti-dumping duties. On the anniversary month of every order, the DOC publishes a notice in the *Federal Register* which reminds interested parties (including foreign exporters) of their right to request an "administrative review" pursuant to section 751(a) of the Act. In an administrative review, the DOC calculates the anti-dumping duties actually owed for merchandise exported to the United States during the previous twelve months and sets the deposit rate for estimated duties that might be owed on future entries. 19 U.S.C. § 1675 (Ex. USA-19). Because the actual duties levied may exceed or fall short of the deposits or bonds posted at the time of entry, the Customs Service either collects additional money or refunds the excess (with interest). 19 U.S.C. § 1677g (Ex. USA-19).

<sup>256</sup> *Preliminary Results Third Review*, 62 Fed. Reg. at 12795 (Ex. USA-20). A request was also received from Micron. *Ibid.*

<sup>257</sup> The URAA revised certain terminology in the Act, including substituting the term "normal value" for "foreign market value." However, because the instant review was initiated prior to the date the DOC's new regulations took effect on 1 July 1997, the 1996 regulations were still controlling and are, therefore, cited herein unless otherwise noted. These regulations used the previous terminology.

<sup>258</sup> *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 61 Fed. Reg. 32771 (1996) (Ex. USA-25). The challenged administrative review was conducted pursuant to the Act, as amended by the Uruguay Round Agreements Act ("URAA"). Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. II, 108 Stat. 4808, 4842 (1994).

preliminary results of its third review on 18 March 1997.<sup>259</sup> In the notice, the DOC informed the respondents of its intention not to revoke the order pursuant to section 353.25. In particular, the DOC determined that the administrative record "does not support a conclusion at this time that there is no likelihood of future dumping by the Korean respondents."<sup>260</sup>

4.374 At the heart of the DOC's decision was evidence of a dramatic decline in DRAM prices throughout 1996 that was more severe than the market downturn in 1990-91<sup>261</sup> and only "a little less severe" than the one in 1985-86.<sup>262</sup> This downturn in the market caused U.S. and Korean producers to experience double-digit percentage declines in revenue on sales of DRAMS.<sup>263</sup> Exacerbating the situation was the willingness of certain producers at this time to increase production and liquidate inventories of finished goods.<sup>264</sup> As the DOC explained in its notice:

(1) The DRAM market is in a year-long downturn, with steep price declines in the DRAM market beginning in January 1996 and continued price declines forecasted; (2) the downturn has resulted in declines of sales and revenues in the DRAM market, growth in DRAM inventories, and the existence of significant DRAM oversupply; (3) the Korean respondents and other DRAM producers have continued to increase DRAM production during the downturn (which may further depress prices during such an oversupply period); (4) the Korean respondents will likely continue to maintain a substantial presence in the U.S. market during various phases of the business cycle (including periods of significant price decline) in light of substantial Korean capacity and large U.S. demand; and (5) based on the information on the record, Korean pricing in the United States appears, according to price trends, to be at or near normal value, indicating that only a slight downward movement in U.S. price will likely result in dumping margins.

*Preliminary Results Third Review*, 62 Fed. Reg. at 12796 (Ex. USA-20).

<sup>259</sup> *Preliminary Results Third Review*, 62 Fed. Reg. 12794 (Ex. USA-20).

<sup>260</sup> *Ibid.* at 12796.

<sup>261</sup> Case Brief of LG Semicon, Ex. B (Merrill Lynch) (Ex. USA-15).

<sup>262</sup> Case Brief of Hyundai, Ex. 2 at 5 (conclusion of Dr. Flamm) (Ex. USA-12); *but see Preliminary Results Third Review*, 62 Fed. Reg. at 12797 (Ex. USA-20). Whether the 1996 downturn was more or less severe than prior downturns is unimportant. What is important is that the 1996 downturn was not unlike prior downturns *and* during those periods (including the milder one in 1990-91), DRAM producers were found to be dumping.

<sup>263</sup> *DRAMs from Korea: Micron's Third Review Rebuttal Brief*, 30 Apr. 1997, Ex. 7 (hereinafter "Micron Rebuttal Brief") (Ex. USA-26); Case Brief of LG Semicon, Ex. B (VLSI Research ) (Ex. USA-15).

<sup>264</sup> *Prelim. Analysis* at 24, 28, & 29 (Ex. USA-13); Case Brief of LG Semicon, Ex. B (Merrill Lynch: "With no recession, the more rapid decline was clearly a massive inventory correction. That is why it fell so quickly.") (Ex. USA-15).

4.375 The DOC did not, however, view the 1996 market downturn in isolation. Instead, it analyzed all of the evidence on the record which bore on the likelihood issue. Thus, in addition to respondents' three years of no dumping, the DOC considered, *inter alia*, pricing practices and trends in prior market downturns. When it did this, the DOC discovered that there was a history of dumping in the United States during downturns in the DRAM market. In summarizing its conclusions, the DOC stated, in part:

Given these circumstances, we preliminarily find that it would be difficult for the Korean respondents to remain competitive without selling DRAMs at less than normal value. The history of the DRAM industry is one of dumping in periods of significant downturn. ...While Korean respondents did not dump in the three consecutive review periods, most of this period was marked by an expanding DRAM market. ...This third review period ended in April 1996, and there has been a continuing decline in global prices since that time. Further, we note that the price decline in 1996 was more severe than in prior downturns. ... For these reasons, we preliminarily find that there is no basis to conclude that there is no likelihood of future dumping by LGS and Hyundai  
*Id.* at 12796-97 (Ex. USA-20).

4.376 "Case briefs," which commented on the DOC's preliminary results, were filed by respondents and Micron on 18 April 1997. "Rebuttal briefs" were filed by the parties on 29 April 1997. On 5 May 1997, the DOC held a public hearing at which respondents and Micron presented oral arguments.

4.377 In their comments on the preliminary results, respondents did *not* argue that the DOC's revocation standards or procedures were contrary to the AD Agreement. In fact, Hyundai stated just the opposite - it acknowledged that United States law was "within the letter and spirit of Article 11."<sup>265</sup> Instead, respondents argued, *inter alia*, that the DOC's use of the phrase "no likelihood" distorted the regulatory standard and allegedly forced them to prove the impossible - that the likelihood of future dumping was "almost zero."<sup>266</sup> Respondents also maintained that the DOC ignored data which supported a "not likely" determination. In particular, they pointed to (i) their lack of dumping between the 1991 and 1996 market downturns, and (ii) record evidence which, they believed, showed a dramatic improvement in the market by the end of 1996 that was characterized by decreases in production, increases in demand, and rising prices for DRAMs in the United States.<sup>267</sup>

4.378 In its final determination published on 24 July 1997, the DOC once again found that Hyundai and LG Semicon had not sold DRAMs in the United States at less than normal value during the period covered by the third review (*i.e.*, 1

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<sup>265</sup> See, e.g., Case Brief of Hyundai, at 5 (Ex. USA-12).

<sup>266</sup> *Final Results Third Review*, 62 Fed. Reg. at 39812 (Ex. USA-1).

<sup>267</sup> *Ibid.* at 39814-16.

May 1995 through 30 April 1996).<sup>268</sup> The agency also reaffirmed its preliminary finding that the evidence on the record of the review did not support a finding that a resumption of dumping was not likely under section 353.25(a)(2) of the regulations.<sup>269</sup> In making this determination, the DOC emphasized several points it had made in its preliminary determination. First, the DOC discussed the cyclical nature of the DRAM industry and the pricing practices of DRAM producers during market downturns:

The DRAM industry is highly cyclical in nature with periods of sharp upturn and downturn in market prices. In the past, the DRAM industry has been characterized by dumping during periods of significant downturn. For instance, various foreign producers were found to have dumped during the downturn in the mid-1980s . . . and the Korean respondents in this proceeding were found to have dumped in the less than fair value investigation during 1991-1992, the last period when there was a significant downturn in the DRAM industry. Because DRAMs are a commodity product, DRAM producers/resellers must price aggressively during a downturn period in order to stay competitive and maintain their customer base. This is especially true during the lowest point in the downturn. Therefore, it is reasonable to conclude that information regarding the selling activities and pricing practices of respondents, as well as other market conditions, during periods of significant downturn are relevant to whether dumping is not likely to occur in the future. Thus, . . . we found the January through December 1996 time period to be particularly relevant to the "not likely" issue because it corresponded with a significant "downturn" in the DRAM industry.<sup>270</sup>

4.379 Next, the DOC addressed its findings regarding respondents' pricing practices and production levels during the market downturn that began toward the end of the third review period and continued throughout 1996 and into 1997:

. . . according to Electronic Buyers News, total worldwide market revenue plunged 38% to \$25.13 billion in 1996. Both Hyundai and LGS reported dramatic decreases in revenues in their 1996 publicly available financial statements. . . . Although we agree with the respondents that DRAM prices have recovered somewhat during 1997, prices fell significantly during the 1996 downturn. In any case, it appears that pricing in the DRAM market has not yet fully recovered. Current prices are still lower than in the years preceding the 1996 market downturn, years in which the

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<sup>268</sup> *Final Results Third Review*, 62 Fed. Reg. at 39824 (Ex. USA-1).

<sup>269</sup> *Ibid.* at 39810, 39811, & 39816.

<sup>270</sup> *Ibid.* at 39810.

respondents were found not to be dumping. Furthermore, prices have, in fact, decreased recently . . . the average price for a 64M DRAM is now in the mid \$40 range, down from \$55 earlier this year.

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In regard to inventory levels and the supply of DRAMs, the record demonstrates that supply exceeded demand during 1996 and thus far in 1997 . . . [I]t is uncertain how long it will be before production returns to previous levels in anticipation of increased demand in the marketplace. According to Electronic Buyer's News (January 27, 1997, Issue 1042), an upturn in demand in October, 1996, triggered a simultaneous increase in production . As a result, the DRAM market was glutted, driving prices down in December, 1996 to one of the lowest levels during the downturn.<sup>271</sup>

4.380 At this point, the DOC turned its attention to evidence on the record concerning the possibility of sales at less than normal value in the United States. In particular, the agency summarized the company-specific data submitted by respondents as part of the third administrative review (*i.e.*, data up to, and including, April 30, 1996) and the data received or obtained by the DOC regarding subsequent periods:

...(1) The respondents' own sales and cost data indicate that there were a substantial number of home market sales made at prices below COP during the two months immediately following the close of the third administrative review, (2) the lowest point of the downturn, in terms of DRAM pricing and other market conditions, did not occur until after mid-1996 (well after the end of the third administrative review period); (3) publicly available spot market pricing data, when viewed in conjunction with the respondent's cost data, extrapolated to a future point in time, indicate that LGS and Hyundai may have made U.S. sales at prices below COP during 1996; (4) respondent's own pricing data indicate that [their] contract prices generally follow the same pricing patterns as spot market prices . . . [I]n light of the market conditions during the downturn and the fact that the months actually examined during the POR [period of review] did not include the lowest point in the downturn, we find that *the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is*

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<sup>271</sup> *Final Results Third Review*, 62 Fed. Reg. at 39816-17 (Ex. USA-1).

*suggestive of deteriorating market conditions that often give rise to dumping.*<sup>272</sup>

4.381 Lastly, after discussing LG Semicon's assertion that it has no economic incentive to dump in the United States,<sup>273</sup> the DOC addressed respondents' argument that they did not dump subsequent to the third review period because their production costs were declining as fast as prices were falling:

Historical data support the premise that both costs and prices of any given generation of DRAM will decline over time. What respondents have been unable to demonstrate, however, is that the decline in costs kept up with the rapid rate of decline in prices during the second half of 1996.<sup>274</sup>

4.382 As a result of the DOC's final determination, it did not revoke the anti-dumping order. However, entries covered by the challenged review were not assessed (or levied) anti-dumping duties and the cash deposit rate for subsequent entries (*i.e.*, entries made after 30 April 1996) of respondents' merchandise was set at zero.<sup>275</sup>

#### *E. Claims under Articles 2, 6 and 17 of the AD Agreement*

##### *1. Failure to Verify Information from the US, and Failure to Consider Fairly and Objectively Respondents' Information and Data*

###### *(a) Claim raised by Korea*

4.383 **Korea** claims that in analyzing the "no likelihood/not likely" criterion for revocation, the United States violated its obligations under and the standards set forth in Articles 2.2.1.1, 6.6 and 17.6(i) of the AD Agreement. The following are Korea's argument in support of that claim:

<sup>272</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1) (emphasis added).

<sup>273</sup> The relevant portion of the notice states:

In this regard, LGS argues that it has a relatively small share of the U.S. market, which decreases its economic incentive to dump. However, the United States is part of the world's largest regional market for DRAMs, with considerable growth potential. Given the importance of the U.S. market, as a general matter, even a producer with a relatively small market share would have an incentive to ride out industry downturns. The fact that DRAM producers, including the Korean respondents, have historically been found to have dumped during downturns supports this conclusion.

*Ibid.* at 39819.

<sup>274</sup> *Ibid.*

<sup>275</sup> These entries are, in fact, the subject of an administrative review initiated by the DOC on 19 June 1997. As part of this review, respondents have renewed their requests for revocation pursuant to section 353.25(a) of the DOC's regulations. See *Dynamic Random Access Memory Semiconductors of One Megabit or Above From Korea; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent not to Revoke Order*, 63 Fed. Reg. 11411 (9 Mar. 1998) (Ex. USA-27).

4.384 In analyzing the "no likelihood/not likely" criterion, the United States violated its obligations under and the standards set forth in Articles 2.2.1.1, 6.6 and 17.6(i) of the AD Agreement.

4.385 Article 17.6(i) states in relevant part:

the panel shall determine whether [i] the authorities' establishment of the facts was proper and whether [ii] their evaluation of those facts was unbiased and objective.

4.386 The United States: (i) improperly established the facts; and (ii) evaluated the facts in a biased and non-objective manner. Thus, the Panel should find that the United States violated the standards for review set forth at Article 17.6.

4.387 Article 6.6 states in relevant part:

the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

4.388 The United States violated its obligation under Article 6.6 because it failed to satisfy itself as to the accuracy of data supplied by Petitioner. Indeed, the United States uncritically accepted and relied on Petitioners' data without taking any action to confirm that it was accurate.

4.389 Article 2.2.1.1 states in relevant part:

costs shall normally be calculated on the basis of records kept by the exporter or producer . . . , provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

4.390 The United States disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs, thereby violating its obligation under Article 2.2.1.1.

4.391 To support its decision regarding the likelihood of dumping in the future, the United States disregarded a valid econometric study on DRAM cost and pricing and Respondent-specific cost and pricing data<sup>276</sup> and relied instead on irrelevant spot market pricing and speculative assumptions of future costs supplied by Petitioner.<sup>277</sup> Also, the DOC disregarded Respondents' data collection proposal, apparently assuming (incorrectly) that it had no bearing on the likelihood issue.

4.392 The US divided its analysis of the revocation issue into four topics:

- Pricing Trends in the DRAM Industry;

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<sup>276</sup> See Case Brief of Hyundai, Exhibits 2 and 3, Case No. A-580-812 (21 April 1997) (Ex. ROK-35).

<sup>277</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39814-39819 (24 July 1997) (Ex. ROK-3).

- Inventory Levels;
- Petitioner's Allegation that LG Semicon and Hyundai Were Dumping in 1996; and
- Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping.<sup>278</sup>

As discussed in detail below, in analyzing each of these four topics, the DOC chose Petitioner's position over Respondents'. In doing so, the DOC unfairly disregarded actual Respondent-specific price and cost data and embraced Petitioner's irrelevant data, broad-brush allegations and unfounded theories.

(i) Pricing Trends in the DRAM Industry.

4.393 The DOC analyzed pricing trends in the spot market and disregarded the actual price data submitted by Respondents. However, as Respondents demonstrated to the DOC during the Third Review, Respondents rely primarily on long-term contracts, not the spot market.<sup>279</sup> Moreover, the DOC's analysis did not even acknowledge the fact that the cost of producing 16 megabit DRAMs (indeed of producing any DRAM)<sup>280</sup> has decreased dramatically because of die shrinkage and yield improvements.<sup>281</sup> The DOC concluded its analysis of this topic by indicating that "although the DRAM market has stabilized somewhat, prices continue to *fluctuate* and a large degree of uncertainty about the direction of the market remains."<sup>282</sup> That statement is hardly indicative of a fair and objective determination of future dumping by Respondents. Obviously, DRAM prices fluctuate-this is a commodity market, after all. However, just as important and inexorable, DRAM costs fall. There is no indication on the record that DRAM prices fell or will fall faster or for a more sustained period than DRAM costs. On the other hand, the record does contain an econometric study regarding

<sup>278</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39814-39819 (24 July 1997) (Ex. ROK-3).

<sup>279</sup> Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 14 (Ex. ROK-35); Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3). Generally, in a declining market, spot market prices will be lower than previously negotiated long-term contracts. Therefore, an analysis between spot prices and cost unfairly disadvantaged Respondents, which sold primarily pursuant to long-term contracts.

<sup>280</sup> Shipments of 16 megabit DRAMs in the United States more than doubled between 1995 and 1996 and were the major density category in 1997.

<sup>281</sup> The shrinkage and yield improvements inherently drive costs down. Costs are important because, as DRAMs are a commodity product with high value and low transportation costs, unitary worldwide pricing precludes a finding of dumping based on price-to-price analyses. However, when pricing falls below cost there are certain scenarios where dumping may occur. See Article 2.2 of the AD Agreement.

<sup>282</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (emphasis added by Korea) (Ex. ROK-3).

Respondents' cost trends which concludes that Respondents will not dump in the future. The DOC summarily rejected this report.<sup>283</sup> The DOC's conclusion reflecting an axiom of commodity markets-"prices fluctuate"-would not be an adequate basis for a decision not to revoke were it standing alone, much less here, where the record contains contrary empirical data and a valid econometric study.

(ii) Inventory Levels.

4.394 In discussing whether inventory levels would increase or decrease,<sup>284</sup> the DOC acknowledged that Respondents publicly had announced DRAM production cutbacks "and it appears that the market has reacted with higher prices." However, it then concluded erroneously that "it is unclear how much of an effect this will have on the overall supply of DRAMs."<sup>285</sup> It should have been obvious to the DOC that, in this commodity market, if prices were to rise and demand did not, then production and inventory would have been cut. There is no credible evidence on the record that production did not decrease just as Respondents stated. Inventory levels naturally decreased and prices rose in response to these production and inventory decreases.

4.395 The DOC refused to revoke the order even though Respondents' data were not refuted. The DOC failed to apply basic economic supply and demand theories or to distinguish between Respondents' facts and the US petitioner's unfounded assertions.

(iii) Petitioner's Allegations that LG Semicon and Hyundai Were Dumping in 1996.

4.396 The DOC employed unreliable extrapolations and suppositions and irrelevant spot market pricing, and ignored Respondents' verified actual costs, *en route* to determining that Respondents did not satisfy the "no likelihood/not likely" criterion for revocation because they *may* have dumped in 1996. Even while agreeing with Respondents that an allegation concerning sales at below COP largely was irrelevant for purposes of detecting dumping in the post-review period, the United States relied on that irrelevant data to find that future possible market conditions (also based largely on irrelevant spot-market pricing) produced a "pattern [that] is suggestive of deteriorating market conditions that often give rise to dumping."<sup>286</sup> The DOC's use of irrelevant data to "suggest"

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<sup>283</sup> Case Brief of Hyundai, Exhibit 2, Case No. A-580-812 (21 April 1997) (Ex. ROK-35); Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39818 (24 July 1997) (Ex. ROK-3).

<sup>284</sup> In theory, large inventory overhangs will either depress prices by their very existence or will depress prices once the inventory is released.

<sup>285</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3).

<sup>286</sup> *Ibid.*

that dumping *may* occur directly contravenes the mandate of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts, not speculation and conjecture.

4.397 In addition, in analyzing whether Respondents had dumped in 1996, the DOC relied on unverified data from Micron, while rejecting verified data supplied by Respondents. Micron's "data" consisted of news articles and research reports regarding the state of the industry, including spot market prices. The data were not verified (and were not specific or, even, germane to either Respondent). Respondents, in contrast, submitted actual cost and price data for the period. The DOC verified the data for that part of 1996 that was within the period of review. These data and Respondents' actual cost and price data demonstrated, conclusively, that Respondents were not dumping in 1996. The DOC's failure to treat properly Respondents' actual cost and price data, and acceptance of Petitioner's data, violates Articles 2.2.1.1 and 6.6, respectively, of the AD Agreement. Moreover, the DOC's treatment of these data violates the standard of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts.

(iv) Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping.

4.398 In the DOC's Final Results, it stated that "[i]n sum, the current condition of the DRAM market and the data on the record supports a conclusion that the not likely criterion for revocation has not been satisfied."<sup>287</sup> The DOC also unreasonably claimed that "Respondents have been unable to demonstrate . . . that the decline in costs kept up with the rapid rate of decline in prices during the second half of 1996."<sup>288</sup>

4.399 This is inaccurate. The record evidence—including the economic analyses of Dr. Flame and Law & Economics Consulting Group—establishes that Korean DRAM manufacturers have not dumped and will not dump in the future. In addition, Respondents provided actual cost and price data to refute Micron's unfounded speculation and conjecture. As Respondents pointed out in the Review, costs decrease rapidly in the DRAM industry and prior cost decreases were sufficient to ensure that Respondents did not dump in the relevant examination periods, which included significant downturns. Moreover, Respondents demonstrated in numerous ways that they had no economic incentive to dump in the US market.

<sup>287</sup> Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39819, (24 July 1997) (Ex. ROK-3)..

<sup>288</sup> *Ibid.*

For example:

*Hyundai*

1. does not depend on exports from Korea to supply the U.S. market because it has invested \$1.4 billion to construct a DRAM wafer-fabrication facility in the United States; and
2. does not have to rely on the U.S. market to absorb its Korean production, because demand for DRAMs is growing in Korea, Southeast Asia and Europe.<sup>289</sup>

*LG Semicon*

1. has a stable, relatively small presence in the United States;
2. has a customer base of first-tier computer manufacturers that depend on steady supply (in this sub-market, pricing is significantly less volatile than it is in the spot market); and
3. is focusing on Southeast Asian markets.<sup>290</sup>

4.400 In addition, each company submitted detailed economic studies demonstrating that it had no economic incentive to dump.<sup>291</sup>

4.401 Respondents have not dumped; Respondents have no reason to dump in the United States; and the record data verified that they will not dump in the future. Therefore, the DOC's analysis of this topic and its conclusion that Respondents' inability "to demonstrate" precludes revocation is not indicative of Respondents' data or the state of the market." It is unreasonable, conclusory and unsupported by the facts.

4.402 In addition, in analyzing whether Respondents could remain competitive without dumping (as was the case in analyzing whether Respondents had dumped in 1996-see paragraph 4.74), the DOC relied on unverified data from Micron, while rejecting verified data supplied by Respondents. The DOC's reliance on unverified, non-germane data rather than Respondents' verified data violates Article 6.6 of the AD Agreement, which requires Members to "satisfy themselves as to the accuracy" of data submitted and relied upon to support a finding. It also violates the standard of Article 17.6 of the AD Agreement, which requires Members to base determinations on an objective and fair analysis of facts.

4.403 **Korea**, in response to a question from the Panel,<sup>292</sup> subsequently clarified its claim under Article 17 as follows:

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<sup>289</sup> See Case Brief of Hyundai, Case No. A-580-812 (21 April 1997) at 16 and 26-27 (Ex. ROK-35).

<sup>290</sup> See Case Brief of LG Semicon, Case No. A-580-812 (21 April 1997) at 16-61 (Ex. ROK-2); Rebuttal Brief of LG Semicon Co., Ltd., Case No. A-580-812 (30 April 1997) at 8-20 (Ex. ROK-39).

<sup>291</sup> See Exs. ROK-39, ROK-30 and ROK-35.

<sup>292</sup> The Panel recalls that the question was: "Korea argues that the United States has violated certain substantive obligations under Article 17.6 of the AD Agreement. Could Korea please explain the nature of that violation in concrete terms?"

4.404 Korea's claim is that when the Panel examines the conduct of the United States, applying the standards of review at Article 17.6, the Panel should find that:

- the DOC's establishment of the facts was improper;
- the DOC's evaluation of the facts was biased and not objective; and
- the US interpretations of various provisions of the AD Agreement are impermissible.

4.405 As a result of these findings, the Panel then should make appropriate recommendations and suggestions to the US Government. Use of the word "violated" in a few instances in Korea's first submission was meant as a shorthand reference to this point. Korea does not take the position that the United States "violated" Article 17.6 in the same sense that it violated Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement and Articles I, VI and X of the General Agreement.

(b) Response by the United States

4.406 The following are the **United States'** arguments in response to Korea's claim:

4.407 Korea attacks the DOC's analysis of the DRAM market and Respondents' selling activities during and after the lowest point in the 1996 market downturn. According to Korea, the DOC based its determination not to revoke "on unverified information from the US petitioner and on mere conjecture, and by failing to consider fairly and objectively Respondents' information and data." The DOC's analysis, Korea insists, "is nothing more than a transparent effort . . . to substantiate its groundless conclusion." Korea even accuses the United States of a "pattern of bias [that] is pervasive."

4.408 These allegations are without merit.

(i) Pricing Trends in the DRAM Industry

4.409 Korea's basic allegation is that the DOC erred when it concluded that the DRAM market experienced a significant downturn in 1996 that might continue well into 1997. Korea maintains that the record in the underlying administrative proceeding established that: (i) by the end of 1996, the DRAM market was firmly on the road to recovery; (ii) the DOC focused on price trends in the spot market and ignored data on Respondents' contract prices to original equipment manufacturers ("OEMs"); (iii) the DOC did not even "acknowledge" that DRAM costs constantly decline; and (iv) DRAM prices were not falling faster (or for a more sustained period) than DRAM costs.

4.410 In point of fact, when the administrative record closed to new factual information on 2 May 1997, the road to recovery for the DRAM industry was, at

best, bumpy. First of all, the enormity of the 1996 downturn cannot be overstated. It was the first year of negative growth for the DRAM industry since the downturn in 1985.<sup>293</sup> As put by Kenneth Flame, Hyundai's economic consultant, "[n]o forecaster predicted the exceptional magnitude of the enormous decline in DRAM prices that took place in the 2<sup>nd</sup> quarter of 1996."<sup>294</sup>

4.411 Secondly, the only reason anyone in the industry was talking about a recovery in 1997 is because the Korean producers announced production cutbacks toward the end of February, 1997,<sup>295</sup> and not because the systemic problems which plague this industry (e.g., excess production capacity, excess supply, accumulated inventory) had corrected themselves.<sup>296</sup> Therefore, while the announcement had a positive impact on the market,<sup>297</sup> it was, at best, a temporary measure which could easily reverse itself.<sup>298</sup> According to a February, 1997 report prepared by De Dios & Associates, and cited by Korea:

You will notice, however, that the basis for the momentum deviates from the normal causes of price increases. We did not mention overwhelming demand or true and prolonged lack of supply as reasons for the momentum. In the end, strong demand and prolonged lack of supply are the bases for a true shortage. *What we have here is a temporary situation that will change.*<sup>299</sup>

4.412 In its rebuttal submission, Korea will undoubtedly argue that one of the ways the market could have "changed" at this time was for the better. It will cite passages in the administrative record where various investment bankers and industry experts predict higher prices and better times for the DRAM industry in 1997.<sup>300</sup> What it will ignore, is roughly the same number of experts who were not sure which way the market was headed and who openly expressed concerns about its future.<sup>301</sup> This evidence, which was put on the record as late as 2 May

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<sup>293</sup> LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15); Case Brief of Hyundai, Ex. 2 at 5 and Fig. 3 ("Flamm Study") (Ex. USA-12).

<sup>294</sup> *Ibid.*, Ex. 2 at 22 (emphasis added by the United States).

<sup>295</sup> Micron Rebuttal Br., Ex. 1 (Goldman Sachs) (Ex. USA-26); Case Brief of Hyundai, Ex. 7-11 (Ex. USA 12).

<sup>296</sup> *See, e.g.*, Case Brief of Hyundai, Ex. 10 (Morgan Stanley) ("the global oversupply problem still remains") (Ex. USA-12). For a fuller discussion of the economic forces that were pulling on the DRAM industry during the very volatile period before and after the DOC's preliminary results in this case, *see Ibid.*, Ex. 5 (De Dios & Associates: "The DRAM Market Advisor") (Ex. USA-12).

<sup>297</sup> Indeed, spot market prices for 16 Meg DRAMs reportedly rose by approximately twenty percent on mere rumours of the *announcement*. *Ibid.*, Ex. 7 (Electronic News) (Ex. USA-12).

<sup>298</sup> *Ibid.*, Ex. 5 (De Dios & Associates) (Ex. USA-12).

<sup>299</sup> *Ibid.* (emphasis added by the United States).

<sup>300</sup> *See, e.g., Ibid.*, Ex. 10 (Morgan Stanley) and Ex. 15 (Merrill Lynch) (Ex. USA-12); LG Semicon Case Br., Ex. B (VLSI Research) (Ex. USA-15).

<sup>301</sup> *See, e.g.*, Case Brief of Hyundai, Ex. 5 (De Dios & Associates: "The momentum and market psychology can still shift back in the opposite direction.") and Ex. 7 (Electronic News: "... others are left wondering if the market can absorb the combined capacity coming from Korea, Japan and elsewhere ...") (Ex. USA-12). *See also* Letter from Hale and Dorr to Secretary of Commerce, 2 May 1997, at Ex. 1 (Electronic Buyers' News (28 Apr. 1997): "The mainstay 16-Mbit market last week

1997 (more than six weeks *after* the DOC's preliminary results), established that numerous forces threatened to reverse the market's brief turnaround, including:

- the temptation on the part of Korean vendors to "ship more of their accumulated inventory";<sup>302</sup>
- excessive customer inventories due to "slow PC end-use demand";<sup>303</sup>
- the tendency of some Japanese producers to "weigh additional profit margin against strategic customer relationships";<sup>304</sup>
- global oversupply and excess production capacity;<sup>305</sup> and,
- the pricing strategies of European and US DRAM suppliers.<sup>306</sup>

4.413 Moreover, the uncertainty surrounding the direction of the market had not resolved itself by the time the DOC issued its final results on 24 July 1997. For example, after initially rising on news of the Korean "production cutbacks," spot market prices for the 1Mx16 EDO DRAM decreased from the \$7.45 to \$8.09 range on 13 June 1997 to the \$6.30 to \$6.85 range on 27 June 1997.<sup>307</sup>

4.414 This evidence, when measured with the entire record, led the DOC to conclude:

In sum, although the DRAM market has stabilized somewhat, prices continue to fluctuate and a large degree of uncertainty about the direction of the market remains.<sup>308</sup>

4.415 Far from being a "tepid conclusion" which states the obvious, this finding by the DOC accurately described the volatile state of the DRAM market in the late spring and early summer of 1997. As the DOC emphasized in later sections of its notice:

wholly apart from the data concerning the 1996 downturn, ... our analysis indicates that market conditions in the DRAM industry *remain volatile*. As stated previously, while the plunge in prices began to stabilize somewhat in early 1997, recent data indicate that prices are headed downward again. For example, according to publicly available data, the average US price for a 16M DRAM

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continued to be highly unstable. Analysts and independent distributors all agreed that average selling prices slipped about 10 percent in the spot market.") (Ex. USA-33).

<sup>302</sup> Case Brief of Hyundai, Ex. 5 (De Dios & Associates) (Ex. USA-12).

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*

<sup>305</sup> *Ibid.* See also *Ibid.*, Ex. 10 (Morgan Stanley) (Ex. USA-12).

<sup>306</sup> *Ibid.* As if to underscore this point, Compaq Computer Corporation ("Compaq"), one of Respondents' "premium" OEM customers in the United States, stated in a letter to the DOC on 15 July 1997 that "[t]here is only one, worldwide DRAM market. What is done in Europe affects the market in the United States." Letter from Vinson & Elkins (on behalf of Compaq, et al.) to Secretary of Commerce, 15 July 1997, at 4 (hereinafter "Compaq Ltr.") (Ex. USA-34).

<sup>307</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817, citing Dataquest ("The Semiconductor DQ MONDAY Report," Issue 24, 23 June 1997, and Issue 25, 30 June 1997) (Ex. USA-1).

<sup>308</sup> *Ibid.*

fell from approximately \$18.00 in May 1996 to approximately \$7.00 in December 1996. According to Dataquest, the price for the 16M *as of June 30, 1997*, is approximately \$6.50. This represents a 64 percent decline in prices between the end of the third period of review (April 30, 1996) and *June 1997*. Since DRAMs are a commodity product, it is reasonable to expect that Korean producers will match prevailing market prices in the United States.<sup>309</sup>

4.416 In short, Korea's claim that the DRAM market was firmly on the road to recovery by the end of 1996 is without merit.<sup>310</sup> The DOC reasonably determined based upon facts properly established that US market conditions in the DRAM industry remained volatile during the first part of 1997.

4.417 Equally infirm is Korea's contention that the DOC ignored or disregarded: (i) Respondents' contract prices to OEMs, (ii) the constant decline in DRAM costs, and (iii) the absence of any evidence on the record which indicated that DRAM prices were falling faster (or for a more sustained period) than DRAM costs. On the contrary, the administrative record is replete with evidence that the DOC gave careful consideration to each of these matters before making its final determination.

4.418 For example, the DOC determined, based upon company-specific cost and price data provided by Respondents (and verified by the DOC), that as the market downturn in 1996 worsened after the close of the third review, Respondents were forced to price a "substantial" portion of all home market sales below their declining cost of production.<sup>311</sup> In addition, the DOC verified, as Respondents had alleged, that their sales were based primarily on contract prices to OEMs (such as Compaq), as opposed to "spot market" prices, and that contract prices tended to lag behind market prices in a declining market.<sup>312</sup> However, the DOC also determined, based upon record evidence, that: (i) contract prices to OEM customers follow the direction of prices on the spot market; and (ii) when Respondents restricted the supply of DRAMs to distributors and brokers in February of 1997 in order to stabilize spot market

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<sup>309</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (emphasis added by the United States) (Ex. USA-1).

<sup>310</sup> Also without merit is Korea's claim that the DOC based its determination solely "on events during calendar year 1996; and it did so despite acknowledging that market conditions in the DRAM industry had recovered in 1997." The DOC based its final determination upon properly established facts covering 1996 and 1997.

<sup>311</sup> Analysis Memorandum from Program Manager to Deputy Assistant Secretary for Import Administration, 16 July 1997, bates no. 41-45 (hereinafter "*Final Analysis*") (Ex. USA-35).

<sup>312</sup> *Final Analysis*, bates no. 52. See also LG Semicon Case Br., at 31-34 (Ex. USA-15). The DOC did *not* verify, and the record does not support, Korea's suggestion that contract prices were set over a "long-term." In a volatile market such as the one that prevailed throughout 1996, DRAM customers, such as Compaq, insist upon renegotiating their purchase prices at least every quarter. *Final Results Third Review*, 62 Fed. Reg. at 39819 (Ex. USA-1).

prices, their contract prices fell *below* the spot market.<sup>313</sup> According to some industry observers, contract prices for DRAMs fell by as much as \$4 below the spot market.<sup>314</sup> In summarizing its conclusions on these points, the DOC stated, in part:

We disagree with the Respondents' assertion that the average US prices presented in the petitioner's analysis bear no relation to their actual US prices. We recognize that the petitioner based its analysis upon average US spot market prices instead of contract prices. However, based upon the average gross unit prices calculated using Respondent's own data from the POR, it appears that contract prices generally follow the same pricing patterns as spot market prices. There is even evidence on the record indicating that the actual contract prices were sometimes lower than the average spot prices presented in the petitioner's analysis.<sup>315</sup>

4.419 Finally, the DOC determined, based upon record evidence, that contract and spot prices were rapidly trending below Respondents' reported costs of production throughout the period that immediately followed the third administrative review.<sup>316</sup> Indeed, part of the DOC's basis for this determination was price data for the first quarter of 1997 provided by some of Respondents' OEM customers and company-specific cost projections for the second quarter of 1997 contained in the Flame Study.<sup>317</sup>

#### (ii) Inventory Levels

4.420 In the *Final Results Third Review*, the DOC stated:

although the Respondents have made public announcements regarding DRAM production cut-backs and it appears that the

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<sup>313</sup> See, e.g., Case Brief of Hyundai, Ex. 5 at 12 (De Dios & Associates) (Ex. USA-12), Ex. 9 (Computer Reseller News) (Ex. USA-12), and Ex. 11 (Electronic Buyers News) (Ex. USA-12). According to Morgan Stanley, "[t]he Korean firms executed the change skillfully. For example, they used a clever tactic when they cut their shipments to discount brokers, who have a big influence on the spot price." *Ibid.*, Ex. 10 (Morgan Stanley) (Ex. USA-12).

<sup>314</sup> *Ibid.*, Ex. 9 (Computer Reseller News) (Ex. USA-12).

<sup>315</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817-18 (Ex. USA-1). Later in the notice, the DOC revisited the relationship between spot and contract prices during the first several quarters of 1997: "In fact, even into 1997, prices to OEM customers remained depressed, and below spot market prices, even as the spot market prices began to show some increase." *Ibid.* at 39819.

<sup>316</sup> *Final Analysis*, bates no. 52-57, and 59 (Ex. USA-35).

<sup>317</sup> *Ibid.* bates no. 59. While it is true that the DOC considered many aspects of the study prepared by Dr. Flamm to be unduly optimistic, see *Final Results Third Review*, 62 Fed. Reg. at 39818, Korea's repeated assertion that the DOC "ignored" or "summarily rejected" the study rings hollow. The DOC not only scrutinized every inch of the study, see, e.g., *Final Analysis*, bates no. 58 (Ex. USA-35), but actually compared some of Dr. Flamm's optimistic projections of future costs with prices reported by several US customers of Respondents.

market has reacted with higher prices, it is unclear how much of an effect this will have on the overall supply of DRAMs.<sup>318</sup>

4.421 Korea contends that it "should have been obvious to the DOC that, in this commodity market, if prices were to rise and demand did not, then production and inventory would have been cut."<sup>319</sup> According to Korea, "[t]here is no credible evidence on the record that production did not decrease just as Respondents stated."

4.422 On the contrary, a careful reading of the administrative record casts a large shadow of doubt over the "production cutbacks" announced by the Korean producers. First, record evidence indicates that the Respondents never actually "reduced" production. At most, they simply held back on previously announced *increases* in production.<sup>320</sup> Secondly, the administrative record is awash in evidence that the Respondents orchestrated a very "clever" tightening of the spot market in February of 1997 by cutting back on shipments to distributors and brokers (who have a big influence on the spot price), while maintaining shipments to their "premium," OEM customers.<sup>321</sup> The record also establishes that the Respondents were able to affect this change in the "market's psychology," as one observer put it, by accumulating inventory.<sup>322</sup> Goldman Sachs, for example, informed clients as late as 14 April 1997 that the Korean producers never instituted any type of production cutbacks. Instead, they simply built up inventories "that will be unleashed on the market later."<sup>323</sup>

(iii) Petitioner's Allegation that LG Semicon and Hyundai Were Dumping in 1996

4.423 Korea argues that the DOC based its determination not to revoke the anti-dumping order on *DRAMs from Korea*, in part, on certain data reported by Respondents which showed that their home market sales made below cost increased at a rapid pace in May and June of 1996 as the downturn in the DRAM market worsened. Korea contends that because the DOC conceded that this information was "irrelevant" to its analysis of dumping, the DOC should not have relied on these data to inform its revocation decision. However, Korea misstates what the DOC actually did.

4.424 To begin with, the DOC did not disregard *any* home market sales on the basis that they were below cost when it calculated normal value in the final

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<sup>318</sup> 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>319</sup> Whether "obvious" or not, Korea claims, without support or citation, that "[i]nventory levels naturally decreased and prices rose in response to these production and inventory decreases."

<sup>320</sup> Case Brief of Hyundai, Ex. 10 at 1 (Morgan Stanley: "hold down increases in 16m DRAM production . . . The recent announcement by the Koreans is that they will hold capacity expansion 30 percent below originally projected levels.") (Ex. USA-12) and Ex. 11 (Electronic Buyer's News: "scale back a planned 16-Mbit production expansion by 30 percent") (Ex. USA-12).

<sup>321</sup> *Ibid.*, Ex. 10 at 2 (Morgan Stanley) (Ex. USA-12).

<sup>322</sup> *See, e.g.*, Case Brief of Hyundai, Ex. 5 at 2-3 & 6 (De Dios & Associates) (Ex. USA-12).

<sup>323</sup> Micron Rebuttal Br., Ex. 1 (Goldman Sachs) (Ex. USA-26).

results of the third administrative review.<sup>324</sup> Thus, any arguments based upon the requirements of the below-cost test under United States law are of no consequence.<sup>325</sup>

4.425 Secondly, the DOC did not equate sales made below cost during a two-month period with dumping. As the agency clearly stated in its final results:

We note that, according to the DOC's cost test methodology, these below cost sales were not sufficiently numerous for the DOC to reject as a basis for determining normal value in this third review. We also agree with LG Semicon that whether it made home market sales at prices below the COP during the two months immediately following the close of the third review period in and of itself does not demonstrate that dumping occurred.<sup>326</sup>

4.426 Instead, the DOC weighed all of the record evidence and arguments made by the parties before it decided that the requirements set forth in 19 C.F.R. § 353.25 (1997) had not been met. As the DOC explained in the final results of the challenged determination, Respondents' dramatic increase in below-cost sales immediately after the period of review was only one factor that influenced its decision:

. . . we find that the not likely criterion for revocation has not been satisfied for the following reasons: (1) The Respondents' own sales and cost data indicate that there were a substantial number of home market sales made at prices below COP during the two months immediately following the close of the third administrative review; (2) the lowest point of the downturn, in terms of DRAM pricing and other market conditions, did not occur until after mid-1996 (well after the end of the third administrative review period); (3) publicly available spot market pricing data, when viewed in conjunction with the Respondent's cost data, extrapolated to a future point in time, indicate that LG Semicon and Hyundai may have made US sales at prices below COP during 1996; (4) Respondent's own pricing data indicate that [their] contract prices generally follow the same pricing patterns as spot market prices. . .  
[I]n light of the market conditions during the downturn and the fact that the months actually examined during the POR did not include

<sup>324</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>325</sup> Under section 773(b) of the Act, home market sales that are below cost may be disregarded in the calculation of normal value if they are made "within an extended period of time." 19 U.S.C. § 1677b(b)(1) (1997) (Ex. USA-19). "As in the [AD] Agreement, the term 'extended period of time' is defined in new section 773(b)(2)(B) as being normally one year, but not less than six months." Statement of Administrative Action (URAA), H.R.Doc. 103-316, vol. 1, at 831-32 (1994) (Ex. USA-36). Since Respondents' prices did not begin to fall below their costs in substantial quantities until the end of the period covered by the third administrative review (*i.e.*, 1 May 1995 to 30 April 1996), none of these sales were excluded from the DOC's calculation of normal value. *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>326</sup> *Ibid.* at 39817.

the lowest point in the downturn, we find that the existence of below-cost sales during the May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period as the DRAM market worsened. As prices in the DRAM market fell, a substantial number of sales were made below cost. This pattern is suggestive of deteriorating market conditions that often give rise to dumping.<sup>327</sup>

(iv) Whether Korean DRAM Producers Can Remain Competitive in the US Market Without Dumping

4.427 Korea asserts that the Respondents had no incentive to dump in the United States because they were either establishing production facilities in the United States, had limited sales to the United States, or because demand in other parts of the world was so great they could afford not to dump in the United States.

4.428 With respect to Korea's assertion that LG Semicon's share of the US market was too small to justify dumping, the record actually demonstrates that the company's share of the US market, both in relative and absolute terms, was far from insignificant.<sup>328</sup>

4.429 As for Korea's claim that both Respondents focus more on Southeast Asia and/or Europe, and less on the United States, the record confirms that the United States is home to the world's largest consumers of DRAMs, including important customers of both LG Semicon and Hyundai.<sup>329</sup> Moreover, data obtained from Dataquest shows the Americas to be close to twice the size of other regional markets for DRAMs. In 1996, for example, the Americas accounted for a reported \$10,107 million in DRAM consumption, compared with \$5,895 million for Asia/Pacific (excluding Japan), \$5,166 million for Japan, and \$4,759 million for Europe.<sup>330</sup> In addressing these issues in the *Final Results Third Review*, the DOC stated, in part:

... the United States is part of the world's largest regional market for DRAMs, with considerable growth potential. Given the importance of the US market, as a general matter, even a producer with a relatively small market share would have an incentive to ride out industry downturns. The fact that DRAM producers,

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<sup>327</sup> Since Respondents' prices did not begin to fall below their costs in substantial quantities until the end of the period covered by the third administrative review (*i.e.*, 1 May 1995 to 30 April 1996), none of these sales were excluded from the DOC's calculation of normal value. *Final Results Third Review*, 62 Fed. Reg. at 39817 (Ex. USA-1).

<sup>328</sup> *Final Analysis*, bates no. 50 (Ex. USA-35).

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

including the Korean Respondents, have historically been found to have dumped during downturns supports this conclusion.<sup>331</sup>

4.430 Finally, Korea's claim that Hyundai had no incentive to dump because it is building a DRAM factory in the United States cannot be sustained. First of all, what little information is on the record regarding this issue indicates that the plant had not been completed, let alone begun commercial operations, at the time the DOC issued the *Final Results Third Review*.<sup>332</sup> Secondly, there is nothing on the record of the underlying administrative proceeding which demonstrates that Hyundai would not continue to import DRAMs into the United States once the plant was completed.

(c) Rebuttal arguments made by Korea

4.431 **Korea** in its oral statement at the first meeting of the Panel with the Parties, further argued as follows:

4.432 The United States improperly established the facts; and evaluated the facts in a biased and non-objective manner, in violation of the standards set forth in Article 17.6. The United States violated its obligation under Article 6.6 by failing to satisfy itself as to the accuracy of data supplied by Petitioner. Indeed, the United States uncritically accepted and relied on Petitioners' data without taking any action to confirm that it was accurate. The United States disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs, thereby violating its obligation under Article 2.2.1.1. Finally, to support its decision regarding the likelihood of dumping in the future, the United States disregarded a valid econometric study on DRAM cost and pricing and Respondent-specific cost and pricing data and relied instead on irrelevant spot market pricing and speculative assumptions of future costs supplied by Petitioner. Also, the DOC disregarded Respondents' data collection proposal, apparently assuming (incorrectly) that it had no bearing on the likelihood issue.

(d) Rebuttal arguments made by the United States

4.433 The **United States** makes the following rebuttal arguments:

(i) The United States Appropriately Satisfied Itself as to the Accuracy of the Data Relied Upon

4.434 Korea's generalized allegation that the DOC relied upon data submitted by Micron without satisfying itself as to the accuracy of the data is baseless. The DOC appropriately evaluated all of the information gathered in the underlying

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<sup>331</sup> 62 Fed. Reg. at 39819 (Ex. USA-1).

<sup>332</sup> Case Brief of Hyundai, at 26 (Ex. USA-12).

administrative proceeding, and relied upon information submitted by both Respondents and by Micron in reaching its determination concerning the likelihood of future dumping.

4.435 First, the DOC conducted on-site verifications of the cost and sales data submitted by LG Semicon and Hyundai in their questionnaire responses for the May 1995 to April 1996 third review period (including home market cost and price data through June 1996).<sup>333</sup> As discussed in the first US submission, the DOC relied on this verified cost and price data in its determination not to revoke, when it concluded: (i) that Respondents had made a substantial number of sales below cost in Korea in May and June 1996, as the rapid and continuing decline in DRAM prices drove their prices below cost; and, (ii) that Respondents' verified cost data for 1995 and the first half of 1996, extrapolated forward to the second half of 1996, indicated that Respondents may have already resumed dumping in the latter half of 1996.<sup>334</sup>

4.436 Second, the DOC satisfied itself as to the accuracy of the information it relied upon concerning developments following the end of the third-review period. This information, submitted by the Respondents as well as by Micron and other interested parties, included independent market analysts' reports from such reputable brokerage houses as Goldman Sachs, Merrill Lynch, Lehman Brothers, and ABN Amro Hoare Govett; business and market news reporting by well-known news organizations such as the Wall Street Journal, New York Times, Financial Times, Reuters, Korea Herald, and Nikkei; and reports from various trade journals.<sup>335</sup> As the DOC noted in the *Final Results Third Review*, the Respondents and their customers submitted data on average US prices reported by Dataquest and the American IC Exchange, studies by independent analysts and numerous newspaper and magazine articles.<sup>336</sup>

4.437 The DOC did not accept such reports uncritically, but instead appropriately evaluated the factual assertions made by the interested parties, and satisfied itself as to the accuracy of the information on which it relied. For example, as discussed in the first US submission, the Korean Respondents contended that the prevailing excess of DRAM supply over demand would be ameliorated in the future by production cutbacks the Korean producers had announced on 30 January 1997. However, while their own production figures were obviously available to them, the Respondents did not provide any data to substantiate their assertion that they had, in fact, cut back production. Instead, in their 18 April 1997 case briefs before the DOC, they relied exclusively on *news*

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<sup>333</sup> *Final Results Third Review*, 62 Fed. Reg. at 39815-17 (Ex. USA-1).

<sup>334</sup> *Final Results Third Review*, 62 Fed. Reg. at 34817 (Ex. USA-1).

<sup>335</sup> See, e.g., LG Semicon Case Br. at Appendix B (submitting 13 industry research studies) and Appendix C (submitting 18 news reports) (Ex. USA-15 & 96); Case Brief of Hyundai Ex. 5, 10, 15 (market analysts' reports) and Ex. 7-9, 11 (news reports) (Ex. USA-12); Micron Rebuttal Br. Ex. 1 (Goldman Sachs) and Ex. 2, 3, 7-9 (news reports) (Ex. USA-26 & 97).

<sup>336</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

*reports* concerning their earlier announcements.<sup>337</sup> The DOC appropriately discounted the news reports of production cutbacks which were not substantiated by data readily available to Respondents.

4.438 Similarly, the DOC carefully considered each of the parties' contentions concerning both the reliability of the submitted information and the appropriate conclusions to be drawn from it.<sup>338</sup> For example, the DOC specifically addressed LG Semicon's argument that the DRAM pricing data series compiled by Lehman Brothers (a well-known US brokerage house) and submitted by Micron was unreliable, noting that [t]hese data were similar to other pricing data submitted on the record, including the pricing data obtained from the American Integrated Chip Exchange (AICE) and Dataquest.<sup>339</sup> In each case, the DOC applied its considerable experience in market analysis and considered the source of the information, its internal logic, and its consistency with other information in determining its accuracy and usefulness. In short, there simply is no basis for Korea's claim that the DOC did not satisfy itself as to the accuracy of the data that it relied upon.

(ii) The United States Properly Evaluated All Cost Data Submitted by the Korean Respondents

4.439 Korea alleges that the United States violated Article 2.2.1.1 of the AD Agreement by disregarding cost data prepared by Respondents, which, it claims, was prepared in accordance with Korean GAAP and accurately reflected costs. The record is clear, however, that the DOC verified the cost data submitted by both Respondents as it pertained to cost of production for the third-review period (covering quarterly costs from the first quarter of 1995 through the second quarter of 1996). The DOC relied on this verified cost data in considering whether Respondents may have resumed dumping in the months following the end of the third-review period.

4.440 In addition to the cost data for the third review submitted by both Respondents, late in the proceeding, LG Semicon also submitted information which purportedly represented its cost of production for two DRAM models in

<sup>337</sup> Case Brief of Hyundai at 19-20 and Ex. 7 (Ex. USA-12 & 98); LG Semicon Case Br. at 66-69 (Ex. USA-99). In this regard, it is worth noting that in the *Indonesia Autos* case, the panel justified a negative ruling of market displacement or impedance under Article 6.3 of the Agreement on Subsidies and Countervailing Measures on the failure of the complainants to provide evidence that, according to the panel, was at the disposal of the companies in question. *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel issued 2 July 1998, para. 14.234 (unadopted).

<sup>338</sup> See *Final Results Third Review*, 62 Fed. Reg. at 39817 ( We have reviewed the data submitted by the petitioner as well as all arguments and information on the record regarding the veracity of the data and the underlying assumptions. . . . [M]any of the Respondents' arguments concerning the alleged distortions and inaccuracies in the petitioner's analysis lack merit. ) (Ex. USA-1).

<sup>339</sup> *Ibid.* at 39818. See also Micron Rebuttal Br. Ex. 6 (Ex. USA-97); Case Brief of Hyundai Ex 5 (Ex. USA 12).

the second half of 1996. These data were *not* submitted in the same format as the data in the third review questionnaire response, with underlying detail and copies of the company's financial statements for the period, nor were they provided in the form of hard figures of the kind that could be verified by reconciliation to financial and cost records. Instead, the claimed cost of production information was submitted in the form of data points on a graph, with an express disclaimer that [t]he reported figures were calculated based on best information currently available.<sup>340</sup>

4.441 In addition, numerous news reports and market analysts' reports were submitted which indicated that LG Semicon had made several changes in accounting practices, including changes in the accounting for depreciation and for foreign exchange losses.<sup>341</sup> These reports indicated that LG Semicon had a loss of 40 billion won in the second half of 1996, and would have reported a loss for the year if it continued to use the accounting methods it had used in the prior year.<sup>342</sup> The DOC noted these changes, and further noted the fact that LG Semicon failed to identify these adjustments to its costs significantly reduces the reliability of the information. We are uncertain whether LG Semicon made other adjustments to its reported costs.<sup>343</sup>

4.442 Despite LG Semicon's claim that its late-submitted 1996 cost data were prepared in conformity with its financial statements, LG Semicon never submitted its 1996 financial statements to allow the DOC to confirm LG Semicon's assertion, or to determine whether any other accounting changes had been made. Under these circumstances, the DOC properly concluded that, taking into consideration LG Semicon's verified cost data for the first half of 1996, that the piecemeal data submitted for the second half of 1996 could not be accepted at face value. The DOC was under no obligation to accept the incomplete cost data in the format submitted by LG Semicon when it contained undisclosed changes in accounting methods and an unsubstantiated claim that it was prepared in accordance with its normal accounting records.

(iii) The United States Appropriately Discounted Hyundai's Economic Study Containing Unrealistic Projections of Costs and Prices and Respondents' Unsubstantiated Cost and Pricing Data

4.443 Korea also claims that the DOC improperly disregarded an economic study submitted by Respondent Hyundai that purported to show, based on a number of assumptions concerning the trend in prices and costs, that Hyundai's prices would remain above its costs in the second half of 1997 and 1998. The

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<sup>340</sup> LG Semicon Case Br. at 57, n. 21 (Ex. USA-99).

<sup>341</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1).

<sup>342</sup> Micron Rebuttal Br. at 8-10 and Exhibits 2 & 3 (Ex. USA-97).

<sup>343</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1).

DOC did not ignore the Flame study. To the contrary, in the *Final Results Third Review*, the DOC carefully considered Respondent's submissions, but concluded that the unrealistic assumptions on which the study was based (which assumptions were contradicted by other data submitted by Respondents and by pricing data submitted by their computer customers) rendered the study's projections unreliable.<sup>344</sup> Indeed, as noted by the DOC, those optimistic projections had already proved incorrect by the pricing trends and analysts' reports in June 1997.<sup>345</sup> While baldly asserting that the Flame study was a valid econometric study, Korea does not address any of the specific flaws in its underlying assumptions that the DOC identified in its determination.

4.444 Korea also complains that the DOC disregarded the Respondent-specific cost and pricing data submitted by the companies. The DOC in fact relied upon the verified cost and pricing data for the third-review period that Respondents had submitted in their questionnaire responses. In addition, one Respondent, LG Semicon, submitted monthly averages for selected cost and pricing data. The DOC properly discounted that data (which in itself showed that LG Semicon's earlier projections were erroneous).

4.445 Korea further asserts that Respondents' data (which were verified by the DOC) showed that their contract prices were above spot prices. However, Korea does not cite any specific evidence in the record to support its assertion, apparently relying generally on its earlier reference to the data submitted by Respondents in their 18 April 1997 case briefs. The DOC properly evaluated Respondents' data, in light of all the evidence on the record including actual pricing data submitted by the OEM computer customers themselves and concluded that Respondents' contract pricing generally followed the pricing trends in the spot market.<sup>346</sup>

4.446 LG Semicon submitted two charts in its 18 April 1997 case brief (at 49-50, Figures 5 and 6) in support of its argument that its contract prices to OEMs during the third-review period were above the average US spot-market price. Those charts actually support the DOC's conclusion that Respondents' US prices followed the declining trend of spot prices, and that the extrapolation of those trends indicated that Respondents already may have made sales below cost during 1996.

4.447 To the extent that the charts show a lag between LG Semicon's prices and the rapidly declining spot prices in the second quarter of 1996, it reflects a fundamental distortion in the way the data were presented by LG Semicon. The charts present LG Semicon's *quarterly* average prices and costs for 4 meg and 16 meg DRAMs from the first quarter of 1995 through the second quarter of 1996, based on US prices and cost data submitted in the third review. However,

<sup>344</sup> *Final Results Third Review*, 62 Fed. Reg. at 39818 (Ex. USA-1). See also Micron Rebuttal Br. at Ex. 5 (Critique of Flamm Analysis) (Ex. USA-97).

<sup>345</sup> *Ibid.* (current market conditions do not bear the strong demand assumption out).

<sup>346</sup> *Final Results Third Review*, 62 Fed. Reg. at 39817-18 (Ex. USA-1).

because the third review covered US sales made during the period 1 May 1995 through 30 April 1996,<sup>347</sup> what is shown in the chart as the average US price for the second quarter of 1996 actually represents sales *for just the first month* (April 1996) in the quarter. In a rapidly declining market, using prices for just the first month of a quarter to represent a quarterly average badly skews the comparison. This error was compounded when LG Semicon uses these quarterly averages to derive trends on which it based cost and price projections for the second half of 1996.<sup>348</sup>

4.448 The distortion in the calculation of LG Semicon's average DRAM prices for second quarter 1996 was demonstrated by the additional pricing data submitted by LG Semicon, purporting to show actual monthly average US prices for May to December 1996.<sup>349</sup> The monthly US pricing data for May and June show the gross distortion reflected by the quarterly average data for the second quarter of 1996, as well as in the projections for the second half of 1996 that are based on a trend using the distorted quarterly average.<sup>350</sup>

(iv) The United States Properly Relied on Publicly Available Reports Concerning Market Price Trends and Projections of Costs Based on Respondents' Verified Cost Submissions

4.449 Korea contends that the DOC improperly relied on publicly reported spot-pricing data in considering pricing trends and price levels, arguing that spot prices are irrelevant to the assessment of the market-pricing trends. Similarly, Korea asserts that the DOC improperly utilized the cost projections submitted by Micron, which were based on Respondents' own verified cost data for the third-review period. The United States reaffirms the discussion in its first written submission which showed that Korea's arguments are groundless.

4.450 The DOC carefully considered Respondents' arguments against reliance on independent analysts' spot-market pricing data in making determinations concerning the pricing levels and trends in the DRAM market. Respondents claimed that their sales to OEM customers, which Korea now asserts were made according to long-term contracts, did not precisely track spot-market prices.

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<sup>347</sup> By contrast, pursuant to its standard questionnaire format, the DOC had collected information on Respondents' costs and sales in the *home market* through June 1996, as potential comparisons for the reported US sales for the period through April 1996.

<sup>348</sup> LG Semicon Case Br. at 52-54, Figures 7 and 8 (Ex. USA-99).

<sup>349</sup> *Ibid.* at 58-59, Figures 9 and 10 (Ex. USA-99). These unsubstantiated data, first submitted late in the proceeding with the case briefs, were submitted only in the form of data points on a graph showing simple monthly weighted average prices, an averaging methodology that is not consistent with the DOC's practice.

<sup>350</sup> Compare LG Semicon Case Br. at 52-54 with *Ibid.* at 55-59 (Ex. USA-99).

4.451 First, the evidence does not support Korea's assertion that Hyundai and LG Semicon sold to US customers pursuant to long-term contracts. While Respondents may have reached periodic understandings on prices with their OEM customers, the actual prices were set in individual purchase orders, and were subject to change. As stated in their questionnaire responses, Respondents reported the invoice date (generally coincident with the date of shipment to the customer) as the date of sale.<sup>351</sup> Under the DOC's well-established practice, if all of the material terms of a sale are fixed in a legally binding long-term contract including, most importantly, the product, the price and quantity of the sale then the DOC would use the date of the long-term contract, not the invoice date, as the date of sale in its dumping analysis.<sup>352</sup> Neither Respondent indicated in its verified questionnaire response that it sold pursuant to such long-term contracts, and the DOC used the date of invoice as the date of sale.

4.452 Second, the evidence showed that even those OEM customers that had non-binding understandings regarding pricing over longer periods abandoned such understandings as the DRAM market price continued its dramatic fall throughout 1996. A report on LG Semicon from the brokerage house ABN Amro Hoare Govett, prepared in November 1996, stated:

LG Semicon's interim net profits fell 60 percent {year-over-year} in 1H96 as prices tumbled. However, the worst is yet to be reported for the company. . . . [A]lthough spot market DRAM prices declined sharply in the first half of the year, the average for the half was much higher than those which have prevailed so far in the second half. However, the difference between the prices that LG Semicon actually realized in the first half and the second half is likely to be even more pronounced because of long-term contracts that many DRAM producers had signed. These were typically quarterly contracts, and had the effect of keeping contract high above the spot market prices . . . . *By mid-year, many industry sources confirmed that quarterly contracts had been replaced by monthly contracts, and that prices were being renegotiated as often as once per week. Consequently, the prices that DRAM makers have received on the bulk of their products in the second half have been much closer to the spot market rate.* As a result,

<sup>351</sup> See, e.g., LG Semicon Questionnaire Response, Section C, 16 August 1996, at 7 ( LG Semicon has reported invoice date as date of sale ) (Ex. USA-100); *Ibid.*, Section A, at 15 ( A variety of changes occur after the initial {purchase order} that affect the terms of the sale. *Price.* As a result of changing market conditions, the customer may demand a lower price. . . . ) (Ex. USA-100); Hyundai Questionnaire Response, Section A, 19 August 1996, at A-10 ( the product, unit price and quantity are shown in the purchase order from the customer. Once a sales order has been issued, the terms, *i.e.*, price, product, and quantity, may be modified. If so, then a new sales order is issued. ) (Ex. USA-101).

<sup>352</sup> See *Anti-dumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27348-50 (Ex. USA-102); *Ibid.* at 27411 (codifying practice in new regulation, 19 CFR § 351.401(i)) (9 May 1997) (Ex. USA 102)

we expect that *LG Semicon* will post negative gross profits for the second half of 1996.<sup>353</sup>

4.453 Consequently, while *LG Semicon* might have been in a position to obtain some price premium over spot-market prices at the beginning of 1996, this situation clearly evaporated by the second half of 1996, as longer-term price agreements were displaced and OEM customers had ample access to an excess supply of DRAMs at even lower prices.

*F. Claims under Article X:1 and X:2 of GATT 1994*

*1. Transparency and Due Process in the Administration of Government Measures*

*(a) Submission by Korea*

4.454 **Korea** makes the following arguments on the application of Article X:

4.455 Unlike most GATT provisions, which are concerned with the content of a government's laws, regulations, decisions and rulings, Article X of the General Agreement focuses on the administration of those laws, regulations, decisions and rulings.<sup>354</sup> It articulates the fundamental principles of transparency (publication and disclosure of government measures and actions) and what is widely known as due process (fundamental fairness).

4.456 Despite its importance, there is very little precedent regarding Article X. A review of the relevant chapter of the *GATT Analytical Index* discloses that, in most disputes, complainants made subsidiary claims regarding Article X. When panels found violations of a substantive GATT article, however, they declined to rule on the subsidiary claim.<sup>355</sup> Given the past treatment of Article X, Korea stresses its Article X claims are not subsidiary to any other claim. They are independent - separate and distinct.

4.457 The *GATT Analytical Index* notes that Article X was based on the 1923 International Convention Relating to the Simplification of Customs Formalities and on US proposals.<sup>356</sup> In Article 1 of the Simplification Convention, "[t]he Contracting States . . . undertake that their commercial relations shall not be hindered by excessive, unnecessary or arbitrary customs or other similar formalities."

4.458 The concerns that led to the drafting of GATT Article X are fully expressed in the so-called Sullivan Study, prepared by the US Department of State to annotate and explain the articles of the US model friendship, commerce

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<sup>353</sup> Letter from Micron Technology, Inc. to Assistant Secretary LaRussa, 28 January 1997, at Ex. 1, p.18 (emphasis added by the United States) (Ex. USA-103).

<sup>354</sup> The Appellate Body referenced this distinction in *European Communities-Regime for the Importation, Sale and Distribution of Bananas* (9 September 1997), WT/DS 27/AB/R, para. 200.

<sup>355</sup> See 1 GATT, analytical index: Guide to GATT law and practice 293-312 (6th ed. 1995).

<sup>356</sup> See *Ibid.* at 309. The 1923 Convention is printed in 30 League of Nations Treaty Series, No. 775, p. 378 (Ex. ROK-74).

and navigation (FCN) treaty.<sup>357</sup> In the annotation for Article XV of the US model FCN, which closely follows GATT Article X, the drafters state:

Inclusion of Article XV in the treaty is based primarily because of concern that customs administration could nullify or impair the benefits occurring from the liberalization of trade. *This Article is intended to provide protection against a variety of forms of administrative inequity or harassment which cumulatively could become a serious impediment to trade.* Article XV is based on ample precedents, including reciprocal trade agreements, GATT, the proposed ITO Charter, and various multilateral conventions on customs administration and formalities dating back to the 1920's.<sup>358</sup>

4.459 The WTO Appellate Body has recognized the critical role of the GATT Article X obligations. In *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* it stated:

Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance - that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. *The relevant policy principle is widely known as the principle of transparency and has obviously due process dimensions.* The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.<sup>359</sup>

4.460 This quotation, which relates to the requirement of prior publication set out in Article X:2, applies with equal force to Articles X:1 and X:3(a), which state in relevant part:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection,

<sup>357</sup> US DOC of State, *Standard Draft Treaty of Friendship, Commerce and Navigation* (Charles H. Sullivan ed., 1970) (relevant excerpts Ex. ROK-75).

<sup>358</sup> *Ibid.* at p. 247 (emphasis added by Korea).

<sup>359</sup> *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear* (10 February 1997), WT/DS24/AB/R, section VI, DSR 1997:I, 11, at 29 (emphasis added by Korea).

exhibition, processing, mixing or other use, shall be *published promptly in such a manner as to enable governments and traders to become acquainted with them.*

\* \* \*

3. (a) Each contracting party shall administer *in a uniform, impartial and reasonable manner* all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article. (Emphasis added by Korea.)

Government measures must be published in such a manner as to enable governments and traders to become acquainted with them (Article X:1), and they must be administered in a uniform, impartial and reasonable manner (Article X:3(a)).

4.461 In Response to a question from the Panel,<sup>360</sup> **Korea** further argued:

The WTO Agreements are a unitary whole. The transparency and uniformity obligations of Article X apply to the WTO Agreements, including the AD Agreement. When a Member promulgates a law or regulation or issues an administrative ruling of general application, it must comply with Article X:1. Also, the Member must administer each statute, regulation and administrative ruling in a way that complies with Article X:3. Thus, Article X applies to each and every action the Department takes in a revocation proceeding. Any other interpretation would allow a Member to completely avoid the dictates of Article X (and, thereby, the substantive obligations of the AD Agreement).

(b) Response by the United States

4.462 The **United States** responds to Korea's submission with the following arguments:

4.463 Article X:1 provides, in part:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

4.464 Throughout its submissions, the United States has established that section 751 of the Act and section 353.25(a)(2) of the DOC's regulations govern a decision by the DOC to revoke an anti-dumping duty order. Section 353.25(a)(2) of the regulations sets forth the criteria which the DOC will consider in evaluating whether revocation is appropriate. Moreover, the DOC's regulations

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<sup>360</sup> The panel recalls that the question was: "How would Korea describe the relationship, if any, in legal terms between Article X of GATT 94 and the AD Agreement?"

require that the final results of all administrative reviews be published, including decisions on revocation.<sup>361</sup> Thus, the United States has complied with its obligations under Article X:1 by promptly publishing all relevant laws, regulations, and administrative decisions in a manner that enables governments and traders to become acquainted with them.

4.465 Considering the undisputed fact that the United States promptly published these statutory and regulatory provisions, the United States has satisfied all the requirements of Article X:1. As the plain language suggests, Article X:1 simply requires Members to publish certain laws and regulations of general application. This provision does not concern itself with the content or substantive elements of a Member's legislation. Indeed, Korea agrees by stating that Article X is unlike most provisions of the WTO agreements, "which are concerned with the content of a government's laws, regulations, decisions and rulings," because Article X relates to the administration of those laws, regulations, decisions and rulings. Nevertheless, Korea's arguments focus solely on the substantive elements of the US anti-dumping law and regulations.

4.466 Aside from publication, Korea believes that the relevant issue under Article X:1 is "whether the criteria on which [the DOC's] decision was based were objective . . ." No possible interpretation of the plain language of Article X:1 could contemplate a requirement such as the one Korea advocates before this Panel. Article X:1 does not require "objective criteria" to be set forth in the DOC's regulations. This argument goes to the content of the US laws and regulations which Korea acknowledges to be irrelevant in the context of an Article X:1 argument. Were this not the case, then probably all anti-dumping legislation of every WTO Member with such legislation, including Korea, would be in violation of Article X:1.

4.467 The United States has consistently noted, that Korea, as the complaining party, bears the burden of proving that the DOC's application of its anti-dumping law and regulations to the *Final Results Third Review* violated Article X. Specifically, under paragraph 1 of Article X, Korea must establish that the United States failed to publish rules and requirements which establish or revise principles applicable in future cases. Moreover, under paragraph 3 of Article X, Korea bears the burden of establishing that the DOC failed to administer its laws and regulations in a uniform, impartial, and reasonable manner. Korea's mere assertions - unsupported by proof - do not sustain Korea's burden to establish an Article X violation. Therefore, the United States submits that the Panel must reject these claims.

4.468 Korea recognizes that Article X embodies the fundamental principles of transparency and (what is widely known as) "due process." These principles do not concern themselves with the consistency of a Member's laws, regulations, decisions and rulings with the substantive provisions of the WTO agreements,

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<sup>361</sup>. See 19 C.F.R. §§ 353.22(c)(8) and 353.25(c)(2)(v)(vi) (1997) (Ex. USA-24).

including the AD Agreement.<sup>362</sup> Rather, Article X relates to the administration of a Member's laws, regulations, decisions, and rulings.<sup>363</sup>

4.469 In discussing the policy underlying the obligations contained in Article X, the Appellate Body has stated:

The essential implication is that Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a *reasonable opportunity to acquire authentic information* about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.<sup>364</sup>

4.470 Korea has not sustained its burden to establish that the Korean Respondents in the *Final Results Third Review* did not have a "reasonable opportunity to acquire authentic information" regarding the administration of the US anti-dumping law and regulations. Moreover, Korea's arguments do not relate to the "administration" of the US measures but, rather, the consistency of such measures with other GATT 1994 or AD Agreement provisions.<sup>365</sup> As such, Korea's argument that the United States has violated Article X should be rejected.

## 2. *Failure to Publish Objective and Specific Factors Regarding the "No Likelihood/Not Likely" Criterion*

### (a) Claim raised by Korea

4.471 **Korea** claims that the United States failed to publish objective and specific factors regarding the "no likelihood/not likely" criterion promptly and in such a manner as to enable Korea and Korean companies to become acquainted with them, thus violating Article X:1 of GATT 1994. Korea makes the following arguments in support of this claim:

4.472 The standard governing the objective criteria and methodology which the United States will use in determining whether (and when) to revoke an anti-

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<sup>362</sup> See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 9 September 1997, at para. 200.

<sup>363</sup> *Ibid.*

<sup>364</sup> *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, Report of the Appellate Body adopted 10 February 1997, DSR 1997:I, 11, at 29 (emphasis added by the United States).

<sup>365</sup> For example, Korea's argument that the "not likely" criterion in section 353.25(a)(2) does not contain objective criteria is one of Korea's central arguments under both Article 11 of the AD Agreement and Article X:1 of GATT 1994. In addition, the argument that the United States failed to provide the same advantage to Korea that was provided to Japan is the basis for Korea's arguments under GATT 1994 Article I, as well as Article X:3(a). The notion that Article X imposes duplicative obligations on WTO Members is untenable, and is inconsistent with the Appellate Body's interpretation of Article X.

dumping duty order clearly is (a) a government measure of general application<sup>366</sup> that (b) pertains to (i) rates of customs duty or (ii) requirements on imports. Accordingly, the application of that standard in the proceeding involved in this dispute is subject to the transparency and due process requirements of GATT Article X.

4.473 US law does not set out the objective criteria and methodology for determining entitlement to revocation. The applicable provision (section 751(d)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(d)(1)) merely states that "[t]he administering authority may revoke, in whole or in part, . . . an anti-dumping duty order . . . after review under . . . this section." There are no objective criteria or methodology, merely authorization of unbounded discretion.<sup>367</sup>

4.474 The US regulation also does not set out the objective criteria and methodology for determining entitlement to revocation. The applicable provision provides no guidance in this regard:

(2) The Secretary may revoke an order in part if the Secretary concludes that:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;

(ii) It is "not likely" that those persons will in the future sell the merchandise at less than foreign market value; and

(iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value.<sup>368</sup>

Governments and traders are advised that the Secretary has the authority to revoke (but is not required to revoke) if he concludes that "[i]t is not likely that those persons will in the future sell the merchandise at less than foreign market value." However, they are not advised of the meaning of "not likely" or how it will be applied, and, by virtue of the verb "may" at the start of the regulation,

<sup>366</sup> The recently released Panel Report in *Japan-Measures Affecting Consumer Photographic Film and Paper* clarifies that Article X:1 extends to administrative rulings in individual cases that establish or revise principles or criteria applicable in future cases. WT/DS44/R, para. 10.388 (31 March 1998).

<sup>367</sup> See *Toshiba*, 15 C.I.T. at 598-600 (Ex. ROK-5).

<sup>368</sup> 19 C.F.R. § 353.25(a)(2) (1996).

they are reminded that the US authorities have unbounded discretion to decide not to revoke an anti-dumping duty order.

4.475 US judicial decisions permit this and, thus, are also unenlightening on that point. For example, in *Toshiba*, the CIT declared:

Section 751(c) [now 751(d)(1)] of the Tariff Act of 1930 commits the decision to revoke an anti-dumping order to the *unfettered discretion* of the DOC of Commerce . . .

\* \* \*

The language of the regulations indicates that the *Secretary is not compelled to grant revocation* even when plaintiffs satisfy the requirements for revocation.

\* \* \*

The *regulation does not present an objective criterion* for determining whether there is "no likelihood" of resumption of LTFV [less than fair value (*i.e.*, less than normal value)] sales. Instead, the petitioner must establish this fact to the satisfaction of the Secretary.<sup>369</sup>

4.476 Finally, no objective criteria and methodology for determining entitlement to revocation are set out in US administrative rulings of general application. In the Notice of Final Results in this case the DOC mentioned "the predictive nature of the revocation proceeding."<sup>370</sup> The US CIT has asserted that ordinarily past behaviour constitutes substantial evidence of expected future behaviour.<sup>371</sup> In the Final Results in this case, the DOC agrees that *normally* three years of no dumping margins plus certification of agreement to reinstatement of the anti-dumping order are all that is required for a decision to revoke.<sup>372</sup> When is satisfaction of these criteria not sufficient in the DOC's eyes? "When additional evidence is on the record . . ."<sup>373</sup> In other words, the DOC adds a third, vague and undefined requirement for revocation whenever it believes that it should do so. This is not an objective criterion. It is the exercise of unfettered discretion.

4.477 In this way, there is no publication in such a manner as to enable governments and traders to become acquainted with the situations in which the US authorities will choose to add a third requirement to secure revocation. Likewise, there is no such publication of what substantive criteria will be applied in those cases in which the DOC chooses to examine this additional requirement. What does the DOC look at? "[A]ll relevant economic factors and other

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<sup>369</sup> *Toshiba*, 15 C.I.T. at 598-600 (emphasis added by Korea) (citations omitted) (Ex. ROK-5).

<sup>370</sup> 62 Fed. Reg. 39809, 39812 (24 July 1997) (Ex. ROK-3).

<sup>371</sup> *Tatung Co. v. United States*, 18 C.I.T. 1137, 1144, 1994 C.I.T. LEXIS 288 (Ex. ROK-76).

<sup>372</sup> 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>373</sup> *Ibid.*

information on the record in a particular case."<sup>374</sup> The DOC continues by noting that "depending upon the facts of a case, we consider 'such factors as . . .'"<sup>375</sup>; a list of factors follows.

4.478 For purposes of GATT Article X, the issue is not whether the DOC explained its decision at length. Rather, the issue is whether the criteria on which its decision was based were objective and were publicized in such a manner as to enable governments and traders to become acquainted with them (*i.e.*, to know ahead of time the criteria on which the determination would be based). They were not.

4.479 First, the standard applied by the DOC in its preliminary determination not to revoke the anti-dumping duty order was different, and stricter, than the standard set out in the US regulations. The DOC denied revocation on the grounds that the Korean Respondents could not satisfy the DOC that there was "no likelihood" of future dumping.<sup>376</sup> By the final determination, the DOC recognized that it should have applied the standard of whether it was "not likely" that the Korean companies would dump in the future. The DOC also recognized "the potential difference in meaning" between "no likelihood" and "not likely."<sup>377</sup> However, it sought to argue that it had not applied the erroneous "no likelihood" standard so as to require a higher degree of certainty that dumping would not recur than was implied by the current standard-"not likely." The explanation rings hollow, but more significant for purposes of GATT Article X, it is an admission that neither the Korean government nor the companies could have known the level of certainty that the DOC would require for revocation in this case.

4.480 Second, neither the Korean government nor the companies could have known the substantive factors that the DOC would consider appropriate. The DOC acknowledges this, albeit in a convoluted fashion, in its notice of final results:

We also disagree with Hyundai's assertion that the DOC erred by relying on Brass Sheet and Strip as support for its preliminary determination not to revoke. The DOC did not rely upon Brass Sheet and Strip as support for each of the elements addressed in the DOC's preliminary determination regarding the "not likely" issue. Rather, the DOC relied upon Brass Sheet and Strip primarily to confirm *the legal standard for the type of factors the DOC has considered* relevant in the past (*e.g.*, conditions and trends in the

<sup>374</sup> 62 Fed. Reg. 39809, 39810 (24 July 1997) (Ex. ROK-3).

<sup>375</sup> *Ibid.* (quoting *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727, 49730 (23 September 1996)).

<sup>376</sup> 62 Fed. Reg. 12794, 12796 (18 March 1997) (Ex. ROK-34).

<sup>377</sup> 62 Fed. Reg. 39809, 39812-13 (24 July 1997) (Ex. ROK-3).

industry, currency movements and the ability of the foreign entity to compete in the US without dumping).<sup>378</sup>

Thus, despite its repeated references to *Brass Sheet and Strip*,<sup>379</sup> the DOC admits that this supposed source of criteria does not in fact specify the criteria that the DOC *will* use in its revocation decision, and indeed it does not necessarily specify the range of factors that Commerce *may* use.

4.481 Thus, the DOC believes it has complete discretion to choose the criteria it wishes to consider determinative in each specific case. The criteria the DOC uses will vary from case to case. They are not uniform or impartial and they are neither known to nor knowable by governments and traders. Therefore, the United States is in breach of its transparency and due process obligations under Article X:1 and X:3(a) of the General Agreement. The United States also is in breach of the obligations of Article 17.6(i) of the AD Agreement to evaluate facts in an unbiased and objective manner.

(b) Response by the United States

4.482 The **United States** responds to Korea's claim with the following arguments:

4.483 Korea complains that the "not likely" criterion included in section 353.25(a)(2) does not advise governments and traders of the "meaning of 'not likely' or how it will be applied." This argument implies that a Member cannot satisfy its obligations under Article X:1 unless interpretive notes and definitions accompany every provision of a Member's trade legislation. Suggesting that the DOC's regulations could be consistent with Article X:1 if section 353.25(a)(2) included "the meaning of 'not likely' or how it will be applied," is merely a further attempt by Korea to address the content of the DOC's regulations. The drafters could not have contemplated that Article X:1 would be considered a remedy for such an argument.<sup>380</sup>

4.484 Moreover, Korea suggests that the measure of discretion allowed for in section 751(d)(1) of the Act is inconsistent with Article X:1. For the same reasons discussed above, this argument relates to the content of the statute. While the DOC's discretion may be relevant to the interpretation of the AD Agreement and the issue of whether the United States is in compliance with the agreement, it is irrelevant to the issue of whether the United States published its laws, regulations, and administrative decisions in a manner consistent with Article X:1.

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<sup>378</sup> 62 Fed. Reg. 39812 (24 July 1997) (emphasis added by Korea) (Ex. ROK-3).

<sup>379</sup> *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36).

<sup>380</sup> Of course, parties may "become acquainted" with how the DOC has applied the "not likely" criterion by examining past revocation decisions, all of which have been published in the *Federal Register* in accordance with 19 C.F.R. § 353.25(c)(2)(vi) (1997) (Ex. USA-24) and its predecessor provisions.

4.485 Korea also suggests that the DOC adds a "vague and undefined requirement for revocation whenever it believes that it should do so." In this regard, Korea states that "the DOC agrees that *normally* three years of no dumping margins plus certification of agreement to reinstatement of the anti-dumping order are all that is required for a decision to revoke." Thus, Korea apparently argues that the DOC's failure to publish when the "not likely" criterion will be applied violates Article X:1.

4.486 Korea predicates this argument upon the false premise that the DOC *normally* will not examine the "not likely" requirement in a revocation inquiry. In the *Final Results Third Review*, the DOC stated:

In evaluating the "not likely" issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent's certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>381</sup>

4.487 To intimate that the above passage reflects a practice of "normally" not considering the "not likely" criterion published in the DOC's regulations belies the unambiguous language contained in the *Final Results Third Review*. The DOC stated that while satisfaction of two of the three criteria contained in the regulation may be "indicative of expected future behavior," it would consider any additional available evidence in conducting its inquiry. Contrary to Korea's contention, section 353.25(a)(2) of the DOC's regulations does not contain a "vague and undefined requirement" that may be applied "whenever [the DOC] believes that it should do so." On the contrary, the level and depth of the DOC's analysis of the "not likely" criterion in any given case is almost entirely dependent on the amount and type of information placed on the record by the parties, including Respondents. Thus, the DOC's published regulations allow governments and traders to become acquainted with all of the criteria which the DOC will apply when determining whether revocation of an anti-dumping order is appropriate.

4.488 While the DOC will apply the criteria contained in section 353.25(a)(2) in each revocation inquiry, the DOC must also evaluate the facts on the

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<sup>381</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted)(emphasis added by the United States) (Ex. USA 1).

administrative record in order to determine whether these criteria have been satisfied. Interestingly, Korea offers the fact that the DOC will examine "information on the record in a particular case" and that a determination to revoke will be "depending upon the facts of a case" as evidence of an Article X violation. However, the United States does not violate its obligation to publish laws, regulations, and administrative rulings by examining evidence on a case-by-case basis. The absence of more detailed or specific requirements as they relate to the "not likely" criterion merely reflects the fact-specific, case-by-case analysis in which the DOC engages in order to determine whether revocation is justified.<sup>382</sup>

4.489 Article 11 of the AD Agreement does not provide specific guidance to Members with regard to determining "whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both." This determination is factual in nature. Certainly, Article X does not require Members to promulgate published rules and regulations in more detail than that which is required under the terms of the AD Agreement.<sup>383</sup> Because the United States published the laws, regulations, and administrative decisions relevant to the application of the "not likely" criterion and the DOC's revocation decisions, the United States complied with its obligations under Article X:1.

3. *Failure to Publish Objective and Specific Factors Regarding the Time-Period Used in Analyzing the "No Likelihood/Not Likely" Criterion*

(a) Claim raised by Korea

4.490 **Korea** claims that the failure by the United States to publish objective and specific factors regarding the time-period selected for analyzing the "no likelihood/not likely" criterion violates the transparency obligations of Article X:1 of the General Agreement. The following are Korea's arguments in support of this claim:

4.491 In the determination itself the DOC states:

There is nothing in the Act, the Department's regulations or case precedent that defines the relevant time period in considering the likelihood issue.<sup>384</sup>

4.492 Thus, there are no objective criteria published in such a manner as to enable governments and traders to become acquainted with them, in breach of the United States' obligations under Article X:1 of the General Agreement.

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<sup>382</sup> Article 17.6 of the AD Agreement, which contains the Panel's standard of review for this case, recognizes that each anti-dumping determination requires a case-by-case evaluation of the facts.

<sup>383</sup> Otherwise, Members who treat international agreements as self-executing under their legal and constitutional systems would presumably be in violation of Article X.

<sup>384</sup> 62 Fed. Reg. 39809, 39814 (24 July 1997) (Ex. ROK-3).

4.493 The United States breached its obligations under Article X of the General Agreement in regard to the period selected by the Department for purposes of analyzing whether it believed that the "no likelihood/not likely" criterion is permissible, its purpose must be to try to predict whether the respondent companies would sell at less than normal value in the future. Thus, one would expect that: (i) the Department would select the period to examine in each case based on objective criteria; and (ii) the period chosen would reasonably seek to be predictive and relevant. The period chosen by the Department in *DRAMS from Korea* fails in both respects

4.494 **Korea** in response to a question by the Panel,<sup>385</sup> further argued as follows:

4.495 Korea has established that the failure of the DOC to publish objective and specific factors regarding both the "no likelihood/not likely" criterion and the time period used by the DOC in analyzing whether this criterion was met violates the transparency obligation of Article X:1 of GATT 1994. More specifically, the DOC did not publish regulations or administrative rulings of general application "promptly and in such a manner as to enable governments and traders to become acquainted with them."

(b) Response by the United States

4.496 The **United States** responds to Korea's claim with the following arguments:

4.497 Korea argues that the United States breached its obligations under Article X:1 of GATT 1994 with regard to the period selected by the DOC for purposes of analyzing whether it believed that the "not likely" criterion was satisfied. Korea claims that the DOC failed to publish "objective criteria" that helps define the relevant time period in considering the likelihood issue. Article X:1 does not concern the content of a Member's laws, regulations, decisions, and rulings. Korea's argument that the DOC's regulations do not contain additional elements is wholly irrelevant to the issue of whether the United States published its laws and regulations of general application in accordance with Article X:1.

4.498 Neither the AD Agreement nor Article X:1 requires Members to prescribe in their legislation the time frame that will be applicable in all cases for purposes of determining whether dumping or injury would occur in the future. That is because the time period most relevant to this issue will always depend upon the nature of the evidence on the record in each case. With respect to determining the appropriate time period in applying the "not likely" criterion in the instant case, the DOC stated in its *Final Results Third Review*: "[c]ommon sense . . .

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<sup>385</sup> The Panel recalls that the question was: "Could Korea please explain the essence of its claim under Article X of GATT 1994. Is Korea concerned principally with the alleged failure to publish under Article X:1, or is the focus of Korea's complaint directed at the alleged failure to administer laws and regulations etc. in the 'uniform, impartial and reasonable manner' required by Article X:3(a)?"

dictates that the DOC should, as always, base its determination on all record evidence."<sup>386</sup> Thus, the DOC "considered all publicly available data and information placed on the record by all parties (including data regarding the January 1997 through April 1997 time period, which Respondents characterize as a market upturn)."<sup>387</sup> A determination that is based upon the record evidence does not reflect a lack of transparency and certainly does not constitute a violation under Article X:1. Therefore, the lack of published "objective criteria" or more specific factors relating to the time period examined when considering the likelihood issue does not violate the United States' obligations under Article X:1.

4.499 There is no basis for Korea's assertion that the DOC "revived the 'gap period' review" without such a requirement being published.<sup>388</sup>

4.500 First, the 1989 amendments to the DOC's anti-dumping regulations did not affect a substantive change in the likelihood standard. Under this provision, the DOC's long-standing practice has been to examine *all* economic factors and other information on the record which bear on the issue of future dumping.<sup>389</sup> Korea's attempts to keep the DOC from looking at the period immediately after the third administrative review are contrary to this practice and without support.

4.501 Secondly, in evaluating whether future dumping is not likely, the DOC may find that market conditions and trends during a certain period or periods are probative. Often times, the agency's analysis will focus on the period immediately following the close of the three-year period of no dumping because it contains the most recent data available on market conditions and prices.<sup>390</sup> In the instant case, the DOC found the January through December 1996 time frame to be particularly probative because it contained recent data that corresponded with a significant downturn in the DRAM market. As the DOC explained in the final results of its review, the fact that this period coincided with the end of the third review was coincidental:

We consider it merely coincidental that this time frame coincided with the end of the third administrative review and the period

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<sup>386</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

<sup>387</sup> *Ibid.*

<sup>388</sup> Prior to the promulgation in 1989 of the regulations which governed this proceeding, the DOC required a finding of no dumping for a period of two years. In addition, it was the DOC's practice to consider whether dumping took place in the period between the end of the two-year period and the date of its tentative determination to revoke (the "gap period"). The 1989 amendments to the regulations eliminated the need for "gap period" reviews by adopting the current system which is based, *inter alia*, upon three consecutive years of no dumping.

<sup>389</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173-74 (Ex. USA-52); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-31 (Ex. USA-46); *FCOJ from Brazil*, 56 Fed. Reg. at 52511 (Ex. USA-31).

<sup>390</sup> See, e.g., *Steel Rope from Korea*, 62 Fed. Reg. at 17173 (Ex. USA-52); *Silicon Metal From Brazil*; *Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 62 Fed. Reg. 1970, 1973 (1997) (Ex. USA-79); *Brass Sheet from Germany*, 61 Fed. Reg. at 49730-31 (Ex. USA-46); *Televisions from Japan*, 54 Fed. Reg. at 35519 (Ex. USA-47).

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immediately following. Had the most recent downturn occurred during a different time frame, it may have been appropriate to take that period into account in our analysis.<sup>391</sup>

4.502 In sum, the fact that the DOC considered the likelihood issue by examining a period of time which extended beyond the end of the third administrative review does not constitute a non-published revival of the "gap period" reviews. The DOC's regulations, which do not contain a predetermined time frame in which to examine the likelihood issue, are consistent with the United States' obligations under Article X:1. Moreover, the DOC's decision to examine a period of time which extended beyond the end of the third administrative review was based solely on record evidence. Contrary to Korea's argument, the DOC did not effectively resurrect the "gap period review" without publication. Therefore, the United States complied with its Article X:1 obligations by publishing all relevant statutory and regulatory provisions which applied to its revocation decision

(c) Rebuttal arguments made by Korea to *both* claims under Article X:1 of GATT 1994

4.503 **Korea** makes the following arguments in rebuttal to the United States responses on both Article X:1 claims regarding the failure to publish objective and specific factors regarding the "no likelihood/not likely" criterion and failure to publish objective and specific factors regarding the time-period used in analyzing the "no likelihood/not likely" criterion:

4.504 Article X:1 of the General Agreement articulates the fundamental principle of transparency. The procedural protectionism of unknown, unknowable government requirements is every bit as pernicious as the substantive protectionism of discriminatory government measures. This procedural protectionism was condemned by the Appellate Body in *United States - Cotton Underwear* in the context of Article X:2. The logic of this condemnation applies with equal force to the transparency requirement of Article X:1. If governments and traders are not aware of the substantive requirements that they are required to meet (or, as in this case, that they are required to prove), they will not be able either to protect and adjust their activities or to seek modification of the hidden measures. The United States violated the transparency obligation of Article X:1 by failing to publish objective and specific factors regarding both the "no likelihood/not likely" criterion and the time period used by the DOC in analyzing it. There was no US law, regulation or administrative ruling to which the Korean Respondents could turn to become acquainted with the factors or the time period the DOC would use in assessing whether to revoke the anti-dumping duties.

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<sup>391</sup> *Final Results Third Review*, 62 Fed. Reg. at 39814 (Ex. USA-1).

4.505 This is not, as the United States alleges, an argument addressing the substance of the US revocation scheme. Rather it is an indictment of the uncertainty and confusion flowing from the DOC's failure to publish the substantive factors and criteria the DOC would apply.

4.506 The United States seeks to excuse its lack of required transparency by claiming that it published the US revocation regulation (Section 353.25(a)(2)) and that the absence of more detailed requirements relating to the "no likelihood/not likely" criterion and the time period to be analyzed "merely reflects the fact-specific, case-by-case analysis in which the DOC engages."

4.507 The fact that revocation decisions are fact-intensive (as are all decisions in anti-dumping proceedings) does not excuse the United States from its GATT Article X:1 obligations. The US revocation regulation does not set out the basis (or bases) on which the United States decides how it will apply the "no likelihood/not likely" criterion or the time period it will examine in assessing whether the criterion is satisfied. Publication in Section 353.25(a)(2) of the regulations of a criterion denominated "not likely" is not enough. Without an articulation of objective and specific factors, the criterion is meaningless, because it does not provide accurate information that enables those seeking revocation to know the substantive requirements the Department will apply. Also, the lack of articulation reinforces the Secretary's discretion and insulates a decision not to revoke from challenge.

4.508 Equally unavailing is the subsidiary US argument that Article X:1 cannot require publication of regulations "in more detail than that which is required under the terms of the AD Agreement." The United States has not supported and cannot support this assertion. Within national systems, laws provide the basic, general authority. They are implemented and specified by regulations, which, in turn, are further specified by administrative rulings of general application.

4.509 As the United States itself has argued, the AD Agreement (and the other WTO Agreements) set out the parameters within which national governments can legislate and regulate in conformity with their WTO obligations. Just as regulations and rulings are often necessary to flesh out national laws, they are essential in situations such as anti-dumping revocation determinations—they enable governments and traders to become acquainted with how national authorities will apply and administer the requirements mandated by the WTO Agreements.

4.510 To meet the transparency obligation of Article X:1, each national regime must amplify and specify the basic, general authority set out in the AD Agreement. The United States has not satisfied this obligation.

(d) Rebuttal response by the United States to *both* claims under Article X:1 of GATT 1994

4.511 The **United States** also responds to both Article X:1 claims (*i.e.* failure to publish objective and specific factors regarding the "no likelihood/not likely" criterion and failure to publish objective and specific factors regarding the time-

period used in analyzing the "no likelihood/not likely" criterion) by Korea in its rebuttal briefs putting forward the following arguments:

4.512 Korea alleges that the United States violated Article X:1 by not further defining the "not likely" criterion with objective criteria. As demonstrated in the first US submission, an interpretation based upon the plain language of Article X:1 does not require that each and every statutory or regulatory provision be further defined by the inclusion of "objective criteria." Suggesting that the DOC's regulations could be consistent with Article X:1 if section 353.25(a)(2) included "the meaning of 'not likely' or how it will be applied" is merely a further attempt by Korea to address the content of the DOC's regulations. Nonetheless, the DOC, through its various decisions in which the "not likely" criterion has been applied, has published factors which have been considered consistently in determining whether the criterion has been satisfied.<sup>392</sup> Therefore, even under an impermissibly broad interpretation of Article X:1, the United States would be found in compliance because all such determinations applying and describing the "not likely" criterion have been published. Significantly, Korea has not alleged that the United States has failed to publish relevant decisions or rulings.<sup>393</sup>

4.513 In addition, Korea alleges that the discretionary nature of section 353.25(a)(2), as well as the failure to publish when the "not likely" criterion will be applied, are violations of Article X:1. These allegations effectively concern the consistency of section 353.25(a)(2) with Article 11 of the AD Agreement. Contrary to Korea's suggestion, an interpretation based on the ordinary meaning of the language contained in Article X:1 does not require the DOC to eliminate the discretionary element of its regulation. Moreover, the DOC need not publish when the "not likely" criterion will be applied because, pursuant to section 353.25(a)(2), it is applied in every case in which the Secretary conducts a review under this regulation.

4.514 In sum, the United States, consistent with its obligations under Article X:1, published all laws, regulations, judicial decisions and administrative rulings of general application in a manner which enabled the Respondents and Korea to

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<sup>392</sup> In every proceeding under section 353.25(a) of the DOC's regulations, the agency tends to examine the same factors to determine whether a resumption of dumping is "not likely." These factors are: the nature of the product(s) at issue; trends in the domestic and home market industries; currency movements; supply and demand conditions; price trends; and, the importance of the US market to the Respondent(s). See, e.g., *Steel Wire Rope From the Republic of Korea; Final Results of Anti-dumping Duty Administrative Review and Revocation in Part of Anti-dumping Duty Order*, 62 Fed. Reg. 17171, 17173-74 (1997) (Ex. USA-52); *Brass Sheet and Strip From Germany; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 61 Fed. Reg. 49727, 49732 (1996) (Ex. USA-46); *Television Receivers, Monochrome and Color, From Japan; Final Results of Anti-dumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35517, 35519 (1989) (Ex. USA-47); *Frozen Concentrated Orange Juice From Brazil; Final Results and Termination In Part Of Anti-dumping Duty Administrative Review; Revocation In Part of Anti-dumping Duty Order*, 56 Fed. Reg. 52510, 52511 (1991) (Ex. USA-31).

<sup>393</sup> In addition, Korea has not alleged that the United States has violated the publication and explanation requirements of Article 12 of the AD Agreement.

become acquainted with them. For these reasons, the Panel should reject Korea's claim that the DOC's regulatory regime governing the revocation of anti-dumping duties violates Article X:1.

4. *Imposition of a New Unpublished Requirement in Contravention to Article X Paragraphs 1 and 2 of GATT 1994*

(a) Claim raised by Korea

4.515 **Korea** claims that in selecting the time-period used in analyzing the "no likelihood/not likely" criterion the United States imposed a new unpublished requirement in contravention to Article X:2 and Article X:2 of GATT 1994.

4.516 By applying a requirement regarding the period following the Third Annual Review Period, the DOC revived the "gap period" review. Under the DOC's regulations in the 1980s, a Respondent seeking revocation of an order had to establish, at a minimum, a history of no sales at less than fair value (LTFV sales) for at least two years.<sup>394</sup>

4.517 Although the regulation required a two-year period without dumping for revocation, the DOC adopted a rule of practice requiring a Respondent seeking revocation to submit to an examination of, at a minimum, about two years and nine months of its sales. This rule allowed the DOC to examine the period between the end of the two-year period and the date of the tentative revocation (the so-called gap period). Under the procedure at that time, the Respondent had to show that it was not dumping during the gap period (and that there was no likelihood of future dumping) by presenting its sales and cost data to the DOC for the gap period.

4.518 However, in 1986 the DOC issued proposed amendments to the anti-dumping regulations that substantially revised revocation procedures. The changes were incorporated in the final regulations published in the Code of Federal Regulations in 1990.<sup>395</sup> The new regulations expanded the required period of no dumping from two years to three years and, at the same time, eliminated the requirement for a gap period review.

4.519 In the Third Annual Review of *DRAMs from Korea*, the DOC effectively resurrected the gap period review, applying it to Respondents even though it had been repealed from US law. Apart from being absurdly unfair, this violated Paragraphs 1 and 2 of Article X of the General Agreement because the United States applied a more burdensome requirement that was not published.

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<sup>394</sup> See, e.g., 19 C.F.R. 353.54(b) (1988) (Ex. ROK-77).

<sup>395</sup> See 19 C.F.R. 353.25 (1990) (Ex. ROK-78).

4.520 **Korea** in response to a question by the Panel,<sup>396</sup> further clarified its claim under Article X:2 as follows:

4.521 Korea established that by reviewing the time period following the period of review, the Department was applying the so-called "gap-period review" methodology. This methodology legally had ended with the revision of the Department's regulations in 1986. Therefore, its application to *DRAMs from Korea* in 1997 constituted the imposition of a new, unpublished requirement in contravention of Article X:2 of the General Agreement.

(b) Rebuttal response by the United States

4.522 The **United States** responds to Korea's submission in its rebuttal briefs putting forward the following arguments:

4.523 Korea apparently makes a legal claim under paragraph 2 of Article X. The United States will not address the merits of this claim as Korea apparently did not care to discuss the obligations of Article X:2, nor did Korea provide support for including paragraph 2 in its Article X claim. Indeed, in discussing the policy of transparency which underlies all of Article X, Korea quotes the relevant paragraphs of Article X, omitting paragraph 2. The Panel should, therefore, reject this "claim."

G. *Claims under Articles I and X:3 of GATT 1994*

1. *The United States Revoked Anti-Dumping Duties in Like Cases*

(a) Claim raised by Korea

4.524 **Korea** claims that the refusal to revoke the anti-dumping duty order in the case of *DRAMs from Korea* constitutes a violation of Articles I and X:3(a) of GATT 94 because in like cases in the past the United States has revoked the order. The following are Korea's arguments in support of this claim:

4.525 In numerous revocation cases, the DOC has revoked an anti-dumping duty order on the basis of only two criteria - three years of no dumping margins and agreement by the Respondent companies to immediate reinstatement in the anti-dumping duty order if they breached their commitment not to dump in the future. The DOC generally does *not* conduct a "no likelihood/not likely" analysis of the type conducted in the Final Determination in the Third Annual Review of *DRAMs from Korea*. Since 1989, the DOC has revoked on the basis of three years of no dumping and a Respondent's certification in the following cases:

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<sup>396</sup> The Panel recalls that the question was: "Could Korea please explain the essence of its claim under Article X of GATT 1994. Is Korea concerned principally with the alleged failure to publish under Article X:1, or is the focus of Korea's complaint directed at the alleged failure to administer laws and regulations etc. in the 'uniform, impartial and reasonable manner' required by Article X:3(a)?"

- *Certain Fresh Cut Flowers from Mexico*, 63 Fed. Reg. 1428 (Preliminary) (9 January 1998);
- *Large Power Transformers from Italy*, 62 Fed. Reg. 3661 (24 January 1997);
- *Fresh Cut Flowers from Mexico*, 61 Fed. Reg. 63882 (2 December 1996);
- *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 61 Fed. Reg. 58374 (14 November 1996);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Thailand*, 61 Fed. Reg. 33711 (28 June 1996);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 60 Fed. Reg. 10900 (28 February 1995);
- *Titanium Sponge from Japan*, 59 Fed. Reg. 9963 (2 March 1994);
- *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 58 Fed. Reg. 39729 (26 July 1993);
- *Dichloro Isocyanurates from Japan*, 57 Fed. Reg. 55223 (24 November 1992);
- *Red Raspberries from Canada*, 57 Fed. Reg. 49686 (3 November 1992);
- *Industrial Phosphoric Acid from Israel*, 57 Fed. Reg. 10008 (23 March 1992);
- *Elemental Sulphur from Canada*, 57 Fed. Reg. 1452 (14 January 1992);
- *Titanium Sponge from Japan*, 57 Fed. Reg. 557 (7 January 1992);
- *Elemental Sulphur from Canada*, 56 Fed. Reg. 16068 (19 April 1991);
- *Certain Fresh Cut Flowers from Colombia*, 56 Fed. Reg. 50554 (7 October 1991);
- *Calcium Hypochlorite from Japan*, 55 Fed. Reg. 41259 (10 October 1990); and
- *Elemental Sulphur from Canada*, 55 Fed. Reg. 13179 (9 April 1990).<sup>397</sup>

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<sup>397</sup> See Ex. ROK-57 through Ex. ROK-73.

4.526 In the instant case (as in a small number of other cases), the DOC required satisfaction of a third requirement, which it variously termed the "no likelihood" or the "not likely" criterion.

4.527 Assuming for the sake of argument that the "no likelihood/not likely" criterion is permissible under the WTO rules, the United States would have two choices. It could conduct an analysis of this third criterion for revocation in all cases, or in none. What it cannot do, consistent with its obligations under Article I of the General Agreement, is what it actually has done in practice, which is to base its decision whether to revoke on an analysis of this criterion in some but not all cases.

4.528 Article I:1 of the General Agreement provides:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

4.529 Criteria for determining whether to revoke an anti-dumping duty order are within the scope of Article I. First, the report of the Panel in *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* found that:

The rules and formalities applicable to countervailing duties, including those applicable to the revocation of countervailing duty orders, are rules and formalities imposed in connection with importation, within the meaning of Article I:1.<sup>398</sup>

4.530 What is true for revoking countervailing duty orders is equally true for revoking anti-dumping duty orders. This is confirmed by a 1968 ruling of the Director-General regarding the application of the obligations of Article I to the provisions of the then-existing Anti-Dumping Code.<sup>399</sup> In that ruling the Director General also declared that the provisions of the Code constituted a "method of levying such duties and charges," so there is a second basis for finding that criteria for determining whether to revoke an anti-dumping duty order are within the scope of Article I.

<sup>398</sup> *United States-Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128, 150, para. 6.8.

<sup>399</sup> Note by the Director-General (29 November 1968), L/3149, *quoted in* 1 GATT, Analytical Index: Guide to GATT Law and Practice 30 (6<sup>th</sup> ed. 1995).

4.531 The application of less stringent criteria and procedures in determining whether to revoke an anti-dumping duty order in some cases constitutes an "advantage, favour, privilege or immunity" granted by the United States. The *Brazilian Footwear* case is on point in this regard as well. There, the United States automatically revoked a countervailing duty order retroactively in certain cases, while in others it required countries to request an injury review and did not make the revocation retroactive to the same degree. This discriminatory treatment was found to violate Article I even though the United States was acting under two different laws.<sup>400</sup> Here, on the other hand, the US practice provides differential treatment under the very same law and regulations.

4.532 As regards the "like product" criterion of Article I, once again the *Brazilian Footwear* case is instructive. The report in that proceeding states:

The Panel . . . examined whether the products to which the United States had accorded the advantage of automatic backdating are like the products to which this advantage had been denied. The Panel noted that *the products to which the procedures under Section 331 of the Trade Act of 1974 had actually been applied* (industrial fasteners, industrial lime, automotive glass) *are not like the product to which Section 104(b) of the Trade Agreements Act of 1979 had been applied in the case of Brazil (non-rubber footwear)*. However, the Panel also noted that Brazil not only claimed that the application of these two Acts in concrete cases was inconsistent with Article I:1 of the General Agreement but also that the United States' legislation itself was inconsistent with that provision. The Panel recalled that *neither Section 331 of the 1974 Act nor Section 104(b) of the 1979 Act makes any distinctions as to the particular products to which each applies*, other than that the former applies to duty-free products originating in the territories of contracting parties and the latter applies to dutiable products originating in the territories of contracting parties signatories to the Subsidies Agreement. *The products to which Section 331 of the 1974 Act accords the advantage of automatic backdating are therefore in principle the same products to which Section 104(b) of the 1979 Act denies the advantage of automatic backdating.*<sup>401</sup>

4.533 For the same reason, it is irrelevant that none of the proceedings which were revoked without analysis of the "no likelihood/not likely" criterion involved DRAMs. The products as to which no analysis was undertaken are in principle

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<sup>400</sup> *United States-Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128, 150-53, paras. 6.7-6.17.

<sup>401</sup> *Ibid.* at 151-52, para. 6.12 (emphasis added by Korea). See also *Belgian Family Allowances* (7 November 1952), BISD 1S/59, 60, para. 3, in which a violation of Article I was found regarding a law that discriminated against any product from a country not having a particular system of family allowances.

the same products as to which the analysis was conducted, thereby satisfying the "like product" criterion.<sup>402</sup>

4.534 The finding of a violation of Article I would not be affected if the United States were to seek to argue that its regulation lists three criteria for revocation, including the "no likelihood/not likely" criterion, and that it was following its regulation. GATT precedent clearly condemns *de facto* as well as *de jure* discrimination (*i.e.*, discrimination in practice even where the law or regulation on its face is not discriminatory). In the *EC Bananas* case, the Appellate Body, citing the panel decision in *Beef from Canada*, declared that Article I applied to actions of a government that had the effect of discriminating against certain imported products.<sup>403</sup>

4.535 The refusal of the United States to revoke the order also violates Article X of the General Agreement. Because in like cases in the past the United States has revoked duties, the United States violated Paragraph 3(a) of Article X by failing to administer its revocation regime in a "uniform, impartial and reasonable" manner.

4.536 Accordingly, by requiring satisfaction of the "no likelihood/not likely" criterion in some cases, while waiving analysis of it in others, the United States does not accord most-favored-nation treatment in its determination of whether to revoke anti-dumping duty orders and it fails to administer its law in a uniform manner. This is in violation of the United States' obligations under Articles I and X of the General Agreement.

#### (b) Response by the United States

4.537 The following are the **United States'** arguments in response to Korea's claim:

4.538 Korea argues that the United States violated its obligations under Article I of GATT 1994 by not according most-favored-nation treatment in its revocation decisions. Korea bases its Article I arguments upon its erroneous assertion that the DOC inconsistently applies the "not likely" criterion in its revocation decisions, thus according favorable treatment in cases that allegedly do not consider this criterion. Korea's arguments lack merit.

4.539 Despite the non-binding, non-authoritative sources relied upon by Korea to establish the applicability of Article I to the DOC's *Final Results Third*

<sup>402</sup> Korea need not rely on the *Brazilian Footwear* precedent alone because the United States actually discriminated against *DRAMs from Korea* versus DRAMs from another source. The DOC accepted a data collection proposal in the Japanese DRAM case and did not apply the "not likely/no likelihood" criterion. Thus, the administrative process employed by the DOC treated Korean DRAMs in a manner different from the way it treated DRAMs from Japan - there was discriminatory treatment as to a "like product."

<sup>403</sup> European Communities-Regime for the Importation, Sale and Distribution of Bananas (9 September 1997), WT/DS27/AB/R, para. 232, citing European Economic Community-Imports of Beef from Canada (10 March 1981), BISD 28S/92, 97-98, paras. 4.1-4.3.

*Review*,<sup>404</sup> Korea's substantive claims under Article I are without merit. Korea analogizes this case to the *Brazilian Footwear* case.<sup>405</sup> However, unlike the circumstances before the panel in *Brazilian Footwear*, the United States applies the same statutory and regulatory provisions with regard to the issue of revocation in every case. As such, the same three criteria enunciated in section 353.25(a)(2) of the DOC's regulations, including the "not likely" criterion, are applied in each case. However, as can be expected in any fact-oriented, anti-dumping proceeding, the DOC's final decision will be based upon the evidence on the administrative record. As the DOC stated in the *Final Results Third Review*:

In evaluating the "not likely" issue in numerous cases, Commerce has considered three years of no dumping margins, plus a Respondent's certification that it will not dump in the future, plus its agreeing to immediate reinstatement in the order all to be indicative of expected future behavior. In such instances, this was the only information contained in the record regarding the likelihood issue. . . .

In other cases, when additional evidence is on the record concerning the likelihood of future dumping, Commerce is, of course, obligated to consider that evidence. In this regard, in evaluating such record evidence to determine whether future dumping is not likely, the DOC has a longstanding practice of examining all relevant economic factors and other information on the record in a particular case.<sup>406</sup>

4.540 Thus, the DOC recognizes that in some cases, satisfaction of two of the DOC's criteria, in the absence of other evidence, is relevant to the consideration of whether the "not likely" criterion has been satisfied. When additional evidence relating to the "not likely" criterion is available, the DOC is "obligated to consider that evidence." Thus, the DOC's consideration of whether each criterion is satisfied will be based on the record evidence. Indeed, the various cases to which Korea cites reflect this fact-oriented approach, and, contrary to Korea's claim, indicate that the DOC considers all three criteria identified in section 353.25(a)(2) in the course of a revocation inquiry. While the DOC always applies the same criteria in every revocation decision, the DOC must conduct a case-by-case analysis of the evidence in the administrative record in order to determine if these criteria have been satisfied. Such a case-by-case approach

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<sup>404</sup> Korea relies upon a 1968 ruling of the Director General to establish the applicability of Article I to anti-dumping proceedings. However, the Appellate Body recently noted "that the 1968 Note cannot be considered as an authoritative interpretation of GATT rules because it was never endorsed by a formal decision of the CONTRACTING PARTIES." *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS 27/AB/R, Report of the Appellate Body adopted 9 September 1997, para. 200.

<sup>405</sup> *United States - Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil*, Report of the Panel adopted 19 June 1992, BISD 39S/128.

<sup>406</sup> *Final Results Third Review*, 62 Fed. Reg. at 39810 (citations omitted) (Ex. USA-1).

does not constitute *de facto* or *de jure* discrimination, nor does it accord an advantage to any party.

4.541 As a result, Korea errs when it states that "[t]he DOC generally does not conduct a 'no likelihood/not likely' analysis" and that the DOC requires "satisfaction of the 'no likelihood/not likely' criterion in some cases, while waiving analysis of it in others ... ." Because section 353.25(a)(2) of the DOC's regulations governs all revocation decisions and the DOC consistently applies this provision and the same standards to all products from all countries, the United States has complied with its Article I obligations.

4.542 Throughout its arguments regarding Articles I and X:1, Korea interjects claims under Article X:3(a) of GATT 1994. In many respects repeating its arguments under Articles X:1 and I, Korea complains that the case-by-case approach taken by the Department in examining whether the "not likely" criterion has been satisfied violates Article X:3(a). The disjointed manner in which Korea raises these claims reflects the substantive deficiencies in its arguments.

4.543 Article X:3(a) requires each Member to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings." As the United States has established throughout this submission, the DOC refused to revoke the anti-dumping order on *DRAMS from Korea* based on an unbiased and objective evaluation of the facts which led the DOC to conclude that the "not likely" criterion had not been satisfied. The DOC's impartial and reasonable application of its regulations and governing statute was consistent with the United States' obligations under Article X:3(a). As a result, the Panel should reject Korea's arguments.

4.544 Korea states that "[b]ecause in like cases in the past the United States has revoked duties, the United States violated Paragraph 3(a) of Article X by failing to administer its revocation regime in a 'uniform, impartial and reasonable' manner." The DOC applies the same criteria in every revocation decision. However, as it does in all cases, the DOC considers all of the facts on the record to determine whether these criteria have been satisfied. A mere assertion that the United States revoked anti-dumping orders in allegedly "like cases" is not evidence of an Article X:3(a) violation.

### (c) Rebuttal arguments made by Korea

4.545 **Korea** makes the following arguments in rebuttal to the United States' responses:

4.546 Article I:1 of the General Agreement requires that: "any advantage, favour, privilege or immunity"; with respect, *inter alia*, to rules and formalities imposed on or in connection with importation or the method of levying customs duties and charges imposed on or in connection with importation; granted by a WTO Member to any product originating in any other country; shall be accorded immediately and unconditionally to the like product originating in all other WTO Member countries.

4.547 The United States does not challenge (presumably because it recognizes that it cannot do so) the facts that:

1. in most cases, the DOC's finding that the "no likelihood/not likely" criterion is satisfied automatically where there have been three consecutive determinations of no or *de minimis* dumping margins and the certification of no future dumping by Respondent companies constitutes an "advantage, favour, privilege or immunity";
2. the DOC's revocation criteria constitute both: (a) a rule or formality imposed in connection with importation; and (b) a method of levying customs duties and charges;<sup>407</sup>
3. the DOC has not conducted a substantive analysis of the "no likelihood/not likely" criterion in most cases, but rather has automatically concluded that this criterion was satisfied where there have been three consecutive determinations of no or *de minimis* dumping margins and certification of no future dumping by Respondent companies; and
4. the DOC conditioned revocation in *DRAMS from Korea* on proof by the Respondent companies of satisfaction of the "no likelihood/not likely" criterion.

4.548 The United States' only response is that "the United States applies the same statutory and regulatory provisions with regard to the issue of revocation in every case" and that "each anti-dumping proceeding is unique and the DOC must base each decision on the facts before it."<sup>408</sup>

4.549 First, the facts that the same US regulation (section 353.25(a)(2)) ostensibly controls in all determinations regarding whether to revoke and that this regulation lists three criteria, including the "no likelihood/not likely" criterion, are not dispositive. The Appellate Body in the *EC Bananas* case, citing with approval the panel decision in *Beef from Canada*, declared that Article I of

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<sup>407</sup> Korea does not rely upon "non-binding, non-authoritative sources ... to establish the applicability of Article I," as alleged by the United States in paragraph 163 and note 285 of its First Submission. As readily apparent even when one just scans paragraphs 4.84 through 4.88 of Korea's First Submission, Korea establishes the applicability of Article I through determinations and declarations in the *adopted* panel reports on *United States - Denial of Most-Favored-Nation Treatment as to Non-Rubber Footwear from Brazil* (19 June 1992), BISD 39S/128; *Belgium Family Allowances* (7 November 1952), BISD 1S/59; *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (25 September 1997), WT/DS27/R; and *European Economic Community - Imports of Beef from Canada* (10 March 1981), BISD 28S/92. The 1968 ruling of the Director-General was cited as secondary support for the proposition that criteria for determining whether to revoke are "rules and formalities" and "a method of levying such duties and charges." Korea believes the reasoning of the Director-General in the 1968 ruling will provide useful guidance to the Panel, as the Appellate Body found with respect to unadopted panel reports in *Japan - Taxes on Alcoholic Beverages* (1 November 1996), WT/DS8/AB/R, DSR 1996:I, 97, at 108.

<sup>408</sup> The Panel notes that this argument by the United States is presented in Paragraph 4.563 of this report.

the General Agreement condemns government actions that have the *effect* of discriminating against certain imported products.

4.550 That is exactly what happened here. The United States may not have engaged in *de jure* discrimination against Korean DRAMS, because the DOC uses Section 353.25(a)(2) in making its determination of whether to revoke in all cases. The shifting of the standard-not its literal text-is what is at issue here. Conditioning revocation for the Korean Respondents upon proof of the "no likelihood/not likely" criterion, while automatically concluding in other cases that this criterion was satisfied where there had been three consecutive determinations of no or *de minimis* dumping margins and certification of no future dumping by Respondent companies, constitutes *de facto* discrimination. The *application* of less stringent criteria and procedures in these cases constitutes an "advantage" that was not afforded in the *DRAMS from Korea* case. To be consistent with its obligations under Article I of the General Agreement, the United States should have substantively analyzed the "no likelihood/not likely" criterion in all cases, or in none. Arbitrarily conducting a substantive analysis in *DRAMS from Korea*, while not doing so in other cases, is a *de facto* violation of the most-favoured-nation principle.

4.551 Second, the United States' assertion that in all cases the DOC bases its revocation decision on the facts on the record is false. The reality is that in the vast majority of cases the DOC automatically presumes satisfaction of the "no likelihood/not likely" criterion when the two primary criteria (no dumping for three reviews and agreement to reinstatement) are satisfied. The only instance in which it does not do so is where the US petitioner chooses to allege that the "no likelihood/not likely" criterion is not satisfied. In these instances, the DOC does not require the US petitioner to prove its allegations; rather, it requires the Respondent companies to prove to the satisfaction of the Secretary (whose decision is not based on any objective criteria) that there is "no likelihood" that dumping will resume (or that the resumption of dumping is "not likely").

4.552 The United States explicitly admits this where it declares that, except where the US petitioner<sup>409</sup> raises concerns, there is "a *de facto* presumption that if a Respondent has not dumped within the prior three-year period, it is not likely to resume dumping in the future."

4.553 Thus, the US assertion that different outcomes in its revocation cases are based on different facts boils down to an admission that different outcomes are based on the application of a different standard when the US petitioner so demands. The Panel should reject this attempt by the United States to shield itself from Article I's requirement of non-discriminatory application of revocation determinations.

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<sup>409</sup> While the United States refers to "the parties" raising concerns, no one reasonably can argue that a Respondent company would claim it was likely to dump in the future. Only a US petitioner would ever make such an allegation.

(d) Rebuttal response by the United States

4.554 The following are the **United States'** rebuttal arguments in response to Korea's claim:

4.555 Korea argues that the United States has violated its obligations under Article I of GATT 1994 by not according most-favored-nation treatment in its revocation decisions. Korea bases its Article I arguments upon its erroneous assertion that the DOC inconsistently applies the "not likely" criterion in its revocation decisions, thus according favorable treatment in those cases that do not consider this criterion. Korea's arguments lack merit and should be rejected by the Panel.

4.556 The United States has established that it applies the same statutory and regulatory provisions with regard to the issue of revocation in every case. As such, the same three criteria set forth in section 353.25(a)(2) of the DOC's regulations, including the "not likely" criterion, are applied in each case subject to the regulation. While the three criteria in section 353.25(a)(2) are independently applied in every case, satisfaction of two of the DOC's criteria is relevant to the consideration of whether the "not likely" criterion has been satisfied. When additional evidence relating to the "not likely" criterion is available, the DOC reviews that evidence. Thus, the evidence on the record, not the DOC's whim, will dictate whether the three criteria contained in section 353.25(a)(2) are satisfied. This approach does not constitute *de facto* or *de jure* discrimination, nor does it accord an advantage to any party. As such, the United States has complied with its obligations under Article I.

2. *Korea Submitted an Effective Data Collection Proposal*

(a) Claim raised by Korea

4.557 **Korea** claims that the refusal of the United States to give Korea the opportunity to negotiate a Data Collection Proposal despite doing so in like cases in the past constitutes a violation of Articles I and X:3 of GATT 1994. The following are Korea's arguments in support of that claim:

4.558 As part of their express, binding commitment not to sell at less than fair value (normal value) in the future, the Korean Respondents agreed to participate in a data collection program (DCP) that the Government of Korea had proposed to the United States. This agreement is noted in the DOC's Notice of Determination Not to Revoke.<sup>410</sup> The DOC rejected the proposed agreement, based on Micron's repeated opposition to it.<sup>411</sup> In the Final Determination, the DOC noted that the DCP originally was proposed prior to the deadline for submitting new information, but then seems to say that the proposal came too late to be considered.<sup>412</sup> Also, the DOC stated that the proposal was "precatory in

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<sup>410</sup> 62 Fed. Reg. 39809, 39810-11 (24 July 1997) (Ex. ROK-3).

<sup>411</sup> *Ibid.* at 39811.

<sup>412</sup> *Ibid.*

nature"; presumably, this means that the program was not currently in place.<sup>413</sup> (It could not be, because the United States refused to negotiate it) This part of the Final Determination, in particular, demonstrates the flaws of the DOC's "analysis"

4.559 In a prior anti-dumping proceeding involving semiconductors from Japan, the United States terminated its suspension agreement on 256k and above DRAMs from Japan in return for an agreement similar to that offered by both the Government of Korea and Respondents-an agreement to ensure that there would be no further dumping of the products.

4.560 In this way the United States provided an advantage to Japan with respect to its semiconductor imports concerning a rule or formality applicable to anti-dumping duties (or a method of levying such duties) that it refused to provide to Korea with respect to its semiconductor imports. The failure to grant this advantage - the *opportunity* to negotiate and implement a data collection system in lieu of the imposition of anti-dumping duties - to Korea constitutes *de facto* discrimination in contravention of the United States' obligations under Article I.

4.561 The US conduct also violated Article X. Paragraph 3(a) of Article X requires a Member to administer its laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner." By refusing Korea's DCP and maintaining the duties, even though in another similar case the DOC accepted such a proposal, the DOC violated Article X.

(b) Response by the United States

4.562 The following are the **United States'** arguments in response to Korea's claim:

4.563 Korea's argument that the United States violated its obligations under Article I because the DOC did not accept a data collection program (DCP) proposed by Korea is groundless. The only support Korea musters for this argument is that the United States engaged in another data collection program in another anti-dumping proceeding. Once again, Korea's arguments do nothing more than point to the fact that each anti-dumping proceeding is unique and the DOC must base each decision on the facts before it. Merely noting different outcomes in two different cases is inadequate to sustain an argument under Article I. Therefore, the United States did not violate Article I of GATT 1994 in its *Final Results Third Review*.

4.564 Korea argues that the United States violated Article X:3(a) by refusing Korea's DCP after having accepted such a proposal in "another similar case." For the same reasons that the United States did not violate Article X:3(a) by revoking anti-dumping orders in allegedly "similar" cases, the United States did not violate Article X:3(a) with regard to the rejection of Korea's DCP proposal. Certainly, the factual records and procedural history of each case were distinct

<sup>413</sup> 62 Fed. Reg. 39809, 39810-11 (24 July 1997) (Ex. ROK-3).

and, thus, will lead to different results. However, different results based on different facts does not constitute an Article X:3(a) violation

(c) Rebuttal arguments made by Korea

4.565 **Korea** makes the following arguments in rebuttal to the United States' responses:

4.566 In providing the opportunity to negotiate and then accepting a DCP from Japan in *256K and Above DRAMs from Japan*, but refusing to extend as favorable treatment to Korea, the United States failed to grant an "advantage" to Korea that it had granted to Japan. This failure to grant the opportunity to negotiate and implement a DCP in lieu of the imposition of anti-dumping duties constitutes *de facto* discrimination in contravention of the United States' obligations under Article I of the General Agreement.

(d) Rebuttal response by the United States

4.567 The following are the **United States'** rebuttal arguments in response to Korea's claim:

4.568 Korea's additional argument that the United States has violated its obligations under Article I because the DOC did not accept the DCP proposed in the instant case is equally groundless. The paucity of support for this claim is evident in Korea's first submission because Korea has not provided any evidence to support a finding of disparate treatment. Most importantly, Korea has provided *no* evidence concerning the facts pertaining to the earlier proceeding on DRAMs from Japan.<sup>414</sup> Accordingly, Korea has failed to establish a critical component of a disparate treatment claim that the facts in the two proceedings are similar.

4.569 In its first submission Korea relies entirely on its 17 June 1997 letter containing its DCP proposal, and on the similar suggestions from Compaq and Respondents Hyundai and *LG Semicon*.<sup>415</sup> Those documents make clear that Korea proposed a data collection program modeled on the 19 December 1996 agreement between the US and Japanese semiconductor industries.<sup>416</sup> By definition, an industry-to-industry agreement does not depend on acceptance by

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<sup>414</sup> Anti-dumping; Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan; Suspension of Investigation and Amendment of Preliminary Determination, 51 Fed. Reg. 28396 (7 August 1986) (hereinafter *256K DRAMs from Japan*) (Ex. USA-89).

<sup>415</sup> Case Brief of Compaq, 18 April 1997 at 9-10 (Ex. USA-90), Letter from Doug Young Joo, Commercial Counsellor, Embassy of the Republic of Korea, 17 June 1997 (hereinafter *Korea Letter of 17 June 1997*) (Ex. USA-91), and Letter of Michael P. House (counsel to LG Semicon) and Lawrence R. Walders (counsel to Hyundai), 27 June 1997 at 2-3 (Ex. USA-92).

<sup>416</sup> See *Korea Letter of 17 June 1997* ("Compaq pointed out that the December 19, 1996 agreement between the US Semiconductor Industry Association (SIA) and the Electronic Industries Association of Japan (EIAJ) could provide an appropriate model for resolving the Korean DRAM case. We agree with that suggestion.") (Ex. USA-91).

the United States, which is not a party to the agreement. Furthermore, Korea's proposal did not make any reference to the circumstances or agreements involved in the termination of the earlier anti-dumping proceeding in *256K DRAMs from Japan*. The Panel should not find an Article I violation based on the assertions offered by Korea.

4.570 In any case even if the Panel deem Korea's bare assertions sufficient to satisfy its burden of presenting a *prima facie* case of a violation of Article I, publicly available information concerning the earlier investigation demonstrates that the circumstances of the two proceedings are fundamentally dissimilar. The earlier anti-dumping investigation concerning *256K DRAMs from Japan* was suspended in August 1986 pursuant to a statutory suspension agreement (undertaking) concluded in connection with the 1986 US-Japan Semiconductor Agreement.<sup>417</sup> As part of this agreement, the Japanese semiconductor companies undertook to provide a range of cost and pricing data to the DOC on a quarterly basis and to revise their prices to eliminate dumping.<sup>418</sup>

4.571 In 1991, when the 1986 agreement came up for renewal, the DRAM anti-dumping proceeding and related price undertaking were terminated with the express support of the US semiconductor industry.<sup>419</sup> At the same time, the data collection procedures were extended, with the proviso that data would be made available to the DOC only upon initiation of a new anti-dumping investigation. In 1996, the US-Japan Semiconductor Agreement was modified further. This time, the provisions regarding data collection took the form of an industry-to-industry agreement.<sup>420</sup> It was this formulation of the DCP which was suggested as the basis for an arrangement in the instant case.<sup>421</sup>

<sup>417</sup> See *256K DRAMs from Japan*, 51 Fed. Reg. 28396 (7 Aug. 1986) (Ex. USA-89). The US-Japan Semiconductor Agreement also involved market-access commitments in settlement of an investigation under section 301 of the Trade Act of 1974. Presidential Memorandum of 31 July 1986, *Determination Under Section 301 of the Trade Act of 1974*, 51 Fed. Reg. 27811 (4 Aug. 1986) (Ex. USA-93).

<sup>418</sup> *Ibid.*, 51 Fed. Reg. at 28398-99 (7 Aug. 1986) (Ex. USA-89). The DOC's notice announcing the agreement stated as follows:

*Basis of the Agreement.* On and after the effective date of this Agreement, each signatory producer/exporter individually agrees to make any necessary price revisions to eliminate completely any amount by which the foreign market value of its merchandise exceeds the United States price of its merchandise subject to this Agreement.

*Ibid.*, 51 Fed. Reg. at 28398 (Ex. USA-89).

<sup>419</sup> *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan; Termination of Anti-dumping Duty Investigation*, 56 Fed. Reg. 37522, 37523 (7 August 1991) (Ex. USA-94).

<sup>420</sup> See Office of the US Trade Representative, Press Release 96-65, US and Japan Reach Semiconductor Accord, 2 August 1996 (The heart of the new agreement is an industry-to-industry accord which will provide a broad range of activities across industry as well as serving as a clearinghouse for the collection and analysis of data. The new agreement retains a role for government in reviewing a wide range of qualitative and quantitative data, including market share) (Ex. USA-95).

<sup>421</sup> See Korea Letter of 17 June 1997.

4.572 This brief review of the circumstances underlying the US-Japan data collection program as it evolved out of the *256K DRAMs from Japan* investigation reveals the substantial differences between that case and the case before this Panel. First, the 1996 US-Japan industry-to-industry data collection agreement, which was identified as the model for Korea's proposal, involved neither acceptance by the United States government, which was not a party to the agreement, nor any action by the United States involving an active anti-dumping proceeding. Second, the DOC's 1991 termination of the suspension agreement in the *256K DRAMs from Japan* case, the central element in Korea's disparate treatment claim, was predicated upon receipt of the express support of the domestic industry, which thereby indicated that it no longer had an interest in the continuation of the suspension agreement. In the present case, there is an outstanding anti-dumping order, not a suspension agreement, and, as Korea acknowledges, the domestic industry has opposed termination of the order.

4.573 The facts underlying the *256K DRAMs from Japan* case demonstrate that Korea's claim under Article I is based on mere assertion of a violation. While the results in the two cases differed, the treatment of Respondents and the application of the DOC's regulations in the two cases was not such that an advantage was provided in *256K DRAMs from Japan* that was not accorded to Respondents in the *Final Results Third Review*. Therefore, the Panel should reject Korea's claims under Article I.

3. *Variance of the "No Likelihood/Not Likely" Criterion and the Time-Period Selected*

(a) Claim raised by Korea

4.574 **Korea** claims that by varying the "no likelihood/not likely" criterion and the time-period selected for analyzing it from case to case the United States has Contravened its Obligations under Article X:3(a) of GATT 1994. The Following are Korea's arguments in support of this claim:

4.575 Despite its repeated references to *Brass Sheet and Strip*,<sup>422</sup> the DOC admits that this supposed source of criteria does not in fact specify the criteria that the DOC *will* use in its revocation decision, and indeed it does not necessarily specify the range of factors that Commerce *may* use. Thus, we come back full circle-the DOC believes it has complete discretion to choose the criteria it wishes to consider determinative in each specific case. The criteria the DOC uses will vary from case to case. They are not uniform or impartial. Therefore, the United States is in breach of its transparency and due process obligations under X:3(a) of the General Agreement

4.576 Moreover, given the absence of objective criteria and the resulting unfettered discretion to select any period it desires, the United States is not

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<sup>422</sup> *Brass Sheet and Strip from Germany*, 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36).

administering its law in a uniform, impartial and reasonable manner, as required by Article X:3(a).

4.577 The period chosen by the United States illustrates the results of the administrative arbitrariness that Article X is meant to prevent. The administrative determination at issue in this dispute was published in the US *Federal Register* on 24 July 1997. At the time the determination was drafted, actual data were available for the first half of 1997 and credible predictive data were available for the remainder of the year. Yet, the DOC chose to base its "no likelihood/not likely" determination on events during calendar year 1996; and it did so despite acknowledging that market conditions in the DRAM industry had recovered in 1997.<sup>423</sup> The DOC then accepted and rejected data in a biased fashion, to reach its conclusion that the "no likelihood/not likely" standard was not satisfied. Therefore, the period chosen by the United States was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement.

#### (b) Response by the United States

4.578 The **United States** responds to Korea's claim with the following arguments:

4.579 Korea states that the United States violated Article X:3(a) because "[t]he criteria the DOC uses will vary from case to case." The United States addressed this argument in the context of its discussion of Article X:1. As the United States does not vary the criteria relevant to a revocation decision from case to case, the United States has not violated Article X:3(a).

4.580 Korea states that "the period chosen by the United States was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement." The DOC determined the relevant period in which to consider the likelihood issue on the basis of the evidence on the record. The fact that different periods of time may be examined in different cases is a result of the existence of different factual records. Once again, a different result based on different facts does not constitute an Article X:3(a) violation.

### 4. *Rejection and Acceptance of Data*

#### (a) Claim raised by Korea

4.581 **Korea** claims that the United States by rejecting verified and corroborated evidence from the Korean Respondent companies while accepting

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<sup>423</sup> 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3). Also, the DOC rejected the Flamm study because, according to the DOC, the study was overly optimistic. But, elsewhere, the DOC itself acknowledged that market conditions improved, thus confirming the accuracy of Dr. Flamm's assumptions.

the US petitioner's claims violated its obligations under Article X:3(a) of GATT 1994. The following are Korea's arguments in support of that claim:

4.582 The United States, by rejecting and accepting data in a biased fashion, also breached its obligations under Article X:3(a) of the General Agreement. Article X:3(a) requires Members to administer their anti-dumping laws in a uniform, impartial and reasonable manner.

4.583 In its efforts to satisfy the DOC that there was "no likelihood" of future dumping, the Korean companies submitted large amounts of current data regarding pricing trends, inventory levels and various other aspects of market conditions for DRAMs. All of these data were corroborated; indeed, the DOC verified much of it. The US petitioner, on the other hand, generally submitted speculation and innuendo, little of which was corroborated and none of which the DOC verified. Despite this, the DOC uniformly rejected verified and corroborated Korean data and accepted the US petitioner's speculative claims. For example, with respect to pricing trends in the DRAM industry, the DOC conceded that the Korean companies had established that prices had stabilized, indeed recovered somewhat, during 1997.<sup>424</sup> Yet, the DOC speculatively concluded that "a large degree of uncertainty about the direction of the market remains."<sup>425</sup> Similarly, with respect to inventory levels, the DOC rejected the companies' publicly announced and published plans to decrease production levels (even while noting that "the market . . . reacted with higher prices") and instead accepted speculative assertions that production might increase, due to the possibility that there might be a temporary spike in demand (which would increase prices, of course).<sup>426</sup> Thirdly, although acknowledging that below-cost sales by the Korean companies were not sufficiently numerous to be disregarded in the normal value calculations, the DOC concluded that the record "suggests that the number of below-cost sales increased . . ."<sup>427</sup> This is nothing more than a transparent effort by the DOC to substantiate its groundless conclusion.

4.584 The pattern of bias is pervasive. The DOC wanted to conclude that continued dumping was likely, so it discounted evidence that contradicted this belief. This is not a matter of a few isolated incidents. The pattern is universal—claims by the US petitioner were accepted even if speculative, while those of the Korean companies were rejected even if corroborated and verified. This violates the US obligation under Article X:3(a) to administer its anti-dumping law in a uniform, impartial and reasonable manner.

(b) Response by the United States

4.585 The **United States** responds to Korea's claim with the following arguments:

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<sup>424</sup> 62 Fed. Reg. 39809, 39814 and 39817 (24 July 1997) (Ex. ROK-3).

<sup>425</sup> *Ibid.* at 39817.

<sup>426</sup> *Ibid.*

<sup>427</sup> 62 Fed. Reg. 39809, 39817 (24 July 1997) (Ex. ROK-3).

4.586 Korea assails the DOC's consideration of the evidence submitted for the record as "biased" and states that "[t]he pattern of bias is pervasive." Korea couches these allegations in the context of an argument under Article X:3(a). As the *Final Results Third Review* make vividly clear, the DOC afforded all parties an opportunity to submit evidence. The DOC thoroughly evaluated all of the evidence and data submitted by the parties and provided a well-reasoned analysis of this information. The fact that the DOC's evaluation of this data did not produce a result that Korea favors does not provide a basis for Korea's claims of bias. As such, the DOC's consideration of this data did not violate the United States' obligations under Article X:3(a).

(c) Rebuttal arguments made by Korea to *all* claims under Article X:3(a) of GATT 1994

4.587 **Korea** makes the following arguments in rebuttal to the United States responses on all Article X:3(a) claims (i.e. the United States revoked anti-dumping duties in like cases, Korea submitted an effective data collection proposal, variance of the "no likelihood/not likely" criterion and the time-period selected rejection, and acceptance of data):

4.588 Article X:3(a) of the General Agreement requires governments to administer their laws, regulations and administrative rulings of general application in a "uniform, impartial and reasonable manner." It embodies the fundamental principle of due process. If government measures are arbitrarily applied, the resulting procedural protectionism is as damaging as would be the application of measures that are discriminatory on their face.

4.589 Four aspects of the DOC's actions in *DRAMs from Korea* violate the United States' due process obligation under Article X:3(a):

1. the refusal of the United States to revoke the duties despite doing so in the past,
2. the refusal of the United States to give Korea the opportunity to negotiate a Data Collection Proposal despite doing so in like cases in the past;
3. varying the "no likelihood/not likely" criterion and the time period selected for analyzing it from case to case; and
4. rejecting verified and corroborated evidence from the Korean Respondent companies while accepting the US petitioner's unsubstantiated speculative claims.

4.590 As was true with regard to Article X:1, this is *not*, as the United States alleges, an argument addressing the substance of the US revocation scheme. Rather, it condemns the arbitrary administration of the law by the DOC. Korea has never argued that the Department denied rights of participation in this proceeding. What it has established is that the United States applied different

criteria in this case than in other cases and that it accepted and evaluated data in a biased fashion. These are the denials of due process contrary to Article X:3(a).

4.591 The US argument that its anti-dumping revocation regime is administered in conformity with Article X:3(a) because the same regulation (Section 353.25(a)(2)) ostensibly is applied in all cases, and that different outcomes are due to different facts is no defense. To conform to Article X:3(a), the United States would have had to uniformly *apply* the standards for determining whether to revoke. Either in its laws, regulations or administrative rulings of general application the United States would have had to set out the specific, objective criteria on which it bases its revocation decisions. The United States has not done so. As acknowledged repeatedly by its own courts, in the United States there are no objective criteria governing revocation.

4.592 The United States claims that the *Brass Sheet and Strip* determination sets out the factors always used by the DOC in analyzing the "no likelihood/not likely" criterion. Yet, at page 49727 of the Final Results of the Third Review,<sup>428</sup> the DOC admits that the determination does not specify the factors the DOC will use in revocation determinations and that *Brass Sheet and Strip* in fact did not set out the factors used in the *DRAMs from Korea* decision.

4.593 In most cases the United States revokes anti-dumping duties without conducting a substantive analysis of the "no likelihood/not likely" criterion. In only a very few cases, including *DRAMs from Korea*, did the DOC substantively analyze this criterion and require Respondents to prove it to the satisfaction of the Secretary. The United States terminated the anti-dumping proceeding on 256K and above DRAMs from Japan in return for a data collection proposal. However, the DOC refused even to allow Korea the opportunity to negotiate a similar proposal. The DOC arbitrarily chose the time period it examined in determining whether the "no likelihood/not likely" criterion was satisfied. Finally, the DOC systematically rejected verified or verifiable evidence submitted by the Korean Respondent companies while accepting the US petitioner's unverified, speculative claims.

4.594 Each of the four actions set out above demonstrates that the DOC applied its revocation regime in a manner that was neither uniform, impartial, nor reasonable.

4.595 Facts differ from case to case, but Article X:3(a) requires that they be analyzed in a uniform, impartial and reasonable manner. The United States did not do so, and thereby violated its obligations under Article X:3(a).

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<sup>428</sup> See Ex. ROK-36.

(d) Rebuttal response made by the United States to *all* claims under Article X:3(a) of GATT 1994

4.596 The **United States** makes the following arguments in rebuttal all Article X:3(a) claims made by Korea<sup>429</sup> (i.e. the United States revoked anti-dumping duties in like cases, Korea submitted an effective data collection proposal, variance of the "no likelihood/not likely" criterion and the time-period selected rejection, and acceptance of data):

4.597 Korea has failed to establish a violation under Article X:3(a). Korea bears the burden of providing evidence that the DOC, in reaching its determination in *Final Results Third Review*, failed to administer its regulations in a "uniform, impartial and reasonable manner."<sup>430</sup> Considering the Appellate Body's finding that "the mere assertion of a claim" does not amount to proof,<sup>431</sup> this Panel should reject Korea's baseless claims under Article X:3(a).

4.598 Korea asserts that "[t]he criteria the DOC uses will vary from case to case" and, thus, "[t]hey are not uniform or impartial." The United States has established, however, that the criteria contained in section 353.25(a)(2) have remained substantially the same since the promulgation of this regulation in 1980, and apply in each case where an anti-dumping order may be revoked pursuant to this regulation. Therefore, the premise underlying Korea's claim that the criteria are not uniform or impartial is not grounded in fact. Because Article X:3(a) concerns itself with the administration of the DOC's regulations, Korea's failure to present evidence (beyond mere assertions) that the DOC has applied section 353.25(a)(2) in a non-uniform and biased manner. Korea's claim fails.

4.599 Korea alleges bias by stating that "[t]he DOC wanted to conclude that continued dumping was likely . . ." The only support offered by Korea consists of isolated instances where the DOC concluded that evidence presented by the Korean Respondents did not support their arguments. A proper review of the record in the underlying administrative proceeding reveals that the DOC's conclusions in the *Final Results Third Review* were based on an objective and unbiased evaluation of the facts. While the DOC's conclusions may have been to the detriment of the Respondents, this does not substantiate a claim that the DOC administered its law and regulations in a biased or unreasonable fashion.

4.600 Korea also alleges that "the period chosen by the United States [in which to consider the likelihood issue] was neither impartial nor reasonable, and the United States breached its obligations under Article X:3(a) of the General Agreement." The DOC determined the relevant period in which to consider the likelihood issue on the basis of the evidence provided by the parties to the administrative review. The fact that different periods of time may be examined in

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<sup>429</sup> The Panel notes that this includes those Article X:3 claims made in conjunction with Article I claims.

<sup>430</sup> GATT 1994, Art. X:3(a).

<sup>431</sup> *Wool Shirts*, WT/DS33/AB/R, at 14.

different cases derives from the simple fact that the evidentiary records in each case will differ. For the same reasons, Korea's arguments that the DOC rejected a data collection proposal (DCP) after having accepted such a proposal in "another similar case," and that the United States has revoked duties "in like cases in the past," do not establish a violation under Article X:3(a). Korea fails to demonstrate that, despite the different results in different cases with different facts, the DOC failed to administer its laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner. Stated differently, Korea's claims must be rejected, because what little evidence Korea has provided does not relate to the legal obligation imposed by Article X:3(a).

*H. Claims under Articles 2 and 3 of the AD Agreement*

*1. The DOC's Decision Regarding the Scope of the Proceeding*

*(a) Claim raised by Korea*

4.601 **Korea** claims that the United States violated its obligations under Articles 2 and 3 of the AD Agreement because, during the original investigation of *DRAMs from Korea* the DOC (i) failed to include in the scope products that were in existence and that are like products to the investigated products; and (ii) included products in the scope of its proceeding that did not exist at the time of the original investigation. The following are Korea's arguments in support of this claim:

4.602 Articles 2 and 3 of the AD Agreement set forth procedures and requirements for Members to employ and follow in determining whether a product is dumped and whether that dumping has caused injury to a Member's domestic industry. In order for an anti-dumping measure to be taken, a Member must determine that a like product is being sold at a price below its normal value and that the sales below normal value of the like product cause (or threaten) material injury to a domestic industry of the Member.<sup>432</sup>

4.603 The United States violated its obligations under Articles 2 and 3 of the Agreement by including within the scope of the proceeding products that were not in existence at the time of the original investigation and therefore could not have been investigated to determine if they were dumped and injured an industry in the United States.<sup>433</sup> The United States also violated its obligations under Articles 2 and 3 of the Agreement by excluding certain products that were like

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<sup>432</sup> Articles 2 and 3 of the AD Agreement.

<sup>433</sup> The scope of the anti-dumping duty order includes DRAMs of one megabit and above. *See* Notice of Final Results of Anti-dumping Duty Administrative Review and Determination Not to Revoke Order in Part; *DRAMs from Korea*, 62 Fed. Reg. 39809 (24 July 1997) (Ex. ROK-3). Theoretically, this scope includes products such as 64 megabit DRAMs that were not even shipped to the United States until 1996, as well as DRAMs with higher densities (memory capacities) that have not yet been developed.

those considered in the investigation. The exclusion of the like products contributed to the issuance of the anti-dumping duty order because they could have significantly altered the dumping and injury results.<sup>434</sup>

4.604 The AD Agreement does not envision manipulation of the scope of a proceeding to, on the one hand, exclude a substantial portion of like products<sup>435</sup> from the original dumping and injury analyses and, on the other hand, create a completely open-ended scope that includes future generations of DRAMs with a memory capacity 64 times, 256 times, or greater, than that of the products originally investigated. Common sense alone dictates that a definition of like products that defines a 64 megabit DRAM (64 times the memory capacity of a one megabit DRAM) as a like product to the one megabit DRAM investigated in the original investigation and defines a 256 kilobit DRAM (a one megabit DRAM has only 4 times the memory capacity of a 256 kilobit DRAM) not a like product is indefensible. Not only does the memory capacity difference between DRAM generations separate DRAMs such as one megabit and four megabit and 64 megabit DRAMs into different like products, an examination of design and process differences further distinguishes one and four megabit DRAMs from 64 megabit and above DRAMs. There are significant design, process and application differences between the categories, that demonstrate that the one and four megabit DRAMs are not like products to the 64 megabit and above DRAMs.

4.605 The open-ended nature of the product scope suggested by Micron and accepted by the DOC embraced not only infinitely increasing memory capacities, but also infinitely advancing technologies. The product scope of the anti-dumping duty order extends to memory devices that are so technically advanced that they cannot reasonably be considered like products to the originally investigated products—they are not merely model-year changes. This, also, violates the United States' obligations under Articles 2<sup>436</sup> and 3 of the AD Agreement.

4.606 A basic limitation faced by DRAM producers is speed. The speed of a DRAM, whether a Fast Page Mode (FPM) DRAM, the type of DRAM investigated during the original investigation, or an Extended Data Output (EDO) DRAM, does not match that of microprocessors. Significant, costly delays, or "wait states," occur when speed mismatches between the DRAM and the microprocessor develop. FPM and EDO DRAMs are referred to as asynchronous DRAMs and, in order to decrease wait states, each type has been

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<sup>434</sup> The DOC's investigation did not examine sales of Korean DRAMs with densities of less than one megabit. In previous investigation, the DOC treated 256 kilobit DRAMs as like products to one megabit DRAMs. See *DRAMs from Japan*, 51 Fed. Reg. 9475 (19 March 1986) (Ex. ROK-54).

<sup>435</sup> During the period of investigation (November 1991 - April 1992), 256 kilobit DRAMs represented a sizable segment of DRAM shipments.

<sup>436</sup> The Panel notes that there was an error in Korea's first submission which originally referred to Article 1 of the AD Agreement. All further incorrect references have also been revised. See also footnote 15.

subjected to advanced engineering techniques. FPM speeds have been increased by process and photolithographic advances; minor architectural changes have increased the speed of EDO DRAMs. However, FPM and EDO DRAMs still suffer from the mismatch speed problem.

4.607 Synchronous DRAMs (SDRAMs), on the other hand, represent a major technological advance in the memory market. The operation of an SDRAM is fully synchronized with an internal system clock. This is completely different from a conventional DRAM, such as FPM and EDO DRAMs, which lack such a clock. Also, the architecture of SDRAMs (*i.e.*, design topology, operation diagram and function) is radically different from previous DRAMs. The architecture of SDRAMs supports multiple and new functions to synchronize (*e.g.*, multi-bank, on-chip programmable functions and multi-operational mode). The system clock and radical architectural changes synchronize the function of the SDRAM with that of the microprocessor so as to provide a data rate in line with the speed of the microprocessor. Thus, SDRAMs are a complete reinvention of random access memory that provide "burst" technology to deliver data faster and cheaper. In somewhat simpler terms, SDRAMs multiply and synchronize memory access to avoid downtime for the microprocessor and to increase data retrieval speed.

4.608 In addition, future DRAMs will have new, completely distinct architectures, such as Rambus DRAMs, SyncLink DRAMs and DRAMs with embedded logic. The name, "DRAM," likely will still be used, even though the products are distinct and do not compete.

4.609 Thus, the technological advance from the FPM/EDO DRAMs to SDRAMs is not a matter of generational or memory capacity change. The advance is so radical that including this new type of memory in a proceeding where the original investigation was limited only to sales of FPM and EDO DRAMs is akin to including Ferraris in an anti-dumping proceeding regarding one-horse carts. Articles 2 and 3 of the AD Agreement simply do not permit the open-ended application of anti-dumping duties so as to capture products that because of technological advances are virtually unrelated to the products originally investigated.

4.610 Therefore, the United States violated its obligations under Articles 2 and 3 of the AD Agreement when it excluded products that were clearly like products from its investigation and at the same time determined that there was no upper limit on the memory capacities and additional features or functions of DRAMs considered to be like products and subject to its anti-dumping duty order.

4.611 In response to a question by the Panel,<sup>437</sup> **Korea** further argued as follows:

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<sup>437</sup> The Panel recalls that the question was: "Could Korea confirm that it is challenging the product scope determination in the 1997 refusal to revoke, and not product scope determination in the original 1993 *DRAMs from Korea* determination? Is Korea making two legally distinct claims: (1) against the original product scope determination in the 1993 *DRAMs from Korea* order, and (2)

4.612 Korea is making two legally distinct claims. First, Korea argues that every time since the WTO entered into force that the United States has forced the Respondents to report data for a new product, *e.g.*, the 64M DRAM, and has calculated a dumping margin based in part on that data, the United States has engaged in a "post-GATT" action. These "post-GATT" actions are not, as the United States asserts, insulated from review. They must comply with the dictates of the WTO agreements. In this case, the United States improperly has acted to include within the scope of administrative reviews products that did not even exist at the time of the investigation (indeed, products made using technologies and machines that did not even exist at the time of the investigation). This violates Articles 2 and 3 of the Anti-Dumping Agreement.

4.613 Second, Korea claims that the United States is in violation of its Anti-Dumping Agreement obligations by continuing to apply the original product scope determination in the 1993 *DRAMs from Korea* order. Although the scope determination was made in 1993, the United States has not modified it to conform to its WTO obligations. Thus, each time the United States has published a determination with the same scope it has violated Article 18.4 of the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement.

4.614 The United States has argued throughout this proceeding that its Federal Register determinations, *e.g.*, the *Final Results in Brass Sheet and Strip*<sup>438</sup>, constitute "administrative rulings of general application" within the meaning of GATT Article X:1. (Korea concurs.) If, indeed, one can (indeed, must) rely on the U.S. administrative rulings to ascertain U.S. law, then obviously those rulings must comply with Article 18.4 and Article XVI:4. If this is true of the "no likelihood/not likely" analysis in *Brass Sheet and Strip*, then it is true of the scope determinations in this proceeding.

(b) Response by the United States

4.615 The Panel notes that the **United States** raised a preliminary objection with regards to Korea's claims under Articles 2 and 3 of the AD Agreement. In light of its preliminary objection the United States did not respond directly to Korea's claim. The arguments of the Parties on this matter can be found in Section IV.A.2 of this report.

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against the product scope determination contained in the 1997 refusal to revoke? Or does Korea consider that these two claims are essentially linked, to the extent that one claim cannot exist independently of the other?"

<sup>438</sup> 61 Fed. Reg. 49727 (23 September 1996) (Ex. ROK-36)

I. *Claims under Article 5.8 of the AD Agreement*

1. *De Minimis Margin Threshold for Administrative Reviews*

(a) Claim raised by Korea

4.616 **Korea** claims that the United States violates Article 5.8 of the AD Agreement by setting the *de minimis* margin threshold for administrative reviews at a level lower than that required by that provision. The following are Korea's arguments in support of that claim:

4.617 The WTO obliges the United States to ensure not only that its practice in administering its anti-dumping law is in conformity with the AD Agreement and the General Agreement, but also that its law and regulations on their face are consistent with those obligations. This claim concerns the latter obligation.

4.618 By setting the *de minimis* threshold in administrative reviews at 0.5 percent,<sup>439</sup> the United States has violated its obligations under Article 5.8 of the AD Agreement, which sets the threshold at two percent. The obligation of Article 5.8 is that:

There shall be immediate termination in *cases* where the authorities determine that the margin of dumping is *de minimis* ... The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 percent, expressed as a percentage of the export price. (Emphasis added by Korea.)

4.619 Nor is there any basis to the arguments, as pursued by the United States in the course of enacting its legislation to implement the WTO agreements and its anti-dumping regulations pursuant to that law, that the obligation imposed by Article 5.8 is limited to anti-dumping investigations and does not extend to reviews of anti-dumping duties.

4.620 Article 5.8 uses the word "cases," a generic word that applies to the review stage of proceedings as well as the investigation stage. "Cases" was used in the comparable provision, Article 5.3, of the Tokyo Round Anti-Dumping Code.<sup>440</sup> Although the focus of revisions to this Article in the Uruguay Round was to make it mandatory (replacing "should" with "shall") and to replace "negligible" with a quantified "*de minimis*" threshold, the scope of applicability also was addressed.

4.621 A review of the Uruguay Round negotiating history of Article 5.8 shows that the obligation imposed by Article 5.8 is not limited to investigations. Article 5.7 of the 6 July 1990 "Carlisle I" draft read: "For the purpose of this *Code*, the

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<sup>439</sup> The threshold for reviews is set out in Section 351.106(c) of the DOC's anti-dumping regulations, 62 Fed. Reg. 27296, 27382-83 (May 19, 1997) (Ex. ROK-49). The current regulation is cited rather than the regulation applicable to the Korean DRAM proceeding because this claim relates to an inconsistency of the regulation on its face rather than as applied in the DRAM proceeding.

<sup>440</sup> Article 5.3 of the Tokyo Round Anti-Dumping Code provided: "There should be immediate termination in cases where the margin of dumping . . . is negligible."

margin of dumping shall be considered to be *de minimis* if this margin is less than x percent *ad valorem* . . ." (emphasis added by Korea).<sup>441</sup> This attempt to clarify the scope of the provision was opposed by the United States, and so the express application to all phases of an anti-dumping proceeding disappeared in the "Carlisle II" draft of 14 August 1990, which contained two alternate bracketed versions of this provision. One said that "there should be immediate termination of cases, at any stage of the *investigation*, against imports from a particular country where the margin of dumping is less than x percent *ad valorem* . . ." (emphasis added by Korea). The other version repeated the formulation of the Tokyo Round Code, substituting a quantified threshold for "negligible": "There should be immediate termination in *cases* where the margin of dumping is less than x percent *ad valorem*" (emphasis added by Korea).<sup>442</sup>

4.622 By the next draft, the 6 November 1990 New Zealand I, Article 5.8 said: "There should be immediate termination in cases where the margin of dumping is *de minimis*,<sup>10/</sup>" and this footnote 10 provided: "For the purpose of this paragraph, a *de minimis* margin of dumping is considered to be less than x percent, expressed as a percentage of the normal value."<sup>443</sup> This formulation remained unchanged until the "Dunkel Draft" of 20 December 1991, in which the formulation is the same as that quoted above from Article 5.8 of the approved Agreement (except for substitution of the last two words - "export price" is used in the Agreement, whereas the Dunkel Draft referred to "normal value").<sup>444</sup>

4.623 Thus, the effort by the United States to expressly limit the scope of Article 5.8 to investigations was unsuccessful. The same generic formulation used in the Tokyo Round Code ("in cases") was maintained.

4.624 The application of the *de minimis* threshold to reviews as well as to investigations also is supported by a review of related Uruguay Round AD Agreement provisions. According to Article 9.2, anti-dumping duties, when imposed, shall be collected "in the appropriate amounts in each case." That amount, as per Article 9.3, shall not exceed the margin of dumping established under Article 2. The margin of dumping calculation rules of Article 2 apply to both investigations and reviews. This tracing of the rules applicable to the assessment of anti-dumping duties to be collected discloses no logical reason why the *de minimis* level during the review stage of a proceeding should be different than at the investigation stage. That which is the legal equivalent of a zero margin for purposes of determining whether to impose an anti-dumping duty is also the legal equivalent of zero for collecting anti-dumping duties.<sup>445</sup>

<sup>441</sup> MTN.GNG/NG8/W/83/Add.5 (23 July 1990), p. 18.

<sup>442</sup> Unpublished working document, reprinted in *Inside US Trade* (21 August 1990) (Ex. ROK-80).

<sup>443</sup> Unpublished working document, reprinted in *Inside US Trade* (9 November 1990) (Ex. ROK-81).

<sup>444</sup> Reprinted in 3 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 457 (TERENCE P. STEWART, ed., 1993) (Ex. ROK-82).

<sup>445</sup> The United States appears to be the only WTO Member that provides a separate, lower *de minimis* threshold for reviews. The EU and Japan, in contrast, expressly apply the AD Agreement's

4.625 Finally, this analysis is confirmed by the DOC's own regulations, which, by definition, treat investigations and annual reviews as parts of the same proceeding. Section 353.2(q) defines "Proceeding" as follows:

A "proceeding" begins on the date of the filing of a petition or publication of a notice of initiation under §353.11, and ends on the date of publication of the earliest notice of (1) dismissal of petition, (2) rescission of initiation, (3) termination of investigation, (4) a negative determination that has the effect of terminating the proceeding, (5) *revocation of an order*, or (6) termination of a suspended investigation.<sup>446</sup>

In that investigations and annual reviews are part of the same proceeding, they should be subject to the same *de minimis* threshold.

4.626 The proscription of Article 11.1 is that an anti-dumping duty shall remain in force only as long as and to the extent necessary "to counteract dumping which is causing injury." Under Article 5.8, a calculated margin of dumping of less than two percent is not "dumping." Therefore, the United States is in breach of its WTO obligations by maintaining a *de minimis* threshold of 0.5 percent for administrative reviews.

4.627 At the first meeting of the Panel, **Korea** made the following additional arguments:

4.628 By setting the *de minimis* threshold in administrative reviews at 0.5 percent, the United States has violated its obligations under Article 5.8 of the Anti-Dumping Agreement, which sets the threshold at two percent. The obligation of Article 5.8 applies to "cases," including reviews as well as investigations.

4.629 The United States has argued, as it did in the course of enacting its legislation to implement the WTO agreements and its anti-dumping regulations pursuant to that law, that the obligation imposed by Article 5.8 is limited to anti-dumping investigations and does not extend to reviews of anti-dumping duties. This is incorrect.

4.630 Article 5.8 uses the word "cases," a generic word that applies to the review stage as well as the investigation stage of proceedings. The extensive review of the Uruguay Round negotiating history of Article 5.8 contained in our written submission shows that the obligation of Article 5.8 is not limited to investigations and that the effort by the United States during the negotiations to expressly limit the scope of Article 5.8 to investigations was unsuccessful. The same generic formulation used in the Tokyo Round Code ("in cases") was maintained.

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two percent *de minimis* threshold to both investigations and reviews. See, respectively, G/ADP/N/1/EEC/2/Suppl.1 (1 April 1997), clause 17 and Articles 11(5) and 9(3); G/ADP/Q1/JPN/4 (12 August 1996), para. 4.

<sup>446</sup> 19 C.F.R. § 353.2(q) (1996) (emphases added by Korea) (Ex. ROK-83).

4.631 This analysis is confirmed by an analysis of the provisions both of the Uruguay Round and of the DOC's own regulations, which, by definition, treat investigations and annual reviews as parts of the same proceeding. In that an investigation and all subsequent reviews are parts of the same "case" or "proceeding," they are subject to the same *de minimis* threshold.

(b) Response by the United States

4.632 The **United States** responds to Korea's claim with the following arguments:

4.633 Consistent with the framework set forth in the AD Agreement, anti-dumping proceedings in the United States consist of two phases: (1) an initial phase consisting of an investigation; and (2) if an investigation results in the imposition of an order (definitive duties), an assessment and review phase. In an investigation, the DOC applies a *de minimis* standard of 2 percent *ad valorem*.<sup>447</sup> In the assessment and review phase, the DOC applies a *de minimis* standard of 0.5 percent *ad valorem*.<sup>448</sup>

4.634 Under Article 5.8, Members must apply a 2 percent *de minimis* standard in anti-dumping investigations. Korea claims that because the DOC does not apply a *de minimis* standard of 2 percent for purposes of assessments and reviews, the United States is in violation of Article 5.8.<sup>449</sup> Korea's claim is unfounded, however, because Article 5.8 applies only to initial anti-dumping investigations. Article 5.8 does not apply to assessments and reviews.

4.635 By way of background, the AD Agreement distinguishes between the investigatory phase and the assessment and review phase of an anti-dumping proceeding. Article 5 deals with investigations, while Article 9 deals with assessments and Article 11 deals with reviews. This structure is reflected in other provisions of the AD Agreement. For example, Articles 12.1 and 12.2 set forth obligations concerning the contents of public notices issued during an investigation, while Article 12.3 sets forth comparable obligations with respect to reviews. Likewise, Article 18.3, which is a transition rule, distinguishes between "investigations" and "reviews of existing measures."

4.636 In *Desiccated Coconut*, the Appellate Body recognized this distinction between an initial investigation and the post-investigation phase, noting that the imposition of "definitive" duties (an "order" in US terminology) ends the investigative phase.<sup>450</sup> Although *Desiccated Coconut* was a dispute over countervailing duties, given the similarities between the SCM Agreement and the

<sup>447</sup> 19 U.S.C. § 1673b(b)(3) (Ex. USA-19); *New AD Regulations*, 62 Fed. Reg. at 27382-83 (sec. 351.106(b)(1)) (Ex. USA-80).

<sup>448</sup> *New AD Regulations* at § 351.106(c)(1).

<sup>449</sup> Although Korea's request for the establishment of a panel fails to specify the particular provision of US law alleged to be in violation of Article 5.8, in its first submission, Korea refers to 19 C.F.R. § 351.106(c) (1998).

<sup>450</sup> WT/DS/22/AB/R, DSR 1997:I, 167, at 176.

AD Agreement, the following statement of the Appellate Body is particularly apt:

we see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary and a final determination. A positive final determination that subsidized imports are causing injury to a domestic industry authorizes the domestic authorities to impose a definitive countervailing duty on subsidized imports.<sup>451</sup>

4.637 Article 5 is entitled "*Initiation and Subsequent Investigation*." There is nothing in the text of Article 5 that suggests that the provisions of that article, including Article 5.8, apply to anything other than the investigation phase of an anti-dumping proceeding. Indeed, the first sentence of Article 5.8 makes it clear that Article 5.8, like Article 5 in general, deals only with the investigation phase.<sup>452</sup>

4.638 Korea's only textual argument is that the word "cases" in the second sentence of Article 5.8 refers "to the review stage of proceedings as well as the investigation stage." In other words, according to Korea, the word "cases," appearing in an article that, by its terms, deals only with "investigations," means "investigations and reviews."

4.639 Korea must violate basic principles of treaty interpretation in order to reach this result. According to Article 31(1) of the *Vienna Convention*, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The first sentence of Article 5.8 also uses the word "case," and in that sentence it is very clear that "case" means "investigation." Moreover, the ordinary meaning of the term "case" is: "[a]n instance of the existence or

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<sup>451</sup> WT/DS/22/AB/R, DSR 1997:I, 167, at 176. A similar distinction was recognized under the 1979 AD Agreement. See *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel adopted 30 October 1995, para. 585, in which the panel stated:

Those adjustments or allowances mentioned by Brazil were only relevant to the stage of investigation of dumping or injury, whereas the "constructive remedies" in the context of Article 13 only applied once an investigation was completed. Accordingly, such adjustments or allowances would not be "constructive remedies provided for by this Code". Equally, a determination of negligible margins of dumping or low volume of market share, was required, pursuant to Article 5:3, to be made at a stage of the investigation process prior to the time at which parties were obliged to consider the possibility of constructive remedies; consequently, they should not be considered as "constructive remedies provided for by this Code" either.

<sup>452</sup> The first sentence of Article 5.8 provides as follows: "[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

occurrence of something."<sup>453</sup> The United States previously has established that the context of Article 5.8 is "investigations." Putting the ordinary meaning of "cases" and the context together, it is clear that the second sentence of Article 5.8 was intended to refer to investigations where there was the existence or occurrence of a *de minimis* dumping margin.

4.640 Korea cites the fact that the EU and Japan apply a 2 percent *de minimis* standard to both investigations and reviews. This reference is legally irrelevant. While Article 31(3)(b) of the *Vienna Convention* permits a consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," unilateral policy decisions made by only two signatories to the AD Agreement for purposes of their domestic legislation do not constitute "subsequent practice" within the meaning of Article 31.3(b).<sup>454</sup>

4.641 Finally, Korea's discussion of the negotiating history of Article 5.8 is both legally irrelevant and contradicts Korea's own position. Korea's discussion is legally irrelevant because under Article 32 of the *Vienna Convention*, recourse may be had to the preparatory work of a treaty "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." The application of Article 31 to Article 5.8 makes it clear that the 2 percent *de minimis* standard applies only to investigations, and not to reviews. Thus, the meaning of Article 5.8 is not "ambiguous or obscure." Moreover, this result is not "manifestly absurd or unreasonable," and Korea has not even alleged that it is.

4.642 Moreover, as a factual matter, the drafting history discussed by Korea contradicts its own position. Korea refers to the so-called "Carlisle I" draft, which would have expanded the coverage of Article 5.8 to the entire "Code." Korea correctly notes that the United States opposed this expansion and that, as a result, the ultimate language of Article 5.8 repeated the formulation in the 1979 AD Agreement. Thus, contrary to what Korea alleges, the drafting history shows that the drafters declined to apply the 2 percent *de minimis* standard to anything other than investigations.

4.643 In light of the above, the Panel should dismiss Korea's claim and find that the United States' application of a 0.5 percent *de minimis* standard to the assessment and review phase does not violate US obligations under Article 5.8 of the AD Agreement.

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<sup>453</sup> Webster's II New Riverside University Dictionary, 234 (1984).

<sup>454</sup> See *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, Report of the Panel adopted 30 October 1995, para. 497 ("The practices of three of the total signatories to an Agreement did not constitute subsequent practice in the application of the treaty in accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties.").

(c) Rebuttal arguments made by Korea

4.644 **Korea** makes the following arguments in rebuttal to the United States responses:

4.645 The United States seeks to make much of the facts that Article 5 of the AD Agreement is entitled "Initiation and Subsequent Investigation" and that the Appellate Body in *Brazil - Coconut* recognized there were two distinct phases in an anti-dumping proceeding-investigation and reviews.

4.646 The second US fact is self-evident, uncontested and irrelevant. The issue is whether the mere fact that the *de minimis* threshold appears in Article 5 is dispositive. It is not.

4.647 As to the first "fact," Article 5.9 clearly is not limited to the investigation stage. It provides that "[a]n anti-dumping *proceeding* shall not hinder the procedures of customs clearance." (Emphasis added by Korea.) Thus, Article 5 is not limited to investigations, its title notwithstanding.

4.648 Also, the *de minimis* threshold set out in the second sentence of Article 5.8 uses the generic word "cases." Granted, as a matter of drafting, the use of "proceedings" (as in Article 5.9), rather than the retention of the more amorphous "cases" (as originally used in the comparable provision (Article 5.3) of the Tokyo Round Anti-Dumping Code), would have been preferable. However, US argument to the contrary notwithstanding, "cases" as used in Article 5.8 cannot be interpreted textually to refer only to the investigation stage of an anti-dumping proceeding.

4.649 The purpose of the AD Agreement and of GATT Article VI-to define the circumstances in which and procedures by which a Member legitimately can apply an anti-dumping measure-also supports finding that a good-faith interpretation of the *de minimis* provision must apply the provision to all phases of an anti-dumping proceeding. There is no logical reason why the *de minimis* level during the review stage of a proceeding should be different than at the investigation stage. Moreover, any other holding would allow a Member such as the United States to set the review threshold as low as it wished.

4.650 Application of the *de minimis* threshold to the review stage of a proceeding thus is supported by the interpretive rules of Article 31 of the *Vienna Convention*. According to Article 32 of the *Vienna Convention*, recourse to the preparatory work of the AD Agreement and the circumstances of its conclusion is permissible to confirm the meaning of the *de minimis* provision. Alternatively, recourse to supplemental means of interpretation would be permissible if the Panel were to find either that limiting the threshold to the investigation stage would lead to an unreasonable, indeed manifestly absurd, result, or that the meaning of "cases" is ambiguous.

4.651 The negotiating history shows clearly that the US effort to limit the provision to investigations failed. The arguments to the contrary in the US first submission do not square with the facts. The Tokyo Round Code used the generic word "cases." Attempts in the "Carlisle I" and "Carlisle II" drafts to specify more clearly the scope of the provision were unsuccessful. Therefore, in

the "Dunkel Draft," as in the text of Article 5.8 appearing in the approved legal text, the Tokyo Round Code's reference to "cases" was retained.

4.652 Thus, the text of Article 5.8, rules of treaty interpretation, the Uruguay Round negotiating history and common sense dictate that the 2.0 percent *de minimis* threshold apply to anti-dumping reviews. Because Section 351.106(c) of the DOC's regulations<sup>455</sup> sets the *de minimis* threshold for administrative reviews at 0.5 percent, the United States is in breach of its WTO obligations.

(d) Rebuttal arguments made by the United States

4.653 The **United States** makes the following arguments in rebuttal:

4.654 In its first written submission to the Panel, the United States established that the text and context of Article 5.8 demonstrate that this provision applies only to initial anti-dumping investigations, and not to reviews of definitive anti-dumping duties, such as the underlying administrative review of the order on *DRAMS from Korea*. There is one additional contextual point that further confirms the fact that Article 5.8 applies only to investigations.

4.655 Korea's argument, as the United States understands it, is that due to the presence of the word "cases" in the second sentence of Article 5.8, Article 5.8 applies to an anti-dumping proceeding as a whole, and not merely to the initial investigatory phase. The natural consequence of this argument is that whenever the authorities find a dumping margin of less than 2 percent, then they must consider the margin *de minimis* and immediately terminate the case (or, in US terminology, "revoke" the anti-dumping order).

4.656 However, this result is at odds with Article 11.3, footnote 22. That provision says that in countries with a retrospective assessment system, such as the United States, a finding "that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." In other words, under footnote 22, a finding of a zero dumping margin does *not* require termination of an anti-dumping order, even though such a dumping margin would be considered *de minimis* under Article 5.8.

4.657 Put simply, if Article 5.8 means what Korea says it means, then footnote 22 is a nullity. If Article 5.8 applies to more than initial investigations, then any time an authority administering a retrospective system finds a dumping margin of less than 2 percent, under Article 5.8 it must immediately terminate the case (or revoke the order). Under Korea's interpretation, one never gets to footnote 22, because one of the events that triggers its application (a finding of a zero dumping margin) automatically results in the termination of the duty, and there is nothing left to do under Article 11.

4.658 Obviously, this construction violates the principle of "effectiveness" of treaty interpretation which. Therefore, the United States respectfully submits that

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<sup>455</sup> See 62 Fed. Reg. 27296, 27382-83 (19 May 1997) (Ex. ROK-49).

the Panel must find that Article 5.8 only applies to initial anti-dumping investigations. Such an interpretation renders both Article 5.8 and Article 11.3 (footnote 22) effective, and, as a result, conforms to accepted rules of treaty interpretation.

4.659 Finally, although the text and context of Article 5.8 make clear that Article 5.8 applies only to investigations, Korea has suggested that it somehow makes no sense to have different *de minimis* standards apply to different phases of an anti-dumping proceeding. To the contrary, there is a very good reason for having different standards.

4.660 Injurious dumping is a pernicious trade practice which the international community has "condemned" for over fifty years.<sup>456</sup> Dumping is defined as the amount by which the normal value of a like product sold in the ordinary course of trade exceeds the export price of the product.<sup>457</sup> Any excess, however small, constitutes dumping.

4.661 In the Uruguay Round of multilateral trade negotiations, however, the drafters recognized that for purposes of investigations, a higher (more forgiving) standard of "actionable dumping" (which is what a *de minimis* standard is) was appropriate. This recognition is consistent with the fact that the calculation of a dumping margin necessarily involves scores (and in some cases, hundreds) of discrete factual determinations, some of which may involve situations where the outcome is close and the exercise of human judgment is unavoidable. For example, in the case of an adjustment to normal value, it may be a "close call" as to whether a particular expense is direct or indirect or whether the amount of the adjustment has been properly documented. This inevitable aspect of the anti-dumping process arguably makes it unfair to subject parties involved (perhaps for the first time) in an initial investigation of dumping to an overly rigorous standard of actionable dumping.

4.662 Following an investigation, however, an exporter knows how the anti-dumping rules apply to its particular factual situation. Therefore, it is appropriate to hold the exporter to a more demanding *de minimis* standard, because the exporter is in a position to avoid dumping margins of 1-2 percent. Thus, contrary to Korea's assertions, there is a sound basis for apply different *de minimis* standards to different phases of an anti-dumping proceeding.

4.663 Finally, Korea's reliance on the negotiating history of Article 5.8 remains misplaced. First of all, it is clear from the plain text (and context) of Article 5.8 that it applies only to investigations. Thus, reliance on negotiating history to reach a different interpretation is precluded by the *Vienna Convention*. Secondly, as discussed in our first written submission, that negotiating history actually confirms the position of the United States. Specifically, it shows that there was an attempt to render the definition of *de minimis* in Article 5.8 applicable to more than just the investigatory phase. However, this attempt was not successful.

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<sup>456</sup> GATT 1994, Art. VI:1.

<sup>457</sup> *Ibid.* See also AD Agreement, Art. 2.

4.664 At the second meeting of the Panel, the **United States** made the following additional rebuttal arguments:

4.665 Korea notes that Article 5.9 of the AD Agreement uses the word "proceeding." According to Korea, this proves that Article 5 is not limited to investigations, and Korea implies that this means that Article 5.8 is not limited to investigations.

4.666 First, it is by no means clear that the term "proceeding," as used in Article 5.9, refers to something other than an "investigation." The term "proceeding" is simply not defined in the AD Agreement.

4.667 However, even assuming that Korea is correct in its assertion that the word "proceeding," as used in Article 5.9, encompasses both the investigatory and post-investigatory phases, this fact would seem to undercut Korea's argument, because it suggests that the drafters knew what terminology to use when they sought to make a particular right or obligation extend beyond the investigation phase. Thus, if Korea's definition of "proceeding" is correct, the fact that the drafters declined to use this term in Article 5.8 demonstrates that the drafters intended that Article 5.8 apply only to investigations.

4.668 Indeed, in its rebuttal submission, Korea concedes that it "would have been preferable" if the drafters had used the word "proceeding" in Article 5.8. Certainly, from Korea's perspective, it would have been preferable if the drafters had done so, because it would have given Korea a textual basis for its claim. Unfortunately for Korea, the drafters did not.

#### *J. Inconsistency of the Remedy Sought by Korea*

##### *(a) Submission by the United States*

4.669 Regarding the findings and recommendations requested by Korea, contained in Section III.A of this report. The **United States** submits that the specific remedy sought by Korea is inconsistent with established panel practice. The following are the arguments of the United States in support of this submission:

4.670 In its first submission, Korea has asked this Panel to recommend that the United States "revoke the anti-dumping duty order on *DRAMs from Korea*." In so doing, Korea has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Korea on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a general recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its anti-dumping measure into conformity with its obligations under the AD Agreement.

4.671 The specific remedy<sup>458</sup> of revocation requested by Korea goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country "bring its measures . . . into conformity with GATT."<sup>459</sup> This is true not only for GATT disputes, in general, but for disputes involving the imposition of anti-dumping (and countervailing duty) measures, in particular.<sup>460</sup>

4.672 This well-established practice is codified in Article 19.1 of the DSU, which provides:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. (footnotes omitted).

4.673 Indeed, in the first case to work its way through the WTO dispute settlement system, the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.<sup>461</sup>

4.674 The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that "[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter," and Article 3.7 provides that "[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred." To this end, Article 11 of the DSU directs panels to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution." Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, a general panel recommendation that directs a

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<sup>458</sup> By "specific" remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

<sup>459</sup> See, e.g., *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, Report of the Panel adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States indicates that in excess of 100 prior panel reports in which panels have made recommendations using similar language.

<sup>460</sup> See, e.g., *Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korean Resins*, ADP/92, para. 302.

<sup>461</sup> In *Reformulated Gasoline*, the Appellate Body recommended "that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*." WT/DS2/AB/R, p. 29. The panel in that case issued a virtually identical recommendation. WT/DS2/R, Report of the Panel, as modified by the Appellate Body, adopted 20 May 1996, para. 8.2. Even more noteworthy is *Japan Taxes*, in which the Appellate Body recommended "that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994." WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 97, at 123.

party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.<sup>462</sup>

4.675 Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

4.676 In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.<sup>463</sup> Thus, while it is appropriate for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

4.677 The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

4.678 In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Therefore, regardless of how the merits of this case are decided, Korea's request for revocation of the anti-dumping order on DRAMs should be rejected.

(b) *Rebuttal response by Korea*

4.679 **Korea** makes the following arguments in rebuttal to the United States submission:

4.680 The United States erroneously asserts that Korea impermissibly requests the Panel to recommend a "specific remedy."

4.681 There are two sentences in Korea's remedy request. In the first, Korea respectfully requests the Panel to find that the United States is not in conformity

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<sup>462</sup> As noted by Prof. Jackson:

One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than "punishment" or imposing a "sanction" or obtaining "compensation." This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the "withdrawal" of a measure inconsistent with the General Agreement.

John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted) (Ex. USA 82).

<sup>463</sup> Indeed, Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

with its obligations under Articles I, VI and X of the General Agreement and Articles 2, 5.8, 6, 11.1 and 11.2 of the AD Agreement. This is in complete compliance with the so-called "general remedy" recommendation that is mandated by Article 19.1 of the DSU, which provides that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that Agreement." (Footnotes omitted.)

4.682 In the second sentence of its remedy request, Korea "further requests that the Panel *suggest* that the United States take the following actions to comply with its obligations under the WTO Agreements . . ." This language was carefully crafted to conform with the second sentence of Article 19.1 of the DSU, which provides:

In addition to its recommendations, the panel or Appellate Body *may suggest ways* in which the Member concerned could implement the recommendations. (Emphasis added by Korea.)

4.683 In short, Korea is asking the Panel: (a) to make the "general remedy" recommendation called for by the first sentence Article 19.1 of the DSU; and (b) to suggest ways the US could implement that recommendation, as permitted by the second sentence of Article 19.1.

## V. INTERIM REVIEW

5.1 On 6 November 1998, Korea and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report issued to parties on 23 October 1998.

### A. *Comments by Korea*

5.2 Korea requested a number of changes to the Panel's description of Korea's main arguments. Certain of these proposed changes were made by the Panel.

5.3 The Panel corrected typographical errors identified by Korea in Section VI of the report.

5.4 At the request of Korea, we corrected our description of the period of the first administrative review at paragraph 6.2. In light of this correction, we amended references in the findings to the period of time during which no dumping was found.

5.5 With regard to paragraph 6.55, Korea asserted that the Panel made a conclusory assertion with no explicit indication of the reasons supporting the finding. Korea asked the Panel to clarify the reasons why the *Final Results Third Review* were inconsistent with Article 11.2 of the AD Agreement. The Panel made a change to this paragraph.

5.6 With regard to paragraph 6.92, Korea asked the Panel to issue findings regarding GATT 1994 Articles I and X, to avoid the situation described by the Appellate Body in *Australia - Measures Affecting Importation of Salmon*.<sup>464</sup> Korea stated that in that case the Appellate Body found that the panel had erred in law by misapplying the doctrine of judicial economy. We note the Appellate Body's statement in *United States - Shirts and Blouses* that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".<sup>465</sup> We also note that this statement was referred to by the Appellate Body in *Salmon*. In *Salmon*, the Appellate Body also stated that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members' [consistent with Article 21.1 of the DSU]." Having found that section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review* based on that provision, are inconsistent with Article 11.2 of the AD Agreement, we consider that we have resolved "the matter at issue" and "enable[d] the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by [the United States] with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'." For these reasons, we consider that it is not necessary for us to examine Korea's claims under Articles I and X of GATT 1994.

*B. Comments by the United States*

5.7 With regard to paragraphs 6.42 to 6.50, the United States expressed the concern that certain phrases used by the Panel could be taken out of context. The United States asked the Panel to ensure a clear distinction between the type of standard that administering authorities must apply in order to satisfy the "necessary" standard under Article 11.2, and the quantum (and nature) of the evidence that must support conclusions under such a standard. The Panel made some changes to paragraphs 6.43, 6.47 and 6.50.

5.8 The Panel corrected a typographical error identified by the United States in Section VI of the report.

5.9 With respect to the second sentence of paragraph 6.50, the United States proposed replacing the word "likelihood" with "necessity". The Panel did not make this change.

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<sup>464</sup> Adopted 20 October 1998, WT/DS18/AB/R, hereinafter "*Salmon*".

<sup>465</sup> Adopted 23 May 1997, WT/DS33/AB/R, DSR 1997:I, 323, at 340.

## VI. FINDINGS

### A. Introduction

6.1 This dispute arises out of the US Department of Commerce ("DOC") 24 July 1997 Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea ("*Final Results Third Review*").<sup>466</sup>

6.2 An anti-dumping order was imposed on DRAMs from Korea ("*DRAMs from Korea*") on 10 May 1993,<sup>467</sup> following an investigation initiated pursuant to an application filed on 22 April 1992 by Micron Technologies, Inc. ("Micron"). Two administrative reviews were initiated by the DOC on 15 June 1994 and 15 June 1995, covering the periods 29 October 1992 to 30 April 1994 and 1 May 1994 to 30 April 1995 respectively. The DOC found that LG Semicon Co., Ltd. ("LGS") and Hyundai Electronics Industries, Inc. ("Hyundai") (the "respondents") had not dumped in either period of review.

6.3 The DOC initiated a third annual review on 25 June 1996, covering the period 1 May 1995 to 30 April 1996. At the same time, the DOC initiated a revocation review pursuant to a request from the respondents under section 353.25(a)(2) of the DOC regulations to revoke *DRAMs from Korea* in part. On 24 July 1997, the DOC issued its *Final Results Third Review*, which contained a determination not to revoke *DRAMs from Korea* in part, and a finding that the respondents had not dumped during the period of the third administrative review.

6.4 On 14 August 1997, Korea requested consultations with the United States concerning the DOC's determination not to revoke *DRAMs from Korea*.<sup>468</sup> Consultations were requested under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("Dispute Settlement Understanding", or "DSU") and Article 17.3 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). Consultations were held in Geneva on 9 October 1997, but the parties failed to reach a mutually satisfactory solution.

6.5 On 6 November 1997, Korea requested the establishment of a panel<sup>469</sup> to examine *inter alia* the consistency of (1) section 353.25(a)(2)(ii) and (iii) of the DOC regulations, and (2) the DOC's determination not to revoke, with various provisions of the AD Agreement. This Panel was established on 16 January 1998, with standard terms of reference.<sup>470</sup>

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<sup>466</sup> 62 Fed. Reg. 39809 (24 July 1997).

<sup>467</sup> 58 Fed. Reg. 27520 (10 May 1993).

<sup>468</sup> WT/DS99/1.

<sup>469</sup> WT/DS99/2.

<sup>470</sup> WT/DS99/3.

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*B. Preliminary Issues*

6.6 The United States initially raised three preliminary objections. First, the United States asserted that claims raised by Korea under Articles 1, 2, 3 and 17 of the AD Agreement were not properly before the Panel (*i.e.*, were inadmissible) because they were not identified in Korea's request for consultations. Second, the United States asserted that Korea's Article 1 claim was inadmissible because it was not included in Korea's request for establishment of a panel. Third, the United States argued that product scope claims raised by Korea under Articles 2, 3 and 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement, were inadmissible because they concerned a product scope determination that is not subject to the disciplines of the AD Agreement.

6.7 In response to questions from the Panel, Korea stated that it "intended to advance no arguments under Article 1",<sup>471</sup> and that it "does not take the position that the United States 'violated' Article 17.6 ...".<sup>472</sup> We therefore consider that Korea has not raised any claims under Articles 1 and 17.6 of the AD Agreement, and do not consider it necessary to rule on the US preliminary objections concerning these issues.

6.8 In response to a question from the Panel, the United States asserted that "a Member should be permitted to refer a claim to a panel if it was actually raised during consultations, even though it may not have been included in the written request for consultations."<sup>473</sup> The United States also asserted that the parties to the present case actually consulted on Korea's claims under Articles 2.1, 2.2, 2.2.1.1 and 3.1 of the AD Agreement. In its second submission, the United States repeated its request for the Panel to find Korea's claims under Articles 1, 2, 3 and 17 of the AD Agreement inadmissible, "with the exception of claims under Articles 2.1, 2.2, 2.2.1.1, and 3.1".<sup>474</sup> We therefore consider that the United States has withdrawn its preliminary objection to Korea's Article 2.1, 2.2, 2.2.1.1 and 3.1 claims, and do not consider it necessary to rule on this matter.

6.9 Furthermore, Korea stated at the second meeting with the Panel that it is not raising separate claims under Article 18.4 of the AD Agreement or Article XVI:4 of the WTO Agreement.<sup>475</sup> Accordingly, it is not necessary for us to rule on the US preliminary objection concerning such claims.

6.10 In light of the above, we consider that the only preliminary issue before us is the admissibility of Korea's claims under Articles 2 and 3 of the AD Agreement concerning product scope. More particularly, the outstanding preliminary issue concerns the admissibility of Korea's claim that the United States violated Articles 2 and 3 of the AD Agreement by "includ[ing] within the scope of administrative reviews products that did not even exist at the time of the

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<sup>471</sup> See para.4.20, *supra*.

<sup>472</sup> See para.4.22, *supra*.

<sup>473</sup> See para.4.15, *supra*.

<sup>474</sup> See para.3.2(a), *supra*.

<sup>475</sup> See para.4.43, *supra*.

investigation (indeed, products made using technologies and machines that did not even exist at the time of the investigation)." The United States argues that this claim is inadmissible because, in accordance with Article 18.3 of the AD Agreement, there is no product scope determination that is subject to the AD Agreement.

6.11 Article 18.3 provides for the application of the AD Agreement to:

"investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement."

6.12 We note that the WTO Agreement entered into force for the United States on 1 January 1995.

6.13 We recall that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the AD Agreement, "in accordance with customary rules of interpretation of public international law". The rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), have "attained the status of a rule of customary or general international law".<sup>476</sup> Article 31.1 of the Vienna Convention provides:

"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".

6.14 In our view, pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the AD Agreement applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the AD Agreement for the Member concerned ("post-WTO reviews").<sup>477</sup> However, we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to the post-WTO review. In other words, the scope of application of the AD Agreement is determined by the scope of the post-WTO

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<sup>476</sup> *United States - Standards for Reformulated and Conventional Gasoline* (hereinafter *Gasoline*), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 16.

<sup>477</sup> We note that this approach is in line with that adopted by the panel in *Desiccated Coconut* in respect of Article 32.3 of the SCM Agreement, which is virtually identical to Article 18.3 of the AD Agreement. That panel stated that "Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to reviews of existing measures initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply" (*Brazil - Measures Affecting Desiccated Coconut*, WT/DS22/R, para. 230, upheld by the Appellate Body in WT/DS22/AB/R, adopted on 20 March 1997).

review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. By way of example, a pre-WTO injury determination does not become subject to the AD Agreement merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping.

6.15 The principal issue in this dispute, therefore, is whether the DOC's 1993 product scope determination was subject to review in the third administrative review.<sup>478</sup> Also at issue, however, is whether US "administrative reviews", *i.e.*, Article 9.3.1 duty assessments, constitute "reviews" within the meaning of Article 18.3 of the AD Agreement. In the present case, we note that both parties consider that Article 9.3.1 duty assessment procedures constitute "reviews" within the meaning of Article 18.3.<sup>479</sup> For the purpose of our analysis in this case, therefore, we shall proceed on the assumption that Article 9.3.1 duty assessment procedures do constitute "reviews" within the meaning of Article 18.3.

6.16 There is nothing in the *Final Results Third Review* to indicate that the third administrative review included a review of the 1993 *DRAMs from Korea* product scope determination. Although the *Final Results Third Review* contain a section entitled "Scope of the Review",<sup>480</sup> this does not by itself mean that the 1993 product scope determination was subject to review. To the contrary, the product scope of the *DRAMs from Korea* order, and thus of the third administrative review, was determined once and only once in the original pre-WTO investigation, well before the entry into force of the WTO Agreement for the United States on 1 January 1995. The product scope of the order was not subject to any re-examination in the third administrative review, nor was any determination regarding product scope made at that time. In effect, therefore, Korea is asking the Panel to review the WTO-consistency of an anti-dumping measure with regard to an aspect governed solely by a pre-WTO determination.

6.17 Thus, we find that the scope of the third administrative review set forth in the *Final Results Third Review* did not include the 1993 product scope determination. Proceeding on the basis of the parties' agreement that Article 9.3.1 duty assessments constitute "reviews" within the meaning of Article 18.3 of

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<sup>478</sup> Korea's claim appears to include all three post-WTO administrative reviews initiated by the DOC (see para. 4.612, *supra*). However, we note that only the third administrative review, *i.e.*, the *Final Results Third Review*, is included in Korea's request for establishment. In line with consistent WTO panel and Appellate Body practice, the two preceding administrative reviews therefore fall outside the Panel's terms of reference.

<sup>479</sup> In response to questions from the Panel, both parties confirmed their view that administrative reviews (*i.e.*, Article 9.3.1 duty assessment procedures) constitute "reviews" within the meaning of Article 18.3. The United States also asserted that "the third administrative review ... is subject to the AD Agreement by virtue of Article 18.3." (See para. 4.38, *supra*.)

<sup>480</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39809.

the AD Agreement (an issue on which we do not make any findings or conclusions), the 1993 product scope determination was not part of that "review" and is therefore not rendered subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement. For this reason, Korea's product scope claim concerning Articles 2 and 3 of the AD Agreement is not admissible.

*C. Consistency of Section 353.25(a)(2) (ii) and (iii) with Article 11.2 of the AD Agreement*

6.18 The determination not to revoke in part *DRAMs from Korea* was based on section 353.25(a)(2) of the DOC regulations.<sup>481</sup> Section 353.25(a)(2) of the DOC regulations provides that:

"The Secretary may revoke an order in part if the Secretary concludes that:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years;

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and

(iii) For producers or resellers that the Secretary previously has determined to have sold the merchandise at less than foreign market value, the producers or resellers agree in writing to their immediate reinstatement in the order, as long as any producer or reseller is subject to the order, if the Secretary concludes under §353.22(f) that the producer or reseller, subsequent to the revocation, sold the merchandise at less than foreign market value."

6.19 Korea has raised a number of claims concerning the consistency of section 353.25(a)(2)(ii) and (iii) with Article 11.2 of the AD Agreement.<sup>482</sup>

6.20 Article 11.2 of the AD Agreement provides:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.\* Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or

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<sup>481</sup> 19 C.F.R. §353.25(a)(2) (1997).

<sup>482</sup> We recall that the consistency of section 353.25(a)(2)(i) of the DOC regulations with Article 11.2 of the AD Agreement is not at issue (see note 50, *supra*).

both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

\* A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

6.21 In interpreting Article 11.2 of the AD Agreement, we bear in mind that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the AD Agreement, "in accordance with customary rules of interpretation of public international law". We recall that the rules of treaty interpretation set forth in Article 31 of the Vienna Convention have "attained the status of a rule of customary or general international law".<sup>483</sup> We note that Article 31.2 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, the entire text of the AD Agreement may be relevant to a proper interpretation of any particular provision thereof.

6.22 In examining Korea's claims, we also bear in mind the standard of review set forth in Article 17.6(ii) of the AD Agreement:

"the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

6.23 In addressing Korea's claims, the Panel is required to examine:

1. whether Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset; and
2. whether sub-paragraphs (ii) and (iii) of section 353.25(a)(2) are consistent with Article 11.2.

*1. Whether Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset dumping" where there is no present dumping to offset*

6.24 Korea argues that Article 11.2 of the AD Agreement contains procedures to ensure that a duty is not applied when it is no longer "necessary to offset dumping" that is causing injury, *e.g.*, where an exporter is found not to have been dumping.<sup>484</sup> We understand Korea to claim that Article 11.2 of the AD Agreement precludes an anti-dumping duty being deemed "necessary to offset

<sup>483</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 16.

<sup>484</sup> See para.4.93, *supra*.

dumping" where there is no present dumping to offset, and that Article 11.2 requires duties to be revoked as soon as there is a finding of "no dumping".<sup>485</sup>

6.25 Having regard to the rules of treaty interpretation contained in Article 31.1 of the Vienna Convention, we consider that the following textual and contextual analysis of Article 11.2 of the AD Agreement is appropriate in resolving this issue.

6.26 First, we note that the second sentence of Article 11.2 refers to an examination of "whether the continued imposition of the duty is necessary to offset dumping." We note further that this sentence is expressed in the present tense. In addition, the second sentence of Article 11.2 does not explicitly include any reference to dumping being "likely" to "recur", as is the case with the injury review envisaged by that sentence.

6.27 However, the second sentence of Article 11.2 requires an investigating authority to examine whether the "continued imposition" of the duty is necessary to offset dumping. The word "continued" covers a temporal relationship between past and future. In our view, the word "continued" would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset *present* dumping. Thus, the inclusion of the word "continued" signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.

6.28 Furthermore, with regard to injury, Article 11.2 provides for a review of "whether the injury would be likely to continue or *recur* if the duty were removed or varied" (emphasis supplied). In conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (*i.e.*, future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a

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<sup>485</sup> In the US, an anti-dumping order does not of itself result in the levying/assessment of duties, but sets a rate of deposit for estimated duties to be paid on future imports. In the anniversary month of every order, interested parties may request an "administrative review" of the anti-dumping order (*i.e.*, an Article 9.3.1 duty assessment procedure). In an administrative review, the DOC calculates the anti-dumping duties actually owed on imports during the previous 12 months, and sets a new deposit rate for estimated duties on future imports. If the actual duties levied fall short of the deposit rate in the order, the excess is repaid. If the actual duties levied exceed the deposit rate, the additional amount is collected. Despite the imposition of an anti-dumping *order*, therefore, it is possible that no anti-dumping *duties* are actually levied. In cases where no anti-dumping duties are levied, one could query whether Article 11.2, which concerns the imposition of a "duty", applies. However, neither party disputes the application of Article 11.2 in such circumstances. In particular, in response to the Panel's question: "Is the United States of the view that an anti-dumping duty is not being 'imposed' within the meaning of Article 11 in cases where no duties are collected as a result of determinations in administrative reviews that there has been no dumping?", the United States asserted that "a definitive anti-dumping duty (or 'order' in U.S. parlance) is 'imposed' within the meaning of Art. 11 even when no duties are actually being 'assessed' (or collected) ...". Korea concurred orally with this view, as it applies in this case. For the purpose of our analysis in this case, therefore, we proceed on the assumption that Article 11.2 does apply.

commensurately prospective timeframe. To do so, the investigating authority would first need to have established a status regarding the prospects of dumping. For these reasons, we do not agree that Article 11.2 precludes *a priori* the justification of continued imposition of anti-dumping duties when there is no present dumping.

6.29 In addition, we note that there is nothing in the text of Article 11.2 of the AD Agreement that explicitly limits a Member to a "present" analysis, and forecloses a prospective analysis, when conducting an Article 11.2 review.

6.30 Turning to the context of Article 11.2, we consider that Article 11.3 of the AD Agreement is particularly relevant in giving support for and reinforcing this interpretation. Article 11.3 provides:

"Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.\* The duty may remain in force pending the outcome of such a review."

\* When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

6.31 We note that, with regard to dumping, the "sunset provision" in Article 11.3 of the AD Agreement envisages *inter alia* an examination of whether the expiry of an anti-dumping duty would be likely to lead to "continuation or recurrence"<sup>486</sup> of dumping. If, as argued by Korea, an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility (explicitly envisaged by Article 11.3) of the expiry of that duty causing dumping to *recur* could never arise. This is because the reference to "expiry" in Article 11.3 assumes that the duty is still in force, and the reference to "recurrence" of dumping assumes that dumping has ceased, but may "recur" as a result of revocation. Korea's textual interpretation of Article 11.2 would effectively exclude the possibility of an Article 11.3 review in circumstances where dumping has ceased but the duty remains in force. Korea's interpretation therefore renders part of Article 11.3 ineffective. As stated by the Appellate Body in *Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or

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<sup>486</sup> Emphasis supplied.

inutility".<sup>487</sup> An interpretation of Article 11.2 which renders part of Article 11.3 meaningless is contrary to the customary or general rules of treaty interpretation, and thus should be rejected.

6.32 Furthermore, Korea's argument that Article 11.2 requires the immediate revocation of an anti-dumping duty in case of a finding of "no dumping" (e.g., when a retrospective assessment finds that no duty is to be levied) is also inconsistent with note 22 of the AD Agreement. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, "a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty". If Korea's interpretation of Article 11.2 were accurate, then an investigating authority would be obligated under Article 11.2 to terminate an anti-dumping duty upon making such a finding, and note 22 would be meaningless. In our view, this confirms a finding that the absence of present dumping does not in and of itself require the immediate termination of an anti-dumping duty pursuant to Article 11.2.

6.33 We have also taken into account the basic operation of the AD Agreement more generally. Under the AD Agreement, a Member is entitled to impose anti-dumping duties with prospective effect on the basis of an examination of past dumping during a recent period of investigation, provided that it creates a duty assessment mechanism under Article 9.3 to ensure that the amount of the anti-dumping duty does not exceed the margin of dumping.<sup>488</sup> As the basic operation of the AD Agreement is intrinsically prospective, it appears to us that any departure from this approach would be explicitly provided for, which, as noted in para. 6.29 above, is manifestly not the case. Thus, the Panel finds that, absent any such explicit provision, the AD Agreement does not require the automatic revocation of anti-dumping duties as soon as dumping ceases after the date of imposition of the duties.

6.34 In light of the above, the Panel rejects the claim that Article 11.2 of the AD Agreement requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping.<sup>489</sup>

2. *Are sub-paragraphs (ii) and (iii) of section 353.25(a)(2) consistent with Article 11.2?*

6.35 Korea claims that both the section 353.25(a)(2)(ii) "not likely" test and the section 353.25(a)(2)(iii) certification requirement violate Article 11.2 of the

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<sup>487</sup> *Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21.

<sup>488</sup> It has long been recognised in the GATT system that such an approach, sometimes referred to as a "pre-selection system", is permissible. See, for example, the Second Report on Anti-Dumping and Countervailing Duties, adopted on 27 May 1960, BISD 9S/194, at 195.

<sup>489</sup> Of course, the absence of dumping and the length of time that situation has existed may well be relevant to the issue of the prospect of recurrence of dumping.

AD Agreement. We will address the consistency of both provisions with Article 11.2 in turn.

(a) Consistency of the section 353.25(a)(2)(ii) "not likely" criterion with Article 11.2

6.36 Korea claims that the section 353.25(a)(ii) "not likely" criterion is inconsistent with Article 11.2 of the AD Agreement. Korea argues *inter alia* that Article 11.2 only applies a "likely" test in the context of injury, and not dumping. Korea argues that, even assuming the Article 11.2 "likely" test were to apply in the context of dumping as well as injury, "the United States has pushed the text of Paragraph 2 still further without support. The United States has turned the 'likely' standard on its head, transmogrifying it to 'not likely', ...."

6.37 We recall that section 353.25(a)(2) of the DOC regulations provides in relevant part that:

"The Secretary may revoke an order in part if the Secretary concludes that:

(...)

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value;

(...)

6.38 We note that in the *Final Results Third Review*, the DOC states that it "must be satisfied that future dumping is not likely in order to revoke an order. In this case, based upon the evidence in the record, this standard has not been met and, therefore, we conclude that there is a need for the order to remain in place".

<sup>490</sup> On the basis of the clear evidence of record, therefore, it is apparent that section 353.25(a)(ii) is in fact a "not likely" criterion, such that the only determination made under section 353.25(a)(2)(ii) is whether recurrence of dumping is "not likely". If the DOC fails to satisfy itself that recurrence of dumping is "not likely", it will find that there is a need for the continued imposition of the anti-dumping duty.

6.39 In light of the above, we must consider whether the section 353.25(a)(2)(ii) "not likely" criterion is, as claimed by Korea, inconsistent with the terms of Article 11.2. In particular, we must examine whether the terms of Article 11.2 preclude the continued imposition of anti-dumping duties on the basis that an authority fails to satisfy itself that recurrence of dumping is "not likely". In order to do so, we must first examine the relationship between Articles 11.2 and 11.1. In our view, the references in Article 11.2 to "the need for the continued imposition of the duty" and "whether the continued imposition of the duty is necessary to offset dumping" can only be understood in a meaningful manner when read in conjunction with the obligation in Article 11.1, whereby:

<sup>490</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39819.

"An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

6.40 Both parties agree that Article 11.2 of the AD Agreement implements Article 11.1. Both parties have argued that Article 11.1 of the AD Agreement contains a general rule that anti-dumping duties shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Both parties have also argued that the general rule contained in Article 11.1 is implemented through Article 11.2 (and Article 11.3).<sup>491</sup>

6.41 We agree with the parties that, by virtue of Article 11.1 of the AD Agreement, an anti-dumping duty may only continue to be imposed if it remains "necessary" to offset injurious dumping. We are of the view that Article 11.1 contains a general necessity requirement, whereby anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping. That anti-dumping duties "shall remain in force only as long as and to the extent necessary" to counteract injurious dumping is therefore an unambiguous requirement of Article 11.1. We also agree with the parties that the application of the general rule in Article 11.1 is specified in Article 11.2, which provides generally that "authorities shall review the need for the continued imposition of the duty", and requires authorities "to examine whether the continued imposition of the duty is necessary to offset dumping" in the context of Article 11.2 dumping reviews.

6.42 Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, *i.e.* whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.

6.43 The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be "necessary" in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding<sup>492</sup> that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the "necessity" standard, even where the need for the continued imposition of an anti-dumping

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<sup>491</sup> See, for example, paras. 4.91 (Korea) and 4.154 (United States) *supra*.

<sup>492</sup> See section VI.C.1, *supra*.

duty is tied to the "recurrence" of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping.

6.44 We must now consider whether a failure to find that the recurrence of dumping is "not likely" meets the standard that the continued imposition of the anti-dumping duty be demonstrable on the basis of the evidence adduced. In doing so, we note the US argument that "under section 353.25, the Department seeks to determine ... whether the dumping which had occurred in the past, and which led to the imposition of the order, is likely to recur if the order is revoked. If a resumption of dumping is likely should the order be terminated, then a plain reading of the terms of Article 11 indicate that the "continued imposition of the duty is necessary to offset dumping."<sup>493</sup> As a first step, therefore, we must consider whether the section 353.25(a)(2)(ii) "not likely" approach utilized by the United States is indeed equivalent to a test of whether dumping is "likely to recur". This is without prejudice to any view at this stage regarding the second step of whether the "likely to recur" standard would be, in turn, itself consistent with the terms of Article 11.2 as regards the necessity of the anti-dumping duty to offset dumping.

6.45 We consider that a failure to find that an event is "not likely" is not equivalent to a finding that the event is "likely". We see a clear conceptual difference between establishing something as a positive finding, and failing to establish something as a negative finding. It is perfectly possible that one could not determine that someone was unlikely to dump and find that they were also likely to dump. But the former determination does not, in and of itself, amount to a demonstrable basis for concluding the latter. This is evident from the fact that the former finding is manifestly compatible also with the *reverse* of the latter situation, *i.e.*, it is perfectly logical to find that you cannot determine that someone is unlikely to dump, yet also be unable to determine that they were actually likely to dump. In other words, determining that something is not "not likely" is entailed by, but does not itself entail, that something is likely.

6.46 We consider that this reflects common usage of the relevant terms. A finding that an event is "likely" implies a greater degree of certainty that the

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<sup>493</sup> See para. 4.124 *supra*.

event will occur than a finding that the event is not "not likely". For example, in common parlance, a statement that it is "likely" to rain implies a greater likelihood of rain than a statement that rain is not unlikely, or not "not likely". Similarly, a statement that a horse is "likely" to win a race implies a greater likelihood of victory than a statement that the same horse is not unlikely to win, or not "not likely" to win. The difference between the concepts of "likely" and "not likely" is perhaps made clearer by interpreting the word "likely" in accordance with its normal meaning of "probable". The question then becomes whether not "not probable" is equivalent to "probable". In our view, the fact that an event is not "not probable" does not by itself render that event "probable".

6.47 Given this reality, it is *a priori* possible that situations could arise where the not "not likely" criterion is satisfied but where the likelihood criterion is not satisfied. Reliance on the not likely criterion clearly fails to provide any reliable means to avoid or preclude this flaw. Given such a fundamental flaw, it cannot constitute a demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied.

6.48 In light of the above analysis, we conclude that the section 353.25(a)(2)(ii) "not likely" standard is not in fact equivalent to, and falls decisively short of, establishing that dumping is "likely to recur if the order is revoked". This being so, we do not need to address the potential second step of whether, in turn, the "likely" standard is itself consistent with the terms of Article 11.2 of the AD Agreement.<sup>494</sup>

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<sup>494</sup> While we do not need to proceed to the second step, and have not done so, we make the following observations. We note that Article 11.3 provides for termination of a definitive anti-dumping duty five years from its imposition. However, such termination is conditional. First, the terms of Article 11.3 itself lay down that this should occur unless the authorities determine that the expiry would be "likely to lead to continuation or recurrence of dumping and injury." Where there is a determination that both are likely, the duty may remain in force, and the five year clock is reset to start again from that point. Second, Article 11.3 provides also for another situation whereby this five year period can be otherwise effectively extended, viz in a situation where a review under paragraph 2 covering both dumping and injury has taken place. If, for instance, such a review took place at the four year point, it could effectively extend the sunset review until 9 years from the original determination. In the first case, we note that the provisions of Article 11.3 explicitly conditions the prolongation of the five year period on a finding that there is *likelihood* of dumping and injury continuing or recurring. In the second case, where there is reference to review under Article 11.2, there is no such explicit reference.

However, we note that both instances of review have the same practical effect of prolonging the application of anti-dumping duties beyond the five year point of an initial sunset review. This at the very least suggests, in our view, that there could be reason to support a view that authorities are entitled to apply the same test concerning the likelihood of recurrence or continuation of dumping for both Article 11.2 and 11.3 reviews. There certainly appears to be nothing that explicitly provides to the contrary. Nor do we see any reason why this conclusion would be materially affected by whether or not the dumping review occurred in conjunction with an injury review. There is nothing in the text of Article 11 which suggests there should be some fundamental bifurcation of the applicable standard for dumping review contingent on whether there is also an Article 11.2 injury review being undertaken.

We also note that "likelihood" or "likely" carries with it the ordinary meaning of "probable". That being so, it seems to us that a "likely standard" amounts to the view that where recurrence of

6.49 We have not found any other detailed argument developed by the United States in justification of its view that the section 353.25(a)(2)(ii) "not likely" criterion is consistent with the terms of Article 11.2. We consider, however, that the US submission could be construed to argue that the necessity of the continued imposition of a duty may be somehow more directly warranted by a finding that it is not possible to determine that recurrence of dumping is "not likely", irrespective of the fact that a finding that recurrence of dumping is not "not likely" is not equivalent to a finding that recurrence of dumping is "likely".

6.50 Recalling our views in para. 6.42 above, we note that "necessity" in the context of Article 11.2 requires the need for the continued imposition of an anti-dumping duty being demonstrable on the basis of the evidence adduced. In our view, given that we have found that a determination that it is not possible to conclude that recurrence of dumping is "not likely" does not in and of itself provide a demonstrable basis to reliably conclude that recurrence of dumping is "likely", we also find that it is logically incapable of providing any predictive assurance at even an equivalent, and certainly not a higher, level than likelihood. Nor has the United States in any case provided any argument as to what, if any, other standard of predictive assurance is in fact consistent with the terms of Article 11.2 short of likelihood. As outlined in para. 6.43 above, while mathematical certainty of recurrence of dumping is not required, the conclusions must still be demonstrable on the basis of the evidence adduced. In this case, however, it is not even established that recurrence of dumping is likely. Absent any other rationale, this amounts to an effective presumption that, in the absence of a finding that recurrence of dumping is not "not likely", anti-dumping duties may continue to be imposed. But "presumption", by definition, exists only where there is no requirement of justification or proof. As such, it is manifestly irreconcilable with the requirements of meeting a standard of necessity which involves demonstrability on the basis of the evidence adduced. In light of this, we are unable to find that the section 353.25(a)(2)(ii) "not likely" criterion provides any demonstrable basis on which to reliably conclude that the continued imposition of the duty is necessary to offset dumping.

6.51 For these reasons, we find that the section 353.25(a)(2)(ii) "not likely" criterion operates to effectively require<sup>495</sup> the continued imposition of anti-

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dumping is found to be probable as a consequence of revocation of an anti-dumping duty, this probability would constitute a proper basis for entitlement to maintain that anti-dumping duty in force. Without prejudice to the legal status of such a view in terms of its consistency with the terms of Article 11.2 - a matter on which we are not required to rule as noted in the text above - we feel obliged to at least take note that, at least as a practical matter, rejection of such a view would effectively amount to a systematic requirement that reviewing authorities are obliged to revoke anti-dumping duties precisely where doing so would render recurrence of dumping probable.

<sup>495</sup> In making this finding, we note that the DOC's determination in the *Final Results Third Review* is not separable from, or contingent to, the terms of the DOC regulations. Rather, our finding of inconsistency with the terms of the AD Agreement are rooted in and tied to the terms of the DOC regulations. In this way, it is by reason of the section 353.25(a)(2) "not likely" criterion that we find the United States to be in breach of the terms of Article 11.2. The United States is effectively obliged

dumping duties, and prevents revocation, in circumstances inconsistent with and outside of those provided for in Article 11.2. Accordingly, we find that section 353.25(a)(2)(ii) constitutes a mandatory requirement inconsistent with Article 11.2 of the AD Agreement.<sup>496</sup>

- (b) Is the section 353.25(a)(2)(iii) certification requirement consistent with Article 11.2 of the AD Agreement?

6.52 Korea raises two claims concerning the section 353.25(a)(2)(iii) certification requirement. First, Korea claims that "the limited authority granted Members under Article 11 to impose and maintain anti-dumping duties does not extend so far as to permit a Member to impose a certification requirement for revocation".<sup>497</sup> Second, Korea claims that the certification requirement "requires a respondent to forgo its right under Paragraph 2 of Article 11 to an injury finding. This violates Paragraph 2 of Article 11 of the Anti-Dumping Agreement, which requires Members to impose duties only where dumping exists and is causing injury and obliges Members to conduct investigations of dumping and injury before imposing (or maintaining) any duty".<sup>498</sup>

6.53 We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of "changed circumstances". We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found

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to act upon the DOC regulations, such that to all practical intents and purposes the DOC regulations are mandatorily applicable.

<sup>496</sup> According to the United States, "respondents are free to pursue revocation through an Article 11.2-type review under section 751(b)" of the 1930 Tariff Act, in addition to section 751(a) thereof. We take note of the view that, consistent with reasoning that has been applied in earlier GATT/WTO disputes, the existence of alternative, WTO-consistent legislative avenues for Article 11.2-type reviews (such as section 751(b)) could be considered capable of precluding a finding that the inability of the United States to revoke under section 353.25(a)(2) in and of itself constitutes a mandatory requirement inconsistent with Article 11.2. This issue does not arise in respect of the section 353.25(a)(2)(ii) "not likely" criterion, however, since there are, in any case, no alternative, WTO-consistent avenues for Article 11.2-type reviews available. The United States asserts that "[r]egardless of the procedural mechanism used (e.g., section 751(a) of the Act and section 353.25(a) of the Department's regulations, or section 751(b) of the Act and section 353.25(d) of the Department's regulations), the Department will not revoke an anti-dumping order based on a cessation of dumping *unless it determines that a resumption of dumping is not likely*" (emphasis supplied). In other words, because the *WTO-inconsistent* "not likely" criterion will be applied in all cases, there are necessarily no WTO-consistent alternative avenues for Article 11.2-type reviews.

<sup>497</sup> See para. 4.285, *supra*.

<sup>498</sup> See para. 4.286, *supra*.

inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the AD Agreement.

### 3. Conclusion

6.54 For the above reasons, we conclude that section 353.25(a)(2)(ii) is not consistent with Article 11.2 of the AD Agreement.<sup>499</sup>

#### D. Consistency of the Final Results Third Review with Article 11.2 of the AD Agreement

6.55 We have found that section 353.25(a)(2)(ii) of the DOC regulations is inconsistent with Article 11.2 of the AD Agreement. Since the *Final Results Third Review* is itself based on and determined by section 353.25(a)(2)(ii), we must find that the *Final Results Third Review* is thereby also inconsistent with Article 11.2 of the AD Agreement.

#### E. Consistency of the Failure to Self-Initiate an Injury Review with Article 11.2 of the AD Agreement

6.56 Korea raises two claims concerning *ex officio* Article 11.2 injury reviews. First, Korea effectively claims that an *ex officio* injury review was "warranted" in the present case because there had been no dumping - and therefore no injury caused by dumping - for three years and six months. Second, Korea claims that even if the US were to have decided that an *ex officio* injury review was "warranted" in the present case, the International Trade Commission ("ITC") does not have the authority to conduct such a review because Article 11.2 is not properly implemented in US legislation.

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<sup>499</sup> In arriving at our finding, we examined the matter in accordance with the terms of Article 17.6, including 17.6 sub-para (ii). In interpreting the relevant provisions of the AD Agreement in the course of addressing the claims and arguments before it, we have done so in accordance with customary rules of interpretation of public international law. We note that, in making certain of its arguments in response to the claims of Korea, the United States characterised those arguments as constituting a "permissible interpretation" of the terms of the AD Agreement. As a matter of fact, where we failed to find those arguments persuasive, we rejected them on the basis that they were not consistent with the AD Agreement and, in reaching such a view, we did so on the basis of the customary rules of interpretation of public international law. The fact that the arguments concerned had been presented as a "permissible interpretation" did not, in the circumstances of this case, alter the legal basis upon which we were able to, and did, evaluate them, *viz.* the customary rules of interpretation of public international law. We further observe that, as a consequence, there is neither warrant nor need in this case to enquire further as to whether the AD Agreement "more generally", as it were, admits of further interpretation.

1. *Is an ex officio Article 11.2 injury review warranted after three years and six months' no dumping?*

6.57 Korea argues that the United States violated Article 11.2 of the AD Agreement because, "after concluding for three years that no injury was occurring as a result of dumping, the authorities had an obligation on their own initiative ('it was warranted') to investigate whether injury as well as dumping would be likely to resume if the order were revoked."<sup>500</sup> Korea is effectively claiming that Article 11.2 necessarily requires an investigating authority to self-initiate an Article 11.2 injury review solely on the basis of three years and six months' no dumping, because any injury found to exist will not be caused by dumped imports due to the absence of dumping.

6.58 The issue before us is whether Article 11.2 necessarily requires an investigating authority, following three years and six months' findings of no dumping, to find that an *ex officio* Article 11.2 review of "whether the injury would be likely to continue or recur if the duty were removed or varied" is "warranted".

6.59 A review of "whether the injury would be likely to continue or recur if the duty were removed or varied" could include a review of whether (1) injury that is (2) caused by dumped imports<sup>501</sup> would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months' no dumping, the issue of causality becomes whether injury caused by *dumped* imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the "injury" review that Korea believes is "warranted" on the basis of three years and six months' no dumping would be entirely dependent upon a determination of whether dumping will recur. This is precisely the type of determination that the United States sought to make in the present case. The mere fact of three years and six months' findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of "whether the injury would be likely to continue or recur if the duty were removed or varied".

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<sup>500</sup> See para. 4.303, *supra*.

<sup>501</sup> We note that, by virtue of note 9 of the AD Agreement, the term "injury" in Article 11.2 "shall be interpreted in accordance with the provisions of" Article 3. Article 3.5 of the AD Agreement requires the establishment of a causal link between the dumped imports and the injury found to exist. Thus, we consider that the Article 11.2 examination of "whether the injury would be likely to continue or recur if the duty were removed or varied" may also involve an examination of whether any injury that is found to be likely to continue or recur is caused by dumped imports. We can envisage circumstances, however, when an Article 11.2 injury review need not necessarily include an examination of causal link.

6.60 We therefore reject Korea's claim that the United States violated Article 11.2 of the AD Agreement by failing to initiate, solely on the basis of three years and six months' no dumping, an *ex officio* Article 11.2 review of "whether the injury would be likely to continue or recur if the duty were removed or varied".

2. *Does the ITC have the authority to conduct an ex officio Article 11.2 injury review?*

6.61 Korea effectively claims that US law is inconsistent with Article 11.2 of the AD Agreement because it does not provide the ITC with the authority to conduct an *ex officio* Article 11.2 injury review where "warranted".

6.62 We reject Korea's claim because the United States has established that the ITC has a general authority to conduct *ex officio* Article 11.2 injury reviews by virtue of section 751(b) of the 1930 Tariff Act and section 207.45(c) of the ITC regulations.<sup>502</sup>

F. *Article 2.2.1.1 of the AD Agreement*

6.63 Korea submits that the United States violated Article 2.2.1.1 of the AD Agreement because it "disregarded cost data prepared by Respondents which were in accordance with generally accepted accounting principles of Korea and accurately reflected costs".<sup>503</sup> We understand Korea to claim that the United States violated Article 2.2.1.1 by rejecting (a) the Flame econometric study regarding cost trends (the "Flame study"), and (b) the cost data submitted by respondents for 1996.

6.64 Article 2.2.1.1 of the AD Agreement provides in relevant part:

"For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. ..."

6.65 In addressing these two claims, we note that Article 2.2.1.1 of the AD Agreement applies "[f]or the purpose of paragraph 2" of Article 2, while the cost data in issue was submitted in the context of an Article 11.2 review. However, neither party questioned the applicability of Article 2.2.1.1 in the present case.<sup>504</sup>

<sup>502</sup> See para. 4.317, *supra*.

<sup>503</sup> See para. 4.390, *supra*.

<sup>504</sup> The Panel asked both parties oral questions concerning the applicability of Article 2.2.1.1 in the present case. In its oral response, the United States in particular did not dispute the applicability of Article 2.2.1.1. While noting that an Article 2 dumping determination had not been made in the present Article 11.2 review, the United States asserted that cost data submitted for the Article 11.2 review had been assessed using the "Anti-Dumping Agreement, our standard methodology".

For the purpose of our analysis in this case, therefore, we proceed on the assumption that Article 2.2.1.1 does apply.

1. *Rejection of the Flame study*

6.66 Korea claims that the United States violated Article 2.2.1.1 of the AD Agreement because it disregarded cost data in the Flame study which (1) were in accordance with the generally accepted accounting principles of Korea and (2) accurately reflected costs. Korea's claim is effectively based on an interpretation of Article 2.2.1.1 of the AD Agreement that requires a Member to accept projections for future costs based on historical cost data provided those projections are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration." Article 2.2.1.1, however, clearly indicates that the provisos concerning generally accepted accounting principles and reflection of costs of production and sale only apply to "records kept by the exporter or producer under investigation". As the projections for the Flame study, which were prepared by an outside consultant on behalf of Hyundai, do not constitute "records kept by the exporter or producer under investigation", we believe that the two provisos contained in the first sentence of Article 2.2.1.1 do not apply to the US treatment of the projections for that study. Accordingly, we must reject Korea's claim based on those provisos, *i.e.*, that the United States violated Article 2.2.1.1 because it rejected projections for future costs based on historical cost data that are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration."

6.67 Assuming for the sake of argument that it were permissible to interpret Article 2.2.1.1 of the AD Agreement so as to require a Member to accept projections for future costs based on historical cost data provided they are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration", we believe that Korea's claim would still fail. As the *Final Results Third Review* do not suggest that any projected costs were rejected because they were not prepared "in accordance with the generally accepted accounting principles" of Korea, we understand Korea to argue that the United States violated Article 2.2.1.1 by rejecting projected costs that "reasonably reflect the costs associated with the production and sale" of DRAMs. In light of Korea's interpretation of Article 2.2.1.1 of the AD Agreement, and in light of Articles 17.5(ii) and 17.6(i) of the AD Agreement, Korea's claim would require us to determine whether, given the record evidence before the DOC, an unbiased and objective investigating authority could properly have found that the Flame study did not "reasonably reflect the costs associated with the production and sale" of DRAMs. In its *Final Results Third Review*, the DOC found that "the cost portion of the Flame study was based on several questionable premises including the assumption of certain production yields and rates." For example, the DOC stated that the Flame study contained "optimistic capacity rates" that

were "difficult to accept" in a context of production cutbacks, and that the capacity scenario was based on a demand assumption that could not be borne out by market conditions present at that time.<sup>505</sup> Korea has failed to challenge the DOC's finding of "questionable premises", and has failed to identify anything in the record to indicate that, in light of the "questionable premises" identified by the DOC, an unbiased and objective investigating authority could not properly have considered that the study did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Korea merely notes that the "record contains ... a valid econometric study", and accuses the DOC of having "summarily rejected" that study.

6.68 In *EC - Hormones*, the Appellate Body stated that:

"[t]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."<sup>506</sup>

6.69 In failing to advance anything beyond conclusory arguments in support of its claim that the DOC should not have rejected the Flame study, we consider that Korea has failed to "establish a *prima facie* case" that an objective and impartial investigating authority could not properly have found that the study did not "reasonably reflect the costs associated with the production and sale" of DRAMs.

6.70 Accordingly, assuming for the sake of argument that Article 2.2.1.1 of the AD Agreement requires a Member to accept projections for future costs based on historical cost data provided those projections are "in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration", we would reject Korea's claim that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting projections for future costs based on historical cost data that "reasonably reflect the cost of production and sale" of DRAMs.

## 2. *Rejection of respondents' 1996 cost data*

6.71 Korea further claims that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting respondents' cost data for 1996. We understand Korea's claim to refer exclusively to the DOC's rejection of cost data submitted by *LGS* for the *second* half of 1996. The *Final Results Third Review* do not suggest

<sup>505</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>506</sup> *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, adopted 13 February 1998, para. 98.

that the DOC rejected LGS cost data for the *first* half of 1996.<sup>507</sup> Nor do the *Final Results Third Review* suggest that cost data submitted by *other respondents* for 1996 was rejected.

6.72 As the *Final Results Third Review* do not suggest that LGS cost data for the second half of 1996 were rejected because they were not prepared "in accordance with the generally accepted accounting principles" of Korea, we understand Korea to argue that the United States violated Article 2.2.1.1 by rejecting LGS cost data for the second half of 1996 that "reasonably reflect the costs associated with the production and sale" of DRAMs. In light of Articles 2.2.1.1, 17.5(ii) and 17.6(i) of the AD Agreement, Korea's claim requires us to determine whether, given the record evidence before the DOC, an unbiased and objective investigating authority could properly have found that the cost data submitted by LGS for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs.

6.73 In its *Final Results Third Review*, the DOC stated that its review of LGS cost data for the second half of 1996 "indicates that there are serious questions whether the reported costs were understated due to significant changes in LGS' depreciation schedule and write-offs of foreign exchange losses."<sup>508</sup> These "serious questions" were then described in greater detail by the DOC in the *Final Results Third Review*. However, Korea has failed to challenge the DOC's finding of "serious questions", and has failed to identify anything in the record to indicate that, in light of such "serious questions", an unbiased and objective investigating authority could not properly have considered that the LGS cost data for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Korea merely states that the DOC's "failure to treat properly Respondents' actual cost and price data ... violates Article 2.2.1.1".<sup>509</sup> In failing to advance anything beyond conclusory arguments in support of its claim that the DOC should not have rejected the LGS cost data for the second half of 1996, we consider that Korea has failed to establish a *prima facie* case that an objective and impartial investigating authority could not properly have found that the LGS cost data for the second half of 1996 did not "reasonably reflect the costs associated with the production and sale" of DRAMs. Accordingly, we must reject Korea's claim that the United States violated Article 2.2.1.1 of the AD Agreement by rejecting the LGS cost data for the second half of 1996.

### G. Article 6.6 of the AD Agreement

6.74 Korea submits that, in making the alleged errors in its flawed analysis, the DOC infringed Article 6.6 of the AD Agreement because "it failed to satisfy

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<sup>507</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>508</sup> 62 Fed. Reg. 39809 (24 July 1997), at 39818.

<sup>509</sup> See para. 4.397, *supra*.

itself as to the accuracy of data supplied by the Petitioner",<sup>510</sup> and uncritically accepted and relied on the petitioner's data without taking any action to confirm that it was accurate. It appears that Korea's claims target principally the DOC's treatment of data *supplied by the petitioner*, and not data obtained from other sources.<sup>511</sup> In particular, Korea argues that in analyzing whether respondents may have dumped in 1996, and whether respondents could remain competitive without dumping, the DOC relied on unverified data from petitioner Micron.

6.75 Article 6.6 provides:

"Except in circumstances provided for in paragraph 8 [facts available], the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

6.76 With reference to Articles 6.6, 17.5(ii) and 17.6(i) of the AD Agreement, we must determine whether, on the basis of record evidence before the DOC, an unbiased and objective investigating authority could properly have been satisfied as to the accuracy of the information on which the DOC based its findings of (a) whether respondents had dumped in 1996, and (b) whether respondents could remain competitive without dumping.

### 1. *Whether respondents had dumped during 1996*

6.77 Korea asserts that the United States violated Article 6.6 of the AD Agreement because, in determining whether the respondents had dumped<sup>512</sup> during 1996, the DOC relied on unverified news articles and research reports regarding the state of the industry, including spot market prices, that had been provided by the petitioner.

6.78 In essence, we understand Korea to argue that Members cannot discharge their Article 6.6 obligation to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based" unless they verify the accuracy of that information. However, the text of Article 6.6 does not explicitly require verification of all information to be relied on. Indeed, the term "verify" only arises in Article 6.7 of the AD Agreement. Article 6.6 simply requires Members to "satisfy themselves as to the accuracy of the information". In our view, Members could "satisfy themselves as to the accuracy

<sup>510</sup> See para. 4.388, *supra*.

<sup>511</sup> This is confirmed by para. (g) of Korea's request for establishment, where Korea asserts that the *Final Results Third Review* were "based on unverified information from the petitioning company" (WT/DS99/2).

<sup>512</sup> A careful reading of the *Final Results Third Review* reveals that the DOC did not find that respondents had "dumped" during 1996. The DOC only found that respondents "may have made U.S. sales below COP [cost of production] during 1996", and that "the existence of below-cost sales during May and June of 1996 suggests that the number of below-cost sales increased following the end of the third review period" (62 Fed. Reg. 39809 (24 July 1997), at 39817). A finding of sales below-cost is not equivalent to a finding of dumping within the meaning of Article 2.

of the information" in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.<sup>513</sup>

6.79 The United States asserts that information submitted by interested parties "included independent market analysts' reports from such reputable brokerage houses as Goldman Sachs, Merrill Lynch, Lehman Brothers, and ABN Amro Hoare Govett; business and market news reporting by well-known news organizations such as the Wall Street Journal, New York Times, Financial Times, Reuters, Korea Herald, and Nikkei; and reports from various trade journals" (footnote omitted).<sup>514</sup> The United States also notes that the respondents and their customers submitted data on "average U.S. prices reported by Dataquest and the American IC Exchange, studies by independent analysts and numerous newspaper and magazine articles".<sup>515</sup> The United States argues that the DOC satisfied itself as to the accuracy of information submitted by interested parties, and refers to specific examples of how the DOC "applied its considerable experience in market analysis and considered the source of the information, its internal logic, and its consistency with other information in determining [the] accuracy and usefulness" of certain news reports presented by the respondents and brokerage house reports presented by the petitioner.<sup>516</sup> Korea has failed to identify anything in the record (other than the fact that the information was not verified) to indicate that an unbiased and objective investigating authority could not properly have been satisfied as to the accuracy of this information.

6.80 We recall that the text of Article 6.6 does not support Korea's argument that it is perforce violated in all cases where a Member fails to verify the accuracy of all information relied on. In the absence of additional argumentation from Korea demonstrating that an unbiased and objective investigating authority could not properly have been satisfied as to the accuracy of the information relied on by the DOC in determining whether respondents had dumped during 1996, we find that Korea has failed to establish a prima facie case that the United States violated Article 6.6 of the AD Agreement in determining whether respondents had dumped during 1996.

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<sup>513</sup> For example, we query whether investigating authorities should be required to verify import statistics from a different government office. We also query whether investigating authorities should be required to verify "official" exchange rates obtained from a central bank.

<sup>514</sup> See para. 4.436, *supra*.

<sup>515</sup> See para. 4.436, *supra*.

<sup>516</sup> See para. 4.438, *supra*.

2. *Whether respondents could remain competitive without dumping*

6.81 We consider that Korea's claim concerning the use of unverified data regarding the competitiveness of respondents should be rejected for two reasons. First, Korea fails to identify which "unverified data from Micron" is in issue.

6.82 Second, Korea's claim again assumes that Article 6.6 of the AD Agreement requires Members to verify the accuracy of information on which findings are based. However, we recall that failure to verify the accuracy of information does not necessarily constitute a violation of Article 6.6. In the absence of additional argumentation (i.e., other than the failure to verify) from Korea indicating that an objective and unbiased investigating authority could not properly have been satisfied as to the accuracy of information relied on by the DOC in determining whether respondents could remain competitive without dumping, we find that Korea has failed to establish a *prima facie* case that the United States violated Article 6.6 with regard to the DOC's findings as to whether respondents could remain competitive without dumping.

H. *Article 5.8 of the AD Agreement*

6.83 Korea claims that the United States violates Article 5.8 by setting the *de minimis* dumping margin threshold for Article 9.3 duty assessment procedures at 0.5%, instead of the 2% standard set forth in Article 5.8.<sup>517</sup> Korea argues that "[t]he obligation of Article 5.8 applies to 'cases', including [Article 9.3] reviews as well as investigations."<sup>518</sup>

6.84 The text of Article 5.8 reads in relevant part:

"An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. ... "

6.85 Essentially, the parties disagree as to whether the second sentence (and therefore the *de minimis* standard contained in the third sentence) of Article 5.8 applies to both anti-dumping investigations and Article 9.3 duty assessment procedures (referred to in US parlance as "administrative reviews"), or only to anti-dumping investigations.

<sup>517</sup> The Panel notes that the relevant provision is set forth in section 351.106(c) of the DOC regulations.

<sup>518</sup> See para. 4.628, *supra*.

6.86 In our view, the scope of the obligation in the second sentence of Article 5.8 is defined by the term "cases". However, the ordinary meaning of that term does not clarify whether it refers to both anti-dumping investigations and Article 9.3 duty assessment procedures, or only to the former. To resolve this matter, therefore, we must consider the following context of Article 5.8, second sentence.

6.87 First, the term "case" is used in the first sentence of Article 5.8. The first sentence is concerned explicitly and exclusively with the circumstances in which an "application" ("under [Article 5,] paragraph 1") shall be rejected and an "investigation" terminated as a result of insufficient evidence to justify proceeding with the "case". As the treatment of the "application" and conduct of the "investigation" is dependent on the sufficiency of evidence concerning the "case", we consider that the term "case" in the first sentence must at least encompass the notions of "application" and "investigation". In our view, it would be meaningless for the term "case" in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure, since we fail to see how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an "application" or the conduct of an "investigation", both of which precede the Article 9.3 duty assessment procedure.<sup>519</sup> As we consider that the term "case" in the first sentence of Article 5.8 does not include the concept of "duty assessment", we see no reason to adopt a different approach to the term "cases" in the second sentence of that provision.

6.88 Second, we consider that note 22 of the AD Agreement effectively provides that a finding in a US duty assessment procedure that no duty is to be levied "shall not by itself require the authorities to terminate the definitive duty." According to note 22, therefore, a finding in an Article 9.3 duty assessment procedure of a zero percent margin of dumping, which is *de minimis* under both the US 0.5 percent standard and the 2 percent standard advocated by Korea on the basis of Article 5.8, shall not by itself lead to termination of the duty. Nevertheless, by arguing that Article 5.8, including the second sentence thereof, applies in the context of Article 9.3 duty assessments, Korea is effectively arguing that a zero percent, *i.e.*, *de minimis*, margin of dumping shall lead to "immediate termination" of the duty. Thus, to the extent that Korea's interpretation of Article 5.8, second sentence, requires "immediate termination" of the duty in circumstances where termination "shall not" be required by note 22 of the AD Agreement, Korea's interpretation renders note 22 meaningless.<sup>520</sup>

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<sup>519</sup> In this regard, we note that Korea has not argued before us that an Article 9.3 duty assessment procedure should be included within the notion of "investigation" for the purpose of Article 5.8. In the context of Article 5 of the AD Agreement, it is clear to us that the term "investigation" means the investigative phase leading up to the final determination of the investigating authority.

<sup>520</sup> As stated by the Appellate Body in *Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (*Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, at 21).

6.89 For these reasons, we conclude that Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures. As Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures, it certainly cannot require Members to apply a particular *de minimis* standard in such procedures.

6.90 Korea argues that there is "no logical reason why the *de minimis* level during the [Article 9.3.1] review stage of a proceeding should be different than at the investigation stage. That which is the legal equivalent of a zero margin for purposes of determining whether to impose an anti-dumping duty is also the legal equivalent of zero for collecting anti-dumping duties."<sup>521</sup> As explained above, we consider that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure. In any event, there are possible logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures. Article 5.8 requires the termination of investigations in cases where the margin of dumping is *de minimis*. Thus, in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty. A *de minimis* test in the context of an Article 9.3 duty assessment procedure will not remove an exporter from the scope of the order. Thus, the implications of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly. Accordingly, we are not convinced that Korea's policy argument requires us to abandon our conclusion that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure.

6.91 In light of our conclusion that Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures, we reject Korea's claim that the United States violates Article 5.8 by applying a 0.5 percent *de minimis* standard in the context of Article 9.3 duty assessment procedures.

### I. Korea's Claims under GATT 1994

6.92 We note that Korea has made a number of claims concerning the consistency of the application of section 353.25(a)(2)(ii) and (iii) of the DOC regulations, and the consistency of the *Final Results Third Review*, with Articles I and X of the GATT 1994. We note that a panel "need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."<sup>522</sup> Since we have already found that section 353.25(a)(2)(ii) of the DOC

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<sup>521</sup> See para. 4.624, *supra*.

<sup>522</sup> *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 340.

regulations, and the *Final Results Third Review* based on that provision, are inconsistent with Article 11.2 of the AD Agreement, we do not consider it necessary to examine Korea's claims under Articles I and X of the GATT 1994.

## VII. CONCLUSIONS AND RECOMMENDATION

7.1 We conclude that, for the reasons outlined in this report, section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review* based on that provision, are inconsistent with the US obligations under Article 11.2 of the AD Agreement.

7.2 The Panel *recommends* that the Dispute Settlement Body request the United States to bring section 353.25(a)(2)(ii) of the DOC regulations, and the *Final Results Third Review*, into conformity with its obligations under Article 11.2 of the AD Agreement.

7.3 Korea has requested us to suggest that the United States (i) revoke *DRAMs from Korea* and (ii) eliminate the section 353.25(a)(2)(ii) "not likely" criterion. In this regard we note Article 19.1 of the DSU, which provides in relevant part that:

"In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

7.4 By virtue of Article 19.1 of the DSU, therefore, the Panel has discretion to suggest ways in which it believes the United States could appropriately implement the above recommendation. However, in light of the range of possible ways in which we believe the United States could appropriately implement our recommendation, we decline to make any suggestion in the present case.

**EUROPEAN COMMUNITIES - REGIME FOR  
THE IMPORTATION, SALE AND DISTRIBUTION  
OF BANANAS  
(RECOURSE TO ARBITRATION BY THE EUROPEAN  
COMMUNITIES UNDER ARTICLE 22.6 OF THE DSU)**

**Decision by the Arbitrators**  
WT/DS27/ARB

*Circulated on 9 April 1999*

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## I. INTRODUCTION

1.1 On 14 January 1999, the United States (US), pursuant to Article 22.2 of the DSU, requested the Dispute Settlement Body (DSB) to authorize suspension of the application to the European Communities (EC) and its member States of tariff concessions and related obligations under GATT 1994 covering trade in an amount of US\$520 million (WT/DS27/43). At the DSB meeting held on 25 January-1 February 1999, the European Communities objected to the level of suspension proposed by the United States on the ground that it was not equivalent to the level of nullification or impairment of benefits suffered by the United States and claimed that the principles and procedures set out in Article 22.3 of the DSU had not been followed. Pursuant to Article 22.6 of the DSU, the European Communities requested that the original panel carry out the arbitration on the foregoing matters (WT/DS27/46). In response, the DSB decided on 29 January 1999 to submit the matter to arbitration of the original panel in accordance with Article 22.6 of the DSU (WT/DSB/M/54).

1.2 The Arbitrators are:

Chairman: Mr. Stuart Harbinson  
Mr. Kym Anderson  
Mr. Christian Häberli

1.3 The tasks of Arbitrators under Article 22 of the DSU are described in paragraphs 6 and 7 of that Article:

"... 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. ..."

"The arbitrator[s] ... shall determine whether the level of such suspension is *equivalent* to the level of nullification or impairment. The arbitrator[s] may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 *have not been followed*, the arbitrator[s] shall examine that claim. In the event that the arbitrator[s] determine that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. ..."

1.4 Accordingly, our tasks encompass an examination of the equivalence of the level of proposed suspension to the nullification or impairment caused, and of whether the principles and procedures set forth in Article 22.3 of the DSU

have been followed.<sup>1</sup> In this decision, we address the following issues: (i) certain preliminary issues; (ii) the procedures and principles to be followed under Article 22.3 of the DSU, including (a) the scope of review by Arbitrators under Article 22.3 and (b) the application of Article 22.3 to this case; (iii) the concept of equivalence and the scope of this arbitration procedure under Article 22 of the DSU; (iv) whether there is continuing nullification or impairment of US benefits under the new EC banana import regime; (v) the parameters for the calculation of the level of nullification or impairment, including (a) the issue of "indirect" benefits and (b) specific issues concerning the calculation of nullification or impairment in services; and (vi) the level of suspension.

## II. PRELIMINARY ISSUES

### A. *Working Procedures and Business Confidential Information*

2.1 We met with the parties on 5 February 1999 to establish our working procedures and timetable. Prior to that date, we invited the United States to submit a communication, if possible by 5 February 1999, explaining the methodology it applied in calculating its proposed level of suspension.<sup>2</sup> Pursuant to the timetable (as later modified), the parties made their initial submissions on 11 February 1999 and their rebuttal submissions on 18 February 1999. We held a meeting with the parties on 22 February 1999.

2.2 On 5 February 1999, the United States indicated that it would request the Arbitrators to establish procedures for the handling of business confidential information ("BCI") similar to those established in several pending panel procedures.<sup>3</sup> In response, the European Communities indicated that any such procedures must allow the European Communities to have access to the BCI.

2.3 On 10 February 1999, the United States requested the Arbitrators to establish specific procedures for BCI. Under the US proposal, there would be two levels of BCI: regular BCI and super BCI. Regular BCI was described as company-specific information that was non-public and sensitive, but that could be extrapolated from other public and non-public information available to governments and the company's competitors. Super BCI was described as non-public, sensitive company-specific information that could not be so extrapolated. As to regular BCI, one copy would be deposited with the Secretariat and one copy with the Geneva mission of the receiving party. As to Super BCI, one copy would be deposited with the Secretariat. Both types of BCI would also be

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<sup>1</sup> We note that our task is not to examine the relationship of Articles 21.5 and 22 of the DSU. We do, however, respond to certain EC arguments related to this issue at the end of Part IV.

<sup>2</sup> In response to a question from the European Communities, we indicated that we considered the request to the United States to be of an informative nature only, aimed at saving time.

<sup>3</sup> Panel on *Brazil - Export Financing Programme for Aircraft*, WT/DS46; Panel on *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70; Panel on *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126.

available in the missions in the respective capitals of the parties (e.g. BCI submitted by the United States would be available for inspection by the European Communities at any time in the US mission to the EC in Brussels). For both types of BCI, there would be provisions related to non-disclosure, storage and return or destruction, and recipients of BCI would be required to sign a non-disclosure form. These provisions and the treatment of regular BCI were based on the procedures used in pending panel proceedings.<sup>4</sup> The concept of super BCI was additional to those procedures, as were the US proposals that certain sanctions should be applied for violating the procedures and that only certain categories of representatives of a party should have access to BCI.

2.4 Later on 10 February 1999, the chairman of the Arbitrators met with the parties to hear their views on the US request. The European Communities objected to it on the grounds that working procedures on confidentiality should not be adopted on a case-by-case basis, but rather by WTO Members as a whole. It noted that it had successfully opposed the adoption of such procedures in another case involving the United States. Second, the European Communities argued that special procedures were unnecessary because its officials were bound by confidentiality obligations contained in Article 214 of the EC Treaty. Third, the European Communities objected that such procedures would limit its rights because of practical problems that would be created if the information were not available in its Brussels headquarters. The United States responded that the extent of the BCI was limited, that it was in fact highly sensitive information because it was company-specific and that it was essential for the Arbitrators to have the information in order to perform their functions.

2.5 On 11 February 1999, we adopted BCI procedures. While we agreed with the United States that special rules were justified in light of the type of information involved, we did not accept the need for special treatment of super BCI, for specific sanctions or for limitations on the identity of those permitted to view the information (so long as a non-disclosure form was signed). On 15 February 1999, the European Communities raised further objections concerning practicality, the impossibility of limiting reporting obligations to superiors within the European Communities and concerns that the inviolability of the EC Mission in Geneva had been put into question. On 16 February 1999, we modified the BCI procedures to address the latter point.

2.6 On 17 February 1999, the European Communities indicated that it could not accept the BCI procedures and that the Arbitrators should not consider any BCI as to do so would violate Article 18.1 of the DSU, which prohibits *ex parte* contacts between parties and panelists. Since we are of the view that the procedures are reasonable in the circumstances<sup>5</sup>, we do not accept the EC

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<sup>4</sup> Panel on *Brazil - Export Financing Programme for Aircraft*, WT/DS46; Panel on *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70; Panel on *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126.

<sup>5</sup> As noted above, similar procedures had previously been adopted by three different panels in cases involving export subsidies. In one of those cases, a Member refused to supply BCI on the

argument that its decision not to receive information under the rules we have established means that the United States may not submit the information. Acceptance of the EC argument would mean that a party's refusal to participate in a proceeding would effectively prevent the proceeding from going forward.

2.7 In any event, we note that we did not find it necessary to rely on the BCI submitted by the United States in setting the level of suspension. As explained below (Part VII), we used an alternative calculation method, not relying on company-specific cost and profit information but instead on non-business confidential information supplied in the parties' submissions. We did, however, examine non-company-specific BCI simply to compare it with the assumptions we had made. Our calculations would have been no different had that BCI not been examined.

### *B. Request for Third-Party Rights*

2.8 On 4 February 1999, Ecuador requested the Arbitrators to accord it third-party status in light of its special interest in the proceedings. However, in light of the absence of provisions for third-party status under Article 22 of the DSU and given that we do not believe that Ecuador's rights will be affected by this proceeding, we declined Ecuador's request. In this regard, we note that our Initial and Final Decisions in this arbitration fully respect Ecuador's rights under the DSU, and, in particular, Article 22 thereof.

### *C. Request for Suspension*

2.9 In a letter dated 22 February 1999, the European Communities requested that we suspend this arbitration proceeding until 23 April 1999, i.e. until 10 days or so after the date set for the completion of the pending proceedings brought by Ecuador and the European Communities pursuant to Article 21.5 of the DSU in respect of the revised EC banana import regime.<sup>6</sup> However, in light of Article 22.6 of the DSU, which requires that an arbitration thereunder "shall be completed within 60 days after the date of expiry of the reasonable period of time", or 2 March 1999, we decided that we were obligated to complete our work in as timely a fashion as possible and that a suspension of our work would accordingly be inappropriate.

### *D. Initial Decision*

2.10 On 2 March 1999, the Chairman of the Arbitrators informed the Chairman of the DSB as follows (WT/DS27/48):

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grounds that the procedures were inadequate and that super BCI procedures were necessary. If anything, this suggests that the BCI procedures adopted in this arbitration are not excessively restrictive.

<sup>6</sup> See WT/DSB/M/43.

"I write to inform you that the Arbitrators have today issued an initial decision to the parties in which we rule on matters related to the scope of our work and to certain aspects of the methodology and calculations of the United States for determining the level of suspension of concessions. In addition, we have requested the parties to supply us with additional information. This information should enable us to take a final view on the level of nullification or impairment based on the WTO inconsistency, if any, of the revised EC banana regime, and, if relevant, to determine the level of suspension of concessions or other obligations equivalent to the level of such nullification or impairment. Following our receipt and analysis of that information, we expect to be in a position to issue a final decision in this matter soon thereafter."

2.11 The Initial Decision discussed issues related to Article 22.3, the concept of equivalence and the scope of this arbitration procedure under Article 22 and parameters for the calculation of the level of nullification or impairment. Our discussion of these issues appears *verbatim* (except as indicated otherwise) in Parts III, IV and VI of this Decision. As indicated above, in the Initial Decision, we also requested the parties to submit by 15 March 1999 answers in writing to certain questions, the answers to which were necessary for us to complete our task. In the case of the European Communities, we asked them to respond to certain arguments made in the US submissions concerning the consistency of the new EC regime for banana imports with the WTO Agreement (see Part V). In the case of the United States, we asked them to analyze two additional counterfactuals and to re-consider their calculations in respect of two of their original counterfactuals in light of our Initial Decision (see Part VII).

2.12 We noted in our concluding remarks to the Initial Decision, that we were aware of the fact that, pursuant to Article 22.6 of the DSU, Arbitrators "shall" complete their work within 60 days after the expiry of the reasonable period of time for implementation. However, given that our own decisions cannot be appealed, we considered it imperative to achieve the greatest degree of clarity possible with a view to avoiding future disagreements between the parties. Reaching this objective required the parties to have more time to submit to us the information necessary for us to complete our tasks.<sup>7</sup>

2.13 We emphasized that the number, scope and complexity of the tasks before us in our capacity as Arbitrators under Article 22.6 of the DSU required the

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<sup>7</sup> 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".

continuing cooperation of the parties, acting in good faith in accordance with Article 3.10 of the DSU. In this regard, we encouraged the parties to continue in their efforts to reach a mutually acceptable solution to this matter promptly, as the suspension of concessions is not in the economic interest of either of them.

### III. PROCEDURES AND PRINCIPLES TO BE FOLLOWED UNDER ARTICLE 22.3 OF THE DSU

3.1 In its request for arbitration pursuant to Article 22.6 of the DSU, the European Communities maintains that the United States has not followed the procedures and principles set out in paragraph 3 of Article 22 in its request for the authorization to suspend concessions or other obligations pursuant to Article 22.6. The United States contends that the Arbitrators shall not examine the principles and procedures set forth in Article 22.3 in this arbitration proceeding because the United States has requested authorization to suspend concessions only pursuant to paragraph (a) of Article 22.3 of the DSU. In the view of the United States, the European Communities could only make such a claim if the United States had requested authorization to suspend concessions pursuant to paragraphs (b) or (c) of Article 22.3 of the DSU.

3.2 The relevant parts of Article 22.3 of the DSU provide:

"In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the *same sector(s)* as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is *not practicable or effective* to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations *in other sectors under the same agreement*;

(c) if that party considers that it is *not practicable or effective* to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the *circumstances are serious enough*, it may seek to suspend concessions or other obligations under *another covered agreement*;

(d) in applying the above principles, that party shall take into account:

(i) the *trade in the sector under the agreement* under which the panel or Appellate Body has found a violation or other nullification or impairment, and the *importance of such trade to that party*;

(ii) the *broader economic elements* related to the nullification or impairment and *the broader economic*

*consequences* of the suspension of the concessions or other obligations; ...

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to *subparagraphs (b) or (c)*, it *shall state the reasons therefore* in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b) the relevant sectoral bodies;

(f) for purposes of this paragraph, "*sector*" means:

(i) with respect to goods, *all goods*;

(ii) with respect to services, a *principal sector* as identified in the current "Services Sectoral Classification List" which identifies such sectors." (emphasis added, footnotes omitted).

3.3 Before addressing the EC's challenge under Article 22.3 of the DSU, we recall the mandate of Arbitrators in this respect. Article 22.6 of the DSU provides in the relevant part:

"[I]f a Member concerned ... 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. ..."

Article 22.7 of the DSU specifies:

"[I]f the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. ..."

#### A. *The Scope of Review by Arbitrators under Article 22.3*

3.4 In view of the United States defense to the EC's challenge, we first have to define the scope of the discretion granted under Article 22.3 of the DSU to a Member seeking authorization to suspend, and to distinguish it from the scope of the authority of Arbitrators to review, pursuant to paragraphs 6 and 7 of Article 22 of the DSU, the choice made by that Member.

3.5 Article 22.7 of the DSU empowers the Arbitrators to examine claims concerning the principles and procedures set forth in Article 22.3 of the DSU in its entirety, whereas Article 22.6 of the DSU seems to limit the competence of Arbitrators in such examination to cases where a request for authorization to suspend concessions is made under subparagraphs (b) or (c) of Article 22.3 of the DSU. However, we believe that there is no contradiction between paragraphs

6 and 7 of Article 22 of the DSU, and that these provisions can be read together in a harmonious way.

3.6 If a panel or Appellate Body report contains findings of WTO-inconsistencies only with respect to one and the same sector in the meaning of Article 22.3(f) of the DSU, there is little need for a multilateral review of the choice with respect to goods or services or intellectual property rights, as the case may be, which a Member has selected for the suspension of concessions subject to the DSB's authorization. However, if a Member decides to seek authorization to suspend concessions under another sector, or under another agreement, outside the scope of the sectors or agreements to which a panel's findings relate, paragraphs (b)-(d) of Article 22.3 of the DSU provide for a certain degree of discipline such as the requirement to state reasons why that Member considered the suspension of concessions within the same sector(s) as that where violations of WTO law were found as not practicable or effective.

3.7 We believe that the basic rationale of these disciplines is to ensure that the suspension of concessions or other obligations across sectors or across agreements (beyond those sectors or agreements under which a panel or the Appellate Body has found violations) remains the exception and does not become the rule. In our view, if Article 22.3 of the DSU is to be given full effect, the authority of Arbitrators to review upon request whether the principles and procedures of subparagraphs (b) or (c) of that Article have been followed must imply the Arbitrators' competence to examine whether a request made under subparagraph (a) should have been made - in full or in part - under subparagraphs (b) or (c). If the Arbitrators were deprived of such an implied authority, the principles and procedures of Article 22.3 of the DSU could easily be circumvented. If there were no review whatsoever with respect to requests for authorization to suspend concessions made under subparagraph (a), Members might be tempted to always invoke that subparagraph in order to escape multilateral surveillance of cross-sectoral suspension of concessions or other obligations, and the disciplines of the other subparagraphs of Article 22.3 of the DSU might fall into disuse altogether.

#### *B. Application of Article 22.3 of the DSU in this Case*

3.8 The European Communities alleges that in cases where findings of violations or other nullification have been made in more than one sector, or under more than one agreement, requests for the suspension of concessions have to be made commensurate with the number or the degree of violations, i.e. with the amount of nullification or impairment suffered, in each of those sectors or under each of those agreements taken separately. Given the EC's position that the United States has not suffered any nullification or impairment in the area of trade in goods even under the previous regime, the European Communities contends that the United States should have considered seeking authorization to suspend concessions, in the first place, in the distribution service sector, or in the second place, in any other service sector for nullification suffered as a result of GATS violations, provided that such violations would continue under the revised

regime. In view of the fact that the United States has requested the suspension of concessions on trade in goods, the European Communities claims that the US request is in reality a cross-sectoral request and should have been made under Article 22.3(b) or (c). Moreover, the United States is alleged not to have fulfilled the procedural requirements foreseen in subparagraphs (d) and (e) of Article 22.3.

3.9 We do not share the EC's view. The scenario developed by the European Communities and the obligations contained in subparagraphs (b)-(e) of Article 22.3 would only apply if the dispute at issue concerned violations exclusively under the GATS. In that case, the US request would also in our view concern the suspension of concessions across sectors and across agreements. However, the obligations of subparagraphs (b) or (c) to substantiate why suspensions of concessions under the same sector or under the same agreement were not practicable or effective would only be relevant if the suspension of concessions proposed by the United States would be outside the scope of the panel or Appellate Body findings, e.g. if the proposed suspension would concern other service sectors than distribution services, or trade-related intellectual property rights.

3.10 We recall that subparagraph (a) of Article 22.3 of the DSU refers to the suspension of "concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment." We note that the words "same sector(s)" include both the singular and the plural. The concept of "sector(s)" is defined in subparagraph (f)(i) with respect to goods as *all goods*, and in subparagraph (f)(ii) with respect to services as a *principal sector* identified in the "Services Sectoral Classification List". We, therefore, conclude that the United States has the right to request the suspension of concessions in either of these two sectors, or in both, up to the overall level of nullification or impairment suffered, if the inconsistencies with the EC's obligations under the GATT and the GATS found in the original dispute have not been removed fully in the EC's revision of its regime. In this case the "same sector(s)" would be "all goods" and the sector of "distribution services", respectively. Our conclusion, based on the ordinary meaning of Article 22.3(a), is also consistent with the fact that the findings of violations under the GATT and the GATS in the original dispute were closely related and all concerned a single import regime in respect of one product, i.e. bananas.

#### **IV. THE CONCEPT OF EQUIVALENCE AND THE SCOPE OF THIS ARBITRATION PROCEDURE UNDER ARTICLE 22**

4.1 Article 22.7 of the DSU provides that "[t]he arbitrator[s] ... shall determine whether the level of such suspension is *equivalent* to the level of nullification or impairment" (emphasis added). In addition, Article 22.4 of the DSU provides:

"The level of the suspension of concessions or other obligations authorized by the DSB shall be *equivalent* to the level of the nullification or impairment." (emphasis added).

We note that the ordinary meaning of the word "*equivalence*" is "equal in value, significance or meaning", "having the same effect", "having the same relative position or function", "corresponding to", "something equal in value or worth", also "something tantamount or virtually identical".<sup>8</sup> Obviously, this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the one hand, and the level of the nullification or impairment, on the other.

4.2 The former level, i.e. the proposed suspension of concessions, is clearly discernible in respect of the overall amount (US\$520 million) suggested by the United States as well as in terms of the product coverage envisaged.<sup>9</sup> However, the same degree of clarity is lacking with respect to the latter, i.e. the level of nullification or impairment suffered. It is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined. Therefore, as a prerequisite for ensuring equivalence between the two levels at issue we have to determine the level of nullification or impairment.

4.3 In the original *Bananas III* dispute, the findings of nullification and impairment were based on the conclusion that several parts of the EC measures at issue were inconsistent with its WTO obligations. Therefore, any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken by the European Communities, i.e. the revised banana regime, in relation to the panel and Appellate Body findings concerning the previous regime.

4.4 The immediate context of paragraphs 4 and 7 of Article 22, which spell out the requirement of "*equivalence*", confirms our conclusion. The introductory sentence of paragraph 6 of Article 22 refers back to the situation described in paragraph 2. The provision cross-referred to provides:

"If the Member concerned *fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply* with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21.3, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application

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<sup>8</sup> The New Shorter Oxford English Dictionary on Historic Principles (1993), page 843.

<sup>9</sup> WT/DS27/43.

to the Member concerned of concessions or other obligations under the covered agreements."

Thus, authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB.

4.5 We also note that both parties accept that it is the consistency or inconsistency with WTO rules of the new EC regime - and not of the previous regime - that has to be the basis for the assessment of the equivalence between the level of nullification suffered and the level of the proposed suspension. In fact, in this arbitration procedure the United States has dedicated a significant part of its written submissions and oral statements to the Arbitrators to the question why it considers the new regime to continue most of the WTO-inconsistencies of the previous regime.

4.6 By the same token, the European Communities has repeatedly emphasized that any determination of the amount of concessions to be suspended would have to be based exclusively on the amount of the nullification or impairment caused by its revised regime if it were found to be WTO-inconsistent - albeit in another procedure before us, i.e. in our capacity as reconvened panelists under Article 21.5. However, we also note that the European Communities has to some extent responded to the US allegations concerning the alleged WTO-inconsistency of the revised regime in its written submissions or oral statements to the Arbitrators. Finally, the European Communities has pointed out several times that the consistency or inconsistency with WTO rules of its revised banana regime cannot be determined unilaterally by the United States, and that it considers any such determination outside the WTO dispute settlement mechanism as inconsistent with the unambiguous requirements of Article 23 of the DSU.

4.7 In view of these considerations, it is our opinion that the concept of *equivalence* between the two levels (i.e. of the proposed suspension and the nullification or impairment) remains a concept devoid of any meaning if either of the two variables in our comparison between the proposed suspension and the nullification or impairment would remain unknown. In essence, we would be left with the option to declare the level of nullification or impairment to be tantamount to the proposed level of suspension, i.e. to equate one variable in the equation with the other. To do that would mean that any proposed level of suspension would necessarily be deemed equivalent to the level of nullification or impairment so equated. Or, we could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.

4.8 Consequently, we cannot fulfil our task to assess the *equivalence* between the two levels before we have reached a view on whether the revised EC regime

is, in light of our and the Appellate Body's findings in the original dispute, fully WTO-consistent. It would be the WTO-inconsistency of the revised EC regime that would be the root cause of any nullification or impairment suffered by the United States. Since the level of the proposed suspension of concessions is to be equivalent to the level of nullification or impairment, logic dictates that our examination as Arbitrators focuses on that latter level before we will be in a position to ascertain its equivalence to the level of the suspension of concessions proposed by the United States.<sup>10</sup>

4.9 In arriving at this conclusion, we are mindful of the DSB Chairman's statement at the meeting of 29 January 1999 when the DSB decided to refer this matter to us in our capacity as Arbitrators:

"... There remains the problem of how the Panel and the Arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU. ..."

We are convinced that our chosen "way forward" in tackling the tasks before us is the most "logical way forward". It is the one that gives full weight and meaning to all of the dispute settlement mechanisms provided for under the DSU that parties to the original *Bananas III* dispute have chosen to invoke.

4.10 In response to the foregoing paragraphs of Part IV, which appeared in our Initial Decision, the European Communities argues that we should not consider the consistency of its new banana regime. First, it argues that to do so would go beyond our terms of reference, which it suggests are limited to determining the level of suspension and its equivalence to the level of nullification or impairment. As noted above, however, setting the level of nullification or impairment may require consideration of whether there is nullification or impairment flowing from a WTO-inconsistency of the new banana regime.

4.11 Second, the European Communities argues that if we consider the WTO consistency of its banana regime in an arbitration proceeding under Article 22, we will deprive Article 21.5 of its *raison d'être*. We disagree. For those Members that for whatever reasons do not wish to suspend concessions, Article 21.5 will remain the prime vehicle for challenging implementation measures. However, if we accepted the EC's argument, we would in fact read the time-limit foreseen in Article 22.6 out of the DSU since an Article 21.5 proceeding, which

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<sup>10</sup> In this connection, we note that Article 23.2(a) of the DSU provides that Members shall make any determination to the effect that a violation has occurred or that benefits have been nullified or impaired "consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding" (emphasis added). This by implication suggests that issues of violation and nullification or impairment can be determined by arbitration.

in the EC view includes consultations and an appeal, would seldom, if ever, be completed before the end of the time-limit specified within Article 22.6 (i.e. thirty days of the expiry of the reasonable period of time).<sup>11</sup> In this regard it is useful to recall the arbitration award in the *Hormones* case, in which it is stated "Read in context, it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest* period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."<sup>12</sup> We note that in the US view, if it cannot make a request for authorization to suspend concessions within the Article 22.6 time-period, it loses its right to do so, at least under circumstances where the negative-consensus rule of Article 22.6 applies.

4.12 Third, the European Communities argues that the reference to arbitration in Article 23.2(a) should not be read as meaning that an Article 22 arbitration can determine whether WTO agreements have been violated or whether there is nullification or impairment. In our view, while the reference to arbitration in Article 23.2(a) may be inconclusive, it is clear that the goal of Article 23 - multilateral determination - is achieved if the issue of nullification or impairment is considered in an arbitration before the original panel.

4.13 Fourth, the European Communities argues that it is inappropriate to consider inconsistency in an arbitration proceeding because such matters as burden of proof are not clear. In this regard it stresses that it is also not clear that the United States is challenging the WTO consistency of the new EC regime. In our view, the 30-plus pages of the first US submission devoted to establishing the continuing nullification and impairment caused by the new EC regime demonstrate how the United States is arguing that the new regime is WTO inconsistent. As to burden of proof, if the United States has not convinced us that there is a positive level of nullification or impairment, then we will set the level of suspension of concessions at zero.

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<sup>11</sup> As we noted in our Initial Decision, Arbitrators pursuant to Article 22 of the DSU are neither in a position to influence the point in time when parties to the original dispute initiate such a procedure, nor when original parties initiate a procedure under Article 21.5 of the DSU, nor when the DSB is in a position to deal with such requests, nor when the DSB establishes a reconvened panel, nor when the DSB refers a matter to arbitration. We recall, on the one hand, that Article 21.5 of the DSU requires reconvened panels to complete their work in principle within 90 days as of the referral of the matter to them, but without specifying when such a proceeding should be initiated. The express wording of Article 21.5 of the DSU does not exclude the possibility of initiating such a proceeding *before* or *after* the expiry of the reasonable period of time for implementation of panel and/or Appellate Body reports adopted by the DSB. On the other hand, we recall that, pursuant to Article 22.6 of the DSU, Arbitrators shall complete their work within 60 days as of the expiry of the reasonable period of time. If a proceeding under Article 21.5 of the DSU is initiated close to the end of the reasonable period, or after it has expired, the 90 day period of Article 21.5 and the 60 day period of Article 22.6 become irreconcilable. In any event, our terms of reference as Arbitrators are limited to those foreseen in paragraphs 6 and 7 of Article 22 of the DSU. We note that the relationship of Articles 21.5 and 22 is now under discussion in the ongoing review of the DSU.

<sup>12</sup> Arbitration Award under Article 21.3(c) in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/15 & WT/DS48/13, paragraph 26 (29 May 1998) (emphasis added).

4.14 Fifth, the European Communities argues that our consideration of the consistency issue deprives third parties and the DSB of their rights to participate in the determination of nullification or impairment. However, we note that we are not called upon and do not intend to make a formal determination of nullification or impairment, but to ensure that the level of suspension of concessions is equivalent to the level of nullification or impairment. In this regard, we note that the DSB has the same ability to reject our decision on the level of suspension as it does to reject panel and Appellate Body reports. Thus, we are not depriving the DSB of its supervisory function. If the DSB were to conclude that there is no nullification or impairment, it presumably would reject any level of suspension of concessions above zero.

4.15 Finally, we emphasize again our view recorded in paragraph 4.9 above. In the special circumstances of this case, and in the absence of agreement of WTO Members over the proper interpretation of Article 21 and 22, it is necessary to find a logical way forward that ensures a multilateral decision, subject to DSB scrutiny, of the level of suspension of concessions. In our view, we have accomplished this task.

## **V. IS THERE NULLIFICATION OR IMPAIRMENT OF US BENEFITS UNDER THE REVISED EC BANANA IMPORT REGIME?**

5.1 The United States argues that in terms of Article 22.2, the European Communities has failed to bring its banana import regime, which was found in the original proceeding in this case to be inconsistent with its obligations under several covered agreements<sup>13</sup>, into compliance with those agreements. In its initial submission, the United States develops this contention as outlined below. At our request, the European Communities responded to the US arguments.

5.2 Because it is necessary to have a view on the WTO-consistency of the revised EC banana regime, we examine whether there is nullification or impairment of US benefits under that regime in the following paragraphs.

### *A. Article XIII of GATT 1994*

5.3 The United States argues that Regulations 1637/98 and 2362/98, in the way in which they (i) establish a tariff quota providing duty-free treatment for 857,700 tonnes of traditional banana imports from 12 ACP States and (ii) assign country-specific shares of the EC's MFN tariff quota for bananas, are inconsistent with the EC's obligations under Article XIII of GATT 1994.

5.4 In this regard, we note that Regulation 1637/98 confirms the tariff quota of 2,200,000 tonnes bound in the EC Schedule and an additional autonomous

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<sup>13</sup> Panel reports on *Bananas III*, as modified by the Appellate Body report.

tariff quota of 353,000 tonnes.<sup>14</sup> These are at the same levels as in the prior regime. Given that an agreement on the allocation of country-specific allocations could not be achieved with the substantial suppliers, in Regulation 2362/98 the European Communities assigned the following country shares to each of the substantial suppliers pursuant to Article XIII:2(d) (i.e. Colombia, Costa Rica, Ecuador and Panama):

**Table 1 - EC tariff quota allocations for third-country and non-traditional ACP banana suppliers**

Country	Share (%) <sup>15</sup>	Volume ('000 tonnes) <sup>16</sup>
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Others	9.43	240.7
Total of the above	100.00	2,553.0

5.5 The Annex to Regulation 1637/98 provides for an aggregate quantity of 857,700 tonnes for traditional imports from ACP States. Under the revised EC regime, there are no longer any country-specific allocations to the 12 traditional ACP States (i.e. Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent & the Grenadines, and Suriname).<sup>17</sup>

5.6 In examining the revised EC banana regime and its consistency with Article XIII, we recall that in *Bananas III* the Appellate Body overruled the Panel's interpretation of the scope of the Lomé waiver and held that the Lomé waiver does not cover inconsistencies with Article XIII. Accordingly, in considering Article XIII issues, we do not consider what is or is not required by the Lomé Convention.

*1. The 857,700 Tonnes Reserved for Traditional Imports from ACP States*

5.7 The United States alleges that the division of the revised EC import regime for bananas into (i) an MFN tariff quota of 2,553,000 tonnes, in combination with (ii) an amount of 857,700 tonnes reserved for traditional imports from ACP States at a zero-duty level fails to conform to the non-discrimination requirements of Article XIII and amounts to a continued

<sup>14</sup> Article 18, paragraphs 1 and 2 of Regulation 1637/98.

<sup>15</sup> Annex I to Regulation 2362/98.

<sup>16</sup> Calculation of absolute shares based on the 2,553,000 tonne tariff quota and the shares of substantial suppliers according to Annex I to Regulation 2362/98.

<sup>17</sup> Annex to Regulation 1637/98 and Annex I to Regulation 2362/98.

application of "separate regimes" of the sort found to be inconsistent with Article XIII by the original panel and the Appellate Body in *Bananas III*.

5.8 The European Communities responds that a single import regime exists under Regulations 1637/98 and 2362/98. It is the EC's position that for purposes of Article XIII the quantity of 857,700 tonnes for traditional ACP imports is outside the MFN tariff quota of 2,553,000 tonnes. In the EC's view, the amount of 857,700 tonnes constitutes an upper limit for the zero-tariff preference for traditional ACP imports. It notes that the tariff preference is required by the Lomé Convention and is covered by the Lomé waiver as to any inconsistency with Article I:1 of GATT. In addition, the European Communities relies on the panel report on *EEC - Imports of Newsprint*<sup>18</sup> in arguing that imports under preferential arrangements should not be counted against an MFN tariff quota. The European Communities also argues that its collective allocation of an amount of 857,700 tonnes for traditional imports from ACP States is effectively required by the Appellate Body report in *Bananas III*.

(a) The Applicability of Article XIII

5.9 Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.

5.10 In our view, the *Newsprint* case does not affect the applicability of Article XIII to the tariff quota for traditional imports from ACP States. In that case, the European Communities had unilaterally reduced a 1.5 million tonne tariff quota for newsprint to 500,000 tonnes on the grounds that certain past supplying countries under the tariff quota had entered into free-trade agreements with the European Communities and that the tariff quota should be reduced to reflect that fact. The panel held that the European Communities could not unilaterally make such a change. In passing, the *Newsprint* panel stated: "Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota."<sup>19</sup> The *Newsprint* panel did not deal with the applicability of Article XIII to a case such as this one. Moreover, our conclusions do not imply that the European Communities must count ACP imports against its MFN tariff quota.

5.11 Thus, in our view, the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it.

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<sup>18</sup> Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133.

<sup>19</sup> *Ibid.*, paragraph 55.

## (b) The Requirements of Article XIII and the 857,700 Tonne Tariff Quota for Traditional ACP Imports

5.12 The United States challenges the 857,700 tonne tariff quota under both paragraphs 1 and 2 of Article XIII. We address its arguments in that order. In assessing the 857,700 tonne tariff quota for traditional ACP imports in light of the requirements of Article XIII, we recall the Appellate Body's findings in *Bananas III* concerning "separate regimes":

"The issue here is not whether the EC is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member."<sup>20</sup>

5.13 We also recall the Appellate Body finding that the Lomé waiver does not justify inconsistencies with Article XIII. As stated by the Appellate Body:

"In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly."<sup>21</sup>

We, therefore, in our examination of the WTO-consistency of the EC's revised regime, have to apply fully the non-discrimination and other requirements of Article XIII to all "like" imported bananas irrespective of their origin, i.e. regardless of whether imports occur under the MFN tariff quota of 2,553,000

<sup>20</sup> Appellate Body report on *Bananas III*, paragraph 190.

<sup>21</sup> Appellate Body report on *Bananas III*, paragraph 187.

tonnes or under the tariff quota of 857,700 tonnes reserved for traditional ACP imports.

(i) Article XIII:1

5.14 In this regard, we note that under the revised regime, on the one hand, bananas may be imported under the MFN tariff quota on the basis of past trade performance during a previous representative period (i.e. the three-year period from 1994 to 1996). On the other hand, bananas from traditional ACP supplier countries may be imported up to a collective amount of 857,700 tonnes, which was originally set to reflect the overall amount of the pre-1991 best-ever imports by individual traditional ACP suppliers, with allowance made for certain investments.<sup>22</sup> We further note that imports under the tariff quota by some non-substantial suppliers (i.e. third-country and non-traditional ACP suppliers) are restricted, in aggregate, to 240,748 tonnes (i.e. the "other" category of the MFN tariff quota), whereas imports of other non-substantial sources of supply (i.e. traditional ACP suppliers) are restricted, in aggregate, to 857,700 tonnes. Moreover, some non-substantial suppliers, namely the ACP suppliers, could benefit from access to the "other" category of the MFN tariff quota once the 857,700 tonne tariff quota was exhausted. On the other hand, non-substantial suppliers from third countries have no access to the 857,700 tonne tariff quota once the "other" category of the MFN tariff quota is exhausted. Individual Members in these two groups - traditional ACP suppliers and the other non-substantial suppliers - are accordingly not similarly restricted. This disparate treatment is inconsistent with the provisions of Article XIII:1, which require that "[n]o ... restriction shall be applied by any Member on the importation of any product of the territory of any other Member ... unless the importation of the like product of all third countries ... is similarly prohibited or restricted".

(ii) Article XIII:2

5.15 The general rule laid down in Article XIII:2 of GATT requires Members to "aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". To this end, where the option of allocating a tariff quota among supplying countries is chosen, Article XIII:2(d) provides that allocations of shares (i.e. country-specific allocations for *substantial* suppliers; and a global allotment in an "other" category for *non-substantial* suppliers unless country-specific allocations are allotted to each and every non-substantial supplier) should be based upon the proportions supplied during a previous representative period. The European Communities explains that it chose the three-year period

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<sup>22</sup> The country-specific allocations for, e.g. Belize, Cameroon, Côte d'Ivoire and Jamaica seem to include allowances for investment made.

from 1994 to 1996 as the most recent three-year period for which reliable import data were available.

5.16 According to the information available to us, for traditional ACP supplier countries the average imports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent). Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions.

5.17 In light of the foregoing, and in light of the Appellate Body findings that the Lomé waiver does not cover inconsistencies with Article XIII, we are of the view that imports from different *non-substantial* supplier countries are not similarly restricted in the meaning of Article XIII:1 of GATT. Moreover, the allocation of a collective tariff quota for traditional ACP States does not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT. Therefore, the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.

(c) The Requirements of the Appellate Body Report  
in *Bananas III*

5.18 The European Communities recalls that the panel and the Appellate Body held in *Bananas III* that it is required by the Lomé Convention to provide duty-free access to traditional exports from ACP suppliers in an amount of their pre-1991 best-ever exports (i.e. 857,700 tonnes) and that the Appellate Body held that it could not assign country-specific allocations to those suppliers inconsistently with Article XIII. It argues that in consequence the Appellate Body report in *Bananas III* requires it to provide a collective allocation of 857,700 tonnes to those suppliers.

5.19 We note, however, that the panel and Appellate Body reports made it clear that what was required by the Lomé Convention was not necessarily covered by the Lomé waiver. And, as the Appellate Body found in *Bananas III*, the European Communities is not authorized by the Lomé waiver to act inconsistently with its obligations under Article XIII. The Appellate Body also upheld the panel finding that the European Communities could not allocate country-specific shares to some non-substantial suppliers (e.g. traditional and non-traditional ACP countries and BFA signatories) unless country-specific allocations were also given to all non-substantial suppliers.

## 2. *The MFN Tariff Quota Shares*

5.20 Article XIII:2(d) provides that if a Member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member

"shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a *previous representative period*, of the total quantity or value of imports of the product, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product" (emphasis added).

5.21 The United States argues that the EC's allocation of the MFN tariff quota to shares to substantial suppliers does not approximate the shares that they might expect to obtain in the absence of restrictions. It also argues that since the 1994-1996 period was "restricted", it is unrepresentative for purposes of Article XIII.

5.22 The European Communities notes that it based its calculation of country allocations under the MFN tariff quota of the revised regime on the three-year period from 1994 to 1996. In the EC's view, this was the most recent three-year period for which reliable data were available at the time.

### (a) The Requirements of Article XIII

5.23 In considering the US arguments regarding tariff quota shares under Article XIII, we recall our findings in *Bananas III*:

"The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on this use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule of the chapeau of Article XIII:2:

'In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions ...'

In this case we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate

under such measures the trade shares that would have occurred in the absence of the regime."<sup>23</sup>

5.24 We also noted the following:

"[I]n order to bring its banana import regulations into line with Article XIII, the EC would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the EC would have to base such shares on an appropriate previous representative period<sup>375</sup> and any special factors would have to be applied on a non-discriminatory basis."

<sup>375</sup> "In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

'[I]n keeping with normal GATT practice the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1965, 1977, 1978 as a 'representative period'.'

[Citation omitted.] In the report of the 'Panel on Poultry' issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: '[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports'. See also Panel report in 'Japan - Restrictions on Imports of Certain Agricultural Products, para. 5.1.3.7 [citation omitted]'."

5.25 It is to accomplish the chapeau's requirement that a "Member shall aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of restrictions", that Article XIII:2(d) requires, as one alternative, the allocation of shares on the basis of a previous representative period (adjusted for special factors if and to the extent appropriate).

5.26 If data from a period are out-of-date or imports distorted because the relevant market is restricted, then using that period as a representative period cannot achieve the aim of the chapeau. Thus, under GATT practice it is necessary that the "previous representative period" for purposes of Article XIII:2(d) be the most recent period not distorted by restrictions. As noted

<sup>23</sup> Panel reports on *Bananas III*, paragraph 7.68.

above, the panel on *EEC - Restrictions on Imports of Apples from Chile*<sup>24</sup>, dealt with the question whether import restrictions reflected the proportion of imports to the European Communities "prevailing during a previous representative period" in the context of Article XI:2(c). That panel excluded the year 1976 from the most recent three-year period previous to 1979, the year when the EC restriction in dispute was in effect, and chose 1978, 1977 and 1975 instead. It held that 1976 could not be considered representative due to the existence of restrictions during that year.

5.27 The panel on *Japan - Restrictions of Imports of Certain Agricultural Products*<sup>25</sup> addressed the question of the absence of a "previous representative period" in the context of Article XI:2(c). It noted that:

"in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. ... The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. ... The Panel considered for these reasons that the burden of providing evidence that all requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision."

5.28 We note that Article XI:2(c), which stipulates that quotas must be such as not to reduce the total of imports relative to domestic production which might reasonably be expected to rule between the two in the absence of restrictions, is an exception from the prohibition of quantitative restriction in Article XI:1. Article XIII regulates the non-discriminatory administration of quantitative restrictions, including, where applied, the allocation of shares among Members. The determination of a previous representative period under Article XIII raises similar problems as under Article XI:2. Thus we deem the above considerations pertinent to the case before us. The effect of a lack of a representative period under Article XIII is much less far-reaching than the lack of such a period under Article XI:2(c). In the *Japan - Restrictions* case, the lack of a suitable previous representative period precluded the use of the Article XI:2(c) exception. Under Article XIII, the lack of a suitable previous representative period would only

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<sup>24</sup> Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.8.

<sup>25</sup> Panel report on *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, paragraph 5.1.3.7.

preclude allocation of a tariff quota unilaterally. It would not preclude the use of a global tariff quota nor of country-specific allocations by agreement.

(b) The Representative Period

5.29 With regard to the selection of a "previous representative period" for applying the tariff-quota regime for imports of bananas to the European Communities, we recall that prior to 1993, EC member States applied different national import regimes. Some member States applied import restrictions or prohibitions, while imports to other member States were subject to a tariff-only regime or could enter duty-free.<sup>26</sup> Thus, that period could not serve as a previous representative period (see paragraph 5.24).

5.30 With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

5.31 It could be argued that within the "other" category of the 2,200,000 tonne tariff quota (autonomously enlarged by 353,000 tonnes as of 1995 for the EC-15), Ecuador and Panama and the non-substantial third-country suppliers without allocated shares were competing on a relatively undistorted basis during the period when the previous regime was in force (although less so after the BFA entered into force). However, given that, for purposes of applying the requirements of Article XIII, it does not matter whether imports from some suppliers countries were relatively less distorted than others since distortions with respect to one (group of) supplier countries will have repercussions on the import performance of other substantial or non-substantial supplier countries within a single product market.

5.32 Accordingly, in our view, the 1994-1996 period could not serve as a previous representative period because of the presence in the market of the foregoing distortions.

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<sup>26</sup> For a description of the market, see panel report on *EEC - Member States' Import Regime for Bananas*, issued on 3 June 1993 (not adopted), GATT Doc. DS32/R, pages 3-7.

5.33 Thus, while Members have a degree of discretion in choosing a previous representative period, it is clear in this case that the period 1994-1996 is not a "representative period". Accordingly, it is our view that the country-specific allocations assigned by the European Communities to the substantial suppliers are not consistent with the requirements of Article XIII:2.

### B. GATS Issues

5.34 The United States alleges that Regulations 1637/98 and 2362/98 perpetuate nullification and impairment caused by the previous EC regime which was found to be inconsistent with the EC's obligations under Articles II and XVII of GATS. More specifically, the United States alleges (1.) that the revised licensing procedures perpetuate the violations of Articles II and XVII of GATS (i.e. GATS' most-favoured nation and national treatment clauses) found by the original panel and the Appellate Body in *Bananas III* and (2.) that the enlargement of the licence quantity reserved for "newcomers" to 8 per cent and the criteria for acquiring "newcomer" status under the revised licensing procedures are inconsistent with Article XVII of GATS.

#### 1. Licence Allocation Procedures

5.35 The United States alleges that the revised EC licensing regime is inconsistent with Articles II and XVII of GATS and continues nullification and impairment because it perpetuates or carries on the discriminatory elements of the previous licensing system in that licenses are allocated to those who used licenses to import, and paid customs duties on, bananas during the 1994-1996 period. Moreover, it claims that the new, so-called "single pot" licensing allocation rules, under which, *inter alia*, past importers of ACP bananas may apply for import licenses to import non-ACP third-country bananas on the basis of reference quantities derived from their ACP banana imports, exacerbates the discriminatory elements of the past regime.<sup>27</sup>

5.36 The EC contends that it has abolished the previous licensing system including operator categories, activity functions, export certificates and hurricane licences. The new criterion for the allocation of licences to "traditional operators", i.e. proof of payment of customs duties, eliminates any "carry-on effects" from the previous to the revised license allocation system and to ensure that "true and real" importers in the past obtain licence entitlements for the future.

5.37 The consideration of alleged inconsistencies under the GATS' national treatment and MFN clauses usually presupposes a two-step examination. For

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<sup>27</sup> The United States refers in this regard to the reservation of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas to Category B operators, the reservation of 28 per cent of such import licences to ripeners under the activity function rules, and the allocation of hurricane licences exclusively to certain Category B operators.

purposes of Article XVII, it is necessary to examine (i) whether the domestic and foreign services or service suppliers at issue are "like" and (ii) whether services or service suppliers of the complainant's origin are treated less favourably than those of domestic origin. For purposes of Article II, it is necessary to examine (i) whether services or service suppliers originating in different foreign countries are "like" and (ii) whether services or service suppliers of the complainant's origin are subject to less favourable treatment than those of other Members' origin.

5.38 In this context, we recall that issues such as the origin of services and service suppliers and the "likeness" of services or service suppliers of the complainant's origin and of those of EC or other third-country origin, as the case may be, were resolved in the original case. We also note that the panel and the Appellate Body - albeit on different legal grounds - found that the national treatment obligation as well as the MFN treatment obligation under the GATS prohibit *de iure* and *de facto* discrimination. For purposes of resolving the issues before us, we need, therefore, not discuss whether the notion of *de facto* discrimination under Article II is similar to or narrower than the notion of *de facto* discrimination under Article XVII, and in particular under paragraphs 2 and 3 of that Article. We only need to recall that the original panel, but also the Appellate Body found that Article II of GATS, too, covers *de facto* discrimination: "... For these reasons we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de iure*, discrimination ...".<sup>28</sup> Therefore, we consider it appropriate to examine jointly the question whether or not the revised licence allocation procedures accord less favourable treatment in the meanings of Articles II and XVII of GATS to services or service suppliers of the United States.

(a) The Findings in Bananas III on Articles II and XVII of GATS

5.39 We recall our findings with respect to particular aspects of the licence allocation procedures which applied under the previous regime to third-country and non-traditional ACP imports within the tariff quota, to the extent they are relevant here, i.e.:

"... that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Articles II and XVII of GATS."<sup>29</sup>

"... that the allocation to ripeners of 28 per cent of Category A and B licences allowing the importation of third-country and

<sup>28</sup> Appellate Body report on *Bananas III*, paragraph 234.

<sup>29</sup> Panel reports on *Bananas III*, paragraphs 7.341 and 7.353.

non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS." <sup>30</sup>

"... that the allocation of hurricane licences exclusively to operators who included or directly represented EC (or ACP) producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII (or II) of GATS." <sup>31</sup>

These findings were upheld by the Appellate Body.

(b) The Revised EC Licensing Regime

5.40 Under the revised EC licensing regime, licences are allocated to importers on the basis of their reference quantities. These reference quantities are allocated to "traditional operators" (defined below) to the extent that they are able to show that they actually imported bananas in the 1994-1996 period. More particularly, Article 3 of Regulation 2362/98 provides:

"[T]raditional operators' shall mean economic agents established in the European Community during the period for determining their reference quantity ... who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period. The minimum quantity ... shall be 100 tonnes imported in any one year of the reference period ... [or] ... 20 tonnes where the imports entirely consist of bananas with a length of 10 centimetres or less."

5.41 Article 5 of Regulation 2362/98 provides:

"3. Actual import shall be attested by both of the following:

(a) by presenting *copies of the import licences used* either by the *holder* or, in the case of a transfer ... duly endorsed by the competent authorities, by the *transferee*, in order to release the relevant quantities for free circulation; and

(b) by presenting *proof of payment of the customs duties* due on the day on which customs import formalities were completed. The payment shall be made either *direct* to the competent authorities or via a *customs agent* or *representative*.

Operators furnishing *proof of payment of customs duties*, either direct to the competent authorities or via a customs agent or

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<sup>30</sup> Panel reports on *Bananas III*, paragraph 7.368.

<sup>31</sup> Panel reports on *Bananas III*, paragraph 7.393 (and paragraph 7.397).

representative, for the release into free circulation of a given quantity of *bananas without being the holder or transferee holder of the relevant import licence ... shall be deemed to have actually imported the said quantity provided that they have been registered in a Member State under Regulation No. 1442/93* and/or that they fulfil the requirements of *this Regulation* for registration as a *traditional operator*. Customs agents or representatives may not call for the application of this subparagraph." (emphasis added).

5.42 Article 31 of Regulation 2362/98 repeals Regulations 1442/93 and 478/95, which were the basis of the previous licensing regime. We note, however, that according to Article 5(3) of Regulation 2362/98, operators that have been registered under Regulation 1442/93 may acquire the status of a "traditional operator" under the revised licensing procedures.

### (c) The Requirements of Articles XVII and II of GATS

5.43 We recall our decision in *Bananas III* on the elements necessary to establish an inconsistency under Articles XVII and II of GATS and on certain preliminary issues.<sup>32</sup> These are not controverted in this proceeding, so we turn to the main issues.

5.44 For purposes of Article XVII, we have to ascertain whether, by applying its revised licensing regime, the European Communities accords less favourable treatment to services and service suppliers of the United States than it accords to its own like service and service suppliers. For purposes of Article II, we also have to ascertain whether, under the revised regime, less favourable treatment is being accorded to services and service suppliers of the United States than to services and service suppliers of other Members. In this context, we recall our consideration above that we deem it appropriate to examine jointly whether the EC's revised regime accords less favourable treatment in the meanings of both Article II and XVII to services or service suppliers of the United States. The crucial issue in respect of these claims against the EC's revised licensing procedures is whether the allocation of licences based on the criterion of "*actual payment*" of customs duties by "*traditional operators*" under the revised regime prolongs the allocation of licences on the basis of those aspects of the previous licensing system which were found to be inconsistent with the GATS in *Bananas III*.

5.45 In framing this issue for consideration, we do not imply that the EC is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "... the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." This principle requires

<sup>32</sup> Panel reports on *Bananas III*, paragraphs 7.314, 7.317, 7.344, 7.277 et seq., 7.298.

compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999.

5.46 At the outset of our analysis, we note that the United States does not allege that the new EC regime is *de iure* discriminatory. The issue, as in *Bananas III*, is whether it is *de facto* discriminatory in a way that is inconsistent with Articles XVII and II of GATS. In this regard, we recall that, pursuant to Article XVII:2, a Member may ensure no less favourable treatment for foreign services or service suppliers by according formally identical treatment or formally different treatment to that it accords to its own like service suppliers. Moreover, according to Article XVII:3, formally identical treatment may, nevertheless be considered to be less favourable treatment if it adversely modifies conditions of competition for services or service suppliers of other Members. We also recall the panel and Appellate Body findings in the original dispute that the MFN clause of GATS includes prohibitions of both *de iure* and *de facto* discrimination.

(d) The Parties' Arguments

(i) European Communities

5.47 The European Communities argues at the outset that the facts on which the original panel had based its conclusions had so changed by 1994-1996 that the panel would not have made the same findings had it disposed of the 1994-1996 facts.

5.48 With respect to the major third-country operators (e.g. Chiquita, Dole, Del Monte and Noboa), the European Communities contends that the allocations of licences for the importation of third-country and non-traditional ACP bananas to these operators increased by an average of 35 per cent between 1994 under the previous regime and 1999 under the revised regime.<sup>33</sup> Specifically, the European Communities reports increases in licence allocations to Chiquita and Dole of 34 and 44 per cent, respectively, between 1994 and 1999. Moreover, licence allocations for Chiquita and Dole were higher in 1999 than in 1998. According to the European Communities, this occurred because of two reasons: investments and licence transfers.

5.49 First, there were investments by third-country operators in EC/ACP operators. The European Communities mentions investments in Compagnie

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<sup>33</sup> The European Communities also submits that licence allocations to these major third-country operators were as follows: 1994: 598,857 tonnes; 1995: 651,266 tonnes; 1996: 726,782 tonnes; changes: 1994-1995: 8.8 per cent; 1995-1996: 11.6 per cent; 1994-1996: 201.4 per cent.

Fruitière and CDB/Durand by Dole and Chiquita, respectively, and concludes that reference quantities for major third-country operators doubled between 1993 and 1996<sup>34</sup>, when the overall reference quantities of third-country operators amounted to 272,822 tonnes. The European Communities further points out that the original panel found that there was no *de iure* discrimination, based on an operator's origin, with respect to the access to the activity of ripening which entitled operators to licence allocations and thus to reap quota rents under the previous regime. However, the panel found that *de facto* less favourable conditions of competition existed for third-country suppliers of wholesale services because ripeners in the European Communities were predominantly EC owned or controlled<sup>35</sup> and thus licence allocations and quota rents accrued largely to service suppliers of EC origin. Before this Panel, the European Communities emphasizes that, based on 1994 to 1996 statistics, three out of the four biggest ripeners are now non-EC owned and that these alone represent around 20 per cent of the total ripening capacity of the European Communities.<sup>36</sup>

5.50 The second reason why licence allocations to third-country operators has apparently increased is that there have been licence transfers under conditions that allow these operators to claim reference quantities under the revised regime. In the EC's view, this could explain why there has been a decline in the number of operators receiving licences. According to the European Communities, under the previous regime 1568 Category A and B operators were registered, whereas under the revised regime the number of traditional operators has decreased to 629 operators. For the European Communities this shows that the mainly EC-owned operators that received licences in the past without being engaged in actual importation were *ipso facto* excluded from the allocation of licences by the introduction of the revised regime, i.e. mainly ripeners and EC producer organizations.

5.51 The European Communities submits that it is reasonable to assume that under the previous regime non-EC operators received an amount of 50.35 per cent of all available reference quantities that entitle operators to licence allocations in the future.<sup>37</sup> The European Communities then increases the base

<sup>34</sup> EC figures: 1989: 21,305 (reference quantities in tonnes); 1990: 30,514; 1991: 45,532; 1992: 72,592; 1993: 132,614; 1994: 267,511; 1995: 276,804; 1996: 272,822.

<sup>35</sup> In the original dispute, the panel drew this conclusion on the basis that the average estimated volume ripened by EC owned ripeners was, according to the complainants to 83.7 per cent of the overall ripening volume in the European Communities. The European Communities stated that between 20 and 26 per cent of the ripening capacity in the European Communities were foreign-owned, i.e. mainly by Chiquita, Dole and Del Monte. Panel reports on *Bananas III*, footnote 514.

<sup>36</sup> The EC submits the following data on volumes ripened by major third-country operators:

Chiquita:	1994: 214,037; 1995: 232,544; 1996: 241,386;
Atlanta:	1994: 425,147; 1995: 449,969; 1996: 360,179;
Dole Group:	1994: 146,530; 1995: 139,257; 1996: 121,617.

<sup>37</sup> In estimating reference quantities which non-ACP third-country service suppliers could obtain in their entirety under the previous regime, the European Communities considers it appropriate to assume that Category A primary importers obtained 37.905 per cent of the reference quantities (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, the European Communities does not

figure by 35 per cent (see paragraph 5.48) to conclude that non-EC operators are now getting some 68 per cent of licence allocations. Since 8 per cent of allocations go to newcomers, only 24 per cent go to EC/ACP service suppliers. The European Communities suggests that the licences have been legitimately allocated to EC/ACP service suppliers under the revised regime since these operators actually imported Latin American bananas.

5.52 The European Communities also makes two more general arguments. In the first instance, the European Communities insists that the GATS does not guarantee any particular market shares over time, i.e. there are no provisions for grandfather rights. Second, the European Communities argues that it has a right to choose "actual imports" as a basis for licence allocation. In particular, the European Communities refers to Article 3.5(j) of the Agreement on Import Licensing Procedures<sup>38</sup>, pursuant to which consideration should be given to "full utilization of licenses" as a criterion for future allocations. In the EC's view, the only objective and indisputable way of proving the "effective" importation is the payment of duties, either directly or through a customs agent on a fee or contract basis, i.e. the system chosen by Regulation 2362/98.

(ii) United States

5.53 The United States argues that the *de facto* discrimination in the EC's previous licensing regime persists because of the EC's choice of criteria for allocating licences. By basing licence allocation on the "actual importer" criteria, the EC ensures that the predominantly EC/ACP service suppliers to whom Category B, ripener and hurricane licences were issued in the previous regime will retain rights to most of those licences in the new regime.

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object to the assumption that two-thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACP origin. Accordingly, 6.65 per cent of customs clearance reference quantities (i.e. 10 per cent of 66.5 per cent) may be presumed to accrue to third-country operators. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided by using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this results in 1.8 per cent for third-country operators and in 6.6 per cent for EC/ACP operators of the 8.4 per cent which represent the licence allocation for Category B ripening activities (i.e. 28 per cent of 30 per cent). As a result, in estimating the total share of reference quantities for non-ACP third-country suppliers, the European Communities adds up 37.905 per cent (for Category A primary importers), 6.65 per cent (for customs clearers of non-ACP third-country origin), 4 per cent and 1.8 per cent (for ripening activities effectuated by Category A and B operators of non-ACP third-country origin). This results in an estimate for the overall share of licence entitlements of 50.35 per cent of all reference quantities for non-ACP third-country service suppliers.

<sup>38</sup> Article 3.5(j) of the Agreement on Import Licensing Procedures provides that: "... consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period."

5.54 The United States contests as inaccurate the EC information that, *inter alia*, because of investments in Compagnie Fruitière and CBD/Durand by Dole and Chiquita, respectively, licence allocations to major third-country operators doubled between 1993 and 1996. Even if this data were accurate, in the US view, given that total EC imports from traditional ACP countries amounted to 734,000 tonnes in 1996, the 272,822 tonne figure would still indicate that, while non-EC firms have in fact been forced under the previous regime to increase ACP purchases, the clear majority of that Category B/ACP volume continues to be in the hands of EC-owned operators.

5.55 The United States argues that the EC figures about an increase in the foreign ownership of ripeners are inaccurate because the data includes volumes ripened under customer contracts such that the economic benefits of the licence flow to EC-owned ripeners, not to third-country operators. Moreover, even if the figures were accurate they would only confirm that approximately 80 per cent of the EC's total ripening capacity is still EC-owned, thereby reinforcing the "drag-on effect" from the previous regime.

5.56 The United States emphasizes that Chiquita's licence allocation for 1999 under the revised regime was less than in 1998 when the previous regime was in force.<sup>39</sup> In the US view, Dole coped better with the EC banana regime than Chiquita as the result of licence purchases and investment in operators that had access to licences, in particular Category B licences. The United States also refers to Odeodom data<sup>40</sup> (i.e. Office de Développement de l'économie agricole des Départements d'Outre-Mer, the French authority responsible for accepting licence applications and registering licence transfers) according to which significant Category B licence sales for those years occurred in only two countries, i.e. in France and in Spain, whereas these data show no sales in the United Kingdom.<sup>41</sup> In addition, the United States also mentions industry information indicating that during the 1994-1996 period, the EC/ACP firms Fyffes, Geest and Jamaican Producers imported on average over 300,000 tonnes of Latin American bananas per year.<sup>42</sup> The United States concludes that this factual information supports its position that under the revised regime US suppliers of wholesale services continue to be subject to less favourable conditions of competition than suppliers of such services of EC/ACP origin.

5.57 Overall, the United States argues that under the revised regime, non-EC/ACP operators can be expected to receive only 43.7 per cent of the licences they should receive because, in its view, the EC estimate according to which third-country operators receive 68 per cent of licence allocations is flawed. First, it stresses that there is no basis for assuming that under the previous regime two-

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<sup>39</sup> US responses to EC questions concerning licensing of 22 February 1999.

<sup>40</sup> The European Communities contests that information and presents a letter in which Odeodom emphasizes that it never published the chart about licence transfers which had been submitted by the United States.

<sup>41</sup> US Exhibit 6 to the US First Submission.

<sup>42</sup> US Exhibit 7 to the US First Submission.

thirds of customs clearers were third-country owned and only one third was EC/ACP owned. Accordingly, the EC estimate of 50.35 per cent of licence allocations for third-country operators under the previous regime would be reduced by 6.65 per cent to 43.7 per cent, which means that less than half of the licences used to administer the third-country tariff quota were in the hands of non-EC/ACP operators. Second, it points out that it refers only to the tariff quota of overall 2,553,000 tonnes but not to the entire import quantity (including traditional ACP imports) of 3.4 million tonnes. Third, the United States argues that the average growth increase of 35 per cent in licence allocations to third-country operators between 1994 and 1996 is distorted given that the 1994 figures relate to the EC-12 (excluding Austria, Finland and Sweden), while the 1996 figures include also the new EC member States.

5.58 Therefore, the United States alleges that the revised system perpetuates the underallocation of licences to its service suppliers, who cannot obtain licences to import their bananas on terms as favourable as those EC/ACP suppliers who continue to benefit under the revised regime from the carry-on of GATS-inconsistent licence allocation criteria under the previous regime. The United States points out that under the previous regime those initial licence holders who usually did not import third-country bananas themselves learned not to sell their licences outright. On the contrary, initial holders of Category B and ripener licences devised contractual arrangements under which service suppliers of US origin were obliged to pay for the ability to get bananas into the European Communities without actually obtaining the licence (e.g. licence leases, buy-back arrangements, licence 'pooling', sales of bananas landed in the European Communities but not yet cleared in customs). The United States submits that its service suppliers were forced to enter into unfavourable contractual arrangements also today with initial licence holders under the previous regime. Under many of those arrangements, according to the United States, original licence holders, whether or not they physically imported, may prove payment of customs duties which makes them "actual importers" for purposes of licence allocations under the revised regime.

#### (e) The Arbitrators' Analysis of the Allegations

5.59 In analyzing whether the new EC regime is *de facto* discriminatory, we will first consider the two general EC arguments set out in paragraph 5.52. Thereafter we evaluate the evidence presented by the parties on actual licence allocations and consider its relevance to the allegations by the United States. We will then consider the regime's structure and the extent to which it is based on or related to the previous regime found to be inconsistent with Articles XVII and II in *Bananas III*.

(i) General Arguments by the European Communities

5.60 As to the EC argument that there are no grandfather rights in the GATS or guarantees of market shares, we agree, but note that does not rule out the possibility that *de facto* less favourable conditions of competition may be found and prolonged in violation of GATS rules.

5.61 As to the EC's claimed right to choose "actual imports" as a basis for licence allocation, here again, we agree that the European Communities is not precluded from basing licence allocation on past usage. However, we note that the Import Licensing Agreement's provision that "consideration should be given" to full utilization of licenses does not rule out the possibility that the choice of how to assure that may be limited where *de facto* discrimination has been found in the past, and where reliance on licence usage may result in a prolongation of the results of a violation of GATS rules. The availability of the past performance allocation method, which is an option and not required by the Import Licensing Agreement, would not justify such a violation. In other words, even if Members are normally free to base licence allocation on past usage, that does not mean they are free to do so without regard to their GATS obligations. Moreover, we note that proof of payment of customs duties, directly or through a representative or customs agent, does not necessarily prove licence usage by a particular operator.

(ii) Licence Allocations under the Revised Regime

5.62 In examining the evidence on licence allocations under the revised regime, we note that we based our original findings on the facts available at the time. Our findings explicitly foresaw that one of the effects of the previous regime would be to encourage service suppliers of non EC/ACP origin to invest in EC/ACP banana production and marketing and to acquire licenses from EC/ACP service suppliers. Although these effects were anticipated, our findings were based on the fact that the previous EC regime modified the conditions of competition in violation of Article XVII and II.

5.63 As regards licence allocations to major third-country suppliers of wholesale services under the revised regime, we note that the European Communities has submitted only limited information. This information would not permit us to recalculate whether licence allocations to third-country service suppliers increased between 1994 and 1999 by an average of 35 per cent overall, by 34 per cent for Chiquita, and by 44 per cent for Dole in particular.

5.64 As to the evidence presented by the European Communities concerning the increase in licence allocations to non-EC suppliers as a result of their investments in ACP operators, we note that the European Communities did not submit evidence on the precise extent of non-ACP third-country shareholdings in Compagnie Fruitière and CBD/Durand. Therefore, it is unclear whether these investments are large enough to cause a change in the attributability of these

service suppliers at issue from EC/ACP origin to the origin of other WTO Members. In this regard, we recall that, according to Article XXVIII(n) of GATS, a service supplier in the form of a legal person has the origin of a WTO Member if it is owned by more than 50 per cent by natural or juridical persons of that Member, or if is controlled by those persons in the sense that they have the power to name the majority of directors. Moreover, in respect to investments in ripeners and licence transfers, we note that the EC's evidence was not comprehensive, which means that we not in a position to ascertain the extent to which these factors have led to a change in licence allocations compared to the previous regime.

5.65 As to the EC argument that there were 1,568 Category A and B operators registered under the previous regime, but that there are only 629 traditional operators under the revised regime, we note that the European Communities did not include information on ownership or control of these remaining traditional operators. Therefore, we are not in a position to ascertain whether the decline in the number of registered operators had an impact on the competitive conditions of non-ACP third-country service suppliers.

5.66 Even if the precise extent is uncertain, however, it is clear to us that an increase in licence allocations to non-EC/ACP operators has occurred. Indeed, such an increase would be in line with our considerations in the original dispute, that increase in licence allocations to non-ACP third-country suppliers during the period when the previous regime was in force could be the result of the "cross-subsidization" effect that induced such service suppliers who were previously engaged in the non-ACP third-country market segment into entering the EC/ACP market segment, or to engage in ripening and customs clearance activities in order to qualify for licence allocations in the future.

5.67 As regards the Odeadom data submitted by the United States and the EC contention<sup>43</sup> to that evidence, we agree with the European Communities as far as data on licence transfers with respect to other member States than France are concerned. However, with respect to France we consider the Odeadom data reliable because, according to Article 5.2(a) of Regulation 2362/98, a licence transferee is not recognized as "actual importers" unless such a licence transfer is duly endorsed by the competent authorities of member States, and given that Odeadom is, according to Annex II of Regulation 2362/98, the competent authority for France. We thus note that the data concerning Category B licence allocations in France in the chart submitted by the United States and the data mentioned in the Odeadom letter submitted by the European Communities correspond.<sup>44</sup>

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<sup>43</sup> The European Communities submitted a letter in which Odeadom stresses that it never published data on licence sales, and in particular not with respect to other EC member States than France.

<sup>44</sup> The letter by Odeadom to the EC Commission, DG on Agriculture, states that the following amounts of Category B licences were issued in France: 1994: 230,531 tonnes; 1995: 252,740 tonnes; 1996: 294,410 tonnes.

5.68 As regards the industry information submitted by the US concerning imports of Latin American bananas by EC/ACP operators, on the one hand, we are not in a position to assess to what extent this information is representative and reliable as an adequate description of the pattern of participation by EC/ACP operators in non-ACP third-country imports as developed under the previous regime. On the other hand, we note that the trend of an increasing involvement of EC/ACP operators in the non-ACP third-country market segment points in the direction which the cross-subsidization approach of the previous regime would suggest.

5.69 In our view, it is not particularly relevant for the purposes of this case to what extent precisely licence allocations to US suppliers (i.e. Chiquita, Dole or their subsidiaries) or to other third-country suppliers of wholesale services increased under the revised system in comparison to the previous, low level. An increase only indicates that the carry-on effect of the revised regime is less than 100 per cent. What is relevant for purposes of GATS, however, is that the information submitted shows that US companies in their attempts to supply wholesale trade services in the European Communities, with respect of part of their business, must purchase or lease licences from or otherwise enter into contractual arrangements with those who have access to licences.. Given the structure of the previous regime, those licence holders would be in the group of service suppliers in favour of which the previous EC regime altered competitive conditions. Thus, United States and other third-country service suppliers are faced with a competitive disadvantage that is not equally inflicted on service suppliers of EC/ACP origin. While we cannot ascertain the precise extent of this carry-on effect, it appears to be not unsubstantial, particularly in respect of US service suppliers. Therefore, an increase, even if it is within the order of the EC estimates, may not be considered as evidence that conditions of competition for non-ACP third-country suppliers are not less favourable than for EC/ACP suppliers under the revised regime.

5.70 Therefore we conclude that the EC/ACP operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators and that advantage comes from the "carry on" effects of the GATS-inconsistent aspects of the previous regime. Even if such EC/ACP operators do deal in Latin American bananas and do not simply sell or lease their licences, they are able to compete on more favourable conditions in the market for distribution of bananas than their non-EC competitors because of the licences allocations that are derived from the previous

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The Odeadom chart submitted by the United States as Exhibit 6 showed the volumes of Category B licences that were issued (essentially only in France, Spain and the United Kingdom and to a much lesser extent in Italy and Portugal). For France, the US chart recorded practically identical figures about the issuance of Category B licences: 1994: 230,476 tonnes; 1995: 252,531 tonnes; 1996: 295,359 tonnes. The Odeadom chart submitted by the US further records that most of the B licences issued in Spain were sold, approximately half of those issued in France, and that none of those issued in the United Kingdom were sold.

discriminatory regime. In this way, the revised regimes carries forward the *de facto* discrimination of the previous regime.

(iii) The Structure of the Revised Regime

5.71 We also examine structure of the revised regime because the Appellate Body has noted in the past, in *Japan - Alcoholic Beverages*<sup>45</sup>, that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Although the dispute on *Japan - Alcoholic Beverages* concerned claims under the GATT, we believe that the Appellate Body's description of *de facto* discrimination under the GATT may also give some guidance in analyzing whether there is *de facto* discrimination under the GATS.

5.72 In our examination of the structure of Regulation 2362/98, we start from the proposition that if, in its new licensing regime, the European Communities had simply provided that licenses would be issued to those to whom licenses had been issued in the 1994-1996 period when those aspects of the previous licence allocation procedures which were found to be WTO-inconsistent in the original dispute by the Panel and the Appellate Body, were in force, we would find that such a revised regime did not remove the GATS inconsistencies of the old regime, even if technically different rules for licence allocation had been implemented. This would be so because the less favourable conditions of competition for service suppliers of the United States (or other WTO Members) would continue to exist. The revised regime is not, however, based on licence issuance during the 1994-1996 period, but rather on licence usage and payment of customs duties during that period. According to Article 4 of Regulation 2362/98, the reference quantities for 1999 of "traditional operators" under the revised regime are calculated on the basis of the average quantity of bananas actually imported during the 1994-1996 period.<sup>46</sup>

5.73 The choice of the years from 1994 to 1996 as the reference period is explained in Recital 3 of Regulation 2362/98 as follows:

"[W]hereas, for the purpose of implementing the new arrangements in 1999, it is advisable, in the light of *available knowledge on the de facto patterns of importation*, to determine the rights of traditional operators in accordance with their actual imports during the three-year period 1994 - 1996". (emphasis added).

5.74 We note that officials in certain EC member States raised concerns about the Commission's choice of the 1994-1996 reference period.<sup>47</sup> A legal analysis

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<sup>45</sup> Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, DSR 1996:I, 97, at 120.

<sup>46</sup> Paragraphs 1 and 2 of Article 4 of Regulation 2363/98.

<sup>47</sup> US Exhibit 9 to the First US Submission.

of the Commission Proposal done in an EC member State also raised doubts about this approach.<sup>48</sup>

5.75 In this context, we also note that the Commission Working Document "Determination of Reference Quantities from 1995 Onwards"<sup>49</sup> acknowledges that licence allocation on the basis of the 'licence usage method' would "maintain the same pattern of licence allocation between different types of operators as is seen at present" and "fossilize licence allocation in its current form. Traders could not obtain more quota by expanding their business; the only way to do so would be by buying licences from another operator, or by taking over another company".<sup>50</sup>

5.76 We acknowledge, however, that where US service suppliers entered into contractual arrangements with initial licence holders under conditions where they are able to present proof of actual payment of customs duties and of licence usage there is no carry-on effect. In contrast, in cases where the contractual arrangements between initial licence holders and US service suppliers do not allow them to prove actual payment of customs duties and licence usage during the 1994-1996 reference period (licence buy-back arrangements or licence "pooling"), they cannot claim reference quantities as "traditional operator" for licence allocations from 1999 onwards.

5.77 In the latter case, the revised licensing regime facilitates the continuance of past patterns of licence allocation based on WTO-inconsistent elements of the previous allocation. In particular, e.g. where former Category B operators and/or ripeners are able to prove licence usage and payment of customs duties for imports made with such licences during the 1994-1996 period, such operators are able to claim reference quantities for 1999 under the revised regime, regardless of whether they imported in fact.

5.78 In conclusion, in our examination of the structure of the revised regime, we note that licence allocations under the revised regime are based on license usage (and payment of customs duties), which according to the cited Commission Document is likely to freeze or at least to continue in part past licence allocations. We further note that the base period (1994-1996) is one in which the rules for licence allocation had been in certain aspects found to be WTO-inconsistent in *Bananas III*. On its face, the choice of the 1994-1996 reference period in combination with the licence usage/actual tariff payment

<sup>48</sup> "Using import performance results in a recent period, i.e. the years 1993-1998, would in effect perpetuate the (de facto) discriminatory treatment by rewarding the recipients of the WTO denounced category B and ripeners licences, contrary to GATS Articles XVII and II." in: Amending the EC banana Regulation 404/93 and making it WTO compatible: A legal analysis of Commission Proposal COM(1998) 4 final (98/0013(CNS)), paragraph 22; US Exhibit 8 to US First Submission.

<sup>49</sup> Exhibit 5 to the First Submission by the United States.

<sup>50</sup> Commission Working Document "Determination of Reference Quantities from 1995 Onwards" of 6 October 1993". The document further notes "... *Obviously the licence usage method can only be used for the years when the common market organization was in place.* Thus if it is decided to adopt this method there would be three years (1995-97) when both methods [i.e. licence usage and operator categories/activity functions] would have to be applied. ..." (emphasis added).

criteria would seem to continue at least in part the less favourable conditions of competition for foreign service suppliers found under the previous licensing regime.

(iv) Overall Evaluation

5.79 In light of all these considerations, we are of the view that the United States has shown that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of US origin. The United States has also shown that its service suppliers do not have opportunities to obtain access to import licences on terms equal to those and enjoyed by service suppliers of EC/ACP origin under the revised regime and carried on from the previous regime.

5.80 Therefore, we are of the view that the revised licence allocation system reflecting past performance and licence usage during the 1994-1996 period displays *de facto* discriminatory structure. It is also our view that under the revised regime wholesale service suppliers of the United States are accorded less favourable treatment than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS.

(f) The "Single Pot" Licence Allocation

5.81 Regulation 1637/98 introduced a so-called "single pot" licence allocation system under which reference quantities claimed under the tariff quota of 2,553,000 tonnes are pooled with those claimed under the quantity of 857,700 tonnes reserved for traditional ACP imports. Thus, under the revised regime, a traditional operator may use its reference quantities based on past imports of traditional ACP bananas to apply for licences to import third-country bananas and *vice versa*.

5.82 The United States alleges that this "single pot" solution for calculating reference quantities aggravates the carry-on *de facto* discrimination from the previous regime and further erodes the licence allocations to US service suppliers. Specifically, the United States submits that licence applications by US service suppliers are significantly cut in the quarterly licence allocation procedures due to oversubscription and the application of reduction coefficients with respect to the country allocations for substantial suppliers and the allocation for "other" non-substantial suppliers from which US service suppliers traditionally source their banana imports to the EC. In the US view, these results are due to the "single pot" licence allocation under the revised regime.

5.83 The European Communities contends that, in compliance with the DSB rulings, it has abolished the different licensing procedures of the previous regime for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. It has introduced a single licensing regime for banana imports from all sources of supply and has created a "single pot" or "pool" for purposes of calculating reference quantities under the revised regime. The European Communities emphasizes that there cannot be a protection of

"grandfather" rights as to licence entitlements, especially not in the transition from the previous to the revised regime.

5.84 We note the results of the quarterly two-round licence allocation procedures for the first and the second quarter of 1999. Due to the oversubscription of available licence quantities during the first round of the licence allocation procedures for the first quarter of 1999,<sup>51</sup> reduction coefficients of 0.5793, 0.6740 and 0.7080 were applied to applications for licences for imports from Colombia, Costa Rica and Ecuador, respectively. While licence quantities of 77,536.711 tonnes and 41,473.846 tonnes for imports from Panama and "other" (i.e. non-substantial third-country and non-traditional ACP supplier countries) were transferred to the second round, these quantities were exhausted in the second round, when reduction coefficients of 0.9701 and 0.7198 were applied to applications for licences allowing imports from Panama and "other", respectively.<sup>52</sup> Licence quantities for 148,128.046 tonnes of traditional ACP imports were not applied for in the first round, and apparently also not exhausted in the second round. In the first round of the allocation procedure for the second quarter of 1999<sup>53</sup>, reduction coefficients of 0.5403, 0.6743 and 0.5934 were applied to applications for licences allowing imports from Colombia, Costa Rica and Ecuador, respectively. However, licence quantities for 120,626.234 tonnes and 7,934.461 tonnes of imports from Panama and from other third-country and non-traditional ACP sources, respectively, were transferred to the second round of the allocation procedure for the second quarter of 1999.

5.85 The parties agree that a so-called "single pot" solution is not *de iure* discriminatory. We agree also. The pooling of reference quantities claimed under the tariff quota of 2,553,000 with those under the quantity of 857,700 tonnes reserved for traditional ACP imports in a single licensing regime can be expected to intensify competition between the operators who apply for licences in the quarterly allocation procedures. Given that it is more profitable to market Latin American bananas than ACP bananas, it is evident that profit-maximizing operators have an incentive to apply in the two-round quarterly licence allocation procedures first for low-cost Latin American sources of supply. This obvious effect is confirmed by the fact that in the first two quarterly licence allocation procedures under the revised regime, available licences for most Latin American sources were oversubscribed in the first round (i.e. country-allocations for the substantial suppliers Ecuador, Colombia and Costa Rica), and the remaining licences for imports from Latin America (i.e. Panama and "other" non-substantial suppliers) were exhausted in the second round. However, licence applications for imports within the quantity of 857,700 tonnes reserved for traditional ACP suppliers were generally made in the second round and this quantity was not exhausted.

<sup>51</sup> Regulation (EC) No. 2806/98 of 23 December 1998, O.J. L 349/32 of 24 December 1998.

<sup>52</sup> Regulation (EC) No. 102/1999 of 15 January 1999, O.J. L 11/16 of 16 January 1999.

<sup>53</sup> Regulation (EC) No. 608/1999 of 19 March 1999, O.J. L 75/18 of 20 March 1999.

5.86 We next examine whether the alleged *de facto* discriminatory effects of pooling third-country and traditional ACP licences in a "single pot" derive from the fact that under the revised regime reference quantities are calculated based on the 1994-1996 period when those allocation criteria that were found to be GATS-inconsistent were in force. We recall that the previous regime provided for two separate sets of licensing procedures for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. Under the latter licensing system, Category B operators, based on reference quantities for marketing traditional ACP or EC bananas, were allocated 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas reserved for those B operators *in addition* to the right to continue importing traditional ACP bananas. Likewise, ripeners were allocated 28 per cent of the third-country import licences. Under the revised, single licensing regime, there is no comparable reservation of licence quantities for former Category B operators or for ripeners.

5.87 However, to the extent that former Category B operators and ripeners may prove licence usage and payment of customs duties with respect to imports carried out during the 1994-1996 reference period with licences obtained from the GATS-inconsistent quantities reserved for those operators under the previous regime, these operators are able to claim reference quantities under the revised regime for licence allocations from 1999 onwards. Therefore, former Category A service suppliers of US origin who have not benefitted from licence allocations based on GATS-inconsistent criteria under the previous regime enjoy *de facto* less favourable opportunities to obtain access to import licences under the revised regime than those EC/ACP service suppliers who, as former Category B operators or ripeners, may prove payment of customs duties and licence usage for licences obtained on the basis of GATS-inconsistent allocation rules.

5.88 We note that the so-called single pot solution does not in itself raise problems of WTO inconsistency. On the contrary, it would seem at least in theory to provide for equal conditions of competition between wholesale service suppliers, against a background of varying degrees of economic incentive to import bananas from varying sources. However, it may well be that, when a single pot solution relies on a skewed reference period (i.e. 1994-1996), combined with certain criteria for licence allocation (such as actual importer/payment of customs duties), the *de facto* less favourable conditions of competition for US service suppliers are aggravated through the carry-on effects of the previous regime.

## 2. *The Rules for "Newcomer" Licences*

5.89 The United States alleges that (i) the enlargement of the licence quantity reserved for "newcomers" from 3.5 per cent in the previous regime to 8 per cent in the revised regime (i.e. licences for up to 272,856 tonnes of imports) and (ii) the criteria for demonstrating competence in order to acquire "newcomer" status under the revised regime result in *de facto* less favourable treatment for US wholesale service suppliers and thus are inconsistent with the EC's obligations

under Article XVII of GATS. According to the United States, for 1999 there were 997 applicants for "newcomer" status, but only 13 of them were non-EC-owned companies.<sup>54</sup>

5.90 The European Communities responds that the enlargement of the licence quantity reserved for "newcomers" is *de iure* and *de facto* non-discriminatory for foreign service suppliers. It indicates that EC licence allocation procedures for other EC products have set aside quantities as high as 20 per cent for "newcomers". As regards the criteria for demonstrating competence in order to acquire "newcomer" status, the European Communities argues that there is no distinction in Regulation 2362/98 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers of different origins, on the other hand. It points out that importers of fruits and vegetables established in the European Communities are not necessarily EC-owned or EC-controlled service suppliers, nor does Regulation 2362/98 preclude companies newly established in the European Communities in, e.g. 1998, from applying as a "newcomer". The European Communities also submits that the figure of 400,000 Euro of declared customs value was chosen because it represented the size of a company which would have sufficient capacity to be viable in the sector. It adds that there are third country-owned companies which have qualified as "newcomers" under the revised regime.

5.91 We recall that Article 7 of Regulation 2362/98 provides:

"...'*newcomers*' shall mean economic agents established in the European Community who, at the time of registration:

- (a) have been *engaged independently* and *on their own account* in the commercial activity of importing fresh fruit and vegetables falling within chapters 7 and 8, of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought; and
- (b) by virtue of this activity, have undertaken imports to a *declared customs value of ECU 400 000* or more during the period referred to in point (a)."

5.92 We do not see how the enlargement of the licence quantity to 8 per cent of the tariff quotas and the traditional ACP quantities<sup>55</sup> in itself could create less favourable conditions of competition for service suppliers of third-country origin.

5.93 In respect of the criteria for acquiring "newcomer" status, we note that the parties agree that Article 7 of Regulation 2362/98 does not contain conditions which discriminate *de iure* against service suppliers on the basis of their foreign

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<sup>54</sup> Exhibit 16 to the US First Submission.

<sup>55</sup> Article 2.1(b) of Regulation 2362/98.

as opposed to EC origin. However, we note that potential "newcomers" must have a certain degree of ongoing relationship to the European Communities because they need to be established within the European Communities and they must have been engaged in the commercial activity of importing fruits or vegetables in one of the three years immediately preceding the year for which registration as "newcomer" is sought. More importantly, service suppliers of other Members may prove expertise with respect to the commercial activity of importing fresh fruit and vegetables only through imports carried out to the European Communities but not through the same type of commercial activity of trading in fruits or vegetables with other countries. If it is indeed the level of experience that this criterion is designed to ensure, in our view, experience with trade in fruits or vegetables in or to other countries should equally be deemed sufficient to ensure a requisite level of expertise. If it is the commercial viability of the enterprise in question that is at issue, we believe that it should also be possible to establish that viability on the basis of commercial activity outside the European Communities.

5.94 Thus, while any potential service supplier originating in third countries is not *de iure* precluded from acquiring "newcomer" status, in our view, the criteria for demonstrating the requisite expertise in order to qualify as an importer of bananas as "newcomer" create in their overall impact less favourable conditions of competition for service suppliers of the United States or other Members than for like service suppliers of EC origin. In this respect, we recall the Appellate Body's statement in *Japan - Alcoholic Beverages*<sup>56</sup> that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure".

5.95 In light of these considerations, we are of the view that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to service suppliers of the United States *de facto* less favourable conditions of competition in the meaning of Article XVII than to like EC service suppliers.

### 3. Summary

5.96 In respect of Article XIII of GATT, in our view the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. Further, the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.

5.97 In respect of GATS, we are of the view that (i) under the revised regime US suppliers of wholesale services are accorded *de facto* less favourable treatment in respect of licence allocation than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS and (ii) the criteria for

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<sup>56</sup> Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, DSR 1996:I, 97, at 120.

acquiring "newcomer" status under the revised licensing procedures accord to service suppliers of the United States *de facto* less favourable conditions of competition than to like EC service suppliers in violation of Article XVII of GATS.

5.98 Thus, it is our view that there is a continuation of nullification or impairment of US benefits under the revised EC regime.

## VI. PARAMETERS FOR THE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

6.1 In its initial submission, the United States recalls that Article XXIII of GATT 1994 provides for a level of suspension that is "appropriate in the circumstances". It also argues that the evaluation of equivalence should be reasonable and take into account that suspension is an incentive for prompt compliance, that precision in measuring trade damage is not required and that both direct and indirect trade damage should be taken into account.

6.2 In this section we address from a general perspective the parameters and criteria that, in our view, should apply when matching the level of the suspension of concessions to be authorized by the DSB with the level of nullification or impairment resulting from WTO-inconsistent measures.

### A. *General Considerations*

6.3 In this regard, we first recall the overall objective of compensation or the suspension of concessions or other obligations as described in Article 22.1:

"Compensation and the suspension of concession or other obligations are temporary measures available in the event that the recommendations or rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements."

Accordingly, the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature.

6.4 We are mindful of the fact that the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*<sup>57</sup> considered whether the proposed action was "appropriate" and that the Working Party only had "regard" to the *equivalence* of the impairment suffered:

"2. The Working Party was instructed by the CONTRACTING PARTIES to investigate the *appropriateness of the measure* which the Netherlands Government proposed to take, having regard to the *equivalence to the impairment* suffered by the Netherlands as a result of the United States restrictions.

3. The Working Party felt that the appropriateness of the measure envisaged by the Netherlands Government should be considered from two points of view: in the first place, whether in the circumstances, the measure proposed was *appropriate* in character, and secondly, whether the extent of the quantitative restriction proposed by the Netherlands Government was *reasonable*, having regard to the impairment suffered." (emphasis added).

In our view, in light of the explicit reference in paragraphs 4 and 7 of Article 22 of the DSU to the need to ensure the *equivalence* between the level of proposed suspension and the level of the nullification or impairment suffered, the standard of *appropriateness* applied by the 1952 working party has lost its significance as a benchmark for the authorization of the suspension of concessions under the DSU.

6.5 However, we note that the ordinary meaning of "appropriate", connoting "specially suitable, proper, fitting, attached or belonging to"<sup>58</sup>, suggests a certain degree of relation between the level of the proposed suspension and the level of nullification or impairment, where as we stated above, the ordinary meaning of "equivalent" implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment. Therefore, we conclude that the benchmark of *equivalence* reflects a stricter standard of review for Arbitrators acting pursuant to Article 22.7 of the WTO's DSU than the degree of scrutiny that the standard of *appropriateness*, as applied under the GATT of 1947 would have suggested.

### B. *The Issue of "Indirect" Benefits*

6.6 The next question we address is the notion of *direct or indirect benefits* accruing under the agreements covered by the WTO whose nullification or impairment may give rise to an entitlement to obtain compensation or the authorization to suspend concessions or other obligations. This is of particular

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<sup>57</sup> Report of the working party on *Netherlands Action under Article XXIII:2 to Suspend Obligations to the United States*, adopted on 8 November 1952, BISD 1S/62.

<sup>58</sup> The New Shorter Oxford English Dictionary on Historic Principles (1993), page 103.

relevance in this case as the United States argues, *inter alia*, that US exports to Latin America (e.g. fertilizers) used in the production of bananas that would be exported to the European Communities under a WTO-consistent regime should be counted in setting the level of suspension.

6.7 The relevant part of Article XXIII:1 of GATT 1994 reads:

"If a Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired ..." (emphasis added).

While Article XXIII:1 of GATS does not contain analogous language, Article 3.3 of the DSU provides:

"The prompt settlement of situations in which a Member considers that any benefit accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." (emphasis added).

6.8 We note that, *inter alia*, from the wording of Article XXIII:1 of GATT and Article 3.3 of the DSU, the United States assumes that any nullification or impairment of any benefit that it considers to directly or indirectly accrue to it under the GATT or the GATS may be taken into account in calculating the level of nullification or impairment for purposes of paragraphs 6 and 7 of Article 22 of the DSU. The European Communities contends that especially with respect to trade in goods the nullification or impairment suffered by the United States can only be negligible or *nil* since there is no *actual* trade and little prospect for *potential* trade in bananas between the United States and the European Communities. The United States substantiates its reasoning at least in part with our findings in the original dispute concerning the question whether the United States had a "legal interest" to launch a complaint against the EC's previous regime based on the EC's obligations under the GATT. Therefore, we first recall our findings on this issue and then discuss what inferences may be drawn therefrom for the notion of *direct or indirect benefits* accruing under the GATT and the GATS.

6.9 In the original panel proceeding we held "that under the DSU the United States has a right to advance the claims that it had raised in this case."<sup>59</sup> We recall the EC's argument in the original dispute that if a Member not suffering nullification or impairment of WTO benefits in respect of bananas were allowed to raise a claim under the GATT, that Member would not have an effective remedy under Article 22 of the DSU.<sup>60</sup> We also note the complainants' argument<sup>61</sup> in the original dispute that Article 3.8 of the DSU presupposes a finding of infringement prior to a consideration of the nullification or impairment

<sup>59</sup> Panel reports on *Bananas III*, paragraph 7.52.

<sup>60</sup> Panel reports on *Bananas III*, paragraph 7.47.

<sup>61</sup> Panel reports on *Bananas III*, paragraph 7.48.

issue, suggesting that even if no compensation were due, an infringement finding could be made. We agree. Article XXIII:1 of GATT 1994 and Article 3.3 of the DSU do not establish a procedural requirement. These provisions concern the initiation of a WTO dispute settlement proceeding where a Member considers benefits directly or indirectly accruing to it have been nullified or impaired. Such an initial decision on whether or not to raise a complaint is necessarily the result of a subjective and strategic consideration from the individual perspective of a Member. However, a decision on whether the assertion of nullification or impairment by an individual Member was warranted and justified in light of WTO law is a different decision, taken by a panel or the Appellate Body from the objective benchmark of the agreements covered by the WTO.

6.10 The *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system. The review of the level of nullification or impairment by Arbitrators from the objective benchmark foreseen by Article 22 of the DSU, is a separate process that is independent from the finding of infringements of WTO rules by a panel or the Appellate Body. As a result, a Member's potential interests in trade in goods or services and its interest in a determination of rights and obligations under the WTO Agreements are each sufficient to establish a right to pursue a WTO dispute settlement proceeding. However, a Member's legal interest in compliance by other Members does not, in our view, automatically imply that it is entitled to obtain authorization to suspend concessions under Article 22 of the DSU.

6.11 Over the last decades of GATT dispute settlement practice, it has become a truism of GATT law that lack of *actual* trade cannot be determinative for a finding that no violation of a provision occurred because it cannot be excluded that the absence of trade is the result of an illegal measure. As discussed by the original panel reports<sup>62</sup>, in past dispute settlement practice the non-discrimination provisions have been interpreted to protect "competitive opportunities"<sup>63</sup> or the "effective equality of opportunities"<sup>64</sup> for foreign products which may be undermined by "any laws or regulations which might adversely modify the conditions of competition between domestic and imported products".<sup>65</sup> All these past panel reports concerned the alleged nullification or impairment of potential trade opportunities under the national treatment clause. Also the *US - Superfund*

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<sup>62</sup> Panel reports on *Bananas III*, paragraph 7.50.

<sup>63</sup> Report of the working party on *Brazilian Internal Taxes*, adopted on 30 June 1949, BISD II/181, 185, paragraph 16.

<sup>64</sup> Panel report on *United States - Section 337 of the Tariff Act of 1930*, adopted on 7 November 1989, BISD 36S/345, 386-387, paragraph 5.11.

<sup>65</sup> Panel report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, 64, paragraph 12.

case<sup>66</sup>, from which the wording of Article 3.8 of the DSU establishing the presumption of nullification or impairment in case of an infringement of GATT is drawn, concerned the alleged violation of Article III of GATT. Therefore, the notion underlying the protection of *potential* trade opportunities is *potential* trade between the complaining and the respondent party. Likewise, in the case of an alleged violation of the MFN treatment clause, a dispute would involve trade between the complaining party or a third country, on the one hand, and the respondent party, on the other.

6.12 We are of the view that the benchmark for the calculation of nullification or impairment of US trade flows should be losses in US exports of goods to the European Communities and losses by US service suppliers in services supply in or to the European Communities. However, we are of the opinion that losses of US exports in goods or services *between the US and third countries* do not constitute nullification or impairment of even *indirect* benefits accruing to the United States under the GATT or the GATS for which the European Communities could face suspension of concessions. To the extent the US assessment of nullification or impairment includes *lost US exports* defined as *US content incorporated in Latin American bananas* (e.g. US fertilizer, pesticides and machinery shipped to Latin America and US capital or management services used in banana cultivation), we do not consider such lost US exports for calculating nullification or impairment in the present arbitration proceeding between the European Communities and the United States.

6.13 As for goods used as inputs, this conclusion is also consistent with the rules of origin for goods. The WTO Agreement on Rules of Origin contains some disciplines, but otherwise leaves discretion to WTO Members to devise rules for the determination of the country of origin of goods during a transitional period until the work programme for the harmonization of non-preferential rules of origin is completed. WTO Members typically determine the origin of agricultural products based on the place of production. In principle, every banana has the origin of the country where it was grown. For purposes of WTO rules it is irrelevant whether goods or services (e.g. fertilizer, machinery, pesticides, capital and management services) used as intermediate inputs in the cultivation of bananas and their delivery up to the f.o.b. stage are of US origin even if US content should amount to a significant part of the end-product's value. Also under US rules of origin bananas grown in Puerto Rico or Hawaii are US products regardless of the percentage of foreign input incorporated in them or used for their cultivation. Our conclusion also reflects the fact that the requirements of Articles I and XIII of GATT are tied to the origin of goods.

6.14 It would be wrong to assume that there is no further recourse within the framework of the WTO dispute settlement system to claim compensation or to request authorization to suspend concessions equivalent to the level of the

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<sup>66</sup> Panel report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 158, paragraph 5.1.9.

nullification or impairment caused with respect to bananas of Latin American origin, including incorporated inputs of whatever kind or origin. A right to seek redress for that amount of nullification or impairment does exist under the DSU for the WTO Members which are the countries of origin for these bananas, but not for the United States. In fact, a number of these WTO Members have been in the recent past, or are currently, in the process of exercising their rights under the DSU. Moreover, our concern with the protection of rights of other WTO Members is in conformity with public international law principles of sovereign equality of states and the non-interference with the rights of other states. Consequently, there is no right and no need under the DSU for one WTO Member to claim compensation or request authorization to suspend concessions for the nullification or impairment suffered by another WTO Member with respect to goods bearing the latter's origin or service suppliers owned or controlled by it.

6.15 Moreover, if *overlapping* claims by different WTO Members as to nullification or impairment suffered because of the same lost trade in goods (and goods and service inputs used in their production or incorporated therein) or the same lost trade in services were permissible under the DSU, the problem of "*double-counting*" of nullification or impairment would arise. Due to the difference in origin of goods or services used as *inputs* in the banana production, on the one hand, and the origin of the bananas as *end-products*, on the other, *cumulative* requests for compensation or suspension of concessions could be made for the *same* amount of nullification or impairment caused by a Member.

6.16 If we were to allow for such "*double-counting*" of the same nullification or impairment in arbitration proceedings under Article 22.6 of the DSU with different WTO Members, incompatibilities with the standard of "*equivalence*" as embodied in paragraphs 4 and 7 of Article 22 of the DSU could arise. Given that the *same* amount of nullification or impairment inflicted on *one* Member cannot simultaneously be inflicted on *another*, the authorizations to suspend concessions granted by the DSB to different WTO Members could exceed the overall amount of nullification or impairment caused by the Member that has failed to bring a WTO-inconsistent measure into compliance with WTO law. Moreover, such *cumulative* compensation or *cumulative* suspension of concessions by different WTO Members for the *same* amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures.<sup>67</sup>

6.17 In view of the fact that initially five WTO Members participated in the original *Bananas III* dispute, the problem of "*double-counting*" nullification or

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<sup>67</sup> Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, January 1997, Article 49 on Proportionality: "Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the international wrongful act and the effects thereof on the injured State." See also: I. Brownlie, *International Law and the Use of Force by States*, Oxford (1983), page 219; H. Kelsen, *Principles of International Law*, New York (1966), page 21.

impairment is more than a theoretical possibility. Despite the ambiguity in the wording of Article 22.6 of the DSU, we as Arbitrators in this arbitration proceeding involving only the United States do not exclude the possibility that other original complainants may request authorization from the DSB to suspend concessions towards the European Communities at a later point in time (assuming that the revised regime should prove to be WTO-inconsistent). Therefore, in addition to the need to preserve the rights of other WTO Members under Article 22.6 of the DSU, we also believe that the calculation of the level of nullification or impairment suffered by other original complainants in the *Bananas III* dispute is not within our terms of reference in this arbitration proceeding between the European Communities and the United States only.

6.18 We consider that not only goods or service inputs in banana cultivation but also services that add value to bananas after harvesting up to the f.o.b. stage should be excluded from the calculation of nullification or impairment that the United States is entitled to claim in the present arbitration proceeding. We realize that the use of this f.o.b. cut-off point as well as of origin rules is somewhat arbitrary. The globalization of the world economy means that products increasingly "incorporate" as intermediate inputs many goods and services of different origins. While it may be necessary to develop more sophisticated rules in this regard in the future, we believe that the line we have drawn is appropriate in this particular case, which involves the suspension of concessions. We imply no limitations on the extent of WTO obligations for this or other cases by this decision.

6.19 In response to the foregoing section B, which was contained in our Initial Decision, the United States argues that the export of packaging materials should be treated differently because such materials are not an input to banana production *per se*. However, in our view, to the extent that the packaging is part of the value of the exported bananas as of the f.o.b. stage, the reasoning set out above clearly applies.

### C. *Services Calculation Issues*<sup>68</sup>

6.20 The European Communities raises one preliminary issue in respect of the scope of service transactions that may be included in the calculation of nullification or impairment in light of the reach of the specific commitments bound in the EC's GATS Schedule. It contends that the revision of the UN Central Product Classification system affects the interpretation of the scope of its market access and national treatment commitments on "wholesale trade services" which the European Communities has bound in its GATS Schedule. The European Communities submits that the Provisional CPC has been replaced in the meantime by the Central Product Classification (CPC) - Version 1.0 ("Revised CPC"), and that the Revised CPC seeks to create a system of service

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<sup>68</sup> This is a modified version of the Initial Decision, reaching the same result.

categories that are both exhaustive and mutually exclusive. Therefore, in the EC's view, any services related to wholesale trade transactions which at the same time fall into another CPC category should be assessed on the basis of this new reality, i.e. should not be considered to be covered by the EC's commitments on "wholesale trade services".<sup>69</sup> The European Communities adds that the specific commitments bound in its GATS Schedule are still valid.

6.21 The United States contends that the scope of the EC's specific commitments under the GATS, which were bound in the EC GATS Schedule, cannot be affected by the subsequent modification of the Central Product Classification by the UN. Consequently, it is still the Provisional CPC that matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services".

6.22 We note that the specific commitments bound by the European Communities in its GATS Schedule with respect to the service sectors<sup>70</sup> or sub-sectors at issue in the original case were categorized according to the Services Sectoral Classification List which refers to the more detailed Provisional CPC. We also recall that in *Bananas III*, the parties disagreed as to whether the panel's terms of reference comprised the narrower sub-sector of "wholesale trade services", or encompass the broader sector of "distributive trade services" as described in a headnote to section 6 of the provisional CPC. The relevant definition of the Provisional CPC for "*wholesale trade services*" reads:

"Specialized wholesale services of fresh, dried, frozen or canned fruits and vegetables (Goods classified in CPC 012,013,213, 215)"

The description for "*distributive trade services*", in turn, provides:

"Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (*wholesaling services*) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (*retailing services*). The principal services rendered by wholesalers and retailers may be characterized as reselling merchandise, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services;

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<sup>69</sup> The European Communities notes that, according to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC", item 62221 "Wholesale trade services of fruit and vegetables" corresponds in the CPC Version 1.0 to 61121 "Wholesale trade services, except on a fee and contract basis, fruit and vegetables."

<sup>70</sup> Article XXVIII (e) of GATS: "sector" of a service means,

- (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,
- (ii) otherwise, the whole of that service sector, including all of its subsectors;"

refrigeration services; sales promotion services rendered by wholesalers ..."

6.23 We recall that with respect to both wholesale and distributive trade services, the European Communities had bound specific commitments on liberalization of market access and national treatment without specific conditions or limitations, and without scheduling any MFN exemptions. The original panel limited its findings to the narrower sub-sector of "wholesale trade services".

6.24 It is not entirely clear to us in which way, in the EC's view, the new categorization of service sectors according to the Revised CPC should affect the classification of service sectors on the basis of which the European Communities bound its specific commitments on market access and national treatment in its GATS Schedule. Therefore, it is not clear how the principle of the mutually exclusive categorization of service sectors could affect the reach of the EC's "wholesale trade services" commitments to those service transactions that do not fall into any other category of the Revised CPC. In any event, we do not see how the revision of the CPC could retroactively change the specific commitments listed and bound in the EC GATS Schedule on the basis of the Provisional CPC. Indeed, at the hearing, the European Communities stated that such a change in the EC's specific commitments bound in its GATS Schedule could only be made consistently with the requirements of Article XXI of GATS on the "Modification of Schedules".

6.25 In our view, what matters for purposes of the calculation of nullification or impairment under the GATS, in light of the EC's commitments on "wholesale trade services", is that, according to the UN CPC descriptions quoted above, the *principal* services rendered by *wholesalers* relate to reselling merchandise, accompanied by a variety of related, *subordinated* services, such as, maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services. We consider that this rather broad variety of *principal* and *subordinated* services should constitute the benchmark against which the United States could possibly claim nullification or impairment for losses in its actual or potential trade with the European Communities.

6.26 We would also emphasize that, according to Article XXVIII(b) of the GATS, the "supply of a service" (e.g. wholesaling) includes "the production, distribution, marketing, sale and delivery of a service". We also recall that, pursuant to Articles XXVIII(d,f,g,l,m,n) of the GATS, the origin of a service supplier is defined on the basis of its ownership and control. Therefore, for the calculation of nullification or impairment by reference to losses of actual or potential service supply, it does not matter whether the lost services relate to trade in bananas from the United States, or from third countries, to the European Communities, or to bananas wholesaled within the European Communities, provided that the service suppliers harmed are commercially present in the European Communities and US-owned or US-controlled. These considerations are subject to our conclusion above that it is the right of those WTO Members

which are the countries of origin of bananas to claim nullification or impairment for actual or potential losses in the supply of service transactions that add value to bananas up to the f.o.b. stage, and that such claims cannot be made by the United States under Article 22.6 of the DSU.

*D. Company-Specific Effects vs. Overall Effect on the US*

6.27 We note that the initial US request for the authorization to suspend concessions or other obligations involved only losses incurred by one US company. In order to calculate the level of nullification and impairment for the United States, it is our view that it is necessary to calculate the aggregate net effects on all US suppliers of wholesale services to bananas wholesaled in the European Communities.

## **VII. CALCULATIONS OF THE LEVELS**

7.1 To estimate the level of nullification or impairment, the same basis needs to be used for measuring the level of suspension of concessions. Since the latter is the gross value of US imports from the European Communities, the comparable basis for estimating nullification and impairment in our view is the impact on the value of relevant EC imports from the United States (rather than US firms' costs and profits, as used in the US submission). More specifically, we compare the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with their value under a WTO-consistent regime (a "counterfactual" situation).

7.2 In its initial submission, the United States based its proposed level of suspension of concessions on a "base" counterfactual that assumed that the European Communities would maintain a quota of 857,700 tonnes for traditional ACP imports and would expand the tariff quota for third-country and non-traditional ACP imports to 3.7 million tonnes, which the United States argues would be required in order to make the 857,700 tonne quota WTO-consistent. The United States also submitted four other counterfactuals, including one based on no increase in the overall tariff quota.

7.3 In response, the European Communities criticized some of the specific assumptions used in the US base counterfactual. It also argued that there were many possible WTO-consistent counterfactuals under which there would be varying effects on US suppliers. Two examples cited were a tariff-only regime and the current tariff quota regime with a first-come, first-served licensing system.

7.4 In our Initial Decision, we requested the United States to provide us with new calculations with respect to the following four "counterfactuals" to the actual EC revised regime:

- (1) a tariff-only regime, without tariff quotas, but including an ACP tariff preference (with effects calculated for a range of tariff rates from 75 Euro per tonne to the out-of-quota bound rate);

- (2) a tariff-quota system with licence allocations based on the first-come, first-served method;
- (3) the complete allocation of a tariff-quota system (with traditional ACP quotas reduced to actual past trade performance) with country-specific allocations to all substantial and non-substantial ACP and non-ACP suppliers; and
- (4) the base US counterfactual, which, as noted above, assumed a continuation of a 857,700 tonne quantity for ACP imports and an expansion of the MFN tariff quota to 3.7 million tonnes.

7.5 In its response, the United States did so and came up with a range of levels as follows (excluding packaging):

- |  |                        |
|--|------------------------|
| (1) Tariff-only regime at 75 Euro per tonne:   | US\$326.9 million;     |
| (2) First-come, first-served licensing system: | US\$619.8 million;     |
| (3) Fully allocated tariff quota:              | US\$558.6 million; and |
| (4) Base US counterfactual:                    | US\$362.4 million.     |

7.6 In commenting in general on the four counterfactuals, the European Communities notes that in a tariff-only regime, the profits of US suppliers would be lower than at present because of the absence of quota rents. Moreover, according to the European Communities, the market share of those suppliers would not likely change as they would be competing with each other and other non-US suppliers as they do at present. As to a first-come, first-served licence regime, the European Communities notes that prices and volumes would stay the same and only the licence allocations would change. The European Communities asserts that given the large number of traditional importers who would be eligible to apply for licences, the share of licences held by US suppliers would drop and they would obtain less quota rent (and have lower profits) than at present. In the case of the third counterfactual - complete allocation of the tariff quota - the European Communities argues that it is likely that supplies and prices would remain the same, with US suppliers having profits comparable to the present regime. Finally, as to the base US counterfactual, the European Communities argues that the expansion of the tariff quota in the amount suggested by the United States would be sufficiently large so that the result in economic terms would be equivalent to a tariff-only regime (i.e. the first counterfactual). In short, the European Communities believes none of these counterfactuals would involve higher profits for US suppliers than the current revised regime. As already noted above, however, in our view the relevant effect is not on US suppliers' profits but rather on the value of relevant imports from the United States.

7.7 There are various counterfactual regimes that would be WTO-consistent. We have evaluated the various counterfactuals and we have decided to choose, as a reasonable counterfactual, a global tariff quota equal to 2.553 million tonnes

(subject to a 75 Euro per tonne tariff) and unlimited access for ACP bananas at a zero tariff (with the ACP tariff preference being covered as now by a waiver). Since the current quota on tariff-free imports of traditional ACP bananas is in practice non-restraining, this counterfactual regime would have a similar impact on prices and quantities as the current EC regime. However, import licenses would be allocated differently in order to remedy the GATS violations.

7.8 We calculated the effect on relevant US imports of the revised EC banana regime, compared with the counterfactual described in the previous paragraph, based on the assumption that the aggregate volume of EC banana imports is the same in the two scenarios *ceteris paribus*. This implies that EC banana production and consumption, and the f.o.b., c.i.f., wholesale and retail prices of bananas, also are the same in the two scenarios. This in turn implies that the aggregate value of wholesale banana trade services after the f.o.b. point, and the aggregate value of banana import quota rents, are the same in the two scenarios. Both of those values are readily calculated from the price and quantity data made available to us. The only difference between the scenarios is in the shares of those aggregates that are enjoyed by US and other service suppliers. Hence with this particular methodology and counterfactual we do not need to make assumptions about the volume responsiveness of producers, consumers and importers to EC domestic price differences, since there are none. Rather, the task is reduced to working out the differences between the two scenarios in (a) the US share of wholesale trade services in bananas sold in the European Communities and (b) the US share of allocated banana import licences from which quota rents accrue. Using the various data provided on US market shares, and our knowledge of the current quota allocation and what we estimate it would be under the WTO-consistent counterfactual chosen by us, we determine that the level of nullification and impairment is US\$191.4 million per year.

## VIII. AWARD AND DECISION OF THE ARBITRATORS

8.1 In light of the foregoing considerations, the Arbitrators determine that the level of nullification or impairment suffered by the United States in the matter *European Communities -Regime for the Importation, Sale and Distribution of Bananas* is US\$191.4 million per year. Accordingly, the Arbitrators decide that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under GATT 1994 covering trade in a maximum amount of US\$191.4 million per year would be consistent with Article 22.4 of the DSU.

## IX. CONCLUDING REMARKS

9.1 As suggested by the Chairman of the DSB as quoted above (paragraph 4.9), we have found a logical way forward to consider the issues raised in this Arbitration, as well as in the Article 21.5 Panel proceedings. Our findings in all three proceedings are consistent. It is not known whether the Appellate Body

will accept jurisdiction of an appeal in an Article 21.5 proceeding. If it does so, the above level of suspension of concessions may need to be modified following adoption of the Appellate Body report. In such a case we would be able, if requested, to advise the parties of our view of the effect of that report on the level of suspension of concessions.

9.2 Finally, we emphasize that Article 22.8 of the DSU provides that:

"[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits ...".



**EUROPEAN COMMUNITIES - REGIME FOR THE  
IMPORTATION, SALE AND DISTRIBUTION OF  
BANANAS**

**(RECOURSE TO ARTICLE 21.5 BY THE EUROPEAN  
COMMUNITIES)**

**Report of the Panel**

WT/DS27/RW/EEC\*

*Circulated to Members on 12 April 1999*

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\* WT/DS27/RW/EEC/Corr.1.

## I. INTRODUCTION

1.1 On 25 September 1997, the Dispute Settlement Body (DSB) adopted the Appellate Body report on European Communities - Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/AB/R) and the panel reports<sup>1</sup>, as modified by the Appellate Body (AB) report, recommending that the European Communities bring the measures found to be inconsistent with the GATT 1994 and the GATS into conformity with the obligations of the European Communities under those agreements. On 7 January 1998, the Arbitrator, appointed in accordance with Article 21.3(c) of the DSU concluded that the reasonable period of time to implement the recommendations and rulings of the DSB in this case would expire on 1 January 1999.

1.2 On 20 July 1998, the Council of the European Union adopted Regulation (EC) No. 1637/98 amending Regulation (EEC) No. 404/93 on the common organization of the market in bananas. On 18 August 1998, Ecuador, Guatemala, Honduras, Mexico and the United States acting jointly and severally, requested consultations (WT/DS27/18) with the European Communities ("EC") in relation to the implementation of the DSB recommendations in this matter. Consultations were held on 17 September 1998. These consultations did not result in a mutually satisfactory solution of the matter.

1.3 On 28 October 1998, the Commission of the European Communities adopted Regulation (EC) No. 2362/98 laying down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the Community. Regulation 1637/98 as well as Regulation 2362/98 were implemented as from 1 January 1999. On 13 November 1998, Ecuador requested further consultations in this matter which took place on 23 November 1998 (WT/DS27/30 and Add.1). Mexico also requested consultations and was joined as a co-complainant.

1.4 On 14 December 1998, the European Communities requested the establishment of a panel under Article 21.5 of the DSU with the mandate to find that the implementing measures of the European Communities must be presumed to conform to WTO rules unless their conformity had been duly challenged under the appropriate DSU procedures (WT/DS27/40). The DSB, at its meeting on 12 January 1999, decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the European Communities. Belize, Brazil, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, the Dominican Republic, Grenada, Haiti, India, Jamaica, Japan, Mauritius, Nicaragua, Saint Lucia, and Saint Vincent and the Grenadines reserved their third-party rights in accordance with Article 10 of the DSU.

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<sup>1</sup> WT/DS27/R/ECU, WT/DS27/R/GTM-WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA.

*(i) Terms of Reference*

1.5 The following standard terms of reference applied to the work of the Panel:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40 the matter referred to the DSB by the EC, 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."

*(ii) Panel Composition*

1.6 The Panel was composed as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson  
Mr. Christian Häberli

1.7 The Panel submitted its report to the European Communities on 6 April 1999.

## II. MAIN ARGUMENTS<sup>2</sup>

### A. Procedural Aspects

2.1 The **European Communities** noted that, in accordance with Article 21.6 of the DSU, it had provided the DSB with a status report on its implementation of the recommendations and rulings of the DSB at every regular meeting of the DSB since the 23 July 1998 DSB meeting. From the beginning of the reasonable period of time, the original complainants had not ceased to affirm in the press and in the DSB their conviction that the measures first envisaged, then proposed, then adopted by the Council, then finally adopted by the Commission, did not comply with the recommendations and rulings of the DSB in this case.

2.2 On 18 August 1998, Ecuador, Guatemala, Honduras, Mexico and the United States formally requested consultations within the legal framework of Article 21.5 of the DSU (WT/DS27/18). Consultations were held on 17 September 1998. However, the European Communities formally agreed to those consultations only insofar as they related to measures that had already been formally adopted and published, i.e. Regulation 1637 of 20 July 1998. The European Communities refused to engage in discussions concerning import licensing rules which not only had not yet been adopted at that time but had not even been submitted to the management committee as a preliminary step for

<sup>2</sup> If not otherwise stated, footnotes are those of the European Communities.

their definitive approval by the Commission. On 13 November 1998, Ecuador requested consultations within the legal framework of Article 21.5 of the DSU (WT/DS27/30). It was joined by Mexico. These consultations concerned almost exclusively Regulation 2362.

2.3 Outside these procedures, one of the original complainants, the United States, published three notices in the US Federal Register<sup>3</sup> of proposed determination of action by imposing prohibitive (100 per cent *ad valorem*) duties on selected products from the European Communities. This proposed action was based on the unilateral determination by the United States that "the measures the EC has undertaken to apply as of January 1, 1999 fail to implement the WTO recommendations concerning the EC banana regime". The actions proposed were intended to be in place "beginning as early as February 1, 1999". However, the United States, supported by three other original complainants, expressed repeatedly and publicly its unwillingness to submit its own subjective views on this issue to the objective scrutiny of a panel within the multilateral framework of the WTO, in particular under Article 21.5 of the DSU.

2.4 On 12 January 1999, the DSB established a panel under Article 21.5 of the DSU at the request of Ecuador, on the one hand, and the present Panel at the request of the EC, on the other hand. The other four original complaining parties (i.e. Guatemala, Honduras, Mexico and the United States) refrained from requesting a panel or from joining the procedure initiated by Ecuador. On 19 January 1999 three of the original complainants, Guatemala, Honduras and the United States, expressed their views in a letter sent to the WTO Secretariat "concerning the nature and the terms of reference" of these proceedings. However, they did not deem appropriate, on the one hand, to state their position in a formal submission to the Panel in the framework of the on-going dispute settlement procedure nor, on the other hand, to guarantee their participation in the further proceedings. The European Communities submitted further that in a letter dated 2 February 1999, the Panel considered, in reply to a request by the EC, that there was no need to provide in the Panel's timetable for a submission from the original complainants and that the Panel could not compel the original complaining parties to participate in these proceedings.

(i) *Preliminary Issue Concerning the Establishment of this Panel*

2.5 In document WT/DS27/45, the WTO Secretariat officially announced that on 12 January 1999, the Dispute Settlement Body decided "in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the European Communities in document WT/DS27/40". This communication contained also the terms of reference of the Panel, which were expressly referred to as "standard terms of reference", as follows:

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<sup>3</sup> Vol. 63, page 56687, page 63099 and page 71665.

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40, 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".

2.6 In their letter of 19 January 1999 to this Panel, three of the original complainants - Guatemala, Honduras and the United States - took the following position :

"the panel finding sought by the EC (...) does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter for which the appropriate procedural requirements under DSU Articles 4 and 6 have not been satisfied";

"there is no provision in the DSU for a Member to compel other countries to come forward to serve as complaining parties against its measures at a time determined by that member";

"any conclusion regarding the conformity of the EC measures cannot bind a non-party to the process, despite the EC's attempts to achieve this purpose".

2.7 In a letter to this Panel dated 18 January 1999, another of the original complainants, Ecuador, took the following position:

"in the current circumstances, the invitation of a Member to participate in a meeting to organize a panel that has only one party does not create or give validity to any legal provisions that are not included in the dispute settlement procedures";

"the initiative, taken by the European Communities, without any legal justification, to find a party with which to dispute this issue should not, in Ecuador's view, be allowed to succeed in that it could seriously undermine the dispute settlement system".

2.8 The European Communities submitted that, as a matter of logic, it was compelled to address as a first point the question of the competence of a panel to determine the scope of its own terms of reference. In this respect, the European Communities referred to a recent AB report which indicated that "... as a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".<sup>4</sup> However, the AB also noted that the aim of dispute settlement was not "to encourage either panels or Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only to address those claims which must be

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<sup>4</sup> *Banana III* AB report, paragraph 142.

addressed in order to resolve the matter in issue in the dispute".<sup>5</sup> In the present panel proceedings, all four above-mentioned original complainants have claimed that they were not parties to this dispute. If this were true, their unilateral views expressed in their letters could not be considered as "claims which must be addressed in order to resolve the matter in issue" because a non-party could not address any issue or claim in a panel procedure in which it was not a party.

2.9 Thus, as a preliminary point, the Panel had to decide whether the questions raised by the above-mentioned original complainants were to be considered as claims and to do so, it must consider whether they were presented by a party to the dispute. In case of a negative outcome of this preliminary test, the European Communities continued, the Panel would not be empowered to enter into any issue raised by the four original complainants. Panels were not empowered to determine on their own initiative the scope of the mandate received by the DSB unless and until such an issue was raised as a claim by one of the parties to the dispute. There was no scope for a *proprio motu* examination, because that would grant panels the role of a kind of "public prosecutor" which did not however exist in the WTO dispute settlement system.

2.10 By contrast, in case of a positive outcome of the preliminary test, the European Communities submitted, two out of the three preliminary issues raised by the four original complaining parties could no longer stand, because their argument was based on their (unilateral) view, expressed in their letters to the Panel, that the present dispute was a procedure to which only one WTO Member was a party. As soon as the Panel started considering the objections of the original complainants, this argument would, in the opinion of the European Communities, become moot. Therefore, in case the Panel wished to examine the preliminary objections raised by the original complainants in their letters to the WTO Secretariat, the only remaining objection that really needed to be addressed was the view expressed by these original complainants that "the panel finding sought by the EC does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter for which the appropriate procedural requirements under the DSU Articles 4 and 6 have not been satisfied".

2.11 The European Communities submitted that this position was incorrect in fact and in law. As a matter of *fact*, the European Communities indicated in its request for the establishment of this Panel that the issues raised in the present panel proceedings were already duly considered in consultations under Article 4 of the DSU. The "matter" concerned in particular "the disagreement as to the ... consistency with a covered agreement of measures taken [by the EC] to comply with the recommendations and rulings [adopted by the DSB on the basis of the original panel and Appellate Body reports]".<sup>6</sup> As a consequence of the consultations held with the original complainants, acknowledging the persistence

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<sup>5</sup> *Blouses and Shirts* AB report, page 19; confirmed by Argentina *Footwear* panel, paragraphs 6.12 to 6.15.

<sup>6</sup> Article 21.5 of the DSU.

of the disagreement, the European Communities requested the establishment of this Panel whose terms of reference covered the "matter" raised in the consultations, i.e. either a challenge was made by the original complainants, and the claims with respect to the consistency of the measures taken by the European Communities to comply with the recommendations and rulings of the DSB were upheld, or the original complainants had to be deemed to be satisfied and they had to be deemed not to maintain their disagreement.

2.12 The European Communities was of the opinion that, as a matter of *law*, a procedure under Article 21.5 of the DSU was part of the dispute settlement procedure which had started with an earlier panel procedure, and such a procedure therefore had to be confined to the original parties to the dispute. This was already evident from the title ("Surveillance of Implementation of Recommendations and Rulings") and the context in which Article 21 was placed. Moreover, Article 21.3(b) explicitly referred to the "parties to the dispute". Article 21.5 provided for resorting to "the original panel". The term "original panel" referred, the European Communities submitted, to the same panel that was originally charged by the DSB with the responsibility to look into a specific dispute within specific terms of reference concerning only some and not each and every WTO Member. However, Article 21.5 did not specify in any way which of the parties to the original dispute was entitled to have recourse to the dispute settlement proceedings. Article 21.5 did, however, identify expressly the prerequisite under which such recourse was allowed, i.e. the existence of a disagreement as to the consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. Consequently, the European Communities was entitled to have recourse to the procedures under Article 21.5 in presence of a disagreement among the parties to the original dispute; consultations held in accordance with Article 4 of the DSU; and the request for the establishment of a panel submitted in writing in accordance with Articles 6.2 and 7 of the DSU.

2.13 The European Communities submitted that a dispute was solved either by a determination of non-compliance, whether in part or *in toto*, which opened the door to a recourse by some or all of the original complainants to the provisions of Article 22 of the DSU; or by a determination of compliance; or by the acknowledgement that all parties were fully satisfied; or, finally, by a combination of these. All these routes were open and admissible within the realm of Article 21.5. The European Communities was of the view that it had complied fully with all the above-mentioned requirements and there was therefore no reason to cast any doubt on the consistency of its panel request with the letter and the spirit of Article 21.5 of the DSU.

(ii) *WTO Obligations of Members during the "Reasonable Period of Time"*

2.14 Referring to Article 3.7 of the DSU, the European Communities submitted that the primary obligation of the Member whose measures had been found inconsistent with its WTO obligations as the result of a dispute settlement

procedure was therefore to withdraw such inconsistent measures. Moreover, referring also to the reasonable period of time and arbitration in Article 21.3 of the DSU and the status report that had to be provided to the DSB in accordance with Article 21.6, the European Communities considered that it had scrupulously respected the above-mentioned obligations by repealing the provisions in Regulation 404/93 which were found inconsistent with some WTO covered agreements, and by entirely repealing Regulations 1442/93 and 478/95.

2.15 In particular, the following issues had been addressed: the so-called B licences had been abolished and replaced by a single licensing system for all origins; allocation of licences according to (a), (b), (c) marketing functions had been abolished and replaced by new rights to licences based on proof of actual imports; tariff rate quota allocations to some WTO Members but not to others, including allocations to individual traditional ACP countries, had been abolished and replaced by an allocation only to all substantial suppliers, while the ACP tariff preference had been capped at the level of the pre-1991 best-ever shipments in accordance with the recommendations and rulings of the DSB; the transferability of country-allocated quotas had been abolished; the allocation of hurricane licences only to EC/ACP operators had been abolished; and the special export certificates available to some exporting countries and not to others had been abolished.

2.16 The European Communities had complied with its obligation to implement the recommendations and rulings of the DSB by withdrawing the measures found inconsistent with certain covered agreements within the reasonable period of time which expired on 1 January 1999. As a result of this process, a new regime for the importation, sale and distribution of bananas was applicable in the European Communities as from 1 January 1999. Referring to the text of Article 21.5, the European Communities noted that Ecuador had expressed its disagreement and had brought this dispute to the DSB under Article 21.5 of the DSU. To different degrees and at different occasions, Guatemala, Honduras, Mexico and the United States had publicly criticized the new EC banana regime and requested consultations on Regulation No. 1637 but these consultations were not followed-up by an Article 21.5 panel request.

2.17 Thus, while a number of political positions had been stated, a panel established under Article 21.5 of the DSU could only acknowledge and consider the present legal situation, i.e. that Guatemala, Honduras, Mexico and the United States had refrained from making any further use of their procedural rights under Article 21.5 of the DSU. Since these original complainants had refrained from challenging the EC's implementing measures, they had to be deemed and recognized to be satisfied by the explanations received during consultations and otherwise with regard to the present EC banana regime.

2.18 Beyond the requirements resulting from the multilateral nature of the WTO dispute settlement system, there was another fundamental WTO principle involved in the present case. This principle was related to the "security and predictability" of the multilateral trading system which had already been recognized in the second AB report as an essential element of the WTO

Agreement.<sup>7</sup> This principle was also reflected in the procedural guarantees of the DSU which excluded in its Article 23 any unilateral determination by individual WTO Members that any other WTO Member was acting inconsistently with its WTO obligations. In the opinion of the European Communities, a presumption of *inconsistency* would gravely affect the security and predictability of the international trading system because of the ensuing uncertainty. For similar reasons, the criminal law of all civilized countries was firmly based on a presumption of innocence, not on a presumption of guilt.

2.19 If it could be unilaterally determined by any Member, outside a procedure under Article 21.5, that another WTO Member had incorrectly implemented the recommendations and rulings of the DSB in an earlier dispute, and if this determination were considered to be legally relevant within the WTO system, the European Communities submitted that this would be paramount to a presumption of inconsistency. Such a presumption would mean in practical terms that an implementing measure that did not satisfy the original complainant could lead to the threat of immediate retaliation through the withdrawal of concessions or other obligations. A trading system based on a presumption of inconsistency would not be based on security and predictability of international trade relations and would thus be the opposite of the multilateral trading system envisaged by the Marrakesh Agreement on the Establishment of the World Trade Organization.

(iii) *Legal Analysis of Article 23 of the DSU*

2.20 According to the European Communities, Article 23 of the DSU was at the core of the dispute settlement mechanism created in Marrakesh in 1994. Its provisions were an expression of the new multilateral legal commitments that the WTO Members had decided to undertake and was based on the fundamental principle of the rejection of any determination or action taken by any Member outside the rules and procedures of the DSU. Referring to the first paragraph of Article 23 as well as to (a) of the second paragraph of Article 23 of the DSU<sup>8</sup>, the European Communities submitted that in the present case, the EC measures which were found inconsistent with certain WTO covered agreements under the recommendations and rulings of the DSB, had, as was stated above, been withdrawn in accordance with the primary objective set out in Article 3.7 of the

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<sup>7</sup> Quotation is near to footnote 67 in that report.

<sup>8</sup> "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. ... "In such cases Members shall, (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding".

DSU. Consequently, new measures had been adopted and the European Communities had put in place, at the end of the reasonable period of time, a new regime for the importation, sale and distribution of bananas.

2.21 As a consequence of the above, Guatemala, Honduras, Mexico and the United States could not seek redress of an alleged violation by the EC's new measures of its WTO obligations outside the rules and procedures of the DSU, including Article 21.5. Nor could they make any determination to the effect that a violation had occurred, including the alleged failure to bring any measures that were found to be inconsistent with a covered agreement into compliance with the recommendations and rulings of the DSB, or that benefits had been nullified or impaired, without having recourse to dispute settlement procedures in accordance with the rules and procedures of the DSU as foreseen in Article 23.2(a). Finally, irrespective of what was the correct interpretation of the deadlines in Article 22 of the DSU (a matter which was outside the terms of reference of this Panel), that provision did not in any way authorize any departure from the fundamental principle which found its expression in Article 23 of the DSU.

### *B. Conclusions*

2.22 The European Communities requested the Panel to find that, since Guatemala, Honduras, Mexico and the United States had failed to pursue any recourse to dispute settlement procedures under the rules and procedures of the DSU, the new EC regime for the importation, sale and distribution of bananas adopted in order to comply with the recommendations and rulings of the DSB in the three dispute settlement procedures ("*EC - Regime for Importation, Sale and Distribution of Bananas*"<sup>9</sup>) had to be deemed to satisfy these parties to the original dispute and, in so far as those parties were concerned, to be in conformity with the WTO covered agreements as long as those original parties had not successfully challenged the new EC regime under the relevant dispute settlement procedures of the WTO.

## **III. ARGUMENTS BY THIRD PARTIES**

### *A. India*

3.1 **India** submitted that although India had only a limited trade interest in the matter before the Panel, the systemic issues involved were of great importance to India. The matter before the Panel went far beyond the dispute at hand; in fact, it touched on the very core of the principles and the functioning of the dispute settlement mechanism, the central principle of which was its multilateral character and which was expected to provide security and predictability to the multilateral trading system.

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<sup>9</sup> WT/DS27/GTM-WT/DS27/HND, WT/DS27/MEX and WT/DS27/USA.

3.2 In the view of India the crux of the systemic issue was the meaning, the operation and the interpretation of Article 21.5 of the DSU, especially in relation to Article 22 of the DSU and in the light of Article 23.2 of the DSU.

3.3 India noted that Article 21.5 described a situation where there was disagreement between the parties to a dispute as to the existence or the consistency of measures taken by a party to comply with the recommendations of the DSB. The provisions of this Article made it clear that such a dispute should be decided through the DSU procedures, including wherever possible by resort to the original panel. Article 22 of the DSU set out conditions under which a Member could suspend concessions against another Member when that Member had either failed to bring the measure found to be inconsistent with a covered agreement into compliance or had failed to comply with the recommendations of the DSB. Therefore, the right to suspend concessions under Article 22 was a conditional right granted under the DSU.

3.4 Furthermore, India argued that a Member could not invoke Article 22 directly without traversing the route of Article 21.5, except in situations where the losing party itself acknowledged that it had not complied with the recommendations and rulings of the DSB. Article 21.5 preceded Article 22 and was critical in deciding whether or not a Member had complied with the recommendations of the DSB. Such a determination had to be done under Article 21.5 and indeed would seem to be the very purpose of the provisions of that Article. If the determination was not made under Article 21.5, the right under Article 22 became an unfettered right for every winning party to seek suspension of concessions against the losing party. Such unilateral determination of non-compliance ran counter to the basic tenets of the multilateral trading system as well as the central objectives of the dispute settlement system. Indeed, Article 23.2(a) explicitly forbade a party from making a unilateral determination that a violation had occurred or that benefits had been nullified or impaired or that the attainment of any objective of the covered agreements had been impeded, except through recourse to the DSU rules and procedures.

3.5 India submitted further that after the DSB had made its recommendations, the parties were expected to agree on a reasonable period of time for implementation. Once that period had been agreed upon, the party expected to comply with the DSB's recommendations had to be given the entire time agreed upon to make a good faith effort to comply with its obligations under the WTO. At the end of the reasonable period of time for implementation there were two possible scenarios. One, the party expected to comply made no change whatsoever and maintained its inconsistent measure. In this case, Article 21.5 procedures would be confined to confirming the non-existence of the measure taken to comply and thereafter the winning party could proceed to Article 22 and exercise its rights to suspend concessions against the erring party. The second scenario was more complicated where the losing party believed it had taken steps to comply with the DSB's recommendations but the winning party did not agree. In India's view, there was only one way to find out whether or not the losing party had taken steps to comply in good faith, i.e. recourse to Article 21.5. India believed this could be done either by the winning party or even by the losing

party. Indeed, the latter must be welcomed as a show of good faith by the losing party which could be eager to prove that it had complied.

3.6 In India's view, it was crucial that the determination of compliance or non-compliance must be made multilaterally under the aegis of the DSB and in accordance with the procedures of the DSU, i.e. Article 21.5. It was true that Article 21.5 was silent on whether there was a possibility of appeal against the panel verdict. It was India's view that there must be a possibility of appeal as well. The reason for this was that the move to suspend concessions was a measure of last resort in the DSU and therefore could not be taken lightly. If the right to suspend concessions was granted without due process, it would spell the end of the security and predictability of the dispute settlement mechanism and indeed of the multilateral trading system as a whole.

3.7 In India's view there was yet another systemic issue at stake. If Article 22 was interpreted as being totally de-linked from Article 21.5, there was a danger that the winning party could allege non-compliance by referring to any matter which was not properly before the Panel or which the Panel had explicitly refused to consider and suspend concessions on the basis of such alleged non-compliance. This would be untenable from both a legal and systemic point of view.

3.8 In conclusion, it was India's view that there was an intrinsic and inevitable link between Article 21.5 and Article 22 of the DSU. India believed that Article 22 should be resorted to only after traversing the entire route from Article 4 consultations onwards. In this process, Article 21.5 was critical and indispensable as a step before rights under Article 22 were exercised. Indeed, recourse to Article 21.5, as the European Communities had done in this case, was a fundamental right available to all Members of the WTO in the dispute settlement system. Denial of Article 21.5 procedures to any Member would therefore be both a procedural and substantive injustice under the DSU.

#### *B. Jamaica*

3.9 **Jamaica** agreed with the EC's analysis of Article 23 of the DSU leading to the conclusion that the new EC regime must be deemed to be in conformity with the WTO covered agreements.<sup>10</sup> With regard to the relationship between Article 21.5 and Article 22, Jamaica submitted that this issue was outside the Panel's terms of reference and that these Articles should only be interpreted by the appropriate WTO bodies. Jamaica concluded that the European Communities had complied with the relevant requirements of the DSU and that there was therefore no reason to cast any doubt on the EC's panel request pursuant to Article 21.5.

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<sup>10</sup> Paragraphs 34 and 42 of the EC's submission.

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### C. Japan

3.10 **Japan** submitted that there were a number of systemic issues in this dispute that were of critical importance to the dispute settlement mechanism of the WTO. In the view of Japan, some of these issues might be beyond the purview of any panel and were the prerogative of collective decision-making by Members. As a country greatly benefiting from the multilateral trading system under the WTO, Japan was very interested in ensuring that these attributes of the WTO dispute settlement mechanism were not in any way compromised. Japan considered that when there was a disagreement as to whether a party had complied with a panel or AB recommendations and rulings, the parties must resort to Article 21.5 procedures before invoking their rights under Article 22. Retaliatory actions must not be taken based on a unilateral determination by the complaining party of non-conformity of the measures in question without recommendations and rulings of an Article 21.5 panel.

3.11 Implementation of measures in good faith in accordance with the recommendations and rulings of a panel and the AB, Japan continued, was of prime importance, not only for the settlement of disputes but also to enhance the credibility of the dispute settlement mechanism. In order to address the issues raised in this dispute, Japan believed that it was necessary to review them in the context of Article 21 as a whole, including the roles and functions of a panel established under Article 21.5.

3.12 In the view of Japan, this Panel proceeding had a number of anomalies. First, the European Communities was the sole party to this Panel while the original complaining parties had remained non-parties. Article 21.5 provided that the role and function of a panel established thereunder was to assist in deciding the dispute over the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. Article 11 provided that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Since there was only one party to this Panel, the question arose how this Panel could fulfil the function given to it by the above DSU provisions. If the original parties questioned the conformity of the measures taken by the losing party and subsequently disregarded the panel process under Article 21.5, this was tantamount to a sabotage of the dispute settlement mechanism.

3.13 Japan considered that, if the European Communities requested the Panel to find that the implementation measures taken by it "must be presumed to conform to WTO rules unless their conformity has been duly challenged" under Article 21.5 and did not request the Panel to find that such measures were consistent with the WTO Agreement based on an objective assessment of the facts of the case and the conformity with the relevant WTO agreements, responding to the request for such a simple presumption of "innocence" was not the function of a panel under Article 21.5.

3.14 In a normal panel proceeding, the party asserting a fact or making a legal claim was required to establish a *prima facie* case, and once that *prima facie* case

was made, the burden of proof shifted to the other party which was then required to rebut the fact or claim. Without such procedures, Japan was not certain how the present Panel could effectively carry out the tasks assigned to it. In the view of Japan, it was not a responsible attitude of a WTO Member not to participate in panel proceedings under Article 21.5 while at the same time asserting the failure of the other party to bring the measures into conformity with the WTO Agreement. Such behaviour by certain original parties would seriously undermine the credibility of the WTO dispute settlement mechanism. Japan considered that as a matter of general principle for the dispute settlement procedures in the WTO, all the original parties to a dispute, whether or not they had participated in a panel or the AB proceedings under Article 21.5 must, in accordance with Article 23 of the DSU, be bound by the findings and ruling of that panel or the AB.

#### IV. FINDINGS

##### A. *Terms of Reference*

4.1 As noted above, we have the following terms of reference:

"To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS27/40, 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."

4.2 Document WT/DS27/40 reads in the most relevant parts as follows:

"The EC submits that Article 23 of the DSU confirms that there is a general principle in the WTO agreements that measures taken by WTO Members are in conformity with their rules unless they have been challenged under the appropriate dispute settlement procedures and proven not to conform. Since none of the original complainants has continued to pursue the procedures under Article 21.5, *they must presently be deemed to be satisfied with the way in which the European Communities has brought its measures into conformity* with the recommendations and rulings of the DSB in this case.

Within this legal context, the EC requests the establishment of a panel under Article 21.5 of the DSU *with the mandate to find that the above-mentioned implementing measures of the EC must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures.*" (emphasis added).

4.3 In our findings, we deal consecutively with the identity of the parties to this dispute, the relief sought by the European Communities and the relationship of Articles 21, 22 and 23 of the DSU.

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*B. The Parties to this Dispute*

4.4 Following the establishment of this Panel, the Secretary on behalf of the Panel informed Ecuador, Guatemala, Honduras, Mexico and the United States that the European Communities had requested the Panel to invite those Members in their capacity as original complaining parties in the *Banana III* panel proceedings, to an organizational meeting for this Panel. The Panel then sought an indication from them as to their response should such an invitation be forthcoming.

4.5 Ecuador responded that:

"the initiative, taken by the EC without any legal justification, to find a party with which to dispute this issue should not, in Ecuador's view, be allowed to succeed in that it could seriously undermine the dispute settlement system."

4.6 Ecuador emphasized that it considered the panel established by the DSB under Article 21.5 of the DSU on 12 January 1999, in response to its request (WT/DS27/41), as entirely independent from this Panel proceeding, initiated by the European Communities.

4.7 Guatemala, Honduras and the United States expressed their position that the panel finding sought by the European Communities in its panel request:

"does not constitute recourse to Article 21.5 but rather constitutes an entirely different matter, for which the appropriate procedural requirements under Articles 4 and 6 of the DSU have not been satisfied. Contrary to the EC's oral representations to the DSB, the EC's request does not constitute a request for an objective review of the EC measures. Moreover, there is no provision in the DSU for a member to compel other countries to come forward to serve as complaining parties against its measures at a time determined by that Member. Furthermore, any conclusion regarding the conformity of the EC measures cannot bind a non-party to the process, despite the EC's attempts to achieve this purpose. ..."

4.8 Mexico made a similar response.

4.9 Thereafter, the European Communities raised certain concerns with the decisions taken by this Panel regarding its timetable and working procedures. In particular, it suggested to amend the timetable under the heading "receipt of written submissions" with an additional item "(a) original complainants ... 2 February 1999". In the event the Panel did not agree with that suggestion, the European Communities requested that a ruling *in limine litis* be issued in writing on this issue.

4.10 We responded as follows:

"The Panel acknowledges receipt of your letter ... in which you refer to the timetable and working procedures of the above-mentioned Panel. It has taken note of your various points. However, the Panel would like to stress, firstly, that, according to Article 12.1 of the DSU, it has the right to decide on its own

working procedures, including the timetable, after consultations with the parties. Such consultations with the EC took place on 20 January 1999.

The Panel notes that, in response to a suggestion by the EC, it had sought, in a letter dated 15 January 1999, a reaction from all the original complaining parties in the original *Bananas III* dispute to an invitation to an informal meeting of the Panel, reconvened under Article 21.5 of the DSU, should such an invitation be forthcoming. As you know, Ecuador in a letter, dated 18 January 1999, indicated that it was not interested in participating in this Panel, reconvened at the initiative of the EC. As concerns Guatemala, Honduras and the United States they indicated at the special DSB meeting on 12 January 1999 and in a letter, dated 19 January 1999, that they did not intend to take part in the present Panel proceedings. Mexico responded in a similar way by telephone and has made a statement in the DSB reserving its right to initiate a separate procedure under Article 21.5 of the DSU. Therefore, the timetable for the Panel's work at this point refers to the EC and third parties only, since as a matter of fact only this party and third parties appear to have the intention to file submissions on the due dates.

The Panel does not believe that the current wording of the timetable is in any way contrary to the provisions of Article 12 of the DSU, nor that this Article would empower the reconvened Panel to compel original complaining parties in the *Bananas III* dispute to participate in this proceeding.

The Panel notes that of course it has the right, pursuant to Article 13 of the DSU, to seek information, at any point of time during this proceeding, from any individual or body from which it deems appropriate, including the original complainants in the *Bananas III* case. ..."

4.11 In response to questions by the Panel, the European Communities took the following positions concerning this Panel proceeding:

- the European Communities considers Guatemala, Honduras, Mexico and the United States to be parties to this proceeding under Article 21.5 of the DSU;
- a party that refuses to appear has to bear the consequences of such refusal and must be presumed to have failed to appear;
- this Panel should rule that Guatemala, Honduras, Mexico and the United States have not brought their disagreement to the correct forum and thus they cannot rely on their unsupported allegations in any other legal procedure, since with regard to them the present EC banana import regime must be presumed to be WTO-consistent;

- such rulings by this Panel would become binding upon Guatemala, Honduras, Mexico and the United States after their adoption by the DSB.

4.12 In our view, there is no provision in the DSU that would authorize a panel to compel a Member to participate as a party in a panel proceeding. Accordingly, we do not have the authority to compel the original complainants to participate in this Article 21.5 proceeding. We note that the original complainants have declined to participate in this proceeding, and we therefore find that they are not parties to this proceeding. As a consequence, we do not find it necessary to address the procedural issues mentioned in their letters, e.g. whether the European Communities has failed to comply with Articles 4 and 6 of the DSU in respect of this Panel proceeding.

### C. *The Relief Sought by the European Communities*

4.13 The European Communities requests us to find that its implementing measures "must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures". We agree with the European Communities that there is normally no presumption of inconsistency attached to a Member's measures in the WTO dispute settlement system. At the same time, we also are of the view that the failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the WTO Agreement. In this regard, we note the statement by a GATT panel that "it would be erroneous to interpret the fact that a measure has not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties".<sup>11</sup>

4.14 As noted in our Concluding Remarks, it is not clear from the provisions of Article 21.5 whether the original respondent in a panel proceeding is, or should be, permitted under the DSU to initiate an Article 21.5 proceeding for the purpose of establishing the WTO consistency of measures taken to implement DSB rulings and recommendations. Assuming such an action is permitted, we note that in this proceeding, the European Communities presents in its written submission only one summary paragraph (paragraph 2.15) listing aspects of its prior banana import regime that it has changed in order to comply with the DSB's recommendations and rulings. We do not believe that a finding of WTO consistency could be made on the basis of the submission made by the European Communities in this case, as there is an insufficient discussion of how the previously found WTO inconsistencies have been eliminated in a WTO-consistent manner.

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<sup>11</sup> Panel report on *EEC - Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, 138, paragraph 28.

4.15 Finally, we note that immediately prior (on the same date) to the establishment of this Panel, a panel was established by the DSB at the request of Ecuador to consider Ecuador's claim in an Article 21.5 proceeding that the EC's implementing measures are not consistent with its WTO obligations. The same three individuals are the panelists in these two Article 21.5 proceedings. Since we have found in the proceeding initiated by Ecuador that the EC's implementing measures are *not* consistent with its WTO obligations, it is clear that they cannot be presumed to be consistent in this proceeding.

*D. The Relationship of Articles 21, 22 and 23 of the DSU*

4.16 A main argument of the European Communities in this proceeding concerns the relationship of Articles 21, 22 and 23 of the DSU. As noted above, the three individuals serving on this Panel have been charged by the DSB in Ecuador's recourse to Article 21.5 of the DSU to consider the WTO consistency of the EC's measures. The three of us have also been charged by the DSB, pursuant to Article 22 of the DSU, to consider as Arbitrators the level of the suspension of concessions proposed by the United States under that Article. At the time of our appointment as Arbitrators, we were entrusted with the following task by the Chairman of the DSB:

"There remains the problem of how the panel and the arbitrators would coordinate their work, but as they will be the same individuals, the reality is that they will find a logical way forward, in consultation with the parties. In this way, the dispute settlement mechanisms of the DSU can be employed to resolve all of the remaining issues in this dispute, while recognizing the right of both parties and respecting the integrity of the DSU."

In these circumstances, we do not believe it would be appropriate for us to rule in this proceeding, as requested by the European Communities, that there is only one type of proceeding (i.e. pursuant to Article 21.5) in which the consistency of its measures may be considered. Rather, the issue of whether a claim may be made in a particular procedure is best left for determination in that procedure.

4.17 Moreover, in respect of the EC arguments concerning Articles 21, 22 and 23 of the DSU, we are well aware of the controversy in the DSB over the interpretation of these Articles and their relationship, but we view that question as one best resolved by Members in the context of the ongoing DSU review and not in a panel proceeding where there is only one party present and only a few active third parties.

*E. Concluding Remarks*

4.18 In fulfilling our terms of reference, we have not considered whether the original respondent in a panel proceeding, such as the European Communities, is authorized to initiate an Article 21.5 proceeding. In this regard, we would note that allowing such a procedure presents certain practical problems or anomalies, as cited by Japan in its arguments as a third party (paragraphs 3.12-3.14).

However, we are also sympathetic to the concerns of India, also expressed as a third party, that in an appropriate case a respondent-initiated Article 21.5 proceeding should be allowed (paragraph 3.5). In our view, we would not rule out the possibility of using Article 21.5 in such a manner, particularly when the purpose of such initiation was clearly the examination of the WTO-consistency of implementing measures.

## **V. CONCLUSION**

5.1 In light of the foregoing, we do not make findings as requested by the European Communities.



**EUROPEAN COMMUNITIES - REGIME FOR THE  
IMPORTATION, SALE AND DISTRIBUTION OF  
BANANAS**

**( RECOURSE TO ARTICLE 21.5 BY ECUADOR )**

**Report of the Panel**

WT/DS27/RW/ECU

*Circulated to Members on 6 May 1999*

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(i) *Terms of Reference*

1.4 The following standard terms of reference applied to the work of the Panel:

"To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS27/41 the matter referred to the DSB by Ecuador, 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."

(ii) *Panel Composition*

1.5 The Panel was composed as follows:

Chairman: Mr. Stuart Harbinson

Members: Mr. Kym Anderson  
Mr. Christian Häberli

1.6 The Panel submitted its report to the parties to the dispute on 6 April 1999.

## II. FACTUAL ASPECTS

2.1 The complaint examined by the Panel relates to the EC implementation of the DSB's recommendations in the matter European Communities - Regime for the Importation, Sale and Distribution of Bananas concerning the EC's import measures for bananas. The EC implementation measures at issue are contained in the following regulations: (i) Regulation (EC) No. 1637/98 ("Regulation 1637") amending Regulation (EEC) No. 404/93 ("Regulation 404") on the common organization of the market in bananas, and (ii) Regulation (EC) No. 2362/98 ("Regulation 2362") laying down detailed rules for the implementation of Regulation 404. Regulations 1637 and 2362 have been applied as from 1 January 1999.

### A. *Access Quantities and Country Allocations*

2.2 Regulation 1637 provides for access to the EC market for three categories of banana imports: traditional ACP imports, non-traditional ACP imports, and imports from third (non-ACP) countries.

*(i) Traditional ACP Imports*

2.3 Traditional ACP imports are defined as banana imports from twelve ACP countries<sup>1</sup> up to an annual aggregate limit of 857,700 tonnes.<sup>2</sup> As part of its implementation measures of the above-mentioned DSB recommendations, the EC has eliminated the country-specific allocations that previously existed for each of the twelve ACP countries. The aggregate import volume is not bound in the EC Schedule and there is no provision in the EC regulations for an increase in the level of the traditional ACP quantity.

*(ii) Third-Country and Non-Traditional ACP Imports*

2.4 The EC has a tariff quota commitment for banana imports of 2.2 million tonnes (net weight) bound in its Schedule. Regulation 1637 provides for additional tariff quota access of 353,000 tonnes per year.<sup>3</sup> This latter quantity is not bound in the EC Schedule (autonomous tariff quota).

2.5 The aggregate tariff quota quantity of 2.553 million tonnes has been allocated to Colombia, Costa Rica, Ecuador, and Panama and an "others" category in the proportions set out in Table 1. According to Regulation 2362, the country-specific allocations are based on imports into the EC during the years 1994 to 1996.<sup>4</sup> There are no specific provisions for reallocating unfilled portions of the country-specific allocations or the "others" category.<sup>5</sup> The "others" category of the tariff quota is reserved for imports of third-country bananas as well as non-traditional ACP bananas.

**Table 1 - EC Tariff Quota Allocations**

Country	Share (%)	Volume ('000 tonnes)
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Other	9.43	240.7
Total of the above	100.00	2,553.0

*Note:* Calculation of shares done by Secretariat based on 2,553.0 million tonne tariff quota and the percentage shares according to Annex I to Regulation 2362.

<sup>1</sup> Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname, see Annex to Regulation 1637.

<sup>2</sup> Annex I to Regulation 2362.

<sup>3</sup> Article 18.2 of Regulation 1637.

<sup>4</sup> Paragraph (2) of Regulation 2362.

<sup>5</sup> The provisions which allowed the reallocation of unfilled portions of the country-specific allocations have been repealed, see Article 31 of Regulation 2362.

2.6 Non-traditional imports from ACP countries cover any quantities supplied in excess of traditional quantities supplied by ACP countries (i.e. in excess of 857,700 tonnes) or any quantities supplied by ACP countries which are not traditional suppliers to the EC, such as the Dominican Republic. Non-traditional bananas may be imported duty-free under the "others" category of the tariff quota and are limited to 240,748 tonnes (9.43 per cent of the 2.553 million tonne tariff quota). The country-specific allocations for non-traditional ACP imports provided for in EC Regulation 478/95 as the result of the Banana Framework Agreement (BFA) (totalling 90,000 tonnes) have been eliminated.<sup>6</sup>

### B. Tariff Treatment

2.7 Table 2 shows the EC tariffs applicable to traditional ACP, non-traditional ACP as well as third-country banana imports. It also summarizes the key modifications of the banana import regime with respect to tariffs, country-specific allocations and volumes which the European Communities has undertaken as part of its implementation measures.

**Table 2 - The EC Import Regime for Bananas since 1 January 1999**

Category of banana imports	Access volume	Source/definition	Tariffs applied	Modifications of the EC tariff quota regime under Regulations 1637 and 2362
Traditional ACP bananas	857,700 tonnes	Imports without country-specific quantitative limits from 12 traditional ACP countries.*	Duty-free	- elimination of country-specific allocations.
Non-traditional ACP bananas	2,553,000 tonnes	Imports of traditional ACP quantities above the 857,700 tonnes or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 240,748 tonnes. For additional imports the bound out-of-quota duty (currently 737 Euro per tonne minus 200 Euro per tonne) applies.	- elimination of country-specific allocations and "other" category totalling 90,000 tonnes. - increase in duty-free access opportunities from 90,000 tonnes to 240,748 tonnes under the "others" category of the 2.553 million tonnes tariff quota. - increase of the margin of preference for out-of-quota imports from 100 to 200 Euro per tonne.
Third-country bananas	2,553,000 tonnes	Imports from any non-ACP source.	75 Euro per tonne up to 2.553 million	- modified country-specific allocations allocated to four

<sup>6</sup> Article 31 of Regulation 2362.

Category of banana imports	Access volume	Source/definition	Tariffs applied	Modifications of the EC tariff quota regime under Regulations 1637 and 2362
			tonnes. There are 4 country-specific allocations plus an "others" category. For additional imports the bound out-of-quota tariff applies (currently 737 Euro per tonne).	Members and an "others" category - transferability of unfilled portions of country-specific allocations eliminated - increase in access opportunities by 90,000 tonnes to 2.553 million tonnes as the result of the elimination of country-specific allocations to non-traditional ACP suppliers.

\*Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.

### C. *Administrative Aspects of the Banana Import Regime*

#### (i) *Eligible Operators*

2.8 The tariff quota of 2.553 million tonnes and traditional ACP quantities (857,700 tonnes) are made available to two categories of operators - traditional operators and newcomers. Under the EC's amended banana import regime, the operator categories (A, B and C) and the activity functions (primary importer, secondary importer/customs clearer and ripener) have been abolished.

2.9 Under the amended regime, operators have access to the above quantities in the following proportions:<sup>7</sup>

traditional operators	92 per cent
newcomers	8 per cent.

This distribution between the two operator categories may be amended to "make better use of the tariff quotas and the traditional ACP quantities".<sup>8</sup> The quantities available in one operator category after requests have been fulfilled may be allocated to the other category.

2.10 To be eligible as a traditional operator, operators must be established in the European Communities during the period determining their reference quantity (explained below) and must have imported a minimum quantity of third-

<sup>7</sup> Article 2.1 of Regulation 2362.

<sup>8</sup> Article 2.2 of Regulation 2362.

country and/or ACP-country bananas on their own account for subsequent marketing in the European Communities during the reference period.<sup>9</sup>

2.11 To qualify as a newcomer, an operator must be established in the European Communities at the time of registration and must have been engaged "independently and on his own account in the commercial activity of importing fresh fruit and vegetables falling within Chapters 7 and 8 of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 [coffee, tea, maté and spices] thereof if he has also imported products falling within Chapters 7 and 8 in one of the three years immediately preceding the year in respect of which registration is sought ...". The declared customs value of such imports during that three-year period must be at least Euro 400,000.<sup>10</sup>

2.12 For the purposes of registration, newcomer operators are to provide, *inter alia*, to the competent authority in one of the EC member States certified evidence of having imported the products referred to above (import licences used or customs documents, as appropriate) and of having complied with the above minimum import value requirement.<sup>11</sup> Applications for registration must be made by 1 July of each year in not more than one of the member States. Renewal of a newcomer's registration is subject to submission of proof that at least 50 per cent of the quantity allocated was imported on the newcomer's own account.<sup>12</sup>

(ii) *Determination of Traditional Operators' Reference Quantities and Newcomer Allocations*

2.13 For each traditional operator, import entitlements are established (i.e. the annual "reference quantity") on the basis of quantities of bananas "actually imported" during the reference period.<sup>13</sup> The reference period for 1999 covers the years 1994-1996.<sup>14</sup> Written applications for reference quantities have to be submitted in one of the member States by 1 July of each year.<sup>15</sup> In their applications, operators have to provide data of the total volume of imports from origins covered by the tariff quota and of traditional ACP bananas during each year of the applicable reference period. Import volumes ("actual imports") are to be documented through both (i) copies of the import licences used either by the holder, or in the case of a transfer of the licence, by the transferee, and (ii) proof of payment of the customs duties. A traditional operator who furnishes proof of

<sup>9</sup> The minimum import quantity is 100 tonnes in any one year of the reference period, or 20 tonnes for bananas equal to or shorter than 10 cm. Article 3 of Regulation 2362.

<sup>10</sup> Article 7 of Regulation 2362.

<sup>11</sup> Article 8 of Regulation 2362.

<sup>12</sup> *Idem*.

<sup>13</sup> Article 4 of Regulation 2362.

<sup>14</sup> For operators established in the new member States (Austria, Finland and Sweden) the corresponding reference period is 1994 and the first three quarters of 1995, see Article 5.4 of Regulation 2362.

<sup>15</sup> Article 5 of Regulation 2362.

payment of customs duties, for the release into free circulation of a given quantity of bananas, without being the holder or the transferee holder of the relevant import licence, is considered to have actually imported the declared quantity provided that he has actually registered in a member State under Regulation (EEC) 1442/93 and/or fulfils the conditions of Regulation 2362 for registration as a traditional operator.<sup>16</sup>

2.14 There are no reference quantities for newcomers. Applications for an annual quota must not exceed 10 per cent of the total annual quantity reserved for newcomers.<sup>17</sup> A new operator may become a traditional operator after three years of commercial activity.<sup>18</sup>

### (iii) *Import Licensing Procedures*

2.15 Imports of traditional ACP, non-traditional ACP and third-country bananas are subject to licensing procedures.

2.16 For the purpose of issuing import licences, the Commission of the European Communities may fix an "indicative quantity" of the annual tariff quota for the first three quarters of the year in accordance with the proportions set out in Table 1 above. It may be decided that during that period, applications for licences may not exceed a certain percentage of the reference quantity of each traditional operator or of the quantity allocated to each newcomer.<sup>19</sup>

2.17 Applications for import licences have to be submitted in the European Communities member State where the operator is registered. Import licences are then issued, on a quarterly basis, following a two-round licensing procedure. In the first round, operators must specify, *inter alia*, the quantities requested from the origins specified in Table 1 above or from traditional ACP sources.<sup>20</sup>

2.18 A reduction coefficient is applied if licence requests, in any quarter and for any source, exceed significantly the indicative quantities or exceed the annual quantities available.<sup>21</sup> The reduction coefficients for each origin, if any, proportionally reduce the quantities indicated on the operators' licence requests.<sup>22</sup>

2.19 After the first round, the EC Commission publishes the origins and quantities for which new import licence applications can be made. For licence requests for origins that are subject to a reduction coefficient, operators may either renounce their licence requests or make new licence requests for the

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<sup>16</sup> Article 5.3 of Regulation 2362.

<sup>17</sup> Article 9 of Regulation 2362.

<sup>18</sup> Article 10 of Regulation 2362.

<sup>19</sup> Article 14 of Regulation 2362.

<sup>20</sup> Article 15 of Regulation 2362.

<sup>21</sup> Article 17 of Regulation 2362.

<sup>22</sup> For the applicable reduction coefficients in the first quarter of 1999, see Regulation (EC) No. 2806/98 and Regulation (EC) No.102/1999.

unfulfilled portion of their original licence request.<sup>23</sup> Import licences cannot be used to import from origins other than the origin indicated on the licence.<sup>24</sup>

2.20 Unused import licences are, if requested, re-allocated to the same operator, whether a licence holder or transferee, for use in a subsequent quarter in the same year as the original licence. Such applications are not subject to the reduction coefficient that may apply in that quarter.<sup>25</sup>

2.21 Import licences are transferable once:

- (a) between traditional operators;
- (b) from traditional operators to eligible newcomers;
- (c) between eligible newcomers.

2.22 In the event of an import licence transfer among traditional operators, the reference quantity of the transferor and the transferee are, respectively, decreased and increased accordingly. In turn, traditional operators' reference quantities are reduced when transferred to a newcomer. Quantities transferred to a newcomer are credited when the new operator applies for traditional operator status.<sup>26</sup> Newcomers are not permitted to transfer import licences to traditional operators.<sup>27</sup>

#### *D. Lomé Waiver*

2.23 The Fourth Lomé Convention, signed on 15 December 1989 between the European Communities and 68 African, Caribbean and Pacific (ACP) developing countries contains a protocol concerning bananas, along with provisions applying to products more generally. Like its predecessors, the Fourth Lomé Convention was notified to GATT and considered by a working party.

2.24 In December 1994, the European Communities was granted a waiver by the CONTRACTING PARTIES from the EC's obligations under Article I:1 of GATT 1947 as concerns the Lomé Convention.<sup>28</sup> The waiver provides, in paragraph 1 of the decision, as follows:

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

<sup>23</sup> Article 18 of Regulation 2362.

<sup>24</sup> Article 15.4 of Regulation 2362.

<sup>25</sup> Article 20 of Regulation 2362.

<sup>26</sup> Article 21.3 of Regulation 2362.

<sup>27</sup> Article 21 of Regulation 2362.

<sup>28</sup> GATT document L/7539 of 10 October 1994 and L/7539/Corr.1.

<sup>29</sup> Paragraph 1 of GATT document L/7604 of 19 December 1994.

2.25 In October 1996, the Lomé waiver was extended until 29 February 2000 (in accordance with the procedures mentioned in paragraph 1 of the Understanding in respect of Waivers and those of Article IX of the WTO Agreement).<sup>30</sup>

### III. PROCEDURAL ISSUES

3.1 The **European Communities** contested the original complainants' position that consultations were not required under Article 21.5 of the DSU, since that provision referred explicitly to "these dispute settlement procedures", i.e. the entirety of the DSU. Consultations were in fact held on 17 September 1998 with all the original complainants on the amendments to Regulation 404 as set out in Regulation 1637. Also, in a communication of 13 November 1998<sup>31</sup>, Ecuador requested the "reactivation" of the consultations, which had started on 17 September 1998. In this communication, Ecuador explicitly referred to Regulation 2362. The consultations were held on 23 November 1998 in the presence of Ecuador and Mexico as original complainants.

3.2 The European Communities submitted that the alleged WTO-inconsistency of the revised EC import regime for bananas raised during consultations related exclusively to Articles I and XIII of GATT and Articles II and XVII of GATS. The European Communities was of the opinion that some claims raised by Ecuador in its first written submission went beyond the scope of this Panel procedure, which was limited to the settlement of a dispute "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the [original] recommendations and rulings" (Article 21.5 of the DSU). The matter which was within the terms of reference of this Panel was therefore to be limited to the matters on which the DSB had adopted its recommendations and rulings based on the original panel and AB reports.

3.3 The European Communities was of the view that Ecuador's reference to Article 19 of the DSU, amounted to an attempt to transform this Panel procedure into a sort of arbitration "*ex aequo et bono*" which, in the opinion of the European Communities, had no legal basis under Article 21.5, and whose suggested recommendations would have the effect of imposing a modification of the existing bindings in the EC Schedules as they were negotiated in the Uruguay Round. However, a panel established in accordance with Article 21.5 had to apply "these dispute settlement procedures", i.e. the DSU.

3.4 According to the European Communities, this Panel could therefore only verify the consistency of measures taken to comply with the original recommendations and rulings of the DSB by "clarify[ing] the existing provisions" and "preserv[ing] the rights and obligations of members under the

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<sup>30</sup> WT/L/186 of 18 October 1996.

<sup>31</sup> WT/DS27/30 of 16 November 1998.

covered agreements". Panels should, in accordance with Article 19.1, "recommend that the Member concerned bring that measure into conformity with that agreement". However, they were not empowered to "recommend specific, immediate actions" as Ecuador had suggested.<sup>32</sup> Article 19.1, last part, allowed panels to "suggest ways" (i.e. technical means) in which a Member could implement the recommendation. This should be read in its context, i.e. paragraph 2 of the same Article, which explicitly forbade panels to "add to or diminish the rights and obligations provided in the covered agreements". The European Communities did not agree and will not allow that any of its negotiated rights and obligations bound in its Schedule be modified or affected outside a trade negotiation.

3.5 **Ecuador** submitted that the terms of Article 21.5 left no doubt that the issue in an Article 21.5 panel was not merely whether the new measures were consistent with specific rulings and recommendations of the DSB but also whether the measures that were taken allegedly for that purpose were consistent with the rules of the WTO Agreement. The plain language of Article 21.5 caused no injustice to the defending party, and EC claims to the contrary in this dispute would be frivolous. While the panel process was accelerated under Article 21.5, the defending party had the benefit of panel and perhaps AB rulings, as it designed remedial measures over a "normal" 15-month period with frequent DSB meetings. Further extraneous matters would be avoided, since only measures taken and not taken to comply with the rulings and recommendations would be at issue, even though the question was conformity with any WTO covered agreement. Finally, any rights of the defending party needed to be balanced against the rights and interests of the complainant party or parties. By the time of an Article 21.5 proceeding against a recalcitrant defendant, the complaining parties would have been suffering nullification or impairment for two and a half years or more with no compensation.

3.6 In this proceeding, Ecuador submitted, it was evident that every Ecuadorian complaint concerned an EC measure that had either been maintained contrary to panel rulings or that had been modified or extended without conforming to the WTO rules. If the European Communities was seeking to invoke a procedural defence under Article 21.5, Ecuador submitted that more than a footnote was required to meet the burden of such a defence. As concerns Ecuador's request for specific recommendations and suggestions under Article 19 of the DSU, Ecuador submitted that nothing in its request was inconsistent with the language of the DSU or with the WTO agreements. The suggestion of "ways" to comply was not limited on its face to "technical means", as claimed by the European Communities. Further, the past history of this dispute, was ample grounds for the Panel to use the authorities granted by the DSU. Ecuador further submitted that while repealing non-conforming measures was an important part

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<sup>32</sup> Ecuador's first submission, paragraph 27.

of compliance, it was not a remedy insofar as some illegal measures were not fully remedied and other measures inconsistent with the WTO were substituted.

#### IV. MAIN ARGUMENTS<sup>33</sup>

##### A. General

4.1 **Ecuador** challenged the conformity of the EC's revised system for the importation, sale and distribution of bananas with:

- (a) Articles I and XIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994);
- (b) Articles II and XVII of the General Agreement on Trade in Services (GATS); and the rulings and recommendations of the original panel in its report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*<sup>34</sup> (hereinafter "Panel report"), as modified by the AB in its report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*<sup>35</sup> (hereinafter "AB report");
- (c) Ecuador requested the Panel not only to reaffirm its prior rulings and interpretations, as confirmed and modified by the AB, but also to provide the *European Communities* with a more explicit recommendation and guidance how to comply.

4.2 The **European Communities** requested that the Panel reject all the allegations made by Ecuador both under the GATT and the GATS and find that the European Communities had complied with the original recommendations and rulings of the DSB adopted on 25 September 1997.

##### B. Issues Related to the GATT

4.3 **Ecuador** claimed that the revised EC system retained the same three categories of imports as the previous system and the same tariff treatment of those categories<sup>36</sup> except as follows:

- (a) there were no individual country quotas in the ACP quantity for traditional ACP bananas;<sup>37</sup>
- (b) for non-traditional ACP bananas<sup>38</sup>, there was no longer any 90,000 tonne limit on the amount that could enter the European

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<sup>33</sup> Footnotes in this part of the report are those of the parties when not otherwise stated.

<sup>34</sup> 22 May 1997, WT/DS27/R/ECU.

<sup>35</sup> 9 September 1997, WT/DS27/AB/R.

<sup>36</sup> See Table 2 above under Factual Aspects, Secretariat remark.

<sup>37</sup> Traditional ACP bananas were defined as bananas originating in the following countries up to a limit of 857,700 tonnes: Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, St. Lucia, Somalia, St. Vincent and the Grenadines and Suriname. Article 16.1 of Council Regulation (EEC) 404/93 as amended by Article 1 of Council Regulation (EC) 1637/98.

Communities duty-free under the "other" category of the third-country quotas. For quantities above the third-country quotas, the tariff preference for non-traditional ACP bananas had been increased from 100 Euro per tonne to 200 Euro per tonne;

- (c) there were no country allocations to non-substantial suppliers.

### *1. Article I Issues*

#### *(i) Traditional ACP Bananas*

4.4 **Ecuador** submitted that the revised system did not comply with Article I of GATT 1994 and the rulings of the panel and the AB, as concerns traditional ACP bananas, in three respects. First, the total allotment of 857,700 tonnes was equal to the sum of the previous individual traditional ACP country allocations prior to 1 January 1999, and the panel and the AB had already found that those allocations exceeded what was required under the Lomé waiver.<sup>39</sup> The European Communities could not rectify the problem of excessive individual allocations by cumulating them into one basket allotment in excess of that required for the sum of the shares of the countries participating in the basket. Ecuador argued that the revised system, by assigning a cumulative share to all traditional ACP suppliers, aggravated the violation of Article I since there were no individual limits, which meant that each country was in principle allowed to exceed its pre-1991 duty-free best-ever level.

4.5 Nor could the European Communities circumvent this obligation by devising new pretexts to justify the same quantities whose original rationale was rejected by the panel and the AB<sup>40</sup> before both of which the European Communities had stated that the figure of 857,700 tonnes included expected increases in banana exports after 1990. They were therefore outside the scope of the Lomé waiver, and were accordingly inconsistent to that degree with the EC's obligations under Article I of GATT 1994.<sup>41</sup> The discriminatory effect of this violation would also be exacerbated in practice because the revised import licensing system penalized the failure to use fully all licence quantities, for all countries. Together with the elimination of country limits for each traditional ACP country, the effect was to encourage maximum usage of the 857,700 tonne duty-free quota, and within that quota, to encourage a shift to the relatively more efficient suppliers and away from the less competitive among the ACP countries.

4.6 Second, Ecuador argued, the revised system's removal of individual country ceilings on duty-free access exacerbated the degree to which the EC's preferences exceeded what was "required" by the Lomé Convention and

<sup>38</sup> Non-traditional ACP bananas were defined as quantities of bananas exported by the ACP countries which exceeded the quantity defined above. Article 15.1 of Council Regulation (EEC) 404/93 (as amended).

<sup>39</sup> Panel report at paragraph 7.102; AB report at paragraph 175.

<sup>40</sup> Panel report at paragraph 4.131 and following; AB Report at paragraph 28.

<sup>41</sup> Panel report at paragraph 7.103; AB report at paragraph 175.

accordingly increased the degree of non-conformity with Article I of GATT 1994. As a consequence, every traditional ACP supplier could in principle ship 857,700 tonnes duty-free, whereas the panel and the AB held that any quantity for any country in excess of its pre-1991 "best-ever" was not required under the Lomé Convention and therefore not covered by the Lomé waiver. In Ecuador's view, this was more than a technical legal contravention, since the result was adverse commercial consequences. The traditional ACP suppliers would be more likely to ship the full available total of traditional ACP bananas, since the more productive and efficient among them would be able to plan, compete and invest accordingly.

4.7 The non-conformity with Article I could not, Ecuador argued, be off-set by a decrease in imports from less efficient traditional ACP suppliers since the panel's and AB's findings were very clear on that account, i.e. that the Lomé waiver applied for each traditional ACP supplier only up to that supplier's best-ever year before 1991.<sup>42</sup> Presumably, some or even many traditional ACP suppliers would effectively lose duty-free access to the European Communities because importers would naturally tend to buy from the most efficient and cheapest sources within a basket of countries.

4.8 Referring to Article 168(2)(a)(ii) of the Lomé Convention<sup>43</sup>, in particular, the **European Communities** responded that it had to honour its obligations under the Lomé Convention. Moreover, it noted that Protocol 5 of the Lomé Convention<sup>44</sup> had been interpreted to mean that "the European Communities is 'required' under the relevant provisions of the Lomé convention to provide duty-free access for all traditional ACP bananas".<sup>45</sup> The European Communities was thus providing duty-free treatment to traditional banana imports from ACP countries for a maximum volume of 857,700 tonnes which was an "additional preferential treatment for traditional ACP bananas over and above the preferential treatment for *all* ACP bananas that is required by Article 168(2)(a)(ii)".<sup>46</sup> This corresponded therefore to the limitation of the volume of bananas, i.e. traditional imports, which could benefit from this preferential treatment, as envisaged by the terms of the Lomé waiver resulting from the interpretation by the AB.

4.9 Maintaining the maximum of 857,700 tonnes of traditional ACP bananas per year was fully justified after having applied the new interpretative criterion set out by the AB in its report (paragraphs 175 and 178). Traditional ACP

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<sup>42</sup> As was noted by the AB in interpreting Article III, less favourable treatment for some cannot be balanced with more favourable treatment for others. See *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R and WT/DS2/R.

<sup>43</sup> I.e. " ... take the necessary measures to ensure more favourable treatment than that granted to third-countries benefiting from the most-favoured-nation clause for the same products".

<sup>44</sup> I.e. " ... [i]n respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present".

<sup>45</sup> AB report at paragraph 178. See also paragraph 172.

<sup>46</sup> AB report at paragraph 170.

bananas were not imported under the third-country tariff quotas, but competed with all the bananas that could be imported outside the bound tariff rate quota (and the autonomous quota), albeit with a preferential (duty-free) treatment as required by the Lomé Convention and permitted under the Lomé waiver. The margin of preference to the benefit of traditional ACP bananas outside the (bound and autonomous) tariff quotas was at present 737 Euro per tonne.<sup>47</sup> The European Communities recalled that the panel and the AB had considered that only pre-1991 best-ever import volumes from the traditional ACP banana suppliers could serve as justification to allow imports of traditional ACP bananas outside the tariff quotas. On the basis of the historical figures that were now available for pre-1991 best-ever import volumes of traditional ACP bananas (i.e. 952,933 tonnes), a maximum of 857,700 tonnes, duty-free, from all the traditional ACP banana suppliers was therefore entirely legitimate.<sup>48</sup>

4.10 The European Communities submitted that the original panel and the AB had agreed that the zero duty preference was "required" for traditional ACP bananas up to the level, for each supplier, of its pre-1991 best-ever exports to the European Communities, but that allowances for any country above that level were not within the waiver and were therefore inconsistent with Article I of GATT 1994. The sum of the individual country allocations for traditional ACP bananas under the prior system was 857,700 tonnes, which included for each traditional ACP country its best-ever exports to the European Communities, and for some countries an extra duty-free allotment based on expected increased production as a result of recent investments. The revised EC system created a single duty-free quota of 857,700 tonnes for all traditional ACP countries, with no limit on any individual ACP country's duty-free access within that overall quota.

4.11 **Ecuador** submitted in response, that a comparison of Annex 1 of the EC's first submission with the country limits of the prior system indicated that every country allocation was the same or less under Annex 1, except for Jamaica and Somalia, both of which were stated to have had a larger best-ever year in 1965 and 1966. Since the European Communities was putting forward this data as a defence after many years of not considering such data as valid for Lomé Convention, GATT or WTO purposes, the European Communities needed to do far more to explain why today such data should be accepted as valid, required by the Lomé Convention, and within the scope of the Lomé waiver. The years in question all pre-dated the EC's agreements with traditional Lomé countries, or even the accession of the United Kingdom to the European Communities. Further, having found this data, there was no explanation why the European Communities did not consider itself "required" to grant the additional quantities to Somalia and Jamaica. Ecuador considered that even if the Panel were to accept as valid this data, and thus increase the "requirement" of the Lomé Convention

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<sup>47</sup> It was scheduled to decrease to 708 Euro as from 1 July 1999.

<sup>48</sup> The relevant historical figures justifying the quantitative limitation of the importation of traditional ACP bananas at 857,700 tonnes are contained in Annex 1.

and expanding the scope of the Lomé waiver, the revised EC system would still be inconsistent with Article I of GATT 1994 with respect to traditional ACP bananas, since it allowed any traditional ACP supplier duty-free access beyond its "best-ever" level.<sup>49</sup>

4.12 The **European Communities** noted that the AB had overruled the panel in the original dispute with regard to the coverage of the Lomé waiver which in the view of the AB<sup>50</sup> did not extend to Article XIII of GATT. The European Communities therefore considered itself to be compelled to abandon the country-allocation for the imports of traditional ACP bananas, since in spite of the preference, none of the banana-exporting ACP States was a substantial supplier of bananas to the EC's market. Under such circumstances, the European Communities did not see how it would be possible to allocate shares of the overall volume to individual ("specific") ACP States as long as the European Communities did not distribute its MFN tariff quotas among non-substantial suppliers. In this regard, the European Communities did no more than respect its WTO obligations the way it understood them, but the European Communities had an open mind if it was clarified in unambiguous terms that other options were available to it. Moreover, the inconsistency alleged by Ecuador did not relate to Article I of GATT, but, in the opinion of the European Communities, rather to an alleged inconsistency of the EC's banana import regime with the requirements of Article 1 of Protocol 5 on bananas because of the absence of country allocations for the preferential import volume for traditional ACP bananas.

4.13 Referring to the EC's argument in paragraph 4.12 above, **Ecuador** submitted that the AB, in ruling that the Lomé waiver did not apply to the EC's infringement of Article XIII, did not find that the European Communities was thereby excused from compliance with Article I of GATT 1994, including the AB's express affirmation that duty-free quantities in excess of a traditional ACP country's pre-1991 "best-ever" level were not within the scope of the Lomé waiver<sup>51</sup> and therefore infringed Article I. That infringement of Article I existed whether or not the Panel accepted the "new" old data on Jamaica and Somalia.

#### (ii) Non-Traditional ACP Bananas

4.14 **Ecuador** argued that, under the terms of the Lomé Convention, the more favourable tariff treatment in the revised system of non-traditional ACP bananas was not required by, and hence was not within the scope of, the Lomé waiver.<sup>52</sup>

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<sup>49</sup> First Ecuador Submission at paragraphs 56-63.

<sup>50</sup> Paragraph 188 of the AB report in the original dispute, doc. WT/DS27/AB/R of 9 September 1997.

<sup>51</sup> AB report at paragraph 174, footnote 94.

<sup>52</sup> The relevant provision of the Lomé Convention in this regard was Article 168(2)(a)(ii), which provided that: "... the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third-countries benefiting from the most-favoured-nation clause for the same products" (emphasis added).

Ecuador considered that it was not justifiable to expand, in the amended system, the preferences allowed in the old system. Neither the limited finding regarding the previous system, nor the language of the Lomé waiver could justify such an increase. The panel and the AB affirmed, according to Ecuador, that the Lomé waiver covered duty-free treatment for 90,000 tonnes of non-traditional ACP bananas and a 100 Euro per tonne preference for such bananas above the overall tariff-rate quota (TRQ). Under the revised EC system, however, the 90,000 tonne cap on duty-free importation had been removed, and the preference for above-quota imports had been increased to 200 Euro per tonne. Ecuador argued that this Panel should find that the expansion of the preference was more than what was required by the Lomé Convention, and hence not justified under the Lomé waiver, and therefore not consistent with Article I of GATT 1994.

4.15 The **European Communities** noted that non-traditional imports of ACP bananas were currently benefiting from duty-free treatment within the tariff quotas (which amounted in practical terms to a preference of 75 Euro per tonne) and a duty preference of 200 Euro per tonne outside the tariff quotas. According to the European Communities, the fact that the AB had mentioned a volume of 90,000 tonnes for duty-free banana imports within the (bound) tariff quota and a figure of 100 Euro for any further preference was not an indication of an upper limit of the preference for non-traditional ACP bananas. The AB had limited itself to examining "whether the particular measures chosen by the European Communities to fulfil the obligations in [Article 168(2)(a)(ii)] to provide 'more favourable treatment' to non-traditional ACP bananas are also in fact 'necessary' measures ...".<sup>53</sup> According to the European Communities, the AB had stated very clearly that "Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of a measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a tariff preference for non-traditional ACP bananas."<sup>54</sup>

4.16 The European Communities further noted that the above figures were the ones on which the previous EC banana import regime was based. The Lomé waiver covered preferential treatment of ACP bananas over and above these figures to the extent that the waiver from Article I was only qualified by the condition that the preferential treatment had to be "required" by the Lomé Convention. Article 168(2)(a)(ii) of the Lomé Convention required preferential treatment of *all* ACP banana imports<sup>55</sup> unlike the requirements contained in Article 1 of Protocol 5 which were limited to traditional ACP banana suppliers. In the opinion of the European Communities, there was no basis for a volume limitation of such preferential treatment in Article 168(2)(a)(ii) of the Lomé Convention, nor for a limitation of the margin of preference to 100 Euro per tonne of non-traditional ACP bananas imported outside the tariff quotas.

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<sup>53</sup> Paragraph 173 of the AB report.

<sup>54</sup> *Idem*.

<sup>55</sup> Paragraph 170 of the AB report.

4.17 **Ecuador** submitted that the revised EC system increased the preferences for non-traditional ACP bananas, both by eliminating the 90,000 tonne cap on duty-free entry and by increasing the preference for over-quota bananas to 200 Euro per tonne. These increases went beyond what the panel had found required under the Lomé Convention, and thus did not fall within the Lomé waiver, and were inconsistent with Article I of GATT 1994. In Ecuador's opinion, the AB's observation that *other* forms of tariff preference might have been chosen was used by the European Communities as a pretext to justify greater preferences of the same type. In granting the Lomé waiver, WTO Members did not give *carte blanche* to the European Communities and ACP States. The EC's actions and rationale for its substantial increase of those preferences were abusive, and unjustifiable in terms of the Lomé waiver or past rulings.

4.18 The **European Communities** argued that contrary to Ecuador's allegations in paragraphs 4.14 and 4.17 above, the elimination of the tariff quota share for non-traditional ACP bananas *reduced* the value of the preference granted under the previous EC banana import regime, since these bananas were now imported in competition with bananas from other sources under the general "others" category of the tariff quota that was not allocated to bananas of a particular origin. The European Communities thus considered that the abolition of the tariff quota share allocated to imports of non-traditional ACP bananas did not "expand" the preference for non-traditional ACP bananas beyond the requirements of Article 168(2)(a)(ii) of the Lomé Convention. In order to partly compensate for the loss of the allocation of the 90,000 tonne tariff quota share for non-traditional ACP suppliers, the European Communities continued, it had agreed with these suppliers to increase the margin of preference for out-of-quota imports from 100 Euro per tonne to 200 Euro per tonne. In conclusion, the European Communities saw no valid basis for Ecuador's complaint regarding the preferential treatment of non-traditional imports of ACP bananas under the present regime.

## 2. *Article XIII Issues*

4.19 **Ecuador** argued that the revisions of the EC's system were not sufficient to conform with the obligations of Article XIII, and in some respects aggravated the contraventions of Article XIII in the previous system. Indeed, even the size of the respective TRQ baskets was unchanged: 857,700 tonnes of duty-free access for traditional ACP bananas, and 2,553,000 tonnes of preferential tariff access for other bananas. The revised system retained the use of two TRQ regimes, and maintained the same overall quota level for each group as in the previous system, resulting in more favourable treatment of bananas from traditional ACP countries than from Ecuador or other countries. The panel and the AB had held that the EC's establishment of two banana import regimes, or use of different terminology, did not justify a separate evaluation of those regimes in terms of Article XIII. Ecuador considered that there was no exemption from the obligations of Article XIII for measures that favoured products of a group of countries where the same favouritism was not permitted

for a single country, as was evident, for example, in the evaluation of the BFA by the panel and the AB.

4.20 Ecuador submitted that the questions with respect to the allocation of the TRQs were, firstly, whether the European Communities had complied with Article XIII, and the findings and recommendations in that regard, by according to traditional ACP countries, as a group, a share of the TRQ that was equal to the sum of the individual country shares for ACP bananas; and secondly whether the allocation assigned to Ecuador, relative to the share allotted to the ACP and to the import regime of the EC generally, conformed with Article XIII. Ecuador contended that in both respects the European Communities had failed to conform with Article XIII and the pertinent findings and recommendations of the panel.

4.21 Ecuador asserted, moreover, that the original panel had found that Article XIII did not permit the European Communities to allocate country shares to some non-substantial suppliers, while not doing so to others.<sup>56</sup> Ecuador noted that the particular country shares allotted to each traditional ACP supplier were based on the "best-ever" performance of each country prior to 1991, with a supplement even beyond that for some of the traditional ACP suppliers. However, actual imports from the traditional ACP countries as a group had been in the range of 200,000 tonnes less than the 857,700 tonnes in total allotments. In line with past rulings<sup>57</sup>, the panel had found that the chapeau in Article XIII:2 constituted a "general rule" to which the provisions of Article XIII:2(d) were subordinate.<sup>58</sup> The panel had also found that the European Communities could leave in place the TRQs for traditional ACP bananas because it was of the view that the Lomé waiver applied to Article XIII violations as well as to violations of Article I.<sup>59</sup> This panel finding had been overruled by the AB.<sup>60</sup>

4.22 Ecuador argued that a discriminatory quota in favour of one country could not be cured by combining that quota share with another excessive country quota share. Indeed, were it otherwise, Article XIII would become meaningless. WTO members could then freely discriminate simply by allocating quotas by blocks of two or more country quotas, instead of individual quotas. There was nothing in the findings of the panel or AB, or in the plain language of Article XIII, to suggest that such discrimination by blocks of countries was admissible. By eliminating the sub-allotments, Ecuador submitted, it was more likely that more of the quota would be filled, since more efficient traditional ACP suppliers would face little limit and would have an incentive for investment. The TRQ for traditional ACP bananas was isolated from competition from other sources such as Ecuador, both under the previous system and in the amended system, another advantage for traditional ACP bananas which was not accorded to other bananas.

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<sup>56</sup> Panel report at paragraphs 7.90-7.118.

<sup>57</sup> See working party report on "Quantitative Restrictions", adopted on 2, 4, and 5 March 1955, BISD 3S/170, 176, paragraph 24, cited at *Bananas III* panel report at paragraph 7.68, footnote 365.

<sup>58</sup> Panel report at paragraph 7.70.

<sup>59</sup> Panel report at paragraph 110.

<sup>60</sup> AB report at paragraph 188.

4.23 The **European Communities** submitted that according to the findings of the panel and the AB with regard to Article XIII of GATT<sup>61</sup>, tariff quota shares could not be allocated only to some non-substantial suppliers of a product. In examining the old EC banana regime, the AB had considered that (partial) allocation was an advantage which had not been extended to all non-substantial suppliers. Thus, the European Communities was not permitted under Article XIII:2(d) of GATT 1994 to allocate a specific tariff quota share only to non-traditional ACP banana suppliers. Therefore, the European Communities would have to allocate tariff quota shares to all non-substantial suppliers which the European Communities considered was difficult in practice. It would introduce undesirable rigidity in the administration of the tariff quota, as some tariff quota shares for non-substantial suppliers would have to be very small indeed. On the basis of these considerations, the European Communities had decided to introduce a general (undistributed) "others" category without allocation of country-specific tariff quota shares.

4.24 In order to respect the ruling of the AB, the European Communities continued, according to which breaches of Article XIII of GATT were not covered by the Lomé waiver, and in particular its finding in paragraph 188, the European Communities had refrained from allocating shares to any specific traditional ACP banana supplying country. The European Communities did not understand how the absence of a distribution of the quantity between traditional ACP suppliers could negatively affect Ecuador's export interests, since imports of traditional ACP bananas were in any case not counted against the (bound and autonomous) tariff quotas, on the one hand, while full competition outside the tariff quotas was already established by the Uruguay Round, on the other hand. The only differential treatment between Ecuadorian bananas and ACP traditional bananas was the tariff applied (duty-free vs. bound rate) but this was consistent with the Lomé waiver.

4.25 The European Communities submitted that a number of fundamental principles of GATT/WTO had to be observed when addressing this matter. They included the following: the Lomé waiver was a decision of the CONTRACTING PARTIES which was foreseen by the Marrakesh Agreement, Article IX.3, and was obligatory upon all the WTO Members. According to a general principle of public international law applied in the WTO by the AB, " ... *an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility* ...".<sup>62</sup> Therefore, this Panel was not free to interpret Article XIII of GATT in such a way as to render the Lomé waiver " a redundancy or an inutility". To put it otherwise, it must be possible to apply the Lomé waiver in the context of the *existing* WTO rights and obligations.

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<sup>61</sup> Paragraph 7.90 of the panel report and paragraph 161 of the AB report.

<sup>62</sup> AB report on *United States - Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, AB-1996-1, DSR 1996:I, 1, at 21.

4.26 According to the same principle, no interpretation of Article XIII of GATT could enlarge its scope to such an extent that Article I of GATT would be reduced, *in casu*, to "redundancy or inutility". Both these provisions were concerned with the MFN principle. However, they had their separate scope and purpose that could not be superposed or confused. The AB affirmed in the LAN case<sup>63</sup> that "*the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of GATT 1994*". The Newsprint panel report<sup>64</sup> was a practical application of this important principle which in the EC opinion was relevant for the solution of the present case. As the AB in the "*India patent*" case had indicated, "*... both panels and the AB (...) must not add to or diminish rights and obligations provided in the WTO Agreement. This conclusion is dictated by two separate and very specific provisions of the DSU. (...) These provisions speak for themselves. Unquestionably, both panels and the AB are bound by them*".<sup>65</sup> Any claim or suggestion by the complainant, the European Communities submitted, had to be dealt with by the Panel with this fundamental principle in mind.

4.27 The European Communities submitted that it could not possibly be in Ecuador's best interest that imports of duty-free traditional ACP bananas be counted against imports at in-quota rates from other sources, including from Ecuador, since this would necessarily reduce the share of imported non-ACP bananas. The European Communities stressed that imports of traditional ACP bananas were not counted against any MFN tariff quota. They were imported duty-free *outside* the existing (bound and autonomous) MFN tariff quotas. If it were not for the conditions attached to the Lomé waiver, as interpreted by the panel and the AB in the original dispute, the European Communities would not have indicated any specific volume for such imports. It therefore considered that Article XIII of GATT did not apply to duty-free imports of traditional ACP bananas which were not counted against a tariff quota but to which a cap to the tariff preference was applied.

4.28 The European Communities considered that Article XIII:5 of GATT 1994 would not be applicable in the absence of the AB interpretation of the Lomé waiver limiting duty-free imports of traditional ACP bananas in the European Communities to a volume of 857,700 tonnes. This volume found therefore its basis exclusively in the conditions attached to the Lomé waiver, not in the EC's tariff bindings, nor in Article XIII which was meant, in the final analysis, to protect those bindings. Thus, the volume limitation for duty-free imports of traditional ACP bananas was inseparably attached to the Lomé waiver and was both required and permitted by the waiver. Referring to its obligations under

<sup>63</sup> *European Communities - Customs Classification of Certain Computer Equipment*, AB-1998-2, paragraph 82.

<sup>64</sup> Adopted 20 November 1984, BISD 31S/114, 130, notably paragraphs 50 to 52.

<sup>65</sup> Paragraphs 46 and 47 (emphasis added).

Article 1 of Protocol 5, as confirmed by the AB<sup>66</sup>, the European Communities submitted that it had an obligation to allow imports of traditional ACP bananas into the European Communities under an import arrangement that was separate from the import arrangement applying to bananas from other sources, because any other solution would negatively affect the bound tariff quota and thus reduce the share of non-ACP banana imports, breaching the principle set out in the AB report on LAN.<sup>67</sup> While it was true that, in accordance with the findings of the AB in the earlier dispute, the waiver only waived obligations of the European Communities under Article I:1 and not under Article XIII of GATT 1994, this waiver had to be given its full scope and meaning (see paragraph 4.25 above). The European Communities submitted that it would not be entitled to count preferential imports that were not included in a tariff binding against imports under the bound tariff quota. This question was extensively dealt with in the 1984 panel on *Newsprint*<sup>68</sup> which was relevant to the claim submitted by Ecuador in this case.<sup>69</sup> The European Communities quoted the *Newsprint* panel as saying "[...] It is in the nature of a duty-free tariff quota to allow specified quantities of imports into a country duty-free which would otherwise be dutiable, which is not the case for EFTA imports by virtue of the free-trade agreements. *Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota*" (emphasis added).

4.29 While the MFN tariff quotas for bananas were not duty-free, the European Communities continued, but allowed imports at reduced rates of duty, the logic of the above findings was even more compelling in that situation. If preferential duty-free imports were counted against an MFN tariff quota at reduced rates, this would completely undermine the value of the MFN tariff quota and thus the balance of rights and obligations negotiated in tariff negotiations between WTO Members. "[T]he security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade", as the AB had indicated, would be put at serious risk.

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<sup>66</sup> Paragraph 178.

<sup>67</sup> *European Communities - Customs Classification of Certain Computer Equipment*, AB-1998-2, paragraph 82.

<sup>68</sup> Adopted 20 November 1984, BISD 31S/114, 130, notably paragraphs 50 to 52.

<sup>69</sup> In the *Newsprint* case, the complainant (Canada) argued that the respondent (EC) had not respected its tariff commitment for newsprint, because it had bound a duty-free MFN tariff quota of 1.5 million tonnes but in 1984 had only allowed a volume of 500,000 tonnes to be imported duty-free in the European Communities. The European Communities responded that the MFN tariff rate quota had in the past been shared between Canada and some Northern European countries (Finland, Norway, Sweden) which had in the meantime been granted duty-free access in the context of the EC-EFTA free trade agreements. For this reason, the imports from these countries were no longer counted against the MFN tariff quota. Under these circumstances, the European Communities had reduced duty-free access under the MFN tariff quota to 500,000 tonnes which corresponded to the share of non-EFTA imports under that quota. During the proceedings of the *Newsprint* panel, the European Communities argued that if the panel held that this action was inconsistent with the EC's GATT obligations, then the European Communities would have no option but to count the duty-free imports from EFTA countries against the imports under the MFN tariff quota.

4.30 On the other hand, duty-free imports of *non-traditional* ACP bananas were counted against the MFN quota. However, the EC's tariff binding for bananas specifically referred to imports of such non-traditional ACP bananas, for which a quota share of 90,000 tonnes had been allocated under the binding (see also paragraph 4.17 above). The situation of non-traditional ACP bananas *which were specifically referred to in the EC's tariff binding*, the European Communities submitted, was thus entirely different from that of traditional ACP bananas which were never the subject of any tariff negotiations under GATT or the WTO. The AB had recognized<sup>70</sup> that the European Communities was required, in accordance with Article 1 of Protocol 5, to grant traditional ACP bananas a tariff treatment that was preferential even in comparison to the import regime for non-traditional ACP bananas.<sup>71</sup> A "tariff quota share" in this context could only mean a defined import volume at a preferential tariff level. The value of a tariff preference resided in the preferential margin, much more than in the volume. The preferential margin of traditional ACP bananas was presently at 737 Euro per tonne, since these bananas were imported in competition with bananas imported out of quota, while the preferential margin for non-traditional ACP bananas was 200 Euro if imported out of quota and only 75 Euro if imported under the MFN tariff quota. Including traditional ACP bananas in the MFN tariff quota would thus mean (independently of the volume limitation) that the margin of preference would be reduced by 662 Euro per tonne (737 Euro - 75 Euro = 662 Euro).

4.31 In the opinion of the European Communities, there was no basis in the original panel or AB reports for such a drastic reduction of the margin of preference for traditional ACP bananas. The volume limit was thus a cap to this very substantial preference, but not an advantage to be shared under Article XIII of GATT with other (MFN) suppliers. Article XIII was a special MFN clause with regard to the distribution of (tariff) quotas, not a provision that governed volume limitations imposed on preferential suppliers. It was the preference that constituted the economic advantage for traditional ACP banana imports, whereas the volume limitation was a *disadvantage*. The volume limitation was thus inseparably linked to the tariff preference, but did not by itself constitute the preference.

4.32 If Ecuador's approach were correct, the European Communities continued, the European Communities would have to distribute the 857,700 tonnes in part to substantial suppliers, including Ecuador. However, Ecuador would not have access to the preferential zero duty rate. Thus, since this volume was beyond the bound tariff quota of 2.2 million tonnes, the base rate of presently Euro 737 would apply to any quantities imported from Ecuador under such an additional "tariff quota". Of the 857,700 tonnes of the so-called "tariff quota", Ecuador would receive a share of 26.17 per cent (224,460 tonnes). This

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<sup>70</sup> Paragraph 173 of the report of the AB in the original dispute, doc. WT/DS27/AB/R of 9 September 1997.

<sup>71</sup> Paragraph 178 of the AB report, doc. WT/DS27/AB/R of 9 September 1997.

would be absurd since Ecuador was entitled to import into the EC's *unlimited* quantities of bananas at 737 Euro per tonne. The traditional ACP supplying countries would have access to 9.43 per cent of the same volume which was less than *a tenth* of the volume of imports from those countries that the European Communities was required by the Lomé Convention to allow at a duty-free level. In the view of the European Communities, it was self-evident that Ecuador would have no interest whatsoever to import under this "tariff quota", because it could much more easily import outside the quota at the same base rate, while importing under this "tariff quota" would imply additional customs procedures in order to count the import against the quota.

4.33 **Ecuador** recalled that the establishment of two banana import regimes or use of different terminology did not justify separate evaluation of those regimes in terms of Article XIII. Referring to the EC's invocation of the *Newsprint* case attempting to persuade the Panel that the entire 857,700 tonne quota should be viewed as merely a cap on the preferences for ACP suppliers, Ecuador submitted that the 857,700 tonne quota was not simply a capped tariff preference, as the European Communities had sheltered this traditional ACP quota from all competition, given that the over-quota tariff was prohibitive. Ecuador and other suppliers thus could not compete for this allocation. In this respect, the traditional ACP quota was very different from the quantitative "competitive need" limits set by the generalized system of preferences. Though such limits were a tariff rate quota, they were not an allocation in the sense of Article XIII, because other suppliers could compete with the beneficiaries, subject only to the difference in duty. The European Communities could do the same thing in this case, since then the European Communities would only be granting a tariff preference, not an allocation contrary to Article XIII.

4.34 Ecuador agreed with the European Communities that "Article XIII is a special MFN clause with regard to the distribution of (tariff) quotas, not a provision that governs volume limitations imposed on preferential tariffs" (see above, paragraph 4.31). Volume caps on preferential tariffs were, in the opinion of Ecuador, an Article I matter, covered by the Lomé waiver, as long as they were limited to a tariff preference. As the original panel had stated in paragraph 7.80 of its report, constructing tariff preferences in such a way that the "tariff quota construction" became an additional advantage was an Article XIII matter, which was not covered by the Lomé waiver. To the extent that the European Communities argued that its ACP "tariff quota construction" had nothing to do with Article XIII, Ecuador referred to the new Article 18(9) of Regulation 404 which was inserted by Regulation 1637.<sup>72</sup>

4.35 The EC response was also not convincing, Ecuador submitted, in regard to Ecuador's complaint with respect to the continuing infringement of the fundamental non-discrimination obligations of Article XIII, i.e. the prohibition in

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<sup>72</sup> "Third State, traditional ACP and non-traditional ACP bananas re-exported from the Community shall not be counted against *the corresponding tariff quotas*" (emphasis added).

paragraph 1 against restricting products from one Member unless like products of other members were "similarly restricted," and the general rule of paragraph 2 that any allocation system must approximate as closely as possible the allocations that would be expected to prevail in the absence of restrictions. Ecuador noted that the European Communities, Colombia and Costa Rica had all objected to Ecuador's request that the Panel recommend that the European Communities drop the use of country allocations, on the basis that this request would deprive the European Communities of its "right" to allocate under Article XIII:2(d) and would deprive Colombia (and Costa Rica) of an alleged right to a country quota negotiated in the Uruguay Round. Ecuador stressed that it did not seek to deny any WTO Member its rights under the WTO in this dispute. The European Communities was indeed free to allocate by country, as long as it followed the requirements of Article XIII:1, the chapeau of Article XIII:2, and the provisions of Article XIII:2(d). However, as the original panel had ruled, neither the Uruguay Round schedules nor the allocation provisions of Article XIII:2(d) permitted violation of the requirements of Articles XIII:1 and XIII:2.

4.36 The provisions of Article XIII did not *require* the European Communities to allocate quotas, and Ecuador believed that the absence of country allocation would produce the most equitable result, given the manifold restrictions that had distorted the EC market for many years. But if the European Communities instead chose to allocate, then it must use a combination of recent representative period and special factors that resulted in a distribution approximating as closely as possible the shares that might be expected to prevail in the absence of restrictions, and that entailed similar restrictions on bananas from all sources. Ecuador did not believe that those requirements of Article XIII were met by the two systems chosen by the European Communities and by the use of a 1994-1996 period without adjustments for special factors.

4.37 The **European Communities** submitted that in accordance with the panel and AB reports, the European Communities applied the same method of allocation of import licences for all categories of bananas, irrespective of the source of supply to the extent that import licences were necessary in order to count the imports against a tariff quota or to administer the volume limitation for traditional ACP bananas. In this respect, the distribution rules were identical in all cases, since only substantial suppliers had been attributed country-specific shares under the MFN tariff quotas. Since no ACP country was a substantive supplier on the EC's market, no country-specific shares were allocated to any ACP country in respect of the volume limitation for traditional ACP banana imports. The European Communities noted, as concerns BFA allocations, that Nicaragua's shares were reallocated to Colombia in full in 1995 and in part in 1996, and Venezuela's share was partially transferred to Colombia in 1995. The European Communities confirmed Costa Rica's statement that it did not benefit from any transfers of shares under the BFA.

4.38 **Ecuador** submitted that the amended system did not correct, and even intensified, the non-conformity with Article XIII in the preferential treatment of BFA countries. The shares of Columbia and Costa Rica had been permanently increased by the amount of the reallocation of the shortfall that they were granted

inconsistently with Article XIII under the previous system. Ecuador was further of the view that the revised system was inconsistent with the obligations of Article XIII to ensure that a TRQ allocation system approximated as closely as possible the distribution of shares that could be expected in the absence of restrictions. In addition to providing individual country allocations for the 12 ACP suppliers of traditional ACP bananas within the 857,700 tonne quota, the old EC system granted country allocations to four individual ACP countries and an "Other ACP" category for a total of 90,000 tonnes of bananas within the TRQ. The share assigned by the European Communities to Ecuador in the new system was less than warranted by any objective standard, including the trend of Ecuador's exports and, even more markedly, Ecuador's much larger share of the world market outside the EC's market. Ecuadorian bananas were subject to restrictions that were not similarly imposed on like bananas from other sources, contrary to the requirements of Article XIII:1. The European Communities had allotted individual country shares pursuant to the BFA to two substantial suppliers (Colombia and Costa Rica) and two non-substantial suppliers (Nicaragua and Venezuela), who also had shared in a system of preferential reallocation of shortfalls among themselves. Other countries, such as Ecuador, did not have a specific country allocation in the old system, and fell within an "others" category of the 2,553,000 tonne quota.

4.39 Ecuador submitted that Article XIII established two general rules, i.e. Article XIII:1 required that imports from one Member not be restricted unless imports of the like products from other sources were "similarly restricted."<sup>73</sup> Further, the original panel noted that if Members applied quotas to a product, then, in the terms of the chapeau to Article XIII:2, "Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions."<sup>74</sup> This interpretation was confirmed by the AB.<sup>75</sup> While Article XIII:2(d) allowed the use of country allocations, the panel noted that that authorization was subject to observance of the general rule of the chapeau.<sup>76</sup> That finding was likewise confirmed by the AB.<sup>77</sup>

4.40 According to Ecuador, the amended system still had to conform to these requirements. The EC regulations listed the shares of Ecuador and other substantial supplying countries as a proportion of the 2.553 million tonne tariff rate quota.<sup>78</sup> As a proportion of the entire quota of 3.41 million tonnes, however, the allocations would be different.<sup>79</sup> Ecuador claimed that its share had been

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<sup>73</sup> Panel report at paragraph 7.69; AB report at paragraph 160.

<sup>74</sup> Panel report at paragraph 7.68.

<sup>75</sup> AB report at paragraph 161.

<sup>76</sup> Panel report at paragraph 7.70.

<sup>77</sup> AB report at paragraph 161.

<sup>78</sup> Ecuador: 26.17 per cent ; Costa Rica: 25.61 per cent; Colombia: 23.03 per cent; Panama: 15.76 per cent; Other: 9.43 per cent. Regulation 2362.

<sup>79</sup> Traditional ACP: 25.15 per cent ; Ecuador: 19.59 per cent ; Costa Rica: 19.17 per cent; Colombia: 17.24 per cent; Panama: 11.8 per cent; Other: 7.1 per cent.

limited relative to that of other countries as a result of this system and compared to the share that Ecuador could have expected to achieve in the absence of restraints. In other words, a country allocation or, in the case of the traditional ACP countries, a block allocation, benefited countries whose competitiveness was decreasing relative to others, by isolating part of the market from competition from other suppliers. Country allocations further restricted large and efficient suppliers' opportunities, such as Ecuador, to compete, both with producers in the restricted market and with other exporting countries that might be less efficient

4.41 Ecuador asserted that the non-conformity of the amended system with Article XIII as regards Ecuador could be shown objectively in terms of the evolution of Ecuador's share of the EC's market and, even more markedly, in Ecuador's share of world markets (see Chart 1 in Annex II). According to Ecuador, Chart 1 demonstrated that Ecuador's share of the EC's market had grown and far exceeded the share assigned to Ecuador in the present system. However, the object of Article XIII was not to freeze shares of the past, especially if those past periods had been distorted by restrictions. Charts 2 and 3 in Annex II, Ecuador submitted, were even more instructive in considering what share Ecuador might be expected to have in the absence of restrictions. Chart 2 indicated that Ecuador had a substantially larger share of the world market than of the EC's market. Chart 3 measured Ecuador's market share of the world outside of the EC's market. In a product such as bananas, Ecuador believed it was appropriate to consider relatively unrestricted markets elsewhere as much more indicative of what Ecuador might anticipate in the EC's market, if the restrictions were removed. Ecuador concluded that the share assigned to Ecuador was less than what Ecuador could expect in the absence of restrictions, in view of the provisions of Article XIII:1.

4.42 Ecuador further argued that the revised EC system contravened not only the general rule of Article XIII:2, but also specific provisions of Article XIII:2(d) which required that the allocation among substantial suppliers had to be based upon the proportions supplied "during a previous representative period, due account being taken of any special factors which may have affected or may be affecting the trade in the product." Referring to EC's claim that the allocations accorded to suppliers (other than traditional ACP suppliers) under the revised EC system were determined in accordance with average shares of the EC's market in the 1994 to 1996 period<sup>80</sup>, Ecuador noted that the original panel had found that this period was distorted by the non-consistent aspects of the BFA, as well as other distortions related to the EC's licensing system.

4.43 In the opinion of Ecuador, it was not clear whether any country-share allocation system could be devised based on a representative period and special factors that would meet the requirements of Article XIII:2. The original panel confirmed what had been held by prior panels, that periods distorted by trade

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<sup>80</sup> Preambular Clause (2) of Regulation 2362.

restrictions could not be considered representative.<sup>81</sup> Ecuador submitted that neither the period during which the previous banana import regime was in force (1 July 1993-31 December 1998), nor the period prior to that could be seen as "representative" since none of those periods were free of distortions. Ecuador further argued that since relative productive efficiency and capacity varied over time, the older the period chosen, the less likely it was to be representative, bearing in mind that the objective of Article XIII - and the requirement of the chapeau in Article XIII:2 - was to achieve an allocation that came as close as possible to that which would prevail in the absence of restrictions. The intent of Article XIII was not, in the opinion of Ecuador, to create everlasting entitlements based on past trading patterns.

4.44 Ecuador submitted that the result of the EC's system was that ACP countries, as a group, were assigned to a quota to which they had exclusive access. Other countries did not get an allocation by group. The ACP allocation was also far higher, being based on a cumulated pre-1991 best-ever formula, than could be justified by any formula or rule of Article XIII. If the 1994-1996 base period applied to Ecuador and other third countries were applied to the traditional ACP suppliers, the latter would receive a much lower share, while those of Ecuador and other third countries would rise.

4.45 The **European Communities** submitted that the "historical performance" scheme had to be based on some period in the recent past. While it was the least trade-disruptive option, it admittedly had the disadvantage of "freezing" the situation to a certain extent. However, on balance, the European Communities Ministers for Agriculture decided that a higher degree of certainty and predictability to importers than the "first-come, first-served" scheme was to be preferred at this stage and, contrary to the "auctioning" scheme, it was appropriate to leave the quota rent with the operators, thus avoiding an important financial impact on operators at a moment when already a major change in the rules was imposed upon them. The allocation of shares of the quota to those countries with a substantial interest in supplying the EC market was based on the reference period 1994-96 as were the quantities effectively imported by each importer on average during the recent three-year period. Data for 1997 was available but it was provisional at the time of preparing Regulation 2362. This period was the most favourable period for Ecuador since on the basis of the available data at the time, it represented Ecuador's best years. The allocations were calculated on the basis of the average of the actual import years and with a proportional distribution of unidentified sources. Therefore, Ecuador received a higher quota than it would have received based on actual 1994-96 figures only (26.17 per cent as compared to 25.38 per cent) (see also paragraph 4.52). The European Communities believed that the "historical performance" (or traditional/newcomers) scheme could only be legitimate if it was devised taking

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<sup>81</sup> Panel report at paragraph 7.94, footnote 365 quoting the panel report on *EEC Restrictions on Imports of Dessert Apples - Complaint by Chile*, adopted 10 November 1980, BISD 275/98, 113, paragraph 4.8.

into account the conditions listed in Article 3.5(j) of the Licensing Agreement<sup>82</sup>, namely licences had to be issued to applicants *in the past* and their distribution must be based on their full *utilization* during a recent representative period.<sup>83</sup> In the opinion of the European Communities, the new EC licensing system created by Regulation 2362 was entirely in line with Article 3.5 of the Licensing Agreement.

### C. *Issues Related to the GATS*

#### (i) *General*

4.46 **Ecuador** argued that the new licensing system resulted in distribution of most of the import licences to those who had received them under the previous regime, including those who had obtained licences pursuant to criteria ruled inconsistent with the EC's obligations under the GATS. Further, the amended regime's newcomer category had been expanded and itself had criteria favouring EC operators over service suppliers of Ecuadorian and other non-EC origins. Ecuador concluded that the amended system, like its predecessor, created conditions of competition favouring service suppliers of EC and ACP origin, to the detriment of service suppliers of Ecuadorian and other third-country origin in contravention of Articles II and XVII of GATS.

4.47 The **European Communities** recalled that under Article 1 of the Licensing Agreement, an import licence was defined as "... an application or other document (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into a customs territory of the importing Member". Thus, the full utilization of a licence had to refer to the moment in which the use of the licence became indispensable, i.e. the clearance of bananas through customs. *Before* that moment, there was *no* import of bananas into the Community, but rather export operations from the country of production. *After* that moment, there was trading within the European Communities of already imported bananas, which were indistinguishable from any other banana in the EC market from any origin. The only objective and indisputable way of proving the "effective" importation was the payment of duties, either directly or through a customs agent on a fee or contract basis. This was the system chosen by the European Communities in Regulation 2362. Since operator categories had been abolished and any need for any third-country operator (indeed any operator in general) to purchase licences "in order to maintain [its] previous market share"<sup>84</sup> had consequently become obsolete.

4.48 Ecuador noted that Article XVII of GATS provided for national treatment for services and service suppliers whereas Article II of GATS required Members

<sup>82</sup> "... consideration should be given as to whether licences issued to applicants in the past have been fully utilized during a recent representative period."

<sup>83</sup> Ecuador's first written submission paragraph 97 *et sequitur*.

<sup>84</sup> Paragraph 7.339 of panel report.

to accord the services and service suppliers of any other Member most-favoured-nation treatment. The AB upheld the original panel's conclusion that "treatment no less favourable" in Article II:1 of GATS should be interpreted to include *de facto*, as well as *de iure*, discrimination. Ecuador recalled that under the old EC banana import system, import licences for in-quota imports of third-country and non-traditional ACP bananas were allocated by "operator categories" and "activity functions". Operator categories A and B were subdivided into three types of activities. Performing one of these activities during a three-year reference period entitled the operator concerned to a portion of the future import licences that were linked to the imported quantities (see Annex III for details). In addition, Ecuador noted, the European Communities allowed operators who included or represented European Communities and traditional ACP producers to import third-country bananas and non-traditional ACP bananas to compensate for damage suffered from tropical storms (under so-called hurricane licences).

4.49 Ecuador recalled that the original panel had made a number of findings concerning the old regime which in Ecuador's opinion provided the factual and legal context for assessing whether the revised EC regime for allocating in-quota import licences complied with the EC's WTO obligations.<sup>85</sup> Referring to various paragraphs in the original panel's findings, Ecuador noted that<sup>86</sup> the original panel had found, with regard to the old regime's operator categories, activity functions, and hurricane licences, that:

- (a) the allocation to Category B operators of licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore inconsistent with the requirements of Articles XVII and II of GATS;<sup>87</sup>
- (b) the allocation to ripeners of Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS;<sup>88</sup> and that
- (c) the allocation of hurricane licences exclusively to operators who included or directly represented European Communities or ACP producers created less favourable conditions of competition for like service suppliers of complainants' origin and was therefore

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<sup>85</sup> See in particular the panel report at paragraphs 7.286, 7.293, 7.297, 7.330 and 7.331.

<sup>86</sup> Panel report at paragraphs 7.334, 7.335, 7.362, 7.350, 7.363 and 7.392.

<sup>87</sup> Panel report at paragraphs 7.314 and 7.353.

<sup>88</sup> Panel report at paragraph 7.368.

inconsistent with the requirements of Articles XVII and II of GATS.<sup>89</sup>

Ecuador noted that the above findings were upheld by the AB.<sup>90</sup>

4.50 The **European Communities** submitted that already during the period 1994 to 1996, the factual situation of the banana imports into the European Communities could no longer support the findings of a *de facto* discrimination that the original panel made on the basis of earlier statistical data. Indeed, in that period already, third-country wholesale trade suppliers had gained a substantial share of the trade that was previously in the hands of mainly EC/ACP wholesale trade service suppliers. This was the case, for example, of the Category B operators that were no longer attributed, as the panel determined on the basis of 1992 data, almost exclusively to European Communities/ACP. The European Communities noted that two of the Category B operators referred to in the panel report<sup>91</sup> (Compagnie Fruitière and CDB/Durand) were both non-EC owned and Coplaca was no longer registered as an operator following the changes to the regime to base licence allocation on proof of imports. According to the European Communities, third-country operators already had some involvement in ACP imports prior to the regime and their reference quantities more than doubled from 1993 to 1996 (from 132,614 tonnes to 274,822 tonnes). In addition to the increase in their licence share through acquisition of, or partnerships with, formerly traditional EC/ACP operators, third-country operators also increased their licence allocations through transfer of licences from other companies and the purchase of licences. The European Communities considered that it would have been almost impossible for a panel which had these more accurate and more recent figures at its disposal to reach the conclusion of the original panel.<sup>92</sup> This was particularly true for the Ecuador-owned Noboa Group that continuously gained market access opportunities in the importation of third-country bananas into the European Communities.

4.51 As concerns the activity function rules, more accurate and more recent data pointed exactly in the same direction as those mentioned above. According to 1994 to 1996 statistics, three out of four of the biggest ripeners were non-EC owned and these three alone represented around 20 per cent of the total ripening capacity of the European Communities. The European Communities submitted that if the original panel had disposed of such data it could *not* have arrived at the conclusion that "... the allocation of such licences according to activity functions modifies conditions of competition in favour of service suppliers of EC origin given that the vast majority of ripeners who are actually supplying, or capable of supplying, wholesale services are of EC origin".<sup>93</sup>

<sup>89</sup> Panel report at paragraphs 7.393 and 7.397.

<sup>90</sup> AB report at paragraphs 220, 225, 239, 244, 246, 248.

<sup>91</sup> Footnote 502 (Secretariat remark).

<sup>92</sup> Paragraph 7.336 *in fine*.

<sup>93</sup> *Idem*.

4.52 The European Communities noted that, irrespective of the share of the market that wholesale trade suppliers of third-country, EC or ACP origin could have had in the past, only operators that had effectively imported bananas during the period 1994 to 1996, could be considered traditional importers under the new regime. There were no longer transfers of quota rent between operators, unless the operators themselves judged that economic or trade considerations justified a transfer of licences. Nor was it possible any longer to claim licence ownership on the basis of a name on a licence: it was now necessary to show, through proof of duty payment that the holder of the licence was also the legal holder of the bananas. The moment of customs clearance was the point in time that determined whether an export of bananas became an import. Only imports were relevant for the import licences and were covered by the import licensing procedures as defined in the Licensing Agreement. Finally, the European Communities submitted, it was no longer possible to claim non-existent "grandfather" rights in the trade either of ACP or of Latin American bananas, since the new EC licensing regime made no distinction between the origin of bananas that the operators wished to import, except for the sake of administering the country-specific tariff quota shares reserved for the four WTO Members having a substantial interest in supplying bananas to the European Communities. According to more recent statistics based on the applications by traditional importers filed according to the new EC licensing regime, the distribution of licences between third-country, ACP and EC wholesale service suppliers was now the following: 68 per cent: third-country wholesale service suppliers; 24 per cent: EC/ACP wholesale service suppliers; 8 per cent: newcomers who could be either from third-country or EC/ACP wholesale service suppliers.

(ii) *Central Product Classification*

4.53 The **European Communities** submitted that the DSB had recommended that it bring its regime for bananas into conformity with its obligations under the GATS on a number of points referred to in the original panel report<sup>94</sup> and upheld by the AB. The DSB recommendations and rulings in this case were limited to the compatibility with the EC obligations under the EC Market Access Specific Commitments set out in the EC-12 GATS Schedule "Distribution services, B. Wholesale Trade Services (CPC 622)". The original panel had indicated in particular<sup>95</sup> that the specific item 62221 CPC relating to "wholesale trade services of fruit and vegetables" was the appropriate CPC line describing the services in the EC's Schedule concerned with the case under dispute. The EC-15 Schedule (not bound yet for formal reasons) did not change the legal situation with respect to that specific commitment. In accordance with Article 21.5 of the DSU and its related terms of reference, this panel had thus the task of verifying

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<sup>94</sup> Panel report at paragraphs 7.293, 7.297, 7.304, 7.306, 7.341, 7.353, 7.368, 7380, 7385, 7.393, 7.397.

<sup>95</sup> Paragraph 7.292.

the compliance with the above-mentioned recommendations and rulings of measures taken by the European Communities.

4.54 Referring to the findings in the panel and AB reports concerning in particular the CPC, integrated companies and the conformity of the previous banana import regime <sup>96</sup>, the European Communities submitted that after the adoption by the DSB of the original recommendations and rulings, the Provisional Central Product Classification elaborated by the Statistical Office of the United Nations had been replaced by the Central Product Classification (CPC) - Version 1.0.<sup>97</sup> According to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC <sup>98</sup>, item 62221 "Wholesale trade services of fruit and vegetables" matched the CPC Version 1.0 to 61121 "Wholesale trade services, *except on a fee or contract basis*, of fruit of vegetables" (emphasis added). The new Head note to the CPC Version 1.0 stated that "This group includes - the services of wholesalers that purchase goods usually in large quantities and sell them to other businesses, sometimes after breaking bulk and re-packing the product into smaller packages". The conformity of the new EC banana import regime with the WTO agreements, including the original recommendations and rulings of the DSB, the European Communities argued, should therefore be assessed on the basis of this new reality. The European Communities added, however, that its Uruguay Round commitments were still valid.

4.55 According to Part One, Chapter II, Section B, of the CPC<sup>99</sup>, "CPC, covering all goods and services (...), is a system of categories that are both exhaustive and mutually exclusive." Moreover, "the classification of products other than transportable goods, mainly services, shall be determined according to the terms and categories as described in the divisions, groups, classes or subclasses in sections 5 to 9 of the CPC.<sup>100</sup> In practical terms, the European Communities continued, with respect to the activities related to the importation, sale and distribution of bananas into the Community, a number of categories of services were involved (a) to h)). However, it was apparent from the description in the CPC and from the original panel and AB reports that the issue at stake in this Article 21.5 procedure concerned only item f), i.e. 61121 wholesale trade services of fruits and vegetables. The AB made clear that the definition of operator in Regulation 404 concerned only the provision of services under the "wholesale trade services, CPC 622" category and nothing else. Referring to paragraphs 7.294 and 7.296 of the original panel's report, the European Communities further argued that the new EC banana import regime should be

<sup>96</sup> Panel report paragraphs 7.292 and 7.293; AB: paragraphs 225-227.

<sup>97</sup> United Nations document, Statistical Papers, Series M, No. 77, Ver. 1.0, 1998 (see UN Website [www.un.org](http://www.un.org)).

<sup>98</sup> *Idem*, page 351.

<sup>99</sup> Paragraph 15, page 7.

<sup>100</sup> Part One, Chapter V, Section A, paragraph 56, page 19.

considered only with respect to the EC's obligations under Articles II and XVII of GATS concerning the supply of services under mode (3).

4.56 Referring to several findings by the panel<sup>101</sup> and AB which had deemed various EC measures inconsistent with Articles II and XVII of GATS, the European Communities submitted that in order to live up to its WTO obligations as contained in its Schedules of GATS commitments, it had adopted an entirely new banana import regime as set out in Regulations 1637 and 2362. With respect to its GATS obligations, Articles 16 to 20 of Title IV of Regulation 404 had been withdrawn and replaced by Article 1 of Regulation 1637.<sup>102</sup> Moreover, the hurricane licences had been abolished and replaced by a system under Article 18.8 of Regulation 404 which explicitly was based on the principle of non-discrimination "between supply origins".

4.57 Further, the European Communities explained, Regulation 2362 made the tariff quotas and the traditional ACP bananas quantities available to two categories of operators, i.e. traditional importers and newcomers and based licence allocations on "actual imports". (For definitions and other details of Regulation 2362 see "Factual Aspects" above). The European Communities considered that by repealing the old banana import system and introducing new rules, it had complied with all of the seven points found inconsistent with the GATS by the original panel and AB. The new EC rules under Regulations 1637 and 2362 provided market access opportunities with no restraint to operators involved in wholesale trade services which were established in the European Communities (mode 3) within the CPC version 1.0 definition under item 61121. Any wholesaler commercially present in the European Communities, directly or through its subsidiary or other form of commercial presence, could be registered as traditional importer or newcomer, depending on the compliance with the definitions in the EC's regulations (Article 12 of Regulation 2362). The European Communities further explained that, in case the service was not supplied directly by a juridical person but through other forms of commercial presence, this did not imply that the benefit of these market access opportunities was extended to any other parts of the supplier which were located outside the territory where the service was supplied (Article XXVIII (g), footnote 12 of GATS).

4.58 Responding to the EC's arguments concerning the CPC above, **Ecuador** submitted that even if it were agreed that Members who identified their GATS commitments by reference to the Provisional CPC would now be defined by reference to the CPC Version 1.0, an identification of commitments according to item numbers in the CPC Version 1.0 would have to be done by using the concordance between the provisional and revised CPC<sup>103</sup> so that, although the

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<sup>101</sup> Panel report at paragraphs 7.314, 7.320, 7.324, 7.326, 7.334-7.337, 7.339, 7.347, 7.349, 7.360-7.362, 7.364-7.367, 7.392 and 7.396. AB report at 231 and 234.

<sup>102</sup> In this document, the reference to provisions of Regulation 404 without any other precision should be understood as referring to the text as amended by Regulation 1637.

<sup>103</sup> CPC Version 1.0 at pages 339-608.

item numbers used to define a commitment might change from those of the Provisional CPC, the scope of the commitment would not. In Ecuador's opinion, the "revised" classification scheme pertaining to the wholesale services at issue was a distinction without a difference. In no way did it warrant the conclusion put forward by the European Communities in paragraph 4.57 above that "[t]he new EC rules ... provide market access opportunities with no restraint to operators involved in wholesale trade services which are established in the European Communities (mode 3) within the CPC Version. 1.0 definition under item 61121" (emphasis added).

4.59 Ecuador submitted that the provisional CPC and the CPC Version 1.0, items 62221 and 61121, respectively, were identical but for the phrase in CPC Version 1.0 "except on a fee or contract basis, of fruit and vegetables" which, in the opinion of Ecuador, only clarified the *existing* scope of the category since commission agent activities were in a separate item (621) in the Provisional CPC as well. In both classifications, the items fell within section 6, covering distributive trade services, the Head note to the section in the Provisional CPC of which was quoted by the panel.<sup>104</sup> Within section 6 of the Provisional CPC was group 622, "Wholesale trade services". Version 1.0 had no Head note to the section, but rather an explanatory note to group 611, which the European Communities quoted in its submission.<sup>105</sup> If the EC's point was to suggest that the scope of group 611 in the CPC Version 1.0 was narrower than the scope of item 622 of the Provisional CPC, Ecuador submitted it was incorrect. To the extent the Head note to CPC section 6 said anything different about wholesaling than was said in the explanatory note to group 611 of Version 1.0, it was that wholesalers might perform related, subordinated services in addition to their principal activity of reselling merchandise. That, however, was also true under the CPC Version 1.0. As the AB had observed, "[i]t is difficult to conceive how a wholesaler could engage in the 'principal service' of 'reselling' a product if it could not also purchase or, in some cases, import the product."<sup>106</sup>

4.60 As concerns the "both exhaustive and mutually exclusive" phrase in CPC Version 1.0, Ecuador was of the view that the categories of the Provisional CPC were equally exhaustive and mutually exclusive<sup>107</sup>, and services related to the importation, sale and distribution of bananas into the Community was virtually

<sup>104</sup> Panel report at paragraph 7.290. "Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as agent or broker (*wholesaling services*) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (*retailing services*). The principal services rendered by wholesalers and retailers may be characterized as *reselling merchandise*, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by *wholesalers*" (emphasis added; underlining original).

<sup>105</sup> CPC Version 1.0 at page 187.

<sup>106</sup> AB report at paragraph 226.

<sup>107</sup> Compare Provisional CPC at paragraph 21 at page 7 with CPC Version 1.0 at page 7, paragraph 15.

identical to its arguments before the original panel that the complainant countries' services providers were engaged in every service but the ones covered by EC's GATS commitments.<sup>108</sup> In its report, the original panel addressed at length the nature and scope of the EC's GATS commitments and whether Ecuadorian and other third-country service suppliers engaged in importing and distribution of bananas in the European Communities were covered by those commitments.<sup>109</sup> In this proceeding, the European Communities appeared to argue that wholesaling began after customs clearance and ended before ripening.<sup>110</sup> Ecuador was of the view that the European Communities was trying to separate its licensing system from services covered by its GATS commitments, in order to exclude from its GATS commitments the wholesale distribution services provided by Ecuadorian and other third-country banana marketers who, through a commercial presence in the Community, imported bananas and sold them on the EC market. The original panel and the AB had already decided that the European Communities had GATS obligations to those services suppliers, and there was nothing in the appearance of CPC Version 1.0 that could justify a different result.

(iii) *Issues of "Actual Importer" and of de Facto Discrimination*

4.61 **Ecuador** submitted that the *de facto* discrimination in the EC's old licensing system persisted in the new system because of the EC's choice of criteria. By allocating licences on the basis of "actual importer", the European Communities had ensured that the predominantly EC and ACP services suppliers, to whom Category B, ripener, and hurricane licences were granted for importing Latin American bananas in the old system, would retain rights to most of those licences in the new one. Ecuador considered that the entire EC analysis of the GATS issues focused not on whether its amended system was in conformity with its GATS obligations, but on particular modifications that it claimed were responsive to the panel and AB findings.<sup>111</sup>

4.62 In the opinion of Ecuador, the heart of the EC's argument was that - as a matter of law - there could be no *de facto* discrimination in the amended system because the European Communities had changed the facts. *There is no de facto discrimination* did not follow from (i) the *Panel found the prior system to discriminate de facto*; and (ii) the *European Communities had abolished aspects of the old system found to discriminate*. Ecuador did *not* claim that nothing had changed in the EC licensing system. The question in this Article 21.5 proceeding, however, was not whether the prior system had changed, but

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<sup>108</sup> See panel report at paragraphs 4.661, 4.662, 4.663, 7.291; AB report at paragraph 225, 226.

<sup>109</sup> See generally panel report at paragraphs 4.651-4.675, 7.287-7.296.

<sup>110</sup> See First EC Submission at paragraph 47 (list of services activities).

<sup>111</sup> For example: First EC Submission, heading preceding paragraph 55; First EC Submission at paragraph 56; First EC Submission at paragraph 56(b).

whether the system that replaced it was *de iure* or *de facto* discriminatory against Ecuadorian and other third-country services suppliers, and thus inconsistent with the EC's GATS obligations. Ecuador submitted that the persistence of the discrimination in the old system in the new system was not an "assumption" by Ecuador, but was inherent in the architecture of the new system, in particular in its reliance on the EC's definition of "actual importer" to determine who qualified for licences. That is, the *logic* of the prior system was that rational operators would generally have ensured that their licences were used in their names rather than traded. In defining "actual importer" by that behaviour, the *European Communities* had ensured that operators who were in the "abolished" categories would retain licence allocations in the amended system, but as "actual importers."

4.63 Ecuador also argued that the amended system went further to tilt this system toward EC and ACP service suppliers. The pass-through effect of the "actual importer" criterion combined in the new system with a unified licence system to mean that those who had traditionally imported EC and ACP bananas would have an even higher proportion of total licences, which they, like other importers, would use to import Latin American bananas first. Ecuador claimed that the previous importers of ACP bananas were largely EC and ACP service suppliers. They were granted rights to import Latin American bananas through the operator categories. Through the revised system, they not only "inherited" licences derived from the operator categories, but could freely use the licences they "earned" as importers of ACP bananas to try instead to import high-quota-rent Latin American bananas. All this was to the competitive detriment of Ecuadorian services suppliers to whom the European Communities owed GATS-consistent treatment.

4.64 The **European Communities** submitted that the notion of "actual imports" in the definition of traditional operators (Article 5 of Regulation 2362) ensured that the true and real importers during the representative period kept their traditional rights without losing the attached quota rent. Since the operators' categories had been eliminated there was no effect on the conditions of competition which were contrary to Article XVII.2 of GATS of the kind that the original panel had found as a matter of fact<sup>112</sup> in the previous regime. The less favourable conditions of competition that were found in the "opportunity to benefit from tariff quota rents equivalent to that which accrues to an initial licence holder, given that licence transferees are usually Category A operators who are most often service suppliers of foreign origin and since licence sellers are usually Category B operators who are most often service suppliers of EC (or ACP) origin"<sup>113</sup> were no longer existent. In particular, it was no longer possible to assert that the new regime "is intended to 'cross-subsidize' the latter category of operators with tariff quota rents in order to offset the higher costs of

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<sup>112</sup> See findings in paragraph 239 of AB report.

<sup>113</sup> Paragraph 7.336, Secretariat remark.

production, to strengthen their competitive position and to encourage them to continue marketing bananas of EC and traditional ACP origin".<sup>114</sup> The abolition of operator categories therefore put the new EC regime into compliance with Article XVII of GATS. In its original findings in paragraph 244, based on a *de facto* discrimination analysis<sup>115</sup>, the AB ruled that "the allocation to Category B operators of 30 per cent of the licences for importing third-country and non-traditional ACP banana at in-quota tariff rates is inconsistent with the requirements of Article II of the GATS". The abolition of operator categories therefore put the new EC regime into compliance also with Article II of GATS.

4.65 Since, as mentioned above, the activity function rules had also been abolished, there was no longer any effect on the conditions of competition contrary to Article XVII.2 of GATS of the kind that the original panel had found as a matter of fact<sup>116</sup> in the previous regime. The less favourable conditions of competition that were found in the *fact* that "... service suppliers of EC as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities, whereas service suppliers of complainants' origin do not enjoy equal competitive opportunities to make claims for the performance of ripening activities as service suppliers of EC origin"<sup>117</sup> was no longer present. Moreover, it could no longer be affirmed that "allowing third-country and non-traditional ACP imports at in-quota tariff rates to ripeners regardless of whether they have previously imported bananas is intended to strengthen their bargaining position in the supply chain towards primary importers".<sup>118</sup> The abolition of activity function rules therefore put the new EC regime into compliance with Article XVII of GATS.

4.66 A new set of rules, the European Communities continued, was now also in operation with respect to "exceptional circumstances affecting production or importation" which, in turn, "affect supply to the Community market" (Article 18.8 of Regulation 1637). The original panel had noted that "... our findings are limited to the present factual situation where hurricane licences are issued to operators who exclusively include or represent EC (or ACP) producers". The European Communities submitted that this was no longer the case under the new rules, given the abolition of operator categories. Moreover, Article 18.8, second sentence, of Regulation 1637 explicitly indicated that any specific measure taken in order to counter the exceptional circumstances in Article 18.8, "must not discriminate between supply origin". This new provision therefore put the European Communities into compliance with Article XVII of GATS. For the same reasons, it also complied with Article II of GATS.

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<sup>114</sup> Paragraph 7.339, Secretariat remark.

<sup>115</sup> Which was again subject to the findings in paragraph 239. See also footnote 153 of the same AB report.

<sup>116</sup> See paragraph 239 of the AB report.

<sup>117</sup> Paragraph 7.362, Secretariat remark.

<sup>118</sup> Paragraph 7.367, Secretariat remark.

*(iv) Issues Concerning Customs Clearance*

4.67 **Ecuador** noted that the EC's amended system no longer had operator categories and activity functions, but in the opinion of Ecuador their effect on distribution of licences was still present in the new system. Under Regulation 2362, licences were allocated to only two categories of operators: i.e. to "traditional operators", who would normally obtain 92 per cent of the in-quota import licences, and to "newcomers", who would obtain 8 per cent. The new Regulation, however, adopted a criterion for licence eligibility for traditional operators that, according to Ecuador, largely replicated the effect of the old operator categories and activity functions, resulting in service suppliers of EC and ACP origin being allocated nearly the same volume of licences under the new regime as under the old.

4.68 Referring to Article 4 of Regulation 2362, Ecuador noted that import licences were allocated to each "traditional operator" based on its "reference quantity," which was determined by "the quantities of bananas actually imported during the reference period."<sup>119</sup> For 1999, the reference period was 1994-1996, the same as for 1998.<sup>120</sup> Under Article 5, the "actual importer" was the operator in whose name customs duties were paid.<sup>121</sup> In other words, an operator which was credited under the amended system with being the "actual importer" had, during the reference period, either itself cleared a shipment through customs (and therefore paid any customs duties due) or was named on the customs documentation as the owner on whose behalf the customs duties were paid by someone else, and as a result, would be allocated import licences. Ecuador considered that codifying a pattern of treatment that was developed based on discriminatory criteria was itself discriminatory. The European Communities had thus produced the same result by relying on the technicality of who paid the customs duties.

4.69 Ecuador argued that by the very nature of the previous system's licence allocations, a substantial proportion of the imports of in-quota third-country and non-traditional ACP bananas were physically imported by Ecuadorian and other third-country service suppliers, but were customs cleared into the European Communities by or on behalf of a holder of a Category B, ripener, or hurricane licence. Under the amended system, those former holders of Category B, ripener, and hurricane licences consequently were in a position to prove payment of duties for those imports and be deemed to be the "actual importers" entitled to import licences, even though they were not, in the opinion of Ecuador, the true importers in a commercial sense or would not have been but for the artificial distortions created by the prior system.

4.70 Thus, Ecuador argued, in order to import their bananas into the European Communities, Ecuadorian importers, had to enter into unfavourable contractual

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<sup>119</sup> Regulation 2362, Article 4.1.

<sup>120</sup> *Idem.* Article 4.2.

<sup>121</sup> For details, see Factual Aspects above (Secretariat remark).

arrangements with the holders of Category B, ripener, or hurricane licences. In practice, four different types of arrangements were used:

- (a) *Licence transfers*, in which the service provider who purchased the licence became the officially recognized transferee pursuant to Article 9 of Commission Regulation (EEC) No 3719/88. Licence transfers were rare.
- (b) *Licence "leases"* in which the Ecuadorian service supplier imported bananas and fulfilled customs formalities, but used a licence in the name of the original licence holder. These arrangements were also relatively uncommon.
- (c) *Buy-back arrangements*. These were paper transactions in which third-country bananas were imported by an Ecuadorian service supplier but another service supplier was credited with entry of the goods.<sup>122</sup>
- (d) *T1-sales*, i.e. sales in the European Communities before customs clearance.<sup>123</sup>

4.71 Ecuador argued that the Ecuadorian service supplier was the real importer in a commercial sense in all four cases, but only in the first two cases did the new EC regulations give the Ecuadorian service supplier recognition as the "actual importer" and it was only in those two cases that the true importer would be able to prove payment of customs duties. In the two other cases, the holder of the Category B, ripener, or hurricane licence (under the old system) was considered as the "actual importer" under the new system.

4.72 Buy-back and particularly T1 sales covered a very large volume of bananas landed in the European Communities by Ecuadorian suppliers. Buy-back arrangements, Ecuador argued, were designed to keep reference quantities and licence entitlements in the hands of ripeners and other beneficiaries of the former allocation scheme. T1 sales were by definition what a primary importer was intended to do under the previous regime, but reflected also the unfavourable conditions of competition for Ecuadorian service providers under the old licence allocation rules.

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<sup>122</sup> The Ecuadorian service supplier bought or produced bananas in Ecuador, shipped them to the European Communities, and unloaded the goods at an EC port. The Ecuadorian importer then "sold" the bananas to a holder of a Category B, ripener or hurricane licence, who presented the licence and paid customs duties and immediately "sold" the bananas back to the Ecuadorian service supplier. The price of the second "sale" was the price of the first "sale" plus the customs duties and a payment (the quota rent) for use of the import licence. The Ecuadorian service supplier retained custody of the goods throughout, and resold or distributed them in the European Communities.

<sup>123</sup> In these transactions, an Ecuadorian service supplier bought or produced bananas in Ecuador, shipped them to the European Communities, and unloaded the goods at an EC port. In order to enter the bananas, the Ecuadorian service supplier sold them to another operator who was the holder of a Category B, ripener or hurricane licence. The licence holder fulfilled customs formalities and resold or distributed the bananas in the European Communities. As in the buy-back arrangement, the importer in fact paid the duties, because the sale price to the competing service supplier was discounted by both the amount of the duty and the quota rent.

4.73 Referring to the contractual arrangements in (a) and (b) of paragraph 4.70 above (licence transfer and licence lease) which included the payment of duties by the licence transferee or the licence leaser, the **European Communities** said that under the new EC regime the licence transferee or leaser was covered by the definition of traditional importer in Regulation 2362 and was also the legal holder of the bananas. In the contractual arrangement described under (c) in paragraph 4.70 (buy-back), there were two separate operations of selling and purchasing bananas. The first took place before the customs clearance (an export activity), the second after the customs clearance, a wholesale trade activity disconnected from any import activity which could include bananas of any origin already in free circulation in the European Communities and thus indistinguishable.

4.74 The European Communities submitted that there was no evidence that: (i) these contracts existed; (ii) that they existed in a relevant number so that they could be of any importance in these proceedings; (iii) that a legally relevant link was established between the two separate contracts of selling and purchasing. The simple affirmation *ex post* by a party to that effect could not be a reliable source of evidence in these matters and certainly did not reach the minimum standard of evidence under the principle on the burden of proof elaborated by the AB in the "Blouses and Shirt"<sup>124</sup> report. Referring to (d) of paragraph 4.70 above, the European Communities submitted that the contractual arrangement described therein (T1-sales) fit perfectly into the definition of an exporter. Ecuador itself admitted that there was no activity of importation involved. If the existence of a so-called T1-sales were able to qualify any exporter as a 'traditional importer' in the sense of Regulation 2362, this would be tantamount to the elimination of the definition all together. Given that the market access to the wholesale trade services in the European Communities was not limited but that the present level of the tariff represented an implicit limit on the number of bananas that could be imported into the European Communities, the possible number of bananas that could be exported (and of operators willing to export them) would always outnumber the bananas that were really imported (and the operators established in the European Communities). The activity of exporting bananas had, therefore in the opinion of the European Communities, no relevance when determining the "traditional" rights to import under Regulation 2362. No violation of the GATS could therefore be retained against the new EC licensing system.

4.75 **Ecuador** argued that since Ecuadorian service providers did not get a sufficient number of licences, they were effectively forced to make contractual arrangements with licence holders to stay in business. Only the European Commission, which managed the licensing system, had access to records documenting the volume of bananas that, for a given year, was physically imported into the European Communities by an Ecuadorian service supplier but

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<sup>124</sup> WT/DS33/AB/R, DSR 1997:I, 323, at 335.

customs cleared by another service supplier with a Category B, ripener or hurricane licence. In Ecuador's opinion, however, it followed from the nature of the system that holders of Category B, ripener or hurricane licences were the likely participants in arrangements with third-country importers, for two reasons.

4.76 First, they held the greatest volume of potentially available licences.<sup>125</sup> Secondly, Ecuador argued, most EC or ACP service suppliers with Category B, ripener or hurricane licences were not themselves equipped to import Latin American bananas and thus use their licences for their own imports. Importing bananas into the European Communities from Latin America required a sophisticated organization in both producing countries and the European Communities and an integrated transport chain involving specialized refrigerated cargo ships. Most holders of Category B, ripener and hurricane licences therefore chose an easier way to realize the economic value of licences to import Latin American bananas: in return for significant payments, they used them in buyback or T1 arrangements with the true importers - Ecuadorian or other third-country service suppliers. As a result of the way the prior system worked, Ecuador said, the EC's choice of customs clearance as the basis for allotting licences under the amended system had the effect of allocating licences to those who had them under the system found to be inconsistent with the GATS.

4.77 Ecuador submitted, as an example, the 1998 and 1999 licence allocation experience of the Antwerp-based company nv Firma Léon Van Parys (LVP) owned by Noboa, and therefore for GATS purposes had been found to be an Ecuadorian service supplier.<sup>126</sup> The following table shows, for 1994-1996, LVP's imports of bananas into the European Communities, and the import licences LVP was allocated:<sup>127</sup>

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<sup>125</sup> (a) Category A "primary importer" licences accounted for 37.905 per cent (57 per cent of 66.5 per cent of the total import licences for in-quota third-country and non-traditional ACP bananas; (b) Category C or newcomer licences accounted for only 3.5 per cent of the total volume of licences for in-quota third-country and non-traditional ACP imports. Newcomer licences were normally for small volumes; (c) Category A "secondary importer or customs clearer" licences gradually "migrated" to holders of other types of Category A licences. That is, the prior system encouraged holders of Category A "primary importer" or "ripeners" licences to ensure that bananas imported under those licences were customs cleared in their own names, both to be registered as the official licence user to ensure against losing reference quantities and to gain access to future "secondary importer" licences reference quantities; (d) Category B and ripener licences accounted for 48.62 per cent (30 per cent and 28 per cent of 66.5 per cent, or 18.62 per cent) of the available licences for in-quota third-country and non-traditional ACP imports. Hurricane licences and the secondary importer licences that came into the hands of ripeners increased this volume.

<sup>126</sup> See panel report at paragraphs 7.330-7.331; AB report at paragraphs 225 and 239.

<sup>127</sup> For reasons of confidentiality the figures have been changed but the proportions have been maintained. The actual data were available to the European Commission. While there could be minor differences between these figures and data retained by the Commission, any such minor differences would not affect the validity of the example.

Year	LVP imports (tonnes) <sup>128</sup>	Licences allocated (tonnes)
1994	97,620	32,631
1995	95,512	33,045
1996	90,403	36,285

During those years, Ecuador claimed, LVP was compelled for most of its imports to seek access to import licences that had been allocated to other operators. It did so through the various types of contractual arrangements discussed above.

4.78 The years 1994-1996 were the reference period both for 1998 under the prior system, and for 1999 under the amended system. Consequently, the change in LVP's licence allocation from 1998 to 1999 demonstrated the degree to which the amended system departed from or merely perpetuated the prior system. For these years LVP was allocated import licences for the following volumes:

1998: 39,828 tonnes  
1999: 41,055 tonnes

Thus, the new licensing regime had improved LVP's licence allocation by only three per cent, while the licences that LVP paid for to cover most of its 1998 imports remained allocated to the original holders of Category B, ripener and hurricane licences, because they could show duty payment. Since its volume of physical imports to the European Communities had not dropped, LVP would be obliged to continue to seek access to other operators' licences for most of its imports in 1999. Indeed, in 1999 LVP was making the same contractual arrangements with the same licence holders as it did under the previous system.

4.79 Ecuador recalled that the original panel found that service suppliers of complainants' origin would "possibly" be able to claim reference quantities for customs clearance, and that it had been presented with insufficient information to determine whether companies carrying out customs clearance activities were predominantly in European Communities or third-country ownership or control.<sup>129</sup> The panel had therefore concluded that "service suppliers of European Communities as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities. ..." <sup>130</sup> In the opinion of Ecuador, these findings should not comfort the European Communities since the panel had been addressing customs

<sup>128</sup> The figures used were based upon the volumes of bananas that were physically imported by LVP and customs cleared in the European Communities by LVP or another company. The figures exclude imports that were re-exported to non-EC countries. For clarity, also excluded were volumes subject to dispute between LVP and the European Commission concerning whether they were customs cleared in the European Communities or re-exported; their exclusion here was without prejudice to LVP's position in the dispute.

<sup>129</sup> Panel report at paragraph 7.362.

<sup>130</sup> *Idem*.

clearance as one, relatively minor, aspect of banana marketing, not as practically the entire basis for future licence allocations. Also, the European Communities itself had acknowledged that using customs formalities as the criterion for allocating import licences would freeze licence allocations.<sup>131</sup> The European Communities had done in its amended system precisely what the Commission warned would occur: by basing licence allocations on licence usage (i.e. customs clearance) in the 1994-1996 reference period, it had "fossilized" licence allocations that discriminated against Ecuadorian and other third-country service suppliers.

4.80 The **European Communities** was of the view that the new EC measures could not be compared with the old regime. Therefore, any allegation by Ecuador that a "drag-on effect" of the old inconsistencies of the GATS existed under the new regime should be rejected by the Panel. Ecuador's assumption was erroneous in law and in fact. As a matter of law, the European Communities argued, it was not easily understandable how the effects of a discrimination *de facto* that the panel had found with respect to certain aspects of the old EC licensing regime could continue at present when these aspects had been abolished all together. The inconsistencies with the GATS found by the original panel were caused by transfers of quota rent from certain, mainly third-country, wholesale trade service suppliers to certain EC/ACP wholesale trade service suppliers *as a de facto consequence* of the previous EC licensing regime. The panel had considered those transfers as discriminatory under Article XVII of GATS (and in certain more limited circumstances under Article II of GATS).

4.81 In the EC's view, its licensing system in its new modalities ensured full neutrality with respect to the wholesale service suppliers in the banana trade. Therefore, any transaction of licences between operators was now only justified by trade-related or economic considerations over which the European Communities had no control. According to the original panel, the old EC regime was judged discriminatory on the basis of Article XVII.2 of GATS not because the system *per se* created modifications in the conditions of competition but because it forced a transfer of quota rent from the mainly third country Category A operators to the mainly EC/ACP Category B operators. This latter aspect prevented the modification of conditions of competition from being "cured" by the transferability of licences. However, there was no comparison between the new system and the old system. No forced transfer of quota rent could now be claimed, as it was in the previous panel procedure on the basis of the 1992 figures presented by the original complainants.

4.82 Moreover, data shown in the EC rebuttal submission demonstrated that the factual situation that was available to the original panel when it took its decisions, did not appropriately reflect the reality as it developed already under

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<sup>131</sup> European Commission, "Working Document on Determination of Reference Quantities from 1995 Onwards", 6 October 1993, at paragraph 5, attached as Exhibit 15 to Ecuador's first submission to the panel of 9 July 1996.

the old regime in the period 1994 to 1996. These figures showed beyond any possible doubt that the very assumption of *de facto* discrimination in favour of EC or ACP wholesale service suppliers to the detriment of third-country wholesale service suppliers was no longer justified. To affirm that discrimination "lives on" in the new EC regime was contrary to the facts as had been demonstrated by the European Communities.

4.83 The European Communities recalled the original panel's affirmation: "Therefore, service suppliers of EC as well as third-country origin do have comparable opportunities to file claims as to primary and secondary importation activities performed with the EC authorities".<sup>132</sup> The European Communities considered therefore that the accomplishment of primary or secondary importation activities was not discriminatory under the old EC regime and did not breach Articles XVII or II of GATS. *A fortiori*, the new EC regime that had eliminated all distinction between activity functions had to be in line with the EC GATS' obligations in this respect. The European Communities noted that the fact that ripeners were entitled to import bananas was not *per se* contrary to any provision in any covered agreement, including the GATS. The original panel did not find any formal or *de facto* discrimination in the access to the activity of ripener in the European Communities. Any operator, irrespective of its origin, was entitled to act as a ripener provided it met the conditions under the old EC Regulation 1442. What was considered contrary to the GATS was *de facto* discrimination that the original panel found, based mainly on 1992 data submitted by the complainants.<sup>133</sup>

4.84 The discrimination was therefore due to the fact, the European Communities continued, that ripeners sold licences and thus reaped quota rent from mainly primary importers. According to the data available to the panel at that time, the "vast majority" of ripeners were EC owned and the majority of primary importers were third-country owned. Ripeners who had sold licences under the old EC regime could no longer import under the new EC regime, since they had not paid the duties at the moment of the customs clearance of the bananas. Ripeners who had not sold licences under the old EC regime but had acted as importers, did not reap quota rent from primary importers. Thus, any traditional importer, including a ripener, if it met the conditions under the new EC licensing regime, was entitled to import within the strict (non-discriminatory) new limits set out in Regulation 2362. The European Communities recalled that, at the moment when the new EC licensing system entered into force, the majority of ripeners were of third-country origin and not of EC or ACP origin.

4.85 The European Communities further submitted that Ecuador confused export and import activity. It was erroneous to suggest that the volumes of exports of Ecuadorian bananas should be compared to the volumes that Ecuadorian wholesale service suppliers with a commercial presence in the

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<sup>132</sup> Paragraph 7.362 of the panel report.

<sup>133</sup> Paragraph 7.363 of Panel report.

European Communities imported into the Community. Traditionally, Ecuador was a producing and an exporting country. Wholesale service suppliers of Ecuadorian origin appeared on the import market in the European Communities quite late, coinciding with the entry into force of the old EC regime. The activity of the Ecuadorian companies involved in the importation of bananas into the European Communities had grown steadily and substantially during all the years of application of the old EC regime. It had increased even more as from the entry into force of the new EC regime.

4.86 The import licensing regime of the EC was concerned with the importation of bananas and not with the activity connected with the export of bananas from the places of production. Under the conditions stipulated in Regulation 2362, in order to be an importer it was necessary to be registered in one of the member States of the EC. Ecuador enjoyed a very favourable situation among the producing countries since it was the only producing country which had a major group established in the European Communities (Noboa group) performing import activities. By contrast and in comparison, Costa Rica, Colombia and Panama had no significant presence in the supplying of services connected to the importation of bananas into the European Communities (apart from a very small company for Costa Rica, Banatico, and a middle-sized company for Colombia, Banana Marketing). Moreover, another company from Ecuador, UBESA, traded mainly bananas for the Dole group (thus acting as a pure exporter) and Chiquita also exported from Ecuador (and imported into the European Communities). At the same time, a very limited producer and non-exporter like the United States had companies which had developed a major export activity from Latin American producing countries and an important activity of import into the European Communities.

4.87 **Ecuador** submitted that the European Communities should modify its import licensing system to allocate licences to the true importers who were the primary service providers and who took most of the commercial risk in marketing bananas in the European Communities. This could be done by basing reference quantities on submission by importers of evidence of their activities, in the form of: (i) invoices for purchase of bananas in the country of origin; (ii) shipping documents (bills of lading); and (iii) commercial invoices proving a first sale on EC territory. In the past, similar documentation was required by the European Communities to demonstrate reference quantities.<sup>134</sup> Ecuador argued that such a licensing system would not give an advantage to service providers of non-EC origin, but would create, for both non-EC and EC service suppliers, the fair opportunities required by Articles II and XVII of GATS. Ecuador asked that the Panel accompany its findings with these specific recommendations to ensure that action by the European Communities to bring its import licensing system into conformity with the GATS would be forthcoming in the immediate future.

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<sup>134</sup> See Article 7 of Regulation 1442; panel report at paragraph 7.192.

4.88 The European Communities contended that no WTO right could be derived from vague notions like "true importer in a commercial sense", "records documenting the volume of bananas that, for a given year, was physically imported in the European Communities", "true importer, i.e. the service supplier who in fact was in a position to and did undertake the critical steps in moving bananas from producing origins into the EC's market", etc. As the AB had indicated in its original report<sup>135</sup>, it was the definition which could be found in the relevant EC regulations that determined the scope of the analysis on whether the European Communities had complied with its commitments and its obligations under the GATS. There was no definition of operator in the GATS, nor in the EC's Schedules of commitments; there was an EC commitment on wholesale trade services that was relevant insofar as it included activities covered in the definition of operator under the relevant EC regulations.

4.89 In **Ecuador's** view, the European Communities had not demonstrated why, in late 1998, it did not choose the more recent 1995-1997 period as the 1999 reference period since, in principle, any licensing system based on traditional trade flows should reflect the most recent trade flows. Ecuador stressed, however, that in its opinion, the reference period *per se* was not the source of the new system's inconsistency. It was, rather, the EC's decision to use the technicality of payment of customs duties to determine the "actual importer", instead of using commercial evidence to identify the *true* importer, i.e. the service supplier who was in a position to and did undertake the critical steps in moving bananas from producing countries into the EC market.

4.90 The reality of trade showed, the European Communities responded, that there was no factual or logical connection, let alone any legal necessity, between being a producer and exporter of bananas, on the one hand, and an importer in the European Communities, on the other hand.

4.91 The **European Communities** responded that the payment of customs duties was the only objective criterion that allowed the European Communities to verify which operator was entitled to the quality of traditional importer since it concerned the crucial moment for importation i.e. the customs clearance. The suggestions that Ecuador had put forward in paragraph 4.87 above (internal documents of private companies should provide evidence in order to be granted the traditional operator status) was the best recipe to engulf the European Communities and the operators into endless litigation in front of jurisdictions all over the world. In the opinion of the European Communities, no administrative power, including the EC internal offices, could decide on the validity of these documents without immediately raising a concern for other operators disposing of different concurring documents.

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<sup>135</sup> Paragraph 225.

(v) *Newcomers*

4.92 **Ecuador** noted that the European Communities had awarded eight per cent of all banana import licences to "newcomers" in its amended system<sup>136</sup> and established criteria which companies must fulfil to qualify.<sup>137</sup> Ecuador submitted that certain of the newcomer criteria constituted both *de iure* and *de facto* discrimination against Ecuadorian and other third-country service suppliers in general, and against foreign service suppliers engaged in banana importing and wholesaling in particular. The newcomer criteria required a potential newcomer to have imported into the EC fresh fruits and vegetables (or a combination of fresh produce and coffee and tea), with a declared value of 400,000 Euro, in the one to three years preceding registration. This implied that a qualified newcomer was established in the Community, had been able to create the necessary physical and commercial infrastructure, and had been able to secure licences for any designated products requiring import licences. These requirements favoured EC services suppliers, Ecuador argued, since they measured commercial activity only with respect to the EC market. It was not apparent to Ecuador why a non-EC origin services supplier with a newly established commercial presence in the Community should not qualify as a "newcomer" if it documented an equivalent value of imports of fresh produce into Ecuador, or into any one or several other non-EC countries. Ecuador submitted that the failure of Regulation 2362 to permit a foreign origin services supplier established in the European Communities to demonstrate equivalent import experience elsewhere in the world was *de iure* discrimination in contravention of Article XVII of GATS.

4.93 The discrimination arose because of the interaction of the newcomer criteria with the EC's separate discrimination in the allocation of banana import licences, under both the previous and the amended licensing systems, in favour of EC origin service suppliers. Potential newcomers of Ecuadorian or other third-country origin faced extremely high barriers to entering the banana wholesale market in Europe. Such potential newcomers could only gain access by buying, for at least a year, the use of import licences allocated to holders of Category B ripener and hurricane licences in the previous system. Moreover, Ecuador argued, no entitlement to future newcomer status could be gained in 1999 unless the use of licence access was bought, under the amended licensing system, from the same former holders of Category B, ripener, or hurricane licences. The cost of having to buy access to banana import licences was a serious *de facto* barrier to entering the EC banana market, which exacerbated the *de iure* discrimination.

4.94 The **European Communities** responded that, in its opinion, the condition for newcomers was non-discriminatory *de iure*, since there was no distinction in Regulation 2362 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers, on the other hand. Further, the condition was non-discriminatory *de facto*, since the basic assumption made by Ecuador to that

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<sup>136</sup> Article 21 of Regulation 2362.

<sup>137</sup> *Idem*, Article 7. (Secretariat remark: for details see Factual Aspects above.)

effect was wrong. An importer of fruits and vegetables established in the European Communities was not necessarily an EC operator (service supplier) within the definition of Article XXVIII of GATS. Nor could it simply be assumed that there was an imbalance of EC origin operators in the fruits and vegetables sectors compared to non-EC operators to the detriment of the latter. The European Communities recalled that the biggest wholesale trader in fruits and vegetables in the world was Dole, a non-EC service supplier. The European Communities also recalled the rules on the burden of proof as expressed by the AB in the "Blouses and Shirts" report.

(vi) *Remedial Action*

4.95 **Ecuador** argued that a system in conformity with the obligations of Articles I and XIII would include:

- (a) a unified tariff-rate quota of 3.41 million tonnes within which all countries would compete, subject to different tariffs but without individual country allocations;
- (b) each traditional ACP country would be entitled to duty-free treatment up to a quantity of bananas equal to its pre-1991 best-ever quantity;
- (c) non-traditional ACP suppliers would be accorded duty-free treatment up to the first 90,000 tonnes they collectively exported to the European Communities;
- (d) other exporters would pay a duty of 75 Euro per tonne, which rate would also apply to imports from ACP countries above their duty-free levels;
- (e) for over-quota imports (i.e. above 3.41 million tonnes), ACP bananas would have a 100 Euro per tonne tariff preference over other bananas;
- (f) the duty-free levels would not represent entitlements, in that non-ACP bananas could compete for the full 3.41 million tonnes but they would not get the duty-free benefits given to certain levels of ACP imports;
- (g) for distribution of licences, newcomer criteria favouring EC service providers should be amended to remove such bias. For other licences, the definition of "actual importer" should be modified to remove the prejudice in favour of European Communities and ACP service providers, assuring that those who took the true commercial risk obtained equal rights to import licences.

4.96 Ecuador requested furthermore that the Panel recommend that the above system be implemented immediately. All elements of the system that would be inconsistent with the WTO but for the Lomé waiver (e.g. the tariff preferences)

had to be terminated as of 29 February 2000, unless and until the waiver was extended.

4.97 Referring to Ecuador's suggestions concerning certain remedial actions to be taken by the European Communities under Article 19.1 (last sentence) of the DSU, the **European Communities** noted that there had been continuous contacts between the original complainants and the European Communities in order to resolve the divergences about the way in which this dispute could be resolved. The suggestions for remedial action that Ecuador was putting before the Panel had all been discussed during these contacts and had been discarded by the European Communities because they would not allow it to maintain a sufficient margin of preference for traditional and non-traditional imports of bananas from ACP countries. The panel, as the AB in the *India patent* case, reminded, was not a negotiating body and could only pronounce itself on the consistency or otherwise of the present EC banana import regime with its WTO obligations (*de lege lata*). The Panel had no authority to design, in lieu and place of the European Communities, its banana import regime (*de lege ferenda*) nor could it assess the legal and political obligations that the European Communities assumed *vis-à-vis* the banana-exporting ACP States.

4.98 The European Communities submitted that panels and the AB were not well equipped to determine legislative action to be taken by individual WTO Members. The European Communities believed that it had fulfilled its duty under the WTO. In the unlikely event that the Panel disagreed with this position, it might be helpful to receive some indication on what steps could be considered an appropriate remedy for any remaining inconsistency, provided such indications were no more than a clarification of existing WTO obligations rather than a substitute for future tariff negotiations. The European Communities considered the suggestions made by Ecuador to be totally outside the scope of the present dispute, particularly where Ecuador requested the European Communities to establish a single tariff quota of 3.41 million tonnes, while the EC's present tariff binding for bananas was no more than for a tariff quota of 2.2 million tonnes. Any extra tonnage over and above this bound tariff quota could only be agreed upon as the result of future tariff negotiations and not by a panel as the result of a dispute settlement procedure. Recommendations and rulings of the DSB could not add to or diminish the rights and obligations provided in the covered agreements.

#### *D. Conclusion*

4.99 For the reasons set forth above, **Ecuador** considered that the European Communities had failed to conform its measures with the rulings of the original panel and the obligations of the GATT 1994 and the GATS. The failure of the European Communities to take appropriate and expeditious action to fulfil its obligations meant that Ecuador, a developing country, continued to be deprived of the competitive opportunities to which Ecuador was entitled as a WTO Member. Finally, Ecuador urged the Panel to be as specific as possible in its recommendation for a remedy, so that this dispute could finally be resolved.

4.100 The **European Communities** requested that the Panel reject all the allegations made by Ecuador both under the GATT and the GATS and find that the European Communities has complied with the original recommendations and rulings of the DSB adopted on 25 September 1997.

## V. ARGUMENTS BY THIRD PARTIES

### A. *Brazil*

5.1 **Brazil** submitted that, as the world's second largest producer of bananas, it had an interest in starting exports of the "cavendish" variety to the European Communities and had drawn the Government's attention to the need for provisions in the EC's new banana regime that would permit access for new entrants.

5.2 Brazil argued with respect to the creation of the "others" category within the EC's tariff quota that there was no longer any 90,000 tonne ceiling for duty-free imports of non-traditional ACP bananas. This implied, contrary to paragraph 255(g) of the AB report, that up to 241,000 tonnes of non-traditional ACP bananas could be imported duty-free. There was no guarantee that imports under the "others" category would be made from origins benefitting from duty-free treatment. However, for new entrants restricted to an "others" category in a market dominated by traditional suppliers, a negative tariff differential applicable to the full amount of the quota to which they had access would constitute a very serious obstacle to participation in the market. In practice, it would transform the "others" category into a market reserved for non-traditional ACP bananas.

5.3 Brazil did not contest the creation of the "others" category, nor did it wish to address the EC's calculation of the volume of the quota allocated to that category. Brazil questioned the manner in which that category would actually operate, as a result of unlimited duty-free access for non-traditional ACP bananas. If the current EC regime for the allocation of the tariff quota were to be maintained in terms of the "others" category, coupled with an unlimited duty-free access for non-traditional ACP bananas, a Member like Brazil, which had an unquestionable possibility of developing its export potential, would be shut off from the EC's market on a permanent basis. Brazil argued that, while substantial suppliers were shielded by their specific shares of the quota and traditional ACP bananas could be exported duty-free under a separate quota, non-substantial suppliers were the only exporters which had to compete on an unequal footing without any guarantee of access to the EC banana market.

5.4 In view of the reading that the AB had given to the term "required", and with reference to the findings and recommendations of the AB on this matter, Brazil submitted that the European Communities should not have provided duty-free access to non-traditional ACP bananas for the full amount of the "others" category of the tariff quota. This preferential treatment went beyond what was deemed to be "required" by the AB, and beyond a narrow interpretation of the Lomé waiver. It defeated one of the main functions of the "others" category, as

laid out in paragraph 7.76 of the panel report, which consisted in avoiding the continuation of a distortion that was inherent to the operation of tariff quotas.

*B. Cameroon and Cote d'Ivoire*

*1. Issues Related to the GATT*

5.5 **Cameroon and Côte d'Ivoire** submitted that each of the EC's new provisions on preferential treatment afforded to the APC States was in conformity with Article I of GATT and consistent with the recommendations of the panel and the AB.

(i) Traditional ACP Bananas

5.6 Referring to Ecuador's claim that the European Communities went beyond the requirements of the Lomé Convention by setting a global figure for duty-free imports of traditional ACP bananas at the level of pre-1991 best-ever import volumes, Cameroon and Côte d'Ivoire argued that this was irrelevant for several reasons:

- (a) the tariff preference established by the Lomé Convention for all ACP bananas did not have any quantitative limit;
- (b) the only quantitative limit applied to traditional ACP bananas since they enjoyed guaranteed access ("additional preferential treatment"<sup>138</sup>); and
- (c) guaranteed duty-free access for traditional ACP bananas did not exceed the pre-1991 best-ever level.

5.7 Cameroon and Côte d'Ivoire referred to the AB statement that "Article 168(2)(a)(ii) ... applies to all ACP bananas" whether traditional or non-traditional<sup>139</sup>, and to the requirement in Article 168(2)(a)(ii) that, for all ACP bananas, the European Communities shall take "... the necessary measures to ensure more favourable treatment than that granted to third-countries benefiting from the most-favoured-nation clause for the same products". In the view of Cameroon and Côte d'Ivoire, for all tariff measures taken pursuant to Article 168(2)(a)(ii), the European Communities, by virtue of the Lomé waiver, was not bound by the provisions of Article I of GATT. According to Article 168(2)(a)(ii), the European Communities could therefore legitimately grant duty-free access for imports of ACP bananas. Consequently, the tariff preference granted to traditional ACP bananas could not be contested under Article I of GATT.

5.8 Cameroon and Côte d'Ivoire argued that the AB had stated that Protocol 5 of the Lomé Convention allowed the granting of "additional preferential

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<sup>138</sup> Paragraph 170 of the AB report.

<sup>139</sup> Paragraphs 172 and 173 of the AB report.

treatment" as well as "more favourable treatment" in Article 168(2)(a)(ii). In the view of Cameroon and Côte d'Ivoire, "additional preferential treatment" included guaranteed access for the ACP countries. According to Protocol 5, this guaranteed access was confined to the situation that had prevailed previously on their traditional markets. Under the EC's former banana regulations, the European Communities had decided, in order to provide guaranteed access within this quantitative limit, to allocate shares among ACP countries in the amount of their pre-1991 best-ever export volumes. The method, in principle, was not contested by the AB<sup>140</sup> although it was criticized on the grounds that this allocation did not give third countries specific shares.<sup>141</sup> The European Communities was therefore obliged to find another formula to guarantee access to ACP States. The new method adopted was to set an aggregate volume of imports reserved for traditional ACP countries, on the basis of the same uncontested reference quantity.

5.9 Cameroon and Côte d'Ivoire submitted further that there was nothing in the WTO rules that made it obligatory to allocate import volumes among suppliers. The AB itself had described the allocation among ACP countries as simply one option for the European Communities.<sup>142</sup> Moreover, the provisions of the Lomé Convention allowed the European Communities to make such a choice. Article 168(2)(a)(ii) provided for more favourable treatment for "products originating in the ACP States". More favourable treatment was therefore not on an individual basis. The same applied to Protocol 5 which stated that "no ACP State" shall be placed in a less favourable situation, and this applied to each ACP State or all ACP States together. In the absence of any GATT obligations and in view of the freedom of choice afforded by the Lomé Convention, and reaffirmed by the AB, the European Communities could legitimately decide to set a global volume for the traditional ACP bananas.

5.10 Cameroon and Côte d'Ivoire argued that the pre-1991 best-ever exports of the 12 ACP countries exceeded 900,000 tonnes and this fact had already been submitted to the panel and the AB in the course of their previous proceedings. The relevant official statistics collected by the European Communities showed a figure of 952,939 tonnes. By fixing a level of 857,700 tonnes, the European Communities had not exceeded the limits of the requirements under Protocol 5 to the Lomé Convention and traditional ACP bananas did not therefore benefit from any preference that they should not receive.

5.11 Cameroon and Côte d'Ivoire claimed that Ecuador's argument that a global figure would encourage full utilization of the traditional ACP volume was irrelevant since full utilization of import quotas, where established in conformity with WTO rules, was a general requirement in the WTO rules and could be

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<sup>140</sup> Paragraph 174 of AB report.

<sup>141</sup> Paragraph 162 of the AB report.

<sup>142</sup> Paragraph 174 of the AB report.

found, *inter alia*, in Article XIII:2(d) of GATT or Article 3.5(h) of the Agreement on Import Licensing Procedures (ILA).

(ii) Non-Traditional ACP Bananas

5.12 Cameroon and Côte d'Ivoire submitted that with regard to the measures that might be taken by the European Communities to apply Article 168(2)(a)(ii) of the Lomé Convention, the AB had stated as a principle that this provision of the Lomé Convention made it obligatory to grant "more favourable treatment" for all ACP bananas and consequently for all non-traditional ACP bananas.<sup>143</sup> This provision did not indicate what kind of measure was necessary. The European Communities was therefore free to choose what necessary measures on "more favourable treatment" should be established.

5.13 Cameroon and Côte d'Ivoire argued that under the previous EC banana regime, non-traditional ACP bananas were guaranteed, first, access within the tariff quota of 2.2 million tonnes up to a limit of 90,000 tonnes, with a tariff preference of 75 Euro per tonne, and second, a tariff preference of 100 Euro per tonne for imports outside the tariff quota. The first measure was deemed necessary and required by the Lomé Convention and could not therefore be contested under Article I of GATT. The change in the new EC regulations, i.e. the elimination of reserved access for 90,000 tonnes of non-traditional ACP bananas was to the detriment of the ACP countries. Consequently, the new measure taken by the European Communities could only be found to be legitimate since it was less favourable than the previous one.

5.14 In the view of Cameroon and Côte d'Ivoire, the EC measure to increase the tariff preference to 200 Euro per tonne for imports outside the tariff quota should be endorsed because the panel and the AB had already found that the European Communities was free to fix the kind and level of preference to be afforded. It was "required" and "necessary" even more today since, first, the ACP countries had lost the guaranteed access for 90,000 tonnes of non-traditional bananas and had lost the marketing guarantee afforded by the former licensing system. Second, third countries had been given a separate tariff quota of 353,000 tonnes, and, third, under Article 168 of the Lomé Convention it was necessary to ensure that the conditions of competition for non-traditional ACP bananas were satisfactory.

(a) Article XIII Issues

5.15 Cameroon and Côte d'Ivoire submitted that the volume fixed for traditional ACP bananas should not be considered a quantitative restriction as such since its purpose was mainly to administer the tariff preference granted for traditional ACP bananas. As this was more of a tariff measure, it should not be

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<sup>143</sup> Paragraph 173 of the AB report.

examined in the light of Article XIII because this Article only dealt with the application of quantitative restrictions. If the Panel were to consider that the measure in question should be examined in the light of Article XIII of GATT, Cameroon and Côte d'Ivoire submitted that the European Communities had complied with the provisions of that Article as well as the conclusions and recommendations of the AB with regard to Article XIII.

5.16 Cameroon and Côte d'Ivoire submitted that the only reproach made by the AB with regard to Article XIII was that "[a Member may not allocate] tariff quota shares, whether by agreement or assignment, to some, but not to others, Members not having a substantial interest ...".<sup>144</sup> In the view of Cameroon and Côte d'Ivoire, the new EC regime complied with these requirements since it did not allocate individual shares to each of the 12 traditional ACP States.

5.17 Referring to the AB statement that "... the non-discrimination provision applies to all imports of bananas, irrespective of whether and how a Member categorizes or sub-divides these imports for administrative or other reasons"<sup>145</sup>, Cameroon and Côte d'Ivoire submitted that this conclusion demonstrated that the European Communities was free to fix one quantitative restriction for certain volumes of imports (the tariff quotas for third-country bananas) and another for other import volumes (the traditional ACP volume). In the view of Cameroon and Côte d'Ivoire, the only condition imposed by Article XIII on the imposition of several quantitative restrictions for a like product according to its origin was that the restrictions imposed should be similar.

5.18 Cameroon and Côte d'Ivoire submitted that the volume of 857,700 tonnes of traditional ACP bananas corresponded to the distribution of trade which these countries could expect in terms of the requirements of the chapeau to Article XIII:2. This could only be defined in relation to the favourable treatment they received under the Lomé Convention. For traditional ACP bananas, Protocol 5 to the Lomé Convention obliged the European Communities to grant "additional preferential treatment" (according to the expression used by the AB), which consisted of guaranteed access. As defined in relation to the pre-1991 best-ever export figure. Consequently, the share of trade which the ACP States could expect corresponded to this guaranteed access. Moreover, the share of trade attributed to the ACP States by the European Communities for their traditional exports was far from exceeding the volume they had a right to expect, given pre-1991 best-ever exports of 952,939 tonnes. The global figure of 857,700 tonnes for the traditional ACP volume was therefore consistent with the requirements of Article XIII:2 of GATT.

5.19 Cameroon and Côte d'Ivoire argued further that since the European Communities had the option and indeed was obliged to set a global import volume for traditional ACP suppliers, and since traditional ACP volumes corresponded to the level of trade, these countries had a right to expect, and since

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<sup>144</sup> Paragraph 162 of the AB report.

<sup>145</sup> Paragraph 190 of the AB report.

the European Communities could maintain this volume separately from tariff quotas in order to fulfil its commitments under the Lomé Convention, nothing in the GATT could prohibit the ACP countries from fully utilizing the volume that had been allocated to them.

5.20 Referring to Ecuador's claim that its specific share was lower than what it could expect in view of its world market share, Cameroon and Côte d'Ivoire submitted that these figures were of no relevance in determining the share of trade which Ecuador might expect in the European Communities since Article XIII limited the elements to be taken into account to the volume of imports of countries which applied quantitative restrictions. The tariff quota share allocated to Ecuador was fixed in Regulation 2362. To adjust this share, Ecuador would have to follow the normal procedures in Article XIII:4, i.e. it would have to request consultations with the European Communities or consult with Members before any readjustment could be initiated.

5.21 As concerns the representative period selected by the European Communities this was the most appropriate having regard to the GATT rules and Ecuador's interests. In the view of Cameroon and Côte d'Ivoire, the EC's bound tariff quota of 2.2 million tonnes for third-countries had to be taken into account when applying the rule of the previous representative period because it constituted a "special factor" within the meaning of Article XIII.2(d). Neither the panel nor the AB had questioned the quota of 2.2 million tonnes. As restrictions on imports of bananas into the European Communities had existed for a long time, it was not unreasonable for the European Communities to conclude that the most appropriate base period for allocating shares to countries having a substantial interest would be the most recent period.

## 2. *Issues Related to the GATS*

5.22 Cameroon and Côte d'Ivoire submitted that the new EC regulations were in conformity with the conclusions and recommendations of the panel and the AB with regard to Articles II and XVII of GATS.

5.23 Cameroon and Côte d'Ivoire considered that the inconsistency of the old import licence allocation system was due to the fact that 30 per cent of the licences, within the tariff quota of 2.2 million tonnes, was reserved for operators marketing EC bananas and traditional ACP bananas, most of which operators were of EC origin. The new regulations no longer made any reference to operator categories nor established any link between trade in the European Communities and traditional ACP bananas and access to import licences under tariff quotas. The new regulations went even further than the findings of the AB, since they provided for a single licensing system applicable to tariff quotas and the quantity of traditional ACP bananas.

5.24 Cameroon and Côte d'Ivoire submitted that the definition of "traditional importer" adopted by the European Communities was consistent with GATT rules relating to licensing procedures. The acceptance of import licence applications on the basis of the operator's import performance during a recent period was fully consistent with Article 3.5(j) of the Licensing Agreement.

Ecuador's claim that the European Communities should have restricted the definition of "traditional importer" to shipments of bananas was incompatible with the above-mentioned provisions. Indeed, Ecuador's statement that "the European Communities should modify its import licensing system to allocate licences to the true importers who (...) are the primary service providers and take the vast majority of the commercial risk in marketing bananas to the European Communities"<sup>146</sup> referred to operators whose activity function had more to do with exports than imports.

5.25 Cameroon and Côte d'Ivoire submitted that the new import licence allocation rules were consistent with the principle of non-discrimination. The system was identical for all origins of bananas and, therefore, for all operators, whether EC or third-country operators. Furthermore, the new licence allocation rules had provisions with regard to the reference period, establishment in the European Communities, period of validity, transferability of licences, guarantee, etc., irrespective of the origin of operators.

5.26 In the view of Cameroon and Côte d'Ivoire, Ecuador's sole claim related to the selection of the reference period 1994-1996 enabling, in Ecuador's view, all operators holding import licences under the old system (Categories A, B and C) and which had actually used those licences to engage in importation, to submit reference quantities for the grant of new licences. Cameroon and Côte d'Ivoire submitted that the method selected by the European Communities was in conformity with the rules set out in Article 3.5(j) of the Licensing Agreement. Given the allowance of an additional 353,000 tonnes of imports, the accession of Austria, Sweden and Finland into the European Communities and the non-availability of official data for the year 1997 at the time the new regulations were adopted, any reference period other than 1994-1996 would not have been sufficiently representative of recent banana trading conditions in the European Communities. That this period had enabled certain EC or ACP operators previously holding B licences to participate in the allocation of new rights did not give rise to a situation of discrimination. On the contrary, what would have constituted unacceptable discrimination was a prohibition of those operators from participating in the new licence allocation system.

5.27 In the view of Cameroon and Côte d'Ivoire it was also incorrect to claim that the new import licence allocation system "perpetuated" the situation criticized by the panel and the AB since, under Article 4.2 of Regulation 2362, the reference period of 1994-1996 applied only to the granting of import licences for the year 1999.

5.28 Cameroon and Côte d'Ivoire argued further that it was not correct to claim that all holders of B licences were able to present reference quantities for the period 1994-1996, in conformity with the "traditional importer" criterion, and to recover all the imports rights granted in the past to the detriment of third-country operators, such as Ecuador. According to information available to Cameroon and

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<sup>146</sup> Paragraph 141 of Ecuador's first submission.

Côte d'Ivoire, operators holding B licences in the former system had to a very large extent lost their reference quantities to operators importing bananas from Latin America. The official statistics on the evolution of reference quantities between 1998 and 1999, following the introduction of the new regime, showed that Spanish and French operators, who accounted for most of the B licence holders on account of their links with European Communities and ACP production, had lost 41.21 per cent and 20.17 per cent, respectively, of their reference quantities.<sup>147</sup> Operators established in the northern EC countries, which were traditional importers of bananas from Latin America, had increased their reference quantities substantially: Sweden (+114.26 per cent), Finland (+85.14 per cent), Austria (+118.82 per cent) and Benelux (+374.90 per cent).

5.29 With regard to procedures for the allocation of import licences to "newcomers", Cameroon and Côte d'Ivoire submitted that the European Communities had adopted a broad definition of the term "new operator" which extended to all operators who had engaged in trade in any fruit and vegetables and in products such as coffee or spices. This definition made it possible to expand considerably the category of new operators, which today numbered more than 1,000. Ecuador's claim that this category should have included operators on the basis of their world-wide commercial reference quantities, outside the European Communities, was not only inconsistent with any of the GATT rules, but would have precluded proper implementation of Article 3.5(j) of the Licensing Agreement. It would have led to a proliferation of new operators and made it impossible for them to be issued licences for products in economic quantities.

5.30 Cameroon and Côte d'Ivoire concluded that Ecuador's claims should be rejected since the European Communities had conformed with the conclusions and recommendations of the panel and the AB as well as the GATT rules. Moreover, from a tariff point of view, the preferences afforded to ACP States by the European Communities under the new regulations were in conformity with the requirements of Article 168(2)(a)(ii) of the Lomé Convention, both for traditional and non-traditional bananas. From the point of view of guaranteed access, the preference given to the ACP States by the European Communities for the importation of traditional bananas was consistent with the requirements of the Lomé Convention (Protocol 5). Consequently, taking into account the Lomé waiver, Ecuador had no grounds for claiming a violation of Article I of GATT.

### *C. The Caribbean States*

5.31 The Governments of Belize, Dominica, Dominican Republic, Grenada, Jamaica, St. Lucia, and St. Vincent and the Grenadines ("Caribbean States") submitted that they supported the arguments of the European Communities in its request that the Panel affirm the conformity of its new regime with the covered

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<sup>147</sup> Annex 2 of the submissions of Cameroon and Côte d'Ivoire.

agreements and to find that Guatemala, Honduras, Mexico and the United States must be deemed to have accepted that conformity.

5.32 **The Caribbean States** submitted that they were heavily dependent upon the production of bananas and relied on the availability of their traditional markets in the European Communities, the protection of which had been assured by various Lomé Conventions, most recently Lomé IV ("the Lomé Convention") as amended. Each State had a significant interest in the outcome of these proceedings. Their economic well-being, social cohesion and political stability were dependent upon proper effect being given to the relevant provisions of the Lomé Convention.

5.33 The banana industry in the Caribbean States generated a large percentage of gross domestic product and foreign exchange earnings. In the Windward Islands some 34 per cent of the workforce in these islands was engaged in the industry and bananas provided a steady source of income to growers. While the Caribbean States' Windward Islands recognized and accepted the need to diversify their economies, any significant reduction in their traditional sales to the European banana market would be detrimental to the efforts made at national development and economic growth, all aimed at reducing poverty and integrating these economies into the global market. Undermining the new EC banana regime and, in particular, the guaranteed access and advantages of Caribbean States' bananas into the European Communities would destroy their banana industries. This would cause grave economic and social problems. The uncertainty which these proceedings generated were themselves highly destabilizing. It was not possible to invest in and develop the industry in the face of constant attacks on the EC banana import regime, attacks which were scarcely reconcilable with the Lomé waiver granted in 1994 which Ecuador itself had supported when it was extended in 1996.

5.34 The Caribbean States had difficulty in reconciling Ecuador's interpretation of the Lomé waiver with the broader societal commitments reflected in the Preamble to the WTO Agreement. This binding preambular language emphasized that the WTO system did not call for the mechanical application of rules in such a way as to give absolute precedence to market efficiencies. The legal provisions which this Panel was called upon to interpret and apply must be applied consistently with the "needs and concerns" of all WTO Members, taking account of their economic and social circumstances, the geographical conditions in which they found themselves, and their commitment to sustainable development.

5.35 The Caribbean States submitted that the EC's new tariff and quota system for bananas did not violate the GATT and that the new import licensing system did not violate the GATS.

1. *Issues Related to the GATT*

(i) Traditional ACP Bananas

5.36 The Caribbean States also submitted that, *inter alia*, the ACP tariff preferences were required by the Lomé Convention.

5.37 The Caribbean States argued that Ecuador was wrong in claiming that the 857,700 tonne limit on duty-free traditional ACP banana imports was a quantity which was "in excess of that justified by the requirements of the Lomé Convention". The European Court of Justice in *Germany v Council*<sup>148</sup> had referred to the Lomé requirement (Protocol 5) as being a level up to the "best ever exports prior to 1991". This interpretation of the Lomé requirement was confirmed and applied by the panel and AB decisions in relation to Protocol 5 of the Lomé Convention. The only issue for this Panel was, therefore, whether the figure of 857,700 tonnes exceeded "best ever exports prior to 1991". The "best ever" quantities exported by the traditional ACP exporters to Europe in the years prior to 1991 were approximately 940,000 tonnes.

5.38 The Caribbean States submitted further that the elimination in the revised regime of individual country ceilings on duty-free access did not lead to EC preferences in excess of what was required. The total quantities from traditional ACP sources entitled to special protection under Protocol 5 of the Lomé Convention amounted to 940,000 tonnes. The fact that the European Communities had allocated 857,700 tonnes in the previous regime did not affect the entitlement of the ACP States under Protocol 5 of the Lomé Convention to the higher quantity or the obligation on the European Communities to protect the higher quantities.<sup>149</sup>

5.39 The Caribbean States argued that the individual quotas had been found to have infringed Article III, a violation which was found by the AB not to be covered by the Lomé waiver. This was the reason why the European Communities had dropped country-specific ACP tariff quota allocations. The panel and the AB had considered that their function was not to prescribe the detailed arrangements that must be implemented by the European Communities in order to comply with its Lomé Convention obligations. Rather, their function was to determine whether the methodology chosen by the European Communities to determine tariff quota allocations could reasonably be considered to have been "required" to meet obligations under the Lomé Convention. The AB had recognized that other methods might also be "required" by the Lomé Convention. The fact that the panel and the AB had accepted that the tariff quota allocation to individual ACP countries was "required" by the Lomé Convention did not preclude the use of a global tariff allocation to ACP countries. The Caribbean States submitted that the general allocation of 857,700 tonnes may equally be considered to be required by the Lomé Convention.

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<sup>148</sup> Case C - 280 192, ECR 1994, pI-4973, Judgement of 5 October 1994.

<sup>149</sup> Paragraph 7.101 of the panel report and paragraphs 174 and 177 of the AB report.

However, it did not fall foul of Article XIII because the preferential agreement established by the Lomé Convention did not constitute a quota.

(ii) Non-Traditional ACP Bananas

5.40 The Caribbean States submitted that the expansion of duty-free access to "non-traditional" ACP bananas (previously limited to 90,000 tonnes) was "required" by the Lomé Convention. In the view of the Caribbean States, the AB had sought to emphasize that the duty-free benefit for non-traditional bananas applied to "all ACP non-traditional bananas" and had not suggested that the duty-free entry for such bananas should be limited to the 90,000 tonnes. The reference to 90,000 tonnes was merely for identification purposes to clarify the quantities to which the AB was referring. The Lomé waiver provided clearly that enhanced access of non-traditional bananas was "required" by the Lomé Convention. The relevant provision was Article 168(2)(a)(ii), which conferred duty-free entry on all ACP bananas. With regard to the argument that the European Court of Justice had ruled that Protocol 5 of the Lomé Convention superseded Article 168(2)(a)(ii), with the result that the European Communities was not "required" to give non-traditional ACP bananas more favourable treatment pursuant to that provision, the Caribbean States referred to paragraph 7.135 of the panel report and paragraph 173 of the AB report. By removing the limitation to 90,000 tonnes of duty-free access, the European Communities had chosen another form of "more favourable treatment", removing a cap on duty-free access that, as recognized by the AB, it had not been required to impose.

5.41 The Caribbean States concluded that the allocation of 857,700 tonnes in respect of traditional bananas, the duty-free treatment within the tariff quotas and the tariff preference of 200 Euro per tonne outside the tariff quota in respect of non-traditional bananas were, first, "required" by the Lomé Convention, second, provided for by the Lomé waiver, and third, were not incompatible with the GATT.

(iii) Article XIII Issues

5.42 The Caribbean States submitted that the ACP tariff preferences did not constitute a quota within the meaning of Article XIII of GATT. In the alternative, the new regime had been designed consistently with Article XIII of GATT.

5.43 The Caribbean States argued that at no time since the adoption of Regulation 404 had the European Communities treated the preferences granted to the traditional ACP countries as part of the bound tariff quota in accordance with its obligations under Article 168(1) of the Lomé Convention which stated that "products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect." Under Article 169 of the Lomé Convention, the European Communities was bound "not to apply to imports of products originating in ACP States any quantitative restrictions or measures having equivalent effect". If the Panel should rule that

ACP preferences fell within the bound tariff quota, and if the European Communities fulfilled its obligations under the Lomé Convention to ensure access and advantages in the market for the appropriate quantity of traditional ACP bananas, third-country access to the European Communities would be reduced from 2.553 million to 1.7 million tonnes.

5.44 The Caribbean States argued further that whilst the imposition of a tariff constituted a restriction on imports, it did not come within the ambit of Articles XI and XIII of GATT.<sup>150</sup> The alternative view would have the result that Article XIII:1 applied to every tariff preference and therefore every discrimination within the meaning of Article I would necessarily also offend Article XIII. This could not have been the intention of the drafters of the GATT. Or if it was, the waiver of Article I must be accommodated by some other means within Article XIII. The Panel should, therefore, distinguish between those situations which Article XIII sought to address and those that were more properly covered exclusively by the provisions of Article I. The Caribbean States submitted that the preferential arrangements established by the Lomé Convention were governed by Article I and not Article XIII. Further, the history of the special trade agreements between the Lomé countries and the European Communities showed that the benefits and advantages to which the ACP traditional suppliers were entitled did not constitute a quota within the meaning of Article XIII. No reference was made in the Lomé Convention, including Protocol 5 thereof, to the award of a quota to ACP suppliers.

5.45 The Caribbean States argued that the above was confirmed, *inter alia*, by the Lomé waiver, including the context in which it was adopted. Following the finding that the Lomé Convention was not protected by the Article XXIV of GATT exemption for free-trade areas, the European Communities was required to obtain a waiver under Article XXV. The waiver was adopted expressly to accommodate the requirements of the Lomé Convention. It was unambiguously the intention of the CONTRACTING PARTIES that the European Communities should continue to be able to meet its historic obligations under the Lomé Convention which established a preferential agreement entitling ACP States to sell bananas (up to a limit) on a duty-free basis. It was scarcely credible that the CONTRACTING PARTIES could have intended to adopt a waiver under Article I which would nevertheless subject ACP bananas to the quota constraints of Article XIII. A finding by this Panel to the effect that the new regime had been established in breach of Article XIII would defeat the express intention of the waiver and the intention of those granting the waiver.

5.46 The Caribbean States supported their argument that the entitlement of ACP States to duty-free access did not constitute a quota by reference to the *Newsprint* panel finding that "imports, which are already duty free, due to a preferential agreement, cannot by their very nature participate in an MFN duty

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<sup>150</sup> Paragraph 7.154 of the panel report.

free quota".<sup>151</sup> In terms of its purpose and objectives, the Lomé Convention was a preferential agreement and the waiver confirmed that ACP banana imports were duty-free. When subjected to the rigours of Article XIII they were in the words of the *Newsprint* panel "already duty-free". They could not therefore participate in a duty-free quota, or themselves constitute a quota.

5.47 In the view of the Caribbean States, the imposition of a quantitative limit on the special tariff preference granted to traditional ACP bananas did not have the effect of transforming their special tariff and other preferential arrangements into a "quota". The ACP States had argued at the time of the adoption of Regulation 404 that there should not be a quantitative limit on the advantages accorded to ACP traditional suppliers. The advantages they had obtained under the individual national regimes were not subject to any quantitative limit and it was argued by the ACP States that there should not be a ceiling limiting the ability of ACP banana industries to develop. Indeed, one of the express purposes of the Lomé Convention was to encourage the increased production and development of industries and exports from the ACP countries to the European Communities. Nevertheless, despite the understanding of the Caribbean States as to the broader meaning and effect of the Lomé Convention, it was recognized that for WTO purposes the AB had ruled that the benefits of Protocol 5 did not apply without limit to bananas from traditional ACP States. For these purposes it was accepted that the limit of 857,700 tonnes was necessary to give practical effect to the conclusion of the AB regarding best ever pre-1991 levels.

5.48 The Caribbean States submitted that, if the Panel were to find that the preferences for traditional ACP suppliers constituted a tariff quota within the meaning of Article XIII:5 of GATT, the new EC regime had been designed consistently with Article XIII, specifically Article XIII:2(d). This was particularly the case when Article XIII was read in the context of the objectives and specific obligations of the Lomé Convention incorporated into the WTO system by the Lomé waiver.

5.49 The Caribbean States argued that Article XIII:1 set out the general obligation that restrictions applied to one Member must be "similarly" applied to other Members. The language clearly envisaged that there may be differences in the manner in which restrictions between Members were applied. The restrictions had to be "similar"<sup>152</sup> but need not be identical. The chapeau to Article XIII:2 sought to illuminate what could be considered to be "similar" prohibitions. The "expectations" of the ACP States were that the new EC banana regime was designed to meet the EC's obligations under the Lomé Convention and its Banana Protocol. Thus, in providing for duty-free imports of 857,700 tonnes of bananas from traditional ACP countries and a margin of tariff preference for any non-traditional ACP banana imports outside the tariff quota, the European Communities was doing no more than aiming "at a distribution of

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<sup>151</sup> *Newsprint* panel, L5680, BISD31, page 114; adopted November 1984.

<sup>152</sup> The Caribbean States submitted that the French word ("*semblable*") had an even wider meaning.

trade in such product approaching as closely as possible the share which the various Members might be expected to obtain in the absence of such restrictions", given its obligations under the Lomé Convention.

5.50 In the view of the Caribbean States, the sub-paragraphs of Article XIII:2 set out the principles which applied when a Member sought to meet the obligation of applying "similar" restrictions. However, Article XIII:2(d) had no application to traditional ACP bananas since the quantity allocated to the ACP States had not been assigned to the traditional ACP States individually.

5.51 The Caribbean States argued that the European Communities, by carving out the traditional ACP bananas, before calculating allocations to suppliers with substantial interest, was acting in accordance with the specific provisions of Article XIII:2(d) which required it to take due account of any special factors. In the view of the Caribbean States "any special factors" were not related to those states having a "substantial interest" (in other words the "special factors" could arise outside the interests of those states). Nor did the words "special factor" relate to the determination of a "previous representative period". The "special factors" which determined both the decision of the European Communities and the expectations of the European market were the provisions of the Lomé Convention, including its underlying principles, i.e. the importance of a secure and stable European banana market for the socio-economic fabric and the sustainable development of these countries.

## 2. *Issues Related to the GATS*

5.52 The Caribbean States submitted that the re-structuring consequential to the adoption of Regulation 404 had led to a massive transfer of licences from EC origin companies to foreign-owned companies. Mere allegation that the EC's new licensing regime was discriminatory and violated Articles II and XVII of GATS did not relieve Ecuador of its fundamental obligation to prove its case. It was unsupported by any evidence and should be rejected by the Panel.

5.53 The Caribbean States submitted that Ecuador misunderstood the basis upon which the EC's new regime granted licences to operators.<sup>153</sup> The final paragraph of Article 5(3) of Regulation 2362 made clear that where there was a contradiction in the documentation, licences were awarded to the operator that actually paid the customs duty directly or via a customs agent or representative, regardless of whether that operator was the named holder or transferee of the import licence. The European Communities had taken positive steps to remove the benefit of having been a named holder of import licences. This departure from what would otherwise have been an administratively simpler system was designed specifically to benefit foreign owned companies which may have felt disadvantaged as a result of the previous Category B operator system.

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<sup>153</sup> Paragraphs 119-120 of Ecuador's first submission.

5.54 The Caribbean States argued that Ecuador pointed to the factual situation pertaining to only one company - Leon van Parys (LVP) - which was a relatively small Belgian-registered and Ecuadorian-owned operator. It failed to provide any information on the numerous other companies associated with Ecuador or even owned by Ecuadorian nationals, e.g. Pacific Fruit Europe NV, Bana Trading GmbH, Noboa Inc.

5.55 The Caribbean States submitted that Ecuador claimed that LVP's imports in 1994-1996 were "physically imported by LVP and customs cleared in the European Communities by LVP or another company".<sup>154</sup> If these quantities were customs-cleared by another company which was not acting as the agent of LVP, it must be questioned whether they were LVP imports. Ecuador provided no explanation as to the identity of these "other companies". Since LVP did not pay the customs duty and did not apparently own the bananas as they were "actually imported", it had to be assumed that LVP transported the goods by ship: the presumption must be that LVP was neither the owner of the goods nor responsible for them at the time that they cleared customs within the European Communities. If LVP had "actually imported" those bananas, its licence volumes would be substantially greater.

5.56 The Caribbean States argued that Ecuador provided no evidence to support the alleged distortion in favour of companies of EC and ACP origin. Licences in respect of at least 350,000 tonnes had been transferred from or sold by what were previously categorized as Category B operators to other operators, principally of non-EC origin. There was ample evidence that most if not all foreign-owned subsidiaries of wholesale banana suppliers had substantially increased their share of licences as a result of the new regime. Dole and Chiquita had increased their licence awards in excess of 100,000 tonnes. On the other hand, those companies which were awarded licences under the old regime were subject to a substantial reduction in their licences. Those tonnages, which they continued to hold, were only on the basis that they carried out the importation activity in the "relevant" period. Whether the licences granted to such EC and ACP origin companies arose directly as a result of them being awarded B licences originally, or whether the B licences were sold and the subsequent licences which they were now awarded arose out of joint venture arrangements with Latin American banana importers independent of their ownership of Category B licences, was not proven.

5.57 The Caribbean States submitted that recent statistics comparing reference quantities in 1998 and 1999 showed that there had been a significant transfer of reference quantities from operators which were previously awarded Category B licences to operators that imported third-country bananas. Figures compiled by Odeadom demonstrated that operators from Spain and France, which held the majority of Category B licences under the previous regime, had lost approximately 41 and 20 per cent, respectively, of their reference quantities.

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<sup>154</sup> Footnote 84 in Ecuador's first submission.

Operators from the Northern European countries which imported almost exclusively Latin American bananas had made significant gains: Sweden had gained approximately 114 per cent, Finland 85 per cent, Austria 118 per cent and Germany 12 per cent.

5.58 The Caribbean States argued that Ecuador's claim that its companies had been almost unable to buy licences appeared to be inconsistent with the statement to the effect that "Ecuadorian companies had to invest some \$40 million annually - a total of about \$200 million - simply to buy back access for their imports".<sup>155</sup> At an estimated US\$5 per box, this amounted to approximately 200,000 tonnes of licences which had been "bought back" by Ecuadorian companies. Given that Ecuador accounted for approximately 20 per cent of EC imports, on a proportionate basis, almost 1 million tonnes of licences were "bought back" each year by foreign owned companies. Thus, according to Ecuador, all Category B and ripener licences would have effectively been bought back by foreign-owned companies. Category B operators in France and Spain alone had sold or transferred approximately 300,000 to 350,000 tonnes of licences per annum.

5.59 The Caribbean States submitted that Ecuador effectively purported that import licences should no longer be awarded to importers, but to exporters. Ecuador expressed the desire that import licences should be based not on the "actual importer" but on the basis of a submission by importers of evidence of their activities, in the form of invoices for purchase of bananas in the country of origin, shipping documents (bills of lading) and commercial invoices proving a first sale on EC territory.<sup>156</sup> The Panel had no authority to accept this suggestion, which must be rejected. It ran contrary to the normal practice throughout the world of awarding import licences to the "actual importer". The person bearing the greatest risk was normally the "actual importer" who undertook to dispose of the fruit in the European market place and in many instances would have entered into long term commercial contracts with the "shipper", which had purchased the bananas from producers in Latin America. The importer would have invested in distribution networks, ripening centres and marketing programmes, all of which were essential to the business of importing. The definition offered by Ecuador, namely purchase of bananas in the country of origin, shipping and an invoice, could be met by an operator that was no more than a pure exporter and arranger of shipping that would have a tenuous link with the country of eventual imports.

5.60 The Caribbean States argued further that licence allocations based on submissions which may frequently be contradictory or incomplete would pose an unnecessary burden on importers and remove the transparency. Such a system would violate and undermine fundamental principles of the Licensing Agreement, specifically Article 3.2 and 3.3 thereof, as well as Article X:3(a) of GATT.

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<sup>155</sup> Paragraph 19 of Ecuador's first submission.

<sup>156</sup> Paragraph 141 of Ecuador's first submission.

5.61 In the view of the Caribbean States there was no evidence that Ecuador's proposal based on invoices and shipping documents would "cure" the perceived wrong. Ecuador provided no evidence to show that under the factual situation as developed between 1993 and 1999 the award of licences on the basis of such "submissions" would be different from the licence procedures being challenged. The only evidence which Ecuador offered related to one company, LVP. Ecuador did not even attempt to demonstrate that LVP would have benefited by an increased award of licences, should the system proposed by the Ecuador, have been adopted. Given that LVP was a member of the Noboa group of companies, it was likely that neither it nor its parent company would have met the requirements of "primary importer". Historically, Noboa did not qualify as a "primary importer" under the old regime for a number of its large contracts as it was deemed to take no commercial risk where a contract to purchase bananas at a fixed price from a European based importer existed and where the contract with Noboa amounted to no more than a c.i.f. contract. In such situations, the importer, based in Europe, would have qualified as the "primary importer" and the "secondary importer" .

5.62 Referring to Ecuador's statement that "Because ... activity function (b) - was itself a source of entitlement to future licences under the prior system, licence holders had a powerful incentive to ensure that they were registered as the official licence users. Customs clearance was therefore done by them or in their names. A rational ripener with a licence, for example, would insist on buying bananas from a primary importer before customs clearance, so that the ripener could claim future reference quantity not only for ripening but also as a 'secondary importer'"<sup>157</sup>, the Caribbean States submitted that this statement was not true. The amount of import licences in the hands of ripeners and/or secondary importers was minimal compared to the quantities of licences held by the primary importers. There were only four or five major primary importers in Europe and the secondary importer and ripener licences were divided between a number of different small operators. Those who were not already owned by or tied to a primary importer had little ability to control access to third country imports. If they did not respond to the demands of the powerful primary importers, the only bananas that would enter their ripening rooms or be handled by them, as secondary importers, would be those bananas they could obtain under their licences. All secondary importers of Category A combined would have licences equivalent to 65.5 per cent (operator category rules) multiplied by 15 per cent (activity function rules), i.e. 9.7 per cent (multiplied by a reduction coefficient). Thus no secondary importer was granted more than 10 per cent of its normal import requirements as a result of the previous banana regime. This quantity was insufficient relative to its need to make any demands on the primary importers.

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<sup>157</sup> Paragraph 124 of Ecuador's first submission.

5.63 The Caribbean States argued that Ecuador's case appeared to be premised on the belief that companies which were awarded ripener licences might actually have used those to import fruit and may benefit under the new regime. However, no evidence was given as to the extent to which ripeners were successful in subsequently becoming "importers". The Caribbean States submitted that the position of ripeners, which had a minimal amount of import licences, was extremely weak compared to the power of the multi-national companies such as Chiquita, Dole, Del Monte and Noboa, which controlled large quantities of licences and which, in practical terms, from the commencement of the operations refused to provide fruit to ripeners, which would not transfer their licences to them. The ripeners were fully dependent on such large companies because, even if they could use their own licences, the volumes accorded to them with their own licences were insignificant compared to the need they had for volumes to maintain high through-put of bananas in their ripening centres in order to pay the fixed overheads. Thus, even the ripener's quantities migrated to the large foreign owned companies. The major primary importers had the ability to carry out the secondary importation themselves and to use their own ripening centres. They began to do this immediately after Regulation 404 came into force.

5.64 The Caribbean States referred to the four methods of arrangements concerning importation under Regulation 404 described by Ecuador in paragraph 4.70 above. The Caribbean States submitted that it was incorrect and unsupported by any evidence to claim that licence transfers "were rare". Licence transfers were in fact a most common occurrence. Ecuador's own statement in relation to "purchasing" US\$40 million per annum of licences was evidence of this fact. Licence leases, where licences remained in the name of the original licence holder, were rare. Buy-back arrangements were extremely rare in 1994-1996. While it was correct that the person who paid the duty in T1-sales might not be the person who purchased the bananas in the country of origin, this was a normal c.i.f. type transaction. The risk was wholly borne by the importer and there was no reason why the shipper or person who purchased from the producer should be recognized as the appropriate person to hold future licences. This would not be the normal practice in any other substantial trading country, or for other European imports. In the view of the Caribbean States it was incorrect to claim that "in all four cases, the Ecuadorian service supplier was the true importer in a commercial sense".<sup>158</sup> In particular in relation to T1-sales, Ecuador had provided no evidence that the offshore company selling on a c.i.f. basis had any presence in the European Communities. The Caribbean States submitted that no such evidence existed.

5.65 The Caribbean States argued that Ecuador sought to dismiss the finding of the panel in relation to secondary importers on the ground that this was one issue in a case involving many other issues.<sup>159</sup> Ecuador now claimed "that this is the

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<sup>158</sup> Paragraph 127 of Ecuador's first submission.

<sup>159</sup> Paragraph 136 of Ecuador's first submission.

entire basis for future licence allocations". The Caribbean States did not believe that the panel dismissed claims of certain parties solely on the grounds that the issue raised was of relatively lesser importance than other issues. Ecuador, having pointed out that the panel had dismissed the case for lack of evidence, failed to offer any evidence to support the charge that most secondary importers were of EC origin.

5.66 The Caribbean States submitted that the essence of Ecuador's claims was that the Panel should close its eyes to the existence of almost six years of trading history and view the position as between competing suppliers of wholesale banana services prior to Regulation 404. What Ecuador sought to do was to convert the WTO system into a legal system which would award damages or undo the wrongs that may have arisen as a result of a previous illegal regime. This was not the purpose of the WTO system. Article 1:1 of GATS provided that the GATS "applies to measures by Members affecting trade and services". Measures which were no longer in existence did not constitute "measures" and could not be the subject of a WTO dispute settlement procedure. Were the Panel to seek to address the consequences of a regime, considered previously to be illegal, the WTO dispute settlement system must be prepared to receive a flood of disputes in relation to all regimes which had been found illegal since the commencement of the GATT and which, prior to their being overturned, produced consequences which had in effect been continued as a result of the advantages granted improperly to previous Members or companies from those Members.

5.67 The Caribbean States requested that the Panel apply the "principle of effectiveness" identified by the AB. It must give practical meaning and effect to the Lomé waiver. This meant that ACP bananas were entitled to "access to and advantages on" the EC market "in the amount of their pre-1991 best-ever export volumes". Only this would promote the economic and social development of the Caribbean States consistently with the objectives of the WTO Agreement and the Lomé Convention. The Caribbean States submitted that the new EC banana import regime achieved these objectives consistently with the GATT and the GATS. The tariff preference was required by the Lomé waiver and was consistent with Articles I and XIII of GATT. The new licensing arrangements were consistent with the GATS. Ecuador had not provided the evidence required to displace its burden in proving its case. The Panel should reject Ecuador's request in its entirety.

#### *D. Colombia*

5.68 In the view of Colombia, Article 21.5 of the DSU was a procedure applicable to situations where there was disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings. The terms of reference of the Panel were limited to examining the consistency of Regulations 1637 and 2362 with the relevant covered agreements. Colombia submitted that at this stage the complainant could

not include new claims, nor could the Panel examine issues not raised by the complainant.

5.69 **Colombia's** concerns related to a situation where all imports (MFN, traditional and non-traditional ACP supplies) were credited against the existing tariff quota which would result in a 23 per cent reduction of current access to the EC market. Colombia would also be concerned about a situation where all imports would be credited against the existing tariff quota but an additional tariff quota for all suppliers would be opened with a volume equivalent to the ACP imports and at a tariff higher than 75 Euro per tonne but lower than the bound tariff. This situation would also lead to a reduction of current market access opportunities.

5.70 Colombia argued that the modalities for the Uruguay Round negotiations in agriculture indicated that "current access opportunities shall be maintained as part of the tariffication process".<sup>160</sup> It did not define "current access opportunities" which could refer to total imports, MFN imports, or imports from GATT Contracting Parties. In the case of the European Communities, the criteria selected to establish "current access opportunities" for bananas were very important since imports under preferential access accounted for more than 20 per cent of total imports and MFN imports from non-GATT contracting parties accounted for nearly 40 per cent of total imports. The reference volume of the "current access opportunities" was based on the average MFN trade for 1989-1991, i.e. at 1.9 million tonnes, while the average total imports exceeded 2.5 million tonnes. As a result of the BFA, the tariff quota volume was set at 2.1 million tonnes for 1994 and 2.2 million tonnes for 1995, of which 90,000 tonnes were allocated to imports from non-traditional ACP suppliers. The negotiation of the tariff quota also involved a commitment to increase the originally agreed volume in order to take account of the EC enlargement.

5.71 Colombia submitted that the market access commitment of the EC-15 was a tariff quota of 2,553,000 tonnes at 75 Euro per tonne for MFN suppliers and 90,000 tonnes duty-free for non-traditional ACP suppliers.

### *1. Article XIII Issues*

5.72 Colombia submitted that a tariff quota administration through country-specific allocations was both a right and an obligation of the European Communities and that Ecuador had no legal right to request the elimination of country allocations to substantial suppliers. Colombia argued that the right of the European Communities to administer its tariff quota through the allocation of country shares was implicitly recognized by the panel in paragraph 7.85 of its report stating that at the time of the negotiation of the BFA, Colombia and Costa

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<sup>160</sup> Modalities for the Establishment of Specific Binding Commitments under the Reform Programme. Doc. MTN.GNG/MA/W/24, 20 December 1993. These modalities were used as non-binding guidelines.

Rica were GATT contracting parties with a substantial interest. This right was distinct from the actual share allocated to each country which, in accordance with Article XIII:4 of GATT, could be adjusted. The right granted by Article XIII to an importing Member became an obligation for the European Communities by virtue of the commitments in its Schedule. One of the terms and conditions included under the market access commitment for bananas was a country allocation for Colombia as adjusted in accordance with Article XIII:4.

5.73 Colombia submitted that in accordance with Article XIII of GATT an importing Member could legitimately provide for country allocations to substantial suppliers while leaving open the opportunity to any other Member to compete for the remaining part of the quota. Moreover, in this case, the European Communities had bound itself to do so under "terms and conditions" established in its Schedule. Ecuador had no right to request denial of such rights.

5.74 Colombia submitted further that if the country-specific allocations conformed with the provisions set out in Article XIII:2(d) of GATT, it must be assumed that they complied with the obligation to make an allocation that aimed at a distribution that resembled the shares the parties might obtain in the absence of the restriction. The chapeau of Article XIII:2 reflected an obligation with respect to means, not results. An obligation to attain a result would be impossible to achieve as it referred to a future situation (the distribution that would exist in the market if the restriction was not applied). Hence, the obligation under Article XIII:2 was to allocate country shares in accordance with criteria that were objective, reasonable and non-discriminatory rather than an obligation to allocate shares resulting in the distribution that would exist in the absence of a restriction. Given that a future event could not be foreseen, Article XIII:4 allowed any substantial supplier to request adjustment of the proportion determined or adjustment of the representative period in order to ensure a dynamic allocation of the import market.

5.75 In Colombia's view, one of the criteria that would result in a distribution that aimed at what the parties could expect in the absence of the restriction was provided for in the second sentence of Article XIII:2(d) which stated that when agreement was not reasonably practicable, the importing Member shall allot shares based upon the proportions supplied during a previous representative period. According to GATT practice, "a previous representative period" was a recent period and one that reflected three years of trade flows. Consequently, when a distribution was made based on a recent representative period, the importing Member fulfilled the requirement of aiming at the distribution that the parties might obtain in the absence of the restriction.

5.76 Colombia submitted that in the present case the European Communities had consulted with all four substantial suppliers seeking an assignment by agreement. When it became apparent that this was not possible, it had selected 1994 to 1996 as the recent representative period for which definitive data was available and made the corresponding allocations. The allocations corresponded to the distribution of the MFN trade during the selected representative period.

5.77 Colombia submitted that Ecuador's claim that the 1994-96 period was not representative due to the Article XIII violation found by the panel, was contrary to the principle that parties to a treaty were required to implement it in good faith. When the BFA was negotiated, there was no precedent indicating that it was not in conformity with Article XIII. On the contrary, all principles thereof and past practice were followed. Ecuador had never used its right under Article XIII:4 to request an adjustment of the reference period, country allocations or re-allocation rules until it brought an Article XIII action. Furthermore, Ecuador's suggestion implied that the implementation of the panel recommendations had retroactive effect and, since the re-allocation rules were found to be inconsistent with Article XIII, imports made under such allocation be discounted from Colombia's share. Ecuador's claim was without any legal basis under the dispute settlement mechanism which operated in a way that ensured that remedial action was forward-looking. Colombia argued that Costa Rica and Colombia should not be penalized for rules agreed and implemented in good faith.

5.78 With regard to Ecuador's argument that it should be granted a quota on the basis of its share of world trade, Colombia submitted that this was not a criterion relevant to Article XIII of GATT. Article XIII:2(d), second sentence referred to "shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports". This referred to supplies to the market of the importing Member applying the restriction. Two examples demonstrated that the criteria suggested by Ecuador were inapplicable: in 1994-1996, the Philippines, a marginal supplier to the European Communities, had over 9 per cent participation in world exports while Panama, a substantial supplier to the European Communities, had only 5 per cent of total world exports. Colombia submitted that the shares provided for in Regulation 2362 were consistent with Article XIII of GATT since they were based on the proportion of imports from each supplier in the period 1994-1996 which was a recent representative period.

5.79 Colombia submitted that the terms of reference of the Panel were precisely defined by Article 21.5 of the DSU. Consequently the scope of the review could not include new claims and was limited to an analysis of Regulations 1637 and 2362 adopted by the European Communities pursuant to the reports of the panel and AB. Ecuador's suggestions for remedial actions exceeded the scope of review.

5.80 Colombia had demonstrated that the country-specific allocations made by the European Communities complied with its GATT obligations. First, because the EC's obligation was to make a distribution that aimed at, not one that resulted in, the distribution that would exist in the absence of the restriction. Second, because the distribution corresponded to the proportions supplied by each supplier during a previous representative period. Colombia therefore requested the Panel to find that the country allocations made to the substantial suppliers were in accordance with Article XIII of GATT.

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*E. Costa Rica*

5.81 Costa Rica submitted that the complaint by Ecuador concerned matters of direct interest to Costa Rica. Ecuador challenged the obligation of the European Communities to accord a country-specific tariff quota allocation to Costa Rica and the other Members having a substantial interest in supplying bananas to the European Communities. It also challenged the methods used by the European Communities to determine the quota shares and hence the relative size of the quotas allocated to Costa Rica and Ecuador. The current rules of the DSU permitted only Ecuador to defend its interests as party whereas Costa Rica could merely participate in the proceedings as a third party.

5.82 Costa Rica argued that the Panel must go further than granting "enhanced" third-party status to Costa Rica and the other third parties. The Panel's task was to interpret multilateral agreements in respect of measures affecting Members other than the parties to this dispute. In the view of Costa Rica, the Panel must therefore, as Article 10.1 of the DSU confirmed, take into account the interests of third parties throughout the Panel process, including in the drafting of the findings. It was not sufficient to permit third parties to be present and to record their views in the descriptive part of the report. Their arguments, to the extent that they differed from those of the parties, must also be explicitly addressed in the Panel's findings.

5.83 Costa Rica submitted that in its first submission Ecuador did not clearly distinguish between claims relating to measures implementing the rulings of the panel and AB by the European Communities and claims relating to matters which neither the panel nor the AB had addressed. Ecuador's arguments did not take into account the limitation of Article 21.5 procedures to "measures taken to comply with the recommendations and rulings" of the DSB. Instead, on the allocation of the quota among supplying countries, Ecuador went so far as to ask the Panel "not only to reaffirm its prior rulings and interpretations, as affirmed and modified by the AB, but also to provide the European Communities with a more explicit recommendation and guidance as to how to comply ...".<sup>161</sup>

5.84 For these reasons it was not clear to Costa Rica which findings Ecuador expected the Panel to make on the EC's creation and distribution of country-specific quotas for Members with a substantial supplying interest and which rulings or recommendations of the DSB these measures failed to comply with. Costa Rica assumed that Ecuador claimed that the allocation of country-specific quotas to the four Members with a substantial interest in supplying bananas and the distribution of the shares of the quota among those Members on the basis of their shares in the EC market in the period 1994-1996 were measures "taken to comply with the recommendations and rulings [of the DSB]" within the meaning of Article 21:5 of the DSU, and that both these measures were inconsistent with Article XIII of GATT. Costa Rica submitted that, if these were the claims of Ecuador, they must be rejected.

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<sup>161</sup> Paragraph 98 of Ecuador's first submission.

5.85 Costa Rica submitted that the allocation of country-specific quotas and the distribution of the quota shares among Members with a substantial supplying interest were matters on which neither the original panel nor the AB had made any ruling or recommendation and which could therefore not be raised as compliance issues in a proceeding under Article 21.5 of the DSU. Ecuador failed to take into account that there was an important distinction between the scope of ordinary panel procedures and that of procedures initiated in accordance with Article 21.5 of the DSU. In an ordinary panel procedure, a complaint could relate to any measure.<sup>162</sup> Proceedings under Article 21.5 were, however, limited to disputes on measures taken to comply with the recommendations or rulings of the DSB, i.e. exclusively about matters on which a panel or the AB had already made rulings and corresponding recommendations. This followed from the wording of Article 21.5, which accorded Members the right to resort to these procedures only in respect of a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]". If a new matter could be submitted to a panel under an Article 21.5 procedure, the party complained against would be deprived of many of the procedural rights it would have enjoyed had the matter been submitted to an ordinary panel proceeding, including the right to an implementation period of 15 months. Moreover, an examination of entirely new issues within the constrained timeframe of Article 21.5 procedures amounted to a denial of due process.

5.86 Costa Rica submitted further that Ecuador was of the view that the European Communities should abandon country-specific quotas altogether. Ecuador, while conceding that country-specific quotas were permitted under Article XIII, essentially argued that a single global quota would be more efficient. Ecuador therefore did not distinguish between what it considered to be desirable *de lege ferenda* and the recommendations the Panel was entitled to make *de lege lata*. Furthermore, neither the panel nor the AB had made any rulings or recommendations calling into question the right of the European Communities to allocate country-specific quotas. On the contrary, their rulings and recommendations relating to the manner in which the country-specific quotas were to be administered implied that the European Communities had the right to make country-specific allocations.

5.87 According to Costa Rica, Ecuador was also of the view that the allocation of shares among the Members with a substantial interest in supplying bananas was inconsistent with Article XIII:2(d), second sentence, of the GATT, because the European Communities had selected 1994-1996 as the previous representative period, which could not be considered to be representative within the meaning of that provision, and because the European Communities should have taken into account special factors justifying the allocation of a larger share to Ecuador. However, neither the panel nor the AB had addressed the question of

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<sup>162</sup> Article 7 of the DSU.

how the shares of the quota would have to be allocated among Members with a substantial supplying interest once the EC's separate regimes for ACP bananas and other bananas had been merged for the purposes of Article XIII. In the view of Costa Rica, the panel had made it explicit that it considered this matter to be a subsidiary issue that it need not examine.<sup>163</sup>

5.88 According to Costa Rica it was therefore clear that Ecuador was asking the Panel to address aspects of the banana import regime that had not yet been examined, to develop an entirely new interpretation of the concepts of "representative period" and "special factors" and to apply this interpretation to an extremely complex factual situation which was not the subject of a finding by the panel in the original proceeding. Ecuador's requests therefore fell outside the framework of Article 21.5 of the DSU and must consequently be rejected by the Panel.

### 1. *Issues Related to the GATT*

5.89 Costa Rica submitted that the European Communities was not only permitted to allocate country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas under Article XIII of GATT but obliged to do so under Article II of GATT. The European Communities was entitled to allocate the quota shares on the basis of a previous representative period irrespective of any difficulties in determining a period that was representative.<sup>164</sup>

5.90 Costa Rica argued that the allocation of country-specific quotas was a right of the European Communities under Article XIII:2 of GATT. Article XIII:2 did not state that this right may only be exercised when there were no difficulties in establishing a period that was representative. The assumption underlying this provision was that a Member, by selecting a base period and appraising any special factors that may have affected or may be affecting the trade in the product, could arrive at a distribution of quota shares that satisfied the principle of non-discrimination. The drafters of Article XIII took into account the fact that no allocation method guaranteed a distribution of trade identical to that which would prevail in the absence of the restriction. They declared the non-discrimination requirement therefore to be satisfied when the measures taken "aim" at a distribution of trade "approaching as closely as possible" the distribution which "might be expected" in the absence of the quota. In the view of Costa Rica, it was therefore incorrect when Ecuador stated that "country allocations are allowed at least in some circumstances"<sup>165</sup> implying that there were circumstances in which a country-specific allocation was *a priori* excluded.

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<sup>163</sup> Paragraphs 7.94 and 7.88 of the panel report.

<sup>164</sup> Paragraph 95 of Ecuador's first submission.

<sup>165</sup> Paragraph 105 of Ecuador's first submission.

5.91 Costa Rica claimed further that the European Communities was obliged to allocate country-specific quotas to Costa Rica and the other Members with a substantial supplying interest in accordance with the tariff quota concession for bananas incorporated in its Schedule. This agreement was consequently part of the EC's obligations under Article II of GATT. For the purposes of an examination of the issues raised by Ecuador, two sets of obligations of the European Communities under the BFA could be distinguished:

- (a) to allocate shares of the tariff quota established by the European Communities to countries with a substantial supplying interest, such as Costa Rica; and
- (b) to allocate shares of this quota to countries not having a substantial supplying interest and to distribute, and under certain circumstances, redistribute, the quota shares in certain proportions.

5.92 Costa Rica argued that the first set of BFA obligations listed above had not been found to be inconsistent with the EC's obligations under the GATT. The panel had found that "it was not unreasonable for the European Communities to conclude that at the time the BFA was negotiated Colombia and Costa Rica were the only contracting parties that had a substantial interest in supplying the EC banana market in terms of Article XIII:2(d)"<sup>166</sup>. The European Communities therefore continued to observe those clauses of the BFA that were consistent with the GATT by allocating a share of its tariff rate quota to all Members with a substantial supplying interest. Only the second set of BFA obligations listed above was found by the panel to be inconsistent with Article XIII which had given the European Communities a valid ground for suspending the operation of those provisions.<sup>167</sup> However, the European Communities was under a legal obligation to continue to observe those clauses of the BFA that were not found to be invalid by the panel. This was confirmed by Article 44 of the Vienna Convention on the Law of Treaties, entitled "Separability of treaty provisions", which codified the rules of customary international law governing the partial invalidity of a treaty. Paragraph 3 thereof provided:

"If the ground [for suspending the operation of the treaty] relates solely to particular clauses, it may be invoked only with respect to those clauses where:

- (a) the said clauses are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

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<sup>166</sup> Paragraph 7.85 of the panel report.

<sup>167</sup> Paragraph 7.90 of the panel report.

- (c) continued performance of the remainder of the treaty would not be unjust."

5.93 Costa Rica claimed that all of the above conditions for the separability of treaty provisions were met in the present case. The clauses of the BFA providing for allocation of quota shares to countries with a substantial supplying interest could be applied separately from the clauses that called for a discriminatory administration of the quotas. Moreover, discrimination against the two non-BFA countries with a substantial supplying interest (Ecuador and Panama) was not an essential basis for the BFA countries and the EC's consent to the allocation of quota shares for the two BFA countries with a substantial supplying interest (Costa Rica and Colombia). No circumstances had arisen which would render the continued performance of the GATT-consistent provisions of the BFA unjust. On the contrary, the concession of the European Communities incorporating the BFA was "paid for" by the BFA countries through counter-concessions. It was therefore appropriate that the European Communities continued to perform those obligations under the BFA that it could implement consistently with the GATT, including the obligation to accord a country-specific quota to BFA countries with a substantial supplying interest.

5.94 The principles of international law governing the separability of treaty provisions, Costa Rica submitted, were particularly relevant in the case of the provisions contained in GATT Schedules of Concessions. The concessions incorporated in the Schedules generally resulted from a process of give and take during multilateral trade negotiations. The trade opportunities a Member must provide in accordance with its Schedule were therefore normally "paid for" by counter-concessions of other Members. If a concession was subsequently declared to be partly inconsistent with the GATT, the beneficiaries of that concession lost advantages without being able to withdraw the counter-concessions they had made to obtain that advantage, and the negotiated balance of concessions was consequently upset. To minimize such imbalances, the part of the concession that could be carried out consistently with the WTO agreements should be presumed to be separable from the part found to be inconsistent with such an agreement.

5.95 In the view of Costa Rica the European Communities had therefore the obligation under Article II of GATT to accord a country-specific quota to Colombia and Costa Rica and under Article XIII of GATT the obligation to extend this benefit to Ecuador and Panama. The European Communities could therefore not abandon its system of country-specific quotas for Members with a substantial supplying interest without violating its obligations under the GATT. Costa Rica submitted that Ecuador's request for the Panel to call upon the European Communities to eliminate country-specific quotas must therefore be rejected.

5.96 Costa Rica contended that the allocation of the quota shares among the Members with a substantial interest in supplying bananas on the basis of the 1994-1996 period met the requirements of Article XIII of GATT and that

Ecuador bore the burden of proving that the EC's selection of a base period and appraisal of special factors was inconsistent with Article XIII.

5.97 According to the generally accepted rules on the distribution of the burden of proof, Costa Rica argued, Ecuador, as the party claiming that the EC's regime remained inconsistent with Article XIII, must provide evidence supporting the above claim.<sup>168</sup> If any uncertainty were to remain after the evaluation of the evidence before the Panel, the European Communities would have to be given the benefit of the doubt. This followed from the fact that Article XIII:4 specified that "the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the products shall be made initially by the Member applying the restrictions" and that it then was for those Members which considered that there was a "need for an adjustment of the proportions determined or of the base period selected, or for the reappraisal of the special factors involved" to request consultations with the Member applying the restrictions. Costa Rica submitted that Ecuador had not met its burden of proof.

5.98 Costa Rica argued further that Ecuador objected to the selection of the 1994-1996 period because trade was distorted by measures which had been found to be inconsistent by the panel. However, there was nothing in the panel report suggesting that the European Communities should have chosen a more recent base period. Under the banana regime originally examined by the panel the European Communities had based the distribution of trade shares in 1995 on market shares in the 1989-1991 period. The Panel concluded that it was reasonable for the European Communities to base its determination that Colombia and Costa Rica were substantial suppliers in 1995 on their market shares during a three-year period ending four years before 1995. The European Communities was now basing the distribution of trade shares in 1999 on market shares during a period ending three years before 1999. Under the new banana import regime the base period selected was thus more recent than the period which the Panel considered to be relevant for the purpose of determining the substantial supplier status. Against this background it was difficult to see on which basis one could conclude that the choice of the base period was inconsistent with the recommendations and rulings the DSB made on the basis of the original panel's report.

5.99 Costa Rica recalled that Ecuador's share in the world market during the relevant base period would not justify a re-appraisal of the special factors affecting banana trade since, according to the data provided by Ecuador, the average share of Ecuador in the world market during the 1994-1996 period was 26.36 per cent which was almost identical to the quota share of 26.17 per cent allocated by the European Communities. In any case, trade statistics, as such, were not a special factor within the meaning of Article XIII:2. Statistics served

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<sup>168</sup> See AB report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R) Section II. A. 1.

to establish the shares of trade during a previous representative period; factors other than trade statistics could be used to determine whether the quota shares should differ from the trade shares during that period.

5.100 Furthermore, Costa Rica contended that Ecuador claimed that the increase in Costa Rica's country-specific quota share established under Annex I of Regulation 2362 was attributable to the shortfall reallocation carried out under the BFA.<sup>169</sup> Ecuador also claimed that the increase in Costa Rica's quota share, as a result of the recent changes introduced to the allocations of the country-specific quota, based on the 1994-1996 period, "precisely coincide with the shares taken from Venezuela and Nicaragua".<sup>170</sup> Costa Rica submitted that at no time during the years 1994, 1995 and 1996 did it benefit from the reallocation of country shares originally allocated to other BFA countries. The percentage allocated to Costa Rica faithfully reflected its share in the EC market during the representative period.

5.101 Costa Rica submitted that the allocation of country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas and the distribution of the quota shares among those Members on the basis of their shares in the EC market during 1994-1996 were measures on which neither the panel nor the AB had made recommendations or rulings for adoption by the DSB. Costa Rica therefore considered that these measures were not "measures to comply with the recommendations and rulings" of the DSB and that they could not be examined in the framework of a proceeding under Article 21.5 of the DSU.

5.102 Costa Rica further considered that, if the Panel were to examine these measures, it would have to find that:

- (a) the European Communities not only had the right to allocate country-specific quotas to Costa Rica and the other Members with a substantial interest in supplying bananas under Article XIII of GATT, but was obliged to do so under Article II of GATT; and
- (b) Ecuador failed to demonstrate that the distribution of the quota shares on the basis of the shares of imports during the 1994-1996 period did not meet the requirements of Article XIII.

5.103 In either case Ecuador's request that the Panel recommend the elimination of country-specific quotas or a redistribution of the quota shares would therefore have to be rejected.

#### *F. Ecuador's Response to Third Parties*

5.104 In response to the argument presented by the Caribbean States concerning the company Leon Van Parys (LVP) (see paragraph 5.54 above), **Ecuador** submitted that LVP was a substantial importer and wholesaler of Ecuadorian

<sup>169</sup> Paragraph 15 of Ecuador's first submission.

<sup>170</sup> Paragraph 80, subparagraph 4, and paragraph 94 of Ecuador's first submission.

bananas on the EC market, and it was the largest EC company in the Noboa Group.

5.105 Ecuador submitted further that the Caribbean States had misunderstood Ecuador's statement that its services providers had invested some US\$200 million under the prior system to buy-back market access (see paragraph 5.58 above).<sup>171</sup> The investment was the price of buying the ability to get bananas entered into the European Communities - in effect, the quota rent granted to EC and ACP services suppliers under the prior system - without obtaining the licences themselves.

5.106 Ecuador submitted that the Odeadom data cited by the Caribbean States showed only changes in licence allocations by member State and did not show changes in licence allocations by services provider. While some former Category B licence holders (in France and Spain or elsewhere) may not have always ensured that they had title at customs clearance, such that other operators could now claim reference quantities for those, that was not shown by data on shifts in licence allocations by member State. Indeed, a shift from one member State to another could as easily result from internal shifts in the operations of an operator group, or from licence transfers from one former Category B holder to another EC or ACP services provider in another member State, as from any shift to wholesalers of third-country bananas

5.107 In response to allegations that Ecuador's evidence was insufficient to substantiate continuing discrimination against Ecuadorian services suppliers, Ecuador submitted that the Noboa Group's licence allocations covered less than half of the volumes it physically imported into the European Communities (i.e. imports that were customs cleared either by a Noboa company or by an unrelated company).

## VI. FINDINGS

6.1 This case arises out of a challenge by Ecuador of the WTO-consistency of measures taken by the European Communities to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (DS/27/R/ECU & DS/27/AB/R). In particular, Ecuador claims that Regulations 1637/98 and 2362/98 are inconsistent with the EC's obligations under Articles I and XIII of GATT 1994 and Articles II and XVII of GATS. Ecuador also invokes Article 19 of the Dispute Settlement Understanding ("DSU") and requests the Panel to suggest how the European Communities could implement any recommendations that the Panel might make. We first consider certain procedural issues and our terms of reference and then examine Ecuador's claims.

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<sup>171</sup> Paragraphs 81, 82 and 96 of the submission of the Caribbean States.

*A. Working Procedures and Timetable*

6.2 On 15 January 1999, we met with the parties to establish our working procedures and a timetable for the panel proceeding. Given the short period of time available to complete a proceeding under Article 21.5 of the DSU, we did not include in the timetable an interim review period. Both parties requested that we reconsider the possibility of having an interim report. We ultimately concluded that the time necessary to draft the report would not allow us to issue an interim report and still meet the 90-day deadline of Article 21.5. Accordingly, we confirm our initial decision not to provide an interim report.

*B. Terms of Reference*

6.3 The European Communities argues that the terms of reference of this Panel are limited by Article 21.5 of the DSU to the "matters" on which the DSB adopted its recommendations or rulings based on the original panel and Appellate Body reports in this case.<sup>172</sup> In the EC's view, this Panel can only verify the consistency of measures taken to comply with those recommendations and not consider other claims raised by Ecuador.<sup>173</sup> In particular, the European Communities notes that it would be disadvantaged if new claims were allowed because the shorter period of time allowed for an Article 21.5 panel process (90 days compared to a normal panel timetable of at least six months) would affect its ability to defend its measures and because it would not be entitled to a new reasonable period of time to implement any new panel recommendations or rulings. It also argues that it would be inappropriate for the Panel to make recommendations on implementation of the sort requested by Ecuador.

6.4 In Ecuador's view, the limitation proposed by the European Communities is not found in the text of Article 21.5, which refers to disagreements as to the consistency with covered agreements of measures taken to comply with DSB recommendations and rulings. As to the shorter period of time, Ecuador notes that the European Communities has spent 15 months considering the implementation of the original recommendations and rulings and thus does not need as much time as might be necessary in a first-time challenge to an import regime. It also notes that it has waited a long time for the European Communities to comply with its obligations under the WTO Agreement. As to its request that the Panel make specific recommendations and suggestions, Ecuador argues that it has the right to make such a request under Article 19 of the DSU.

6.5 In considering the scope of our terms of reference, we recall that when this case was referred to the Panel by the DSB, it was provided that the Panel

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<sup>172</sup> Colombia and Costa Rica make a similar argument as third parties.

<sup>173</sup> According to the European Communities, such claims include Ecuador's arguments concerning its share of the tariff quota (e.g. concerning the "representative period", "special factors" and the effect of the so-called BFA reallocation), its request that the Panel suggest that the European Communities implement a global tariff quota for bananas, and its GATS arguments in respect of "actual" importers and newcomers.

would have standard terms of reference. Such terms of reference are defined in Article 7.1 of the DSU and, as adapted to this case, are as follows:

"To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS27/41, the matter referred to the DSB by Ecuador in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".<sup>174</sup>

6.6 As recently explained by the Appellate Body:

"[T]he matter referred to the DSB for purposes of Article 7 of the DSU ... must be the 'matter' identified in the request for establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly'. The 'matter referred to the DSB', therefore, consists of two elements: the specific *measures at issue* and the *legal basis of the complaint* (or the *claims*)."<sup>175</sup>

6.7 Thus, pursuant to our terms of reference, we are to consider the matter referred to the DSB by Ecuador and that matter consists of the measures and claims specified by Ecuador in WT/DS27/41. The limitation suggested by the European Communities cannot be found in our terms of reference.

6.8 That limitation also cannot be found in the ordinary meaning of the terms of Article 21.5 of the DSU. The text of Article 21.5 provides (emphasis added):

"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."

Article 21.5 refers to the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings". Here it is clear that the two measures specified by Ecuador (Regulations 1637/98 and 2362/98) were "taken [by the European Communities] to comply" with the DSB's recommendations, as they modify aspects of the EC's banana import regime found by the original panel and Appellate Body reports to be inconsistent with the EC's WTO obligations. There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered. Nor is there a suggestion that the term "measures" has a special meaning in Article 21.5 that would imply that only certain aspects of a measure can be considered.

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<sup>174</sup> WT/DS27/44.

<sup>175</sup> Appellate Body report on *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico*, adopted on 25 November 1998, WT/DS60/AB/R, paragraph 72.

6.9 This interpretation of Article 21.5 of the DSU is supported by its context and the object and purpose of the DSU. For example, Article 21.1 of the DSU states that "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Article 3, which sets out the general provisions of the DSU, provides in its paragraph 3:

"The prompt settlement of situation in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

Acceptance of the EC argument would mean in many cases that two procedures would be necessary. One expedited panel procedure to ascertain if the offending measures have been removed, and a second normal panel procedure to consider the overall consistency with WTO obligations of the new measure. Such a process would not promote and would not be consistent with the prompt settlement of disputes.<sup>176</sup>

6.10 As to the EC's argument that it is unfair to expect it to defend itself in respect of new issues in an expedited panel process, we note that the issues raised by Ecuador in this proceeding are quite similar to those raised in *Bananas III*. As to the EC's argument that it will be deprived of a reasonable period of time in which to implement any new recommendations and rulings of the DSB, that would not justify limiting the scope of an Article 21.5 proceeding. In any event, in our view, these arguments to restrict the scope of Article 21.5 on the grounds of alleged unfairness are not based on the text of Article 21.5 and do not offset the arguments outlined above concerning the need to resolve promptly implementation issues in one panel proceeding.

6.11 As to the question of whether we have the authority to make suggestions in respect of implementation, it is clear from Article 19.1 of the DSU that panels do have such authority. There is nothing in Article 19.1 that suggests that it does not apply to panels established pursuant to Article 21.5. Indeed, the need for prompt resolution of disputes would support more frequent use of that authority in Article 21.5 cases than in others. However, whether we should make suggestions in this case is an issue for later consideration.

**6.12 Accordingly, we find that our terms of reference cover all of the claims raised by Ecuador in this proceeding and that we are authorized by**

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<sup>176</sup> Further support for our interpretation of Article 21.5 can be found in Article 9 of the DSU, paragraph 3 of which provides: "If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized." Such harmonization would be impossible if the limitation on the scope of Article 21.5 proposed by the European Communities were to be accepted.

**Article 19.1 of the DSU to make suggestions on implementation should we consider it appropriate to do so.**

*C. Article XIII of GATT 1994*

6.13 We first address Ecuador's claims under Article XIII of GATT 1994 since that Article regulates tariff quotas, the operation of which is the focus of this case. Ecuador claims that Regulations 1637/98 and 2362/98, in the way in which they (i) establish a tariff quota providing duty-free treatment for 857,700 tonnes of traditional banana imports from 12 ACP States and (ii) assign to Ecuador a country-specific share of the EC's MFN tariff quota for bananas, are inconsistent with the EC's obligations under Article XIII of GATT 1994.

6.14 In this regard, we note that Regulation 1637/98 confirms the tariff quota of 2,200,000 tonnes bound in the EC Schedule and an additional autonomous tariff quota of 353,000 tonnes.<sup>177</sup> These are at the same levels as in the prior regime. Given that an agreement on the allocation of country-specific allocations could not be achieved with the substantial suppliers, in Regulation 2362/98 the European Communities assigned the following country shares to each of the substantial suppliers pursuant to Article XIII:2(d) (i.e. Colombia, Costa Rica, Ecuador and Panama):

**Table 1 - EC tariff quota allocations for third-country and non-traditional ACP banana suppliers**

Country	Share (%) <sup>178</sup>	Volume ('000 tonnes) <sup>179</sup>
Colombia	23.03	588.0
Costa Rica	25.61	653.8
Ecuador	26.17	668.1
Panama	15.76	402.4
Other	9.43	240.7
Total of the above	100.00	2,553.0

6.15 The Annex to Regulation 1637/98 provides for an aggregate quantity of 857,700 tonnes for traditional imports from ACP States. Under the revised EC regime, there are no longer any country-specific allocations to the 12 traditional ACP States (i.e. Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica,

<sup>177</sup> Article 18, paragraphs 1 and 2 of Regulation 1637/98.

<sup>178</sup> Annex I to Regulation 2362/98.

<sup>179</sup> Calculation of absolute shares based on the 2,553,000 tonne tariff quota and the shares of substantial suppliers according to Annex I to Regulation 2362/98.

Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent & the Grenadines, and Suriname).<sup>180</sup>

6.16 The relevant provisions of Article XIII are the following:

*"Non-discriminatory Administration of Quantitative Restrictions*

1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

...

(d) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult

<sup>180</sup> Annex to Regulation 1637/98 and Annex I to Regulation 2362/98.

promptly with the other Member or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

6.17 In examining the revised EC banana regime and its consistency with Article XIII, we recall that in *Bananas III* the Appellate Body overruled the panel's interpretation of the scope of the Lomé waiver and held that the Lomé waiver does not cover inconsistencies with Article XIII. Accordingly, in considering Article XIII issues, we do not consider what is or is not required by the Lomé Convention. We address that issue in connection with Ecuador's claims under Article I of GATT.

1. *The 857,700 Tonnes Reserved for Traditional Imports from ACP States*

6.18 Ecuador alleges that the division of the revised EC import regime for bananas into (i) an MFN tariff quota of 2,553,000 tonnes, in combination with (ii) an amount of 857,700 tonnes reserved for traditional imports from ACP States at a zero-duty level fails to conform to the non-discrimination requirements of Article XIII and amounts to a continued application of "separate regimes" of the sort found to be inconsistent with Article XIII by the original panel and the Appellate Body in *Bananas III*.

6.19 The European Communities responds that a single import regime exists under Regulations 1637/98 and 2362/98. It is the EC's position that for purposes of Article XIII the quantity of 857,700 tonnes for traditional ACP imports is outside the MFN tariff quota of 2,553,000 tonnes and Ecuador should therefore have no interest in it. In the EC's view, the amount of 857,700 tonnes constitutes an upper limit for the zero-tariff preference for traditional ACP imports. It notes that the tariff preference is required by the Lomé Convention and is covered by the Lomé waiver as to any inconsistency with Article I:1 of GATT. In addition, the European Communities relies on the panel report on *EEC - Imports of Newsprint*<sup>181</sup> in arguing that imports under preferential arrangements should not be counted against an MFN tariff quota. The European Communities also argues that its collective allocation of an amount of 857,700 tonnes for traditional

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<sup>181</sup> Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133.

imports from ACP States is effectively required by the Appellate Body report in *Bananas III*.

(a) The Applicability of Article XIII

6.20 Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.

6.21 In our view, the *Newsprint* case does not affect the applicability of Article XIII to the tariff quota for traditional imports from ACP States. In that case, the European Communities had unilaterally reduced a 1.5 million tonnes tariff quota for newsprint to 500,000 tonnes on the grounds that certain past supplying countries under the tariff quota had entered into free-trade agreements with the European Communities and that the tariff quota should be reduced to reflect that fact. The panel held that the European Communities could not unilaterally make such a change. In passing, the *Newsprint* panel stated: "Imports which are already duty-free, due to a preferential agreement, cannot by their very nature participate in an MFN duty-free quota."<sup>182</sup> The *Newsprint* panel did not deal with the applicability of Article XIII to a case such as this one. Moreover, our findings do not imply that the European Communities must count from ACP States imports against its MFN tariff quota.

6.22 As to the EC's suggestion that Ecuador has no interest in the collective allocation to traditional ACP suppliers, we note that the price and even the volume of Ecuador's exports could be affected by the price and volume of traditional ACP exports. In any event, under *Bananas III*, it is clear that Ecuador may bring this claim.<sup>183</sup>

**6.23 Accordingly, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it.**

(b) The Requirements of Article XIII and the 857,700 Tonne Tariff Quota for Traditional ACP Imports

6.24 Ecuador raises claims in respect of the 857,700 tonne tariff quota under both paragraphs 1 and 2 of Article XIII. We address these claims in that order. In assessing the 857,700 tonne tariff quota for traditional ACP exports in light of the requirements of Article XIII, we recall the Appellate Body's findings in *Bananas III* concerning "separate regimes":

<sup>182</sup> Panel report on *EEC - Imports of Newsprint*, adopted on 20 November 1984, BISD 31S/114, 130-133., paragraph 55.

<sup>183</sup> Panel reports on *Bananas III*, paragraphs 7.47-7.52; Appellate Body report on *Bananas III*, paragraphs 132-138.

"The issue here is not whether the European Communities is correct in stating that two separate regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements. The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only within regulatory regimes established by that Member."<sup>184</sup>

6.25 We also recall the Appellate Body finding that the Lomé waiver does not justify inconsistencies with Article XIII. As stated by the Appellate Body:

"In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly."<sup>185</sup>

We, therefore, in our examination of the WTO-consistency of the EC's revised regime, have to apply fully the non-discrimination and other requirements of Article XIII to all "like" imported bananas irrespective of their origin, i.e. regardless of whether imports occur under the MFN tariff quota of 2,553,000 tonnes or under the tariff quota of 857,700 tonnes reserved for traditional ACP imports.

(i) Article XIII:1

6.26 In this regard, we note that under the revised regime, on the one hand, bananas may be imported under the MFN tariff quota on the basis of past trade

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<sup>184</sup> Appellate Body report on *Bananas III*, paragraph 190.

<sup>185</sup> Appellate Body report on *Bananas III*, paragraph 187.

performance by exporting countries during a previous representative period (i.e. the three-year period from 1994 to 1996). On the other hand, bananas from traditional ACP supplier countries may be imported up to a collective amount of 857,700 tonnes, which was originally set to reflect the overall amount of the pre-1991 best-ever exports by individual traditional ACP suppliers, with allowance made for certain investments.<sup>186</sup> We further note that exports under the tariff quota by some non-substantial suppliers (i.e. third-country and non-traditional ACP suppliers) are restricted, in aggregate, to 240,748 tonnes (i.e. the "other" category of the MFN tariff quota), whereas exports from other non-substantial sources of supply (i.e. traditional ACP suppliers) are restricted, in aggregate, to 857,700 tonnes. Moreover, some non-substantial suppliers, namely the ACP suppliers, could benefit from access to the "other" category of the MFN tariff quota once the 857,700 tonne tariff quota was exhausted. On the other hand, non-substantial suppliers from third countries have no access to the 857,700 tonne tariff quota once the "other" category of the MFN tariff quota is exhausted. Individual Members in these two groups - traditional ACP suppliers and the other non-substantial suppliers - are accordingly not similarly restricted. This disparate treatment is inconsistent with the provisions of Article XIII:1, which require that "[n]o ... restriction shall be applied by any Member on the importation of any product of the territory of any other Member ... unless the importation of the like product of all third countries ... is similarly prohibited or restricted".

(ii) Article XIII:2

6.27 The general rule laid down in Article XIII:2 of GATT requires Members to "aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". To this end, where the option of allocating a tariff quota among supplying countries is chosen, Article XIII:2(d) provides that allocations of shares (i.e. country-specific allocations for *substantial* suppliers; and a global allotment in an "other" category for *non-substantial* suppliers unless country-specific allocations are allotted to each and every non-substantial supplier) should be based upon the proportions supplied during a previous representative period. The European Communities explains that it chose the three-year period from 1994 to 1996 as the most recent three-year period for which reliable import data were available.

6.28 According to the information available to us, for traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of

<sup>186</sup> The country-specific allocations for, e.g. Belize, Cameroon, Côte d'Ivoire and Jamaica seem to include allowances for investment made.

2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions.

**6.29 In light of the foregoing, and in light of the Appellate Body findings that the Lomé waiver does not cover inconsistencies with Article XIII, we find that imports from different *non-substantial* supplier countries are not similarly restricted in the meaning of Article XIII:1 of GATT. Moreover, we find that the allocation of a collective tariff quota for traditional ACP States does not approach as closely as possible the share which these countries might be expected to obtain in the absence of the restrictions as required by the chapeau to Article XIII:2 of GATT. Therefore, we find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT.**

(c) The Requirements of the Appellate Body Report  
in *Bananas III*

6.30 The European Communities recalls that the panel and the Appellate Body held in *Bananas III* that it is required by the Lomé Convention to provide duty-free access to traditional exports from ACP suppliers in an amount of their pre-1991 best-ever exports (i.e. 857,700 tonnes) and that the Appellate Body held that it could not assign country-specific allocations to those suppliers inconsistently with Article XIII. It argues that in consequence the Appellate Body report in *Bananas III* requires it to provide a collective allocation of 857,700 tonnes to those suppliers.

6.31 We note, however, that the panel and Appellate Body reports made it clear that what was required by the Lomé Convention was not necessarily covered by the Lomé waiver. And, as the Appellate Body found in *Bananas III*, the European Communities is not authorized by the Lomé waiver to act inconsistently with its obligations under Article XIII. The Appellate Body also upheld the panel finding that the European Communities could not allocate country-specific shares to some non-substantial suppliers (e.g. traditional and non-traditional ACP countries and BFA signatories) unless country-specific allocations were also given to all non-substantial suppliers.

6.32 We stress that the foregoing analysis does not render the Lomé waiver meaningless (see paragraphs sections D.4 and F below). We have taken appropriate account of the EC's admonition that we should not interpret Article XIII so as to reduce the Lomé waiver or Article I to inutility. Nor have we added to or reduced the rights or obligations of Members contrary to Article 3.2 of the DSU.

## 2. *Ecuador's Share of the MFN Tariff Quota*

6.33 Article XIII:2(d) provides that if a Member decides to allocate a tariff quota it may seek agreement on the allocation of shares in the quota with those Members having a substantial interest in supplying the product concerned. In the absence of such an agreement, the Member:

"shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a *previous representative period*, of the total quantity or value of imports of the product, due account being taken of any *special factors* which may have affected or may be affecting the trade in the product" (emphasis added).

6.34 Ecuador challenges the EC's allocation of the MFN tariff quota to it on the grounds that its share does not approximate the share that it might be expected to obtain in the absence of restrictions. It also argues that given the history of trade-distortive EC banana measures, it is far from clear that any country-share allocation system could be devised based on the idea of a representative period and special factors that would meet the requirements of Article XIII:2 (see paragraphs 6.47-6.48).

6.35 The European Communities notes that it based its calculation of country allocations under the MFN tariff quota of the revised regime on the three-year period from 1994 to 1996. In the EC's view, this was the most recent three-year period for which reliable data were available at the time.

### (a) The Requirements of Article XIII

6.36 In considering Ecuador's claims regarding its tariff quota share under Article XIII, we recall our findings in *Bananas III*:

"The wording of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on this use in Article XI), they are to be used in the least trade-distorting manner possible. In the terms of the general rule of the chapeau of Article XIII:2:

'In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions ...'

In this case we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*. However, Article XIII:5 makes it clear, and the parties agree, that Article XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII is to minimize the impact of a quota or

tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime."<sup>187</sup>

6.37 We also noted the following:

"[I]n order to bring its banana import regulations into line with Article XIII, the European Communities would have to take account of Article XIII:1 and XIII:2(d). In order to allocate country-specific tariff quota shares consistently with the requirements of Article XIII, the European Communities would have to base such shares on an appropriate previous representative period<sup>375</sup> and any special factors would have to be applied on a non-discriminatory basis."

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<sup>375</sup>" In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

'[I]n keeping with normal GATT practice the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period.'

[Citation omitted.] In the report of the 'Panel on Poultry' issued on 21 November 1963, GATT Doc. L/2088, paragraph 10, the panel stated: '[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports'. See also Panel report in 'Japan - Restrictions on Imports of Certain Agricultural Products, paragraph 5.1.3.7 [citation omitted]'."

6.38 It is to accomplish the chapeau's requirement that a "Member shall aim at a distribution of trade ... approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of restrictions", that Article XIII:2(d) requires, as one alternative, the allocation of shares on the basis of a previous representative period (adjusted for special factors if and to the extent appropriate).

6.39 If data from a period are out of date or imports distorted because the relevant market is restricted, then using that period as a representative period cannot achieve the aim of the chapeau. Thus, under GATT practice it is

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<sup>187</sup> Panel reports on *Bananas III*, paragraph 7.68.

necessary that the "previous representative period" for purposes of Article XIII:2(d) be the most recent period not distorted by restrictions. As noted above, the panel on *EEC - Restrictions on Imports of Apples from Chile*<sup>188</sup>, dealt with the question whether import restrictions reflected the proportion of imports to the European Communities "prevailing during a previous representative period" in the context of Article XI:2(c). That panel excluded the year 1976 from the most recent three-year period previous to 1979, the year when the EC restriction in dispute was in effect, and chose 1978, 1977 and 1975 instead. It held that 1976 could not be considered representative due to the existence of restrictions during that year.

6.40 The panel on *Japan - Restrictions of Imports of Certain Agricultural Products*<sup>189</sup> addressed the question of the absence of a "previous representative period" in the context of Article XI:2(c). It noted that:

"... in the case before it the import restrictions maintained by Japan had been in place for decades and there was, therefore, no previous period free of restrictions in which the shares of imports and domestic supplies could reasonably be assumed to resemble those which would prevail today. ... The Panel realized that a strict application of this burden of proof rule had the consequence that Article XI:2(c) could in practice not be invoked in cases in which restrictions had been maintained for such a long time that the proportion between imports and domestic supplies that would prevail in the absence of restrictions could no longer be determined on the basis of a previous representative period. ... The Panel considered for these reasons that the burden of providing evidence that all requirements of Article XI:2(c)(i), including the proportionality requirement, had been met must remain fully with the contracting party invoking that provision."

6.41 We note that Article XI:2(c), which stipulates that quotas must be such as not to reduce the total of imports relative to domestic production which might reasonably be expected to rule between the two in the absence of restrictions, is an exception from the prohibition of quantitative restriction in Article XI:1. Article XIII regulates the non-discriminatory administration of quantitative restrictions, including, where applied, the allocation of shares among Members. The determination of a previous representative period under Article XIII raises similar problems as under Article XI:2. Thus we deem the above considerations pertinent to the case before us. The effect of a lack of a representative period under Article XIII is much less far-reaching than the lack of such a period under Article XI:2(c). In the *Japan - Restrictions* case, the lack of a suitable previous representative period precluded the use of the Article XI:2(c) exception. Under

<sup>188</sup> Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.8.

<sup>189</sup> Panel report on *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted on 22 March 1988, BISD 35S/163, paragraph 5.1.3.7.

Article XIII, the lack of a suitable previous representative period would only preclude allocation of a tariff quota unilaterally. It would not preclude the use of a global tariff quota nor of country-specific allocations by agreement.

(b) The Representative Period

6.42 With regard to the selection of a "previous representative period" for applying the tariff-quota regime for imports of bananas to the European Communities, we recall that prior to 1993, EC member States applied different national import regimes. Some member States applied import restrictions or prohibitions, while imports to other member States were subject to a tariff-only regime or could enter duty-free.<sup>190</sup> Thus, that period could not serve as a previous representative period (see paragraph 6.37).

6.43 With the introduction of the common market organization for bananas in mid-1993, we note traditional ACP supplier countries were guaranteed country-specific allocations at pre-1991 best-ever import levels, which were far beyond their actual trade performance in the recent past. As of 1995, the Banana Framework Agreement (BFA) allocated shares of the 2,200,000 tonne tariff quota established by Regulation 404/93 to the substantial suppliers Colombia and Costa Rica. Given the distortions in the EC market prior to the BFA, the shares assigned to Colombia and Costa Rica could not have been based on a previous representative period. Moreover, the BFA contained WTO-inconsistent rules concerning the export certificate requirements and re-allocations of unused portions of country-specific allocations exclusively among BFA signatories, which further aggravated such distortions. The shares of non-traditional ACP supplier countries were also distorted because of the country-specific allocations within the quantity of 90,000 tonnes that were reserved for non-traditional ACP suppliers.

6.44 It could be argued that within the "other" category of the 2,200,000 tonne tariff quota (autonomously enlarged by 353,000 tonnes as of 1995 for the EC-15), Ecuador, Panama and the non-substantial third-country suppliers without allocated shares were competing on a relatively undistorted basis during the period when the previous regime was in force (although less so after the BFA entered into force). However, given that, for purposes of applying the requirements of Article XIII, it does not matter whether imports from some supplier countries were relatively less distorted than others since distortions with respect to one (group of) supplier countries will have repercussions on the import performance of other substantial or non-substantial supplier countries within a single-product market.

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<sup>190</sup> For a description of the market, see panel report on *EEC - Member States' Import Regime for Bananas*, issued on 3 June 1993 (not adopted), GATT Doc. DS32/R, pages 3-7.

6.45 Accordingly, in our view, the 1994-1996 period could not serve as a previous representative period because of the presence in the market of the foregoing distortions.

6.46 We also note that the world market excluding the European Communities is of limited value for purposes of calculating country shares based on a previous representative period because different banana-exporting countries have quite different market shares in different regions of the world. For example, Ecuador's world market share has increased from 26 to 36 per cent during the last decade and thus is significantly higher than its country allocation under the EC revised regime.<sup>191</sup> Panama had a world market share of approximately 2-3 per cent of the market outside the European Communities during the past decade which is much lower than its country allocation under the revised regime. The Philippines had a share of approximately 13-14 per cent of that market outside the European Communities during the past decade, but it does not export significant quantities to Europe. Thus, data on world-market shares of various supplier countries during any past period (regardless of whether such data includes or excludes exports to the European Communities) could hardly be relevant for purposes of calculating country shares based on imports to the European Communities reflecting a previous representative period. Because different banana-exporting countries have quite different market shares in different regions of the world, it would also be difficult, if not impossible, to use a regional or specific country market as a basis for allocating tariff quota shares.

(c) Special Factors

6.47 Ecuador suggests that the European Communities could comply with Article XIII by basing its system on the 1995-1997 period, with adjustments both for the need to cure the distortions that existed in the EC market and the changes in relative economic efficiency and competitiveness.

6.48 However, the European Communities did not use special factors to adjust the country-specific tariff quota share allocated to substantial suppliers under its new banana regime. While in theory special factors could be used to adjust shares based on a previous *un*representative period so as to meet the requirements of the chapeau to Article XIII:2, at least in the present case it would be difficult to do so in practice. We recall that, according to the Notes *Ad* Article XIII:4 and Article XI:2 of GATT, "the term 'special factors' includes changes in the relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement." We note that in the past, GATT dispute settlement panels have appraised the consideration of special factors, such as "an overall trend towards an increase in Chile's relative productive

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<sup>191</sup> Ecuador's world market share outside the European Communities in different three-year periods were approximately as follows: 1988-1990: 25 per cent; 1990-1992: 28 per cent; 1993-1995: 30 per cent; 1994-1996: 32 per cent; 1995-1997: 36 per cent.

efficiency and export capacity ... [as well as] the temporary reduction of export capacity caused by [an] earthquake".<sup>192</sup> In our view, however, it would be inconsistent with paragraphs 2(d) and 4 of Article XIII to take account of special factors with respect to only one Member (see paragraph 6.37).

(d) Ecuador's Country-Specific Tariff-Quota Share

6.49 The reliance by the European Communities on a previous unrepresentative period, and without adjustment for special factors, would suggest that Ecuador's country-specific tariff-quota share does not approach the share that it might be expected to obtain in the absence of restrictions, as required by the chapeau to Article XIII:2. This is confirmed by the significant growth over the past decade in Ecuador's share of the EC<sup>193</sup> and world<sup>194</sup> markets. This growth indicates that Ecuador's country-specific tariff-quota share is less than it should be under the rules of Article XIII:2.

**6.50 While Members have a degree of discretion in choosing a previous representative period, it is clear in this case that the period 1994-1996 is not a "representative period". Accordingly, we find that the country-specific allocations assigned by the European Communities to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2.**

*D. Article I of GATT 1994*

6.51 Ecuador raises several claims under Article I. In respect of the preferential tariff of zero for the traditional imports from ACP States, Ecuador claims that the level of 857,700 tonnes exceeds what is required by the Lomé Convention and that the excess is therefore not covered by the Lomé waiver. Similarly, it claims that the collective allocation of 857,700 tonnes to the 12 traditional ACP States (as opposed to country-specific allocations) is not required by the Lomé Convention and therefore not covered by the Lomé waiver. Ecuador also challenges (i) the unlimited access to the "other" category of the MFN tariff quota at a zero-tariff level of non-traditional ACP imports and (ii) the tariff preference of 200 Euro per tonne for out-of-quota imports of ACP origin. In the previous EC regime, there was a 90,000 tonne limit on duty-free imports of non-traditional ACP bananas and the tariff preference for out-of-quota imports of ACP origin was 100 Euro per tonne.

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<sup>192</sup> Panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, paragraph 4.17; panel report on *United States - Imports of Sugar from Nicaragua*, adopted on 13 March 1984, BISD 31S/67, paragraph 4.3; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 22 June 1989, BISD 36S/93, paragraph 12.24.

<sup>193</sup> Annex II.

<sup>194</sup> Annex II.

6.52 The European Communities argues that these various provisions for ACP bananas are required by the Lomé Convention and are therefore covered by the Lomé waiver. It argues, in particular, that it was necessary to change the form of its preferential treatment of ACP imports to offset the limitations on such treatment imposed by the panel and Appellate Body reports in *Bananas III*.

### 1. *The Lomé Waiver*

6.53 In addressing Ecuador's claims under Article I:1, it is necessary to consider the scope of the Lomé waiver. In this regard, we recall that the operative paragraph of the Lomé waiver provides as follows:

"Subject to the terms and conditions set out thereunder, the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent *necessary* to permit the European Communities to provide *preferential treatment* for products originating in ACP States *as required by the relevant provisions* of the Fourth Lomé Convention, ..." <sup>195</sup>

6.54 In considering the scope of the Lomé waiver in *Bananas III*, both the panel and the Appellate Body applied a two-stage analysis: first, consideration was given to the requirements of the Lomé Convention since only preferential treatment required by the Lomé Convention is covered by the waiver; second, the scope of the Lomé waiver was considered. This second question is of limited relevance in this case as the Appellate Body made clear in the previous case that the Lomé waiver permits inconsistencies only with Article I:1.

### 2. *The Requirements of the Lomé Convention*

6.55 In considering the requirements of the Lomé Convention, the relevant provisions of the Convention are Article 183 and Protocol 5 thereto, on the one hand, and Article 168, on the other.

6.56 Article 183 of the Lomé Convention deals specifically with bananas and provides:

"In order to permit the improvement of the conditions under which bananas originating in the ACP States are produced and marketed, the Contracting Parties hereby agree to the objectives set out in Protocol 5."

Protocol 5 in turn provides:

"In respect of its banana exports to the Community markets, *no ACP State* shall be placed as regards *access to its traditional markets* and *its advantages on those markets*, in a *less favourable* situation than *in the past* or *at present*."

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<sup>195</sup> WT/L/186.

We recall that Article 183 and Protocol 5 were interpreted by the panel and the Appellate Body in the original dispute as applying only to *traditional* ACP banana imports.

6.57 Article 168 of the Lomé Convention deals more generally with preferences for ACP States. It provides as follows:

"(1) Products originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.

(2)(a) Products originating in the ACP States:

- listed in Annex II to the Treaty where they come under a common organization of the market within the meaning of Article 40 of the Treaty, or
- subject, on import into the Community, to specific rules introduced as a result of the implementation of the common agricultural policy,

shall be imported into the Community, notwithstanding the general arrangements applied in respect of third countries, in accordance with the following provisions:

- (i) those products shall be imported free of customs duties for which Community provisions in force at the time of import do not provide, apart from customs duties, for the application of any measure relating to their import;
- (ii) for products other than those referred to under (i), the Community shall take the necessary measures to ensure *more favourable treatment* than that granted to third countries benefitting from the most-favoured-nation clause for the same products."

We note that the preferential treatment foreseen by Article 168(2)(a)(ii) is not limited to traditional ACP exports to the European Communities; it covers any imports from ACP sources of products which are subject to a common market organization in the European Communities, i.e. also *non-traditional* ACP exports to the European Communities.

6.58 Given the factual circumstances under the previous regime, the Appellate Body summarized the preferential treatment required by the relevant provisions of the Lomé Convention - in keeping with the limits of its terms of reference in the original dispute - as follows:

"Thus, of the relevant provisions of the measures at issue in this appeal, we conclude that the European Communities is *"required"* under the relevant provisions of the Lomé Convention to: provide duty-free access for all traditional ACP bananas; provide duty-free access for 90,000 tonnes of non-traditional ACP bananas; provide a margin of tariff preferences in the amount of 100 ECU/tonne for all other non-traditional ACP bananas; and allocate tariff quota

shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes. We conclude also that the European Communities is *not "required"* under the relevant provisions of the Lomé Convention to: allocate tariff quota shares to some traditional ACP States in excess of their pre-1991 best-ever export volumes; allocate tariff quota shares to ACP States exporting non-traditional ACP bananas; or maintain the import licensing procedures that are applied to third country and non-traditional ACP bananas. We therefore uphold the findings of the Panel in paragraphs 7.103, 7.204 and 7.136 of the Panel Reports.<sup>196</sup>

6.59 In light of these Appellate Body findings in the original dispute, we will discuss in turn which elements of the revised EC regime are *"required"* by the Lomé Convention in respect of (i) traditional ACP imports and (ii) non-traditional ACP imports.

### 3. *Preferences for Traditional ACP Imports*

6.60 Ecuador claims that (i) the preferential tariff of zero on 857,700 tonnes of traditional ACP imports exceeds the volume on which such a preference is required by the Lomé Convention and (ii) the collective allocation of that volume to 12 ACP States is not required by the Lomé Convention.

#### (a) *The Level of 857,700 Tonnes and Pre-1991 Best-Ever Export Volumes*

6.61 In considering Ecuador's challenge to the level of 857,700 tonnes, we recall the statement by the Appellate Body quoted above that the Lomé Convention requires the European Communities to "allocate tariff quota shares to the traditional ACP States that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export volumes". In reaching this conclusion it referred to the requirement of Protocol 5 that "no ACP State shall be placed as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present". Thus, the question arises which quantities reflect the pre-1991 best-ever exports by traditional ACP suppliers, individually and collectively.

6.62 As defended by the European Communities before the original panel and the Appellate Body, the level of 857,700 tonnes included allocations to Belize, Cameroon, Cote d'Ivoire and Jamaica in excess of their pre-1991 best-ever exports to the European Communities. These allocations were defended by the European Communities on the grounds that they took account of investments

<sup>196</sup> Appellate Body report on *Bananas III*, paragraph 178.

made in those countries which would subsequently expand their export capacities. We recall that the Appellate Body concluded that, *inter alia*, the European Communities is *not* "required" under the relevant provisions of the Lomé Convention to allocate tariff quota shares to traditional ACP States in excess of their pre-1991 best-ever export volumes to reflect such investments.<sup>197</sup>

6.63 In its submissions to this Panel, the European Communities argues that the total pre-1991 best-ever ACP exports to the European Communities in fact amounted to 952,939 tonnes. It states that the conclusion of the panel and Appellate Body reports that the Lomé Convention requires the European Communities to give duty-free treatment to pre-1991 best-ever ACP exports caused it to re-examine its calculation of the pre-1991 ACP banana export data. It appears that the increase in the total of pre-1991 best-ever exports is due mainly to the addition of an amount of approximately 100,000 tonnes to the totals of Jamaica and Somalia, based on 1965 exports. We note that at least some of the data on which the European Communities now bases its calculations of pre-1991 best-ever exports was put forward by certain ACP States in the *Bananas III* dispute, but at that time not endorsed by the European Communities. While the European Communities has refrained from increasing the 857,700 tonne quantity reserved for traditional ACP imports, it argues that this amount can now be justified without reference to any amounts taking account of investments.

6.64 In the original panel report, we chose not to fix a starting date for consideration of pre-1991 best-ever exports by ACP States. We continue to take that position. In our view, there is no textual basis in the Lomé Convention for holding that only pre-1991 best-ever exports since a specific cut-off date should be taken into consideration for that calculation. While it is true that the first Lomé Convention entered into force in 1975, Protocol 5 does not set a limit on its reference to "the past".

**6.65 Accordingly, we find that on the basis of the data now offered by the European Communities, it is not unreasonable for the European Communities to conclude that the level of 857,700 tonnes for duty-free traditional ACP exports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments.**

(b) Collective Allocation to Traditional ACP States

6.66 Ecuador's argument that the allocation by the European Communities of a collective share of 857,700 tonnes, accessible by all, to 12 traditional ACP States is not required by the Lomé Convention and, as such, is not covered by the Lomé waiver. Consequently, Ecuador argues that the preferential tariff of zero assigned to that volume of imports is inconsistent with Article I:1. The European

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<sup>197</sup> Appellate Body report on *Bananas III*, paragraph 175.

Communities defends this collective allocation by reference to the Appellate Body's decision, based on Protocol 5 to the Lomé Convention, that it is required to give zero-tariff treatment to pre-1991 best-ever ACP exports and that it cannot allocate country-specific shares.

6.67 In considering this claim, we note that the Appellate Body explicitly concluded that the European Communities is required under the Lomé Convention to "allocate tariff quota *shares* to the traditional ACP *States* that supplied bananas to the European Communities before 1991 in the amount of their pre-1991 best-ever export *volumes*".<sup>198</sup> (emphasis added). In our view, the Appellate Body's choice of the plural in this sentence indicates that the requirements of the Lomé Convention refer to country-specific pre-1991 best-ever volumes. To put it differently, Protocol 5 to the Lomé Convention does *not* "require" the European Communities to allow certain traditional ACP suppliers to exceed their individual pre-1991 best-ever import quantity within the "collective" allocation of 857,700 tonnes reserved for all traditional ACP suppliers under the revised regime.

6.68 In our view, it is evident that the existence of a "collective" reservation of 857,700 tonnes entails the possibility that individual - more competitive - traditional ACP suppliers will exceed their individual pre-1991 best-ever import quantities at the expense of other - less competitive - traditional ACP suppliers. Such *de facto* reallocation to the benefit of more competitive traditional ACP suppliers within the collective allocation for traditional ACP suppliers would mean that those suppliers would obtain a preferential tariff of zero for volumes beyond those required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes would not be covered by the Lomé waiver and the preferential tariff thereon would therefore be inconsistent with Article I:1. In this regard, we note the similarity between this conclusion and the Appellate Body's conclusion that the European Communities was not required to allocate country-specific shares in respect of non-traditional ACP bananas.

**6.69 Accordingly, we find that it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes is not required by Protocol 5 of the Lomé Convention. Absent any other applicable requirement of the Lomé Convention, those excess volumes are not covered by the Lomé waiver and the preferential tariff thereon is therefore inconsistent with Article I:1.**

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<sup>198</sup> Appellate Body report on *Bananas III*, paragraph 178.

(4) *Preferential Tariffs for Non-Traditional ACP Banana Imports*

6.70 Ecuador claims that the unlimited preferential tariff of zero for non-traditional ACP banana imports within the "other" category of the MFN tariff quota and the tariff preference of 200 Euro per tonne for all other ACP banana imports are not required by Article 168(2)(a)(ii) of the Lomé Convention and therefore are preferential tariffs inconsistent with Article I:1 of GATT that are not covered by the Lomé waiver.

6.71 In this regard, we recall the Appellate Body's findings in *Bananas III*:

"[T]he obligation imposed on the European Communities by Article 168(2)(a)(ii) to 'take the necessary measures to ensure more favourable treatment' for *all* ACP bananas 'than that granted to third countries benefiting from the MFN clause for the same product' does apply. ... Both the duty-free access afforded to the 90,000 tonnes of non-traditional ACP bananas, imported in-quota, and the margin of tariff preference in the amount of 100 ECU/tonne afforded to all other non-traditional ACP bananas by the European Communities are clearly 'more favourable treatment' than that afforded by the European Communities to bananas from third countries benefiting from MFN treatment. Therefore the remaining issue under Article 168(2)(a)(ii) is whether the particular measures chosen by the European Communities to fulfil the obligations in that Article to provide 'more favourable treatment' to non-traditional ACP bananas are also in fact 'necessary' measures, as specified in that Article. In our view, they are. Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a tariff preference for non-traditional ACP bananas. But it seems to us that this particular measure can, in the overall context of the transition from individual national markets to a single Community-wide market for bananas, be deemed to be 'necessary'. ...".<sup>199</sup>

(a) *The Preferential Tariff of Zero for Non-Traditional ACP Bananas*

6.72 We recall that under the previous regime the preferential tariff of zero for non-traditional ACP bananas was limited to 90,000 tonnes of non-traditional ACP imports, with specific-country allocations to Belize, Cameroon, Cote d'Ivoire and the Dominican Republic. We note that under the revised regime the

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<sup>199</sup> Appellate Body report on *Bananas III*, paragraph 173.

limitation of 90,000 tonnes was abolished in light of the Appellate Body finding that the European Communities is not required under the Lomé Convention to allocate tariff quota shares to ACP States exporting non-traditional ACP bananas.

6.73 The European Communities (and the ACP States) submit that the abolition of the allocations of overall 90,000 tonnes removes the protection that non-traditional ACP bananas enjoyed from competition by third-country, e.g. Latin American bananas. In that sense the preferential tariff of zero *per se* is insufficient to prevent non-traditional ACP imports from being displaced from the EC market by imports from Latin America.

6.74 Ecuador, however, argues that the abolition of the 90,000 tonnes limitation enables non-traditional ACP imports to compete with imports from Latin America based on a preferential tariff of zero within the entire "other" category of 240,748 tonnes under the MFN tariff quota. In this sense, the preferential tariff of zero for non-traditional ACP bananas has been extended potentially up to 240,748 tonnes.

6.75 We recall that the obligation, contained in Article 168 of the Lomé Convention, to ensure duty-free or at least more favourable than most-favoured-nation treatment for products of ACP origin is in theory unlimited. As the Appellate Body put it, "Article 168(2)(a)(ii) does not say that only *one* kind of measure is 'necessary'. Likewise, that Article does not say *what* kind of measure is 'necessary'. Conceivably, the European Communities might have chosen some other 'more favourable treatment' in the form of a preferential tariff for non-traditional ACP bananas."<sup>200</sup>

6.76 Moreover, given the competitive conditions between ACP bananas and third-country bananas on the world market, we believe that the country-specific allocations in aggregate of 90,000 tonnes for non-traditional ACP imports free of in-quota tariffs was in overall terms an advantage in the sense of a protection from third-country competition rather than a limitation on exports to the European Communities which would otherwise have expanded.

6.77 While the reference by the Appellate Body to the possibility for the European Communities to have chosen "other" forms of preference does not necessarily imply that the European Communities is free at any time to expand significantly the scope of ACP preferences covered by the Lomé waiver, the statement by the Appellate Body suggests to us that the European Communities has some discretion as to what kind of preference it affords to the ACP States so as to offset the elimination of a preference that it cannot provide under WTO rules.

**6.78 In light of these considerations, we find that it is not unreasonable for the European Communities to conclude that non-traditional ACP imports at zero tariff within the "other" category of the MFN tariff quota is required**

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<sup>200</sup> Appellate Body report on *Bananas III*, paragraph 173.

**by Article 168 of the Lomé Convention. Therefore, we find that the violation of Article I:1, as alleged by Ecuador, is waived by the Lomé waiver.**

- (b) The Tariff Preference of 200 Euro per tonne for Non-Traditional ACP Bananas

6.79 We next address the issue whether the increase of the tariff preference for all other non-traditional ACP imports from 100 to 200 Euro per tonne is required by the Lomé Convention. Again, we recall that the scope of the obligations of Article 168 to provide duty-free or more favourable treatment to ACP is not limited to preferences enjoyed in the past before a given point in time. We also believe that the increase of the out-of-quota preferential tariff under the revised regime could constitute some other "more favourable treatment" in the form of a preferential tariff for non-traditional ACP bananas that the Appellate Body could conceive of in the original dispute and that the European Communities might have chosen to accord to non-traditional ACP suppliers with a view to offsetting the effect of the abolition of the allocation for these non-traditional ACP suppliers of 90,000 tonnes within the MFN tariff quota.

**6.80 Therefore, we find that it is not unreasonable for the European Communities to conclude that including the tariff preference of 200 Euro per tonne for out-of-quota imports of non-traditional ACP bananas is within the scope of what the European Communities is required to accord to non-traditional ACP supplies by virtue of the Lomé Convention. Therefore, we find that the violation of Article I:1, as alleged by Ecuador, is covered by the Lomé waiver.**

#### *E. GATS Issues*

6.81 Ecuador claims that Regulations 1637/98 and 2362/98 are inconsistent with the EC's obligations under Articles II and XVII of GATS. More specifically, Ecuador alleges that (i) the criteria for qualifying as "traditional operator" based on the payment of customs duties, (ii) the choice of the period from 1994 to 1996 for the calculation of reference quantities for the allocation of licences, and (iii) the so-called "single pot" approach for issuing licences under the revised licensing procedures perpetuate the violations of Articles II and XVII of GATS (i.e. GATS' most-favoured nation and national treatment clauses) found by the original panel and the Appellate Body in *Bananas III*. Furthermore, Ecuador alleges that the (i) enlargement of the licence quantity reserved for "newcomers" to 8 per cent and (ii) the criteria for acquiring "newcomer" status under the revised licensing procedures violate Article XVII of GATS.

##### *1. The Scope of the EC's Commitments on "Wholesale Trade Services"*

6.82 The European Communities raises one preliminary issue in respect of Ecuador's GATS claims. It contends that the revision of the UN Central Product

Classification system affects the interpretation of the scope of its market access and national treatment commitments on "wholesale trade services" which the European Communities has bound in its GATS Schedule.

6.83 The European Communities submits that the Provisional CPC has been replaced in the meantime by the Central Product Classification (CPC) - Version 1.0 ("Revised CPC"), and that the Revised CPC seeks to create a system of service categories that are both exhaustive and mutually exclusive. Therefore, in the EC's view, any services related to wholesale trade transactions which at the same time fall into another CPC category should be assessed on the basis of this new reality, i.e. should not be considered to be covered by the EC's commitments on "wholesale trade services".<sup>201</sup> The EC adds that the specific commitments bound in its GATS Schedule are still valid.

6.84 Ecuador contends that the scope of the EC's specific commitments under the GATS, which were bound in the EC GATS Schedule, cannot be affected by the subsequent modification of the Central Product Classification by the UN. Consequently, it is still the Provisional CPC that matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services".

6.85 We note that the specific commitments bound by the European Communities in its GATS Schedule with respect to the service sectors<sup>202</sup> or sub-sectors at issue in the original case were categorized according to the Services Sectoral Classification List which refers to the more detailed Provisional CPC.

6.86 We also recall that in *Bananas III*, the parties disagreed as to whether the panel's terms of reference comprised the narrower sub-sector of "wholesale trade services", or encompassed the broader sector of "distributive trade services" as described in a headnote to section 6 of the provisional CPC. The panel and Appellate Body findings in *Bananas III* were limited to service supply in the sub-sector of "wholesale trade services". The relevant definition of the Provisional CPC for "*wholesale trade services*" reads:

"Specialized wholesale services of fresh, dried, frozen or canned fruits and vegetables (Goods classified in CPC 012, 013, 213, 215)"

The description for "*distributive trade services*", in turn, provides:

"Distributive trade services consisting in selling merchandise to retailers, to industrial, commercial, institutional or other professional business users, or to other wholesalers, or acting as

<sup>201</sup> The European Communities notes that, according to the "Correspondence Tables between the CPC Version 1.0 and Provisional CPC", item 62221 "Wholesale trade services of fruit and vegetables" corresponds in the CPC Version 1.0 to 61121 "Wholesale trade services, except on a fee and contract basis, fruit and vegetables."

<sup>202</sup> Article XXVIII (e) of GATS: "sector' of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;"

agent or broker (*wholesaling services*) or selling merchandise for personal or household consumption including services incidental to the sale of the goods (*retailing services*). The principal services rendered by wholesalers and retailers may be characterized as reselling merchandise, accompanied by a variety of related, subordinated services, such as: maintaining inventories of goods, physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution in smaller lots; delivery services; refrigeration services; sales promotion services rendered by wholesalers ..."

6.87 We recall that with respect to both wholesale and distributive trade services, the European Communities had bound specific commitments on liberalization of market access and national treatment without specific conditions or limitations, and without scheduling any MFN exemptions. The original panel limited its findings to the narrower sub-sector of "wholesale trade services".

6.88 It is not entirely clear to us in which way, in the EC's view, the new categorization of service sectors according to the Revised CPC should affect the classification of service sectors on the basis of which the European Communities bound its specific commitments on market access and national treatment in its GATS Schedule. Therefore, it is not clear how the principle of the mutually exclusive categorization of service sectors could affect the reach of the EC's "wholesale trade services" commitments to those service transactions that do not fall into any other category of the Revised CPC. In any event, we do not see how the revision of the CPC could retroactively change the specific commitments listed and bound in the EC GATS Schedule on the basis of the Provisional CPC. Indeed, at the hearing, the EC stated that such a change in the EC's specific commitments bound in its GATS Schedule could only be made consistently with the requirements of Article XXI of GATS on the "Modification of Schedules".

6.89 In our view, what matters for purposes of interpreting the scope of the EC's commitments on "wholesale trade services" is that, according to the Provisional CPC descriptions quoted above, the *principal* services rendered by *wholesalers* relate to reselling merchandise, accompanied by a variety of related, *subordinated* services, such as, maintaining inventories of goods; physically assembling, sorting and grading goods in large lots; breaking bulk and redistribution to smaller lots; delivery services; refrigeration services; sales promotion services.

**6.90 In light of these considerations, we find that it is this range of principal and subordinated "wholesale trade services" with respect to which the European Communities has committed itself to accord no less favourable treatment in the meaning of Articles II and XVII of GATS to services and service suppliers of other Members.**

## 2. *Licence Allocation Procedures*

6.91 Ecuador claims that the revised EC licensing regime is inconsistent with Articles II and XVII of GATS because it perpetuates or carries on the

discriminatory elements of the previous licensing system in that licences are allocated to those who used licences to import, and paid customs duties on, bananas during the 1994-1996 period. Moreover, it claims that the new, so-called "single pot" licensing allocation rules, under which, *inter alia*, past importers of ACP bananas may apply for import licences to import Ecuadorian and other non-ACP bananas on the basis of reference quantities derived from their ACP banana imports, exacerbates the discriminatory elements of the past regime.<sup>203</sup>

6.92 The EC contends that it has abolished the previous licensing system including operator categories, activity functions, export certificates and hurricane licences. The new criterion for the allocation of licences to "traditional operators", i.e. proof of payment of customs duties, eliminates any "carry-on effects" from the previous to the revised licence allocation system and ensures that "true and real" importers in the past obtain licence entitlements for the future.

(a) Articles II and XVII of GATS

6.93 Before addressing Ecuador's claims, we recall the relevant GATS provisions. The most-favoured-nation clause of GATS is Article II:1, which provides:

"With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."<sup>204</sup>

Article XVII of GATS, its national treatment clause, provides:

"1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable* than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either *formally identical treatment* or *formally different treatment* to that it accords to its own like services and service suppliers.

<sup>203</sup> Ecuador refers in this regard to the reservation of 30 per cent of the licences required for in-quota imports of third-country and non-traditional ACP bananas to Category B operators, the reservation of 28 per cent of such import licences to ripeners under the activity function rules, and the allocation of hurricane licences exclusively to certain Category B operators.

<sup>204</sup> We note that MFN exemptions as foreseen in Article II:2 of GATS and the Annex on Article II Exemptions were not relevant in the original dispute.

3. Formally identical or formally different treatment shall be considered to be less favourable if it *modifies the conditions of competition* in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (emphasis added, footnote omitted).

6.94 The adjudication of claims under the national treatment and MFN clauses usually presupposes a two-step examination. For purposes of Article XVII, it is necessary to examine (i) whether the domestic and foreign services or service suppliers at issue are "like" and (ii) whether services or service suppliers of the complainant's origin are treated less favourably than those of domestic origin. For purposes of Article II, it is necessary to examine (i) whether services or service suppliers originating in different foreign countries are "like" and (ii) whether services or service suppliers of the complainant's origin are subject to less favourable treatment than those of other Members' origin.

6.95 In this context, we recall that issues such as the origin of services and service suppliers and the "likeness" of services or service suppliers of the complainant's origin and of those of EC or other third-country origin, as the case may be, were resolved in the original case and need not be addressed by this reconvened Panel. We also note that the panel and the Appellate Body - albeit on different legal grounds - found that the national treatment obligation as well as the MFN treatment obligation under the GATS prohibit *de iure* and *de facto* discrimination. For purposes of resolving the claims before us, we need, therefore, not discuss whether the notion of *de facto* discrimination under Article II is similar to or narrower than the notion of *de facto* discrimination under Article XVII, and in particular under paragraphs 2 and 3 of that Article. We only need to recall that the original panel, but also the Appellate Body found that Article II of GATS, too, covers *de facto* discrimination: "... For these reasons we conclude that 'treatment no less favourable' in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de iure*, discrimination ...".<sup>205</sup> Therefore, we consider it appropriate to examine jointly the question whether or not the revised licence allocation procedures accord less favourable treatment in the meanings of Articles II and XVII of GATS to services or service suppliers of Ecuador.

(b) The Findings in *Bananas III* on Articles II and XVII of GATS

6.96 We recall our findings with respect to particular aspects of the licence allocation procedures which applied under the previous regime to third-country and non-traditional ACP imports within the tariff quota, to the extent they are relevant to the claims before this Panel, i.e.:

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<sup>205</sup> Appellate Body report on *Bananas III*, paragraph 234.

"... that the allocation to Category B operators of 30 per cent of the licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Articles II and XVII of GATS."<sup>206</sup>

"... that the allocation to ripeners of 28 per cent of Category A and B licences allowing the importation of third-country and non-traditional ACP bananas at in-quota tariff rates created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII of GATS."<sup>207</sup>

"... that the allocation of hurricane licences exclusively to operators who included or directly represented EC (or ACP) producers created less favourable conditions of competition for like service suppliers of Complainants' origin and was therefore inconsistent with the requirements of Article XVII (or II) of GATS."<sup>208</sup>

These findings were upheld by the Appellate Body.

### (c) The Revised EC Licensing Regime

6.97 Under the revised EC licensing regime, licences are allocated to importers on the basis of their reference quantities. These reference quantities are allocated to "traditional operators" (defined below) to the extent that they are able to show that they actually imported bananas in the 1994-1996 period. More particularly, Article 3 of Regulation 2362/98 provides:

"[T]raditional operators' shall mean economic agents established in the European Community during the period for determining their reference quantity ... who have actually imported a minimum quantity of third-country and/or ACP-country bananas on their own account for subsequent marketing in the Community during a set reference period. The minimum quantity ... shall be 100 tonnes imported in any one year of the reference period ... [or] ... 20 tonnes where the imports entirely consist of bananas with a length of 10 centimetres or less."

6.98 Article 5 of Regulation 2362/98 provides:

"3. Actual import shall be attested by both of the following:

<sup>206</sup> Panel reports on *Bananas III*, paragraphs 7.341 and 7.353.

<sup>207</sup> Panel reports on *Bananas III*, paragraph 7.368.

<sup>208</sup> Panel reports on *Bananas III*, paragraph 7.393 (and paragraph 7.397).

(a) by presenting *copies of the import licences used* either by the *holder* or, in the case of a transfer ... duly endorsed by the competent authorities, by the *transferee*, in order to release the relevant quantities for free circulation; and

(b) by presenting *proof of payment of the customs duties* due on the day on which customs import formalities were completed. The payment shall be made either *direct* to the competent authorities or via a *customs agent* or *representative*.

Operators furnishing *proof of payment of customs duties*, either direct to the competent authorities or via a customs agent or representative, for the release into free circulation of a given quantity of *bananas without being the holder or transferee holder of the relevant import licence ... shall be deemed to have actually imported the said quantity provided that they have been registered in a Member State under Regulation No. 1442/93* and/or that they fulfil the requirements of *this Regulation* for registration as a *traditional operator*. Customs agents or representatives may not call for the application of this subparagraph." (emphasis added).

6.99 Article 31 of Regulation 2362/98 repeals Regulations 1442/93 and 478/95, which were the basis of the previous licensing regime. We note, however, that according to Article 5(3) of Regulation 2362/98, operators that have been registered under Regulation 1442/93 may acquire the status of a "traditional operator" under the revised licensing procedures.

(d) The Requirements of Articles XVII and II of GATS

6.100 In analyzing the EC's revised licensing regime under Article XVII of GATS, we recall that we noted in our decision in *Bananas III* that:

"In order to establish a reach of the national treatment obligation of Article XVII, three elements need to be demonstrated: (i) the EC has undertaken a commitment in a relevant sector and mode of supply; (ii) the EC has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and (iii) the measure accords to service suppliers of any other Member treatment less favourable than that it accords to the EC's own like service suppliers."<sup>209</sup>

As to the first two issues, we found that they had been demonstrated in *Bananas III* and they are not at issue here.

6.101 In respect of the third issue, we noted that there were four preliminary issues to be considered. Those were "(i) the definition of commercial presence

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<sup>209</sup> Panel reports on *Bananas III*, paragraph 7.314.

and service suppliers; (ii) whether operators in the meaning of the EC banana regulations are service suppliers under GATS, (iii) the definition of services covered by EC commitments; and (iv) to what extent services and service suppliers of different origin are like".<sup>210</sup> These are not at issue in the present case, except for point (iii), which we have dealt with above.

6.102 For an analysis of the EC revised licensing regime under Article II of GATS we also recall our decision in *Bananas III*, where we stated:

"In addressing the claim under Article II, we note that two elements need to be demonstrated in order to establish a violation of the GATS MFN clause: (i) the EC has adopted or applied a measure covered by GATS; (ii) the EC's measure accords to service or service suppliers of Complainants' origin treatment less favourable than that it accords to the like services or service suppliers of any other country."<sup>211</sup>

6.103 As to the first element, we have already determined in the original dispute that the EC import licensing procedures for bananas are measures affecting trade in services.<sup>212</sup> We also recall our discussion on the absence of MFN exemptions in the EC list of Article II exemptions which would be relevant to the claims before us.<sup>213</sup>

6.104 We now have to ascertain, for purposes of Article XVII, whether, by applying its revised licensing regime, the European Communities accords less favourable treatment to Ecuadorian services and service suppliers than it accords to its own like service and service suppliers. For purposes of Article II, we also have to ascertain whether, under the revised regime, less favourable treatment is being accorded to Ecuadorian services and service suppliers than to services and service suppliers of other Members. In this context, we recall our consideration above (see paragraph 6.95) that we deem it appropriate to examine jointly whether the EC's revised regime accords less favourable treatment in the meanings of both Article II and XVII to services or service suppliers of Ecuador. The crucial issue in respect of these claims against the EC's revised licensing procedures is whether the allocation of licences based on the criterion of "*actual payment*" of customs duties by "*traditional operators*" under the revised regime prolongs the allocation of licences on the basis of those aspects of the previous licensing system which were found to be inconsistent with the GATS in *Bananas III*.

6.105 In framing this issue for consideration, we do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that "... the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be

<sup>210</sup> Panel reports on *Bananas III*, paragraph 7.317.

<sup>211</sup> Panel reports on *Bananas III*, paragraph 7.344.

<sup>212</sup> Panel reports on *Bananas III*, paragraph 7.277 *et seq.*

<sup>213</sup> Panel reports on *Bananas III*, paragraph 7.298.

inconsistent with the provisions of any of the covered agreements." This principle requires compliance *ex nunc* as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB. If we were to rule that the licence allocation to service suppliers of third-country origin were to be "corrected" for the years 1994 to 1996, we would create a retroactive effect of remedies *ex tunc*. However, in our view, what the EC is required to ensure is to terminate discriminatory patterns of licence allocation with *prospective* effect as of the beginning of the year 1999.

6.106 At the outset of our analysis, we note that Ecuador does not claim that the new EC regime is *de iure* discriminatory. The issue, as in *Bananas III*, is whether it is *de facto* discriminatory in a way that is inconsistent with Articles XVII and II of GATS. In this regard, we recall that, pursuant to Article XVII:2, a Member may ensure no less favourable treatment for foreign services or service suppliers by according formally identical treatment or formally different treatment to that it accords to its own like service suppliers. Moreover, according to Article XVII:3, formally identical treatment may, nevertheless be considered to be less favourable treatment if it adversely modifies conditions of competition for services or service suppliers of other Members. We also recall the panel and Appellate Body findings in the original dispute that the MFN clause of GATS includes prohibitions of both *de iure* and *de facto* discrimination.

(e) The Parties' Arguments

(i) Ecuador

6.107 Ecuador argues that the *de facto* discrimination in the EC's previous licensing regime persists because of the EC's choice of criteria for allocating licences. By basing licence allocation on the "actual importer" criterion, the European Communities ensures that the predominantly EC/ACP services suppliers to whom Category B, ripener and hurricane licences were issued in the previous regime will retain rights to most of those licences in the new regime. Overall, Ecuador argues that under the new regime, non-EC/ACP operators can be expected to receive only 44.6 per cent of the licences they should receive.<sup>214</sup>

6.108 Ecuador submits statistics on exports and licence allocations to individual companies under the previous and under the revised regime. In essence, these statistics show that Noboa, the principal Ecuadorian service supplier, is able to

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<sup>214</sup> In calculating estimates for third-country service suppliers in their entirety, Ecuador submits that under the previous regime, Category A primary importers obtained 37.905 per cent of the reference quantities under the previous regime (i.e. 57 per cent of 66.5 per cent). With respect to customs clearers, Ecuador assumes that two-thirds of the customs clearers were of non-ACP third-country origin, whereas one-third was of EC/ACP origin. Accordingly, 6.65 per cent of customs clearance reference quantities (i.e. 10 per cent of 66.5 per cent) went to third-country operators. This results in an overall licence entitlement of 44.6 per cent of the quantities physically imported for non-ACP third-country operators under the previous regime.

claim reference quantities for licence allocations in 1999 of approximately only half of its actual exports to the EC in the past.

6.109 Ecuador's position is that these statistics demonstrate that its wholesale service suppliers face less favourable conditions of competition than EC/ACP suppliers because they cannot obtain licences to import their bananas on terms as favourable as those EC/ACP suppliers who continue to benefit under the revised regime from the carry-on of GATS-inconsistent licence allocation criteria under the previous regime. In particular, we note in this regard Ecuador's view that this is to be expected because Ecuadorian service suppliers were forced to enter into unfavourable contractual arrangements with initial licence holders under the previous regime. Under many of those arrangements, according to Ecuador, original licence holders, whether or not they physically imported, may prove payment of customs duties which makes them "actual importers" for purposes of licence allocations under the revised regime. Such contractual arrangements continue under the revised regime. Therefore, Ecuador alleges that its suppliers of wholesale services are subject to less favourable treatment than suppliers of such services of EC/ACP origin.

#### (ii) European Communities

6.110 The European Communities argues at the outset that the facts on which the original panel had based its conclusions had so changed by 1994-1996 that the panel would not have made the same findings had it disposed of the 1994-1996 facts.

6.111 With respect to the major third-country operators (i.e. Chiquita, Dole, Del Monte and Noboa), the European Communities contends that the allocations of licences for the importation of third-country and non-traditional ACP bananas to these operators increased by 35 per cent between 1994 under the previous regime and 1999 under the revised regime.<sup>215</sup> According to the European Communities, this occurred because of two reasons: investments and licence transfers.

6.112 First, there were investments by third-country operators in EC/ACP operators. The European Communities mention investments in Compagnie Fruitière and CDB/Durand by Dole and Chiquita, respectively, and concludes that reference quantities based on EC/ACP operations for major third-country operators doubled between 1993 and 1996.<sup>216</sup> The European Communities further point out that the original panel found that there was no *de iure* discrimination, based on an operator's origin, with respect to the access to the activity of ripening which entitled operators to licence allocations and thus to reap quota rents under the previous regime. However, the original panel had

<sup>215</sup> The European Communities also submits that licence allocations to these major third-country operators were as follows: 1994: 598,857; 1995: 651,266; 1996: 726,782; changes: 1994-1995: 8.8 per cent; 1995-1996: 11.6 per cent; 1994-1996: 21.4 per cent.

<sup>216</sup> EC figures: 1989: 21,305 (reference quantities in tonnes); 1990: 30,514; 1991: 45,532; 1992: 72,592; 1993: 132,614; 1994: 267,511; 1995: 276, 804; 1996: 272,822.

found that *de facto* less favourable conditions of competition existed for third-country suppliers of wholesale services because ripeners in the European Communities were predominantly EC owned or controlled<sup>217</sup> and thus licence allocations and quota rents accrued largely to service suppliers of EC origin. Before this Panel, the European Communities emphasizes that, based on 1994 to 1996 statistics, three out of the four biggest ripeners are now non-EC owned and that these alone represent around 20 per cent of the total ripening capacity of the European Communities.

6.113 The second reason why licence allocations to third-country operators have increased is that there have been licence transfers under conditions that allow these operators to claim reference quantities under the revised regime. In the EC's view, this could explain why there has been a decline in the number of operators receiving licences. According to the European Communities, under the previous regime 1568 Category A and B operators were registered, whereas under the revised regime the number of traditional operators has decreased to 629 operators. For the European Communities, this shows that the mainly EC-owned operators that received licences in the past without being engaged in actual importation were *ipso facto* excluded from the allocation of licences by the introduction of the revised regime, i.e. mainly ripeners and EC producer organizations.

6.114 In response to Ecuador's argument that the new regime carries forward the old regime's allocation of licences in that the non-EC operators receive an amount of only 44.6 per cent of the licences they should, the European Communities argues that the correct "base" figure is 50.35 per cent if certain adjustments are made.<sup>218</sup> The European Communities then increases the "base" figure by 35 per cent (see paragraph 6.111) to conclude that non-EC operators

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<sup>217</sup> In the original dispute, the panel drew this conclusion on the basis that the average estimated volume ripened by EC-owned ripeners was, according to the complainants, 83.7 per cent of the overall ripening volume in the European Communities. The European Communities stated that between 20 and 26 per cent of the ripening capacity in the European Communities were foreign-owned, i.e. mainly by Chiquita, Dole and Del Monte. Panel reports on *Bananas III*, footnote 514.

<sup>218</sup> The EC accepts Ecuador's figures for primary importation and customs clearance, but recalculates Ecuador's figures concerning the distribution of reference quantities for ripening activities as follows. For purposes of breaking down ripening activities by third-country and EC/ACP origin, the ripening activities of both Category A and B operators were subdivided using a ratio of 78.5 per cent for EC/ACP operators and 21.5 per cent for non-ACP third-country operators. This results for Category A operators in 4 per cent for third-country operators and in 14.6 per cent for EC/ACP operators of the 18.6 per cent which represent the licence allocation for Category A ripening activities (i.e. 28 per cent of 66.5 per cent). For Category B operators this results in 1.8 per cent for third-country operators and in 6.6 per cent for EC/ACP operators of the 8.4 per cent which represent the licence allocation for Category B ripening activities (i.e. 28 per cent of 30 per cent). Consequently, in calculating the total share of reference quantities for non-ACP third-country wholesalers, the European Communities adds 4 per cent and 1.8 per cent for ripening activities effectuated by Category A and B operators of non-ACP third-country origin to Ecuador's estimate of 37.9 and 6.65 per cent so that the overall estimate for the share of licence entitlements of non-ACP third-country operators increases from Ecuador's estimate of 44.6 per cent to the EC's estimate of 50.35 per cent.

are now getting some 68 per cent of licence allocations. Since 8 per cent of allocations go to newcomers, only 24 per cent go to EC/ACP service suppliers. The European Communities suggests that the licences have been legitimately allocated to EC/ACP service suppliers under the revised regime since these operators actually imported Latin American bananas under the previous regime.

6.115 The European Communities also makes three more general arguments. In the first instance, the European Communities insists that GATS does not guarantee any particular market shares over time, i.e. there are no provisions for grandfather rights. Second, the European Communities argues that it has a right to choose "actual imports" as a basis for licence allocation. In particular, the European Communities refers to Article 3.5(j) of the Import Licensing Agreement,<sup>219</sup> pursuant to which consideration should be given to "full utilization of licenses" as a criterion for future allocations. In the EC's view, the only objective and indisputable way of proving the "effective" importation is the payment of duties, either directly or through a customs agent on a fee or contract basis, i.e. the system chosen by Regulation 2362/98. Third, the European Communities argues that the fact that Noboa exports to the European Communities more than it imports to the European Communities means that it is primarily an exporter and not an importer and that the two businesses are different.

#### (f) The Panel's Analysis of the Claim

6.116 In analyzing whether the new EC regime is *de facto* discriminatory, we will first consider the three general EC arguments set out in the preceding paragraph and thereafter evaluate the evidence presented by the parties on actual licence allocations and consider its relevance to Ecuador's claim. We will then consider the regime's structure and the extent to which it is based on or related to the previous regime found to be inconsistent with Articles XVII and II in *Bananas III*.

#### (i) General EC Arguments

6.117 As to the EC argument that there are no grandfather rights in the GATS or guarantees of market shares, we agree, but note that this does not rule out the possibility that *de facto* less favourable conditions of competition may be found and prolonged in violation of GATS rules.

6.118 As to the EC's claimed right to choose "actual imports" as a basis for licence allocation, here again, we agree that the European Communities is not precluded from basing licence allocation on past usage. However, we note that the Import Licensing Agreement's provision that "consideration should be given"

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<sup>219</sup> Article 3.5(j) of the Agreement on Import Licensing Procedures provides that: "... consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period".

to full utilization of licences does not rule out the possibility that the choice of how to assure that may be limited where *de facto* discrimination has been found in the past, and where reliance on licence usage may result in a prolongation of the results of a violation of GATS rules. The availability of the past performance allocation method, which is an option and not required by the Import Licensing Agreement, would not justify such a violation. In other words, even if Members are normally free to base licence allocation on past usage, that does not mean they are free to do so without regard to their GATS obligations. Moreover, we note that proof of payment of customs duties, directly or through a representative or customs agent, does not necessarily prove licence usage by a particular operator.

6.119 As to the EC's argument that Noboa is principally an exporter and not an importer, we note that Noboa is an Ecuadorian service supplier commercially present in the European Communities that provides wholesale services in respect of bananas. Therefore, it is irrelevant for purposes of this case whether Noboa is primarily an exporter or importer. In our view, what matters for purposes of Articles XVII and II, is whether Noboa is adversely affected in its conditions of competition as a wholesale service supplier under the revised regime because import licences are allocated based on the 1994-1996 reference period when the GATS-inconsistent allocation criteria were in force.

(ii) Licence Allocations under the Revised Regime

6.120 In examining the evidence on licence allocations under the revised regime, we note that we based our original findings on the facts available at the time. Our findings explicitly foresaw that one of the effects of the previous regime would be to encourage service suppliers of non EC/ACP origin to invest in EC/ACP banana production and marketing and to acquire licences from EC/ACP service suppliers. Although these effects were anticipated, our findings were based on the fact that the previous EC regime modified the conditions of competition in violation of Articles XVII and II.<sup>220</sup>

6.121 As to Noboa, we note that the parties generally agree on the evidence concerning the level of Noboa's exports and licence allocations. The European Communities challenges Ecuador's arguments that its service suppliers had to enter into unfavourable contractual arrangements. It notes, for instance, that an example of such a contract cited by Ecuador was a proposed contract, not an actual one. We are not generally persuaded by this EC argument, however, as there is evidence of such arrangements even if the extent of their use is unclear. The licence allocation data for 1999 support Ecuador's claim that in general Noboa did not obtain licences for imports in a manner that would allow it to claim reference quantities under the revised regime for its export interest.

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<sup>220</sup> Panel reports on *Bananas III*, paragraphs 7.341, 7.353, 7.368, 7.393, 7.397.

6.122 As to the evidence presented by the European Communities concerning the increase in licence allocations to non-EC suppliers as a result of their investments in ACP operators, we note that there is evidence from third parties that raises some questions as to whether at least one of these investments was sufficient to make these firms non-EC controlled for purposes of GATS.<sup>221</sup> According to Cameroon and Côte d'Ivoire, 60 per cent of Compagnie Fruitière, the principal exporter in each country, remains in the control of a French family. In this regard, we recall that, according to Article XXVIII(n) of GATS, a service supplier in the form of a legal person has the origin of a WTO Member if it is owned by more than 50 per cent by natural or juridical persons of that Member, or if it is controlled by those persons in the sense that they have the power to name the majority of directors. Moreover, in respect of investments in ripeners and licence transfers, we note that the EC's evidence was not comprehensive, which means that we are not in a position to ascertain the extent to which these factors have led to a change in licence allocations compared to the previous regime.

6.123 As to the EC argument that there were 1568 Category A and B operators registered under the previous regime, but that there are only 629 traditional operators under the revised regime, we note that the European Communities did not include information on ownership or control of these remaining traditional operators. Therefore, we are not in a position to ascertain whether the decline in the number of registered operators had an impact on the competitive conditions of non-ACP third-country service suppliers.

6.124 Even if the precise extent is uncertain, however, it is clear to us that an increase in licence allocations to non-EC/ACP operators has occurred. Indeed, such an increase would be in line with our considerations in the original dispute, that increases in licence allocations to non-ACP third-country suppliers during the period when the previous regime was in force could be the result of the "cross-subsidization" effect that induced such service suppliers who were previously engaged in the non-ACP third-country market segment into entering the EC/ACP market segment, or to engage in the ripening and customs clearance activities in order to qualify for licence allocations in the future.

6.125 In our view, it is not particularly relevant for purposes of this case to what extent precisely licence allocations to Noboa or other third-country suppliers of wholesale services increased under the revised regime in comparison to the previous low level. An increase only indicates that the carry-on effect of the revised regime is less than 100 per cent. The evidence submitted by Ecuador shows that in Noboa's attempts to supply wholesale trade services in the European Communities, in respect of part of its business it must purchase or

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<sup>221</sup> According to Article XXVIII(n) of GATS, a juridical person is:

i) 'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.

lease licences from or otherwise enter into contractual arrangements with those who have access to licences but who do not wish to distribute bananas in the European Communities under the revised regime. Given the structure of the previous regime, those licence holders would be in the group of service suppliers in favour of which the previous EC regime altered competitive conditions. Thus, Noboa and other third-country service suppliers are faced with a competitive disadvantage that is not equally inflicted on service suppliers of EC/ACP origin. While we cannot ascertain the precise extent of this carry-on effect, it appears to be not unsubstantial, particularly in respect of Noboa. Therefore, an increase, even if it is within the order of the EC estimates, may not be considered as evidence that conditions of competition for non-ACP third-country suppliers are not less favourable than for like EC/ACP suppliers under the revised regime.

6.126 Therefore, we conclude that the ACP/EC operators who continue to get licences on the basis of the revised regime, remain in a competitively advantaged position compared to non-EC operators and that advantage comes from the "carry on" effects of the GATS-inconsistent aspects of the previous regime. Even if such ACP/EC operators do deal in Latin American bananas and do not simply sell or lease their licences, they are able to compete on more favourable conditions in the market for distribution of bananas than their non-EC competitors because of the licence allocations that are derived from the previous discriminatory regime. In this way, the revised regime carries forward the *de facto* discrimination of the previous regime.

### (iii) The Structure of the Revised Regime

6.127 We also examine the structure of the revised regime because the Appellate Body has noted in the past, in *Japan - Alcoholic Beverages*<sup>222</sup>, that a measure's "protective application can most often be discerned from the design, the architecture and the revealing structure of a measure". Although the dispute on *Japan - Alcoholic Beverages* concerned claims under the GATT, we believe that this approach may also give some guidance in analyzing whether there is *de facto* discrimination under the GATS.

6.128 In our examination of the structure of Regulation 2362/98, we start from the proposition that if, in its new licensing regime, the European Communities had simply provided that licences would be issued to those to whom licences had been issued in the 1994-1996 period when those aspects of the previous licence allocation procedures which were found to be WTO-inconsistent in the original dispute by the panel and the Appellate Body, were in force, we would find that such a revised regime did not remove the GATS inconsistencies of the old regime, even if technically different rules for licence allocation had been implemented. This would be so because the less favourable conditions of competition for Ecuadorian (and other) service suppliers would continue to exist.

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<sup>222</sup> Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, DSR 1996:I, 97, at 120.

The revised regime is not, however, based on license issuance during the 1994-1996 period, but rather on licence usage and payment of customs duties during that period. According to Article 4 of Regulation 2362/98, the reference quantities for 1999 of "traditional operators" under the revised regime are calculated on the basis of the average quantity of bananas actually imported during the 1994-1996 period.

6.129 The choice of the years from 1994 to 1996 as the reference period is explained in Recital 3 of Regulation 2362/98 as follows:

"[W]hereas, for the purpose of implementing the new arrangements in 1999, it is advisable, in the light of *available knowledge on the de facto patterns of importation*, to determine the rights of traditional operators in accordance with their actual imports during the three-year period 1994 - 1996". (emphasis added).

In this context, we also note that the Commission Working Document "Determination of Reference Quantities from 1995 Onwards"<sup>223</sup> acknowledges that licence allocation on the basis of the "licence usage method" would "maintain the same pattern of licence allocation between different types of operators as is seen at present" and "fossilize licence allocation in its current form. Traders could not obtain more quota by expanding their business; the only way to do so would be by buying licences from another operator, or by taking over another company".<sup>224</sup>

6.130 We acknowledge, however, that where Ecuadorian service suppliers entered into contractual arrangements with initial licence holders under conditions where they are able to present proof of actual payment of customs duties and of licence usage, there is no carry-on effect. However, in cases where the contractual arrangements between initial licence holders and Ecuadorian service suppliers do not allow them to prove actual payment of customs duties and licence usage during the 1994-1996 reference period (e.g. licence buy-back arrangements or licence "pooling"), they cannot claim reference quantities as "traditional operators" for licence allocations from 1999 onwards.

6.131 In the latter case, the revised licensing regime facilitates the continuance of past patterns of licence allocation based on WTO-inconsistent elements of the previous allocation. In particular e.g. where former Category B operators and/or ripeners are able to prove licence usage and payment of customs duties for imports made with such licences during the 1994-1996 period, such operators are

<sup>223</sup> Exhibit 15 to Ecuador's First Submission of the panel in the original dispute of 9 July 1996, referred to again in Ecuador's First Submission to the reconvened Panel of 2 February 1999.

<sup>224</sup> Commission Working Document "Determination of Reference Quantities from 1995 Onwards" of 6 October 1993". The document further notes "... *Obviously the licence usage method can only be used for the years when the common market organization was in place*. Thus if it is decided to adopt this method there would be three years (1995-97) when both methods [i.e. licence usage and operator categories/activity functions] would have to be applied." (emphasis added).

able to claim reference quantities for 1999 regardless of whether they imported in fact.

6.132 In conclusion of our examination of the structure of the revised regime, we note that licence allocations under the revised regime are based on licence usage (and payment of customs duties), which according to the cited Commission Document is likely to "fossilize" or "maintain the same pattern of" past licence allocations. We further note that the base period (1994-1996) is one in which the rules for licence allocation had been in certain aspects found to be WTO-inconsistent in *Bananas III*. On its face, the choice of the 1994-1996 reference period in combination with the licence usage/actual tariff payment criteria would seem likely to continue at least in part the less favourable conditions of competition for foreign service suppliers found under the previous licensing regime. Consequently, in our view, the EC's revised licence allocation system, which reflects licence usage during the 1994-1996 period, displays *de facto* discriminatory structure. While this is not in itself sufficient to find the new regime to be inconsistent with Articles XVII and II, it usefully informs our analysis.

#### (iv) Overall Evaluation

6.133 In light of all these considerations, we conclude that Ecuador has established a presumption<sup>225</sup> that the revised licence allocation system prolongs - at least in part - less favourable treatment in the meanings of Articles II and XVII for wholesale service suppliers of Ecuadorian origin. Ecuador has also shown that its service suppliers do not have opportunities to obtain access to import licences on terms equal to those enjoyed by service suppliers of EC/ACP origin under the revised regime and carried on from the previous regime. Accordingly, it was for the EC to adduce sufficient evidence to rebut this presumption. In light of our evaluation of the factual and legal arguments presented, we conclude that the European Communities has not succeeded in doing so. This result is consistent with our conclusion that the revised licence allocation system reflecting licence usage and payment of customs duties during the 1994-1996 period displays *de facto* discriminatory structure.

**6.134 Accordingly, we find that under the revised regime Ecuador's suppliers of wholesale services are accorded *de facto* less favourable treatment than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS.**

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<sup>225</sup> "... [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." Appellate Body report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, DSR 1997:I, 323, at 335.

## (g) The "Single Pot" Licence Allocation

6.135 Regulation 1637/98 introduced a so-called "single pot" licence allocation system under which reference quantities claimed under the tariff quota of 2,553,000 tonnes are pooled with those claimed under the quantity of 857,700 tonnes reserved for traditional ACP imports. Thus, under the revised regime, a traditional operator may use its reference quantities based on past imports of traditional ACP bananas to apply for licences to import third-country bananas and *vice versa*.

6.136 Ecuador alleges that this "single pot" solution for calculating reference quantities aggravates the carry-on *de facto* discrimination from the previous regime and further erodes the licence allocations to Ecuadorian service suppliers. Specifically, Ecuador submits that less than 60 per cent of licence applications by Noboa and its subsidiaries granted in the quarterly licence allocation procedures due to oversubscription and the application of reduction coefficients with respect to Ecuador's country allocation. In Ecuador's view, these results are due to the "single pot" licence allocation under the revised regime.

6.137 The European Communities contends that, in compliance with the DSB rulings, it has abolished the different licensing procedures of the previous regime for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. It has introduced a single licensing regime for banana imports from all sources of supply and has created a "single pot" or "pool" for purposes of calculating reference quantities under the revised regime. The European Communities emphasizes that there cannot be a protection of "grandfather" rights as to licence entitlements, especially not in the transition from the previous to the revised regime.

6.138 We note the results of the quarterly two-round licence allocation procedures for the first and the second quarter of 1999. Due to the oversubscription of available licence quantities during the first round of the licence allocation procedures for the first quarter of 1999<sup>226</sup>, reduction coefficients of 0.5793, 0.6740 and 0.7080 were applied to applications for licences for imports from Colombia, Costa Rica and *Ecuador*, respectively. While licence quantities of 77,536.711 tonnes and 41,473.846 tonnes for imports from Panama and "other" (i.e. non-substantial third-country and non-traditional ACP supplier countries) were transferred to the second round, these quantities were exhausted in the second round, when reduction coefficients of 0.9701 and 0.7198 were applied to applications for licences allowing imports from Panama and "other", respectively.<sup>227</sup> Licence quantities for 148,128.046 tonnes of traditional ACP imports were not applied for in the first round, and apparently also not exhausted in the second round. In the first round of the allocation procedure for the second quarter of 1999<sup>228</sup>, reduction coefficients of 0.5403,

<sup>226</sup> Regulation (EC) No. 2806/98 of 23 December 1998, O.J. L 349/32 of 24 December 1998.

<sup>227</sup> Regulation (EC) No. 102/99 of 15 January 1999, O.J. L 11/16 of 16 January 1999.

<sup>228</sup> Regulation (EC) No. 608/99 of 19 March 1999, O.J. L 75/18 of 20 March 1999.

0.6743 and 0.5934 were applied to applications for licences allowing imports from Colombia, Costa Rica and *Ecuador*, respectively. However, licence quantities for 120,626.234 tonnes and 7,934.461 tonnes of imports from Panama and from other third-country and non-traditional ACP sources, respectively, were transferred to the second round of the allocation procedure for the second quarter of 1999.

6.139 The parties agree that the so-called "single pot" solution is not *de iure* discriminatory. We agree also. The pooling of reference quantities claimed under the tariff quota of 2,553,000 tonnes with those under the quantity of 857,700 tonnes reserved for traditional ACP imports in a single licensing regime can be expected to intensify competition between the operators who apply for licences in the quarterly allocation procedures. Given that it is more profitable to market Latin American bananas than ACP bananas, it is evident that profit-maximizing operators have an incentive to apply in the two-round quarterly licence allocation procedures first for low-cost Latin American sources of supply. This obvious effect is confirmed by the fact that in the first two quarterly licence allocation procedures under the revised regime, available licences for most Latin American sources were oversubscribed in the first round (i.e. country-allocations for the substantial suppliers Ecuador, Colombia and Costa Rica), and the remaining licences for imports from Latin America (i.e. Panama and "other" non-substantial suppliers) were exhausted in the second round. However, licence applications for imports within the quantity of 857,700 tonnes reserved for traditional ACP suppliers were generally made in the second round and this quantity was not exhausted.

6.140 We next examine whether the alleged *de facto* discriminatory effects of pooling third-country and traditional ACP licences in a "single pot" derive from the fact that under the revised regime reference quantities are calculated based on the 1994-1996 period when those allocation criteria that were found to be GATS-inconsistent were in force. We recall that the previous regime provided for two separate sets of licensing procedures for traditional ACP imports, on the one hand, and for third-country and non-traditional ACP imports, on the other. Under the latter licensing system, Category B operators, based on reference quantities for marketing traditional ACP or EC bananas, were allocated 30 per cent of the licences required for the importation of third-country and non-traditional ACP bananas reserved for those B operators *in addition* to the right to continue importing traditional ACP bananas. Likewise, ripeners were allocated 28 per cent of the third-country import licences. Under the revised, single licensing regime, there is no comparable reservation of licence quantities for former Category B operators or for ripeners.

6.141 However, to the extent that former Category B operators and ripeners may prove licence usage and payment of customs duties with respect to imports carried out during the 1994-1996 reference period with licences obtained from the GATS-inconsistent quantities reserved for those operators under the previous regime, these operators are able to claim reference quantities under the revised regime for licence allocations from 1999 onwards. Therefore, former Category A service suppliers of Ecuadorian origin who have not benefited from licence

allocations based on GATS-inconsistent criteria under the previous regime enjoy *de facto* less favourable opportunities to obtain access to import licences under the revised regime than those EC/ACP service suppliers who, as former Category B operators or ripeners, may prove payment of customs duties and licence usage for licences obtained on the basis of GATS-inconsistent allocation rules.

6.142 We note that the so-called single pot solution does not in itself raise problems of WTO inconsistency. On the contrary, it would seem at least in theory to provide for equal conditions of competition between wholesale service suppliers, against a background of varying degrees of economic incentive to import bananas from varying sources. However, it may well be that, when a single pot solution relies on a skewed reference period (i.e. 1994-1996), combined with certain criteria for licence allocation (such as actual importer/payment of customs duties), the *de facto* less favourable conditions of competition for Ecuadorian service suppliers are aggravated through the carry-on effects of the previous regime.

### 3. *The Rules for "Newcomer" Licences*

6.143 Ecuador alleges that (i) the enlargement of the licence quantity reserved for "newcomers" from 3.5 per cent in the previous regime to 8 per cent in the revised regime (i.e. licences for up to 272,856 tonnes of imports) and (ii) the criteria for demonstrating competence in order to acquire "newcomer" status under the revised regime result in less favourable treatment for Ecuadorian wholesale service suppliers and thus are inconsistent with the EC's obligations under Article XVII of GATS.

6.144 The European Communities responds that the enlargement of the licence quantity reserved for "newcomers" is *de iure* and *de facto* non-discriminatory for foreign service suppliers. It indicates that EC licence allocation procedures for other EC products have set aside quantities as high as 20 per cent for "newcomers". As regards the criteria for demonstrating competence in order to acquire "newcomer" status, the European Communities argues that there is no distinction in Regulation 2362/98 between EC and non-EC service suppliers, on the one hand, and between non-EC service suppliers of different origins, on the other hand. It points out that importers of fruits and vegetables established in the European Communities are not necessarily EC-owned or EC-controlled service suppliers, nor does Regulation 2362/98 preclude companies newly established in the European Communities in, e.g. 1998, from applying as a "newcomer". The European Communities also submits that the figure of 400,000 Euro of declared customs value was chosen because it represented the size of a company which would have sufficient capacity to be viable in the sector. It adds that there are third country-owned companies which have qualified as "newcomers" under the revised regime.

6.145 We recall that Article 7 of Regulation 2362/98 provides:

"...'newcomers' shall mean economic agents established in the European Community who, at the time of registration:

(a) have been *engaged independently and on their own account in the commercial activity of importing fresh fruit and vegetables* falling within chapters 7 and 8, of the Tariff and Statistical Nomenclature and the Common Customs Tariff, or products under Chapter 9 thereof if they have also imported products falling within Chapters 7 and 8 *in one of the three years immediately preceding the year in respect of which registration is sought*; and

(b) by virtue of this activity, have undertaken imports to a *declared customs value of ECU 400 000 or more during the period referred to in point (a).*" (emphasis added).

6.146 We do not see how the enlargement of the licence quantity to 8 per cent of the tariff quotas and the traditional ACP quantities<sup>229</sup> in itself could create less favourable conditions of competition for service suppliers of third-country origin.

6.147 In respect of the criteria for acquiring "newcomer" status, we note that the parties agree that Article 7 of Regulation 2362/98 does not contain conditions which discriminate *de iure* against service suppliers on the basis of their foreign as opposed to EC origin. However, we note that potential "newcomers" must have a certain degree of ongoing relationship to the European Communities because they need to be established within the European Communities and they must have been engaged in the commercial activity of importing fruits or vegetables in one of the three years immediately preceding the year for which registration as "newcomer" is sought. More importantly, service suppliers of other Members may prove expertise with respect to the commercial activity of importing fresh fruit and vegetables only through imports carried out to the European Communities but not through the same type of commercial activity of trading in fruits or vegetables with other countries. If it is indeed the level of experience that this criterion is designed to ensure, in our view, experience with trade in fruit or vegetables in or to other countries should equally be deemed sufficient to ensure a requisite level of expertise. If it is the commercial viability of the enterprise in question that is at issue, we believe that it should also be possible to establish that viability on the basis of commercial activity outside the European Communities.

6.148 Thus, while any potential service supplier originating in third countries is not *de iure* precluded from acquiring "newcomer" status, in our view, the criteria for demonstrating the requisite expertise in order to qualify as an importer of bananas as "newcomer" create in their overall impact less favourable conditions of competition for service suppliers of Ecuador or other Members than for like service suppliers of EC origin. In this respect, we recall the Appellate Body's statement in *Japan - Alcoholic Beverages*<sup>230</sup> that a measure's "protective

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<sup>229</sup> Article 2.1(b) of Regulation 2362/98.

<sup>230</sup> Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, DSR 1996:I, 97, at 120.

application can most often be discerned from the design, the architecture and the revealing structure of a measure".

**6.149 In light of these considerations, we find that the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers *de facto* less favourable conditions of competition in the meaning of Article XVII than to like EC service suppliers.**

#### 4. *General Observations*

6.150 We wish to emphasize that our findings do not deprive any WTO Member of its right to choose WTO-consistent licence allocation methods based on, e.g. first-come, first-served, auctioning, or past trade performance. In principle, the WTO agreements leave Members a significant degree of discretion to choose the beneficiaries of licence allocations. We note that while, e.g. the Agreement on Import Licensing Procedures aims to ensure that licensing procedures do not constitute an additional restriction on trade in goods, the objectives of the GATS non-discrimination clauses are different. Articles XVII and II of GATS aim at ensuring that service suppliers of other Members are accorded conditions of competition no less favourable than those accorded to like service suppliers of national origin or of any other Member. However, the fact that the agreements under Annex 1A to the WTO Agreement and the GATS provide for different requirements, address different issues and pursue different objectives, does not imply that they are incompatible.

6.151 If a Member chooses an import regime which necessarily generates quota rents, such as a tariff quota, the requirement to ensure for service suppliers of other Members no less favourable treatment than for like service suppliers of national origin or of any other Member may have consequences on the choice of allocation criteria and the selection of licence beneficiaries under a licensing system that is based on past trade performance. However, we also recall that the obligation to accord no less favourable treatment under the GATS non-discrimination clauses requires a WTO Member to provide service suppliers of other Members with at least equal opportunities to compete with suppliers of national origin or of any other Member, regardless of the results which such opportunities might produce in terms of particular trade volumes or market shares.

6.152 The EC stresses that there cannot be a presumption of non-compliance with the requirements of Articles II and XVII of GATS if, statistically, the number of domestic importers or beneficiaries of licence allocations happened to be higher than the number of service suppliers of other Members who obtain licence allocations. In principle, we agree with that statement. If one of the WTO-consistent licence allocation methods is introduced in a market situation where service suppliers of national origin and those of other Members enjoy equal opportunities to benefit from licence allocations (and thus equal opportunities to reap quota rents generated by a WTO-consistent tariff quota), service suppliers of other Members presumably enjoy no less favourable

treatment. However, where in a pre-existing market situation, a licence allocation system is introduced (or maintained) which involves allocation criteria that accord more favourable opportunities for service suppliers of national origin or of certain other Members to benefit from licence allocations, competitive conditions are modified to the detriment of like service suppliers of other Members.

6.153 In the present case, the supply of wholesale services is affected by conditions of access to available import licences.<sup>231</sup> If less favourable opportunities to obtain access to licence allocations adversely affect the conditions of competition for service suppliers of another Member, ensuring no less favourable treatment requires equal opportunities to obtain access to licence allocations. As discussed in detail above, under the revised regime service suppliers of Ecuadorian origin continue to be subject to less favourable conditions of competition for a number of reasons. In light of these considerations, we found that the revised licence allocation procedures accord less favourable treatment for Ecuador's service suppliers than for like service suppliers of EC/ACP origin. Thus we consider that EC licence allocation procedures should allow service suppliers of other Members equal competitive opportunities to expand their wholesale business as like EC/ACP suppliers of those services.

#### *F. Suggestions on Implementation*

6.154 Ecuador requests this Panel to make specific suggestions to the European Communities on how it might implement our findings in this proceeding under Article 21.5 of the DSU. In this regard, we recall Article 19.1 of the DSU, which provides:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body *may suggest ways* in which the Member concerned *could implement* the recommendations." (Emphasis added, footnotes omitted.)

Panels have not often made suggestions pursuant to Article 19.1. While Members remain free to choose how they implement DSB recommendations and rulings, it seems appropriate, after one implementation attempt has proven to be at least partly unsuccessful, that an Article 21.5 panel make suggestions with a view toward promptly bringing the dispute to an end.

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<sup>231</sup> The Appellate Body notes that "obviously, a wholesaler must obtain the goods by some means in order to resell them. In this case, for example, it would be difficult to resell bananas in the European Communities if one could not buy them or import them in the first place." Appellate Body report on *Bananas III*, paragraph 226.

6.155 In light of our findings and conclusions with respect to Articles I and XIII of GATT, the requirements of the Lomé Convention and the coverage of the Lomé waiver, above, in our view, the European Communities has at least the following options for bringing its banana import regime into conformity with WTO rules.

6.156 First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.

6.157 Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.

6.158 Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports. In respect of such duty-free treatment, the European Communities could consider with the ACP States whether the Lomé Convention can be read to "require" such treatment within the meaning of the Lomé waiver. We recall that some important preferences found by the original panel and Appellate Body reports to be required by the Lomé Convention cannot be implemented consistently with WTO rules (the most important being the quantitative protections foreseen in Protocol 5). If such a view of the Lomé Convention is challenged, a waiver covering such duty-free treatment could be sought. The MFN tariff quota could also be combined with a tariff quota for ACP imports, whether traditional or not, provided an appropriate waiver of Article XIII is obtained. We note that waivers for duty-free treatment for developing country exports have been granted on several occasions by Members.<sup>232</sup> In this context, some action may be required soon in respect of the Lomé waiver since it expires on 29 February 2000.

6.159 We make no specific suggestions in respect of licence allocation, but note that licences would not be needed at all in a tariff-only regime.

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<sup>232</sup> See WT/L/104 (United States - Caribbean Basin Economic Recovery Act); WT/L/183 (United States - Former Trust Territory of the Pacific Islands); WT/L/184 (United States - Andean Trade Preferences Act); WT/L/185 (Canada - CARICAN).

G. *Summary*

6.160 In respect of Article XIII of GATT, we find that the 857,700 tonne limit on traditional ACP imports is a tariff quota and therefore Article XIII applies to it. We further find that the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime is inconsistent with paragraphs 1 and 2 of Article XIII of GATT. We also find that the country-specific allocations to Ecuador as well as to the other substantial suppliers are not consistent with the requirements of Article XIII:2.

6.161 In respect of Article I of GATT, we find that the level of 857,700 tonnes for duty-free traditional ACP imports can be considered to be required by the Lomé Convention because it appears to be based on pre-1991 best-ever exports and not on allowances for investments. However, we also find that it is not reasonable for the European Communities to conclude that Protocol 5 of the Lomé Convention requires a collective allocation for traditional ACP suppliers. Therefore, duty-free treatment of imports in excess of an individual ACP State's pre-1991 best-ever export volumes is not required by Protocol 5 of the Lomé Convention. Accordingly, absent any other applicable requirement of the Lomé Convention, those excess volumes are not covered by the Lomé waiver and the preferential tariff thereon is therefore inconsistent with Article I:1.

6.162 Also in respect of Article I of GATT, we find that in respect of preferences for non-traditional ACP imports, it is not unreasonable for the European Communities to conclude that (i) non-traditional ACP imports at zero tariff within the "other" category of the tariff quota and (ii) the tariff preference of 200 Euro per tonne for out-of-quota imports, are required by Article 168 of the Lomé Convention. Therefore, we find that the violations of Article I:1, as alleged by Ecuador in respect of preferences for non-traditional ACP imports, are covered by the Lomé waiver.

6.163 In respect of GATS, we define the range of wholesale trade services and find that (i) under the revised regime Ecuador's suppliers of wholesale services are accorded *de facto* less favourable treatment in respect of licence allocation than EC/ACP suppliers of those services in violation of Articles II and XVII of GATS and (ii) the criteria for acquiring "newcomer" status under the revised licensing procedures accord to Ecuador's service suppliers *de facto* less favourable conditions of competition than to like EC service suppliers in violation of Article XVII of GATS.

H. *Concluding Remark*

6.164 We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. As illustrated by our suggestions on implementation above, the WTO system is flexible enough to allow, through WTO-consistent trade and non-trade measures, appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.

## **VII. CONCLUSIONS**

7.1 The Panel concludes that for the reasons outlined in this Report aspects of the EC's import regime for bananas are inconsistent with the EC's obligations under Articles I:1 and XIII:1 and 2 of GATT 1994 and Articles II and XVII of GATS. We therefore conclude that there is nullification or impairment of the benefits accruing to Ecuador under the GATT 1994 and the GATS within the meaning of Article 3.8 of the DSU.

7.2 The Panel recommends that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under the GATT 1994 and the GATS.

## ANNEX 1

**"Pre-1991 best-ever" Imports of Bananas into  
the European Communities  
from Traditional ACP Supplying Countries**

<b>Country</b>	<b>Best year</b>	<b>Tonnes</b>
Belize	1989	26,580
Cameroon	1962	127,171
Cape Verde	1970	4,766
Côte d'Ivoire	1972	135,189
Dominica	1988	70,322
Grenada	1977	14,017
Jamaica	1965	201,000
St Lucia	1990	127,225
St Vincent & the Grenadines	1990	81,536
Madagascar	1976	5,986
Somalia	1965	121,537
Suriname	1975	37,610
<b>Total</b>		<b>952,939</b>

*Source:* 1962-75 UN Comtrade.  
1976-1990 Eurostat (Comext) and member States (Annex 1 Commission report on the functioning of the regime in the banana sector SEC(95) 1595 final).

*Note:* Table provided by the European Communities.

## ANNEX II

**Chart 1: Ecuador's Share of Total EC Banana Imports from all Sources**

Year	Per cent	Year	Per cent
1989	11.77	1994	16.12
1990	12.77	1995	19.95
1991	19.96	1996	21.09
1992	21.84	1997	23.63
1993	19.67		

Source: European Commission. (Chart submitted by Ecuador.)

**Chart 2: Ecuador's Share of World Exports**

Year	World exports	Ecuador exports	Ecuador exports as per cent of world exports (%)
1990	9,334,529	2,156,617	23.10
1991	10,380,249	2,662,750	25.65
1992	10,601,392	2,682,831	25.30
1993	11,127,156	2,563,223	23.03
1994	12,525,825	3,007,925	24.01
1995	13,422,197	3,665,182	27.30
1996	13,914,285	3,866,079	27.78
1997	13,990,158	4,462,099	31.89

Source: FAO Statistical Database (visited 29 January 1999) (<http://www.fao.org>). (Chart submitted by Ecuador.)

**Chart 3: Ecuador's Share of World Banana Exports other than to the EC**

Year	World exports minus EC imports	Ecuador's exports minus exports to the EC	Ecuador's proportion of world exports minus exports to the EC (%)
1990	6,037,561	1,804,417	29.29
1991	6,703,507	2,084,550	31.1
1992	6,399,039	2,008,331	31.4
1993	7,451,371	1,958,023	26.3
1994	8,988,806	1,458,525	27.4
1995	9,991,793	3,032,982	30.4
1996	10,323,065	3,201,479	31.0
1997	10,828,638	3,733,599	34.5

Source: FAO and EUROSTAT and Statistical Offices: Austria, Sweden, Finland. (Chart submitted by Ecuador.)

## ANNEX III

### Prior EC System: Operator Categories under the Tariff Quota for Third-Country/Non-Traditional ACP Imports

Operator category definition	Allocation of import licences allowing the importation of bananas at in-quota rates (%)	Basis of determining operator entitlement
<i>Category A:</i> operators that have marketed third-country and/or non-traditional ACP bananas.	66.5	Average quantities of third-country and/or non-traditional ACP bananas marketed in a three-year reference period.
<i>Category B:</i> operators that have marketed EC and/or traditional ACP bananas.	30	Average quantities of traditional ACP and/or EC bananas marketed in a three-year reference period.
<i>Category C:</i> operators who started marketing bananas other than EC and/or traditional ACP bananas in 1992 or thereafter ("newcomers").	3.5	Divided pro rata among applicants.

Source: Article 19, Council Regulation (EEC) 404/93. (Submitted by Ecuador.)

### Prior EC System: Activity Functions under the Tariff Quota for Third-Country/Non-Traditional ACP Imports

Activity functions	Definitions	Weighting coefficients (%)
Activity (a): "primary importer"	"the purchase of green third-country bananas and/or ACP bananas from the producers, or where applicable, the production, consignment and sale of such products in the Community"	57
Activity (b): "secondary importer or customs clearer"	"as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community"	15
Activity (c): "ripeners"	"as owners, the ripening of green bananas and their marketing within the Community"	28

Source: Article 3, Commission Regulation (EEC) 1442/93 of 10 June 1993. (Submitted by Ecuador.)

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## KOREA - TAXES ON ALCOHOLIC BEVERAGES

### Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Award of the Arbitrator  
Claus-Dieter Ehlermann  
WT/DS75/16  
WT/DS84/14

*Circulated to Members on 4 June 1999*

#### I. INTRODUCTION

1. On 17 February 1999, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report<sup>1</sup> and the Panel Report,<sup>2</sup> as upheld by the Appellate Body Report, in *Korea - Taxes on Alcoholic Beverages*. The measures in dispute in the underlying proceedings are contained in Korea's Liquor Tax Act and Education Tax Act.<sup>3</sup> The Panel concluded that "soju (diluted and distilled), whiskies, brandies, cognac, rum, gin, vodka, tequila, liqueurs and ad-mixtures are directly competitive or substitutable products" and the measures in dispute result in "dissimilar taxation ... applied in a manner so as to afford protection to domestic production," and, therefore, the measures are inconsistent with Article III:2, second sentence, of the GATT 1994.<sup>4</sup> This conclusion was upheld by the Appellate Body.<sup>5</sup> The Appellate Body and the Panel recommended that the DSB request Korea to bring the Liquor Tax Act and the Education Tax Act into conformity with its obligations under the GATT 1994.<sup>6</sup>

2. On 19 March 1999, Korea informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute. Korea indicated that it was impracticable to comply

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<sup>1</sup> Appellate Body Report, *Korea - Taxes on Alcoholic Beverages* ("*Korea - Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999.

<sup>2</sup> Panel Report, *Korea - Taxes on Alcoholic Beverages* ("*Korea - Alcoholic Beverages*"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999.

<sup>3</sup> *Ibid.*, paras. 2.1-2.23.

<sup>4</sup> *Ibid.*, para. 11.1.

<sup>5</sup> Appellate Body Report, *Korea - Alcoholic Beverages*, *supra*, footnote 1, para. 169.

<sup>6</sup> Panel Report, *Korea - Alcoholic Beverages*, *supra*, footnote 2, para. 11.2; Appellate Body Report, *Korea - Alcoholic Beverages*, *supra*, footnote 1, para. 170.

with the recommendations and rulings immediately, and that it would therefore require a reasonable period of time to complete the implementation process.

3. Following the meeting of the DSB on 19 March 1999, the European Communities and Korea held consultations to determine a mutually agreeable period of time for implementation. The United States and Korea also held consultations on this matter.

4. By communication of 9 April 1999, the European Communities and the United States requested that the reasonable period of time be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. In a joint letter dated 23 April 1999, Korea, the European Communities and the United States informed the Chairman of the DSB that they had agreed that I should act as Arbitrator. In this letter, the parties noted that a period of 90 days is set forth in Article 21.3(c) of the DSU for completion of arbitration proceedings and the issuance of an arbitration award. For this arbitration, however, the parties requested that this period be extended for a period of twenty additional days, that is, until 7 June 1999. The parties were informed, by letter of 26 April 1999, that I had accepted the appointment.

5. Korea, the European Communities and the United States filed written submissions on 4 May 1999. In response to my request, Korea provided English-language translations of provisions of certain Korean laws on 11 May 1999. An oral hearing was held on 12 May 1999. On 18 May 1999, Korea provided a revised translation of certain of its laws.

## II. ARGUMENTS OF THE PARTIES

### A. *Korea*

6. Korea requests that the arbitrator declare 15 months as the reasonable period of time for implementation. Korea states that it intends to implement the DSB rulings and recommendations through an increase in tax rates applicable to soju, which requires an amendment of its Liquor Tax Act. Korea states that this legislative amendment will take at least 15 months because it involves actions of the executive branch and the National Assembly, as well as additional administrative actions for its full implementation.

7. According to Korea, any acts related to budgetary changes are reviewed and passed at the regular session of the National Assembly. The Korean Government intends to submit a bill to amend the Liquor Tax Act to the National Assembly's regular session this year, which commences on 10 September 1999. Since its enactment in 1949, the Liquor Tax Act has been amended 23 times, 22 of which were during a regular session of the National Assembly. The one instance where an amendment was passed during an extraordinary session was exceptional, involving a bill that did not entail changes in the budget.

8. Korea argues that the initial executive procedure will take seven months. Korea explains that when the executive branch submits a bill to the National Assembly, the procedural rules set out in the Regulation on the Procedures of

Legislative Activities (the "Regulation") must be observed. Under the Regulation, sufficient time must be secured for consultations between relevant agencies, including the Office of Government Legislation. According to Korea, this means that it takes at least four months for the relevant Ministry, in this case the Ministry of Finance and Economy, to prepare the draft amendment. During this period, the Ministry is required to consult with local governments and private interest groups, including the relevant domestic industries and consumer groups. Barring serious opposition, a first draft of the amendment could be ready by June of this year.

9. Korea explains that the draft amendment will then be submitted to the relevant ministries for comments. This comment period normally takes one month. In addition, if the amendment involves issues that require economic policy coordination, an inter-agency meeting will be convened for this purpose. At the end of this process, the draft amendment will be made public in the Official Gazette and, if necessary, through other means. Korea calculates that this process will be completed by the end of August, at the earliest. At this stage, the draft amendment must be submitted to the Office of Government Legislation for review, a process that takes approximately one to one and a half months. After these procedures, the bill could be sent to the National Assembly by the end of September this year at the earliest. In addition to the requirements described above, the relevant ministry must hold a party-government consultation, to generate political support in the National Assembly.

10. Since the change in the liquor tax rates will have an impact on tax revenues, Korea states that the draft bill should be attached to the global budget bill for the upcoming fiscal year, which is to be passed at the regular session of the National Assembly. Korea explains that the executive branch will formulate the budget bill and submit it to the National Assembly ninety days before the beginning of the fiscal year, i.e., by October 2. Because the early part of the regular session will be allocated to an inspection of state affairs, the review of the budget bill will not take place until mid-October. Following approval by certain committees, the bill will be submitted to the plenary for deliberation. The formal legislative process, including the promulgation by the President, will be completed by the end of December, provided there is no political or social opposition.

11. Korea claims that after the bill is passed by the National Assembly, an additional five months is necessary to complete "follow-up measures", including related changes in Presidential and Ministerial Decrees, enforcement regulations and administrative procedures. This period also includes an adjustment period of at least 30 days before its actual implementation, pursuant to Article 13-2 of the Act on the Promulgation of Acts and Decrees, etc.

12. In addition, Korea argues that, independent of its arguments relating to the time needed for implementation under Korea's domestic legal system, Article 21.3(c) of the DSU provides 15 months as a guideline for the implementation period, only to be adjusted depending upon "particular circumstances". Korea submits that unless such "particular circumstances" are presented and

successfully argued by the complaining parties, the 15-month period should be granted to the implementing Member. In support of this argument, Korea cites the statement of the arbitrator in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities - Hormones*") that "[i]n my view, the party seeking to prove that there are 'particular circumstances' justifying a shorter or longer time has the burden of proof under Article 21.3(c)."<sup>7</sup> Korea also refers to the Awards of the Arbitrators in *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities - Bananas*")<sup>8</sup> and *Japan - Taxes on Alcoholic Beverages* ("*Japan - Alcoholic Beverages*")<sup>9</sup> in support of its position.

13. Korea also maintains that each implementing Member should be accorded a measure of discretion in choosing the modalities of implementation, as long as these are consistent with the recommendations and rulings of the DSB and with the covered agreements. Thus, the decision by a Member concerning the precise means of implementation should be honoured even if it may seem unsatisfactory to the complaining parties, as long as the implementation period does not exceed 15 months.

14. Finally, Korea argues that there is no reason it should be accorded treatment different than that given to Japan in *Japan - Alcoholic Beverages*. The European Communities and United States argued before the Panel that Korea's liquor tax system was very similar to the Japanese system challenged in the *Japan - Alcoholic Beverages* case, and Korea sees no reason why it should be given less than the 15 months Japan was given to implement changes to its liquor tax law.

#### B. *European Communities*

15. The European Communities argues that the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute should be no more than six months from 17 February 1999, the date of adoption of the Appellate Body Report and the Panel Report, i.e., by 17 August 1999.

16. In the view of the European Communities, Members are not automatically entitled to the 15-month period noted in Article 21.3(c) of the DSU. This period is merely a guideline for the arbitrator. The European Communities refers to the statement of the arbitrator in *European Communities - Hormones* that the reasonable period of time "should be the shortest possible within the legal system of the Member to implement the recommendations and rulings of the DSB."<sup>10</sup> The European Communities cites statements by the arbitrators in *Indonesia - Certain Measures Affecting the Automobile Industry* ("*Indonesia -*

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<sup>7</sup> Award of the Arbitrator, WT/DS26/15, WT/DS48/13, 29 May 1998, para. 27.

<sup>8</sup> Award of the Arbitrator, WT/DS27/15, 7 January 1998, para. 19.

<sup>9</sup> Award of the Arbitrator, WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, para. 27.

<sup>10</sup> *Supra*, footnote 7, para. 26.

*Automobiles*")<sup>11</sup> and *Australia - Measures Affecting Importation of Salmon* ("*Australia - Salmon*")<sup>12</sup> for the same proposition.

17. The European Communities argues that, in determining what period of time is "reasonably practicable" for implementation, the arbitrator should consider exclusively: 1) the degree of complexity of the measures to be adopted (e.g., drafting a sanitary standard may require more time than a simple change of a tariff or tax rate); 2) the legal nature of the required implementing act (e.g., whether legislative or administrative measures are needed); and 3) the procedures which must be followed in order to adopt that type of act under the domestic law of the Member concerned.

18. In referring to the Award of the Arbitrator in *Indonesia - Automobiles*,<sup>13</sup> the European Communities notes that the political, economic or social consequences of the required measures are not pertinent considerations for the arbitrator. If those consequences were to be taken into account, it could have the paradoxical result that the greater the degree of inconsistency with the WTO obligations, the longer the period of time a Member may be granted for implementation.

19. In the view of the European Communities, the legislative procedure for amending the Liquor Tax Act and the Education Tax Act can be completed much earlier than December 1999. Korea is not required to wait until the opening of the regular session of the National Assembly in September 1999. The Korean Constitution provides that an extraordinary session of the National Assembly may be convened at any time, a procedure that is frequently invoked.

20. The European Communities argues that the necessary legislative amendments are fairly simple. All that would be needed is to change the tax rates applicable to soju and/or imported distilled spirits. Thus, the Ministry of Finance and Economy should be able to prepare the draft bill within a relatively short period of time. The legislative procedure (including the promulgation of the amendments) could be completed within 5 to 7 months from the adoption of the Appellate Body and Panel Reports, i.e., between 17 July and 17 September 1999.

21. The European Communities further argues that even if it were not possible to convene an extraordinary session of the National Assembly, nothing prevents Korea from completing all the requisite preparatory steps preceding the introduction of the bill into the National Assembly well before the opening of the regular session in September 1999. Accordingly, even if the bill were submitted during the regular session, the amendments could still be promulgated by the end of October 1999.

22. The European Communities notes a claim made by Korea during consultations that the proposed amendments were to be part of a larger effort to

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<sup>11</sup> Award of the Arbitrator, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, para. 22.

<sup>12</sup> Award of the Arbitrator, WT/DS18/9, 23 February 1999, para. 38.

<sup>13</sup> *Supra*, footnote 11, para. 23.

"streamline and enhance the transparency of the existing tax system." In response, the European Communities states that any plans to "streamline" the Korean tax system are not a relevant circumstance for this arbitration.

23. In response to a claim by Korea during consultations that the revenue from the tax measures at issue finances local governments and local education, the European Communities responds that even if some of the tax revenue is earmarked for local authorities, there is no requirement to consult those authorities before amending the measures, let alone to obtain their consent. Moreover, Korea may implement the recommendations and rulings of the DSB without altering the current level of tax revenue and without modifying the destination of the tax proceeds.

24. The European Communities fails to understand why a change in tax rates would require the adoption of any implementing administrative measures at all, given that tax rates are not regulated in the Presidential Decrees or in the Notices. In any event, such measures would only be purely technical adaptations not involving the exercise of administrative discretion. Furthermore, there is nothing that prevents the Korean authorities from preparing those amendments in advance, in parallel with the legislative changes. Past practice demonstrates that changes in tax rates have often taken effect within a few days of their promulgation.

25. Finally, the European Communities asserts that Korea simply wants to avoid the adoption of an unpopular measure before elections to the National Assembly that are due to take place in April 2000. The European Communities reiterates that the electoral needs of the ruling party are not a relevant circumstance in determining the duration of the "reasonable period of time."

### *C. United States*

26. The United States argues that Korea's legal system, as evidenced by past practice, is such that Korea could have complied with the rulings and recommendations of the DSB within six months of their adoption. The United States contends that it is possible for Korea to comply by the end of October 1999, and in any event, no later than 1 January 2000.

27. The United States argues that compliance by Korea in this case involves only a change in the relative tax rates applied to soju and Western distilled spirits under the Liquor Tax Act and the Education Tax Act. The United States therefore does not accept the schedule for implementation envisaged by Korea - waiting seven months to submit legislation and spending five months in regulatory activity all for a very simple change in the law. In the view of the United States, the real purpose of the Korean schedule is to delay meeting its WTO obligations because of pending general elections scheduled for April 2000.

28. The United States notes that the 15-month period provided for by Article 21.3(c) of the DSU is a guideline, not a rule,<sup>14</sup> and that the text "does not mean ... that the arbitrator is obliged to grant 15 months in all cases."<sup>15</sup> According to the United States, it is clear from the context of Article 21.3(c) that prompt compliance is the overriding objective. This principle is also emphasized in Article 3.3 of the DSU. These considerations have led previous arbitrators to rule that the "reasonable period of time" for implementation be the "shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."<sup>16</sup>

29. The United States argues that, to determine which "particular circumstances" warrant a period of time less than 15 months, arbitrators have focused on the requirements of the particular legal system at issue.<sup>17</sup> By contrast, the reasonable period of time must not encompass time for structural adjustments to be made by the protected domestic industry.<sup>18</sup>

30. In the view of the United States, under Korea's legal system, there is no regulatory reason for the effective date of the new tax measure to be later than 1 January 2000. The United States notes that it is far from rare that tax legislation is amended during extraordinary sessions of the National Assembly. According to the United States, once a bill has been submitted to the National Assembly, the legislative process should be completed within a month, the prescribed time for an extraordinary session. In any event, Korea has acknowledged that the process can be finished in two and a half months. Prior drafting, inter-ministerial consultations and the public comment period for a law prior to its submission to the National Assembly should not take more than two months. Thus, Korea still has ample time to call an extraordinary session of the National Assembly and adopt tax rate changes by no later than November 1999.

31. The United States notes that Korea wants to submit the tax amendments in the overall budget package because it intends to include them in a package of additional reforms. The United States maintains that the amendments do not have to be part of a broader tax rationalization plan.

32. The United States further argues that Korea can, in any event, implement the tax rate changes by 1 January 2000. The United States notes that Korea has not explained precisely what aspects of its administrative regulations need to be changed, and that the two most recent amendments to tax rates in the Liquor Tax Act took effect only a few days after their promulgation.

33. According to the United States, even if changes to the Presidential Decrees or ministerial ordinances were required, such changes would only be

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<sup>14</sup> *European Communities - Hormones*, *supra*, footnote 7, para. 25.

<sup>15</sup> *Australia - Salmon*, *supra*, footnote 12, para. 30.

<sup>16</sup> *European Communities - Hormones*, *supra*, footnote 7, para. 26; *Australia - Salmon*, *supra*, footnote 12, para. 38; *Indonesia - Automobiles*, *supra*, footnote 11, para. 22.

<sup>17</sup> *Australia - Salmon*, *supra*, footnote 12, para. 38.

<sup>18</sup> *Indonesia - Automobiles*, *supra*, footnote 11, para. 23.

technical, not substantive, corrections. Thus, they can hardly require five additional months of regulatory activity. Moreover, Korea's assumption that the regulatory process has to be sequential to the legislative process is belied by past practice.

### III. THE REASONABLE PERIOD OF TIME

34. My mandate in this arbitration is governed by Article 21.3(c) of the DSU. It provides that when the reasonable period of time is determined through arbitration:

... a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

35. The precise meaning of this provision becomes clear when it is read in its context. Paragraph 1 of Article 21 provides:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

36. Under Article 21.3 of the DSU, if it is impracticable to comply immediately with the recommendations and rulings of the DSB, the Member concerned shall have a reasonable period of time for implementation. When the reasonable period of time is determined through arbitration, the guideline for the arbitrator is that it should not exceed 15 months from the date of adoption of the panel and/or Appellate Body reports. This does not mean, however, that the arbitrator is obliged to grant 15 months in all cases. The reasonable period of time may be shorter or longer, depending upon the particular circumstances.<sup>19</sup>

37. The most important factor in establishing the length of the reasonable period of time is set out in the Award of the Arbitrator in *European Communities - Hormones*, where it is stated:

... it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB.<sup>20</sup>

38. In the present case, the parties agree on the necessity to amend Korea's tax legislation in order to properly implement the recommendations and rulings of the

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<sup>19</sup> Article 21.3(c) of the DSU.

<sup>20</sup> *Supra*, footnote 7, para. 26; quoted with approval in *Indonesia - Automobiles*, *supra*, footnote 11, para. 22; and *Australia - Salmon*, *supra*, footnote 12, para. 38.

DSB. In fact, Korea has indicated that it intends to increase the tax rates applicable to soju, which requires an amendment of its current Liquor Tax Act.<sup>21</sup>

39. According to Korea, its tax legislation cannot be amended, in this case, before the end of December 1999.<sup>22</sup> Korea asserts that the initial executive procedure, preceding the submission of the tax bill to the National Assembly, will take seven months. Therefore, the bill can be sent to the National Assembly by the end of September at the earliest.<sup>23</sup> Korea maintains that the change in the liquor tax rates will have an impact on tax revenues, and that, therefore, this bill should be attached to the global budget bill for the upcoming fiscal year, which is to be passed at the regular session of the National Assembly, commencing on 10 September 1999.<sup>24</sup>

40. According to the United States, the preparatory steps prior to the submission of the bill to the National Assembly should not take more than two months.<sup>25</sup> The European Communities submits that these steps require, as a general rule, from two to four months, but may be completed within a much shorter period of time in cases of urgency.<sup>26</sup> Both the United States and the European Communities argue that the tax bill could, and should, be adopted in the course of an extraordinary session of the National Assembly which, according to Korea's Constitution, can be convened upon the request of the President or of one fourth or more of the members of the National Assembly. An extraordinary session shall not exceed 30 days.<sup>27</sup> According to the United States and the European Communities, the discussion and adoption of the bill by the National Assembly could be completed within one month, whether submitted during a regular or an extraordinary session.<sup>28</sup> Both of these parties cite a number of amendments of tax laws which have been adopted in extraordinary sessions of the National Assembly.<sup>29</sup>

41. The parties agree that a tax bill with budgetary implications should normally be submitted to the National Assembly at a regular session, together with the draft budget for the following fiscal year. They disagree on whether the proposed amendments to Korea's tax legislation in this case could be passed in an extraordinary session of the National Assembly.

42. Although the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations

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<sup>21</sup> Written Submission of Korea, para. 3.

<sup>22</sup> *Ibid.*, para. 24.

<sup>23</sup> *Ibid.*, paras. 4-14.

<sup>24</sup> *Ibid.*, para. 16.

<sup>25</sup> Written Submission of the United States, para. 15.

<sup>26</sup> Written Submission of the European Communities, para. 27.

<sup>27</sup> Written Submission of the European Communities, para. 44; Written Submission of the United States, paras. 14-15.

<sup>28</sup> Written Submission of the European Communities, para. 28; Written Submission of the United States, para. 15.

<sup>29</sup> Written Submission of the European Communities, para. 24; Written Submission of the United States, para. 14.

and rulings of the DSB, this does not require a Member, in my view, to utilize an *extraordinary* legislative procedure, rather than the *normal* legislative procedure, in every case. Taking into account all of the circumstances of the present case, I believe that it is reasonable to allow Korea to follow its *normal* legislative procedure for the consideration and adoption of a tax bill with budgetary implications, that is, to submit the proposed amendments to the next regular session of the National Assembly. For the same reasons, I consider it reasonable that the new tax legislation should be enacted by the National Assembly in the course of the next regular session, and promulgated by the President before the end of this year.

43. According to Korea, an additional period of five months is necessary to complete certain "follow-up measures", including related changes to Presidential and Ministerial Decrees, enforcement regulations and administrative procedures.<sup>30</sup> This period of five months includes an adjustment period of at least thirty days, Korea argues, as required by Article 13-2 of the Act on the Promulgation of Acts and Decrees, etc.<sup>31</sup>

44. The United States and the European Communities contest the need for amendments to these regulatory instruments. They consider that even if amendments to these regulatory instruments were required, such amendments would only be technical corrections.<sup>32</sup> They argue that these amendments could be prepared in advance, in parallel with the legislative amendments. Past practice, they maintain, shows that the regulatory instruments implementing new tax legislation have been amended within days, and the new tax legislation has entered into force a few days after promulgation.<sup>33</sup>

45. My mandate in this arbitration relates exclusively to determining the reasonable period of time for implementation under Article 21.3(c) of the DSU. It is not within my mandate to suggest ways and means to implement the recommendations and rulings of the DSB. Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements.<sup>34</sup> I consider it, therefore, inappropriate to determine whether, and to what extent, amendments to various regulatory instruments are required before the new tax legislation comes into effect.

46. However, assuming that amendments to these regulatory instruments are necessary, I am not convinced that they can only be prepared *after* the

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<sup>30</sup> Written Submission of Korea, para. 25.

<sup>31</sup> *Ibid.*, para. 26.

<sup>32</sup> Written Submission of the European Communities, paras. 54-55; Written Submission of the United States, paras. 18-20.

<sup>33</sup> Written Submission of the European Communities, para. 56; Written Submission of the United States, para. 21.

<sup>34</sup> *European Communities - Hormones, supra*, footnote 7, para. 38; quoted with approval in *Australia - Salmon, supra*, footnote 12, para. 35.

promulgation of the amendments to the tax legislation. On the contrary, in the light of past experience, I consider that it is possible to prepare such measures during the course of the legislative process. The amendments to the tax legislation could, in my view, be promulgated together with any required amendments to the regulatory instruments by 1 January 2000.

47. Bearing in mind Article 13-2 of the Act on the Promulgation of Acts and Decrees, etc., which provides for a thirty-day grace period for enforcement of certain acts, Presidential Decrees, and other instruments, I consider that it is reasonable to allow Korea an additional thirty days, after the promulgation of the amendments to the tax legislation and the amendments to the regulatory instruments, as part of the reasonable period of time.<sup>35</sup>

#### **IV. THE AWARD**

48. In light of the above considerations, I determine that the reasonable period of time for Korea to implement the recommendations and rulings of the DSB in this case is 11 months and two weeks, that is, from 17 February 1999 to 31 January 2000.

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<sup>35</sup> I recognize that this period of time is shorter than the 15 month period granted by the Arbitrator in *Japan - Alcoholic Beverages*. I would note, however, that the arbitration proceedings in these two cases took place at different times in the respective legislative and budgetary processes of Korea and Japan.