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# ■ WTO Dispute Settlement: One-Page Case Summaries

└ 1995 – December 2007



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## **DISCLAIMER**

This publication is intended to facilitate understanding of the cited cases but does not constitute an official or authoritative interpretation by the WTO Secretariat or WTO Members of these cases or the WTO agreements referred to therein.



## FOREWORD

This second edition of *WTO Dispute Settlement: One-Page Case Summaries* has been prepared by the Legal Affairs Division of the WTO with special assistance from the Rules Division and the Appellate Body Secretariat. This updated edition covers all panel and Appellate Body reports adopted by the WTO Dispute Settlement Body as of 31 December 2007.

As was noted when the first edition appeared, this publication has been prepared in response to numerous requests from the WTO trade community for a simple, straightforward explanation of the key points emanating from the continually expanding body of WTO jurisprudence. Accordingly, the publication attempts to summarize on a single page the core facts and substantive findings contained in the adopted panel and, where applicable, Appellate Body reports for each decided case. Where relevant, the publication also summarizes key findings on significant procedural matters. Other matters of particular significance raised during the proceedings are listed in the accompanying footnotes to each case. The index enables readers to search the disputes by articles and by WTO agreement.

The response to the first edition of this publication has been uniformly positive. We are therefore confident that this updated edition will continue to provide a useful tool for understanding what the WTO dispute settlement system has produced in its first thirteen years of operation. If so, we will endeavour to update it on a regular basis.

Bruce Wilson  
Director, Legal Affairs Division  
31 March 2008



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## ABBREVIATIONS

General Agreement on Tariffs and Trade 1994	GATT
Agreement on Agriculture	AA
Agreement on the Application of Sanitary and Phytosanitary Measures	SPS
Agreement on Textiles and Clothing	ATC
Agreement on Technical Barriers to Trade	TBT
Agreement on Trade-Related Investment Measures	TRIMs
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994	ADA
Agreement on Rules of Origin	ROA
Agreement on Import Licensing Procedures	Licensing Ag
Agreement on Subsidies and Countervailing Measures	ASCM
Agreement on Safeguards	SA
General Agreement on Trade in Services	GATS
Agreement on Trade-Related Aspects of Intellectual Property Rights	TRIPS
Understanding on Rules and Procedures Governing the Settlement of Disputes	DSU
Vienna Convention on the Law of Treaties	VCLT



## US – GASOLINE<sup>1</sup>

### (DS2)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	Brazil Venezuela	GATT Arts. III and XX	Establishment of Panel	10 April 1995 (Venezuela) 31 May 1995 (Brazil)
			Circulation of Final Report	29 January 1996
Respondent	United States		Circulation of AB Report	29 April 1996
			Adoption	20 May 1996

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The "Gasoline Rule" under the US Clean Air Act that set out the rules for establishing baseline figures for gasoline sold on the US market (different methods for domestic and imported gasoline), with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution.
- Product at issue: Imported gasoline and domestic gasoline.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. III:4 (national treatment): The Panel found that the measure treated imported gasoline "less favourably" than domestic gasoline in violation of Art. III:4, as imported gasoline effectively experienced less favourable sales conditions than those afforded to domestic gasoline. In particular, under the regulation, importers had to adapt to an average standard, i.e. "statutory baseline", that had no connection to the particular gasoline imported, while refiners of domestic gasoline had only to meet a standard linked to their own product in 1990, i.e. individual refinery baseline.
- GATT Art. XX(g) (exceptions clause): In respect of the US defence under Art. XX(g), the Appellate Body modified the Panel's reasoning and found that the measure was "related to" (i.e. "primarily aimed at") the "conservation of exhaustible natural resources," and thus fell within the scope of Art. XX(g). However, the measure was still not justified by Art. XX because the discriminatory aspect of the measure constituted "unjustifiable discrimination" and a "disguised restriction on international trade" under the chapeau of Art. XX.

#### 3. OTHER ISSUES<sup>2</sup>

- GATT Art. III:1: The Panel considered it unnecessary to examine the consistency of the Gasoline Rule with Art. III:1 (general provision), given that a finding of violation of Art III:4 (i.e. more specific provision than Art. III:1) had already been made.
- Appeal of an issue: The Appellate Body held that participants can appeal an issue only through the filing of a Notice of Appeal and an "appellant's" submission, but not through an "appellee's" submission.
- VCLT (general rule of interpretation): The Appellate Body stated that general rule of interpretation under VCLT Art. 31 has attained the status of a rule of customary or general international law and thus forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by DSU Art. 3(2), to apply in seeking to clarify the provisions of the General Agreement and the other "covered agreements" of the "WTO Agreement". It also said that one of the corollaries of the "general rule of interpretation" in VCLT Art. 31 is that "interpretation must give meaning and effect to all the terms of a treaty" and an interpreter may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

<sup>1</sup> *United States – Standards for Reformulated and Conventional Gasoline*

<sup>2</sup> Other issues addressed in this case: ceased measure; terms of reference.

# JAPAN – ALCOHOLIC BEVERAGES II<sup>1</sup>

## (DS8, DS10, DS11)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	<i>Canada, European Communities, United States</i>	<i>GATT Art. III</i>	Establishment of Panel	<i>27 September 1995</i>
			Circulation of Final Report	<i>11 July 1996</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>4 October 1996</i>
			Adoption	<i>1 November 1996</i>

### 1. MEASURE AND PRODUCTS AT ISSUE

- Measure at issue: Japanese Liquor Tax Law that established a system of internal taxes applicable to all liquors at different tax rates depending on which category they fell within. The tax law at issue taxed shochu at a lower rate than the other products.
- Products at issue: "Vodka and other alcoholic beverages such as liqueurs, gin, genever, rum, whisky and brandy" and "domestic shochu".

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. III:2, first sentence: The Appellate Body upheld the Panel's finding that vodka was taxed in excess of shochu, in violation of Art. III:2, first sentence, accepting the Panel's interpretation that Art. III:2, first sentence requires an examination of the conformity of an internal tax measures by determining two elements: (i) whether the taxed imported and domestic products are like; and (ii) whether the taxes applied to the imported products are in excess of those applied to the like domestic products.
- GATT Art. III:2, second sentence: The Appellate Body upheld the Panel's finding that shochu and whisky, brandy, rum, gin, genever, and liqueurs were not similarly taxed so as to afford protection to domestic production, in violation of Art. III:2, second sentence. Modifying some of the Panel's reasoning, the Appellate Body clarified three separate issues that must be addressed to determine whether a certain measure is inconsistent with Art. III:2, second sentence: (i) whether imported and domestic products are directly competitive or substitutable products; (ii) whether the directly competitive or substitutable imported and domestic products are not similarly taxed; and (iii) whether the dissimilar taxation of the directly competitive or substitutable imported and domestic products is applied so as to afford protection to domestic production.

### 3. OTHER ISSUES<sup>2</sup>

- Status of prior panel reports: Although reversing the Panel's finding that adopted GATT and WTO panel reports constitute subsequent practice under the VCLT Art. 31(3)(b), the Appellate Body found, however, that such reports create "legitimate expectations" which should be taken into account where they are relevant to a dispute.
- GATT Art. III:1: The Appellate Body agreed with the Panel that Art. III:1, as a provision containing general principles, informs the rest of Art. III, and further elaborated that, because of the textual differences in the two sentences, Art. III:1 informs the first and second sentences of Art. III:2 in different ways.

<sup>1</sup> *Japan – Taxes on Alcoholic Beverages*

<sup>2</sup> Other issues addressed: treaty interpretation (VCLT); terms of reference.

# AUSTRALIA – SALMON<sup>1</sup>

## (DS18)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	SPS Arts. 5.1, 5.5 and 5.6	Establishment of Panel	10 April 1997
			Circulation of Panel Report	12 June 1998
Respondent	Australia		Circulation of AB Report	20 October 1998
			Adoption	6 November 1998

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Australia's import prohibition of certain salmon from Canada.
- Product at issue: Fresh, chilled or frozen ocean-caught Canadian salmon and certain other Canadian salmon.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- SPS Art. 5.1: The Appellate Body, although reversing the Panel's finding because the Panel had examined the wrong measures (i.e. heat-treatment requirement), still found that the correct measure at issue – i.e. Australia's import prohibition – violated Art. 5.1 (and, by implication, Art. 2.2) because it was not based on a "risk assessment" requirement under Art. 5.1.
- SPS Art. 5.5: The Appellate Body upheld the Panel's finding that the import prohibition violated Art. 5.5 (and, by implication Art. 2.3) since "arbitrary or unjustifiable" levels of protection were applied to several different yet comparable situations so as to result in "discrimination or a disguised restriction" (i.e. more strict restriction) on imports of salmon, compared to imports of other fish and fish products such as herring and finfish.
- SPS Art. 5.6: The Appellate Body reversed the Panel's finding that the heat-treatment violated Art. 5.6 by being "more trade-restrictive than necessary", because heat treatment was the wrong measure. The Appellate Body, however, could not complete the Panel's analysis of this issue under Art. 5.6 due to insufficient facts on the record. (In this regard, the Appellate Body said that it would complete the Panel's analysis in a situation like this "to the extent possible on the basis of the factual findings of the Panel and/or of undisputed facts in the Panel record".)

### 3. OTHER ISSUES<sup>2</sup>

- False judicial economy: The Appellate Body found that the Panel in this case exercised "false judicial economy" by not making findings for all the products at issue, in particular, findings in respect of Art. 5.5 and 5.6 for other Canadian salmon. The Appellate Body clarified that, in applying the principle of judicial economy, panels must address those claims on which a finding is necessary to secure a positive solution to the dispute. Providing only a partial resolution of the matter at issue would be "false judicial economy".

<sup>1</sup> *Australia – Measures Affecting Importation of Salmon*

<sup>2</sup> Other issues addressed in this case: SPS Arts. 5.5 and 5.6 as applied to "certain other Canadian salmon" than certain ocean-caught Canadian salmon (in connection with the Appellate Body's finding on the Panel's exercise of false judicial economy); relationship between SPS Arts. 5.5 and 2.3; panel's terms of reference; scope of appellate review (in relation to burden of proof); DSU Art. 11; panel's admission and consideration of evidence; scope of interim review (DSU Art. 15.2); evidentiary issues; claims and arguments; applicability and relationship between the GATT and the SPS Agreement; order of the claims to be addressed.

# AUSTRALIA – SALMON (ARTICLE 21.5)<sup>1</sup>

## (DS18)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	SPS Arts. 2.2, 2.3, 5.1, 5.5 and 5.6	Referred to the Original Panel	28 July 1999
			Circulation of Panel Report	18 February 2000
Respondent	Australia	DSU Art 10.3	Circulation of AB Report	NA
			Adoption	20 March 2000

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Australia published the "1999 Import Risk Analysis" which included additional analyses that considered the health risks associated with the importation into Australia of fresh, chilled and frozen salmon. Australia also modified its legislation on the quarantine of imports by allowing, pursuant to permits, non-heated salmon to be imported and released from Australian quarantine facilities in cases where the salmon was in a "consumer-ready" form. Similar regulations were adopted, around the same time, regarding imports of herring and finfish.

### 2. SUMMARY OF KEY PANEL FINDINGS

- SPS Art. 5.1 (risk assessment): The Panel found that Australia was in violation of Art. 5.1 and by implication, therefore, of the general obligations of Art. 2.2. Reiterating the three requirements laid down previously by the Appellate Body that are essential to constitute a "risk assessment", the Panel noted that for a measure to be "based on" a risk assessment there needs to be a "rational relationship" between the measure and the risk assessment, and that none of the experts consulted by the Panel could find any justification in Australia's risk assessment measure for the requirement that salmon be "consumer-ready". Based on the same rationale, the Panel found that the ban on the imports of salmon enacted by the Tasmanian Government was also in violation of Arts. 5.1 and 2.2.
- SPS Art. 5.5 ("avoid arbitrary or unjustifiable distinctions"): The Panel concluded that Australia was not in violation of Art. 5.5, as it found that although Australia was employing different levels of protection to different, but sufficiently comparable, situations, the different treatment was scientifically justified, and not arbitrary or unjustifiable and the different treatment was thus not a disguised restriction on international trade.
- SPS Art 5.6 ("not more trade-restrictive than required"): Upon examining the Australian measure in light of the three elements needed to demonstrate an inconsistency with Art. 5.6, the Panel found that Australia had acted inconsistently with Art. 5.6. The Panel found that, taking into account the technical and economic feasibility of alternative measures (first element), there were other less-trade restrictive measures available to Australia that would provide the appropriate level of protection (second element), and these alternative measures (i.e. requirement for "special packaging" as an alternative to the current "consumer-ready" requirement) would lead to significantly more imported salmon in the Australian market (third element).

### 3. OTHER ISSUES<sup>2</sup>

- Terms of reference (DSU Art. 21.5 panels): The Panel refused to grant Australia's request to impose jurisdictional limits on Art. 21.5 compliance panels and stated that there is no suggestion in the text of Art. 21.5 that only certain issues of consistency of measures may be considered, but that a compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in light of any provision of any of the covered agreements.

<sup>1</sup> *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*

<sup>2</sup> Other issues addressed: protection of confidential information; *amicus curiae* submission; third party rights; SPS Art. 8 and Annex C, para. 1(c).

# BRAZIL – DESICCATED COCONUT<sup>1</sup>

## (DS22)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Philippines</i>	GATT Arts. I, II and VI  AA Art. 13	Establishment of Panel	<i>5 March 1996</i>
			Circulation of Final Report	<i>17 October 1996</i>
Respondent	<i>Brazil</i>		Circulation of AB Report	<i>21 February 1997</i>
			Adoption	<i>20 March 1997</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: A countervailing duty Brazil imposed on 18 August 1995 based on an investigation initiated on 21 June 1994.
- Product at issue: Desiccated coconut and coconut milk imported from the Philippines.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Arts. I, II and VI: The Appellate Body upheld the Panel's finding that GATT Arts. I, II and VI did not apply to the Brazilian countervailing duty measure at issue because it was based on an investigation initiated prior to 1 January 1995, the date that the WTO Agreement came into effect for Brazil. Specifically, the Panel found that: (i) the subsidy rules in the GATT cannot apply independently of the SCM Agreement; and (ii) non-application of the SCM Agreement renders the subsidy rules in the GATT non-applicable. As for GATT Arts. I and II, they did not apply to this dispute because the claims under these provisions derived from the claims of inconsistency with Art. VI.
- AA Art. 13: The Panel found that the exemption for countervailing duties contained in AA Art. 13 did not apply to a dispute based on a countervailing duty investigation initiated prior to the date the WTO Agreement came into effect.

### 3. OTHER ISSUES<sup>2</sup>

- Terms of reference: The Appellate Body noted that a panel's terms of reference serve two important functions: (i) they fulfil the important due process objective of giving parties and third parties sufficient information about the claims at issue to allow them an opportunity to respond to the complainant, and (ii) they establish the panel's jurisdiction by defining the precise claims at issue.

<sup>1</sup> *Brazil – Measures Affecting Desiccated Coconut*

<sup>2</sup> Other issues addressed: special terms of reference (DSU Art. 7.3); terms of reference (DSU Art. 6.2 – panel request).

# US – UNDERWEAR<sup>1</sup>

## (DS24)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Costa Rica</i>	ATC Art. 6	Establishment of Panel	<i>5 March 1996</i>
			Circulation of Final Report	<i>8 November 1996</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>10 February 1997</i>
			Adoption	<i>25 February 1997</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Quantitative import restriction imposed by the United States, as a transitional safeguard measure under ATC Art. 6.
- Product at issue: Underwear imports from Costa Rica.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ATC Art. 6.10 (application date): The Appellate Body reversed the Panel's finding and concluded that in the absence of express authorization, the plain language of Art. 6.10 creates a presumption that a measure may be applied only prospectively, and thus may not be backdated so as to apply as of the date of publication of the importing Member's request for consultation.
- ATC Art. 6.2 (serious damage and causation): The Panel refrained from making a finding on whether the United States demonstrated "serious damage" within the meaning of Art. 6.2, stating that ATC Art. 6.3 does not provide sufficient and exclusive guidance in this case. However, the Panel found that the United States did not demonstrate actual threat of serious damage, and therefore violated Art. 6. The Panel also found that the United States failed to comply with its obligation to examine causality under Art. 6.2.
- GATT Art. X:2: Although disagreeing with the Panel's application of GATT Art. X:2 to the issue of backdating under ATC Art. 6.10, the Appellate Body agreed with the Panel's general interpretation of Art. X:2 that certain country-specific measures may constitute "measures of general application" under GATT Art. X:2, although a company or shipment-specific measure may not. It also noted the fundamental importance of Art. X:2 which reflects the "principle of transparency" and has "due process dimensions".

### 3. OTHER ISSUES<sup>2</sup>

- Panel's standard of review (DSU Art. 11): As the first panel referring to DSU Art. 11 as its standard of review in examining a determination reached by a WTO Member under a WTO Agreement, the Panel found that its standard of review in this case was to make an "objective assessment" which entails "an examination of whether the US investigating authority had examined all relevant facts before it, whether adequate explanation had been provided of how the facts as a whole supported the determination made, and consequently, whether the determination made was consistent with the international obligation of the United States."

<sup>1</sup> *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*

<sup>2</sup> Other issues addressed: burden of proof (ATC Art. 6 as an exception); treaty interpretation (VCLT in relation to the interpretation of the ATC); structure of ATC Art. 6; panel's evidentiary scope of review (DSU Art. 4.6).

## EC – HORMONES<sup>1</sup>

### (DS26, DS48)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	United States Canada	SPS Arts. 3 and 5	Establishment of Panel	20 May 1996 (United States) 16 October 1996 (Canada)
			Circulation of Panel Report	18 August 1997
Respondent	European Communities		Circulation of AB Report	16 January 1998
			Adoption	13 February 1998

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: EC prohibition on the placing on the market and the importation of meat and meat products treated with certain hormones.
- Products at issue: Meat and meat products treated with hormones for growth purposes.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

##### *Harmonization*

- SPS Art. 3.1 (international standards): The Appellate Body rejected the Panel's interpretation and said that the requirement that SPS measures be "based on" international standards, guidelines or recommendations under Art. 3.1 does not mean that SPS measures must "conform to" such standards.
- Relationship between SPS Art. 3.1, 3.2 and 3.3 (harmonization): The Appellate Body rejected the Panel's interpretation that Art. 3.3 is the exception to Art. 3.1 and 3.2 assimilated together and found that Art. 3.1, 3.2 and 3.3 apply together, each addressing a *separate* situation. Accordingly, it reversed the Panel's finding that the burden of proof for the violation under Art. 3.3, as a provision providing the exception, shifts to the responding party.

##### *Risk assessment*

- SPS Art. 5.1: While upholding the Panel's ultimate conclusion that the EC measure violated Art. 5.1 (and thus Art. 3.3) because it was not based on a risk assessment, the Appellate Body reversed the Panel's interpretation, considering that Art. 5.1 requires that there be a "rational relationship" between the measure at issue and the risk assessment.
- SPS Art. 5.5: The Appellate Body reversed the Panel's finding that the EC measure, through arbitrary or unjustifiable distinctions, resulted in "discrimination or a disguised restriction of international trade" in violation of Art. 5.5, noting that: (i) the evidence showed that there were genuine anxieties concerning the safety of the hormones; (ii) the necessity for harmonizing measures was part of the effort to establish a common internal market for beef; and (iii) the Panel's finding was not supported by the "architecture and structure" of the measures.

#### 3. OTHER ISSUES<sup>2</sup>

- Burden of proof (SPS Agreement): The Appellate Body reversed the Panel's finding that the SPS Agreement allocates the "evidentiary burden" to the Member imposing an SPS measure.
- Objective assessments of facts (DSU Art. 11): Having noted that the issue of whether a panel has made an objective assessment of the facts under DSU Art. 11 is a "legal question" that falls within the scope of appellate review under DSU Art. 17.6, the Appellate Body said that the duty to make an objective assessment of facts is an "obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence." The Appellate Body found that the Panel did comply with the DSU Art. 11 obligation because although the Panel sometimes misinterpreted some of the evidence before it, these mistakes did not rise to the level of "deliberate disregard" or "wilful distortion" of the evidence.
- Claims vs. arguments: The Appellate Body held that while a panel is prohibited from addressing legal claims not within its terms of reference, a panel is permitted to examine any legal argument submitted by a party or "to develop its own legal reasoning".

<sup>1</sup> *European Communities – Measures Concerning Meat and Meat Products*

<sup>2</sup> Other issues addressed: standard of review (DSU, Art. 11); precautionary principle; retroactivity of treaties (VCLT, Art. 28); objective assessment (DSU, Art. 11); expert consultation; additional third party rights to US and Canada (DSU, Art. 9.3); judicial economy.

# EC – BANANAS III<sup>1</sup>

## (DS27)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Ecuador, Guatemala, Honduras, Mexico, United States</i>	<i>GATT Arts. I, III, X, XIII</i>	Establishment of Panel	<i>8 May 1996</i>
		<i>GATS Arts. II, XVII</i>	Circulation of Panel Report	<i>22 May 1997</i>
Respondent	<i>European Communities</i>	<i>Licensing Ag Art. 1.3</i>	Circulation of AB Report	<i>9 September 1997</i>
		<i>Lomé Waiver</i>	Adoption	<i>25 September 1997</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: The European Communities' regime for the importation, distribution and sale of bananas, introduced on 1 July 1993 and established by EEC Council Reg. 404/93.
- Products at issue: Bananas imported from third countries.<sup>2</sup>

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XIII: The Appellate Body upheld the Panel's finding that the allocation of tariff quota shares to some Members not having a substantial interest in supplying bananas, but not to others, was inconsistent with Art. XIII:1. The Appellate Body also agreed with the Panel that the BFA tariff quota reallocation rules<sup>3</sup>, under which a portion of a tariff quota share not used by one BFA country could be reallocated exclusively to other BFA countries, were inconsistent with Art. XIII:1 and XIII:2, chapeau.
- Lomé Waiver: The Appellate Body reversed the Panel's finding and found that the Lomé Waiver does not apply to (i.e. exempt) violations of GATT Art. XIII given that the Waiver refers only to Art. I:1 and that waivers must be narrowly interpreted and be subject to "strict disciplines".
- GATT Art. I: The Appellate Body upheld the Panel's finding that the activity function rules, which applied only to licence allocation rules for imports from other than traditional ACP countries, were inconsistent with Art. I:1. The Appellate Body also agreed with the Panel that the EC export certificate requirement accorded an advantage to some Members only, i.e. the BFA countries, in violation of Art. I:1. In an issue not appealed to the Appellate Body, the Panel found that tariff preferences for ACP countries were inconsistent with Art. I:1, but that they were justified by the Lomé Waiver.
- GATT Art. III:4: The Appellate Body agreed with the Panel that the EC procedures and requirements for the distribution of licences for importing bananas from non-traditional ACP suppliers were inconsistent with Art. III:4.
- GATT Art. X:3(a) and Licensing Agreement Art. 1.3: The Appellate Body reversed the Panel's findings of violations of GATT Art. X:3(a) and Licensing Agreement Art. 1.3, on the grounds that these provisions applied only to the administrative procedures for rules, not the rules themselves.
- GATS Arts. II and XVII: The Appellate Body upheld the Panel's finding that the EC measures were *inconsistent* with GATS Art. II and XVII because they were discriminatory, and clarified that the "aim and effect" of a measure is irrelevant under GATS Art. II and XVII.

### 3. OTHER ISSUES

- Private counsel: The Appellate Body ruled that private lawyers may appear on behalf of a government during an Appellate Body oral hearing. (c.f. the Panel did not allow them.)

<sup>1</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*

<sup>2</sup> Third countries are those countries other than (i) 12 African, Caribbean and Pacific ("ACP") countries who have traditionally exported bananas to the EC and (ii) ACP countries that were not traditional suppliers of the EC market.

<sup>3</sup> The Framework Agreement on Bananas ("BFA").

# EC – BANANAS III (ARTICLE 21.5)<sup>1 2</sup>

## (DS27)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Ecuador	GATT Arts. I and XIII	Referred to the Original Panel	12 January 1999
			Circulation of Panel Report	12 April 1999
Respondent	European Communities	GATS Arts. II and XVII	Circulation of AB Report	NA
			Adoption	6 May 1999

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- EC Regulation No. 1637/98 which was adopted to amend Regulation (EEC) No. 404/93 – i.e. the measure at issue in the original dispute – together with Regulation (EC) No. 2362/98, which laid down implementing rules for the amended Regulation. The Regulation pertained to imports of bananas into the European Communities and access to the EC market for three categories of bananas.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>3</sup>

- GATT Art. XIII:1: The Panel found that the Regulation was inconsistent with Art. XIII:1 as it resulted in disparate treatment between the traditional ACP suppliers and other non-substantial suppliers and third countries by not being "similarly restricted" as required by the GATT.
- GATT Art. XIII:2: The Panel also found a violation of Art. XIII:2 as the EC Banana Regime provided for a large quota to ACP countries of which, collectively, they used only 80 per cent over a two-year period while the MFN quota had always been filled and even some out-of-quota imports had been made. Therefore, the Panel found that the Regime did not aim at a distribution of trade that would represent as closely as possible the market share that countries would have had in the absence of restrictions.
- GATT Art. XIII:2(d): In the case of the tariff quota allocated to Ecuador under the revised EC Regime, the Panel also found a violation of Art. XIII:2(d), as the EC regulations under which the base period was calculated to determine future quota allocations were WTO-inconsistent.
- GATT Art. I:1: The Panel found that a quota level more favourable for ACP countries was a requirement under the Lomé Convention. However, it found a violation of Art. I:1 in the collective allocation of the quota to the ACP countries, calculated on the basis of individual countries' pre-1991 best-ever export volume, since it could have resulted in some countries exporting more than their pre-1991 best-ever export volume, which would not have been justified under the Lomé Waiver. As for the preferential zero-tariff for non-traditional ACP countries' imports, the Panel found no violation since the Lomé Convention allows the European Communities to grant preferential treatment to ACP countries as well as discretion as to the form of that preferential treatment.
- GATS Arts. II and XVII: Having found that the European Communities had committed to accord no less favourable treatment within the meaning of Arts. II and XVII to the range of principle and subordinate "wholesale trade services", the Panel, after examining the design, architecture and revealing structure of the measure at issue, concluded that Ecuador's suppliers of wholesale services were *de facto* granted less favourable treatment than the EC and ACP suppliers, in violation of Arts. II and XVII. The Panel also found that the "newcomer" licences scheme and the "single-pot" licensing rules challenged by Ecuador violated Art. XVII, as both measures also resulted in *de facto* less favourable conditions of competition than to like EC service suppliers.

<sup>1</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*

<sup>2</sup> A report was circulated on 12 April 1999 in respect of *EC – Bananas III (Article 21.5 – EC)*, however as it was not put on the agenda of the DSB, it remains unadopted.

<sup>3</sup> Other issues addressed: DSU Arts. 7, 21.5 and 19; GATS Arts II and XVII.

# CANADA – PERIODICALS<sup>1</sup>

## (DS31)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GATT Arts. III, XI and XX</i>	Establishment of Panel	<i>19 June 1996</i>
			Circulation of Panel Report	<i>14 March 1997</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>30 June 1997</i>
			Adoption	<i>30 July 1997</i>

### 1. MEASURES AND PRODUCTS AT ISSUE

- Measures at issue: (i) Tariff Code 9958, which prohibited the importation into Canada of any periodical that was a "special edition"<sup>2</sup>; (ii) the Excise Tax Act, which imposed, in respect of each split-run edition<sup>3</sup> of a periodical, a tax equal to 80 per cent of the value of all the advertisements contained in the split-run edition; and (iii) the postal rate scheme under which different postal rates were applied to domestic and foreign periodicals.
- Products at issue: Imported periodicals (from the United States) and domestic periodicals.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>4</sup>

- GATT Art. XI (prohibition of quantitative restrictions) and Art. XX(d) (exceptions): The Panel found that Tariff Code 9958, which prohibited the importation of certain periodicals, violated Art. XI, and was not justified under Art. XX(d) because it could not be regarded as a measure to secure compliance with Canada's Income Tax Act.
- GATT Art. III:2, first and second sentences (national treatment): The Appellate Body reversed the Panel's finding that imported split-run periodicals and domestic non-split run periodicals were "like products" (Art. III:2, first sentence). The Appellate Body concluded that the Excise Tax Act was inconsistent with Art. III:2, second sentence since: (i) imported split-run periodicals were "directly competitive or substitutable" with domestic non-split-run periodicals; (ii) imported and domestic products were not similarly taxed; and (iii) the tax was applied so as to afford protection to domestic products.
- GATT Art. III:4 and III:8(b) (national treatment): The Panel found that the application of discriminatory postal rates for domestic and imported periodicals under Canada's postal rate scheme violated Art. III:4. The Appellate Body reversed the Panel's further finding that this postal scheme, however, was justified under Art. III:8(b), on the ground that the kinds of measures covered by Art. III:8(b), and thus exempt from the obligations of Art. III, are "only the payment of subsidies which involves the expenditure of revenue by a government". Under Canada's postal rate scheme at issue, however, no subsidy payments were made to private entities, and certain companies simply received a reduction in postal rates.

<sup>1</sup> *Canada – Certain Measures Concerning Periodicals*

<sup>2</sup> "Special edition" is a periodical that "contains an advertisement that was primarily directed to a market in Canada and that does not appear in identical form in all editions of that issue of the periodical that were distributed in the periodical's country of origin".

<sup>3</sup> The Excise Tax Act defines "split-run edition" as an edition of an issue of a periodical: (i) that is distributed in Canada; (ii) in which more than 20 per cent of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals; and (iii) contains an advertisement that does not appear in identical form in all of the excluded editions.

<sup>4</sup> Other issues addressed: applicability of the GATT and/or the GATS (Excise Tax Act); status of panel finding not appealed; Appellate Body's completion of a panel's analysis.

# US – WOOL SHIRTS AND BLOUSES<sup>1</sup>

## (DS33)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	India	ATC Arts. 6 and 2.4	Establishment of Panel	17 April 1996
			Circulation of Final Report	6 January 1997
Respondent	United States		Circulation of AB Report	25 April 1997
			Adoption	23 May 1997

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Temporary safeguard measure imposed by the United States in the form of a quota on certain imports from India.
- Products at issue: Woven wool shirts and blouses from India.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ATC Art. 6 (serious damage and causation): The Panel found that the United States violated Art. 6 (6.2 and 6.3) because it failed to meet the causation and serious damage (and threat of serious damage) requirements therein when imposing its transitional safeguard measure, in particular, by not examining the data relevant to the "woven wool shirts and blouses industry", as opposed to the "woven shirts and blouses industry in general". The Panel also considered the list of industry impact factors in Art. 6.3 to be a mandatory list: an investigating authority must demonstrate that it considered the relevance or otherwise of each of the listed items in Art. 6.3. Moreover, the Panel stated that under Art. 6.3, "some consideration and a relevant and adequate explanation have to be provided of how the facts as a whole support the conclusion that the termination is consistent with the requirements of the ATC".
- ATC Art. 2.4: The Panel found that, by violating Art. 6, the United States also violated Art. 2.4, which prohibits the imposition of restraints on the import of textiles and clothing beyond those restraints permitted under the ATC.

### 3. OTHER ISSUES<sup>2</sup>

- Burden of proof: Upholding the Panel's interpretation and adopting the rule used by most international tribunals, the Appellate Body clarified the rule on the burden of proof by stating that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence". Also, the Appellate Body found that ATC Art. 6, which governs transitional safeguards with respect to textile products, does not constitute an affirmative defence, but rather a "fundamental part of the rights and obligations of WTO Members ... during the [ATC] transition period", and thus, a Member claiming that the United States violated this right must "assert and prove its claim."
- Judicial economy: The Appellate Body upheld the Panel's exercise of judicial economy and found that, under DSU Art. 11, panels are not required to make a finding on every claim raised, but rather panels may practise "judicial economy" and make findings on only those claims necessary to resolve a dispute.

<sup>1</sup> *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*

<sup>2</sup> Other issues addressed: Appellate Body's revised schedule (Working Procedures for Appellate Review, Rule 16(2)); scope of appellate review (DSU Art. 17.13); expired measure (panel's mandate in its terms of reference); standard of review; role of the TMB and dispute settlement mechanism.

# TURKEY – TEXTILES<sup>1</sup>

## (DS34)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	India	GATT Arts. XI, XIII and XXIV	Establishment of Panel	13 March 1998
			Circulation of Panel Report	31 May 1999
Respondent	Turkey	ATC Art. 2.4	Circulation of AB Report	22 October 1999
			Adoption	19 November 1999

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Turkey's quantitative import restrictions pursuant to the Turkey-EC customs union.
- Product at issue: Textiles and clothing from India.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Arts. XI and XIII (quantitative restrictions): The Panel found that the quantitative restrictions at issue were inconsistent with Art. XI and XIII. (Turkey itself did not deny this.)
- ATC Art. 2.4: The Panel found that Turkey's measures were *new* restrictions, which did not exist at the time of the entry into force of the ATC, and, thus, were prohibited by Art. 2.4.
- GATT Art. XXIV (customs union): The Appellate Body agreed with the Panel's ultimate conclusion that Turkey's measures were not justified under Art. XXIV because there were alternatives available to Turkey that would have met the requirements of Art. XXIV:8(a), which were necessary to form the customs union, other than the adoption of the quantitative restrictions. The Appellate Body, therefore, modified the Panel's legal reasoning and concluded that in order to determine whether a measure found inconsistent with certain other GATT provisions can be justified under Art. XXIV, a panel should examine two conditions: (i) whether a "customs union", as defined in Art. XXIV:8 exists (compatibility of a customs union with the provisions of Art. XXIV); and (ii) whether the formation of a customs union would be prevented without the inconsistent measure (i.e. whether the measure is necessary for the formation of a customs union). (The Panel had assumed the existence of the customs union and moved on to examine the necessity of the measure.)

### 3. OTHER ISSUES<sup>2</sup>

- GATT Art. XXIV (burden of proof): The Appellate Body agreed with the Panel that Art. XXIV may be considered as a "defence" or "exception" to a violation. The Panel also held that the burden of proof under Art. XXIV was on the party invoking it.
- Information from Member not party to the dispute (DSU Art. 13.2): Despite the fact that the European Communities was not a party or a third party to the dispute, the Panel asked the European Communities, pursuant to DSU Art. 13.2, for factual and legal information relevant to this case to have "the fullest possible understanding of this case". The European Communities provided answers to the Panel's questions.

<sup>1</sup> Turkey – Restrictions on Imports of Textile and Clothing Products

<sup>2</sup> Other issues addressed in this case: preliminary ruling on Turkey's claim for the dismissal of India's claims (non-participation of European Communities as respondent); entity to which the measures could be attributed (Turkey, EC or the Turkey-EC customs union); preliminary ruling on the sufficiency of the Panel request (DSU Art. 6.2, identification of measures); role of the TMB; adequacy of consultations (GATT Art. XXII and DSU Art. 4); scope of disputes under GATT Art. XXIV.

# JAPAN – FILM<sup>1</sup>

## (DS44)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GATT Arts. XXIII:1(b), III:4 and X:1</i>	Establishment of Panel	<i>16 October 1996</i>
			Circulation of Panel Report	<i>31 March 1998</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>22 April 1998</i>

### 1. MEASURES AND PRODUCTS AT ISSUE

- Measures at issue: Actions by the Japanese Government affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, in particular, (i) distribution measures; (ii) restrictions on large retail stores; and (iii) promotion measures.
- Products at issue: Imported consumer photographic film and paper.

### 2. SUMMARY OF KEY PANEL FINDINGS

- GATT Art. XXIII:1(b) (non-violation claim): The Panel found that the United States failed to demonstrate that the measures at issue nullified or impaired benefits accruing to the United States within the meaning of Art. XXIII:1(b). In this regard, the Panel considered that a complaining party must demonstrate three elements under Art. XXIII:1(b): (i) application of a measure by a WTO Member; (ii) a benefit accruing under the relevant agreement; and (iii) nullification or impairment of the benefit as the result of the application of the measure.
- GATT Art. III:4 (national treatment, violation claim): Having found that the distribution measures were generally origin-neutral and did not have a disparate impact on imported film or paper, the Panel found that the United States had not proved that the distribution measures were inconsistent with Art III:4.
- GATT Art. X:1 (publication requirement): The Panel considered that the publication requirement in Art. X:1 extends to two types of administrative rulings: (i) administrative rulings of "general application"; and (ii) "administrative rulings addressed to specific individuals or entities" that establish or revise principles or criteria applicable in future cases. Based on this legal standard, the Panel found that Japan was not in violation of Art. X:1 because the United States failed to demonstrate that Japan's administrative rulings at issue in this case amounted to either of these administrative rulings in respect of which the publication requirement under Art. X:1 should be applied.

### 3. OTHER ISSUES<sup>2</sup>

- DSU 6.2 (identification of measures): The Panel found that, for a "measure" not explicitly described in a panel request to be included for its consideration as part of the specific measure in the request, such an unidentified measure must be subsidiary or have a clear relationship to a specifically identified measure. According to the Panel, "only if a measure is subsidiary or closely related to a specifically identified measure will notice be adequate" so as not to cause prejudice to Japan or third parties.

<sup>1</sup> *Japan – Measures Affecting Consumer Photographic Film and Paper*

<sup>2</sup> Other issues addressed: order of examination of claims; burden of proof; procedures for translation.

# BRAZIL – AIRCRAFT<sup>1</sup>

## (DS46)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 4.7, 27.4	Establishment of Panel	23 July 1998
			Circulation of Panel Report	14 April 1999
Respondent	Brazil	Annex I item (k)	Circulation of AB Report	2 August 1999
			Adoption	20 August 1999

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measure at issue: Brazilian government payment for the regional aircraft export under the interest rate equalization component of a Brazilian export financing programme: the *Programa de Financiamento às Exportações* ("PROEX").
- Industry at issue: Regional aircraft manufacturing industry.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 3.1(a) and Annex I, Illustrative List, item (k) (export subsidy): Brazil did not dispute that its PROEX interest rate equalization scheme was a subsidy contingent upon export performance, but argued that it was "permitted" under item (k) of the Illustrative List of Export Subsidies. The Appellate Body reversed and modified the Panel's interpretation of "used to secure a material advantage in export credit terms" but upheld the Panel's conclusion that Brazil failed to establish that the payments fell within the first paragraph of item (k) as well as its consequential finding that the PROEX payments were prohibited export subsidies under Art. 3.1(a).
- ASCM Art. 27 (S&D treatment for developing countries): The Appellate Body upheld the Panel's finding that Brazil's measure was not justified under Art. 27.4, as Brazil had increased the level of its export subsidies and had not complied with the phase-out period under the terms of Art. 27 by continuously granting subsidies after the date on which they should have been terminated. The Appellate Body also upheld the Panel's finding that the burden of proof under Art. 27.4 is on the complaining party as Art. 27.4 constitutes positive obligations for developing country Members as opposed to an affirmative defence.
- ASCM Art. 4.7 (recommendation to withdraw subsidies): The Appellate Body upheld the Panel's recommendation that Brazil withdraw the PROEX export subsidies "without delay", specifically, within 90 days from the date of adoption of the report, and noted that there was a significant difference between the relevant rules and procedures of the DSU on implementation and the special or additional rules and procedures in ASCM Art. 4.7. Hence in this instance, the provisions of DSU Art. 21.3 were not relevant to determining the period of time for implementation.

### 3. OTHER ISSUES<sup>2</sup>

- Relationship of consultations with the panel request: Regarding whether and to what extent the panel's consideration of the matter identified in its terms of reference is limited by the scope of the consultations, the Appellate Body upheld the Panel's finding that consultations and panel requests must relate to the same "dispute", but there need not be a "precise identity" between the two. The Appellate Body noted that DSU Arts. 4 and 6 and ASCM Art. 4 (paragraphs 1-4) do not require a "precise and exact identity" between the specific measures that were the subject of consultations and the measures identified in the panel request. In this case, certain regulatory instruments which came into effect after consultations had been held were nonetheless properly before the Panel because they were specifically identified in the request for establishment of the panel and they did not change the essence of the export subsidies on which consultations had been held.

<sup>1</sup> Brazil – Export Financing Programme for Aircraft

<sup>2</sup> Other issue addressed: methodology for calculating the level of export subsidies granted for purposes of ASCM Art. 27.4; and business confidential information.

# BRAZIL – AIRCRAFT (ARTICLE 21.5 – CANADA)<sup>1</sup>

## (DS46)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Art. 4.7 and Annex I item (k)	Referred to the Original Panel	9 December 1999
			Circulation of Panel Report	9 May 2000
Respondent	Brazil		Circulation of AB Report	21 July 2000
			Adoption	4 August 2000

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Brazil indicated that it had put in place laws through which the interest rate equalization payments under PROEX would be revised, to the effect that the net interest rate applicable to any subsidized transaction under that programme would be brought down to the appropriate market "benchmark".

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 4.7: The Appellate Body upheld the Panel's findings that Brazil was in violation of Art. 4.7 as it had not withdrawn the export subsidies for regional aircraft within 90 days of the adoption of the original panel and Appellate Body reports. The Appellate Body stated that Brazil's argument that it was continuing to make payments under letters of commitment (private contractual obligations under domestic law), which had been made before the expiry of the 90-day period of implementation, was not an adequate defence against the implementation of DSB recommendations.
- ASCM Annex I Illustrative List of Export Subsidies, item (k): The Appellate Body upheld the Panel's conclusion and found that Brazil had failed to demonstrate that the PROEX payments were not used to secure a material advantage in the field of export credit terms within the meaning of item (k) because Brazil had not identified an appropriate "market benchmark" for comparison with the export credit terms available under the measure at issue. The market benchmark (i.e. US Treasury Bond rate plus 20 basis points) was inappropriate since it was not based on evidence from relevant, comparable transactions in the marketplace. In light of its above findings of violation (i.e. Brazil had not proved that PROEX payments met the conditions of the first paragraph of item (k)), the Appellate Body concluded that it was not necessary to rule on whether export subsidies under PROEX were "payments" or whether "export subsidies" were "permitted" under item (k) and found that the Panel's findings on these issues were moot, and, thus, of no legal effect.

### 3. OTHER ISSUES

- Burden of proof: Upholding the Panel's findings, the Appellate Body stated that since Brazil was clearly asserting an "affirmative defence" to a violation of ASCM Art. 3.1(a) under the first paragraph of item (k) of the Illustrative List of Export Subsidies, the burden was on Brazil to prove that the measure put in place was justified under the terms of item (k).

<sup>1</sup> Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU

# BRAZIL – AIRCRAFT (ARTICLE 21.5 II)<sup>1</sup>

## (DS46)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 1, 3 and Annex I	Referred to the Original Panel	16 February 2001
			Circulation of Panel Report	26 July 2001
Respondent	Brazil		Circulation of AB Report	NA
			Adoption	23 August 2001

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Following authorization by the DSB of countermeasures to be imposed by Canada against Brazil, Brazil announced that it had revised the interest rate equalization component of PROEX, its export financing programme related to the sale of regional aircraft, and had, thereby, eliminated the prohibited export subsidy found to be in violation of the ASCM by the original Panel, under its new PROEX III scheme.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ASCM Art. 1 (subsidy): On the question of whether the PROEX III payments constituted a subsidy within the meaning of Art.1 (i.e. whether it was a (i) financial contribution that conferred a (ii) benefit), the Panel found that PROEX III payments did constitute a financial contribution and that the PROEX III scheme conferred a benefit on producers of regional aircraft, as it did not preclude granting of the payments to reduce the interest rates below those which could be obtained commercially. However, the Panel concluded that Canada had failed to establish that PROEX III *mandated* that the Brazilian government conferred a "benefit" on producers of regional aircraft. Since it was a discretionary provision, PROEX III was not found to amount to an *as such* violation.
- ASCM Art 3.1(a): The Panel found that PROEX III applied only to export financing operations and therefore, was contingent upon export under Art. 3.1(a). However, the Panel concluded that because Brazil maintained the discretion to limit the provision of the PROEX III interest rate equalization payments to circumstances where a benefit was not conferred, Brazil was not required by the PROEX III scheme to provide a "subsidy" within the meaning of Art. 1.1. Therefore, there was no prohibited export subsidy and no violation of Article 3.1(a).
- ASCM Annex I, Illustrative List item (k): (second para. of item (k)) The Panel found that PROEX III constituted "interest rate support" and was, therefore, an export credit practice subject to the interest rate provisions of the OECD Arrangement. The Panel nevertheless concluded that PROEX III, *as such, allowed* Brazil to act in conformity with the OECD Arrangement and that Brazil had, therefore, successfully invoked the safe haven provided for by the second paragraph of item (k).

(First paragraph of item (k)) Regarding Brazil's claim that, even if PROEX III was not covered by the safe haven provided under the second paragraph of item (k), the payments under PROEX III were still permitted as they were not used to secure a material advantage in the field of export credit terms under the first paragraph of item (k), the Panel found that Brazil failed to establish that PROEX III was justified under the first paragraph because the payments made under PROEX III were not "payments" within the meaning of the first paragraph: while PROEX III allowed Brazil to make payments that did not secure a material advantage in the field of export credits, the financial institutions involved in financing PROEX III-supported transactions provided "export credits", but they could not be seen as "*obtaining* export credits" as indicated in the first paragraph of item(k). The Panel also found that the first paragraph of item (k) cannot, as a legal matter, be invoked as an affirmative defence to a violation of ASCM Art. 3.1(a).

<sup>1</sup> Brazil – Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU

<sup>2</sup> Other issues addressed: ASCM (general); private counsel; confidentiality; mandatory vs. discretionary legislation distinction.

## INDIA – PATENTS (US)<sup>1</sup>

### (DS50)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>TRIPS Art. 70.8 and 70.9</i>	Establishment of Panel	<i>20 November 1996</i>
			Circulation of Panel Report	<i>5 September 1997</i>
Respondent	<i>India</i>		Circulation of AB Report	<i>19 December 1997</i>
			Adoption	<i>16 January 1998</i>

### 1. MEASURE AND INTELLECTUAL PROPERTY AT ISSUE

- Measure at issue: (i) India's "mailbox rule" – under which patent applications for pharmaceutical and agricultural chemical products could be filed; and (ii) the mechanism for granting exclusive marketing rights to such products.
- Intellectual property at issue: Patent protection for pharmaceutical and agricultural chemical products, as provided under TRIPS Art. 27.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- TRIPS Art. 70.8: The Appellate Body upheld the Panel's finding that India's filing system based on "administrative practice" for patent applications for pharmaceutical and agricultural chemical products was inconsistent with Art. 70.8. The Appellate Body found that the system did not provide the "means" by which applications for patents for such inventions could be securely filed within the meaning of Art. 70.8(a), because, in theory, a patent application filed under the administrative instructions could be rejected by the court under the contradictory mandatory provisions of the existing Indian laws: the Patents Act of 1970.
- TRIPS Art. 70.9: The Appellate Body agreed with the Panel that there was no mechanism in place in India for the grant of exclusive marketing rights for the products covered by Art. 70.8(a) and thus Art. 70.9 was violated.

### 3. OTHER ISSUES<sup>2</sup>

- Interpretation of the TRIPS Agreement: The Appellate Body rejected the Panel's use of a "legitimate expectations" (of Members and private right holders) standard, which derives from the non-violation concept, as a principle of interpretation for the TRIPS Agreement. The Appellate Body based its conclusion on the following: (i) the protection of "legitimate expectations" is not something that was used in GATT practice as a principle of interpretation; and (ii) the Panel's reliance on the VCLT Art. 31 for its "legitimate expectations" interpretation was not correct because the "legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself." Pointing to DSU Arts. 3.2 and 19.2<sup>3</sup>, the Appellate Body clarified that the process of treaty interpretation should not include the "imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."

<sup>1</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (Complaint by the United States)

<sup>2</sup> Other issues addressed: terms of reference (DSU Art. 6.2 in relation to US claim on TRIPS Art. 63); burden of proof.

<sup>3</sup> DSU Arts. 3.2 and 19.2 make clear that panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements".

# INDONESIA – AUTOS<sup>1</sup>

## (DS54, DS55, DS59, DS64)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>European Communities, Japan, United States</i>	<i>TRIMs Art. 2.1</i>	Establishment of Panel	<i>12 June 1997</i>
		<i>GATT Arts. I:1 and III:2</i>	Circulation of Panel Report	<i>2 July 1998</i>
Respondent	<i>Indonesia</i>	<i>ASCM Arts. 5(c), 6, 27.9 and 28</i>	Circulation of AB Report	<i>NA</i>
			Adoption	<i>23 July 1998</i>

### 1. MEASURES AND PRODUCTS AT ISSUE

- Measures at issue: (i) "The 1993 Programme" that provided import duty reductions or exemptions on imports of automotive parts based on the local content percent; and (ii) "The 1996 National Car Programme" that provided various benefits such as luxury tax exemption or import duty exemption to qualifying (local content and etc.) cars or Indonesian car companies.
- Products at issue: Imported motor vehicles and parts and components thereof.

### 2. SUMMARY OF KEY PANEL FINDINGS

- TRIMs Agreement Art. 2.1 (local content requirement):<sup>2</sup> The Panel found the 1993 Programme to be in violation of Art. 2.1 because (i) the measure was a "trade-related investment"<sup>3</sup> measure; and (ii) the measure, as a local content requirement, fell within paragraph 1 of the Illustrative List of TRIMs in the Annex to the TRIMs Agreement, which sets out trade-related investment measures that are inconsistent with national treatment obligation under GATT Art. III:4.
- GATT Art. III:2 (national treatment): The Panel found that the sales tax benefits under the measures violated both Art. III:2, first and second sentences. The Panel noted that under the Indonesian car programmes, an imported motor vehicle would be taxed at a higher rate than a like domestic vehicle in violation of Art. III:2, first sentence, and also, any imported vehicle would not be taxed similarly to a directly competitive or substitutable domestic car due to these Indonesian car programmes whose purpose was to promote a national industry.
- GATT Art. I:1 (MFN treatment): The Panel found the measures to be in violation of Art. I:1 because the "advantages" (duty and sales tax exemptions) accorded to Korean imports were not accorded "unconditionally" to "like" products from other Members.
- ASCM Art. 5(c) (serious prejudice): The Panel found that the duty and sales tax exemptions under the 1996 National Car Programme were "specific subsidies" which had caused "serious prejudice" (through significant price undercutting under Art. 6.3(c)) to like imports of EC (but not US) imports under Art. 5(c).

### 3. OTHER ISSUES<sup>4</sup>

- Private counsel: Following the Appellate Body's ruling in *EC – Bananas*, the Panel, for the first time at this stage, allowed private counsels to be present in panel hearings as part of a party's delegation.

<sup>1</sup> *Indonesia – Certain Measures Affecting the Automotive Industry*

<sup>2</sup> Regarding the relationship between the TRIMs Agreement and GATT Art. III, the Panel noted that the TRIMs Agreement applies independently of Art. III and has autonomous legal existence. It then examined the claims on the TRIMs Agreement first since it is more specific than Art. III:4. The Panel eventually exercised judicial economy on the Art. III claim.

<sup>3</sup> In respect of "investment" measures, the Panel noted that "domestic investment", in addition to "foreign investment", is also subject to the TRIMs Agreement.

<sup>4</sup> Other issues addressed: Annex V (ASCM); terms of reference (DSU Art. 6.2, expired measure); protection of business confidential information; applicability (relationship) of multiple agreements (GATT Art. III, TRIMs Agreement and ASCM).

# ARGENTINA – TEXTILES AND APPAREL<sup>1</sup>

## (DS56)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	United States	GATT Arts. II and VIII	Establishment of Panel	25 February 1997
			Circulation of Panel Report	25 November 1997
Respondent	Argentina		Circulation of AB Report	27 March 1998
			Adoption	22 April 1998

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: (i) Argentina's system of minimum specific import duties, known as "DIEM", on textiles and apparel (under which textiles and apparel were subject to either a 35 per cent *ad valorem* duty or a minimum specific duty, whichever was higher) and (ii) statistical services tax imposed on imports to finance "statistical services to importers, exporters and the general public".
- Product at issue: Imported textiles and apparel.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. II (schedules of concessions): The Appellate Body found Argentina's measure was, in fact, inconsistent with Art. II:1(b). It held that "the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Art. II:1(b), first sentence, of the GATT to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule." In this case, the Appellate Body concluded that "the structure and design of the Argentine system is such that for any DIEM ... the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent."
- GATT Art. VIII (fees and formalities): The Appellate Body upheld the Panel's findings that the statistical tax on imports violated Argentina's obligations under Art. VIII:1(a) "to the extent it results in charges being levied in excess of the approximate costs of the services rendered as well as being a measure designated for fiscal purposes." The Appellate Body also rejected Argentina's argument that the Panel had violated DSU Arts. 11 and 12.7 based on the Panel's failure to consider Argentina's IMF obligations as set forth in a "Memorandum of Understanding" between Argentina and the IMF. The Appellate Body held, *inter alia*, that Argentina failed to show "an irreconcilable conflict" between the Understanding and GATT Art. VIII, and that no other international agreements or understandings regarding the WTO and IMF justified a conclusion that a Member's IMF commitments prevail over its GATT Art. VIII obligations.

### 3. OTHER ISSUES<sup>2</sup>

- Panel's obligation to seek expert advice (DSU Art. 13): The Appellate Body found that the Panel acted within the bounds of its discretionary authority under DSU Art. 13 when it did not accede to the parties' request to seek the advice of the IMF on Argentina's statistical tax. It noted that while an IMF consultation might have been useful, the Panel did not abuse its discretion by declining to engage in such a consultation. (It also noted that the only provision that requires consultations with the IMF is GATT Art. XV:2.)
- Review of a revoked measure: The Panel declined to review a revoked measure (revoked after the panel request but before its establishment), when Argentina raised an objection to the Panel's examination of such a measure.

<sup>1</sup> Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items

<sup>2</sup> Other issues addressed: objective assessment (DSU Art. 11); terms of reference (revoked measure); burden of proof; submission of evidence.

## US – SHRIMP<sup>1</sup>

### (DS58)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	India, Malaysia, Pakistan, Thailand	GATT Arts. XI and XX	Establishment of Panel	25 February 1997
			Circulation of Panel Report	15 May 1998
Respondent	United States		Circulation of AB Report	12 October 1998
			Adoption	6 November 1998

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US import prohibition of shrimp and shrimp products from non-certified countries (i.e. countries that had not used a certain net in catching shrimp).
- Products at issue: Shrimp and shrimp products from the complainant countries.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XI (quantitative restrictions): The Panel found that the US prohibition, based on Section 609, on imported shrimp and shrimp products violated GATT Art. XI. The United States apparently conceded this violation of Art. XI because it did not put forward any defending arguments in this regard.
- GATT Art. XX (exceptions): The Appellate Body held that although the US import ban was related to the conservation of exhaustible natural resources and, thus, covered by Art. XX(g) exception, it could not be justified under Art. XX because the ban constituted "arbitrary and unjustifiable" discrimination under the chapeau of Art. XX. In reaching this conclusion, the Appellate Body reasoned, *inter alia*, that in its application the measure was "unjustifiably" discriminatory because of its intended and actual coercive effect on the specific policy decisions made by foreign governments that were Members of the WTO, also the measure constituted "arbitrary" discrimination because of the rigidity and inflexibility in its application, and the lack of transparency and procedural fairness in the administration of trade regulations.

While ultimately reaching the same finding on Art. XX as the Panel, the Appellate Body, however, reversed the Panel's legal interpretation of Art. XX with respect to the proper sequence of steps in analysing Art. XX. The proper sequence of steps is to first assess whether a measure can be provisionally justified as one of the categories under paragraphs (a)-(j), and, then, to further appraise the same measure under the Art. XX chapeau.

### 3. OTHER ISSUES<sup>2</sup>

- Amicus curiae briefs: The Appellate Body held that it could consider *amicus curiae* briefs attached to a party's submission since the attachment of a brief or other material to either party's submission renders that material at least prima facie an integral part of that party's submission. Based on the same rationale, the Appellate Body reversed the Panel and ruled that a panel has the "discretion either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not" under DSU Arts. 12 and 13.

<sup>1</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products

<sup>2</sup> Other issues addressed: adequacy of the notice of appeal (Working Procedures for Appellate Review, Rule 20(2)(d)).

## US – SHRIMP (ARTICLE 21.5)<sup>1</sup>

### (DS58)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Malaysia	GATT Arts. XI and XX	Referred to the Original Panel	23 October 2000
			Circulation of Panel Report	15 June 2001
Respondent	United States		Circulation of AB Report	22 October 2001
			Adoption	21 November 2001

#### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Revised Guidelines for the Implementation of Section 609, under which certain countries were exempt from the import prohibition on shrimp pursuant to the criteria provided therein.<sup>2</sup>

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XI (quantitative restrictions): The Panel concluded that, as with the measure at issue in the original proceedings, the US import prohibition on shrimp and shrimp products under Section 609 was inconsistent with Art. XI:1.
- GATT Art. XX(g) (exceptions): The Appellate Body upheld the Panel's finding that Section 609, as implemented by the revised guidelines and as applied by the United States, was justified under Art. XX(g), as (i) it related to the conservation of exhaustible natural resources as set out in Art. XX(g) and (ii) it now met the conditions of the chapeau of Art. XX when applied in a manner that no longer constituted a means of arbitrary discrimination as a result of (i) the serious, good faith efforts made by the United States to negotiate an international agreement and (ii) the new measure allowing "sufficient flexibility" by requiring that other Members' programmes simply be "comparable in effectiveness" to the US programme, as opposed to the previous standard that they be "essentially the same". In this regard, the Appellate Body rejected Malaysia's contention and agreed with the Panel that the United States had only an obligation to make best efforts to negotiate an international agreement regarding the protection of sea turtles, not an obligation to actually conclude such an agreement because all that was required of the United States to avoid "arbitrary or unjustifiable discrimination" under the chapeau was to provide all exporting countries "similar opportunities to negotiate" an international agreement. The Appellate Body noted that "so long as such comparable efforts are made, it is more likely that 'arbitrary or unjustifiable discrimination' will be avoided between countries where an importing Member concludes an agreement with one group of countries, but fails to do so with another group of countries".

#### 3. OTHER ISSUES

- Terms of reference (DSU Art. 21.5 panels): Having concluded that when the issue concerns the consistency of a new measure "taken to comply", the task of a DSU Art. 21.5 panel "is to consider that new measure in its totality", which requires a consideration of both the measure itself and its application, [...] the Appellate Body stated that "the task of the Panel was to determine whether Section 609 has been applied by the United States, through the Revised Guidelines, either on their face, or in their application, in a manner that constitutes 'arbitrary or unjustifiable discrimination'". The Appellate Body found that the Panel correctly fulfilled its mandate by examining the measure in the light of the relevant provisions of the GATT and by correctly using and relying on the reasoning in the original Appellate Body report.

<sup>1</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*

<sup>2</sup> The Appellate Body noted that the measure at issue in this dispute consists of three elements: (1) Section 609; (2) the Revised Guidelines for the Implementation of Section 609; and (3) the application of both Section 609 and the Revised Guidelines in the practice of the United States.

# GUATEMALA – CEMENT I<sup>1</sup>

## (DS60)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Mexico	DSU Art. 6.2	Establishment of Panel	20 March 1997
			Circulation of Panel Report	19 June 1998
Respondent	Guatemala	ADA Art. 17.4 (Art. 5)	Circulation of AB Report	2 November 1998
			Adoption	25 November 1998

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Guatemala's anti-dumping investigation (both the initiation and various decisions and conduct of the Ministry).
- Product at issue: Grey Portland cement from Mexico.

### 2. SUMMARY OF KEY PANEL/AB FINDING

- DSU Art. 6.2 and ADA Art. 17.4 ([in]sufficiency of panel request – identification of measure): The Appellate Body, reversing the Panel, concluded that Mexico had failed to identify in its panel request the "specific measures at issue" in accordance with DSU Art. 6.2 and ADA Art. 17.4, i.e., one of the three measures to be specified in a dispute involving anti-dumping investigations: (i) a definitive anti-dumping duty, (ii) the acceptance of a price undertaking, or (iii) a provisional anti-dumping measure.

According to the Appellate Body, the special dispute settlement rules in the ADA and the DSU provisions together create a "comprehensive, integrated dispute settlement system" rather than the former replacing the more general rules in the DSU as the Panel had erroneously found. Also, the Appellate Body rejected the Panel's reasoning that the term "measure" under DSU Art. 6.2 should be interpreted broadly, and clarified that both identification of "measure" and identification of the alleged "violations" are separately required under DSU Art. 6.2.

Consequently, the Appellate Body found that the dispute was not properly before the Panel (i.e. there was no measure properly within the Panel's terms of reference), and, as such, dismissed the case without further reviewing any substantive issues.<sup>2</sup>

### 3. OTHER ISSUES

- Status of panel's findings: As a result of the Appellate Body's decision to dismiss the case as summarized above, the Panel's substantive findings (that Guatemala had violated the notification provisions in ADA Art. 5.5 and the substantive requirements for initiation of an anti-dumping investigation in ADA Art. 5.3) became moot.

<sup>1</sup> *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*

<sup>2</sup> After the Appellate Body dismissed this case, Mexico brought the case again (*Guatemala – Cement II*) with a new panel request in which Mexico specified the relevant measure at issue – i.e. the definitive anti-dumping duty. In *Guatemala – Cement II*, the Panel reached the same conclusions regarding initiation as the Panel in *Guatemala – Cement I*, and it also considered other issues raised by Mexico.

## EC – COMPUTER EQUIPMENT<sup>1</sup>

(DS62, 67, 68)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GATT Art. II:1</i>	Establishment of Panel	<i>25 February 1997</i>
			Circulation of Panel Report	<i>5 February 1998</i>
Respondent	<i>European Communities</i>		Circulation of AB Report	<i>5 June 1998</i>
			Adoption	<i>22 June 1998</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The European Communities' application of tariffs on local area networks: ("LAN") equipment and multimedia personal computers ("PCs") in excess of those provided for in the EC Schedules through changes in customs classification.
- Product at issue: Computer equipment associated with LAN namely, (i) LAN equipment such as network or adaptor cards and (ii) multimedia PCs.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. II:1 (schedule of concessions – LAN equipment): The Appellate Body reversed the Panel's finding of a violation by the European Communities of GATT Art. II:1 with respect to LAN equipment on the basis of the Panel's erroneous legal reasoning and consideration of only selective evidence: (i) the Appellate Body rejected the Panel's finding that a tariff concession in the Schedule can be interpreted in light of an exporting Member's "legitimate expectations" – a concept relevant to a non-violation complainant under GATT Art. XXIII:1(b) – in the context of a violation complaint. Rather, the Appellate Body found that a tariff concession provided for in the Member's Schedule should be interpreted according to the general rules of treaty interpretation set out in Arts. 31 and 32 of the VCLT<sup>3</sup>; (ii) in this regard, the Appellate Body said that the Panel should have further examined the following: the Harmonized System and its Explanatory Notes as context in interpretation of the terms of the Schedule; the existence and relevance of subsequent practice; the European Communities' classification practice during the Tokyo Round, in addition to that during the Uruguay Round; relevant US practice with regard to the classification of the product at issue; and the EC legislation governing customs classification at the time.
- Clarification of the scope of tariff concessions: The Appellate Body reversed the Panel's finding that the United States, as an exporting Member, was not required to clarify the scope of the European Communities' tariff concessions. The Appellate Body emphasized the "give and take" nature of tariff negotiations and that Members' Schedules "represent a common agreement among all Members", particularly in light of the fact that they are an integral part of the GATT, and thus found that clarification is a "task for *all* interested parties".
- GATT Art. II:1 (schedule of concessions – PCs): The Panel found that the United States failed to provide sufficient evidence to demonstrate that the European Communities had violated GATT Art. II:1 with respect to PCs.

<sup>1</sup> *European Communities – Customs Classification of Certain Computer Equipment*

<sup>2</sup> Other issues addressed: measure and products covered (DSU Art. 6.2); scope of the defending parties.

<sup>3</sup> The Appellate Body explained that the purpose of treaty interpretation under VCLT Art. 31 is "to ascertain the common intentions of the parties".

## EC – POULTRY<sup>1</sup>

### (DS69)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Brazil	GATT Arts. XIII, X <i>Licensing Ag<sup>a</sup></i> ;	Establishment of Panel	30 July 1997
			Circulation of Panel Report	12 March 1998
Respondent	European Communities	AA Art. 5	Circulation of AB Report	13 July 1998
			Adoption	23 July 1998

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: European Communities' tariff rate quota ("TRQ") system incorporated into EC Schedule LXXX with respect to frozen poultry and the European Communities' licensing requirements for importers of the product at issue.
- Products at issue: Frozen poultry imported from Brazil.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XIII: The Appellate Body upheld the Panel's finding that the TRQ must be administered on a non-discriminatory basis – as opposed to it being awarded exclusively to Brazil – based on the text of the EC Schedule LXXX and pursuant to Art. XIII, and thus, the European Communities had acted consistently with its WTO obligations. The Appellate Body also upheld the Panel's finding that, even when a TRQ is the result of an Art. XXVIII compensation negotiation, it must be administered in a non-discriminatory manner (total imports, including those from non-Members). The Appellate Body also agreed with the Panel that TRQ shares must be calculated on the basis of "total imports", including imports coming from non-Members, and thus, the European Communities acted consistently with Art. XIII:2 by including imports from non-Members in its TRQ calculation.
- GATT Art. X (transparency): The Appellate Body upheld the Panel's finding that Art. X applies only to measures of "general application", as opposed to specific transactions such as individual poultry shipments, and thus, Brazil's claims were outside the scope of Art. X.
- AA (Art. 5.1(b)): Having found that the special safeguard mechanism in AA Art. 5.1(b) is triggered when the CIF price *alone* (i.e. not including customs duties) falls below the reference or "trigger price", the Appellate Body reversed the Panel and concluded that the European Communities had not violated the requirements of AA Art. 5.1(b). (Art. 5.5) The Appellate Body found that Art. 5.5 *mandates* the use of CIF import prices as the relevant price for calculating additional duty imposed under Art. 5.1(b). Thus, regarding the consistency of the EC Regulation, which provided for two methods for determining the amount of duty: one using the CIF price and one using an alternative "representative price" – the Appellate Body found that the Regulation was inconsistent with Art. 5.5.

### 3. OTHER ISSUES<sup>2</sup>

- Dissenting opinion: This case was the first WTO dispute in which one member of a panel dissented from the majority opinion: In interpreting the "trigger price" under AA Art. 5.1(b), one panellist found that use of the CIF price alone met the requirements of Art. 5.1(b) (C.f. The Panel majority concluded that the trigger price was "CIF price plus customs duty").

<sup>1</sup> *European Communities – Measures Affecting the Importation of Certain Poultry Products*

<sup>a</sup> The Panel rejected all of Brazil's claims under *the Licensing Agreement*. Upon appeal by Brazil against some of these Panel's findings, the Appellate Body upheld the Panel's findings.

<sup>2</sup> Other issues addressed: scope of appellate review (DSU Art. 17.6); relevance of the 1994 Oilseeds Agreement; terms of reference.

# CANADA – AIRCRAFT<sup>1</sup>

## (DS70)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ASCM Arts. 1, 3.1 and 4.7</i>	Establishment of Panel	<i>23 July 1998</i>
			Circulation of Panel Report	<i>14 April 1999</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>2 August 1999</i>
			Adoption	<i>20 August 1999</i>

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measure at issue: Canadian measures providing various forms of financial support to the domestic civil aircraft industry.
- Industry at issue: Civil aircraft industry.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 1.1 (subsidy): The Panel found that a "financial contribution" confers a "benefit" and constitutes a subsidy under Art. 1 when provided on terms more advantageous than those otherwise available to the recipient on the market. The Appellate Body, while upholding this finding, concluded that the word "conferred", in conjunction with "thereby", calls for an inquiry into what was conferred on the recipient, not an inquiry into the cost to the government as argued by Canada.
- ASCM Art. 3.1(a) (export subsidies): The Appellate Body upheld the Panel's finding that contingency exists if there is a relationship of conditionality or dependence between the grant of the subsidy and the anticipated exportation or export earnings.
- Examination of Canada's individual measures: The Panel concluded that the EDC programme *as such* was discretionary legislation and, upon examination of its application, found no prima facie case that these were export subsidies. Although the Panel also found that the Canada Account programme *per se* was discretionary legislation that could not be challenged *as such*, it concluded that the programme *as applied* conferred a benefit and was an export subsidy contingent upon export performance. The Panel also found that TPC assistance was a subsidy contingent in fact upon export performance. In this respect, it applied the standard whether "the facts demonstrate that [TPC contributions] would not have been granted *but for* anticipated exportation". The Appellate Body upheld these findings by the Panel.

### 3. OTHER ISSUES<sup>2</sup>

- Adverse inference: The Appellate Body found that panels have discretion to draw inferences from all the facts including where a party to a dispute refuses to submit information sought by a panel pursuant to DSU Art. 13. In this case, it held that the Panel did not err in refusing to draw adverse inferences from Canada's refusal to provide information. The Appellate Body stated that parties are under an obligation to cooperate with the Panel.

<sup>1</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*

<sup>2</sup> Other issues addressed in this case: panel's terms of reference; relationship between consultations and panel requests; application of the ASCM to measures in place prior to 1 January 1995; adoption of special working procedures on business confidential information.

# CANADA – AIRCRAFT (ARTICLE 21.5)<sup>1</sup>

## (DS70)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ASCM Art.3.1(a)</i>	Referred to the Original Panel	<i>9 December 1999</i>
			Circulation of Panel Report	<i>9 May 2000</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>21 July 2000</i>
			Adoption	<i>4 August 2000</i>

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- (i) Canada Account debt financing for regional aircraft exports – a new policy guideline under which all Canada Account transactions were required to comply with the rules set out in the OECD Arrangement on Guidelines for Officially Supported Export Credits (the "OECD Arrangement"); and (ii) Technology Partnerships Canada ("TPC") assistance – no disbursements pursuant to any existing TPC Contribution Agreement to the Canadian regional aircraft industry; cancellation of conditional approval that had been given for two other regional aircraft industry projects established prior to circulation of the Appellate Body Report; and restructuring of the TPC to comply with the ASCM.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ASCM Art. 3.1(a) (export subsidy): The Appellate Body first held that the obligation of an Art. 21.5 Panel is to review the consistency of the revised measure with the relevant Agreement (i.e. in this case, whether the "revised" TPC was consistent with ASCM Art. 3.1(c)) and that it was *not limited* to examining the measure from the perspective of the original proceedings (i.e. the issue of whether or not Canada has implemented the DSB recommendation). The Appellate Body then found that the Panel had erred in this case in declining to examine Brazil's new argument related to "specific targeting" because the argument was not part of the original proceeding. Having completed the legal analysis of this issue based on the standard it had set out, the Appellate Body then rejected Brazil's argument that Canada's regional aircraft industry was "specifically targeted" for assistance because of its "high export-orientation", since (i) the high export-orientation of a subsidized industry was not enough for the Appellate Body to find export contingency; and (ii) Brazil relied on the evidence relevant to the previous TPC programme and not to the revised programme. Consequently, the Appellate Body found that Brazil failed to establish that the revised TPC programme was inconsistent with ASCM Art. 3.1(a) and failed to establish that Canada had not implemented the recommendations and rulings of the DSB.
- ASCM Annex I, Illustrative List, item (k), second para.: In addressing whether the new policy guideline for Canada Account debt financing was consistent with Canada's obligation to "withdraw" the prohibited export subsidy by ceasing to provide the subsidy, the Panel examined whether the policy guideline "ensure[d]" that future Canada Account transactions in the regional aircraft sector would qualify for the "safe haven" provided by the second paragraph of item (k) of the Illustrative List of Export Subsidies. In this regard, the Panel set out the legal standard for item (k): an "export credit practice which is in conformity with the interest rates provisions of the OECD Arrangement shall not be considered an export subsidy prohibited by the [ASCM]". Having applied this standard to Canada's policy guideline, the Panel found that the policy guideline was not sufficient to ensure that future Canada Account transactions in the regional aircraft sector would be in conformity with the interest rate provisions of the OECD Arrangement, and thus qualify for the "safe haven" in the second paragraph of item (k) of Annex I of the ASCM. Thus, Canada was found to have failed to implement the DSB's recommendations and rulings.

<sup>1</sup> *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*

<sup>2</sup> Other issues addressed: DSU Art. 19.1.

# KOREA – ALCOHOLIC BEVERAGES<sup>1</sup>

(DS75, 84)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	European Communities, United States	GATT Art. III:2, second sentence	Establishment of Panel	16 October 1997
			Circulation of Panel Report	17 September 1998
Respondent	Korea		Circulation of AB Report	18 January 1999
			Adoption	17 February 1999

## 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Korea's tax regime for alcoholic beverages, which imposed different tax rates for various categories of distilled spirits.
- Products at issue: Imported distilled liquors and Soju (traditional Korean alcoholic beverage).

## 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. III:2, second sentence (national treatment): The Appellate Body upheld the Panel's conclusion that Korean tax measures at issue were inconsistent with Art. III:2, second sentence. More specifically, the Appellate Body upheld the Panel's findings that the products at issue were "directly competitive or substitutable" within the meaning of Art. III:2, second sentence and that Korea's tax measures on alcoholic beverages were applied "so as to afford protection" to domestic production within the meaning of Art. III:2, second sentence.

On the question of the interpretation and application of the term "directly competitive or substitutable product", the Appellate Body upheld the Panel's approach: (i) the Panel correctly considered evidence of "*present* direct competition", not the future evolution of the market, by referring to the potential for the products to compete in a market free of protection because in a protected market consumer preferences may have been influenced by that protection; (ii) the Panel was not wrong in looking to the Japanese market for an indication of how the Korean market may develop without the distortions caused by protection; and (iii) the Panel's approach of grouping the products, which was based in part on a collective assessment of the products and in part on individual assessment, was not flawed.

In addressing the issue of "so as to afford protection" under Art. III:2, second sentence, both the Panel and the Appellate Body once again emphasized the importance of examining the "design, structure, and architecture" of the measures, previously clarified by the Appellate Body in *Japan – Alcoholic Beverages II*.

<sup>1</sup> *Korea – Taxes on Alcoholic Beverages*

<sup>2</sup> Other issues addressed: burden of proof; objective assessment (DSU Art. 11); panel's obligation (DSU Art. 12.7); specificity of panel request (DSU Art. 6.2); adequacy of consultations (DSU Art. 3.3, 3.7 and 4.5); confidentiality of consultations (DSU Art. 4.6); late submission of evidence; private counsel; GATT Art. III:2 (general); and GATT Art. III:2, first sentence.

# JAPAN – AGRICULTURAL PRODUCTS II<sup>1</sup>

## (DS76)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>SPS Arts. 2.2, 5.7, 5.6 and 5.1</i>	Establishment of Panel	<i>18 November 1997</i>
			Circulation of Panel Report	<i>27 October 1998</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>22 February 1999</i>
			Adoption	<i>19 March 1999</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Varietal testing requirement (Japan's Plant Protection Law), under which the import of certain plants was prohibited because of the possibility of their becoming potential hosts of codling moth.
- Products at issue: Eight categories of plants originating from the United States, namely, apricots, cherries, plums, pears, quince, peaches (including nectarines), apples and walnuts.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- SPS Art. 2.2 (sufficient scientific evidence): The Appellate Body upheld the Panel's finding that Japan's varietal testing requirement was maintained without sufficient scientific evidence in violation of Art. 2.2.<sup>3</sup>
- SPS Art. 5.7 (provisional application): The Appellate Body upheld the Panel's finding that the varietal testing requirement was not justified under Art. 5.7 because Japan did not meet all the requirements for the adoption and maintenance of a provisional SPS measure as set out in Art. 5.7.
- SPS Art. 5.6 (alternative measures): Having found that the United States, as a complainant, did not claim and, therefore, could not have established a prima facie case of Japan's inconsistency with the existence of an alternative measure (determination of sorption levels) under Art. 5.6, the Appellate Body reversed the Panel's finding that Japan acted inconsistently with Art. 5.6.

Then, as to the alternative measure proposed by the United States – i.e. testing on a product-by-product basis, the Appellate Body upheld the Panel's finding that the United States failed to prove that Japan's measure was "more trade-restrictive than required" in relation to the alternative measure proposed by the United States (testing by product) and thus that it had violated Art. 5.6 because testing by product did not achieve Japan's appropriate level of protection.<sup>4</sup>

- SPS Art. 5.1: Having found that the Panel improperly applied judicial economy to the US claim under Art. 5.1 in relation to apricots, pears, plums and quince – the four products that were not examined by the Panel, the Appellate Body completed the legal analysis and found that Japan's measure violated Art. 5.1 for these four products as it was not based on a proper risk assessment.

<sup>1</sup> *Japan – Measures Affecting Agricultural Products*

<sup>2</sup> Other issues addressed: objective assessment (DSU Art. 11); SPS Agreement Art. 7 and Annex B, para. 1 ("measures"); judicial economy; burden of proof; consultation with scientific experts; and terms of reference/specificity of panel request.

<sup>3</sup> The Appellate Body also agreed with the Panel's legal standard for the analysis of Art. 2.2: the obligation in Art. 2.2 not to maintain an SPS measure without "sufficient scientific evidence" requires that "there be a rational or objective relationship between the SPS measure and the scientific evidence".

<sup>4</sup> The Appellate Body referred back to *Australia – Salmon* for the three elements that an alternative measure should meet within the meaning of Art. 5.6: the alternative measure (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of phytosanitary protection; and (iii) is significantly less restrictive to trade than the measure at issue.

## INDIA – PATENTS (EC)<sup>1</sup>

### (DS79)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	European Communities	TRIPS Arts. 70.8 and 70.9	Establishment of Panel	16 October 1997
			Circulation of Panel Report	24 August 1998
Respondent	India		Circulation of AB Report	NA
			Adoption	22 September 1998

#### 1. MEASURE AND INTELLECTUAL PROPERTY AT ISSUE

- Measure at issue: (i) The insufficiency of the legal regime – India's "mailbox rule" – under which patent application for pharmaceutical and agricultural chemical products could be filed; and (ii) the lack of a mechanism for granting exclusive marketing rights to such products.
- Intellection property at issue: Patent protection for pharmaceutical and agricultural chemical products, as provided under TRIPS Agreement Art. 27.

#### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- TRIPS Art. 70.8: The Panel held that India's filing system based on "administrative practice" for patent applications for pharmaceutical and agricultural chemical products was inconsistent with TRIPS Art. 70.8. The Panel found that the system did not provide the "means" by which applications for patents for such inventions could be securely filed within the meaning of Art. 70.8(a), because, in theory, a patent application filed under the current administrative instructions could be rejected by the court under the contradictory mandatory provisions of the pertinent Indian law – the Patents Act of 1970.
- TRIPS Art. 70.9: The Panel found that there was no mechanism in place in India for the grant of "exclusive marketing rights" for pharmaceutical and agricultural chemical products and thus TRIPS Art. 70.9 had been violated.

<sup>1</sup> *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (complaint by the EC). This dispute concerns the same factual issues and the same legal analyses/conclusions as those involved in the *India – Patents* case brought by the United States.

<sup>2</sup> Other issues addressed: multiple complainants (DSU Art. 19.1); original panel (DSU Article 10.4); *stare decisis* (binding nature of WTO precedent).

# CHILE – ALCOHOLIC BEVERAGES<sup>1</sup>

(DS87, 110)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>GATT Art. III:2</i>	Establishment of Panel	<i>25 March 1998 (DS110)</i>
			Circulation of Panel Report	<i>15 June 1999</i>
Respondent	<i>Chile</i>		Circulation of AB Report	<i>13 December 1999</i>
			Adoption	<i>12 January 2000</i>

## 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Chile's tax measures that imposed an excise tax at different rates – depending on the type of product (pisco, whisky, etc) under the "Transitional System" and according to the degree of alcohol content (35°, 36°, ... 39°) under the "New Chilean System".
- Products at issue: All distilled spirits falling within HS heading 2208, including pisco (Chile's domestic product) and imported distilled spirits such as whisky, vodka, rum, gin, etc.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. III:2, second sentence: The Appellate Body upheld the Panel's finding that Chile's new tax regime for alcoholic beverages violated the national treatment principle under Art. III:2, second sentence. (Chile's appeal was only in regard to the new regime.) The Panel found both Chile's transitional and new tax regimes inconsistent with Art. III:2, second sentence.

("not similarly taxed"): The Appellate Body agreed with the Panel that imported distilled spirits and Chilean pisco, as directly competitive and substitutable products, were not similarly taxed since the tax burden (47 per cent) on most of imported products (95 per cent of imports) would be heavier than the tax burden (27 per cent) on most of the domestic products (75 per cent of domestic production). The Appellate Body took the view that the relevant comparison between imported and domestic products had to be made based on a comparison of the taxation on *all* imported and domestic products over the *entire* range of categories, not simply a comparison of the products within each category.

("applied so as to afford protection"): The Appellate Body stated that an examination of the design, architecture and structure of the New Chilean System "tend[ed] to reveal" that the application of dissimilar taxation of directly competitive or substitutable products would "afford protection to domestic production", as the magnitude of difference (20 per cent) between the tax rates – 27 per cent *ad valorem* for alcohol content of 35° or less (75 per cent of domestic production) and 47 per cent *ad valorem* for alcohol content of over 39° (95 per cent of imports) – was considerable. Also, the Appellate Body stated that a measure's purpose, objectively manifested in the design, architecture and structure of the measure, was pertinent to the task of evaluating whether that measure was applied so as to afford protection to domestic production. However, the Appellate Body rejected the Panel's consideration of the relationship (logical connection) between Chile's new measure and *de jure* discrimination (against imports) found under its traditional system. In this regard, it further said that "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure, as this would come close to a 'presumption of bad faith'".

<sup>1</sup> *Chile – Taxes on Alcoholic Beverages*

<sup>2</sup> Other issues addressed in this case: claim on the panel's failure to provide the "basic rationale" behind its findings (DSU Art. 12.7); DSU 3.2 and 19.2.

# INDIA – QUANTITATIVE RESTRICTIONS<sup>1</sup>

## (DS90)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	GATT Arts. XI and XVIII	Establishment of Panel	18 November 1997
			Circulation of Panel Report	6 April 1999
Respondent	India	AA Art. 4.2	Circulation of AB Report	23 August 1999
			Adoption	22 September 1999

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: India's import restrictions that India claimed were maintained to protect its balance-of-payments (BOP) situation under GATT Art. XVIII: import licensing system, imports canalization through government agencies and actual user requirement for import licences.
- Products at issue: Imported products subject to India's import restrictions: 2,714 tariff lines within the eight-digit level of the HS (710 out of which were agricultural products).

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XI:1 (quantitative restrictions): The Panel found, based on the broad scope of a general ban on import restrictions embodied in Art. XI:1, that India's measures, including its discretionary import licensing system, were quantitative restrictions inconsistent with GATT Art. XI:1.
- GATT Art. XVIII:11 (balance-of-payment ("BOP")): The Panel found that as India's monetary reserves were adequate, and, thus, India's BOP measures were not necessary to forestall the threat of, or to stop, a serious decline in its monetary reserves within the meaning of Art. XVIII:9, India had violated Art. XVIII:11, second sentence, which provides that measures may only be maintained to the extent necessary under Art. XVIII:9.
- Justifications under GATT Art. XVIII:11 (Ad Note and Proviso): Since a removal of India's BOP measures would not immediately produce the conditions contemplated in Art. XVIII:9 justifying the maintenance of import restrictions, the Appellate Body upheld the Panel's finding that India's measures were not justified under Note Ad Art. XVIII:11. Also, the Appellate Body upheld the Panel in finding that since India was not being required to change its development policy, it was not entitled to maintain its BOP measures on the basis of proviso to Art. XVIII:11.
- AA Art. 4.2: The Panel found that the measures violated the obligation under Art. 4.2 not to maintain measures of the kind required to be converted into ordinary customs duties and that they could not be justified under footnote 1 to Art. 4.2 either since the measures were not "measures maintained under balance-of-payments provisions".

### 3. OTHER ISSUES<sup>2</sup>

- Burden of proof (GATT Art. XVIII): The Appellate Body upheld the Panel's findings that the burden of proof with respect to Art. XVIII:11 proviso is on the defending party (as an affirmative defence), and with respect to the Note Ad Art. XVIII:11 on the complaining party.
- Competence of panels to review BOP measures: The Appellate Body held that dispute settlement panels are competent to review any matters concerning BOP restrictions, and rejected India's argument that a principle of institutional balance requires that matters relating to BOP restrictions be left to the relevant political organs – the BOP Committee and the General Council.

<sup>1</sup> India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products

<sup>2</sup> Other issues addressed in this case: special and different treatment for developing countries (DSU Art. 12.10 and 21.2, GATT Art. XVIII:B); consultation with the IMF (DSU Art. 13.1 and GATT Art. XV:2); terms of reference; objective assessment of the matter (DSU Art. 11).

# KOREA – DAIRY<sup>1</sup>

## (DS98)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	SA Arts. 2.1, 4.2, 5.1 and 12	Establishment of Panel	23 July 1998
			Circulation of Panel Report	21 June 1999
Respondent	Korea	GATT Art. XIX:1	Circulation of AB Report	14 December 1999
			Adoption	12 January 2000

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive safeguard measure.
- Products at issue: Imports of certain dairy products (skimmed milk powder preparations).

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. XIX:1(a) (unforeseen development): Reversing the Panel's legal reasoning, the Appellate Body held that the clause – "as a result of unforeseen development and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions" – in Art. XIX:1(a), although not an independent condition, describes certain circumstances which must be demonstrated as a matter of fact in order for a safeguard measure to be applied consistently with the requirements of Art. XIX. The Appellate Body concluded that the phrase "as a result of unforeseen developments" requires that the developments that led to a product being imported in such quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "*unexpected*". The Appellate Body could not complete the Panel's analysis, however, due to the lack of undisputed facts in the record.
- SA Art. 4.2 (serious injury): The Appellate Body upheld the Panel's finding that Korea's serious injury determination did not meet the requirements of Art. 4.2, as it did not adequately examine *all* serious injury factors listed in Art. 4.2 (e.g., imports increase, market share, sales, production, productivity, etc.) and neither did it provide sufficient reasoning in its explanations of how certain factors support, or detract from, a finding of serious injury.
- SA Art. 5.1 (measure): The Appellate Body partly upheld and partly reversed the Panel's legal finding: It agreed that Art. 5.1 (first sentence) "imposes an obligation on a Member applying a safeguard measure to ensure that the measure applied is not more restrictive than necessary to prevent or remedy serious injury and to facilitate adjustment"; and reversed the Panel's broad finding that Art. 5.1 imposes an obligation on a Member applying a safeguard measure to explain that the measure is necessary to remedy serious injury and to facilitate adjustment. Rather, the Appellate Body considered that the clear justification requirement under the second sentence of Art. 5.1 applies only to "a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years for which statistics are available". The Panel had originally found that Korea had acted inconsistently with Art. 5.1, but the Appellate Body was unable to complete the analysis due to the lack of panel findings on Korea's quantitative restrictions.

### 3. OTHER ISSUES

- DSU Art. 6.2 (adequacy of panel request): According to the Appellate Body, simple identification of the articles alleged to have been violated, while a "minimum requirement", may not always be enough to meet all the requirements of Art. 6.2. This requires a case-by-case examination, but the mere listing of the articles may not satisfy Art. 6.2 where those articles listed in the panel request establish multiple obligations. In addition, a panel should take into account "whether the ability of the respondent to defend itself was prejudiced<sup>3</sup>", this had not been proved by Korea.

<sup>1</sup> Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products

<sup>2</sup> Other issues addressed in this case: "all pertinent information" (SA Art. 12.2); evidentiary issues; burden of proof; standing to bring a complaint; deadlines for submission of evidence; claims under Safeguards Agreement, Articles 3 and 4; and standard of review (concerning Members' safeguard investigations).

<sup>3</sup> The Appellate Body referred back to its finding in this regard in *EC – Computer Equipment*. The first case where a panel found "prejudice" to the respondent was *Thailand – H-Beams*.

## US – DRAMS<sup>1</sup>

### (DS99)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Korea	ADA Arts. 11, 2.2, 6.6 and 5.8	Establishment of Panel	16 January 1998
			Circulation of Panel Report	29 January 1999
Respondent	United States		Circulation of AB Report	NA
			Adoption	19 March 1999

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: United States Department of Commerce ("USDOC") regulation (namely, the "three zeroes" rules)<sup>2</sup>, both *as applied* in the DRAMS third administrative review at issue and *as such*, and other aspects of the third administrative review conducted by the USDOC on DRAMS.
- Products at issue: DRAMS from Korea (Hyundai and LG Semicon).

#### 2. SUMMARY OF KEY PANEL FINDINGS<sup>3</sup>

- ADA Art. 11.2 (the "likely" standard): The Panel found for Korea and held that the "not likely" standard in the US regulation (as quoted in footnote 2 below), *as such*, is inconsistent with Art. 11.2 ("likely" standard) because a failure to find that an exporter is "not likely" to dump does not necessarily lead to the conclusion that this exporter is therefore "likely" to dump. The Panel considered that because there are situations where the not "not likely" standard is satisfied but the "likely" standard is not, the "not likely" criterion fails to provide a "demonstrable basis for consistently and reliably determining that the likelihood criterion is satisfied". The Panel also found that because the final results of the third administrative review in the DRAMS case were based on a USDOC determination under that regulation, those results, *as applied*, were inconsistent with Art. 11.2 as well.
- ADA Art. 2.2.1.1 (acceptance of data): The Panel rejected Korea's claim that the USDOC violated Art. 2.2.1.1 by disregarding certain cost data submitted by the respondents during the third DRAMS administrative review proceedings. The Panel found that Korea failed to establish a prima facie case because it merely relied on its own conclusory arguments that the data should have been accepted without challenging the specific bases upon which the USDOC had rejected the submitted data.
- ADA Art. 6.6 (accuracy of the information): The Panel rejected Korea's claim that the USDOC accepted unverified data from a petitioner in reaching decisions regarding the respondents. The Panel found that Korea failed to establish a prima facie case because it had raised no specific challenges to the use of the data other than to argue that all information should be specifically verified. Instead, the Panel was of the view that Art. 6.6 did not require verification of all information upon which an authority relies. (The authority could rely on the reputation of the original source of the information.)
- ADA Art. 5.8 (de minimis margin): The Panel rejected Korea's claim that the United States violated Art. 5.8 by setting the *de minimis* margin threshold for duty assessment procedures (under Art. 9.3) at 0.5 per cent, instead of the 2 per cent standard established in Art. 5.8. The Panel considered that the scope of Art. 5.8 (*de minimis* standard) is limited to applications for investigations and investigations (as set out in Art. 5.8) and does not encompass Art. 9.3 duty assessment procedure.

<sup>1</sup> *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*

<sup>2</sup> The relevant US regulation at issue here is CFR Part 19, Section 353.25(a)(2)(ii), which provides:

"The Secretary [of Commerce] 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; ..."

<sup>3</sup> Other issues addressed in this case: general, alleged US failure to self-initiate an injury review (ADA Art. 11.2); specific recommendations (DSU Art. 19.1); and terms of reference (reviewability of pre-WTO measures).

# CANADA – DAIRY<sup>1</sup>

(DS103, 113)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	United States New Zealand	AA Arts. 9.1, 3.3, 10.1 and 8;	Establishment of Panel	25 March 1998
			Circulation of Panel Report	17 May 1999
Respondent	Canada	GATT Art. II:1(b)	Circulation of AB Report	13 October 1999
			Adoption	27 October 1999

## 1. MEASURE AND INDUSTRY AT ISSUE

- Measure at issue: Canadian government's support system (Special Milk Classes Scheme) for domestic milk production and export, as well as Canada's tariff rate quota ("TRQ") regime for imports of fluid milk.
- Industry at issue: Milk and dairy product industry.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

### *Export subsidy*

- AA Art. 9.1(a) (direct subsidy): Having reversed the Panel's conclusion that Canada's measure involved export subsidies within the meaning of Art 9.1(a) (based on the Panel's erroneous interpretation of the terms "direct subsidies" and "payments-in-kind" under Art. 9.1(a)), the Appellate Body also reversed the Panel's finding that Canada had acted inconsistently with Arts. 3.3 and 8 by providing export subsidies under Art. 9.1(a) – i.e. by exceeding the support reduction commitment levels scheduled by Canada.
- AA Art. 9.1(c) (export subsidy): The Appellate Body upheld the Panel's finding that the provision of milk at discounted prices to processors for export constituted "payments" within the meaning of Art. 9.1(c) and that the relevant payments under Canada's scheme were financed by virtue of governmental action. Thus, it upheld the Panel's ultimate conclusion that Canada's scheme constituted an export subsidy within the meaning of Art. 9.1(c), which exceeded the reduction commitment, and thus, Canada had acted inconsistently with Arts. 3.3 and 8.
- AA Art. 10.1 (other export subsidy): The Panel found alternatively that in the event Canada's measures did not involve export subsidies under Art. 9.1(a) or (c), Canada's measures still constituted an "other" export subsidy in the sense of Art. 10.1 and exceed its reduction commitment levels in violation of Art. 10.1.

### *TRQ regime (fluid milk imports)*

- GATT Art. II:1(b): Recalling its earlier finding<sup>2</sup> that Members' Schedules should be interpreted under the general rules of interpretation set out in the VCLT, the Appellate Body concluded that Canada's limitation of cross-border purchases of fluid milk to "Canadian consumers" by specifying it as a condition in Canada's Tariff Schedule justifies Canada's effective limitation of access to the TRQ to imports for "personal use". But, it found that Canada's value limitation set at Can\$20 for each importation was inconsistent with Art. II:1(b), as there was no mention of such value limitation in Canada's Schedule. (This resulted in a partial reversal of the Panel's interpretations and conclusions.)

## 3. OTHER ISSUES<sup>3</sup>

- Burden of proof (AA Art. 10.3): The Panel noted that AA Art. 10.3 shifts the burden of proof from the complainant to the respondent in cases dealing with export subsidies once the complainant has shown exports in excess of scheduled quantities. It is then for the respondent to prove that export quantities in excess of reduction commitment levels are not subsidized.

<sup>1</sup> Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products

<sup>2</sup> EC – Computer Equipment

<sup>3</sup> Other issues addressed in this case: submission of evidence (preliminary panel decision); export subsidies under both the Agriculture Agreement and the SCM Agreement (Agriculture Agreement, Art. 9.1(a) – "governments or their agents").

# CANADA – DAIRY (ARTICLE 21.5 I)<sup>1</sup>

## (DS103, 113)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	New Zealand United States	AA Art. 9.1(c)	Referred to the Original Panel	1 March 2001
			Circulation of Panel Report	11 July 2001
Respondent	Canada		Circulation of AB Report	12 November 2001
			Adoption	18 December 2001

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The revised version of the system of government support for domestic milk production and export, as well as Canada's tariff rate quota regime for imports of fluid milk, which were the measures at issue in the original dispute. Canada revised the supply system for sales of domestic milk and a separate scheme governing milk to be sold for export.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- AA Art. 9.1(c): On the question of whether the Canadian measures were "payments on the export of an agricultural product that are financed by virtue of governmental action" and thus constituted a subsidy under Art. 9.1(c) (which was made in excess of its export subsidy and quantity commitments in violation of Arts. 3.3 and 8 thereof), the Appellate Body reversed the Panel's legal findings as follows. (The Appellate Body, however, did not complete the analyses based on the correct legal standard.)<sup>3</sup>

("payments") The Appellate Body held first that neither prices for milk destined for the domestic market *nor* world market prices could serve as the appropriate basis for determining whether prices charged for export sales constituted a "payment" within the meaning of Art. 9.1 (c). The Appellate Body, while holding that the "average total cost of production" was the appropriate standard for determining whether export sales involve "payments", did not suggest a specific method for calculating the average total cost of production.

("financed by virtue of governmental action") Second, (i) having found, based on a textual approach, that Canada's regulation of supply and price of milk in the domestic market was a "governmental action" and that the term "by virtue of" in Art. 9.1(c) implies that the payments must be financed "as a result of, or as a consequence of" the governmental action, and (ii) having noted that "payments" within the meaning of Art. 9.1(c) cover both the financing of monetary payments and payments-in-kind, the Appellate Body reversed the Panel's finding that the Canadian governmental action in this case "obliged" producers to sell commercial export milk and that there was a demonstrable link between the governmental action and the financing of the payments. The Appellate Body found that although the governmental action established a regulatory regime whereby some milk producers could make additional profits only if they chose to sell commercial export milk, there was *no demonstrable link* between the governmental action and the financing of the payments.

<sup>1</sup> *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*

<sup>2</sup> Other issues addressed: AA Arts. 3.1 and 10.1.

<sup>3</sup> As a result of the Appellate Body's findings, New Zealand and the United States once again referred this matter to the original panel on the date of the adoption of the first compliance Panel/Appellate Body reports. (See *Canada – Dairy (Article 21.5 – New Zealand and US II)*).

# CANADA – DAIRY (ARTICLE 21.5 II)<sup>1</sup>

## (DS103, 113)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	New Zealand, United States	AA Arts. 3 and 9	Referred to the Original Panel	18 December 2001
			Circulation of Panel Report	11 July 2002
Respondent	Canada		Circulation of AB Report	5 December 2002
			Adoption	17 January 2003

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The system of government support for domestic milk production and export, as well as Canada's tariff rate quota regime for imports of fluid milk, which were the measures at issue in the original dispute. Canada revised the supply system for sales of domestic milk and a separate scheme governing milk to be sold for export.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- AA Art. 9.1: The Appellate Body upheld the Panel's finding that the supply of commercial export milk by Canadian milk producers, at a price below the "average total cost of production", to Canadian dairy processors involved export subsidies under Art. 9.1(c) and were accordingly "payments" within the meaning of Article 9.1(c). The Appellate Body then considered the "role" of the Canadian government and noted that "governmental action" controls "virtually every aspect of domestic milk supply and management," and the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. The Appellate Body concluded that these factors were sufficient to demonstrate the "nexus" between the governmental actions and the financing and hence were covered by Art. 9.1(c). Regarding the method by which to establish the production costs, which are necessary to ultimately determine the existence of "payments", the Appellate Body found that the standard is "an industry-wide average figure that aggregates the costs of production of all producers of milk" and that the industry-wide cost of production could be based on a statistically valid sample of all producers.
- AA Art. 3.3: On the basis of its findings on the export subsidies within the meaning of Art. 9.1(c), which were provided in excess of the quantity reduction commitment set forth in Canada's Schedule, the Appellate Body confirmed that Canada had acted inconsistently with its obligations under Art. 3.3.

### 3. OTHER ISSUES<sup>2</sup>

- AA Art. 10.3 (burden of proof): Reversing the Panel's finding that it is for the complaining Member to make a prima facie case that the exports in excess of the schedule commitments are subsidized, the Appellate Body said that Art. 10.3 "is clearly intended to alter the generally accepted rules on burden on proof" in respect of the question of whether an export subsidy has been granted to the excess quantities. In this connection, the traditional burden of proof principles (i.e. the burden is on the complainant Member) apply only to the question of whether exports have been made in quantities above export quantity commitment levels. Despite the Panel's misapplication of the burden of proof on the issue, the Appellate Body found that the Panel ultimately arrived properly at the burden of proof situation envisaged by Art.10.3 and that its error did not vitiate any of the Panel's substantive findings under Arts. 3.3, 8, 9.1(c) and 10.1.

<sup>1</sup> *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*

<sup>2</sup> Other issues addressed: AA Arts. 10.1 and 8.

## US – FSC<sup>1</sup> (DS108)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ASCM Arts. 1 and 3</i>	Establishment of Panel	<i>22 September 1998</i>
			Circulation of Panel Report	<i>8 October 1999</i>
Respondent	<i>United States</i>	<i>AA Arts. 10, 8</i>	Circulation of AB Report	<i>24 February 2000</i>
			Adoption	<i>20 March 2000</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US tax exemptions for Foreign Sales Corporations ("FSC")<sup>2</sup> in respect of their export-related foreign-source trade income.
- Product at issue: All foreign goods, including agricultural products, affected by the US measure.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 1.1 (revenue foregone): The Appellate Body upheld the Panel's finding that the FSC measure constituted government revenue foregone that was "otherwise due" and, thus a "financial contribution" within the meaning of Art. 1.1.
- ASCM Art. 3.1(a) (export subsidy): The Appellate Body upheld the Panel's finding that the FSC measure constituted prohibited export subsidies under ASCM Art. 3.1(a) because the FSC exemptions (i) were based upon foreign trade income derived from "export property" and (ii) fell within the language of item (e) (full or partial exemption remission ... of direct taxes ... ) of Annex I (illustrative list of export subsidies). The Appellate Body (and the Panel) rejected the US argument that footnote 59 to item (e) exempted the FSC measure from constituting export subsidies.
- AA Arts. 3.3 and 9.1 (export subsidy): The Appellate Body reversed the Panel's finding that the FSC tax exemptions were an export subsidy under AA Art. 9.1(d) and thus violated Art. 3.3. The Appellate Body considered that "income tax liability" that was exempted or reduced under the FSC tax regime could not be considered as "the costs of marketing exports" of agricultural products that were subject to reduction commitment within the meaning of Art. 9.1(d).
- AA Arts. 10.1 and 8 (export subsidies not listed in Art. 9.1): The Appellate Body found that the United States violated AA Art. 10.1 and subsequently Art. 8 because the United States, through the FSC exemptions, which were unlimited in nature (i.e. no limitation on the amount of the exemption and no discretionary element to its grant), acted inconsistently with its export subsidy commitments under the AA, first, not to provide export subsidies for *scheduled* products (Art. 9.1) *in excess of* the scheduled commitments; and, second, not to provide *any* Art. 9.1 export subsidies for *unscheduled* products.
- ASCM Art. 4.7 (recommendation): Pursuant to Art. 4.7, the Panel recommended that the United States "withdraw the FSC subsidies without delay. The parties agreed that the date for withdrawal would be 1 November 2000.

### 3. OTHER ISSUES<sup>3</sup>

- Special burden of proof (AA Art. 10.3): The Panel concluded that an AA Art. 10.3 claim contains a special burden of proof whereby once the complainant has proved that the respondent is exporting a certain commodity in quantities exceeding its commitment levels, then the respondent must prove that such an excessive amount of exports is not subsidized. The Panel found that this rule only applies to Members' "scheduled" products.

<sup>1</sup> *United States – Tax Treatment for "Foreign Sales Corporation"*

<sup>2</sup> FSCs are foreign corporations in charge of specific activities with respect to the sale or lease of goods produced in the US for export outside the US. In practice, many FSCs are controlled foreign subsidiaries of US corporations, as FSCs affiliated with its US supplier receive greater benefits under the programme.

<sup>3</sup> Other issues addressed in this case: ASCM Art. 4.2 (statement of available evidence); new arguments before the AB; interpretation of footnote 59 to item (e) of Annex I; panel's jurisdiction (appropriate tax forum); DSU Art. 6.2 (identification of products (agricultural) at issue); order of consideration of ASCM issues.

# US – FSC (ARTICLE 21.5 I)<sup>1</sup>

## (DS108)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Arts. 1, 3 and 4	Referred to the Original Panel	20 December 2000
			Circulation of Panel Report	20 August 2001
Respondent	United States	AA Arts. 3, 8 and 10	Circulation of AB Report	14 January 2002
			Adoption	29 January 2002

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The US "FSC Repeal and Extraterritorial Income Exclusion Act of 2000" (the "ETI" Act).

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 3.1(a) (export subsidy): The Appellate Body first upheld the Panel's finding that a "financial contribution" within the meaning of Art. 1.1(a)(1)(ii) existed under the ETI Act, as the United States had foregone revenue otherwise due when it excluded a portion of foreign-source income from tax obligations under the ETI Act, while taxing foreign-source income under the normal US tax rules. The Appellate Body upheld the Panel's finding that the ETI Act granted subsidies contingent, in law, upon export performance within the meaning of Art. 3.1(a) with respect to property produced within the United States by conditioning the availability of the subsidy on the sale, lease or rent "outside" the United States of the good produced within the United States.
- ASCM footnote 59 (double taxation exception): The Appellate Body upheld the Panel's finding that the ETI Act was not justified as a measure to avoid the double taxation of foreign-source income under footnote 59 (fifth sentence), because the Act did not exempt only "foreign-source income", but exempted both foreign and domestic-source income. The flexibility under footnote 59 does not allow Members to adopt allocation rules that systematically result in a tax exemption for income that has no link with a "foreign" country and that would not be regarded as foreign-source.
- ASCM Art. 4.7 (withdrawal of export subsidies): As the ETI Act included certain transitional rules that effectively extended the application of the prohibited FSC provisions, the Appellate Body upheld the Panel's finding that the United States failed to implement the DSB's recommendations made under Art. 4.7 to withdraw the export subsidies without delay because it could find no legal basis for extending the time-period for the withdrawal of the subsidies.
- AA Arts. 3.3, 8 and 10.1: The Appellate Body upheld the Panel's finding that the ETI Act involved export subsidies under AA Art. 1(e) with respect to qualifying property produced within the United States and that it was inconsistent with AA Art. 10.1 (and thus with Art. 8) by applying export subsidies in a manner that threatened to circumvent US export subsidy commitments under Art. 3.3.
- GATT Art. III:4 (national treatment): The Appellate Body upheld the Panel's finding that the so-called "fair market value rule"<sup>2</sup> under the ETI Act accorded less favourable treatment to imported products than to like US domestic products in violation of Art. III:4 by providing a "considerable impetus" to use domestic products over imported products for the tax benefit under the ETI Act.

### 3. OTHER ISSUES<sup>3</sup>

- Burden of proof (ASCM footnote 59): As footnote 59 (fifth sentence) constitutes an exception to the legal regime under Art. 3.1(a) and thus is an "affirmative defence" with respect to measures taken to avoid the double-taxation of foreign-source income, the Appellate Body found that the burden of proof is on the party invoking the exception (i.e. United States in this case).

<sup>1</sup> *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*

<sup>2</sup> Under the "fair market value rule", any taxpayer that sought an exemption under the ETI Act had to ensure that in the manufacture of qualifying property, it did not "use" imported input products, whose value comprised more than 50 per cent of the fair market value of the end-product.

<sup>3</sup> Other issues addressed: third parties' right to rebuttal submissions in Art. 21.5 proceedings (DSU Art. 10.3).

# US – FSC (ARTICLE 21.5 II)<sup>1</sup>

## (DS108)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Art. 4.7	Referred to the Original Panel	17 February 2005
			Circulation of Panel Report	30 September 2005
Respondent	United States		Circulation of AB Report	13 February 2006
			Adoption	14 March 2006

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The "American Jobs Creation Act of 2004" (the "Jobs Act")<sup>2</sup> as well as the continued operation of Section 5 of the ETI Act (i.e. the indefinite grandfather provision for FSC subsidies in respect of certain transactions) that had already been found to constitute "prohibited subsidies" in the first Art. 21.5 proceedings.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Art. 4.7 (withdrawal of export subsidies): Having concluded that the "recommendation under Art. 4.7 remains in effect until the Member concerned has fulfilled its obligation by fully withdrawing the prohibited subsidy", the Appellate Body upheld the Panel's finding that "to the extent that the United States, by enacting Section 101 of the Jobs Act, maintains prohibited FSC and ETI subsidies through the transitional and grandfathering measures, it continues to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies and to bring its measures into conformity with its obligations under the relevant covered agreements." In this regard, it agreed with the Panel that "the relevant recommendations adopted by the DSB in the original proceedings in 2000, and those in the first and these second Article 21.5 proceedings, form part of a continuum of events relating to compliance with the recommendations and rulings of the DSB in the original proceedings".

### 3. OTHER ISSUES

- Panel request (DSU Art. 6.2): The Appellate Body explained that in order for a panel request under Art. 21.5 to satisfy the requirements under DSU Art. 6.2, the complainant party in an Art. 21.5 proceeding must identify, at a minimum, the following in its panel request: (i) the recommendations and rulings made by the DSB in the original dispute as well as in any preceding Art. 21.5 proceedings that have allegedly not been complied with; (ii) the measures allegedly taken to comply with those recommendations and rulings, as well as any omissions or deficiencies therein; and (iii) the legal basis for its complaint, by specifying how the measures taken, or not taken, fail to remove the WTO-inconsistencies found in the previous proceedings, or whether they have brought about new WTO-inconsistencies. On the question of whether Section 5 of the ETI Act (i.e. grandfathering prohibited subsidies) was properly identified in the European Communities' panel request so as to put the United States on sufficient notice, the Appellate Body upheld the Panel's finding that it was within the Panel's terms of reference as the European Communities' panel request referred to the *entirety* of the prohibited subsidies, including Section 5 of the ETI Act, found to exist in the original and first Art. 21.5 proceedings. The Appellate Body agreed with the Panel that the panel request should be read as a whole in this regard.

<sup>1</sup> *United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities*

<sup>2</sup> Although the Jobs Act allegedly "repealed" the tax exclusion in the ETI Act: it contains (1) the "transition provision" in Section 101(d) of the Jobs Act for certain transactions between 1 Jan. 2005 and 31 Dec. 2006 pursuant to which the ETI scheme remained available on a reduced basis (80 per cent in 2005 and 60 per cent in 2006); and (2) the grandfather provision in Section 101(f) for certain transactions. Moreover, it did not repeal Section 5(c)(1) of the ETI Act, which had indefinitely grandfathered certain FSC subsidies in respect of certain transactions.

# CANADA – PHARMACEUTICAL PATENTS<sup>1</sup>

(DS114)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	European Communities	TRIPS Arts. 27, 28 and 30	Establishment of Panel	1 February 1999
			Circulation of Panel Report	17 March 2000
Respondent	Canada		Circulation of AB Report	NA
			Adoption	7 April 2000

## 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Certain provisions under Canada's Patent Act: (i) "regulatory review provision (Sec. 55.2(1))"<sup>2</sup>; and (ii) "stockpiling provision (Sec. 55.2(2))" that allowed general drug manufacturers to override, in certain situations, the rights conferred on a patent owner.
- Product at issue: Patented pharmaceuticals from the European Communities.

## 2. SUMMARY OF KEY PANEL FINDINGS

### *Stockpiling provision*

- TRIPS Arts. 28.1 (patent owner rights) and 30 (exceptions): (Canada practically conceded that the stockpiling provision violated Art. 28.1, which sets out exclusive rights granted to patent owners.) Concerning Canada's defence under Art. 30, the Panel found that the measure was not justified under Art. 30 because there were no limitations on the quantity of production for stockpiling which resulted in a substantial curtailment of extended market exclusivity, and, thus, was not "limited" as required by Art. 30. Accordingly, the Panel concluded that the stockpiling provision was inconsistent with Art. 28.1 as it constituted a "substantial curtailment of the exclusionary rights" granted to patent holders.

### *Regulatory review provision*

- TRIPS Arts. 28.1 and 30: (Canada also practically conceded on the inconsistency of the provision with Art. 28.1) The Panel found that Canada's regulatory review provision was justified under Art. 30 by meeting all three cumulative criteria: the exceptional measure (i) must be limited; (ii) must not "unreasonably conflict with normal exploitation of the patent"; and (iii) must not "unreasonably prejudice the legitimate interests of the patent owner", taking account of the legitimate interests of third parties. These three cumulative criteria are necessary for a measure to be justified as an exception under Art. 30.
- TRIPS Art. 27.1 (non-discrimination): The Panel found that the European Communities failed to prove that the regulatory review provision discriminated based on the field of technology (i.e. against pharmaceutical products in this case), either *de jure* or *de facto*, under Art. 27.1.

## 3. OTHER ISSUES<sup>3</sup>

- Burden of proof (TRIPS Art. 30): Since Art. 30 is an exception to the obligations under the TRIPS Agreement, the burden was on the respondent (i.e. Canada) to demonstrate that the patent provisions at issue were justified under that provision.

<sup>1</sup> Canada – Patent Protection of Pharmaceutical Products

<sup>2</sup> The regulatory review provision permitted the general manufacturers of pharmaceuticals to produce samples of the patented product for use during the regulatory review process. The stockpiling provision allowed producers of generic drugs to make the drugs and begin stockpiling them six months prior to the expiration of the patent.

<sup>3</sup> Other issues addressed in this case: application of principles of treaty interpretation (VCLT) to the provisions under the TRIPS Agreement; interpretation of three cumulative criteria under Art. 30 exception.

# ARGENTINA – FOOTWEAR (EC)<sup>1</sup>

## (DS121)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>SA Arts. 2, 4 and 12</i>	Establishment of Panel	<i>23 July 1998</i>
			Circulation of Panel Report	<i>25 June 1999</i>
Respondent	<i>Argentina</i>	<i>GATT Art. XIX:1(a)</i>	Circulation of AB Report	<i>14 December 1999</i>
			Adoption	<i>12 January 2000</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: Provisional and definitive safeguard measures imposed by Argentina.
- Product at issue: Imports of footwear.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. XIX:1(a) (unforeseen development): Having determined that any safeguard measure imposed after the entry into force of the WTO Agreement must comply with the provisions of both the SA and GATT Art. XIX, the Appellate Body reversed the Panel's conclusion that the GATT Art. XIX:1(a) "unforeseen developments" clause does not add anything additional to the SA in respect of the conditions under which a safeguard measure may be applied. It found instead that Art. XIX:1(a), although an independent obligation, describes certain circumstances that must be demonstrated as a matter of fact. The Appellate Body did not however complete the Panel's analysis in this regard.
- SA Art. 2 (parallelism): The Appellate Body upheld the Panel's ultimate conclusion that, based on the ordinary meaning of Arts. 2.1, 2.2 and 4.1(c), a safeguard measure must be applied to the imports from "all" sources from which imports were considered in the underlying investigation, and found that Argentina's investigation was inconsistent with Art. 2 since it excluded imports from MERCOSUR from the application of its safeguard measure while it had included those imports from MERCOSUR in the investigation.
- SA Arts. 2.1 and 4.2(a) (increased imports): The Appellate Body found that the "increased imports" element under the SA requires not only an examination of the "rate and amount" (as opposed to just comparing the end points) of the increase in imports, but also a demonstration that "imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'". Argentina had failed to consider adequately import trends and quantities.
- SA Art. 4.2(a) (serious injury): The Appellate Body agreed with the Panel's interpretation that Art. 4.2(a) requires a demonstration of "all" the factors listed in Art. 4.2(a) as well as all other factors relevant to the situation of the industry concerned. Argentina had failed to meet the requirement.
- SA Art. 4.2(b) (causation): The Appellate Body upheld the Panel's legal finding that a causation analysis requires an examination of: (i) the relationship (coincidence of trends) between the movements in imports and injury factors; (ii) whether the conditions of competition demonstrate a causal link between imports and injury; and (iii) whether injury caused by factors other than imports had not been attributed to imports. The Appellate Body upheld the finding that Argentina's findings on causation were not adequately explained and supported by evidence.

<sup>1</sup> *Argentina – Safeguard Measures on Imports of Footwear*

<sup>2</sup> Other issues addressed in this case: terms of reference (modified measures, DSU Art. 6.2); "All pertinent information" (SA Art. 12.2); passive observer status; terms of reference (DSU Art. 7); standard of review; basic rationale of panel findings (DSU Art. 12.7).

# THAILAND – H-BEAMS<sup>1</sup>

## (DS122)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Poland</i>	<i>ADA Arts. 2, 3, 5 and 17.6</i>	Establishment of Panel	<i>19 November 1999</i>
			Circulation of Panel Report	<i>28 September 2000</i>
Respondent	<i>Thailand</i>		Circulation of AB Report	<i>12 March 2001</i>
			Adoption	<i>5 April 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Thailand's definitive anti-dumping determination.
- Product at issue: H-beams from Poland.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 5 (initiation and notification): The Panel rejected Poland's claim that the Thai authorities' initiation of the investigation could not be justified due to the insufficiency of evidence originally contained in the application. The Panel considered that the application need not contain analysis, but only information. The Panel also rejected Poland's claim that Thailand violated Art. 5.5 by failing to provide a written notification of the filing of application for initiation of investigation. The Panel considered that a formal meeting could satisfy the requirement.
- ADA Art. 2.2 (constructed normal value): Having found that, (i) for the purpose of calculating a dumping margin under Art. 2.2, Thailand used the narrowest product category that included the like product; and (ii) that no separate reasonableness test was required in choosing a profit figure for constructed normal value, the Panel concluded that Thailand had not violated Art. 2.2.
- ADA Art. 3.4 (injury factors): Having upheld the Panel's interpretation of Art. 3.4 that an investigating authority should consider *all* the injury factors listed in Art. 3.4, the Appellate Body upheld the Panel's finding that Thailand acted inconsistently with Art. 3.4.
- ADA, Arts. 3.1 and 17.6 (injury determination): (Thailand only appealed the Panel's legal interpretations of Arts. 3.1 and 17.6, and not the Panel's substantive findings of a violation of certain Art. 3 provisions.) The Appellate Body reversed the Panel's interpretations that Art. 3.1 requires an anti-dumping authority to base its determination only upon evidence that was disclosed to interested parties during the investigation. Similarly, it also reversed the Panel's interpretation that, under Art. 17.6, panels are required to examine only an investigating authority's injury analysis based on the documents shared with the interested parties. The Appellate Body found that the scope of the evidence that can be examined under Art. 3.1 depends on the "nature" of the evidence, not on whether the evidence is confidential or not. A panel should consider all facts, both confidential and non-confidential, in its assessment of the establishment and evaluation of the facts by investigating authorities under Art. 17.6.

### 3. OTHER ISSUES<sup>2</sup>

- DSU Art. 6.2 (panel request): The Appellate Body upheld the Panel's finding that Poland's panel request met the requirements of Art. 6.2. However, it rejected the Panel's rationale for finding Poland's mere listing of Art. 5 (without sub-provisions) in the panel request to be sufficient, i.e. the fact that several of the issues related to Art. 5 had already been raised by the exporters before the Thai authority. The Appellate Body rejected this reasoning because (i) there is not always continuity between claims raised in an investigation and those in WTO dispute settlement related to that investigation; and (ii) third parties to the dispute might not be on notice of the legal basis of the claims as they would not know specific issues raised in the underlying investigation. The Appellate Body considered that reference only to Art. 5 was sufficient in the present case because the sub-provisions of Art. 5 set out "closely related procedural steps".

<sup>1</sup> *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*

<sup>2</sup> Other issues addressed in this case: *amicus curiae* submission (breach of confidentiality, DSU Arts. 17.10 and 18.2); burden of proof and standard of review; confidential information (working procedures).

# AUSTRALIA – AUTOMOTIVE LEATHER II<sup>1</sup>

## (DS126)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ASCM Arts. 1, 3.1(a) and 4.7</i>	Establishment of Panel	<i>22 June 1998</i>
			Circulation of Panel Report	<i>26 May 1999</i>
Respondent	<i>Australia</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>16 June 1999</i>

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measures at issue: Australian government's assistance ("grant contract" (\$A 30 million) and "loan contract" (\$A 25 million)) to Howe, a wholly-owned subsidiary of Australian Leather Upholstery Pty. Ltd., owned by Australian Leather Holdings, Limited ("ALH").
- Industry at issue: Automotive leather production industry.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ASCM Art. 3.1(a) (export subsidy): As for the grant contract, the Panel found that the payments under the grant contract were subsidies prohibited under Art. 3.1(a), on the ground that the payments concerned were in fact "tied to" export performance.

As for the loan contract, the Panel concluded that the payments under the loan contract did not violate Art. 3.1(a) because there was nothing in the terms of the loan contract itself that suggested a "specific link" to actual or anticipated exportation or export earnings.

- ASCM Art. 4.7 (implementation recommendation): The Panel recommended, in accordance with Art. 4.7, that Australia withdraw the prohibited subsidies within a 90-day period, which would run from the date of adoption of the report by the DSB.

### 3. OTHER ISSUES<sup>2</sup>

- Existence of multiple panels regarding the same matter: The Panel rejected, through a preliminary ruling, Australia's request for the Panel to terminate its work on the grounds that the DSU does not permit the establishment of a panel when another panel exists in respect of the same matter and between the same parties.<sup>3</sup> In this regard, the Panel noted, *inter alia*, that the DSU does not expressly prohibit the establishment of multiple panels for the same matter.

<sup>1</sup> *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*

<sup>2</sup> Other issues addressed in this case: procedures governing business confidential information; information acquired during consultations: SCM Agreement Art. 4.2 (statement of available evidence in the consultation request); terms of reference (scope of the measures at issue); ASCM., Art. 1 (definition of subsidy).

<sup>3</sup> A panel was established in January 1998 on the same matter and involving the same parties, but was never composed.

# AUSTRALIA – AUTOMOTIVE LEATHER II (ARTICLE 21.5)<sup>1</sup>

## (DS126)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ASCM Art. 4.7</i>	Referred to the Original Panel	<i>14 October 1999</i>
			Circulation of Panel Report	<i>21 January 2000</i>
Respondent	<i>Australia</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>11 February 2000</i>

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATION(S)

- Australia (i) required Howe to repay \$A 8.065 million, an amount which Australia argued covered "any remaining inconsistent portion of the grants made under the grant contract"; and (ii) terminated all subsisting obligations under the grant contract. Australia also provided a new \$A 13.65 million loan to Australian Leather Holdings Ltd ("ALH"), Howe's parent company.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ASCM Art. 4.7 (withdrawal of the subsidy): Having concluded that the phrase "withdraw the subsidy" under Art. 4.7 encompasses "repayment", the Panel found that repayment in full of the prohibited subsidy was necessary in this case, as it considered that in the case of a one-time subsidy, there were no other ways than repayment in full in which withdrawal of the subsidy could be achieved. The Panel found that Australia failed to comply with the DSB's recommendation to withdraw the subsidy within 90 days, as the provision by the Australian government of a loan of \$A 13.65 million to ALH nullified the repayment by Howe of \$A 8.065 million.

### 3. OTHER ISSUES<sup>2</sup>

- Terms of reference (DSU Art. 21.5): The Panel concluded that the new loan of \$A 13.65 million to ALH was within the Panel's terms of reference because: (i) the panel request, which defined the Panel's terms of reference, identified the loan; and, furthermore, (ii) the loan was "inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature".

<sup>1</sup> *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*

<sup>2</sup> Other issues addressed: business confidential information; third parties' rights to rebuttal submissions in Art. 21.5 proceedings.

# MEXICO – CORN SYRUP<sup>1</sup>

## (DS132)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ADA Arts. 3, 5, 6, 7, 10 and 12</i>	Establishment of Panel	<i>25 November 1998</i>
			Circulation of Panel Report	<i>28 January 2000</i>
Respondent	<i>Mexico</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>24 February 2000</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Mexico's definitive anti-dumping duty measure.
- Product at issue: High-fructose corn syrup ("HFCS") from the United States.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- ADA Art. 5.2 (initiation of an investigation): The Panel rejected the US claim that the anti-dumping application in this case was inconsistent with Art. 5.2 due to insufficient evidence of threat of material injury. The applicant need provide only such information as is reasonably available to it.
- ADA Art. 12.1 (notice of initiation): The Panel rejected the US claim that Art. 12.1 requires the investigating authority to address, in the notice of initiation, the definition of the relevant domestic industry.
- ADA Arts. 5.3, 5.8 and 6.4 (initiation of investigation): The Panel rejected the United States' claims: (i) that Mexico did not have enough evidence of a threat of injury or of a causal link between the dumped imports and injury to justify initiation of the investigation under Art. 5; and (ii) that Mexico had acted improperly under Art. 5.8 when it did not reject the domestic industry's application. Neither Art. 5.3 nor Art. 6.4 requires an authority to resolve all questions of fact prior to initiation.
- ADA Art. 3 (threat of injury): The Panel found that Mexico violated Art. 3.1, 3.4 and 3.7 by failing to consider all the factors governing injury under Art. 3, because an investigation of threat of material injury requires a consideration of not only the factors pertaining to threat of material injury, but also factors relating to the impact of imports on the domestic industry (Art. 3.4). The Panel found that Mexico failed to consider the domestic industry "as a whole" in its threat of material injury analysis, as required by Art. 3.4, when it considered only a portion of the industry's production, and thus violated Art. 3.1, 3.2, 3.4 and 3.7. The Panel found that Mexico violated Art. 3.7(i) because it failed to consider a certain fact relevant to the context of its threat determination and the likelihood of substantially increased imports.
- ADA Art. 7.4 (provisional measure): The Panel found Mexico's application of the provisional anti-dumping measure beyond six months to be inconsistent with Art. 7.4.
- ADA Arts. 10 (retroactive application) and 12 (notification): The Panel concluded that Mexico's retroactive levying of final anti-dumping duties was inconsistent with Art. 10.2, because such retroactive application for the period of provisional measure requires an authority to make a specific finding that, in the absence of provisional measures, the effect of the dumped imports would have led to a determination of injury to the domestic industry. The Panel also found a violation of Art. 12, which sets out the requirements for a public notice of an affirmative final determination, because Mexico's determination contained no explanation of the facts and conclusions underlying Mexico's decision to retroactively apply anti-dumping duties. The Panel also found that Mexico's failure to release bonds collected under the provisional measure was inconsistent with Art. 10.4.

<sup>1</sup> *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup from the United States*

<sup>2</sup> Other issues addressed in this case: legal basis of complaint (DSU Art. 6.2 and ADA Art. 17.4); terms of reference (identification of measures in the context of the ADA); sufficiency of panel request (ADA Art. 17.5(i)); evidence not on record (ADA Art. 17.5(ii)); evidentiary issues (reference to NAFTA proceedings and to alleged statements made during consultations).

# MEXICO – CORN SYRUP (ARTICLE 21.5)<sup>1</sup>

## (DS132)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ADA Art. 3</i>	Referred to the Original Panel	<i>23 October 2000</i>
			Circulation of Panel Report	<i>22 June 2001</i>
Respondent	<i>Mexico</i>		Circulation of AB Report	<i>22 October 2001</i>
			Adoption	<i>21 November 2001</i>

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Mexico's redetermination on threat of injury in relation to its definitive anti-dumping duties on high-fructose corn syrup ("HFCS") imports from the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ADA Art. 3.7 (likelihood of increased imports): The Appellate Body upheld the Panel's finding that the Mexican authority's redetermination on "likelihood of increased imports" was inconsistent with Art. 3.7(i), as it did not provide a reasoned explanation for its conclusion that there was a likelihood of substantially increased imports. The Appellate Body rejected Mexico's argument that the Panel incorrectly applied the standard of review under ADA Art. 17.5 and 17.6 by relying on the existence of an alleged agreement entered into by soft-drink bottlers promising restraint in their use of HFCS, even though the existence of this restraint agreement was never found as a matter of fact in the domestic investigation. The Appellate Body found that the "establishment" of facts by investigating authorities that panels are to assess under the standards set out in ADA Art. 17.5 and 17.6(i) and DSU Art. 11 includes both "affirmative findings" of events as well as "assumptions" relating to such events made by those authorities in the course of their analyses. Since the Mexican authority made an assumption about the existence of the restraint agreement, it was logical for the Panel to examine Mexican authority's conclusions based on the same assumption. The Appellate Body also found that any assumption that the Panel made about the restraint agreement was not, in any event, the basis for its finding of inconsistency under Art. 3.7(i).
- DSU Art. 6.2 (panel request): The Appellate Body rejected Mexico's request that the Appellate Body reverse the Panel's substantive findings because the Panel had failed to address and consider (i) the lack of consultations between Mexico and the United States before the measure was referred to the original panel and (ii) the US failure to indicate in their panel request whether consultations had been held. Since Mexico had failed to indicate to the Panel that it was raising an objection based on these issues, the Panel in this case did not have a duty to address the issues referred to by Mexico. Nor was the Panel required to consider, on its own motion, these issues, as the lack of prior consultations or the absence, in the panel request, of an indication "whether consultations were held" is not a defect that a panel must examine even if both parties to the dispute remain silent on it.
- DSU Art. 12.7 (basic rationale in the panel report): The Appellate Body held that the Panel satisfied its duty under DSU Art. 12.7 to provide a "basic rationale" for its findings. The Appellate Body stated that DSU Art. 12.7 obliges panels to set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for its findings and recommendations. Whether Art. 12.7 is satisfied must be determined on a case-by-case basis, and in some situations a panel's "basic rationale" might be found in other documents, such as the original panel report in the case of the Art. 21.5 proceedings, provided that such reasoning is quoted or incorporated by reference.

<sup>1</sup> *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*

<sup>2</sup> Other issues addressed: DSU Arts. 3.7 and 6.2 (consultations, etc); terms of reference (Art. 21.5 proceeding); Panel's factual standard of review (ADA Art. 17.6(i)).

## EC – ASBESTOS<sup>1</sup>

### (DS135)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	TBT Annex 1.1	Establishment of Panel	25 November 1998
			Circulation of Panel Report	18 September 2000
Respondent	European Communities	GATT Arts. III:4, XX and XXIII:1(b)	Circulation of AB Report	12 March 2001
			Adoption	5 April 2001

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: France's ban on asbestos (Decree No. 96-1133).
- Products at issue: Imported asbestos (and products containing asbestos) vs. certain domestic substitutes such as PVA, cellulose and glass ("PCG") fibres (and products containing such substitutes).

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- TBT Annex 1.1 ("technical regulation"): The Appellate Body, having rejected the Panel's approach of separating the measure into the ban and the exceptions, reversed the Panel and concluded that the ban as an "integrated whole" was a "technical regulation" as defined in Annex 1.1 and thus covered by the TBT Agreement, as (i) the products subject to the ban were identifiable by reference to their characteristics (i.e. any products containing asbestos) and (ii) compliance with the ban was mandatory. However, the Appellate Body did not complete the legal analysis of Canada's TBT claims as it did not have an "adequate basis" upon which to examine them.
- GATT Art. III:4 (national treatment): Having found insufficient the Panel's likeness analysis between asbestos and PCG fibres and between cement-based products containing asbestos and those containing PCG fibres, the Appellate Body reversed the Panel's findings that the products at issue were like and that the measure was inconsistent with Art. III:4. (The Appellate Body emphasized a competitive relationship between products as an important factor in determining likeness in the context of Art. III:4 (c.f. separate concurring opinion by one Appellate Body Member.) Then, having completed the like product analysis, the Appellate Body concluded that Canada had failed to demonstrate the likeness between either set of products, and, thus, to prove that the measure was inconsistent with Art. III:4.
- GATT Art. XX(b) (exceptions): Having agreed with the Panel that the measure "protects human life or health" and that "no reasonably available alternative measure" existed, the Appellate Body upheld the Panel's finding that the ban was justified as an exception under Art. XX(b). The Panel also found that the measure satisfied the conditions of the Art. XX chapeau, as the measure neither led to arbitrary or unjustifiable discrimination, nor constituted a disguised restriction on international trade.

#### 3. OTHER ISSUES<sup>2</sup>

- Scope of non-violation claim (Art. XXIII:1(b)): The Appellate Body, rejecting the EC appeal, agreed with the Panel that Art. XXIII:1(b) (the non-violation provision) applied to the measure at issue, as (i) even a measure that conflicts with a substantive provision of the GATT falls within the scope of Art. XXIII:1(b); and (ii) a health measure justified under Art. XX also falls within the scope of Art. XXIII:1(b). The Panel, having applied Art. XXIII:1(b) to the measure at issue, ultimately rejected Canada's claim and found that the measure did not result in non-violation nullification or impairment under Art. XXIII:1(b), because Canada had had reason to anticipate a ban on asbestos. (Canada did not appeal the Panel's ultimate finding.)

<sup>1</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*

<sup>2</sup> Other issues addressed in this case: Appellate Body adoption of additional procedures to deal with *amicus curiae* submissions; (DSU Art. 11 (Art. XX(b))); separate concurring opinion by one Appellate Body Member; scope of GATT Art. III:4 (applicability to the import ban); consultation of experts (DSU Art. 13); order of examination between TBT and GATT claims.

## US – 1916 ACT<sup>1</sup>

### (DS136, 162)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	European Communities Japan	GATT Art. VI  ADA Arts. 1, 4, 5 and 18	Establishment of Panel	1 February 1999 (EC) 26 July 1999 (Japan)
			Circulation of Panel Report	31 March 2000 (EC) 29 May 2000 (Japan) 2000
Respondent	United States		Circulation of AB Report	28 August 2000
			Adoption	26 September 2000

#### 1. MEASURE AT ISSUE

- Measure at issue: United States' Anti-Dumping Act of 1916, which provided for, *inter alia*, a private right of action, the remedy of treble damages for private complaints and the possibility of criminal penalties in respect of anti-dumping practices.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. VI and ADA (applicability): The Appellate Body upheld the Panel's finding that GATT Art. VI and the ADA applied to the 1916 Act. Art. VI applies to action taken in response to situations involving dumping and the 1916 Act provided for specific action to be taken in situations that present the constituent elements of dumping within the meaning of that provision.
- GATT Art. VI and ADA (substantive violations)<sup>2</sup>: The Appellate Body upheld the Panel's findings on the following claims: the 1916 Act was inconsistent with: (i) GATT Art. VI which, read in conjunction with the ADA, limits the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings; (ii) GATT Art. VI:1 because it did not require a finding of "material injury"; (iii) ADA Art. 4 (and 5 as well in case of Japan) because the Act did not require that a complaint be made "on behalf of the domestic industry"; (iv) ADA Art. 5.2 (Japan) because the Act failed to require the type of evidence (i.e. dumping, injury and causation and a *de minimis* threshold for the level of dumping) to be included in an anti-dumping application under Art. 5.2; (v) ADA Art. 5.5 (EC) because the Act failed to provide for notification to the governments concerned before a case was initiated; and finally, in conclusion, (vi) ADA Art. 1 (and 18.1 as well for Japan) because the 1916 Act failed to meet the requirements of imposing anti-dumping measures in conformity with the provisions of GATT Art. VI and the ADA and to take specific action against dumping of exports only in accordance with the provisions of the GATT, as interpreted by the ADA.
- GATT Art. VI:2: The Appellate Body upheld the Panel's finding that the 1916 Act, by providing for non-anti-dumping measures (i.e. the imposition of fines, imprisonment or treble damages as a response to dumping), violates the requirement of Art. VI:2 that actions taken against dumping be limited to anti-dumping duties.

#### 3. OTHER ISSUES<sup>3</sup>

- Challenge against 1916 Act as legislation *as such*: The Appellate Body upheld the Panel's conclusion that the 1916 Act could be challenged *as such* under GATT Art. VI and the ADA, even though no monetary awards had been made, nor criminal penalties imposed, and even though not one of the measures identified in ADA Art. 17.4 had been adopted.

<sup>1</sup> *United States – Anti-Dumping Act of 1916*

<sup>2</sup> Unless otherwise indicated, these findings are for the claims by both Japan and the European Communities.

<sup>3</sup> Other issues addressed in this case: timely challenge of jurisdiction issue; mandatory/discretionary legislation; panel request (DSU Art. 6.2, preliminary ruling); enhanced third party rights (DSU Art. 10); Panel's examination of domestic law; WTO Agreement Art. XVI:4 and ADA Art. 18.4 (consequential violations); GATT Arts. III and VI (relationship); and ADA and GATT VI (relationship).

## US – LEAD AND BISMUTH II<sup>1</sup>

### (DS138)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ASCM Arts. 1.1, 10 and 21.</i>	Establishment of Panel	<i>17 February 1999</i>
			Circulation of Panel Report	<i>23 December 1999</i>
Respondent	<i>United States</i>	<i>DSU Art. 19.1</i>	Circulation of AB Report	<i>10 May 2000</i>
			Adoption	<i>7 June 2000</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: United States Department of Commerce's ("USDOC") reliance on "change-in-ownership methodology" in calculating the amount of subsidies to determine a countervailing duty rate in an administrative review.
- Product at issue: Certain hot-rolled lead and bismuth carbon steel products from the United Kingdom.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Arts. 1.1(b) (benefit), 10 (countervailing duties) and 21.2 (administrative reviews): The Appellate Body upheld the Panel's finding that the USDOC should not have presumed that the non-recurring subsidy given to a state-owned enterprise (BSC in this case) would have "passed through" to subsequent companies (UES and BSpIc/GKN) when that state-owned enterprise (BSC) had been privatized. Rather, the USDOC was required under Art. 21.2 to examine, in the reviews at issue, whether a "benefit" had been conferred on the new owners of the company (UES and BSpIc/BSES). The USDOC had failed to do so.

The Appellate Body also upheld the Panel's factual finding that no benefit within the meaning of Art. 1.1(b) had been conferred in this case because the new company had paid "fair market value" for all the productive assets, goodwill, etc when it purchased the formerly state-owned company to which the subsidies at issue had been originally granted. Thus, no subsidy under Art. 1 existed.

Thus, the Appellate Body upheld the Panel's ultimate finding that the countervailing duties at issue in this case were imposed inconsistently with Art. 10.

- DSU Art. 19.1 (suggestion of ways to implement): The Panel suggested, in accordance with the discretion provided under Art. 19.1, that the United States take all appropriate steps, including a revision of its administrative practices, to prevent the violation of ASCM Art. 10 from arising in the future.

### 3. OTHER ISSUES<sup>2</sup>

- Standard of review applicable to a review of countervailing duty measures (DSU Art. 11): The Appellate Body upheld the Panel's finding that DSU Art. 11 provides the standard of review for cases involving the imposition of countervailing duties, and that the special standard of review for anti-dumping measure set out in the ADA Art. 17.6 does not apply to such cases.

<sup>1</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*

<sup>2</sup> Other issues addressed in this case: panel's discretion to examine certain issues that it deems necessary; *amicus curiae* submissions (both panel and the AB); outside observers (panel's preliminary ruling); and a panel's authority to request information (DSU Art. 13).

# CANADA – AUTOS<sup>1</sup>

(DS139, 142)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	Japan, European Communities	ASCM Arts. 1, 3 and 4.7	Establishment of Panel	1 February 1999
		GATS Arts. I and II	Circulation of Panel Report	11 February 2000
Respondent	Canada	GATT Arts. I and III	Circulation of AB Report	31 May 2000
			Adoption	19 June 2000

## 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Canada's import duty exemption for imports by certain manufacturers, in conjunction with the Canadian Value Added ("CVA") requirements and the production to sales ratio requirements.
- Product at issue: Motor vehicle imports and imported motor vehicle parts and materials.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. I (MFN treatment): The Appellate Body upheld the Panel's finding that the duty exemption was inconsistent with the most-favoured-nation treatment obligation under Art. I:1 on the ground that Art. I:1 covers not only *de jure* but also *de facto* discrimination and that the duty exemption at issue in reality was given only to the imports from a small number of countries in which an exporter was affiliated with eligible Canadian manufacturers/importers. The Panel rejected Canada's defence that Art. XXIV allows the duty exemption for NAFTA members (Mexico and the United States), because it found that the exemption was provided to countries other than the United States and Mexico and because the exemption did not apply to all manufacturers from these countries.
- GATT Art. III:4 (national treatment): The Panel found that the CVA requirements forcing the use of domestic materials to be eligible for tax exemption resulted in "less favourable treatment" to imports under Art. III:4 by adversely affecting the conditions of competition for imports.
- ASCM Art. 3.1 (prohibited subsidy): (3.1(a): export subsidy) The Appellate Body upheld the Panel's finding that the duty exemption in conjunction with the ratio requirements was a prohibited "subsidy" contingent "in law" upon export performance within the meaning of Art. 3.1(a), because the amount of the duty exemption earned by a domestic manufacturer was directly dependent upon the amount exported. The Panel recommended under Art. 4.7 that Canada withdraw the subsidy within 90 days. (3.1(b): domestic product use subsidy) The Appellate Body, reversing the Panel, found that Art. 3.1(b) extends to subsidies that are contingent "*in fact*" upon the use of domestic over imported goods. It could not complete the Panel's analysis due to the insufficient factual basis.
- GATS Art. I:1 and II:1 (MFN): The Appellate Body, reversing the Panel, found that (i) determination of whether a measure is covered by the GATS must be made before the assessment of that measure's consistency with any substantive obligation of the GATS; (ii) the Panel failed to examine whether the measure affected trade in services within the meaning of Art. I:1; and (iii) the Panel failed to assess properly the relevant facts and to interpret Art. II:1. Thus, the Panel's conclusion that the measure was inconsistent with Art. II:1 was reversed.

## 3. OTHER ISSUES<sup>2</sup>

- Judicial economy: While upholding the Panel's exercise of judicial economy in respect of the European Communities' claim under ASCM Art. 3.1(a), the Appellate Body added a cautionary remark that "for purposes of transparency and fairness to the parties, a panel should, however, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy".

<sup>1</sup> Canada – Certain Measures Affecting the Automotive Industry

<sup>2</sup> Other issues addressed in this case: judicial economy; interpretation of "requirement" under GATT Art. III:4 (panel); deadline for elaboration of claims; order of consideration of parties' claims; and Panel's discussion of the measure under GATS Arts. V and XVII.

## EC – BED LINEN<sup>1</sup>

### (DS141)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	India	ADA Arts. 2, 3, 5, 12 and 15	Establishment of Panel	27 October 1999
			Circulation of Panel Report	30 October 2000
Respondent	European Communities	DSU 6.2	Circulation of AB Report	1 March 2001
			Adoption	12 March 2001

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive anti-dumping duties imposed by the European Communities, including the European Communities' zeroing method used in calculating the dumping margin.
- Product at issue: Cotton-type bed linen imports from India.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 2.4.2 (dumping margin – "zeroing"): The Appellate Body upheld the Panel's finding that the practice of "zeroing", as applied by the European Communities in this case in establishing "the existence of margins of dumping", was inconsistent with Art. 2.4.2. By "zeroing" the "negative dumping margins", the European Communities had failed to take fully into account the entirety of the prices of *some* export transactions. As a result, the European Communities did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all transactions involving *all* models or types of cotton-type bed linen.
- ADA Art. 2.2.2(ii) (profits calculation): The Appellate Body reversed the Panel's finding and found that the method set out in Art. 2.2.2(ii) for calculating amounts for administrative, selling and general costs and profits cannot be applied where there is data for only one other exporter or producer. The Appellate Body also found that, in calculating amounts for profits, sales by other exporters or producers not made in the ordinary course of trade may not be excluded. The Appellate Body, therefore, concluded that the European Communities acted inconsistently with Art. 2.2.2(ii).
- ADA Art. 3.4 (injury): The Panel found that the European Communities acted inconsistently with Art. 3.4 by failing to consider "all" injury factors listed in Art. 3.4. The Panel also found that the European Communities could consider under Art. 3 information related to companies outside of the sample, where such information was drawn from the "domestic industry". However, the European Communities acted inconsistently with Art. 3.4 to the extent that it relied on information on producers not part of the "domestic industry".
- ADA Art. 15 (developing country): The Panel found that Art. 15 requires that a developed country explore the possibilities of "constructive remedies", such as the imposition of anti-dumping duties in less than the full amount and price undertakings, before applying definitive anti-dumping duties to exports from a developing country. The Panel concluded that the European Communities acted inconsistently with Art. 15 by failing to reply to India's request for such undertakings.

#### 3. OTHER ISSUES<sup>2</sup>

- DSU Art. 6.2 (panel request – identification of a provision): The Panel dismissed India's claim related to ADA Art. 6, on the grounds that India failed to identify that provision in its panel request and, thus, denied the responding party and third parties of notice. The Panel did not accept India's reliance on the fact that this provision (Art. 6) was included in its consultations request and was actually discussed during consultations, considering that consultations are a tool to clarify a dispute and often issues discussed during consultations will not be brought in the actual case.

<sup>1</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*

<sup>2</sup> Other issues addressed in this case: ADA Art. 2.2 (reasonability); ADA Art. 3 ('all' imports in the context of injury analysis); ADA, Art. 5.3 (examination of evidence); ADA Art. 5.4 (industry support); ADA Art. 12.2.2 (notification); identification of provisions in panel request (India's claim under Art. 3.4); *amicus curiae* submission; standard of review under ADA Art. 17.6(ii); evidentiary issues (panel – DSU, Art. 11 and 13.2).

## EC – BED LINEN (ARTICLE 21.5)<sup>1</sup>

### (DS141)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	India	ADA Arts. 3 and 15	Referred to the Original Panel	22 May 2002
			Circulation of Panel Report	29 November 2002
Respondent	European Communities		Circulation of AB Report	8 April 2003
			Adoption	24 April 2003

#### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- EC Regulation 1644/2001 pursuant to which the European Communities reassessed the original anti-dumping measure on bed linen. Also, EC Regulation 696/2002 according to which the European Communities reassessed the injury and causal link findings.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 3.1 and 3.2: The Appellate Body reversed the Panel's findings on this issue and concluded that the European Communities' consideration of *all* imports from *un*-examined producers as dumped for the purposes of the injury analysis was based on a presumption not supported by positive evidence. Therefore, the Appellate Body held that the European Communities acted inconsistently with Art. 3.1 and 3.2 as it had not determined the "volume of dumped imports" on the basis of "positive evidence" and an "objective assessment".
- ADA Art. 3.1 and 3.4: The Panel rejected India's claim that the European Communities did not have information on the economic factors and indices in Art. 3.4 (i.e. inventories and capacity utilization). The Panel concluded that the European Communities had collected data on these factors and that it did conduct an overall reconsideration and analysis of the facts with respect to the injury determination, as would an objective and unbiased investigating authority. In this relation, the Appellate Body rejected India's allegation that the Panel acted inconsistently with DSU Art. 11 and ADA Art. 17.6(ii).
- ADA Art. 3.5: The Panel rejected India's claim under Art. 3.5, as that provision does not require that the investigation authority demonstrate that the dumped imports *alone* caused the injury.
- ADA Art. 15: The Panel found that the European Communities had not violated the requirement of Art. 15 by failing to explore the possibilities of constructive remedies before applying anti-dumping duties because the European Communities had suspended application of these duties on Indian imports.

#### 3. OTHER ISSUES<sup>2</sup>

- Terms of reference (DSU Art. 21.5): The Appellate Body upheld the Panel's decision not to examine India's claim on "other factors" under Art. 3.5, as it had been resolved by the original panel (i.e. the claim was dismissed as India had failed to make a prima facie case) and thus was outside the Panel's terms of reference. The Appellate Body concluded that the original panel's finding, which was not appealed and was adopted by the DSB, provided a "final resolution" of the dispute between the parties regarding that particular claim and that specific component of the implementation measure.

<sup>1</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*

<sup>2</sup> Other issues addressed: DSU Art. 21.2 (matters affecting interests of developing countries); DSU Art. 11; and ADA Art. 17.6.

# INDIA – AUTOS<sup>1</sup>

## (DS146, 175)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	United States European Communities	GATT Arts. III, XI and XVIII:B  DSU Art. 19.1	Establishment of Panel	27 July 2000 (US), 17 November 2000 (EC)
			Circulation of Panel Report	21 December 2001
Respondent	India		Circulation of AB Report <sup>a</sup>	19 March 2002
			Adoption	5 April 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: India's (i) indigenization (local content) requirement; and (ii) trade balancing requirement (exports value = imports value) imposed on its automotive sector.<sup>2</sup>
- Product at issue: Cars and their components.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

#### *Indigenization requirement*

- GATT Art. III:4 (national treatment): The Panel concluded that the measure violated Art. III:4, as the indigenization requirement modified the conditions of competition in the Indian market "to the detriment of imported car parts and components".

#### *Trade balancing requirement*

- GATT Art. XI:1 (restriction on importation): Having found that "any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Art. XI", the Panel found that India's trade balancing requirement, which limited the amount of imports in relation to an export commitment, acted as a restriction on importation within the meaning of Art. XI:1, and thus violated Art. XI:1. The Panel also found that India failed to make a prima facie case that this requirement was justified under the balance-of-payments provisions of Art. XVIII:B.
- GATT Art. III:4: As for the aspect of the trade balancing obligations, which imposed on the purchasers of imported components on the Indian market an additional obligation to export cars or components, the Panel found that the measure created a "disincentive" to the purchase of imported products and, thus, accorded less favourable treatment to imported products than to like domestic products inconsistently with Art. III:4.

### 3. OTHER ISSUES<sup>3</sup>

- Evolution of the measures: As to India's claim that since the import regime that gave rise to the two requirements had already expired, and thus the Panel need not recommend to the DSB that India should bring its measures into conformity, the Panel said that where a measure has been withdrawn so as to affect the continued relevance of the Panel's findings of violation, it is understandable for a panel to make no recommendation at all. However, the Panel found the situation in this case different, as the expiration of the import regime subsequent to the Panel's establishment did not affect the continued application of the measures. As such, the Panel recommended that the DSB request that India bring its measures into conformity with its WTO obligations.
- GATT Arts. III and XI (measures): Regarding the scope of measures under (and thus the relationship between) Arts. III and XI, the Panel noted that it could not be excluded that there may be a potential overlap between these two provisions and thus a certain measure may fall under both provisions.

<sup>1</sup> *India – Measures Affecting the Automotive Sector*

<sup>a</sup> India withdrew its appeal prior to the oral hearing. For this reason the Appellate Body issued a short report, which did not address the substantive legal issues, and which adopted by the DSB together with the Panel Report.

<sup>2</sup> Both requirements were contained in Public Notice No. 60 and the MOUs signed between Indian government and car manufacturers.

<sup>3</sup> Other issues addressed in this case: burden of proof (GATT Art. XVIII:B); clarification of claims; terms of reference (measure at issue); *res judicata*; competence of panel (bilateral settlement); due process and good faith; unnecessary litigation; order of examination of claims under Arts. III and XI.

# US – SECTION 301 TRADE ACT<sup>1</sup>

## (DS152)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>DSU Art. 23.2(a) and (c)</i>	Establishment of Panel	<i>2 March 1999</i>
			Circulation of Panel Report	<i>22 December 1999</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>27 January 2000</i>

### 1. MEASURE AT ISSUE

- Measure at issue: US legislation (i.e. Sections 301-310 of the Trade Act of 1974) authorizing certain actions by the Office of the United States Trade Representative ("USTR"), including the suspension or withdrawal of concessions or the imposition of duties or other import restrictions, in response to trade barriers imposed by other countries.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- DSU Art. 23.2(a) (Section 304 – unilateral decision): Based on the terms of Art. 23.2(a), the Panel first set out that it is for the WTO, through the DSU process, and not an individual WTO Member, to determine that a measure is inconsistent with WTO obligations. The Panel then concluded that Sec. 304 was "not inconsistent" with US obligations under Art. 23.2(a) because, while the statutory language of Sec. 304 in itself constituted a serious threat that unilateral determinations contrary to DSU Art. 23.2(a) might be taken, the United States had (i) lawfully removed this threat by the "aggregate effect of the Statement of Administrative Action ('SAA') and (ii) made a statement before the Panel that it would render determinations under Section 304 in conformity with its WTO obligations. In this regard, the Panel added the caveat, however, that should the United States repudiate or remove in any way its undertakings contained in the SAA and confirmed in statements before the Panel, then, the finding of conformity would no longer be warranted.
- DSU Art. 23.2(a) (Section 306): Regarding Sec. 306, which mandated the USTR to consider whether another Member had implemented the DSB's recommendations within 30 days after the lapse of the reasonable period of time, the Panel concluded that Sec. 306 was not inconsistent with DSU Art. 23.2(a) because any prima facie inconsistency under Sec. 306 was removed by the US undertakings in the SAA not to act inconsistently with its obligations under the WTO Agreement.
- DSU Art. 23.2(c) (Sections 305 and 306(b)): For the same reasoning as above, the Panel found that both Sec. 305 and Sec. 306(b) were not inconsistent with DSU Art. 23.2(c), which obliges parties to follow the DSU Art. 22 procedures for determining the level of suspension of concessions or other obligations. As for both Sec. 306(b) (which required the USTR to determine within 30 days after the expiration of the reasonable period of time what further action to take under Sec. 301 in case of a failure to implement DSB recommendations) and Sec. 305 (which required the USTR to implement, within 60 days after the expiration of the reasonable period of time, the action it decided upon earlier under Sec. 306(b)), the Panel concluded once again that any inconsistency based on the mandate contained in the statutory languages of these provisions had been effectively curtailed by the undertakings given in the SAA and in statements made before the Panel.

<sup>1</sup> *United States – Sections 301-310 of the Trade Act of 1974*

<sup>2</sup> Other issues addressed in this case: mandatory/discretionary legislation distinction; examination by panels of Members' law; GATT claims; Vienna Convention on the Law of Treaties.

# ARGENTINA – HIDES AND LEATHER<sup>1</sup>

## (DS155)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>GATT Arts. III:2, X, XI and XX</i>	Establishment of Panel	<i>26 July 1999</i>
			Circulation of Panel Report	<i>19 December 2000</i>
Respondent	<i>Argentina</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>16 February 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: (i) regulations by which representatives of the Argentine leather tanning industry were present during the customs clearance process for bovine hides export; and (ii) advance tax payments that allegedly imposed a higher tax burden on imports.
- Product at issue: Argentine exports of bovine hides and calf skins, semi-finished and finished leather.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

#### *Regulations on export control*

- GATT Art. XI:1 (export restrictions): The Panel rejected the EC claim that the Argentine regulations on export procedures were an export restriction prohibited by Art. XI. The European Communities had failed to meet its burden of proving that the presence of the tanners' representatives during customs procedures, along with the disclosure of information about the slaughterhouses and any possible abuse of this information, was an export restriction under Art. XI:1.
- GATT Art. X:3(a) (administration of domestic law): Having concluded that Art. X:3(a) applied to the measure at issue, as (i) the substance of the measure at issue was "administrative in nature" and did not establish substantive customs rules for enforcement of export laws and (ii) the measure was a law of "general application," rather than a law applying only to the specific shipments of products, the Panel found that the measure was not administered in a reasonable and impartial manner and consequently was inconsistent with Art. X:3(a). This finding was based on the consideration that the confidentiality of information was not guaranteed (*unreasonable* administration) and the procedure allowed persons with adverse commercial interest to obtain confidential information to which they had no right (*partial* administration).

#### *Advance tax payments*

- GATT Art. III:2, first sentence (national treatment): Having found that advance tax payment requirements were financial burdens that tax imports in excess of domestic products (in the form of an opportunity cost (interest lost) and a debt financing (interest paid)), the Panel concluded that the requirements were in violation of Art. III:2, first sentence.
- GATT Art. XX(d) (exception): Although the Panel found that the measures were necessary to secure compliance with Argentina's tax law and, thus, fell within the terms of Art. XX(d), it concluded that they could not be justified because they resulted in "unjustifiable discrimination" under the chapeau of Art. XX when they were not "unavoidable" for the operation of Argentina's tax law and when there were several alternative measures available.

<sup>1</sup> *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*

<sup>2</sup> Other issues addressed in this case: preliminary statements on the interpretation of Arts. X and XI (government measure, etc); government "measure".

# GUATEMALA – CEMENT II<sup>1</sup>

## (DS156)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Mexico	ADA Arts. 3, 5 and 6	Establishment of Panel	22 September 1999
			Circulation of Panel Report	24 October 2000
Respondent	Guatemala	DSU Art. 19.1	Circulation of AB Report	NA
			Adoption	17 November 2000

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Guatemala's anti-dumping investigation on certain imports.
- Product at issue: Grey Portland cement from Mexico.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

#### *Initiation*

- ADA Art. 5.3 and 5.8 (sufficient evidence): The Panel found that Guatemala violated Art. 5.3 because the application for the initiation of anti-dumping investigation did not have sufficient evidence of dumping, threat of injury and causal link to justify the initiation of the investigation. The Panel noted that the evidentiary standards of Art. 2 (dumping) and of Art. 3.7 (threat of injury) are relevant to an investigating authorities' consideration under Art. 5.3. Given that it had already found that there was insufficient evidence to justify initiation under Art. 5.3, the Panel concluded that Guatemala also violated Art. 5.8 by failing to reject such an application.

#### *Evidence*

- ADA Art. 6.1.2 and 6.4: The Panel found the following violations by Guatemala in relation to evidentiary treatment: (i) Art. 6.1.2 and 6.4 by failing to grant Mexico "regular and routine" access to certain evidence; (ii) Art. 6.1.2 by failing to make evidence available "promptly" (20-day delay); and (iii) Art. 6.4 for failing to provide timely opportunities to see evidence.
- ADA Art. 6.5: Regarding the confidential treatment given to the petitioner's submissions, the Panel found an Art. 6.5 violation because there was no record of "good cause" having been shown by the petitioner and the petitioner did not seem to have requested confidential treatment for the information.
- ADA Art. 6.9: The Panel found that Guatemala violated Art. 6.9 by failing to inform the parties of the "essential facts" under consideration for its definitive anti-dumping measure.
- ADA Art. 6.8 and Annex II: Having found that a Mexican exporter's refusal to permit verification was reasonable and that "best information available" ("BIA") should not be used when information is verifiable and can be used in the investigation without undue difficulties, the Panel concluded that Guatemala violated Art. 6.8 by unreasonably using BIA.

#### *Injury analysis*

- ADA Art. 3.4: The Panel found that Guatemala violated Art. 3.4 because Guatemala failed to evaluate some injury factors (i.e. return on investments and ability to raise capital) listed in Art. 3.4.

#### *Recommendation*

- DSU 19.1: In light of the pervasiveness and fundamental nature of the violations found in this case, the Panel, under Art. 19.1, specifically recommended that Guatemala revoke its anti-dumping measure. However, Mexico's request for refund of the anti-dumping duties collected in the past was declined on the grounds that this was a systemic issue beyond the reach of the Panel's consideration in this case.

<sup>1</sup> *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico* (The Appellate Body dismissed, based on procedural grounds, *Guatemala – Cement I*, which dealt with essentially the same measure and claims as those in this case.)

<sup>2</sup> Other issues addressed in this case: ADA Arts. 2, 5.5, 5.7, 6.1, 6.2, 6.1.3, 12 (public notice); extension of POI (Art. 6.1, 6.2 and Annex II(1)); inclusion of non-governmental experts on verification team (6.7 and Annex I); confidential information (Art. 6); injury and causation (Art. 3); "no prejudice" defence (panel - DSU Art. 3.8); panel composition; standard of review (ADA Art. 17.6 (i)); "harmless error" doctrine.

# US – SECTION 110(5) COPYRIGHT ACT<sup>1</sup>

## (DS160)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>TRIPS Arts. 9 and 13</i>	Establishment of Panel	<i>26 May 1999</i>
			Circulation of Panel Report	<i>15 June 2000</i>
Respondent	<i>United States</i>	Berne Convention and Art. 11bis and 11	Circulation of AB Report	<i>NA</i>
			Adoption	<i>27 July 2000</i>

### 1. MEASURE

- Measure at issue: Section 110 of the US Copyright Act that provides for limitations on exclusive rights granted to copyright holders for their copyrighted work, in the form of exemptions for broadcast by non-right holders of certain performances and displays, namely, "homestyle exemption" (for "dramatic" musical works) and "business exemption" (works other than "dramatic" musical works).

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- "Minor exceptions" doctrine: Regarding the US argument that limitations on exclusive rights in the US Copyright Act are justified under TRIPS Art. 13, as Art 13 "clarifies and articulates the 'minor exceptions' doctrine", the Panel concluded as an initial matter: (i) that there is a "minor exceptions" doctrine that applies to Berne Convention Art. 11bis and 11<sup>3</sup>; and (ii) that the doctrine has been incorporated into the TRIPS Agreement.
- TRIPS Art. 13 (limitations on exclusive copyrights): The Panel clarified "three criteria" that parties have to cumulatively meet to make limitations to exclusive right under Art. 13: the limitations or exceptions (i) are confined to certain special cases; (ii) do not conflict with a normal exploitation of the work; and (iii) do not unreasonably prejudice the legitimate interests of the right holder. Based on these criteria, the Panel found as follows:

"Homestyle exemption": The Panel found that the homestyle exemption met the requirements of Art. 13, and, thus, was consistent with Berne Convention Art. 11bis(1)(iii) and 11(1)(ii) as incorporated into the TRIPS Agreement (Art. 9.1): (i) the exemption was confined to "certain special cases" as it was well-defined and limited in its scope and reach (13-18 per cent of establishments covered); (ii) the exemption did not conflict with a normal exploitation of the work, as there was little or no direct licensing by individual right holders for "dramatic" musical works (i.e. the only type of material covered by the homestyle exemption); and (iii) the exemption did not cause unreasonable prejudice to the legitimate interests of the right holders in light of its narrow scope and there was no evidence showing that the right holders, if given opportunities, would exercise their licensing rights.

"Business exemption": The Panel found that the "business exemption" did not meet the requirements of Art. 13: (i) the exemption did not qualify as a "certain special case" under Art. 13, as its scope in respect of potential users covered "restaurants" (70 per cent of eating and drinking establishments and 45 per cent of retail establishments), which is one of the main types of establishments intended to be covered by Art. 11bis(1)(iii); (ii) second, the exemption "conflicts with a normal exploitation of the work" as the exemption deprived the right holders of musical works of compensation, as appropriate, for the use of their work from broadcasts of radio and television; and (iii) in light of statistics demonstrating that 45 to 73 per cent of the relevant establishments fell within the business exemption, the United States failed to show that the business exemption did not unreasonably prejudice the legitimate interests of the right holder. Thus, the business exemption was found inconsistent with Berne Convention Art. 11bis(1)(iii) and 11(1)(ii).

<sup>1</sup> *United States – Section 110(5) of the US Copyright Act*

<sup>2</sup> Other issues addressed in this case: panel's request for information from the WIPO; *amicus curiae*.

<sup>3</sup> The Berne Convention (1971), including Art. 11bis and 11 on exclusive rights granted to copyright holders, are incorporated into the TRIPS Agreement (Art. 9-13 on copyright protection) by Art. 9 of that Agreement.

# KOREA – VARIOUS MEASURES ON BEEF<sup>1</sup>

## (DS161, 169)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Australia United States</i>	<i>GATT Arts. III:4, XX, XI:I and XVII:I</i>	Establishment of Panel	<i>26 May and 26 July 1999</i>
			Circulation of Panel Report	<i>31 July 2000</i>
Respondent	<i>Korea</i>	<i>AA Arts. 3, 4, 6 and 7</i>	Circulation of AB Report	<i>11 December 2000</i>
			Adoption	<i>10 January 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: (i) Korea's measures affecting the importation, distribution and sale of beef, (ii) Korea's "dual retail system" for sale of domestic imported beef), and (iii) Korea's agricultural domestic support programmes.
- Products at issue: Beef imports from Australia and the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- AA Art. 3.2 (domestic support): While upholding the Panel's conclusion that Korea miscalculated its domestic support (AMS) for beef, the Appellate Body reversed the Panel's ultimate finding that Korea acted inconsistently with AA Art. 3.2 by exceeding its commitment levels for total support for 1997 and 1998 since the Panel had also relied on an improper methodology for its own calculations.
- GATT Art. III:4 (dual retail system): The Appellate Body agreed with the Panel's ultimate conclusion that Korea's dual retail system (requiring imported beef to be sold in separate stores) accorded "less favourable" treatment to imported beef than to like domestic beef. According to the Appellate Body, the dual retail system virtually cut off imported beef from access to the "normal" distribution outlets for beef, which modified the conditions of competition for imported beef. In this connection, the Appellate Body said that formally different treatment of imported and domestic products is not necessarily "less favourable" for imports within the meaning of Art. III:4.

(GATT Art. XX) Further, the Appellate Body upheld the Panel's finding that the dual retail system was not justified as a measure necessary to secure compliance with Korea's Unfair Competition Act because the dual retail system was not "necessary" within the meaning of Art. XX(d). "Necessary" requires the weighing and balancing of regulations of factors such as the contribution made by the measure to the enforcement of the law or regulation at issue, the relative importance of the common interests or values protected and the impact of the law on trade. The Appellate Body agreed with the Panel that Korea failed to demonstrate that it could not achieve its desired level of enforcement using alternative measures.

- GATT Arts. XI:1 and XVII:1(a) and AA Art. 4.2 (tender-related practices by a state-trading enterprise (LPMO) for beef imports): The Panel concluded that the LPMO's failure to call, and delays in calling for, tenders, as well as its discharge practices (i.e. the LPMO's increase in its stocks of foreign beef, while failing to meet requests for that beef) led to import restrictions on beef contrary to Art. XI. This also led to the conclusion that the measures were inconsistent with AA Art. 4.2, which prohibits Members from maintaining, resorting to, or reverting to any quantitative import restrictions, including non-tariff measures maintained through state-trading enterprises, which have been required to be converted into ordinary customs duties. The Panel also found that should the LPMO be viewed as a state-trading enterprise without full control over the distribution of its import quota share, the measures violated GATT Art. XVII:1(a) (a provision governing state-trading enterprises) as well, because they were inconsistent with the general principles of non-discriminatory treatment. (*Korea did not appeal this finding.*)

<sup>1</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*

<sup>2</sup> Other issues addressed in this case: AA Art. 6.4, 7.2(a) (*de minimis* levels, current AMS for beef and current *total* AMS); GATT Art. II and XI (grass-fed, grain fed beef distinction); certain aspects of distribution and sales system for imported beef (GATT Art. III:4); state-trading entities (GATT Art. XI and the *Ad Note*; AA Art. 4.2 and footnote 1 to Art. 4.2); and panel's terms of reference (panel request) (DSU, Art. 6.2)

# KOREA – PROCUREMENT<sup>1</sup>

## (DS163)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GPA Arts I and XXII:2</i>	Establishment of Panel	<i>16 June 1999</i>
			Circulation of Panel Report	<i>1 May 2000</i>
Respondent	<i>Korea</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>19 June 2000</i>

### 1. PROJECT AND ENTITY AT ISSUE

- Project and entity at issue: Construction of the Incheon International Airport ("IIA") in Korea and Korea Airport Authority ("KAA") and New Airport Development Group ("NADG"), which were allegedly responsible for the construction of IIA.

### 2. SUMMARY OF KEY PANEL FINDINGS

- GPA Art. I (Scope of Korea's GPA Appendix I commitment): Having found, based on the terms of Korea's concessions in its GPA Schedule and the supplementary negotiating history of the Schedule, that the entities allegedly responsible for IIA procurement – i.e. NADG or KAA – were not entities covered by Korea's GPA schedule, the Panel concluded that the IIA project was not covered by Korea's commitments under the GPA.
- GPA Art. XXII:2 (Non-violation nullification or impairment): Regarding the US non-violation claim under GPA Art. XXII:2, which was based on the frustration of reasonably expected benefits from alleged promises made during "negotiations" rather than nullification or impairment of actual concessions made, the Panel considered that the concept of non-violation could be extended to contexts other than the traditional approach. As such, the Panel decided to examine the US claim "within the framework of principles of international law (Art. 48 of the VCLT) which are generally applicable not only to performance of treaties but also to treaty negotiations" (error in treaty formation).

The Panel found that (i) under the traditional concept of non-violation, the US failed to prove that it had reasonable expectations that a benefit had accrued, as Korea had made no concessions on the project at issue; and (ii) under the concept "error in treaty formation", the alleged error in treaty formation in this case could not be considered "excusable" under Art. 48(1) of the VCLT<sup>2</sup>, as the United States was put on notice of the existence of the entity – i.e. KAA – and the relevant legislation within the meaning of Art. 48(2) of the VCLT.

<sup>1</sup> *Korea – Measures Affecting Government Procurement*

<sup>2</sup> Art. 48 of the Vienna Convention on the Law of Treaties provides:

"Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error related to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that States on notice of a possible error."

# US – CERTAIN EC PRODUCTS<sup>1</sup>

## (DS165)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>GATT Arts. I, II:1(a) and II:1(b)</i>	Establishment of Panel	<i>16 June 1999</i>
			Circulation of Panel Report	<i>17 July 2000</i>
Respondent	<i>United States</i>	<i>DSU Arts. 3.7, 21.5 and 22</i>	Circulation of AB Report	<i>11 December 2000</i>
			Adoption	<i>10 January 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Increased bonding requirements imposed on 3 March 1999 before the issuance of the Art. 22.6 Arbitrator decision on the level of concessions to be suspended (6 April 1999), which was related to the alleged European Communities' failure to implement *EC – Bananas*.
- Product at issue: Certain imports from the European Communities.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. I: The Panel found that the bonding requirements violated the most-favoured-nation principle of Art. I as it only applied to imports from the European Communities.
- GATT Art. II: The Appellate Body reversed the Panel majority's finding that the bonding requirements violated Art. II:1(a) and II:1(b), first sentence, because the Panel's finding was related to the later measure (100 per cent tariff duties) that the United States had imposed subsequent to the Art. 22.6 Arbitration's decision, which was outside the Panel's terms of reference in this case. The Panel also found that the interest charges, costs and fees in connection with the additional bonds requirements violated Art. II:1(b), second sentence, as the requirements resulted in increased costs.
- DSU Arts. 3.7, 22.6, 23.1 and 23.2(c): Having found that the bonding requirements, as a prima facie "suspension of concessions or other obligations" without prior DSB authorization, violated DSU Arts. 3.7, 22.6 and 23.2(c), the Panel concluded that the United States failed to follow the DSU rules and thus violated Art. 23.1 prohibiting unilateral determinations on the WTO-consistency of a measure. The Appellate Body upheld the Panel's finding of a DSU Art. 3.7 violation, as, if a Member violated Arts. 22.6 and 23.2(c), it also acted contrary to Art. 3.7.
- DSU Arts. 21.5 and 23.2(a): The Appellate Body upheld the Panel's finding that the United States violated Art. 21.5 by imposing the bonding requirements, which constituted a unilateral determination of WTO-inconsistency of the EC's implementing measure in relation to the *EC – Bananas* case. However, the Appellate Body reversed the Panel's finding on the violation of Art. 23.2(a), as the European Communities had neither specifically claimed nor provided evidence or arguments in support of the measure's inconsistency with Art. 23.2(a) and, thus, failed to establish a prima facie case of violation of Art. 23.2(a).

### 3. OTHER ISSUES<sup>2</sup>

- Expired measure and panel recommendation: The Appellate Body found that the Panel erred in recommending that a measure, which it had found no longer existed, be brought into conformity.

<sup>1</sup> *United States – Import Measures on Certain Products from the European Communities*

<sup>2</sup> Other issues addressed in this case: terms of reference (measure at issue); adequacy of panel request (DSU Art. 6.2, Art. 23 claims); determination of WTO-consistency of a measure (Arts. 21.5, 22.6); DSB authorization to suspend concessions and its effects; claim on violations of the DSU and DSB meeting rules; separate opinion by a panellist.

# US – WHEAT GLUTEN<sup>1</sup>

## (DS166)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>SA Arts. 2, 4.2 and 12</i>	Establishment of Panel	<i>26 July 1999</i>
			Circulation of Panel Report	<i>31 July 2000</i>
Respondent	<i>United States</i>	<i>DSU Art.11</i>	Circulation of AB Report	<i>22 December 2000</i>
			Adoption	<i>19 January 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive safeguard measure imposed by the United States.
- Products at issue: Wheat gluten from the European Communities.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- SA Art. 2 (increased imports): The Panel found that the United States International Trade Commission's ("USITC") finding of increased imports was consistent with SA Art. 2.1 and GATT Art. XIX, as the imports data indicated a "sharp and substantial rise" through the end of the review period.
- SA Art. 4.2(a) (serious injury): Reversing the Panel's legal interpretation, the Appellate Body held that investigating authorities must examine not only all the factors listed in Art. 4.2(a), but also "all other relevant factors", including those for which they have received insufficient evidence. The Appellate Body agreed with the Panel's ultimate conclusion that the ITC in this case had acted consistently with Art. 4.2(a) when it had failed to examine the wheat gluten prices/protein content relationship, as it was found not relevant.
- SA Art. 4.2(b) (causation): Having reversed the Panel's interpretation of Art. 4.2(b) that imports alone must cause serious injury, the Appellate Body concluded that the proper standard was whether the increased imports demonstrated "a genuine and substantial relationship" of cause and effect with serious injury. The Appellate Body considered that an important step in this process was separating the injurious effects caused by other factors from the injurious effects caused by increased imports so as not to attribute injurious effects from other factors to those from increased imports. By applying this interpretation to the ITC's causation analysis, the Appellate Body found that the ITC had violated Art. 4.2(b) by failing to examine whether domestic "capacity increases" were causing injury at the same time as increased imports.
- Parallelism (SA Arts 2.1 and 4.2): The Appellate Body upheld the Panel's finding that excluding Canada from the application of the safeguard measure at issue, after having included it in the investigation, was inconsistent with Arts. 2.1 and 4.1, as the sources of imports examined during the safeguard investigation and imports subject to the application of the measure must be identical. The Appellate Body also agreed with the Panel that as the United States did not exclude Canada from both the investigation and the application of the measure, the issue of whether, as a general principle, a free-trade area member can exclude imports from other members of that free trade area from its safeguard measure application under GATT Art. XXIV and footnote 1 to SA did not arise in this case.
- SA Art. 12.1(c) (notification): The Appellate Body reversed the Panel's interpretation that Art. 12.1(c) required notification of a proposed safeguard measure before that measure was implemented. The Appellate Body observed that the relevant triggering event was the "taking of a decision" and the timing of notifications is governed solely by the word "immediately" contained in Article 12.1. Having completed the analysis based on this interpretation, the Appellate Body reversed the Panel's finding and concluded that the United States satisfied the requirement under Article 12.1(c).
- DSU Art. 11 (objective assessment): As the Panel's conclusion on the ITC's injury analysis, in particular, its profits allocation method, under Art. 4.2(a) was based on insufficient evidence and on statements outside the ITC Report, the Appellate Body found the Panel acted inconsistently with DSU Art. 11 by failing to make an "objective assessment" of the facts.

<sup>1</sup> *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*

<sup>2</sup> Other issues addressed in this case: DSU Art. 11 claims; SA Arts. 8 and 12 claims; judicial economy; issues related to confidential information; panel's standard of review (DSU Art. 11); adverse inference.

# CANADA – PATENT TERM<sup>1</sup>

## (DS170)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>TRIPS Arts. 33 and 70</i>	Establishment of Panel	<i>22 September 1999</i>
			Circulation of Panel Report	<i>5 May 2000</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>18 September 2000</i>
			Adoption	<i>12 October 2000</i>

### 1. MEASURE AND PATENT AT ISSUE

- Measure at issue: Canada's Patent Act, Section 45, which provided the length of the patent protection for patents filed before 1 October 1989 ("Old Act").<sup>2</sup>
- Patent at issue: "Old Act" patents, i.e. patents filed before 1 October 1989, which existed at the time when the TRIPS Agreement entered into force for Canada, for which the patent term may potentially be less than the required 20-year term.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- TRIPS Art. 70.1 and 70.2 (protection of existing subject matter): (*Art. 70.2*) Having found that "a treaty applies to existing *rights*, even when those rights result from 'acts which occurred' before the treaty entered into force" and Art. 70.2 applies to existing inventions (rights) under Old Act patents whose patents were granted (acts) before the date of entry into force of the TRIPS Agreement, the Appellate Body concluded that Canada was bound by the obligation to provide existing patented inventions with a patent term of not less than 20 years from the filing date as required under Art. 33. (*Art. 70.1*) The Appellate Body also upheld the Panel's finding that Art. 70.1, limiting the retroactive application of the TRIPS Agreement, did not exclude Old Act patents from the scope of the TRIPS Agreement, as "acts" and the "rights created by such acts" should be distinguished and the limitation under Art. 70.1 applies to acts related to the patent, not rights provided by patent itself.
- TRIPS, Art. 33 (term of protection for patents): The Appellate Body upheld the Panel's finding that Canada's Patent Act at issue was inconsistent with Art. 33, as the term of patent protection (i.e. the date of issue of the patent plus 17 years) under Section 45 for Old Act patents did not meet the "20 years from the filing date" requirement under Art. 33. The Appellate Body considered the texts of Art. 33 unambiguous in defining "filing date plus 20 years" as the earliest date on which the term of protection of a patent may end, and this 20-year term must be "a readily discernible and specific right, and it must be clearly seen as such by the patent applicant when a patent application is filed".

### 3. OTHER ISSUES<sup>3</sup>

- Effort to accelerate the proceedings (DSU Art. 4.9): Although the Panel was unable to accelerate the proceedings as requested by the United States, pursuant to DSU Art. 4.9 (basis for the request being that current patent holders subject to the Canadian measure were suffering irreparable harm), the Panel, with Canada's consent, limited its schedule to the minimum periods suggested in DSU Appendix 3.

<sup>1</sup> *Canada – Term of Patent Protection*

<sup>2</sup> Section 45 of Canada's Patent Act provides, "45. the term limited for the duration of every patent issued under this Act on the basis of an application filed *before* October 1, 1989 is seventeen years from the date on which the patent is issued."

<sup>3</sup> Other issues addressed in this case: "subsequent practice" (VCLT, Art. 31(3)(b)); VCLT Art. 28 ("non-retroactivity of treaties").

# EC – TRADEMARKS AND GEOGRAPHICAL INDICATIONS<sup>1</sup>

## (DS174, 290)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>United States Australia</i>	<i>TRIPS Art. 3, 4, 16 and 24</i>	Establishment of Panel	<i>2 October 2003</i>
			Circulation of Panel Report	<i>15 March 2005</i>
Respondent	<i>European Communities</i>	<i>GATT Art. III:4</i>	Circulation of AB Report	<i>NA</i>
			Adoption	<i>20 April 2005</i>

### 1. MEASURE AND PRODUCTS AT ISSUE

- Measure at issue: EC Regulation related to the protection of geographical indications and designations of origin ("GIs").
- Products at issue: Agricultural products and foodstuffs affected by the EC Regulation.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

#### *National treatment (TRIPS Art. 3.1)*

- Availability of protection: The Panel found that the equivalence and reciprocity conditions in respect of GI protection under the EC Regulation<sup>3</sup> violated the national treatment obligation under TRIPS Art. 3 by according less favourable treatment to non-EC nationals than to EC nationals. By providing "formally identical", but in fact different procedures based on the location of a GI, the EC modified the "effective equality of opportunities" between different nationals to the detriment of non-EC nationals. The Regulation was also found to accord less favourable treatment to imported products inconsistently with GATT Art. III:4.
- Application procedures: The Panel found that the application procedures under the Regulation requiring non-EC nationals to file an application in the European Communities through their own government (but not directly with EC member states) for a GI registration located in their own countries, provided formally less favourable treatment to other nationals in violation of Art. 3.1. The Regulation was also found to accord less favourable treatment to imported products inconsistently with GATT Art. III:4.
- Objection procedures (verification and transmission): The Panel found that the objection procedures under the Regulation violated Art. 3.1 to the extent that it did not provide persons resident or established in non-EC countries with a right to directly object to applications for a GI registration in the European Communities.
- Inspection structures: The Panel found that the "government participation" requirement under the inspection structures violated TRIPS Art. 3.1 by providing an "extra hurdle" to third-country applicants: for a third country GI to be registered in the European Community, third-country governments were required to provide a declaration that the inspection structures were established on its territory. The Regulation was also found inconsistent with GATT Art. III:4 in respect of these third-country products.

#### *Relationship between GIs and (prior) trademarks*

- TRIPS Arts. 16.1 and 17 (trademarks): Having found that Art. 16.1 obligates Members to make available to trademark owners a right against certain uses, including uses as a GI, the Panel initially concluded that the EC Regulation was inconsistent with Art. 16.1 as it limited the availability of such a right for the owners of trademarks. However, the Panel ultimately found that the Regulation was justified under Art. 17, which permits Members to provide limited exceptions to the rights conferred by trademarks, including Art. 16.1 rights, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

<sup>1</sup> *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*

<sup>2</sup> Other issues addressed in this case: TRIPS Art. 1, 2, 4; Paris Convention Art. 2, 10; extension of submission deadline; separate panel reports; request for information from WIPO; preliminary ruling; panel request (DSU Art. 6.2); terms of reference; evidence; specific suggestions for implementation (DSU 19); order of analysis (GATT and TRIPS).

<sup>3</sup> For registration in the European Communities of third-country GIs, third countries were required to adopt a GI protection system equivalent to that in the European Communities and provide reciprocal protection to products from the European Communities.

## US – SECTION 211 APPROPRIATIONS ACT<sup>1</sup>

(DS176)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	TRIPS Arts. 2, 3, 4, 15, 16 and 42	Establishment of Panel	26 September 2000
			Circulation of Panel Report	6 August 2001
Respondent	United States	Paris Convention	Circulation of AB Report	2 January 2002
			Adoption	1 February 2002

### 1. MEASURE AND INTELLECTUAL PROPERTY AT ISSUE

- Measure at issue: Section 211 of the US Omnibus Appropriations Act of 1998, prohibiting those having an interest in trademarks/ trade names related to certain businesses or assets confiscated by the Cuban Government from registering/renewing such trademarks/names without the original owner's consent.
- IP at issue: Trademarks or trade names related to such confiscated goods.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

#### *Section 211(a)(1)*

- TRIPS Art. 15 and Art. 2.1 (Paris Convention Art. 6quinquies A(1)): As Art. 15.1 embodies a definition of a trademark and sets forth only the eligibility criteria for registration as trademarks (but not an obligation to register "all" eligible trademarks), the Appellate Body found that Section 211(a)(1) was not inconsistent with Art. 15.1, as the regulation concerned "ownership" of a trademark. The Appellate Body also agreed with the Panel that Section 211(a)(1) was not inconsistent with Paris Convention Art. 6quinquies A(1), which addresses only the "form" of a trademark, not ownership.

#### *Sections 211(a)(2) and (b)*

- TRIPS Arts. 16.1 and 42: As there are no rules determining the "owner" of a trademark (i.e. discretion left to individual countries), the Appellate Body found that Section 211(a)(2) and (b) were not inconsistent with Art. 16.1. The Appellate Body, reversing the Panel, found that Section 211(a)(2) on its face was not inconsistent with Art. 42, as it gave right holders access to civil judicial procedures, as required under Art. 42, which is a provision on procedural obligations, while Section 211 affects substantive rights.
- Paris Convention Art. 2(1) (TRIPS, Art. 3.1): As to the effect on "successors-in-interest", the Appellate Body found that Section 211(a)(2) violated the national treatment obligation, because it imposed an extra procedural hurdle on Cuban nationals. As for the effect on original owners, the Appellate Body reversed the Panel and found that Section 211(a)(2) and (b) violate the national treatment obligations as they applied to original owners who were Cuban nationals, but not to "original owners" who were US nationals.
- TRIPS Art. 4: Reversing the Panel, the Appellate Body found that Section 211(a)(2) and (b) violated the most-favoured-nation obligation, because only an "original owner" who was a Cuban national was subject to the measure at issue, whereas a non-Cuban "original owner" was not.

#### *Trade names*

- Scope of the TRIPS Agreement: Reversing the Panel, the Appellate Body concluded that trade names are covered under the TRIPS Agreement, because, *inter alia*, Paris Convention, Art. 8 covering trade names is explicitly incorporated into Art. 2.1 of the TRIPS Agreement.
- TRIPS Art. 3.1, 4 and 42 and Paris Convention: Completing the Panel's analysis on trade names, the Appellate Body reached the same conclusions as in the context of trademarks above, because Sections 211(a)(2) and (b) operated in the same manner for both trademarks and trade names.

<sup>1</sup> United States – Section 211 Omnibus Appropriations Act of 1998

<sup>2</sup> Other issues addressed in this case: TRIPS, Art. 15.2; Paris Convention, Art. 8; scope of appellate review (question of fact or law, DSU, Art. 17.6); characterization of the measure ('ownership'); information from WIPO.

## US – LAMB<sup>1</sup>

(DS177, 178)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Australia New Zealand</i>	<i>SA Arts. 2 and 4</i>	Establishment of Panel	<i>19 November 1999</i>
			Circulation of Panel Report	<i>21 December 2000</i>
Respondent	<i>United States</i>	<i>GATT Art. XIX:1</i>	Circulation of AB Report	<i>1 May 2001</i>
			Adoption	<i>16 May 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: A definitive safeguard measure imposed by the United States.
- Product at issue: Fresh, chilled and frozen lamb meat from Australia and New Zealand.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XIX:1(a) (unforeseen development): The Appellate Body held that an investigating authority must demonstrate the existence of unforeseen developments "in the same report of the competent authorities" as that containing other findings related to the safeguard investigation at issue to show a "logical connection" between the conditions set forth in Art. XIX and the "circumstances" such as "unforeseen developments". As there was no such demonstration in the International Trade Commission ("ITC") Report, the Panel's ultimate finding that the United States violated Art. XIX:1(a) was upheld.
- SA Art. 4.1(c) (domestic industry): The Appellate Body upheld the Panel's finding that the measure was inconsistent with Art. 4.1(c), as the ITC based its serious injury analysis not only on the producers of lamb meat but also in part on lamb growers and feeders. The Appellate Body stated that the "domestic industry" under Art. 4.1(c) extends solely to the producers of the like or directly competitive products, and thus only to the lamb meat producers in this case.
- SA Art. 4.2 (threat of serious injury): While upholding the Panel's finding that the data the ITC relied on for the threat of serious injury analysis was not sufficiently representative of the domestic industry, the Appellate Body found that it was Art. 4.2(a) ("read together with the definition of domestic industry in Art. 4.1(c)) that the United States had violated, rather than Art. 4.1(c) itself. Also, having concluded that a threat of serious injury analysis requires an assessment of evidence from the most recent past in the context of the longer-term trends for the entire investigative period, the Appellate Body reversed the Panel's interpretation of Art. 4.2(a) and concluded (after finding that the Panel had violated Art. 11 DSU) that the ITC determination was inconsistent with Art. 4.2(a) as the ITC had failed to adequately explain the price-related facts.
- SA Art. 4.2(b) (causation): The Appellate Body reversed the Panel's interpretation that the Safeguards Agreement requires that increased imports be "sufficient" to cause serious injury or that imports "alone" be capable of causing or threatening serious injury. Instead the Appellate Body explained that where several factors are causing injury simultaneously, "a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated". The Appellate Body then found that the ITC had acted inconsistently with Art. 4.2(b), as the ITC Report failed to separate out the injurious effects of different factors and to explain the nature and extent of the injurious effects of the factors other than imports.

### 3. OTHER ISSUES<sup>2</sup>

- Standard of review (SA): Panels are required to examine whether the competent authorities (i) have examined all relevant factors; and (ii) have provided a "reasoned and adequate" explanation of how the facts support their determination.

<sup>1</sup> *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*

<sup>2</sup> Other issues addressed in this case: Panel's standard of review (DSU, Art. 11, in general and in relation to Art. 4.2 claim); meaning of the term "threat of serious injury"; judicial economy; panel request (DSU Art. 6.2); confidential information.

# US – STAINLESS STEEL<sup>1</sup>

## (DS179)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Korea</i>	<i>ADA Art. 2</i>	Establishment of Panel	<i>19 November 1999</i>
			Circulation of Panel Report	<i>22 December 2000</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>1 February 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive anti-dumping duties imposed by the United States on certain steel imports.
- Products at issue: Stainless steel plate in coils and stainless steel sheet and strip from Korea.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- ADA Art. 2.4.1 (currency conversion): Having found that where the prices being compared (i.e. export price and normal price) were already in the same currency, "currency conversion" was not required and thus not permissible under Art. 2.4.1, the Panel concluded that the United States acted inconsistently with Art. 2.4.1 by making a currency conversion that was not required in the Sheet investigation, but did not act inconsistently with Art. 2.4.1 in the Plate investigation.
- ADA Art. 2.4 (unpaid sales): In calculating a "constructed export price", the Panel found that Members are permitted to make only those adjustments identified in Art. 2.4 (i.e. allowances for costs, including duties and taxes, incurred between importation and resale), and thus concluded that the United States improperly calculated a constructed export price in respect of sales made through an affiliated importer by deducting the unpaid sales (from bankrupted buyer) as "allowances" under Art. 2.4. In respect of sales made directly to unaffiliated customers in the US market, the Panel found that the United States also acted inconsistently with Art. 4.2, because "differences in conditions and terms of sale" for which due allowances are allowed under Art. 2.4 do not encompass difference arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales and, thus, the United States Department of Commerce's ("USDOC") adjustment for unpaid sales through unaffiliated importers was not a permissible due allowance.
- ADA Art. 2.4.2 (multiple averaging): The Panel concluded that using multiple averaging periods are justified only if there is a change in both prices and differences in the relative weights by volume of sales in the home market as compared to the export market within the period of investigation. Based on this conclusion, the Panel found that the USDOC had violated the Art. 2.4.2 requirement to compare "a weighted average normal value with a weighted average of all comparable export transactions" when it used multiple averaging periods in its investigations. The Panel reached this conclusion as there was no indication that the USDOC's reason for dividing up the period of investigation ("POI") was based on a difference in the relative weights by volume of sales within the POI between the home and export markets. However, the Panel found no violation of Art. 2.4.1 in respect of USDOC's use of multiple averaging periods to account for the depreciation of the won, as it considered that Art. 2.4.1 addresses the selection of exchange rates, but not the permissibility of the use of multiple averaging and that Art. 2.4.2 does not prohibit a Member from addressing a currency depreciation through multiple averaging.

<sup>1</sup> *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*

<sup>2</sup> Other issues addressed in this case: ADA Art. 2.4 (fair comparison); Art. 12; GATT Art. X:3; specific suggestions of implementation (DSU Art. 19.1); standard of review (ADA Art. 17).

# US – HOT-ROLLED STEEL<sup>1</sup>

## (DS184)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Japan</i>	<i>ADA Arts. 2, 3, 6 and 9</i>	Establishment of Panel	<i>20 March 2000</i>
			Circulation of Panel Report	<i>28 February 2001</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>24 July 2001</i>
			Adoption	<i>23 August 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US definitive anti-dumping duties.
- Products at issue: Imports of certain hot-rolled steel products from Japan.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 6.8 (facts available): The Appellate Body upheld the Panel's findings that the United States acted inconsistently with Art. 6.8 in applying facts available to exporters, as the United States Department of Commerce ("USDOC") had rejected certain information submitted after the deadline without considering whether it was still submitted within a reasonable period of time. The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Art. 6.8 and Annex II when it applied "adverse" facts available to an exporter in respect of certain resale prices by its affiliated company despite the difficulties faced by that exporter in obtaining the requested information and USDOC's reluctance to take any step to assist it.
- ADA Art. 9.4 ("all others" rate): Having found that margins established based *in part* on facts available are to be excluded in calculating an "all others" rate under Art. 9.4, the Appellate Body upheld the Panel's finding that the relevant US statute requiring the inclusion of margins based partially on facts available was inconsistent *as such* and *as applied* with Art. 9.4.
- ADA Art. 2.1 ("ordinary course of trade"): The Appellate Body concluded that the USDOC's 99.5 per cent test (i.e. arm's-length test) was inconsistent with Art. 2.1 because the test did not properly assess the possibility of high-priced sales, as compared to low-priced sales, between affiliates being not "in the ordinary course of trade" within the meaning of Art. 2.1. The Appellate Body found that the USDOC's reliance on downstream sales was "in principle, permissible" under Art. 2.1.
- ADA Art. 3.1 and 3.4 (domestic industry): The Appellate Body upheld the Panel's finding that the captive production provision in the US statute was not inconsistent *as such* with Art. 3, as it allowed the International Trade Commission ("ITC") to examine *both* the merchant market and the captive market along with the market as a whole and thus to evaluate relevant factors in an "objective manner" under Art. 3. However, the Appellate Body, reversed the Panel's finding that the statute was applied in this case consistently with Art. 3.1 and 3.4, as the ITC report did not refer to data for the captive market.
- ADA Art. 3.5 (causation): Having found that the non-attribution language in Art. 3.5 requires "separating and distinguishing" the injurious effects of the other factors from the injurious effects of the dumped imports, the Appellate Body reversed the Panel's interpretation and its finding that the ITC properly ensured that the injurious effects of the other factors had not been attributed to the dumped imports.

### 3. OTHER ISSUES<sup>2</sup>

- Special standard of review (ADA Art. 17.6): Having observed that ADA Art. 17.6 distinguishes between a panel's "assessment of the facts" and its "legal interpretation" of the ADA, the Appellate Body noted the following: (i) that the standard of review under ADA Art. 17.6 complements the "objective assessment" requirement in DSU Art.11. (i.e. the panels must make an "objective" assessment of the facts in order to determine whether the domestic authorities properly established the facts and evaluated them in an objective and unbiased manner); and (ii) the same rules of treaty interpretation apply to the ADA as to other covered agreements, but under the ADA, panels must determine whether a measure rests upon a "permissible interpretation" of that Agreement.

<sup>1</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*

<sup>2</sup> Other issues addressed in this case: AD, Art. 10, Art. 3; conditional appeal (AD, Art. 2.4); GATT, Art. X:3; DSU, Art. 19.1; request to exclude certain evidence (AD, Art. 17.5(ii)); terms of reference (panel request).

# ARGENTINA – CERAMIC TILES<sup>1</sup>

## (DS189)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ADA Arts.2, 6</i>	Establishment of Panel	<i>17 November 2000</i>
			Circulation of Panel Report	<i>28 September 2001</i>
Respondent	<i>Argentina</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>5 November 2001</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Argentina's definitive anti-dumping duties on certain imports.
- Product at issue: Imports of ceramic floors tiles from Italy.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ADA Art. 6.8 and Annex II (facts available): Having found that Art. 6.8, in conjunction with Annex II(6), requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanation within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence of information, the Panel concluded that the Argentine investigating authority ("DCD") acted inconsistently with these requirements under Art. 6.8 by failing to explain its evaluation of the information that led it to disregard in large part the information provided by exporters, resorting instead to the use of facts available. The Panel also rejected Argentina's various justifications for relying on facts available.
- ADA Art. 6.10 (individual margins): the Panel found that the DCD acted inconsistently with Art. 6.10 by imposing the same duty rate on all imports and thus by failing to calculate individual margins for each of the four exporters in the sample and failing to provide, in its final determination, explanations on why it could not calculate individual dumping margins.
- ADA Art. 2.4 (adjustments for differences affecting price comparability): Having noted that Art. 2.4 requires the investigating authority to make due allowance for differences [*inter alia*, in physical characteristics] which affect price comparability and to indicate to the parties what information is necessary to ensure a fair comparison between normal value and export prices, the Panel found that the DCD acted inconsistently with Art. 2.4 by collecting data for only one quality type and one polish type of tiles and thus by failing to make additional adjustments for other physical differences affecting price comparability.
- ADA Art. 6.9 (essential facts): The Panel found that the DCD violated Art. 6.9 by failing to inform the exporters of the "essential facts under consideration which formed the basis for the decision whether to apply definitive measures", because, in light of the "state of the record" in this case (which contained a great deal of information collected from the exporters, the petitioner, importers and official registers), the exporters could not have been aware, simply by reviewing the complete record, that evidence submitted by petitioners, rather than that submitted by the exporters, would form the primary basis of the DCD's determination. In this regard, the Panel interpreted Art. 6.9 to mean that essential facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration.

<sup>1</sup> Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy

## US – COTTON YARN<sup>1</sup>

(DS192)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Pakistan	ATC Art. 6	Establishment of Panel	19 June 2000
			Circulation of Panel Report	31 May 2001
Respondent	United States		Circulation of AB Report	8 October 2001
			Adoption	5 November 2001

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Transitional safeguard remedy imposed by the United States under the ATC on certain imports.
- Product at issue: Imports of combed cotton yarn from Pakistan.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ATC Art. 6.2 (domestic industry): The Appellate Body upheld the Panel's ultimate conclusion that the United States acted inconsistently with Art. 6.2 by excluding from the scope of the domestic industry captive production of yarn (i.e. yarn produced by and processed and consumed within integrated producers for their own use and processing), which was found to be "directly competitive" with yarn offered for sale on the merchant (open) market. In this regard, the Appellate Body considered the term "directly competitive" to suggest a focus on the competitive relationship of products, including not only actual but also "potential competition".
- ATC Art. 6.4 (attribution of serious damage): The Appellate Body found (i) that Art. 6.4 requires a "comparative analysis" when there is more than one Member from whom imports have shown a sharp and substantial increase and (ii) that, under such a comparative analysis, "the full effects" of the factors (i.e. level of imports, market share and prices) can be assessed only if they are compared individually with the levels of the other Members from whom imports have also increased sharply and substantially. As such, it upheld the Panel's ultimate finding that the United States acted inconsistently with Art. 6.4 by failing to examine the effect of imports from Mexico individually when attributing serious damage to Pakistan. The Appellate Body, however, declined to rule on the broader interpretive question of whether Art. 6.4 requires attribution to all Members from which imports increase in a sharp and substantial manner. (The Panel's interpretation was found to have no legal effect.) The Panel also found that the US determination of "actual threat of serious damage" was not justifiable under Art. 6.4, as the underlying US finding of serious damage in this case was found to be flawed.

### 3. OTHER ISSUES

- Standard of review (DSU Art. 11 in the context of ATC Art. 6.2): The Appellate Body found that the Panel in this case exceeded its mandate according to the standard of review under DSU Art. 11 by considering, in the context of reviewing a determination under ATC Art. 6.2, certain data, which did not exist and thus could not have been known by the investigating authority at the time of its determination because a panel was not entitled to review the determination with the benefit of hindsight and to re-investigate *de novo*. The Appellate Body, however, emphasized the limited nature of its finding and clarified that it was not deciding a more general question of, *inter alia*, whether a panel may consider evidence relating to facts that occurred subsequent to the determination.

<sup>1</sup> *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*

<sup>2</sup> Other issues addressed in this case: serious damage; injury factors (ATC Art. 6.2, 6.3); investigation period (ATC Art. 6); specific suggestion for implementation (DSU Art. 19.1); panel's approach to the descriptive part of the panel report.

# US – EXPORT RESTRAINTS<sup>1</sup>

(DS194)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Art. 1.1	Establishment of Panel	11 September 2000
			Circulation of Panel Report	29 June 2001
Respondent	United States		Circulation of AB Report	NA
			Adoption	23 August 2001

## 1. MEASURE AT ISSUE

- Measure at issue: Treatment of "export restraints"<sup>2</sup> under US countervailing duty (CVD) law (statute), in light of the relevant Statement of Administrative Action ("SAA") and Preamble to CVD Regulations, and relevant United States Department of Commerce ("USDOC") practice.

## 2. SUMMARY OF KEY PANEL FINDINGS

*Whether the US statute at issue violates ASCM Art. 1*

- ASCM Art. 1.1 ("financial contribution"): The Panel first concluded that an "export restraint" *cannot* constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) of Art. 1.1(a)(1), and thus does not constitute a "financial contribution" within the meaning of Art. 1.1. According to the Panel, the "entrusts or directs" standard of subparagraph (iv) requires an "explicit and affirmative action of delegation or command", rather than mere government intervention in the market by itself which leads to a particular result or effect.
- Nature of the US law at issue (mandatory vs. discretionary): To answer the ultimate question of whether the United States was in violation of the ASCM, the Panel examined whether the US law at issue "required" the USDOC (i.e. executive branch of the government) to treat export restraints as "financial contributions" in CVD investigations. Having found that the US statute, as interpreted in light of the SAA and the Preamble to the CVD Regulations, did not require the USDOC to treat export restraints as "financial contribution" and that there was no measure in the form of a US "practice" that required the treatment of export restraints as a "financial contribution", the Panel concluded that the statute at issue did not violate Art. 1.1.

## 3. OTHER ISSUES<sup>3</sup>

- Mandatory vs. discretionary legislation: Having referred to the principle that "only legislation that mandates a violation of GATT/WTO obligations can be found as *such* to be inconsistent with those obligations" as the "classical test", the Panel distinguished this case (pertaining to ASCM) from the Section 301 dispute (pertaining to DSU Art. 23.2(a)) in which the panel eventually found that discretionary legislation may violate certain WTO obligations, and decided to apply the classical test to this dispute. The Panel also decided to address first the consistency of the measures with the substantive WTO rules, and then to examine the mandatory or discretionary character of the measures.

<sup>1</sup> *United States – Measures Treating Export Restraints as Subsidies*

<sup>2</sup> "Export restraints" for the purpose of this case were considered as referring to "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports."

<sup>3</sup> Other issues addressed in this case: preliminary request to dismiss claims; operation of each measure, including USDOC's practice (whether each instrument has a functional life of its own).

## US – LINE PIPE<sup>1</sup>

### (DS202)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Korea	SA Arts. 2, 3, 4, 5 and 9	Establishment of Panel	23 October 2000
			Circulation of Panel Report	29 October 2001
Respondent	United States		Circulation of AB Report	15 February 2002
			Adoption	8 March 2002

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US safeguard measure.
- Products at issue: Circular-welded carbon quality line pipe imported from Korea.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- SA Arts. 3.1 and 4.2(c) (injury analysis): The Appellate Body reversed the Panel's finding that the United States violated Arts. 3.1 and 4.2(c) by failing to publish in its investigation report a *discrete* finding or reasoned conclusion that the increased imports caused either "serious injury" or "threat of serious injury", on the ground that the phrase "cause or threaten to cause" should be read to mean that an investigating authority has to conclude either one or both in combination as the US authority had done in the case at hand.
- SA Arts. 2 and 4 (parallelism): The Appellate Body reversed the Panel's finding that Korea did not make a prima facie case of violation of the "parallelism" requirement under Arts. 2 and 4, and concluded that the United States violated the Articles since it had excluded Canada and Mexico from the application of the measure without providing adequate reasoning, while including them in the investigation.
- SA Art. 4.2(b) (non-attribution): The Appellate Body upheld the Panel's finding that the US authority violated Art. 4.2(b) as it did not provide an adequate explanation in its report as to how it had ensured that injury caused to the domestic industry was due to increase in imports and not due to the effects of other factors.
- SA Art. 5.1 (measure): The Appellate Body reversed the Panel's finding that Korea had not made a prima facie case and found that, by establishing a violation under Art 4.2(b), Korea had made a prima facie case that the US measure was not limited to the extent permitted under Art. 5.1 (i.e. to the extent necessary to prevent or remedy serious injury attributed to increased imports and facilitate adjustment). The Appellate Body concluded that the United States violated Art. 5.1 as it had not rebutted Korea's prima facie case under Art. 5.1.
- SA Art. 9.1 (developing country exception): The Appellate Body upheld the Panel's finding that the United States was in violation of Art. 9.1 since the measure imposed duties on the product at issue imported from developing countries that represented only 2.7 per cent of total imports, which is below the 3 per cent *de minimis* level for developing countries set out in Art. 9.1.

<sup>1</sup> United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea

<sup>2</sup> Other issues addressed: General remarks on use of safeguard measures; SA Arts. 12.3 and 8.1, GATT Art. XXIV defence.

# MEXICO – TELECOMS<sup>1</sup>

## (DS204)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	United States	GATS Art I:2(a)	Establishment of Panel	17 April 2002
		GATS Reference Paper under Mexico's GATS Schedule	Circulation of Panel Report	2 April 2004
Respondent	Mexico		Circulation of AB Report	NA
			Adoption	1 June 2004
		GATS Annex on Telecommunications		

### 1. MEASURE AND SERVICES AT ISSUE

- Measure at issue: Mexico's domestic laws and regulations that govern the supply of telecommunication services and federal competition laws.
- Services at issue: Certain basic public telecommunication services, including voice telephony, circuit switched data transmission and facsimile services, supplied by US suppliers across the border into Mexico.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- GATS Art. I:2(a) (cross border supply): The Panel found that the services at issue whereby US suppliers link their networks at the border with those of Mexican suppliers for termination within Mexico are services supplied cross-border within the meaning of Art. I:2(a), since the provision is silent as regards the place where the supplier operates, or is present, and thus is not directly relevant to the definition of "cross-border supply".
- Mexico's Reference Paper<sup>3</sup>, Sections 2.1 and 2.2: The Panel found that Mexico's commitments under Section 2 of Mexico's Reference Paper applied to the interconnection of cross-border US companies seeking to supply the services at issue into Mexico and that Mexico was in violation of its commitments under the provision because the interconnection rates charged by Mexico's major suppliers to US suppliers were not "cost-oriented" as they were in excess of the cost rate for providing the interconnection to the US suppliers.
- Reference Paper, Section 1: The Panel found that Mexico had failed to maintain appropriate measures to prevent "anti-competitive practices" in violation of Section 1. The Panel observed that the measures had effects tantamount to those of a market sharing arrangement between suppliers and in fact required practices by Mexico's major supplier that limited rivalry and competition among competing suppliers.
- GATS Annex on Telecommunications – Section 5(a): The Panel found that the Annex applied to a WTO Member measures that affect the access to and use of public telecommunication transport networks and services by basic telecommunications suppliers of any other Member, and that Mexico was in violation of Section 5(a), by failing to provide US suppliers the said access on "reasonable terms" when it charged US suppliers rates in excess of a cost-oriented rate and when the uniform nature of these rates excluded price competition in the relevant market of the telecommunication services.
- GATS Annex on Telecommunications – Section 5(b): The Panel concluded that Mexico violated its commitments under mode 3<sup>4</sup> (commercial presence) as it had not taken any steps (issuance of any law or regulation) to ensure access to and use of private-leased circuits for the supply of the said service in a manner consistent with Section 5(b). With respect to the supply of non-facilities-based services from Mexico to any other country, the Panel concluded that Mexico was in violation of Section 5(b) since it only authorized international gateway operators, which excluded by definition commercial agencies interconnecting with foreign public telecommunication transport networks and services to supply international telecommunication services.

<sup>1</sup> Mexico – Measures Affecting Telecommunications Services

<sup>2</sup> Other issues addressed: The Panel's duties under DSU, Article 12:11 (S&D considerations).

<sup>3</sup> Mexico's specific commitments for telecommunications services under GATS Article XVIII (Additional Commitments) consist of undertakings known as the "Reference Paper," which contains a set of pro-competitive regulatory principles applicable to the telecommunications sector.

<sup>4</sup> GATS Article I:2(c) (Mode 3 – commercial presence) – supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member.

## US – STEEL PLATE<sup>1</sup>

### (DS206)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	India	ADA Arts. 6.8, 15 and 18.4	Establishment of Panel	24 July 2001
			Circulation of Panel Report	28 June 2002
Respondent	United States		Circulation of AB Report	NA
			Adoption	29 July 2002

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US imposition of anti-dumping duties on certain imports manufactured by Steel Authority of India, Ltd. (SAIL).
- Product at issue: Certain cut-to-length carbon steel plates imported from India.

#### 2. SUMMARY OF KEY PANEL FINDINGS

- ADA Art. 18.4 (facts available): The Panel held that the US authority's practice in the application of "facts available" was not a measure that could be the subject of a claim. Firstly, because such practice could be changed by the authority as long as it provided a reason for the change. Moreover, according to past WTO jurisprudence, a law can only be found inconsistent with WTO obligations if it mandates a violation. Second, the "practice" challenged by India was not within the scope of Art. 18.4, which only refers to "laws, regulations and administrative procedures".
- ADA Art. 6.8 and Annex II(3) ("facts available"): (*as applied claim*) The Panel found that the US authority acted inconsistently with the ADA in finding that SAIL had failed to provide necessary information in response to questionnaires during the course of the investigation and in consequently basing their determination entirely on "facts available", because the information provided by SAIL met all criteria laid down in Annex II(3) and, therefore, it was a must for the US authority to use that information in their determination. (*as such claim*) The Panel rejected India's claim that the US legislation required resort only to "facts available" in circumstances in which Art. 6.8 and Annex II(3) do not permit submitted information to be disregarded. As for India's argument that the US authority's practice reflected a policy where "facts available" were relied upon in circumstances outside the scope of Annex II(3), the Panel stated that this was a mere exercise of discretion, and the legislation itself did not, on its face, mandate WTO-inconsistent behaviour.
- ADA Art. 15 (S&D treatment): The Panel rejected India's claim under Art. 15, first sentence, stating that the provision imposed no specific or general obligation on the United States to undertake any particular action with respect to India's status as a developing country. The Panel also rejected India's claim under the second sentence of the Article, stating that it only requires administrative authorities to *explore* the possibilities of constructive remedies and cannot be understood to require any particular outcome.

<sup>1</sup> United States – Anti-Dumping and Countervailing Measures on Steel Plate from India

# CHILE – PRICE BAND SYSTEM<sup>1</sup>

## (DS207)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Argentina	AA Art. 4.2	Establishment of Panel	12 March 2001
			Circulation of Panel Report	3 May 2002
Respondent	Chile	GATT Art. II:1(b)	Circulation of AB Report	23 September 2002
			Adoption	23 October 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Chile's Price Band System, governed by Rules on the Importation of Goods, through which the tariff rate for products at issue could be adjusted to international price developments if the price fell below a lower price band or rose beyond an upper price band.
- Product at issue: Wheat, wheat flour, sugar and edible vegetable oils from Argentina.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- DSU Art. 11: The Appellate Body reversed the Panels findings under GATT Art. II:1(b), second sentence, on the grounds that it was a claim that had not been raised by Argentina in its panel request or any subsequent submissions, and the Panel, by assessing a provision that was not part of the matter before it, acted *ultra petita* and in violation of DSU Art. 11. The Appellate Body also stated that consideration by a Panel of claims not raised by the complainant deprived Chile of its due process rights under the DSU.
- AA Art. 4.2, footnote 1 (market access): The Appellate Body reversed the Panel's findings that the term "ordinary customs duty" was to be understood as referring to "a customs duty which is not applied to factors of an exogenous nature" and Chile's price band system was not an "ordinary customs duty", as it was assessed on the basis of exogenous price factors. The Appellate Body however upheld the Panel's finding that Chile's price band system was designed and operated as a border measure sufficiently similar to "variable import levies" and "minimum import prices" within the meaning of footnote 1 and therefore prohibited by Art. 4.2. Thus, the Appellate Body concluded that Chile's price band system was inconsistent with Art. 4.2.

### 3. OTHER ISSUES<sup>2</sup>

- Panel's terms of reference: The Appellate Body stated that it was appropriate to rule on the Chile Price Band System as it currently stood, taking into account the amendments enacted after the establishment of the Panel, on the grounds that the Panel request was broad enough to cover future amendments and that the amendment did not change the essence of the measure under challenge. The Appellate Body also added that ruling on the Chile Price Band System currently in place would be in line with its obligations under DSU Art. 3.4 and 3.7 to secure a positive solution of the dispute at hand.

<sup>1</sup> *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*

<sup>2</sup> Other issues addressed: Working Procedure Appellate Review Rule 20(2)(d); passive observers; "subsequent practice" (VCLT, Art. 31.3(b)).

# CHILE – PRICE BAND SYSTEM (ARTICLE 21.5)<sup>1</sup>

## (DS207)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Argentina	AA Art. 4.2	Establishment of Panel	20 January 2006
		GATT 1994 Art. II:1(b), second sentence	Circulation of Panel Report	8 December 2006
Respondent	Chile		Circulation of AB Report	7 May 2007
			WTO Agreement Art. XVI:4	Adoption

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The amended price band system applied by Chile, under which the total amount of duties imposed on imports of wheat, wheat flour and sugar would vary, through the imposition of additional specific duties or through the concession of rebates on the amounts payable. When the reference price determined by the Chilean authorities fell below the lower threshold of a price band, a specific duty was added to the *ad valorem* MFN tariff. Conversely, when the reference price was higher than the upper threshold of the price band, imports would benefit from a duty rebate.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- AA Art. 4.2: The Panel found that the amended price band system continued to be a border measure similar to a variable import levy and a minimum import price and was therefore inconsistent with Article 4.2 of the Agreement on Agriculture. This finding was upheld by the Appellate Body.
- GATT Art. II:1(b): Having found that the amended price band system was inconsistent with AA Art. 4.2, the Panel considered that an additional finding on GATT Art. II:1(b) was not needed in order to resolve the dispute, and consequently exercised judicial economy. Noting the extended arguments of the parties on this issue, however, the panel made some general observations regarding the issue of the proper mandate of a compliance Panel
- WTO Agreement Art. XVI:4: In view of its determination under AA Art. 4.2, the Panel considered that an additional finding on the amended price band system under WTO Agreement Art. XVI:4, as a measure that did not ensure the conformity of Chile's laws, regulations and administrative procedures with its WTO obligations, was not needed and therefore exercised judicial economy.
- The Panel accordingly concluded that Chile had failed to implement the recommendations and rulings of the DSB in the original dispute. This finding was also upheld by the Appellate Body.

### 3. OTHER ISSUES

- In an unappealed section of its report, the Panel advanced some general observations regarding the issue of the proper mandate of a WTO compliance Panel under DSU Art. 21.5. The Panel suggested that, while a compliance panel may consider new claims not raised before the original panel, in order for those new claims to be "properly put" before such compliance panel, three conditions must be present: (i) that the claim is identified by the complainant in its request for the establishment of the compliance panel. (ii) that the claim concerns a new measure, adopted by the respondent allegedly to comply with the recommendations and rulings of the DSB. (iii) that the claim does not relate to aspects of the original measure that remain unchanged in the new measure and were not challenged in the original proceedings or, if challenged, were addressed in those proceedings and not found to be WTO-inconsistent.

<sup>1</sup> *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*

# EGYPT – STEEL REBAR<sup>1</sup>

## (DS211)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Turkey	ADA Arts. 2, 3 and 6	Establishment of Panel	20 June 2001
			Circulation of Panel Report	8 August 2002
Respondent	Egypt		Circulation of AB Report	NA
			Adoption	1 October 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Egypt's definitive anti-dumping measures.
- Product at issue: Steel rebar imported from Turkey.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ADA Art. 3.4 (injury): The Panel interpreted evaluation under Art. 3.4 to mean a process of analysis and interpretation of the facts established, in relation to each listed factor. In the light of this interpretation, the Panel concluded that Egypt acted inconsistently with Art. 3.4 in failing to evaluate six of the factors (productivity, actual and potential negative effects on cash flow, employment, wages and ability to raise capital or investments) as claimed by Turkey but was not in violation with regard to two of the factors (capacity utilization, return on investment) claimed by Turkey.
- ADA Art. 6.8 and Annex II(6): The Panel found that with respect to the investigation of two exporters, Egypt was in violation of Art. 6.8 and Annex II(6), as the investigating authorities, having identified and received the requested information from those companies, nevertheless concluded that the companies had failed to provide the "necessary information" and did not inform the companies that their responses were being rejected nor give them the opportunity to provide further information or clarification.
- Rejected Claims: The Panel found that Turkey had not established its claims under the following Articles: Art. 3.1 and 3.2: The Panel concluded that Art. 3.2 did not require that a price-cutting analysis be conducted at any particular level of trade and that the Egyptian authorities had provided the justification for their choice of the level of trade at which prices were compared; Art. 3.1 and 3.5: With regard to the authorities' failure to develop "positive evidence" in respect of a link between dumped imports and injury to domestic industry, the Panel stated: (i) that there was no basis on which to find a violation for a type of evidence or analysis not explicitly required or even mentioned in the Agreement and not pursued by an interested party during the domestic investigation; and (ii) that there was "substantial simultaneity", between the time periods of the investigations for dumping and injury for the authorities to determine whether injury was caused by the dumping; and Art 2.4: The Panel stated that the request for certain cost information did not impose an unreasonable burden of proof upon the companies within the meaning of Art. 2.4, which seeks to ensure a fair comparison, through various adjustments as appropriate, of export price and normal value.
- ADA Art. 6.7: The Panel noted that the use of the word "may" in the Article meant that "on-the-spot" investigations are permitted but not required and, therefore, found no violation.

### 3. OTHER ISSUES<sup>2</sup>

- Standard of review: As regards Turkey's claims under Art 6.8 and Annex II(5), Annex II(7), the Panel, after a detailed review of the evidence submitted to the investigating authority, determined that an objective and unbiased investigating authority could have reached the determinations challenged by Turkey, and, therefore, found that the Egyptian authority was not in violation of the respective provisions.

<sup>1</sup> Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey

<sup>2</sup> Other issues addressed: ADA Arts. 2.2.1.1, 2.2.2, 2.4, 6.1.1, 6.2, 6.8, ADA Annex II (1,3,5,6 and 7).

# US – COUNTERVAILING MEASURES ON CERTAIN EC PRODUCTS<sup>1</sup>

## (DS212)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>ASCM Arts. 1, 14 and 21</i>	Establishment of Panel	<i>10 September 2001</i>
			Circulation of Panel Report	<i>31 July 2002</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>9 December 2002</i>
			Adoption	<i>8 January 2003</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US countervailing duty law governing the treatment of subsidies provided to state-owned companies later privatized, including certain subsidy calculation methodologies developed by the US Department of Commerce ("USDOC").
- Product at issue: Products exported to the United States from the European Communities by privatized companies that were previously state-owned and that received government subsidies before their privatization, in particular products by GOES from Italy.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ASCM Arts. 1 and 14: The Appellate Body reversed the Panel in its findings and stated instead that privatizations at arm's length and at fair market value gave rise to a rebuttable presumption that a benefit ceased to exist after such privatization. It shifts the burden on the investigation authority to establish that the benefits from the previous financial contribution does indeed continue beyond such privatization.
- ASCM Art. 19.1 (original investigation), Art. 21.2 (administrative review) and Art. 21.3 (sunset review): Based on its analysis above on ASCM Arts. 1 and 14, the Appellate Body upheld the Panel's finding that the "same person" methodology was *as such* inconsistent with Arts. 19.1, 21.2 and 21.3 when the USDOC, based on this methodology and without further analysis, concluded that a privatized enterprise continued to receive the benefits of a previous financial contribution, irrespective of the price paid for the purchase by the new owners of the privatized enterprise. The Appellate Body also stated that since the methodology was *as such* inconsistent with the ASCM, it followed that the application of the method in individual cases would also be inconsistent with the ASCM.
- Mandatory vs discretionary legislation: The Appellate Body reversed the Panel's findings that the US law itself mandated a particular method of determining the existence of a "benefit" that was contrary to the ASCM. The Appellate Body concluded that the law did not prevent the USDOC from complying with the ASCM, although it noted that the finding did not preclude the possibility that a Member violates its WTO obligations, where it enacts legislation that grants discretion to its authorities to act in violation of its WTO obligations.

<sup>1</sup> *United States – Countervailing Measures Concerning Certain Products from the European Communities*

<sup>2</sup> Other issues addressed: Working Procedures for Appellate Review, Rules 16(1) and 20(2)(d); *amicus curiae* submission.

# US – COUNTERVAILING MEASURES ON CERTAIN EC PRODUCTS

## (ARTICLE 21.5)<sup>1</sup>

### (DS212)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Arts. 10, 14, 19 and 21	Referred to the Original Panel	27 September 2004
			Circulation of Panel Report	17 August 2005
Respondent	United States		Circulation of AB Report	NA
			Adoption	27 September 2005

## 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- United States Department of Commerce's ("USDOC") revised sunset determinations (under Section 129 of the Uruguay Round Agreements Act)<sup>2</sup> regarding the likelihood-of-subsidization on products from France, the United Kingdom and Spain.

## 2. SUMMARY OF KEY PANEL FINDINGS

ASCM Arts. 10, 14, 19.4, 21.1 and 21.3 and GATT Art. VI:3

- Re-determination on France: Having noted that the ASCM does not provide a particular methodology for analysing whether a privatization is conducted at arm's length and for FMV, the Panel found that given the complexity of the privatization process involved, the USDOC's *individual* analysis of the conditions of the privatization for each category of share offering was reasonable. The Panel also concluded that the USDOC's analysis and conclusion that the employee share offering was not for FMV was not unreasonable. The Panel ultimately found that the United States had not failed to implement the DSB's recommendations by maintaining the existing countervailing duties given that (i) there is no obligation to recalculate a rate of subsidization in a sunset review; and (ii) the finding that a small part of the benefit passes through to the privatized producer can serve as the basis of the affirmative likelihood-of-subsidization conclusion and the maintenance of the duties.
- Re-determination on the UK: The Panel found that the United States failed to implement the DSB's recommendations with respect to its likelihood-of-subsidization determination on the United Kingdom, as it had failed to determine (as opposed to merely assuming) whether the privatization was at arm's length and for FMV. Having also found that ASCM Art. 21.3 requires the investigating authority during a (revised) sunset review to take into account *all* the evidence placed on its record in making its determination of likelihood-of-subsidization, the Panel concluded that the USDOC's refusal to consider new evidence presented during the Section 129 proceedings was inconsistent with ASCM Art. 21.3.
- Re-determination on Spain: For the same reason as above in respect of the USDOC's re-determination on the United Kingdom (i.e. failure to determine whether the privatization occurred at arm's length and for FMV), the Panel found that the United States had failed to implement the DSB's recommendations regarding Spain. However, the Panel rejected the European Communities' claim that the USDOC's treatment of evidence on the record was inconsistent with ASCM Art. 21.3, as the Panel was not aware of any new evidence that had been presented by the European Communities during the Spain Section 129 proceedings concerning the products from Spain.

## 3. OTHER ISSUES<sup>3</sup>

- Terms of reference (DSU Art. 21.5): The Panel concluded that the European Communities' new claim on the likelihood-of-injury was not properly before it. The Appellate Body clarified that this claim related to an aspect of the original measure, rather than the "measure taken to comply". Allowing such a claim might jeopardize the principles of fundamental fairness and due process by exposing the United States to the possibility of a finding of violation on an aspect of the original measure that the United States was entitled to assume was consistent with its obligations under the relevant agreement given the absence of a finding of violation in the original report.

<sup>1</sup> *United States – Countervailing Measures Concerning Certain Products from the European Communities, Recourse to Article 21.5 of the DSU by the European Communities*

<sup>2</sup> This determination was based on a new privatization methodology, which included a baseline presumption that non-recurring subsidies benefit the recipient over a period of time and are therefore allocable over that period. This presumption can be rebutted by proving, *inter alia*, the sale was at arm's length and for fair market value ("FMV").

<sup>3</sup> Other issues addressed: measures taken to comply; terms of reference (DSU Art. 6.2, European Communities' claim on the USDOC's likelihood-of-injury determination); issues of a "fundamental nature".

# US – CARBON STEEL<sup>1</sup>

## (DS213)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Art. 21.3	Establishment of Panel	10 September 2001
			Circulation of Panel Report	3 July 2002
Respondent	United States		Circulation of AB Report	28 November 2002
			Adoption	19 December 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US laws, regulations, administrative procedures and policy bulletin governing "sunset" reviews of countervailing duties ("CVDs"), and their application in a sunset review of a CVD order on imports from Germany (the US authorities' decision not to revoke the CVD order).
- Product at issue: Corrosion-resistant carbon steel flat products imported from Germany.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ASCM Art. 21.3 (*de minimis* standard): The Appellate Body reversed the Panel's finding that the US law was in violation of Art 21.3, on the grounds that Art. 21.3 does not require the application of a 1 per cent *de minimis* standard in sunset reviews. The Appellate Body reversed the Panel's reasoning that the *de minimis* requirement of Art. 11.9 of the ASCM (which applies to original investigations) is implied in Art. 21.3, on the ground that Art. 21.3 does not have an express reference to the *de minimis* standard nor is there a textual link (cross-reference) between the two Articles.
- ASCM Art. 21.3 (evidentiary standard): The Appellate Body upheld the Panel's findings that the automatic self-initiation of sunset reviews by investigating authorities under US law and accompanying regulations are consistent with the ASCM. The Appellate Body stated that its review of the context of Art. 21.3 revealed no indication that the ability of authorities to self-initiate a sunset review is conditioned on compliance with any evidentiary standards, including those set forth in Art. 11.4. (*as such* claim) The Appellate Body found no reason to disturb the Panel's finding that although the US measure imposed severe limitations on the ability of the authority to come up with a new rate of subsidization, it did not preclude the assessment of a likely rate of subsidization by the authority, and, therefore, did not *mandate* WTO-inconsistent behaviour and, as such, was not in violation of Art. 21.3. (*as applied* claim) The Panel noted that the US authority had made the determination that the revocation of the CVD would likely lead to continuation or recurrence of subsidization, which "likelihood" determination, the Panel stated, should have been based on an adequate factual basis. The Panel found the application of US CVD law in the particular sunset review to be inconsistent with Art. 21.3 as the US authority had failed to take into account a document submitted by the German exporters that would have been relevant in its analysis on the likelihood of continuation or recurrence of subsidization. (This Panel finding of a violation was not appealed.)

<sup>1</sup> *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*

<sup>2</sup> Other issues addressed: panel's terms of reference, DSU Article 11; mandatory and discretionary distinction.

## US – OFFSET ACT (BYRD AMENDMENT)<sup>1</sup>

### (DS217, 234)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	Australia, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand Canada, Mexico	ADA Arts. 5 and 18  ASCM Arts. 11 and 32	Establishment of Panel	12 July 2001 (Australia,, Brazil, Chile, EC, India, Indonesia, Japan, Korea, Thailand), 10 September 2001 (Canada, Mexico)
			Circulation of Panel Report	16 September 2002
Respondent	United States		Circulation of AB Report	16 January 2003
			Adoption	27 January 2003

#### 1. MEASURE AT ISSUE

- Measure at issue: US Continued Dumping and Subsidy Act of 2000 under which anti-dumping and countervailing duties assessed on or after 1 October 2000 were to be distributed to the affected domestic producers for qualifying expenditures.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ADA Art. 18.1 and ASCM Art. 32.1: The Appellate Body upheld the Panel's analysis that the US measure was a specific action against dumping of exports and of subsidies as it was related to the determination of, and designed and structured to dissuade the practice of, dumping or subsidization. On this basis the Appellate Body held that the US measure was inconsistent with the ADA and the ASCM as it was a specific action that was other than one of those permissible under the said agreements.
- ADA Art. 5.4 and ASCM Art. 11.4: The Appellate Body reversed the Panel's findings that the measure at issue was inconsistent with ADA Art. 5.4 and ASCM Art. 11.4. Emphasizing that the interpretation of these Articles must be based on the principles of interpretation in the VCLT, which focus on the ordinary meaning of the words of the provision, the Appellate Body stated that it found difficulty with the Panel's approach of continuing the analysis beyond the ordinary meaning of the text of the provisions of the ADA to examine whether the measure at issue defeated the object and purpose of these provisions. The Appellate Body concluded that the requirement of Arts. 5.4 and 11.4 were fulfilled when a sufficient number (quantity) of domestic producers have expressed support for the application and, contrary to the Panel's analysis, the investigation authority is not required to examine the motives (quality) of domestic producers that elect to support the investigation.
- WTO Agreement Art. XVI:4: The Appellate Body concluded that the US measure was in violation of Article XVI:4, as it was inconsistent with ADA Art. 18.1 and ASCM Art. 32.1, and, therefore, it nullified or impaired benefits accruing to the appellees under those agreements.

<sup>1</sup> *United States – Continued Dumping and Subsidy Offset Act of 2000*

<sup>2</sup> Other issues addressed: good faith fulfilment of treaty obligations (DSU Arts. 7, 9.2, 17.6).

## EC – TUBE OR PIPE FITTINGS<sup>1</sup>

### (DS219)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ADA Arts. 1, 2 and 3</i>	Establishment of Panel	<i>24 July 2001</i>
			Circulation of Panel Report	<i>7 March 2003</i>
Respondent	<i>European Communities</i>		Circulation of AB Report	<i>22 July 2003</i>
			Adoption	<i>18 August 2003</i>

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: EC Regulation imposing anti-dumping duties on certain imports.
- Product at issue: Malleable cast iron tube or pipe fittings imported from Brazil.

#### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. VI:2 and ADA Art. 1: Agreeing with the Panel that there was nothing in the ADA that requires investigating authorities to reassess a determination of dumping on the basis of a devaluation occurring during the period of investigation ("POI"), the Appellate Body upheld the Panel's rejection of Brazil's claims.
- ADA Art. 2.2.2 chapeau (normal value): The Panel rejected Brazil's claim that the EC authorities should have excluded low volume sales figures from their calculation of "normal value" on the ground that the chapeau only allows investigating authorities to exclude data from production and sales that were not made in the ordinary course of trade. The Appellate Body upheld the Panel's findings.
- ADA Art. 3.2 and 3.3 (injury): The Appellate Body upheld the Panel's findings that European Communities did not act inconsistently with Art. 3.2 and 3.3 by cumulatively assessing the effects of the dumped imports. The Appellate Body concluded volumes and prices could be assessed cumulatively without a prior country-specific assessment.
- ADA Art. 3.5 (causation): While upholding the Panel's ultimate finding that the European Communities did not violate Art. 3.5, the Appellate Body rejected the reasoning used by the Panel and found (i) that under the particular facts of the case the European Communities had no obligation to examine the collective effects of all "causal" factors in determining whether injury to domestic industry might have been caused by those factors; and (ii) that the European Communities had determined the cost of production difference to be minimal and the factor claimed to be injuring the domestic industry had effectively been found not to exist.
- ADA Art. 6.2 and 6.4 (evidence): The Appellate Body reversed the Panel's findings and found instead that the European Communities acted inconsistently with Art. 6.2 and 6.4 by failing to disclose to the interested parties certain information, which was relevant to the interested parties, had already been used by the EC authorities in the investigation, and was not confidential.

<sup>1</sup> *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*

<sup>2</sup> Other issues addressed: "implicit" analysis of the "growth" factor (ADA Art. 3.4); exhibit as evidence and Panel's obligation (Arts. 3.1, 3.4 and 17.6(i)); panels terms of reference.

# US – SECTION 129(C)(1) URAA<sup>1</sup>

## (DS221)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	[Legal claims not examined]	Establishment of Panel	23 August 2001
			Circulation of Panel Report	15 July 2002
Respondent	United States		Circulation of AB Report	NA
			Adoption	30 August 2002

### 1. MEASURE AT ISSUE

- Measure at issue: Section 129(c)(1) of the Uruguay Round Agreements Act of the United States, which established, *inter alia*, a mechanism that permitted the agencies concerned to issue a second determination (a "section 129 determination"), where such action was appropriate, to respond to the recommendations in a WTO panel or Appellate Body report.

### 2. SUMMARY OF KEY PANEL FINDINGS

- The Panel rejected Canada's claim that Section 129(c)(1) mandated action that was inconsistent with the GATT, the ADA and the ASCM, as the Panel found that Canada had failed to establish its claim.

Canada claimed that Section 129(c)(1) had the effect of precluding the United States from implementing adverse WTO reports with respect to what it termed "prior unliquidated entries"<sup>2</sup> (i.e. entries made before the end of the reasonable period of time for implementing adverse WTO reports that were not liquidated as of that date).

The Panel found, however, that Section 129(c)(1) applied only to the treatment of unliquidated entries (i.e. entries that occurred "on or after" the end of the reasonable period of time) and did not apply to the so-called "prior unliquidated entries". Therefore, the Panel was not convinced by Canada's assertion that Section 129(c)(1) nevertheless had the effect of precluding the United States from implementing adverse WTO reports with respect to "prior unliquidated entries". In other words, the Panel concluded that because Section 129(c)(1) did not apply to "prior unliquidated entries," it neither required nor precluded the United States to act in a certain way in its treatment of "prior unliquidated entries".

Since Canada failed in establishing that Section 129(c)(1) had the effect of precluding the United States from implementing adverse WTO reports with respect to "prior unliquidated entries", the Panel did not consider it necessary to examine whether Canada was correct in arguing that the GATT, the ADA and the ASCM required the United States to implement adverse WTO reports with respect to such "prior unliquidated entries".

### 3. OTHER ISSUES<sup>3</sup>

- As such claim: The Panel stated that it was clear that a Member may challenge a statutory provision of another Member *as such*, provided that the statutory provision mandated the other Member to take action that was inconsistent with its WTO obligations or not to take action which was required by its WTO obligations. Thus, the Panel considered that Canada's principal claims would be sustained only if Canada established that Section 129(c)(1) mandated the United States either to take action that was inconsistent with the WTO obligations or not to take action which was required by those WTO provisions.

<sup>1</sup> *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*

<sup>2</sup> "Liquidation", refers to the process by which the US Customs Service makes a final settlement with the importer regarding the final, definitive amount of duties owed. Accordingly, the Customs Service either returns to the importer any excess amount of the deposit paid by the importer over the definitive duties owed or collects from the importer an additional amount to the extent that the definitive duties owed are greater than the deposit. The US Customs Service liquidates based on the amount of definitive anti-dumping and countervailing duties owed as provided in the final, definitive duty determinations made by the US Department of Commerce.

<sup>3</sup> Other issues addressed: Terms of reference.

# CANADA – AIRCRAFT CREDITS AND GUARANTEES<sup>1</sup>

## (DS222)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ASCM Arts. 1 and 3.1(a)</i>	Establishment of Panel	<i>March 12 2001</i>
			Circulation of Panel Report	<i>January 28 2002</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>February 19 2002</i>

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measure at issue: Financing, loan guarantees or interest rate support provided by the Canadian Export Development Corporation (EDC) and other export credits, guarantees including equity guarantees etc. provided by the *Investissement Québec* (IQ) to the Canadian civil aircraft industry.
- Industry at issue: Civil aircraft industry.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- ASCM Arts. 1 and 3.1(a) (as such): The Panel found that the EDC and IQ programmes *as such* were not inconsistent with Art. 3.1(a) as Brazil had failed to point out any specific provision in the relevant legal instruments that suggested that the EDC and IQ programmes (and related measures) mandated the conferral of a benefit, and thereby subsidization, within the meaning of Art. 1. The Panel found that even if EDC had the "ability", and the IQ "could" confer such a benefit, this did not necessarily mean that these programmes were required to do so.
- ASCM Arts. 1 and 3.1(a) (as applied in individual instances): The Panel relied on, inter alia, the definition of "benefit" established by the Appellate Body<sup>3</sup>, i.e. that a benefit will be conferred where a recipient received a "financial contribution" on terms more favourable than those available to the recipient in the market.

On this basis, the Panel found that since the EDC loan financing to Air Wisconsin was at rates better than those available commercially, it therefore conferred a benefit and was a subsidy under Art. 1.1(b). The Panel also found that this was a prohibited subsidy under Art. 3.1(a) as Canada itself did not deny this fact and admitted that the subsidy programme in question was intended to support Canada's export trade and hence qualified as an "export subsidy".

Similarly, the Panel found that certain EDC finance transactions<sup>4</sup> conferred "benefits" on the individual recipients and also constituted prohibited export subsidies under Art. 3.1(a). However, in the case of certain other EDC financing transactions<sup>5</sup>, the Panel found that Brazil had failed to establish the existence of a benefit to the individual recipients. The Panel concluded that in these instances no subsidy existed, and therefore no violation could be found of Art. 3.1(a).

In the case of IQ equity guarantees, the Panel examined the level of fees charged before the issuing of guarantees, and found that only one of the IQ equity guarantee transactions at issue conferred a benefit within the meaning of Art. 1. The Panel found that this transaction was neither *de jure* or *de facto* export contingent, and therefore it did not breach Art. 3.1(a).

In the case of IQ loan guarantees, the Panel found that Brazil had not established that one of the two guarantees at issue conferred a benefit under Art. 1, or that the other guarantee, which did confer a benefit, was contingent upon export performance. Thus, the Panel found that Brazil had failed to establish that either of the two IQ loan guarantees were inconsistent with Art. 3.1 (a).

<sup>1</sup> Canada – Export Credits and Loan Guarantees for Regional Aircraft

<sup>2</sup> Other issues addressed: Art 21.5 panel's jurisdiction; DSU Art. 6.2 and 13.1; "as applied" challenge; Item (k); business confidential information.

<sup>3</sup> Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

<sup>4</sup> In respect of Comair and Air Nostrum.

<sup>5</sup> In respect of Atlantic Coast Airlines, Atlantic Southeast Airlines, Comair, Kendell and Air Nostrum.

## EC – SARDINES<sup>1</sup>

### (DS231)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Peru	TBT Annex 1.1 and Art. 2.4	Establishment of Panel	24 July 2001
			Circulation of Panel Report	29 May 2002
Respondent	European Communities		Circulation of AB Report	26 September 2002
			Adoption	23 October 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: EC Regulation establishing common marketing standards for preserved sardines, including a specification that only products prepared from *Sardina pilchardus* could be marketed/labelled as preserved sardines.
- Product at issue: Two species of sardines found in different waters – *Sardina pilchardus* Walbaum (mainly in Eastern North Atlantic, in the Mediterranean Sea and the Black Sea) and *Sardinops sagax sagax* (mainly in the Eastern Pacific along coasts of Peru and Chile).

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- TBT Agreement Annex 1.1 (technical regulation): The Appellate Body upheld the Panel's finding that the EC Regulation was a "technical regulation" within the meaning of Annex 1.1 as it fulfilled the three criteria laid down in the Appellate Body report in *EC - Asbestos*: (i) the document applied to an identifiable product or group of products; (ii) it lays down one or more product characteristics; and (iii) compliance with the product characteristics was mandatory.
- TBT Agreement Art. 2.4 (relevant international standard): The Appellate Body upheld the Panel's finding that the definition of "standard" does not require that a standard adopted by a "recognized body" be approved by consensus. Therefore, the standard in question, Codex Stan 94, fell within the scope of Art. 2.4 as well.
- TBT Agreement Art. 2.4 (burden of proof): The Appellate Body reversed the Panel's finding that the European Communities had the burden of proving that the relevant international standard was ineffective and inappropriate under Art. 2.4 and found, instead, that the burden rested on Peru to prove that the standard was effective and appropriate to fulfil the legitimate objectives pursued by the European Communities through the EC Regulation. The Appellate Body upheld the Panel's alternative finding that Peru had adduced sufficient evidence and legal arguments to demonstrate that the international standard was not ineffective or inappropriate to fulfil the legitimate objectives pursued by the European Communities (of market transparency, consumer protection and fair competition), since it had not been established that most consumers in most member states of the European Communities have always associated the common name "sardines" only with *Sardina pilchardus* Walbaum.

### 3. OTHER ISSUES<sup>2</sup>

- The Appellate Body found that it could accept and consider an *amicus curiae* brief submitted by Morocco, a WTO Member that was not a third party to the dispute, although ultimately it did not take the brief into account.

<sup>1</sup> *European Communities – Trade Description of Sardines*

<sup>2</sup> Other issues addressed in this case: working procedures for Appellate Review (Rule 30(1) – request for passive observer status), temporal scope of TBT Article 2.4, DSU Article 11.

# US – SOFTWOOD LUMBER III<sup>1</sup>

## (DS236)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 1.1, 14, 17 and 20	Establishment of Panel	5 December 2001
			Circulation of Panel Report	27 September 2002
Respondent	United States		Circulation of AB Report	NA
			Adoption	1 November 2002

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Preliminary countervailing duty determination and preliminary critical circumstances determination made by the US authorities in respect of lumber imports and US laws on expedited reviews and "administrative reviews" in the context of countervailing measures.
- Product at issue: US softwood lumber imports from Canada.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ASCM Art. 1.1(a)(1)(iii) ("financial contribution"): The Panel concluded that the US authorities' determination that the Canadian provincial stumpage programme constituted a "financial contribution" by the government within the terms of Article 1.1(a)(iii) was not inconsistent with the ASCM, as the act of the Canadian government of allowing companies to cut the trees amounted to the "supply" of standing timber, which is a good within the meaning of Article 1.1(a)(1)(iii).
- ASCM Art. 14 and 14(d) (benefit): The Panel concluded that the US authorities acted inconsistently with Art. 14 and 14(d) by using the US stumpage prices, in determining whether a "benefit" accrued from the Canadian government to the recipient, instead of the prevailing market conditions for the product at issue in Canada, the country of provision or purchase, as required by Art. 14(d).
- ASCM Art. 1.1(b) (benefit): The Panel found that where a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input, an authority is not allowed to simply assume that a benefit has passed through. Therefore, by failing to examine whether the independent lumber producers had paid an arm's-length price for the logs they purchased, the US authorities' determination that a benefit had accrued to those producers was inconsistent with the ASCM.
- As such challenge:<sup>2</sup> The Panel rejected Canada's *as such* challenge of the US statute and regulations on expedited and administrative review, since it did not *mandate/require* the US authorities to violate the ASCM.

### 3. OTHER ISSUES

- ASCM Art. 20.6 (retroactivity): The Panel concluded that the US authorities' application of provisional measures retroactively was inconsistent with the ASCM.
- ASCM Art. 17.3 and 17.4 (provisional measures): The Panel concluded that the timing (less than 60 days after initiation of investigation) and duration (for a period more than four months) of the US authorities' application of the provisional measures was in violation of the requirements of Art. 17.3 and 17.4.

<sup>1</sup> *United States – Preliminary Determination With Respect to Certain Softwood Lumber From Canada*

<sup>2</sup> The *as such* challenge was brought under GATT Article VI:3, ASCM Agreement Articles 10, 19.3, 19.4, 21.2, 32.1 and 32.5 and WTO Agreement Article XVI:4.

# ARGENTINA – PRESERVED PEACHES<sup>1</sup>

## (DS238)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Chile	SA Arts. 2.1, 4.1 and 4.2	Establishment of Panel	18 January 2002
			Circulation of Panel Report	14 February 2003
Respondent	Argentina	GATT Art. XIX:1(a)	Circulation of AB Report	NA
			Adoption	15 April 2003

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Argentina's safeguard measures imposed, in the form of specific duties, on preserved peaches from all countries other than MERCOSUR States and South Africa.
- Product at issue: Preserved peaches imported into Argentina.

### 2. SUMMARY OF KEY PANEL FINDINGS

- GATT Art. XIX:1(a): Having noted the two distinct requirements under Art. XIX:1(a) to be fulfilled before the imposition of safeguard measures: (i) demonstration of increased imports and (ii) demonstration of unforeseen developments, the Panel concluded that on the facts of the case it was not evident that the Argentine authorities had discussed or offered any explanation on why the developments were "unforeseen" at the time of the negotiation of the obligations, and, therefore, that they had not fulfilled the criteria of Article XIX:1(a).
- SA Arts. 2.1 and 4.2(a) and GATT Art. XIX:1(a): Having noted that the increase in imports must be "qualitative" as well as "quantitative", the Panel concluded that the Argentine authorities had failed to demonstrate: (i) that they had considered trends in imports in absolute terms, which significantly showed a decline over the period of analysis; and (ii) that the increase in imports from one base year to another constituted an increase in quantities relative to domestic production. Therefore, the Panel found that Argentina had not fulfilled the criteria of the relevant provisions and had acted inconsistently with the SA.
- SA Art. 2.1, 4.1(b), 4.2(a) and GATT Article XIX:1(a): The Panel concluded that Argentina had acted inconsistently with the relevant provisions, as it had demonstrated in its determination on a threat of serious injury, neither the relevant factors having a bearing on the domestic industry nor that the serious injury was clearly imminent so as to constitute a threat under the relevant Articles.

<sup>1</sup> Argentina – Definitive Safeguards Measure on Imports of Preserved Peaches

# ARGENTINA – POULTRY ANTI-DUMPING DUTIES<sup>1</sup>

## (DS241)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Brazil</i>	<i>ADA Arts. 2, 3, 5 and 6</i>	Establishment of Panel	<i>17 April 2002</i>
			Circulation of Panel Report	<i>22 April 2003</i>
Respondent	<i>Argentina</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>19 May 2003</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive anti-dumping measures, in the form of specific anti-dumping duties, imposed by Argentina on imports from Brazil for a period of three years.
- Product at issue: Poultry from Brazil imported into Argentina.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- ADA Art. 5.3: The Panel found that, by basing the determination of initiation of an investigation on "some" instances of dumping, Argentina violated Art. 5.3 as a dumping determination should be made in respect of the product as a whole for "all" comparable transactions, not for individual transactions.
- ADA Art. 5.8: The Panel found that Argentina violated Art. 5.8 as it failed to reject an application for investigation which was based on insufficient evidence following the issuance of a negative injury determination from the relevant investigation authority.
- ADA Art. 6.8: The Panel found that Argentina was not in violation of Art. 6.8 when it disregarded information submitted by a company that had not fulfilled procedural provisions of the domestic law. As information submitted by such companies was not considered "appropriately submitted" within the meaning of Art. 6.8, Argentina was held not to be in violation as regards one other claim under this Article. However, Argentina was found in violation of Art. 6.8 by rejecting information received from three other companies, as the Panel could not find, in the record of the investigation, a reference to any of the reasons provided by Argentina for the rejection.
- ADA Art. 6.10: The Panel found that Argentina violated Art. 6.10 as it did not calculate an individual dumping margin for two companies. The Panel found that an investigating authority should calculate the dumping margin for each individual exporter regardless of whether it was provided with partial, unreliable or unusable information from the exporters or producers.
- ADA Art. 2.4 and 2.4.2: The Panel found Argentina in violation of Art. 2.4 as it did not make freight cost adjustments to its calculation of the normal value in the case of a company that had provided supporting documents. However, the Panel found no violation in the case where the company had failed to provide supporting documentation. The Panel found Argentina in violation of Art. 2.4.2 as it established weighted average normal values on the basis of statistical samples of domestic sales transactions.
- ADA Art. 3.1 and 3.5: The Panel stated that where an authority examines different injury factors using different periods, a prima facie case is made that it failed to conduct an "objective" examination. Since Argentina did not provide a justification for its use of different periods, it failed to rebut the prima facie case and was found in violation of Art. 3.1. The Panel found no violation of Art. 3.5 as there was nothing to suggest that the injury period should not exceed the dumping period, provided that the entire dumping period was included within the period of review for injury.
- ADA Art. 3 (non-dumped imports): The Panel found Argentina had violated Art. 3.1, 3.2, 3.4 and 3.5 by including "non-dumped" imports from two companies in the injury analysis.
- DSU Art. 19.1: The Panel suggested for implementation that Argentina repeal the definitive anti-dumping measure at issue.

<sup>1</sup> *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*

<sup>2</sup> Other issues: procedural requirements under ADA Art. 6, ADA Arts. 4 and 9; relevance of prior proceedings before MERCOSUR Tribunal.

## US – TEXTILES RULES OF ORIGIN<sup>1</sup>

### (DS243)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	India	ROA Art. 2	Establishment of Panel	24 June 2002
			Circulation of Panel Report	20 June 2003
Respondent	United States		Circulation of AB Report	NA
			Adoption	21 July 2003

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Rules of origin applied by the United States to textiles and apparel products and used in administering the textile quota regime maintained by the United States under the Agreement on Textiles and Clothing ("ATC"), in particular the US Trade and Development Act of 2000.
- Product at issue: Made-up non-apparel articles, also known as "flat goods", such as bedding articles and home furnishing articles, of export interest to India.

#### 2. SUMMARY OF KEY PANEL FINDINGS

- ROA Art. 2(b) (trade objectives): The Panel rejected India's claim and concluded that although the objectives of protecting the domestic industry against import competition and of favouring imports from one Member over imports from another may in principle be considered to constitute "trade objectives" in pursuit of which rules of origin may not be used, India had failed to establish that US rules of origin were being administered to pursue trade objectives in violation of Art. 2(b).
- ROA Art. 2(c), first sentence (restrictive, distorting or disruptive effects): The Panel rejected India's claim on the grounds that for there to be a violation of Art. 2(c), it must be proved that there is a causal link between the challenged rules of origin itself and the prohibited effects, and that it would not always and necessarily be sufficient for a complaining party to show that the challenged rules of origin adversely affect one Member's trading as it may favourably affect the trade of other Members. The Panel concluded that India had not provided enough relevant evidence that the US measures created "restrictive", "distorting" or "disruptive" effects on international trade.
- ROA Art. 2(c), second sentence (fulfilment of certain conditions): The Panel rejected India's claim, noting that distinctions maintained in order to define the product coverage of particular rules of origin were distinct from conditions of the kind referred to in Article 2(c), second sentence (which prohibits the imposition of condition/s unrelated to manufacturing or processing as a prerequisite to conferral of origin). The Panel concluded that India did not establish that the measures at issue required the fulfilment of conditions prohibited by Art. 2(c) second sentence.<sup>2</sup>
- ROA Art. 2(d) (discrimination): The Panel concluded that Art. 2(d) applies to discrimination between goods that are the "same", not those that are "closely related", and that India had failed to demonstrate that the US legislation was in violation of Art. 2(d).

<sup>1</sup> *United States – Rules of Origin for Textiles and Apparel Products*

<sup>2</sup> The Panel rejected India's interpretation of the phrase 'unduly strict requirements' under Article 2(c) second sentence that rules of origin requirements are "unduly strict" if they are burdensome and do not have to be imposed to determine the country to which the good in question has a significant economic link, and concluded that there was no violation under the said provision.

# US – CORROSION RESISTANT STEEL SUNSET REVIEW<sup>1</sup>

## (DS244)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Japan</i>	<i>ADA Art. 11.3</i>	Establishment of Panel	<i>22 May 2002</i>
			Circulation of Panel Report	<i>14 August 2003</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>15 December 2003</i>
			Adoption	<i>9 January 2004</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: US statute for sunset review of anti-dumping duties, in conjunction with the Statement of Administrative Action ("SAA"), certain provisions of the US regulations related to sunset reviews and the Sunset Policy Bulletin. Application of the aforementioned measures in the sunset review determination of the product at issue.
- Product at issue: Corrosion-resistant carbon steel flat products from Japan.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

#### *Sunset review*

- ADA Art. 11.3 (general interpretation): The Appellate Body made some general observations with regard to such a determination: (i) the second condition of Art. 11.3 involved a prospective determination on the part of the investigating authorities, requiring a forward-looking analysis of what would be likely to occur if the duty were terminated; (ii) as to the standard of "likely", a positive determination may be made only if the evidence demonstrated that dumping would be "probable" (not possible or plausible) if the duty were terminated; and (iii) Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination.
- ADA Arts. 11.3 and 2.4: The Appellate Body reversed the Panel's finding and concluded that the United States violated Art. 11.3 by relying on dumping margins calculated in previous reviews using the "zeroing" methodology. While there is no obligation under Art. 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping, they must calculate dumping margins in conformity with Art. 2.4 should they choose to rely upon margins in making their likelihood determination
- ADA Arts. 11.3 and 6.10: The Appellate Body concluded that the United States was not in violation of Arts. 6.10 and 11.3 by making a "likelihood" determination in a sunset review on an order-wide basis. The Appellate Body observed that Art. 11.3 does not expressly state that a likelihood determination must be separately made for each known producer (or on a company-specific basis), and that Art. 6 (which is relevant and applies to Art. 11.3 investigations by virtue of the cross reference in Art. 11.4) is also silent on this matter.

### 3. OTHER ISSUES

- As such challenge: In order to determine whether an *as such* challenge was possible in the present case, the Appellate Body first looked at the type of measures that can be the subject of dispute settlement proceedings and second whether there were any limitations upon the types of measures that may, *as such*, be the subject of dispute settlement under DSU Art. 3.3 or the applicable covered agreement. The Appellate Body found, contrary to the Panel, that the Sunset Policy Bulletin can be challenged in WTO dispute settlement. The Appellate Body did not, however, find any provision of the Bulletin to be inconsistent, *as such*, with the Anti-Dumping Agreement.

<sup>1</sup> *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*

# JAPAN – APPLES<sup>1</sup>

## (DS245)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>SPS Arts 2.2, 5.7 and 5.1 DSU Art. 11</i>	Establishment of Panel	<i>3 June 2002</i>
			Circulation of Panel Report	<i>15 July 2003</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>26 November 2003</i>
			Adoption	<i>10 December 2003</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Certain Japanese measures restricting imports of apples on the basis of concerns about the risk of transmission of fire blight bacterium.
- Product at issue: Apples from the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- SPS Art. 2.2 (scientific evidence): The Appellate Body upheld the Panel's finding that the measure was maintained "without sufficient scientific evidence" inconsistently with Art. 2.2, as there was a clear disproportion (and thus no rational or objective relationship) between Japan's measure and the "negligible risk" identified on the basis of the scientific evidence.
- SPS Art. 5.7 (provisional measure): The Appellate Body upheld the Panel's finding that the measure was not a provisional measure justified within the meaning of Art. 5.7, as the measure was not imposed in respect of a situation "where relevant scientific evidence is insufficient". Having noted that the pertinent question under Art. 5.7 is whether the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A of the SPS Agreement, the Appellate Body found that in light of the Panel's finding of a large quantity of high-quality scientific evidence describing the risk of transmission of fire blight through apple fruit, there was "the body of available scientific evidence" in this case that would allow "the evaluation of the likelihood of entry, establishment or spread" of fire blight in Japan through apples exported from the United States.
- SPS Art. 5.1 (risk assessment): The Appellate Body upheld the Panel's finding that the measure was not based on a risk assessment as required under Art. 5.1 because the pest risk analysis relied on by Japan (i.e. "1999 PRA") failed to evaluate (i) the likelihood of entry, establishment or spread of fire blight specifically through apple fruit; and (ii) the likelihood of entry "according to the SPS measures that might be applied". In this regard, the Appellate Body noted that the obligation to conduct an assessment of "risk" under Article 5.1 is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of the SPS measure, rather an evaluation of the risk must connect the possibility of adverse effects with an antecedent or cause (i.e. in this case, transmission of fire blight "through apple fruit"). Also, the Appellate Body upheld the Panel's view that the definition of "risk assessment" requires that the evaluation of the entry, establishment or spread of a disease be conducted according to the sanitary or phytosanitary measures which might be applied, not merely measures which are being currently applied.

<sup>1</sup> *Japan – Measures Affecting the Importation of Apples*

<sup>2</sup> Other measures addressed in this case: burden of proof, objective assessment under DSU Art. 11; sufficiency of notice of appeal (Working Procedures for Appellate Review, Rule 20(2)(d)); terms of reference; admissibility of evidence; consultation with scientific experts (SPS Art. 11.2 and DSU Art. 13.1).

# JAPAN – APPLES (ARTICLE 21.5)<sup>1</sup>

## (DS245)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	SPS Arts. 2 and 5	Referred to the Original Panel	30 July 2004
			Circulation of Panel Report	23 June 2005
Respondent	Japan	DSU Art. 11	Circulation of AB Report	NA
			Adoption	20 July 2005

### 1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Japan's revised restrictions on imports of apples from the United States with the following modifications: (i) reduction of annual inspections from three to one; (ii) reduction of the buffer zone from 500 to ten meters; and (iii) elimination of the requirement that crates be disinfected.

### 2. SUMMARY OF KEY PANEL FINDINGS

- SPS Art. 2.2: Regarding the US claim that the Japanese compliance measures were inconsistent with the rulings and recommendations of the DSB because they were not based on "sufficient" scientific evidence, the Panel found that "sufficiency" is a "relational concept between two elements: the scientific evidence and the measure at issue" and found that for each measure at issue, except the certification requirement that fruits were free from fire blight, was not supported by "sufficient scientific evidence".
- SPS Art. 5.1: The Panel found that in "the absence of any scientific evidence of a fire blight-risk posed by mature, symptomless apple fruit, any risk analysis which concludes otherwise would not 'take into account available scientific evidence,' and would not meet the requirements for a risk assessment under Article 5.1". Having reviewed the scientific studies in this regard, including the comments by the scientific experts, the Panel held that the new studies relied upon by Japan did not support the findings in the 2004 Pest Risk Analysis (PRA) that "mature apples could be latently infected". Consequently the Panel held that "the 2004 PRA is not an assessment, as appropriate to the circumstances, of the risks to plant life or health, within the meaning of Article 5.1 of the SPS Agreement".
- SPS Art. 5.6: The Panel concluded that Japan acted inconsistently with Art. 5.6 because the alleged compliance measure was "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection" within the meaning of Art. 5.6. The Panel found that if the United States "only exports mature, symptomless apples, the alternative measure proposed by the United States [i.e. the requirement that apples imported into Japan be mature and symptomless] meets the requirements of Article 5.6 as a substitute to Japan's current measure". In this regard, the Panel concluded that this alternative measure: (i) was reasonably available taking into account technical and economic feasibility; (ii) achieved Japan's appropriate level of sanitary or phytosanitary protection; and (iii) was significantly less restrictive to trade than the SPS measure at issue, and thus satisfied the three-pronged test confirmed by the Appellate Body in *Australia – Salmon*.

### 3. OTHER ISSUES<sup>2</sup>

- DSU Art. 11: After the establishment of the Panel, Japan adopted the Operational Criteria (OC) which were designed to function as guidelines for the compliance measures. As to the US request for a preliminary ruling that the OC was not a "measure taken to comply" on the grounds that the measure (i) was adopted after the establishment of the Panel; and (ii) was not vested with legal binding force, the Panel rejected the US arguments and held that it was obliged under DSU Art. 11 to objectively examine the facts before it: "[a]s soon as the [OC] were brought to the attention of the United States and the Panel, they became an official statement of how Japan intended to implement its legislation on fire blight on which the United States and the Panel could rely".

<sup>1</sup> Japan – Apples Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States

<sup>2</sup> Other issues addressed: SPS Arts. 2.2 and 5.2, GATT Art. XI; and AA Art. 4.2.

# EC – TARIFF PREFERENCES<sup>1</sup>

## (DS246)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	India	GATT Art. I:1	Establishment of Panel	27 January 2003
			Circulation of Panel Report	1 December 2003
Respondent	European Communities	Enabling Clause para. 2(a)	Circulation of AB Report	7 April 2004
			Adoption	20 April 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: European Communities' generalized tariff preferences ("GSP") scheme for developing countries and economies in transition. In particular, special arrangement under the scheme to combat drug production and trafficking (the "Drug Arrangements"), the benefits of which apply only to the listed 12 countries experiencing a certain gravity of drug problems.<sup>2</sup>
- Product at issue: Products imported from India vs. products imported from the 12 countries benefiting from the Drug Arrangements under the EC GSP scheme.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. I:1 (most-favoured-nation treatment): The Panel found that the tariff advantages under the Drug Arrangements were inconsistent with Art. I:1, as the tariff advantages were accorded only to the products originating in the 12 beneficiary countries, and not to the like products originating in all other Members, including those originating in India.
- Enabling Clause, paragraph 2(a): Having agreed with the Panel that the Enabling Clause is an "exception" to GATT Art. I:1, the Appellate Body concluded that the Drug Arrangements were not justified under paragraph 2(a) of the Enabling Clause, as the measure, *inter alia*, did not set out any objective criteria, that, if met, would allow for other developing countries "that are similarly affected by the drug problem" to be included as beneficiaries under the measure. In this regard, although upholding the Panel's conclusion, the Appellate Body reversed the Panel's reasoning and found that not every difference in tariff treatment of GSP beneficiaries necessarily constituted discriminatory treatment. Granting different tariff preferences to products originating in different GSP beneficiaries is allowed under the term 'non-discriminatory' in footnote 3 to paragraph 2, provided that the relevant tariff preferences respond positively to a particular "development, financial or trade need" and are made available on the basis of an objective standard to "all beneficiaries that share that need".

### 3. OTHER ISSUES<sup>3</sup>

- Burden of proof (Enabling Clause): While noting that, as a general rule, the burden of proof for an "exception" falls on the respondent, the Appellate Body clarified that due to "the vital role played by the Enabling Clause in the WTO system as means of stimulating economic growth and development", when a measure taken pursuant to the Enabling Clause is challenged, a complaining party must allege more than mere inconsistency with Art. I:1 and must identify specific provisions of the Enabling Clause with which the scheme is allegedly inconsistent so as to define the parameters within which the responding party must make its defence under the requirements of the Enabling Clause. The Appellate Body found that India in this case sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with GATT Art. I:1.

<sup>1</sup> *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*

<sup>2</sup> The 12 countries benefiting from the Drug Arrangements are the following: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

<sup>3</sup> Other issues addressed in this case: nature of Enabling Clause; dissenting panellist; Art. XX(b) defence; enhanced third party rights (DSU Art. 10); joint representation of India and Paraguay by private counsel.

# US – STEEL SAFEGUARDS<sup>1</sup>

## (DS248, 249, 251, 252, 253, 254, 258, 259)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Brazil, China, European Communities, Japan, Korea, New Zealand, Norway and Switzerland</i>	<i>GATT Art. XIX:1</i>  <i>SA Arts. 2, 3.1 and 4</i>	Establishment of Panel	<i>3 June 2002 (EC); 14 June 2002 (Japan, Korea); 24 June 2002 (China, Switzerland, Norway); 8 July 2002 (New Zealand); 29 July 2002 (Brazil)</i>
			Circulation of Panel Report	<i>2 May 2003</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>10 November 2003</i>
			Adoption	<i>10 December 2003</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US definitive safeguard measures on a wide range of steel products.
- Products at issue: Certain steel product imports<sup>2</sup>, except for those from Canada, Mexico, Israel and Jordan.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>3</sup>

- GATT Article XIX:1(a) (unforeseen developments): The Appellate Body upheld the Panel's findings (i) that an investigating authority must provide a "reasoned conclusion" in relation to "unforeseen developments" for each specific safeguard measure at issue; and (ii) that the USITC's relevant explanation was *not* sufficiently reasoned and adequate and thus inconsistent with GATT Art. XIX:1(a).
- SA Arts. 2.1 and 3.1 (increased imports): Recalling the relevant legal standard that it elaborated in *Argentina – Footwear Safeguards* and rejecting the US argument (comparison of end-points), the Appellate Body upheld the Panel's conclusions that the measures on CCFRS, hot-rolled bar and stainless steel rod were inconsistent with Arts. 2.1 and 3.1 because the United States failed to provide a "reasoned and adequate" explanation of how the facts (i.e. downward trend at the end of the period of investigation) supported the determination with respect to "increased imports" of these products. However, the Appellate Body, reversing the Panel's finding with respect to "tin mill products and stainless steel wire", found that the ITC determination containing "alternative explanations" was not inconsistent with Arts. 2.1 and 4, as the Safeguards Agreement does not necessarily "preclude the possibility of providing multiple findings instead of a single finding in order to support a determination" under Arts. 2.1 and 4.
- SA Arts. 2 and 4 (parallelism): The Appellate Body upheld the Panel's finding that the USITC did not satisfy the "parallelism" requirement, as it should have considered any imports excluded from the application of the measure as an "other factor" in the causation and non-attribution analysis under Art. 4.2(b) and it should have provided one single joint, rather than two separate, determination[s] (i.e. excluding either Canada and Mexico, or, alternatively, Israel and Jordan) based on a reasoned and adequate explanation on whether imports from sources other than the FTA partners (i.e. Canada, Israel, Jordan, and Mexico), *per se*, satisfied the conditions for the application of a safeguard measure.
- SA Arts. 2.1, 3.1 and 4.2(b) (causation): As regards the Panel's findings of violations for the USITC's causation analyses concerning all products other than stainless steel rod, the Appellate Body (i) reversed the Panel's findings with respect to tin mill and stainless steel wire based on its reversal of the Panel's decision on increased imports, and (ii) declined to rule on the issue of causation for all the other seven products based on its findings of violations in respect of previous claims discussed above.

<sup>1</sup> *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*

<sup>2</sup> In specific, these products included the following: CCFRS (certain carbon flat-rolled steel); tin mill products; hot-rolled bar; cold-finished bar; rebar; welded pipe; FFTJ; stainless steel bar, stainless steel wire; and stainless steel rod.

<sup>3</sup> Other issues addressed: issuance of separate panel reports (DSU Article 9.2); time period for data relied upon by the ITC; judicial economy (panel); *amicus curiae* submission; conditional appeals (Appellate Body's completion of panel's analysis); ITC's divergent findings.

# US – SOFTWOOD LUMBER IV<sup>1</sup>

## (DS257)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 1.1(a)(1)(iii), 2, 10, 14(d) and 32	Establishment of Panel	1 October 2002
			Circulation of Panel Report	29 August 2003
Respondent	United States	GATT Article VI:3	Circulation of AB Report	19 January 2004
			Adoption	17 February 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US final countervailing duty determination.
- Product at issue: Certain softwood lumber imports from Canada.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- ASCM Art. 1.1(a)(1)(iii) (financial contribution (provision of goods)): The Appellate Body upheld the Panel's finding that the US Department of Commerce's ("USDOC") "[d]etermination that the Canadian provinces were providing a financial contribution in the form of the provision of a good by providing standing timber to timber harvesters through the stumpage programmes" was not inconsistent with Art. 1.1(a)(1)(iii). It found that the ordinary meaning of "goods" should not be read so as to exclude tangible items of property, like trees, that are severable from land and also, that the way in which the municipal law of WTO Member classifies an item cannot in itself be determinative of the interpretation of provisions of the WTO covered agreements. The Appellate Body also upheld the Panel's finding that through the stumpage arrangements, the provincial governments "provide" such goods within the meaning of Art. 1.1(a)(1)(iii).
- ASCM Art. 14(d) (calculation of benefit): The Appellate Body reversed the Panel's finding and held that "an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." It thus reversed the Panel's consequential findings that the United States acted inconsistently with Arts. 10, 14, 14(d) and 32.1 by imposing countervailing duties based on US stumpage prices rather than using the "prevailing market conditions" in Canada. However, it was unable to complete the legal analysis of whether the USDOC's determination of benefit was consistent with Art. 14(d).
- GATT Art. VI:3/ASCM Art. 10 and 32.1 (pass-through of direct subsidies): The Appellate Body concluded that "where countervailing duties are used to offset subsidies granted to producers of input products, while the duties are to be imposed on processed products, and where input producers and downstream processors operate at arm's length, the investigating authority must establish that the benefit conferred by a financial contribution directly on input producers is passed through, at least in part, to producers of the processed product subject to the investigation." Thus it upheld the Panel's finding that the USDOC's failure to conduct a pass-through analysis in respect of arm's-length sales of logs by timber harvesters who own sawmills to unrelated producers of softwood lumber was inconsistent with Arts. 10 and 32.1 and GATT Art. VI:3. However, it reversed the Panel's finding with respect to sales of lumber by sawmills to unrelated lumber manufacturers.

<sup>1</sup> *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*

<sup>2</sup> Other issues addressed: ASCM Art. 2 (specificity); *amicus curiae* submission; Appellate Body's working procedures (Rule 24(1) – deadline for third participant's submission); terms of reference.

# US – SOFTWOOD LUMBER IV (ARTICLE 21.5)<sup>1</sup>

## (DS257)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 10 and 32	Referred to the Original Panel	14 January 2005
			Circulation of Panel Report	1 August 2005
Respondent	United States	DSU Art. 19.1	Circulation of AB Report	5 December 2005
			Adoption	20 December 2005

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- United States Department of Commerce ("USDOC") revised countervailing duty determination (i.e. "Section 129 determination"<sup>2</sup>). The "First Assessment Review",<sup>3</sup> including the pass-through analysis in the Review.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Arts. 10 and 32.1/GATT Art. VI:3 (pass-through): The Panel found the United States failed to implement the DSB recommendations from the original proceedings and imposed countervailing duties inconsistently with ASCM Arts. 10 and 32.1 and GATT Art. VI:3, because the USDOC, in both the Section 129 Determination and the First Assessment Review, did not conduct a pass-through analysis in respect of certain sales. As the United States did not appeal the Panel's substantive findings on this claim, and the Appellate Body had upheld the Panel's finding below on the scope of the measures in this proceeding, the Appellate Body did not disturb the Panel's substantive findings in this regard.
- Terms of reference (DSU Art. 21.5): On the question of whether and to what extent a panel acting pursuant to Art. 21.5 may assess a measure that the implementing Member maintains is *not* "taken to comply", but is nevertheless identified in the complainant Member's request for recourse to an Art. 21.5 panel, the Appellate Body noted that it is not up to either the complaining or implementing Member to decide whether a particular measure is one that is "taken to comply". It explained that a panel's mandate under Art. 21.5 is not necessarily limited to an examination of an implementing Member's measure declared to be "taken to comply". The Appellate Body noted that "some measures with a particularly *close relationship* to the declared 'measure taken to comply' and to the recommendations and rulings of the DSB may also be susceptible to review by a panel acting under Art. 21.5". The Appellate Body upheld the Panel's finding in this case that the pass-through analysis in the First Assessment Review fell within the Panel's scope of examination of the "measure taken to comply" because of the close connection between the Section 129 determination and the First Assessment Review.<sup>4</sup> The fact that the First Assessment Review was not initiated in order to comply with the DSB's recommendations and operated independently of the Section 129 determination was not sufficient to overcome the multiple and specific links between the final countervailing duty determination, the Section 129 Determination, and the pass-through analysis in the First Assessment Review.

<sup>1</sup> *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*

<sup>2</sup> Section 129 of the US Uruguay Round Agreements Act provides the legal basis for the US to implement adverse WTO decisions by making a re-determination(s) on the issues found to be WTO-inconsistent by the Panel/AB.

<sup>3</sup> The "First Assessment Review" in this case refers to the US first administrative review of the countervailing duties on imports of softwood lumber from Canada, which provided for (i) retrospective final assessment of the countervailing duties to be levied on import entries of softwood lumber from Canada between 22 May 2002 and 31 March 2003; as well as (ii) the basis to set the cash deposit rate to be levied on imports of softwood lumber from Canada as of 20 December 2004.

<sup>4</sup> For example, the Appellate Body referred to the following connections in this case: the same subject-matter (i.e. countervailing duty proceedings), the same product at issue (i.e. softwood lumber), the same 'pass-through' methodology used, the same relationship with the USDOC's Final Countervailing Duty Determination, the timing of the publication and effective dates of both proceedings; and the fact that the cash deposit rate resulting from the Section 129 Determination was updated or superseded by the cash deposit rate resulting from the First Assessment Review.

# US – SOFTWOOD LUMBER V<sup>1</sup>

## (DS264)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Canada	ADA Arts. 1, 2, 4, 5, 6, 9 and 18	Establishment of Panel	8 January 2003
			Circulation of Panel Report	13 April 2004
Respondent	United States		Circulation of AB Report	11 August 2004
			Adoption	31 August 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US final anti-dumping duties.
- Product at issue: Certain softwood lumber products from Canada.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

#### *Dumping determination*

- ADA Art. 2.4 and 2.4.2, (zeroing): The Appellate Body upheld the Panel's (majority) finding that the US acted inconsistently with the first sentence of Art. 2.4.2 in determining dumping margins on the basis of a methodology incorporating zeroing in the aggregation of results of comparisons of weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body ruled in this case only on the first methodology provided for in Art. 2.4.2, first sentence, that is weighted average normal value compared with a weighted average of export prices
- ADA Art. 2.2.1.1, 2.2.2 and 2.4 (allocation of financial expenses): The Appellate Body reversed the Panel's legal interpretation under Art. 2.2.1.1 of the phrase "consider all available evidence on the proper allocation of costs" that an investigating authority is never required to "compare various cost allocation methodologies to assess their advantages and disadvantages" and thus reversed the Panel's finding that the US Department of Commerce ("USDOC") did not act inconsistently thereof.
- ADA Art. 2.6 (like product): The Panel held that the USDOC's approach to defining like product was not inconsistent with Art. 2.6: the USDOC had defined the "product under consideration" – i.e. softwood lumber products – using narrative description and tariff classification.
- ADA Art. 2.4 (adjustments for fair comparison): The Panel found that Canada did not establish that the United States acted inconsistently with Art. 2.4 in not granting the requested adjustment for differences in dimension, because an objective and unbiased investigating authority "could have concluded that data before USDOC did not demonstrate that the remaining differences in dimensions affected price comparability".

#### *Initiation and subsequent investigation*

- ADA Art. 5.2 (application): The Panel found that the Canada failed to establish that the United States had acted inconsistently with Art. 5.2. as the petitioner's application [for an investigation] contained information (i) on prices at which softwood lumber was sold when destined for consumption in Canada, (ii) on its constructed value in Canada, and (iii) on export prices to the United States, as required by Art. 5.2.
- ADA Art. 5.3 and 5.8 (evidence): The Panel found that the United States did not violate Art. 5.3, as an unbiased and objective investigating authority could have concluded that there was sufficient evidence on dumping in the application to justify the initiation of an investigation. It also found that the authority did not violate Art. 5.8, as there was sufficient evidence to justify initiation under Art. 5.3. It further noted that Art. 5.8 does not oblige an authority to continue to assess the sufficiency of the evidence in the application and to terminate an investigation if other information undermines the sufficiency of that evidence.

<sup>1</sup> United States – Final Dumping Determination on Softwood Lumber from Canada

<sup>2</sup> Other issues addressed: COP calculation – by-product offset (Art. 2.2.1.1); role of annexes to parties' submissions; terms of reference (DSU Art. 6.2); evidence not before the investigating authority (ADA Art. 17.5(ii)).

# US – SOFTWOOD LUMBER V (ARTICLE 21.5)<sup>1</sup>

## (DS264)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ADA Art. 2	Referred to the Original Panel	1 June 2005
			Circulation of Panel Report	3 April 2006
Respondent	United States		Circulation of AB Report	15 August 2006
			Adoption	1 September 2006

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Revised anti-dumping duty determination pursuant to Section 129 of the Uruguay Agreements Act: the United States Department of Commerce ("USDOC") recalculated the anti-dumping rates for the exporters, based on a transaction-to-transaction comparison ("T-T comparison"), as opposed to weighted average-to-weighted average comparison ("W-W comparison") under ADA Art. 2.4.2, first sentence. In this connection, a negative amount (where export price was higher than normal value) was treated as "zero".

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 2.4.2 (zeroing in T-T comparisons): Having set out that the Appellate Body's findings in the original proceedings, including the prohibition of the zeroing practice, were limited to the "W-W comparison" and did not apply to the "T-T comparison" under Art. 2.4.2, the Panel found that "the US interpretation of the first sentence of Article 2.4.2, in the context of the T-T comparison methodology, as not precluding zeroing would seem at a minimum to be permissible".

The Appellate Body however reversed the Panel's findings and found, instead, that the use of zeroing is not permitted under the T-T comparison methodology set out in Art. 2.4.2 because "[t]he 'margins of dumping' established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value", and "[i]n aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value."

- ADA Art. 2.4 (fair comparison): As regards the requirement under Art. 2.4 that "a fair comparison shall be made between the export price and the normal value", the Panel found that the use of the zeroing methodology at issue could not be deemed "unfair" in the context of Art. 2.4 since it had already been found to be consistent with Art. 2.4.2.

The Appellate Body reversed the Panel's finding and found that the use of zeroing under the T-T comparison methodology in the Section 129 determination was inconsistent with the "fair comparison" requirement in Art. 2.4 because it distorted the prices of certain export transactions, which were not considered at their real value, and artificially inflated the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.

On the above basis, the Appellate Body reversed the Panel's conclusion that the United States has implemented the DSB's recommendations and rulings to bring its measure into conformity with its obligations under the ADA.

<sup>1</sup> United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada

## EC – EXPORT SUBSIDIES ON SUGAR<sup>1</sup>

### (DS265, 266, 283)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Australia Brazil Thailand</i>	<i>AA Arts 3, 8 and 9.1</i>	Establishment of Panel	<i>29 August 2003</i>
			Circulation of Panel Report	<i>15 October 2004</i>
Respondent	<i>European Communities</i>		Circulation of AB Report	<i>28 April 2005</i>
			Adoption	<i>19 May 2005</i>

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measure at issue: EC measures relating to subsidization of the sugar industry, namely, a Common Organization for Sugar (CMO) (set out in Council Regulation (EC) No. 1260/2001): two categories of production quotas – "A sugar" and "B sugar" – were established under the Regulation. Further, sugar produced in excess of A and B quota levels is called C sugar, which is not eligible for domestic price support or direct export subsidies and must be exported.
- Industry at Issue: Sugar industry.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- EC export subsidy commitment levels for sugar: The Appellate Body upheld the Panel's finding that footnote 1 in the EC Schedule relating to preferential imports from certain ACP countries and India did not have the legal effect of enlarging or otherwise modifying the European Communities' quantity commitment level contained in Section II, Part IV of its Schedule.
- AA Arts. 9.1(c), 3.3 and 8 (export subsidies – exports of C sugar): The Appellate Body upheld the Panel's finding that the European Communities violated Arts. 3.3 and 8 of the AA by exporting C sugar because export subsidies in the form of payments on the export financed by virtue of government action within the meaning of Art. 9.1(c) were provided in excess of the European Communities' commitment level. In this regard, the European Communities provided two types of "payments" within the meaning of Art. 9.1(c) for C sugar producers, i.e. (i) sales of C beet below the total costs of production to C sugar producers; and (ii) transfers of financial resources, through cross-subsidization resulting from the operation of the EC sugar regime. Further, the Panel concluded that the European Communities had not demonstrated, pursuant to AA Art. 10.3, that exports of C sugar that exceeded the European Communities' commitment levels since 1995 had not been subsidized.
- AA Arts. 9.1(a), 3 and 8 (export subsidies – export of ACP/India equivalent sugar): The Panel found that the European Communities acted inconsistently with AA Arts. 3 and 8 since the evidence indicated that European Communities' exports of ACP/India equivalent sugar received export subsidies within the meaning of Art. 9.1(a) and the European Communities had not proved otherwise.

### 3. OTHER ISSUES

- Judicial economy (export subsidies under ASCM and AA): The Appellate Body found that the Panel's exercise of judicial economy in respect of the complainant's claims under ASCM Art. 3 (after having found a violation by the European Communities of AA Arts. 3.3 and 8) was false, as different and more rapid remedies were available to the complainant respectively under ASCM (Art. 4.7) and AA (through DSU Art. 19.1).
- Reversal of burden of proof (AA Art. 10.3): The Panel explained that AA Art. 10.3 reverses the usual rule of burden of proof such that once the complainant has proved that the respondent is exporting a certain commodity in quantities exceeding its commitment levels, then the respondent must prove that such an excessive amount of exports is not subsidized.

<sup>1</sup> *European Communities – Export Subsidies on Sugar*

<sup>2</sup> Other issues addressed in this case: DSU Art. 9.2 (separate panel reports); Art. 10.2 (enhanced third party rights); notification of third parties' interest in participating; confidential information; timing of objection to the panel's jurisdiction; terms of reference (DSU Art. 6.2); *estoppel* from pursuing the dispute; *amicus curiae* (confidentiality); consideration of new arguments (AB); extension of time for appeal and circulation of report (AB, DSU Art. 16.4, 17.5); private counsel (AB); good faith (DSU, Art. 3.10, 7.2, 11); sufficiency of notice of appeal (Working Procedures for Appellate Review, Rule (20)(2)(d)).

# US – UPLAND COTTON<sup>1</sup>

## (DS267)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Brazil	AA Arts. 3.3, 8. 9.1(a) and 10	Establishment of Panel	18 March 2003
			Circulation of Panel Report	8 September 2004
Respondent	United States	ASCM Arts. 3, 5(c) and 6.3(c)	Circulation of AB Report	3 March 2005
			Adoption	21 March 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US agricultural "domestic support" measures, export credit guarantees and other measures alleged to be export and domestic content subsidies.
- Product at issue: Upland cotton and other products covered by export credit guarantees.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- AA Art. 13 (peace clause): The Appellate Body upheld the Panel's finding that the "Peace Clause" in the AA did not apply to a number of US measures, including domestic support measures for upland cotton.
- ASCM Art. 6.3(c) (serious prejudice): The Appellate Body upheld the Panel's finding that the effect of subsidy programme at issue – i.e. marketing loan programme payments, Step 2 (*user marketing*) payments, market loss assistance payments, and counter-cyclical payments – is significant price suppression within the meaning of Art. 6.3(c), causing serious prejudice to Brazil's interests within the meaning of Art. 5(c).

The Panel found that other US domestic support programmes (i.e. production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil's interests because Brazil failed to prove a necessary causal link between these programmes and significant price suppression.

- ASCM Art. 3.1(a) and (b), AA, Art. 9.1(a) (Step 2 Payments – import substitution subsidies and export subsidies): The Appellate Body upheld the Panel's finding that Step 2 payments to *domestic* users of US upland cotton were subsidies contingent on the use of domestic over imported goods that are prohibited under Art. 3.1(b) and 3.2 of the ASCM. The Appellate Body also upheld the Panel's findings that Step 2 payments to *exporters* of US upland cotton constitute subsidies contingent upon export performance within the meaning of Art. 9.1(a) of the AA and, consequently, the United States had acted inconsistently with AA Arts. 3.3 and 8. In addition, the Appellate Body found that the Step 2 payments to exporters were prohibited export subsidies that were inconsistent with Art. 3.1(a) and 3.2. of the ASCM.
- AA Art. 10.1 and ASCM Art. 3.1(a) and 3.2 (Export credit guarantees – export subsidies): The Appellate Body upheld the Panel's finding that US export credit guarantee programmes at issue were "export subsidies" within the terms of the ASCM, and thus, circumvented the US export subsidy commitments in violation of Art. 10.1 of the AA and violated Art. 3.1(a) and 3.2 of the ASCM. The Appellate Body, in a majority opinion, also upheld the Panel's finding that AA Art. 10.2 does not exempt export credit guarantees from the export subsidy disciplines in Art. 10.1. One member of the Appellate Body, however, in a separate opinion, expressed the contrary view that Art. 10.2 exempts export credit guarantees from the disciplines of Art. 10.1 until international disciplines are agreed upon.
- Recommendation (ASCM Arts. 4.7 and 7.8): The Panel recommended that (i) as for prohibited subsidies (export credit guarantees and step 2 payments), the United States withdraw them without delay (i.e. in this case, within six months of the date of adoption of the Panel/AB Report or 1 July 2005 (whichever was earlier))<sup>3</sup>; and (ii) as for subsidies found to cause serious prejudice, the United States should take appropriate steps to remove their adverse effects or withdraw the subsidy.

<sup>1</sup> *United States – Subsidies on Upland Cotton*

<sup>2</sup> Other issues addressed: DSU Arts. 11, 12.7, 17.5; terms of reference (expired measures, consultations); burden of proof; judicial economy; Appellate Body's scope of review (fact vs. law); sufficiency of notice of appeal (Working Procedures for Appellate Review, Rule 20(2)); statement of available evidence (ASCM Art. 4.2); GATT Art. XVI; Item (j) of the illustrative list of the ASCM.

<sup>3</sup> On 3 February 2006, the United States Congress approved a bill that repeals the Step 2 subsidy programme for upland cotton. The bill was signed into law on 8 February 2006, and took effect on 1 August 2006.

# US – OIL COUNTRY TUBULAR GOODS SUNSET REVIEWS<sup>1</sup>

## (DS268)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Argentina</i>	<i>ADA Arts. 1, 2, 3, 6, 11, 12, 18 and Annex II</i>	Establishment of Panel	<i>19 May 2003</i>
			Circulation of Panel Report	<i>16 July 2004</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>29 November 2004</i>
			Adoption	<i>17 December 2004</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US anti-dumping duties as well as laws, regulations and practice governing sunset reviews under the Sunset Policy Bulletin (SPB).
- Product at issue: Oil country tubular goods (OCTG) from Argentina.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

*Sunset review (ADA Art. 11.3): as such violations*

- SPB (DSU Art. 11): The Appellate Body upheld the Panel's finding that the SPB was a "measure" subject to WTO dispute settlement; however, due to what it considered to be an insufficient analysis, it found that the Panel had failed to make an objective assessment of the matter within the meaning of DSU Art. 11 and reversed the Panel's finding that Section II.A.3 of the SPB was inconsistent, *as such*, with Art. 11.3. It did not complete the analysis on this issue.
- "Affirmative and deemed waiver provisions":<sup>3</sup> The Appellate Body upheld the Panel's findings that the waiver provisions relating to waiver of participation in sunset review proceedings were, *as such*, inconsistent with the requirements relating to the likelihood of dumping determination under Art. 11.3 because they required assumptions about a company's likelihood of dumping. Also, having concluded that the respondents' incomplete substantive submissions should still be taken into account, the Appellate Body upheld the Panel's finding that the deemed waiver was inconsistent *as such* with Art. 6.1 and 6.2 (evidence). However, it reversed the Panel's finding of inconsistency regarding respondents who file no submission.

*Sunset review (ADA Art. 11.3): as applied (ITC's determination<sup>4</sup>) violations*

- Likelihood of injury: The Appellate Body upheld the Panel's finding that the obligations in Art. 3 "do not apply to "likelihood of injury" determinations carried out in sunset reviews". It rejected Argentina's argument that Art. 11.3, *per se*, imposes "substantive obligations" on investigating authorities to make sunset review determinations in a particular manner. It found that the Panel did not err in interpreting the term "injury" under Art. 11.3 based on the parameters of injury determinations in Art. 3, as it considered that other factors including those in Art. 3 may be relevant in a given "likelihood-of-injury" determination. Thus, it upheld the Panel's findings: (i) that the ITC determination at issue was consistent with the "likelihood" standard of Art. 11.3; and (ii) that the standard of continuation or recurrence of injury "within a reasonably foreseeable time" as provided in the Tariff Act and as applied in the review at issue was consistent with Art. 11.3.
- Cumulation analysis: The Appellate Body upheld the Panel's findings that: (i) Art. 11.3 does not preclude investigating authorities from cumulating the effects of likely dumped imports in the course of their "likelihood-of-injury" determinations; and (ii) the conditions for the use of cumulation set out in Art. 3.3 do not apply in sunset reviews.

<sup>1</sup> *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*

<sup>2</sup> Other issues addressed: terms of reference and panel requests; types of evidence that can support an investigating authority's findings. GATT Arts. VI and X:3(a), WTO Agreement Art. XVI:4.

<sup>3</sup> Under the provisions, the US Department of Commerce ("USDOC") would consider that an interested party had waived participation in one of two ways: (i) "affirmative waiver" when an interested party waives participation by filing an explicit statement in this regard; and (ii) "deemed (or implicit) waiver" when an interested party submits an incomplete substantive response to the notice of initiation.

<sup>4</sup> ITC (International Trade Commission).

# US – OIL COUNTRY TUBULAR GOODS SUNSET REVIEWS (ARTICLE 21.5)<sup>1</sup>

## (WT/DS268)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Argentina	ADA Arts. 11.3, 11.4, 6.1, 6.2, 6.4, 6.5.1, 6.6, and 6.9	Establishment of Panel	17 March 2006
			Circulation of Panel Report	30 November 2006
Respondent	United States		Circulation of AB Report	12 April 2007
			Adoption by the DSB	11 May 2007

### 1. MEASURES TAKEN TO COMPLY WITH DSB'S RECOMMENDATIONS

- Amended US regulatory provisions regarding waivers by exporters of their right to participate in the section of sunset review investigations conducted by the USDOC; and a re-determination by the USDOC (the Section 129 Determination) on the likelihood that imports of oil country tubular goods ("OCTG") from Argentina would be dumped if the anti-dumping duty order were revoked or the investigation were terminated.

### 2. SUMMARY OF KEY PANEL/APPELLATE BODY FINDINGS

- ADA Art. 11.3: The Appellate Body reversed the Panel's finding that the amended waiver provisions were, as such, inconsistent with ADA Art. 11.3. The Appellate Body noted that, under the "amended" waiver provisions, a company-specific finding by the USDOC was now based on "positive evidence" (and not a mere "assumption") since an exporter waiving its right of participation from the USDOC section of the sunset review investigation now had to sign a statement that it was likely to dump if the order were revoked or the investigation terminated. Further, the Appellate Body observed that the amended waiver provisions did not preclude the USDOC from considering other evidence on the record of the sunset review before making an order-wide determination of likelihood of dumping.
- DSU Art. 21.5 ("measure taken to comply"): The Panel found, and the Appellate Body agreed, that the USDOC's analysis on the decline in the volume of dumped imports – one of the two factual bases of the original likelihood of dumping determination, and which had been incorporated into the Section 129 Determination at issue – was part of the "measure taken to comply" within the meaning of Article 21.5 of the DSU. Consequently, the Appellate Body let stand the Panel's conclusion that the USDOC's findings regarding the volume of dumped imports and the "likely past dumping" (which had not been appealed) lacked a sufficient factual basis and failed to meet the requirements of Art. 11.3.
- ADA Arts. 11.3 and 11.4: The Panel found, and the Appellate Body agreed, that the USDOC did not act inconsistently with ADA Arts. 11.3 or 11.4 by developing a new evidentiary basis, pertaining to the initial sunset review period, for its Section 129 Determination.
- ADA Art. 6: The Panel found that the USDOC did not act inconsistently with Arts. 6.1 and 6.2 by not issuing supplemental questionnaires and a preliminary determination and by not holding a hearing. It did, however, act inconsistently with Article 6.4 by failing to make certain information available to Argentine exporters. The USDOC acted inconsistently with Art. 6.5.1 by not requiring petitioners to submit a non-confidential summary of certain confidential information. The USDOC did not act inconsistently with Art. 6.6 with regard to satisfying itself as to the accuracy of certain information. The USDOC did not violate its notification obligation under Art. 6.9.

### 3. OTHER ISSUES

- Judicial economy: The Panel applied judicial economy with regard to certain claims raised by Argentina.
- Suggestion for implementation (DSU Art. 19.1): The Panel and the Appellate Body declined Argentina's request to make a suggestion, pursuant to DSU Art. 19.1, that the United States revoke the anti-dumping duty order on Argentina's OCTG.

<sup>1</sup> *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*

## EC – CHICKEN CUTS<sup>1</sup>

(DS269, 286)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	Brazil Thailand	EC Schedule and GATT Art. II:1	Establishment of Panel	7 November 2003 (Brazil) 21 November 2003 (Thailand)
			Circulation of Panel Report	30 May 2005
Respondent	European Communities		Circulation of AB Report	12 September 2005
			Adoption	27 September 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: EC measures pertaining to the tariff reclassification from heading 02.10 (relating to, *inter alia*, salted chicken) to heading 02.07 (relating to, *inter alia*, frozen chicken) of certain frozen boneless chicken cuts impregnated with salt.
- Product at issue: Frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2-3 per cent.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

*Schedules of concessions (GATT Art. II:1)*

- The Appellate Body upheld the Panel's ultimate finding that the EC measures (relating to tariff classification) imposed duties on the products at issue in excess of the relevant heading of the EC tariff commitment because under the EC Schedule, tariffs on frozen meat (02.07) are higher than on salted meat (02.10) and, thus, violated GATT Article II:1(a) and (b).

*Interpretation<sup>3</sup> of the term at issue "salted" in EC Schedule*

- Ordinary meaning (VCLT Art. 31(1)): The Appellate Body upheld the Panel's finding that "in essence, the ordinary meaning of the term 'salted' ... indicates that the character of a product has been altered through the addition of salt" and that "there is nothing in the range of meanings comprising the ordinary meaning of the term 'salted' that indicates that chicken to which salt has been added is not covered by the concession contained in heading 02.10 of the EC Schedule".
- Context (VCLT Art. 31(2)): Having considered relevant context including explanatory notes to the EC schedule and the Harmonized System for Tariff Classification for the interpretation of the term "salted", the Appellate Body upheld the Panel's finding that the term "salted" in the relevant EC tariff commitment was not necessarily characterized by the notion of long-term preservation as argued by the European Communities, but rather encompassed both concepts, i.e. "preparation" and "preservation" by the addition of salt.
- Subsequent practice (VCLT 31(3)(b)): The Appellate Body, reversing the Panel's interpretation and application of the concept "subsequent practice" within the meaning of Article 31(3)(b), provided its own interpretation of "subsequent practice" to the extent that the importing Member's practice alone could not constitute "subsequent practice". Consequently, it reversed the Panel's conclusion that the EC practice of classifying the products at issue under heading 02.10 between 1996 and 2002 amounted to "subsequent practice" within the meaning of VCLT 31(3)(b).
- Circumstances of conclusion (VCLT 32): The Appellate Body upheld the Panel's conclusion that the supplementary means of interpretation considered under VCLT Art. 32 (including circumstances of conclusion at the time of tariff negotiations, such as EC's legislation on customs classification, the relevant judgments of the European Court of Justice and EC classification practice) confirmed that the products at issue were covered by the tariff commitment under heading 02.10 of the EC Schedule.

<sup>1</sup> *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*

<sup>2</sup> Other issues addressed in this case: measures and products within terms of reference; executive summaries of submissions (panel working procedures, para. 12); separate panel reports; jurisdiction of the World Customs Organization (DSU Art. 13.1 – expert consultation).

<sup>3</sup> In this case, both the Panel and the Appellate Body provided detailed analyses on treaty (EC Schedule) interpretation pursuant to the customary rules of treaty interpretation embodied in the VCLT Arts. 31 and 32.

# KOREA – COMMERCIAL VESSELS<sup>1</sup>

## (DS273)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ASCM Arts. 3.1(a), 3.2, 4.7, 5(c) and 6.3(a)	Establishment of Panel	21 July 2003
			Circulation of Panel Report	7 March 2005
Respondent	Korea		Circulation of AB Report	NA
			Adoption	11 April 2005

### 1. MEASURE AND INDUSTRY AT ISSUE

- Measures at issue: Korea's various measures relating to alleged subsidies to its shipbuilding industry.<sup>2</sup>
- Industry at issue: EC shipyard industry.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>3</sup>

*Prohibited subsidies* (ASCM Art. 3.1(a) and 3.2)

- Measures as such: Having found that the KEXIM legal regime ("KLR"), APRG and PSL programmes did not "mandate" the conferral of a "benefit," the Panel rejected EC claims that these measures *as such* were inconsistent with Art. 3.1(a) and 3.2.
- Measures as applied: The Panel found that certain "KEXIM guarantees" under the APRG programme were prohibited export subsidies (specific subsidies contingent upon export performance) under Art. 3.1(a) and 3.2 and rejected Korea's argument that item (j) (i.e. export credit guarantee) of the Illustrated List could work as an affirmative defence, on the ground that item (j) does not fall within the scope of footnote 5<sup>4</sup> of ASCM. The Panel also found that certain "KEXIM loans" under the PSL programme were prohibited export subsidies and rejected Korea's defence under item (k) (export credit grants) since the PSLs (as credits to shipbuilders rather than foreign buyers) were not export credits.

*Actionable subsidies* (ASCM, Part III)

- Subsidies (debt restructurings): The Panel rejected EC claims that the debt restructurings of Korean shipyards involved subsidization or that shipyards received subsidies through tax concessions, after having found: (i) that the European Communities had not demonstrated the existence of a benefit or subsidization in respect of the restructuring of DHI; (ii) that the European Communities had not demonstrated that either the decision to restructure or the terms were "commercially unreasonable" for Halla; (iii) that the European Communities had not argued that the determination that the going concern value for Daedong exceeded its liquidation was not proper; and (iv) in respect of Daewoo, as the assets were allocated at book value as part of the spin-off, there was no gain and thus no basis for any tax exemption.
- Serious prejudice (ASCM Arts. 5(c) and 6.3(c)): The Panel rejected EC claim that the subsidized APRG and PSL transactions at issue seriously prejudiced its interests by causing significant price depression within the meaning of Art. 6.3(c), finding that the evidence or arguments did not demonstrate that the subsidized transactions had such an aggregate effect.

*Recommendation* (ASCM Art. 4.7)

- The Panel recommended that Korea withdraw the individual APRG and PSL subsidies within 90 days.

<sup>1</sup> Korea – Measures Affecting Trade in Commercial Vessels

<sup>2</sup> The Act Establishing the Export-Import Bank of Korea ("KEXIM"); the Pre-Shipment Loan ("PSL") and Advance Payment Refund Guarantee ("APRG") schemes established by KEXIM; Individual Granting of PSLs and APRGs by KEXIM to Korean shipyards; Corporate restructuring measures; Special Tax Treatment Control Law ("STTCL").

<sup>3</sup> Other issues addressed: Annex V (information gathering procedure); Additional procedures for BCI; relationship of the consultations and panel requests; Admissibility of certain arguments and data; Annex V(7) adverse inferences; (DSU Art. 6.2) panel request.

<sup>4</sup> Footnote 5 states that "measures listed in Annex I as not constituting export subsidies shall not be prohibited".

# CANADA – WHEAT EXPORTS AND GRAIN IMPORTS<sup>1</sup>

## (DS276)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	GATT Arts. XVII:1 and III:4	Establishment of Panels	31 March and 11 July 2003
			Circulation of Panel Report	6 April 2004
Respondent	Canada		Circulation of AB Report	30 August 2004
			Adoption	27 September 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Canadian Wheat Board ("CWB") Export Regime<sup>2</sup> and requirements related to the import of grain into Canada.
- Product at issue: Wheat and grains from the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>3</sup>

*State Trading Enterprises* ("STE") (GATT Art. XVII:1):

- Relationship between paragraphs (a) and (b) of Art. XVII:1: The Appellate Body reasoned that subparagraph (a) is the general and principal provision, and subparagraph (b) explains it by identifying the types of differential treatment in commercial transactions that are most likely to occur in practice. Therefore, most, if not all, claims raised under Art. XVII:1 will require a sequential analysis of both subparagraphs (a) and (b). At the same time, because both subparagraphs (a) and (b) define the scope of that non-discrimination obligation, panels would not always be in a position to make any finding of violation of Art. XVII:1 until they have properly interpreted and applied both provisions. The Appellate Body, however, rejected Canada's contention that the Panel's approach constituted legal error. Although the Panel refrained from explicitly defining the relationship between the first two subparagraphs of Art. XVII:1 and proceeded on the basis of an assumption that inconsistency with subparagraph (b) is sufficient to establish a breach of Art. XVII:1, its analytical approach was nevertheless considered consistent with the Appellate Body's interpretation. The Panel took several analytical steps under subparagraph (a), in particular, identifying price differentiation allegedly practiced by the CWB, as conduct that could constitute prima facie discrimination under subparagraph (a).
- "Commercial considerations": The Appellate Body found that the United States' claim was based on a mischaracterization of a statement made by the Panel and, therefore, dismissed this ground of appeal. In examining an additional argument submitted by the United States, the Appellate Body agreed with the Panel that although STEs must act in accordance with "commercial" considerations, this is not equivalent to an outright prohibition on STEs using their privileges whenever such use might "disadvantage" private enterprises.
- "Enterprises of the other Members": The Appellate Body also upheld the Panel's finding that the phrase "enterprises of the other Members" in the second clause of (b) includes "enterprises interested in buying the products offered for sale by an export STE" but not "enterprises selling the same product as that offered for sale by the export STE (i.e., competitors of the export STE)". It stated that this phrase refers to the opportunity to become an STE's counterpart but not to replace the STE as a participant in the transaction.
- DSU Art. 11: The Appellate Body rejected US allegations that the Panel had not made an objective assessment of the facts and the measure: (i) as for the legal and special privileges granted to the CWB, it found that the Panel properly took them into account but had found them to be of limited relevance; (ii) as regards the CWB's legal framework, it stated that the United States had not put forward arguments demonstrating such an error.

*National treatment* (GATT Art. III:4) and *exceptions* (GATT Art. XX(d)):

- GATT Art. III:4: The Panel found that Sections 57(c) and 56(1) of the Canada Grain Act were, *as such*, inconsistent with Art. III:4 and were not justified under Art. XX(d) as a measure necessary to secure compliance with Canada's laws and regulations. It also found that Sections 150(1) and 150(2) of the Canada Transportation Act, taken together, were, *as such*, inconsistent with Art. III:4. This finding was not appealed.

<sup>1</sup> *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*

<sup>2</sup> The CWB legal framework, provision of exclusive and special privileges to the CWB, and certain actions of Canada and the CWB related to the sale of wheat.

<sup>3</sup> Other issues addressed: judicial economy; timeliness of request for preliminary ruling.

# US – SOFTWOOD LUMBER VI<sup>1</sup>

## (DS277)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ADA Arts. 3, 12 and 17	Establishment of Panel	7 May 2003
		ASCM Arts. 15 and 22.5	Circulation of Panel Report	22 March 2004
Respondent	United States	DSU Art. 11	Circulation of AB Report	NA
			Adoption	26 April 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive anti-dumping and countervailing duties imposed by the United States.
- Product at issue: Softwood lumber from Canada.

### 2. SUMMARY OF KEY PANEL FINDINGS

- ADA Art. 3.7/ASCM Art. 15.7 (threat of material injury): The Panel concluded that the International Trade Commission's ("ITC") "threat of material injury" determination was inconsistent with ADA Art. 3.7 and ASCM Art. 15.7, because, in light of the totality of the factors considered and the reasoning in the ITC's determination, an objective and unbiased investigating authority could not have made a finding of a likely imminent substantial increase in imports.
- ADA Art. 3.5 and 3.7/ASCM Art. 15.5 and 15.7 (causation): The Panel found that the ITC's causation analysis was inconsistent with ADA Art. 3.5 and ASCM Art. 15.5 because it was based upon the likely effect of substantially increased imports in the near future, which had already been found to be inconsistent with ADA Art. 3.7 and ASCM Art. 15.7.

Also, the Panel considered that the overall absence of discussion of factors other than dumped/subsidized imports potentially causing injury in the future would lead to the conclusion that the ITC determination was inconsistent with the non-attribution obligation under ADA Art. 3.5 and ASCM Art. 15.5 (i.e. injuries caused by these other factors not be attributed to the subject imports).

- ADA Art. 3.4/ASCM Art. 15.4 (injury factors to be considered): The Panel rejected Canada's claim that the ITC acted inconsistently with ADA Art. 3.4 and ASCM Art. 15.4 by failing to consider the injury factors listed in these provisions in its threat of injury determination. Although the factors to be considered in making an "injury" determination under these provisions should also apply to a "threat of injury" determination, once such an analysis has been carried out in the context of an investigation of present injury, no relevant provision in ADA Art. 3 and ASCM Art. 15 requires a second analysis of the injury factors in cases involving threat of injury. In this case, the ITC considered the relevant injury factors in the context of finding no present material injury and then took this into account in its threat of injury determination. The Panel, thus, concluded that once the ITC had properly considered the injury factors as part of its present injury analysis, it was not necessary to conduct a second consideration of these factors as part of its threat of injury analysis.

### 3. OTHER ISSUES<sup>2</sup>

- Standard of review (DSU Art. 11 and ADA Art. 17.6): The Panel did not resolve the question of whether the application of the general standard of review (DSU Art. 11) or the application of both the general standard (DSU Art. 11) and the special standard (ADA Art. 17.6) to the same determination would lead to differing outcomes, as it was not faced, in this case, with the situation where the existence of violation depended on the question of whether there was more than one permissible interpretation of the text of the ADA.

<sup>1</sup> *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*

<sup>2</sup> Other issues addressed in this case: unsolicited *amicus curiae* submission; standard of review (DSU Art. 11 and ADA Art. 17.6); positive evidence and objective examination (ADA Article 3.1/ASCM Art. 15.1); special care in threat cases (ADA Art. 3.8/ASCM Art. 15.8); notification requirements (ADA Art. 12.2.2/ASCM Art. 22.5); ADA Art. 3.2/ASCM Art. 15.2.

# US – SOFTWOOD LUMBER VI (ARTICLE 21.5)<sup>1</sup>

## (DS277)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	DSU Art. 11	Referred to the Original Panel	25 February 2005
		ADA Art. 3	Circulation of Panel Report	15 November 2005
Respondent	United States	ASCM Art. 15	Circulation of AB Report	13 April 2006
			Adoption	9 May 2006

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- United States International Trade Commission's ("USITC") re-determination, pursuant to Section 129 of the US Uruguay Round Agreements Act<sup>2</sup>, on its threat of injury finding in respect of softwood lumber imports from Canada.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>3</sup>

- DSU Art. 11 (panel's standard of review): On the grounds that the Panel had articulated and applied an improper standard of review under DSU Art. 11, the Appellate Body reversed the Panel's finding that the United States' Section 129 determination was not inconsistent with the ADA and the ASCM. Due to insufficient "uncontested facts" on the record, however, the Appellate Body declined to complete the analysis on the substantive question of whether the United States' re-determination was consistent with the ADA and the ASCM.

In this regard, the Appellate Body, first, clarified the proper standard of review to be applied by a panel reviewing determinations of national investigating authorities: (i) in examining factual issues, "a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority"; and (ii) a panel must conduct a "critical and searching" analysis of the information contained in the record to see if the conclusions reached and the explanations given by the investigating authority were "reasoned and adequate". Applying this standard to the present case, the Appellate Body found that the Panel in this case had not engaged in the sufficient degree of scrutiny and failed to engage in the type of critical and searching analysis, as required by Art. 11, in light of, *inter alia*, the brevity of the Panel's analyses of various issues. In particular, it found the following "serious infirmities" in respect of the Panel's application of the standard of review: (i) the Panel's repeated reliance on the test that Canada had not demonstrated that an objective and unbiased authority could not have reached the conclusions of the USITC imposed an undue burden on the complaining party; (ii) the Panel's repeated references to the USITC's conclusions as "not unreasonable" was inconsistent with the standard of review previously articulated by the Appellate Body; (iii) the Panel failed to analyse the USITC's findings in the light of alternative explanations of the evidence; and (iv) the Panel failed to analyse the "totality of factors and evidence", as opposed to individual pieces of evidence, considered by the USITC.

- DSU Art. 21.5 panel proceedings (relationship with the original proceedings): The Appellate Body noted that although an Art. 21.5 panel is not bound by the findings of the original panel, "this does not mean that a panel operating under Article 21.5 of the DSU should not take account of the reasoning of an investigating authority in an original determination, or of the reasoning of the original panel", as Art. 21.5 proceedings are part of a "continuum of events". The Appellate Body found that given the nature of the Section 129 determination, the Panel did not err in articulating its role under Art. 21.5 by stating, *inter alia*, that the Panel "is not limited by its original analysis and decision – rather, it is to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding".

<sup>1</sup> *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*

<sup>2</sup> Section 129 of the US Uruguay Round Agreements Act provides the legal basis for the US to implement adverse WTO decisions by making a re-determination(s) on the issues found to be WTO-inconsistent by the Panel/AB.

<sup>3</sup> Other issues addressed: nature of threat of material injury determination (ADA Art. 3.7/ASCM Art. 15.7); distinct standards of review for the ADA and the ASCM; AB's working procedures.

# US – ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS<sup>1</sup>

## (DS282)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Mexico	ADA Arts. 3 and 11	Establishment of Panel	29 August 2003
			Circulation of Panel Report	20 June 2005
Respondent	United States		Circulation of AB Report	2 November 2005
			Adoption	28 November 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Determinations by the United States Department of Commerce ("USDOC") and the International Trade Commission ("ITC") in the sunset review of the anti-dumping duties on Oil Country Tubular Goods ("OCTG") imports as well as laws and regulations governing sunset reviews.
- Product at issue: OCTG imports from Mexico.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

*Art. 11.3 (sunset review): dumping*

- Sunset Policy Bulletin ("SPB") as such: The Appellate Body reversed the Panel's finding that the SPB as such was inconsistent with ADA Art. 11.3 due to the Panel's failure to make "an objective assessment of the matter and the facts of the case" as required by DSU Art. 11. The Panel initially found that the SPB established an "irrebuttable presumption" of likelihood of dumping inconsistently with Art. 11.3, as the USDOC treated the standard set out in SPB as conclusive or determinative as to the "likelihood" of continuation or recurrence of dumping in "sunset reviews".
- "Likelihood of dumping" standard as applied: The Panel concluded that the USDOC's determination of likelihood of continuation/recurrence of dumping in the sunset review at issue was inconsistent with Art. 11.3 because it had failed to consider relevant evidence submitted by Mexican exporters and almost exclusively relied on the basis of a decline in imports volumes alone.

*Art. 11.3 (sunset review): injury*

- Likelihood of injury standard as such and as applied: The Appellate Body upheld the Panel's finding that US laws dealing with the likelihood of continuation or recurrence of injury in sunset reviews were not inconsistent as such with Arts. 11 or 3, because Art.11.3 does not establish any rules regarding the time-frame for such determination and the temporal elements of Art. 3.7 and 3.8 are not directly applicable in sunset reviews. The Appellate Body also stated that where the determination of likelihood of dumping is flawed, it does not follow that the likelihood of injury determination is *ipso facto* flawed as well. The Panel found that the ITC did not act inconsistently with Arts. 11.3 or 3 in its determination of likelihood of continuation or recurrence of injury.
- Cumulation analysis: The Appellate Body upheld the Panel's finding that the ITC's decision to conduct a cumulative assessment of imports from different countries in its likelihood of injury determination was not inconsistent with Arts. 3.3 and 11.3. The Panel found that "the silence of the [AD] Agreement on cumulation in sunset reviews" must mean that cumulation is permitted, and hence the conditions under Art. 3.3 only apply to original investigations, not to sunset reviews.

*Art. 11.3 (sunset review): causation*

- Causation: The Appellate Body found that the Panel did not act inconsistently with DSU Art. 11 in rejecting Mexico's claims relating to causation, as it considered that Art. 11.3 does not require re-establishing a causal link (established under Art. 3), as a matter of legal obligation, in a sunset review and that "what is essential for an affirmative determination under Article 11.3 is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires".

<sup>1</sup> United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico

<sup>2</sup> Other issues addressed: ADA Art. 11.2; GATT Art. X:2; submission of evidence at late stages; a prima facie case; panel's analysis of the evidence; terms of reference; jurisdiction to address certain issues on its own motion; panel's exercise of judicial economy; Mexico's request to make a specific recommendation for implementation.

## US – GAMBLING<sup>1</sup>

(DS285)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Antigua and Barbuda</i>	<i>GATS Arts. XIV(a), (c) and XVI</i>	Establishment of Panel	<i>21 July 2003</i>
			Circulation of Panel Report	<i>10 November 2004</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>7 April 2005</i>
			Adoption	<i>20 April 2005</i>

### 1. MEASURE AND SERVICES AT ISSUE

- Measure at issue: Various US measures relating to gambling and betting services, including federal laws such as the "Wire Act", the "Travel Act" and the "Illegal Gambling Business Act" ("IGBA").
- Services at issue: Cross-border supply of gambling and betting services.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- Scope of GATS commitments: The Appellate Body upheld, based on modified reasoning, the Panel's finding that the US GATS Schedule included specific commitments on gambling and betting services. Resorting to "document W/120" and the "1993 Scheduling Guidelines"<sup>3</sup> as "supplementary means of interpretation" under Art. 32 of the VCLT, rather than context (Art. 31), the Appellate Body concluded that the entry, "other recreational services (except sporting)", in the US Schedule must be interpreted as including "gambling and betting services" within its scope.
- GATS Art. XVI:1 and 2 (market access commitment): The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Art. XVI:1 and 2, as the US federal laws at issue, by prohibiting the cross-border supply of gambling and betting services where specific commitments had been undertaken, amounted to a "zero quota" that fell within the scope of, and was prohibited by, Art. XVI:2(a) and (c). However, it reversed a similar finding by the Panel on state laws because it considered that Antigua and Barbuda ("Antigua") had failed to make a prima facie case with respect to these state laws.
- GATS Art. XIV(a) (public morals defence): The Appellate Body upheld the Panel's finding that the US measures were designed "to protect public morals or to maintain public order" within the meaning of Article XIV(a), but reversed the Panel's finding that the United States had not shown that its measures were "necessary" to do so because the Panel had erred in considering consultations with Antigua to constitute a "reasonably available" alternative measure. The Appellate Body found that the measures were "necessary": The United States had made a prima facie case showing of "necessity" and Antigua had failed to identify any other alternative measures that might be "reasonably available". With respect to the Article XIV(c) defence, the Appellate Body reversed the Panel due to its erroneous "necessity" analysis and declined to make its own findings on the issue.

The Appellate Body modified the Panel's finding with respect to the chapeau of Article XIV. The Appellate Body reversed the Panel's finding that the measures did not meet the requirements of the chapeau because the United States had discriminated in the enforcement of those measures. However, the Appellate Body upheld the second ground upon which the Panel based its finding, namely that in the light of the Interstate Horseracing Act (which appeared to authorize domestic operators to engage in the remote supply of certain betting services), the United States had not demonstrated that its prohibitions on remote gambling applied to both foreign and domestic service suppliers, i.e. in a manner that did not constitute "arbitrary and unjustifiable discrimination" within the meaning of the chapeau.

<sup>1</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*

<sup>2</sup> Other issues addressed: confidentiality of panel proceedings; terms of reference; the relevance of statements by a party to the DSB; measure at issue (total prohibition); practice as a measure; establishment of a prima facie case; late submission of a defence (DSU Art. 11); burden of proof.

<sup>3</sup> "W/120", entitled "Services Sectoral Classification List", was circulated by the GATT Secretariat in 1991. It contains a list of relevant service "sectors and subsectors", along with "corresponding CPC" numbers – from the UN Provisional Product Classification – for each subsector. The "1993 Scheduling Guidelines" were set out in an "Explanatory Note" issued by the Secretariat in 1993.

# EC – APPROVAL AND MARKETING OF BIOTECH PRODUCTS<sup>1</sup>

## (DS291, 292, 293)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	United States Canada Argentina	SPS Arts. 2.2, 2.3, 5.1, 5.5, 5.6, 5.7, 7, 8, 10.1; Annex B(1), C(1)(a), C(1)(b), C(1) (c), C(1)(e)	Establishment of Panel	29 August 2003
			Circulation of Panel Report	29 September 2006
Respondent	European Communities		Circulation of AB Report	NA
			Adoption	21 November 2006

### 1. MEASURES AND PRODUCTS AT ISSUE

- Measures at issue: (i) Alleged general EC moratorium on approvals of biotech products; (ii) EC measures allegedly affecting the approval of specific biotech products; and (iii) EC member State safeguard measures prohibiting the import/marketing of specific biotech products within the territories of these member States.
- Products at issue: Agricultural biotech products from the United States, Canada and Argentina.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

#### *General EC moratorium*

- Existence of moratorium: The Panel found that a general de facto moratorium on approvals of biotech products was in effect on the date of panel establishment, i.e., August 2003. It was general in that it applied to all applications for approval pending in August 2003 under the relevant EC legislation, and de facto because it had not been formally adopted. Approvals were prevented through actions/omissions by a group of five EC member States and/or the European Commission.
- SPS Arts. 5.1 and 2.2: The Panel found that the EC decision to apply a general moratorium was a decision concerning the application/operation of approval procedures, i.e., a procedural decision to delay final substantive approval decisions. It was not applied for achieving the EC level of sanitary or phytosanitary protection and, hence, was not an "SPS measure" subject to Arts. 5.1 or 2.2.
- SPS Annex C(1)(a) and Art. 8: The Panel found that the general moratorium led to undue delay in the completion of the EC approval procedure conducted in respect of at least one biotech product at issue and thereby to the European Communities acting inconsistently with Annex C(1)(a) and, by implication, Art. 8.

#### *Product-specific measures*

- SPS Annex C(1)(a) and Art. 8: The Panel found that in 24 of the 27 product-specific approval procedures it examined, the procedure had not been completed without undue delay. In respect of these procedures, the European Communities had, therefore, acted inconsistently with Annex C(1)(a) and, by implication, Art. 8.

#### *EC member State safeguard measures*

- SPS Arts. 5.1, 2.2 and 5.7: According to the Panel, the record did not indicate that there was insufficient evidence to conduct a risk assessment within the meaning of Art. 5.1 and Annex A(4) for the biotech products subject to safeguard measures. As a result, Arts. 5.1 and 2.2 were applicable. In this regard, the Panel found that none of the safeguard measures at issue were based on a risk assessment as required under Art. 5.1 and defined in Annex A(4). By maintaining measures contrary to Art. 5.1, the European Communities had, by implication, also acted inconsistently with Art. 2.2.

<sup>1</sup> *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*

<sup>2</sup> Other issues addressed in this case: unauthorized disclosure of confidential interim panel reports; consultation of scientific experts; submission of new evidence at interim review stage; DSU Art. 6.2: specificity required in case of de facto measures; findings on measures no longer in existence on the date of panel establishment and on measures that subsequently cease to exist; DSU 19: qualified recommendation; VCLT Art. 31(3)(c): relevance of other rules of international law to the interpretation of the WTO Agreement; precautionary principle in international law; precautionary approach: (i) in the context of SPS Annex C(1)(a), (ii) in the context of SPS Art. 5.1; SPS Annex A(1): (i) scope of SPS Agreement (e.g., environment, labelling, co-existence), (ii) meaning of "SPS measure"; relationship between the SPS Agreement and the TBT Agreement; SPS Art. 5.1: meaning of "appropriate to the circumstances"; SPS Art. 5.7: (i) relationship with SPS Arts. 2.2 and 5.1, (ii) relevance of appropriate level of sanitary or phytosanitary protection, (iii) time at which insufficiency of scientific evidence is to be assessed; GATT Art. III:4.

# US – ZEROING (EC)<sup>1</sup>

## (DS294)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ADA Arts. 9.3, 2.4 and 2.4.2	Establishment of Panel	19 March 2004
			Circulation of Panel Report	31 October 2005
Respondent	United States	GATT Art. VI:2	Circulation of AB Report	18 April 2006
			Adoption	9 May 2006

### 1. MEASURE AT ISSUE

- Measures at issue: US application of the so-called "zeroing methodology" in determining dumping margins in anti-dumping proceedings as well as the zeroing methodology *as such*.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

*As applied claims*

- ADA Art. 9.3 and GATT Art. VI:2 (imposition and collection of anti-dumping duties): Reversing the Panel, the Appellate Body found that the zeroing methodology, *as applied* by the United States in the administrative reviews at issue, was inconsistent with ADA Art. 9.3 and GATT Art. VI:2, as it resulted in amounts of anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping. Under ADA Art. 9.3 and Art. VI:2 (GATT), investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter.
- ADA Art. 2.4, third to fifth sentences (due allowance or adjustment): The Appellate Body agreed with the Panel that, conceptually, zeroing is not 'an allowance or adjustment' falling within the scope of Art. 2.4, third to fifth sentences, which covers allowances or adjustments that are made to take into account the differences relating to characteristics of the export and domestic transactions, such as differences in conditions and terms of sale, taxation, levels of trade, etc. Thus, the Appellate Body upheld the Panel's finding that zeroing is not an impermissible allowance or adjustment under Art. 2.4, third to fifth sentences.

*As such claims*

- Zeroing methodology as such: Although it disagreed with some aspects of the Panel's reasoning, the Appellate Body upheld the Panel's finding that the United States' zeroing methodology (which is not in a written form), as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, *as such*, in WTO dispute settlement (given the sufficient evidence before the Panel), and that it is a "norm" that is inconsistent, *as such*, with ADA Art. 2.4.2 (original investigation) and GATT Art. VI:2.

### 3. OTHER ISSUES<sup>2</sup>

- Measure: The Appellate Body found that an unwritten rule or norm can be challenged as a measure of general and prospective application in WTO dispute settlement. It emphasized, however, that particular rigour is required on the part of a panel to support a conclusion as to the existence of such a "rule or norm" that is *not* expressed in the form of a written document. A complaining party must establish, through sufficient evidence, at least (i) that the alleged "rule or norm" is attributable to the responding Member; (ii) its precise content; and (iii) that it does have "general and prospective" application.

<sup>1</sup> *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*

<sup>2</sup> Other issues addressed: standard of review (ADA Art. 17.6(ii)); ADA Art. 2.4, first sentence (fair comparison); conditional appeal (Art. 2.4.2); ADA Art. 11.1 and 11.2; "measure" (general (DSU Art. 3.3) and under ADA); mandatory/discretionary distinction; DSU Art. 1.1 (Panel's obligations); *prima facie* case; judicial economy (Panel); "standard zeroing procedures"; zeroing "practice" as such; dissenting opinion (Panel).

# MEXICO – ANTI-DUMPING MEASURES ON RICE<sup>1</sup>

## (DS295)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ADA Arts. 3, 5.8, 6, 9, 11 12 and 17;</i>	Establishment of Panel	<i>7 November 2003</i>
			Circulation of Panel Report	<i>6 June 2005</i>
Respondent	<i>Mexico</i>		Circulation of AB Report	<i>29 November 2005</i>
			Adoption	<i>20 December 2005</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Mexico's definitive anti-dumping duties; several provisions of Mexico's Foreign Trade Act; and the Federal Code of Civil Procedure.
- Product at issue: Long-grain white rice from the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

*Injury determination (ADA Arts. 3.1, 3.2, 3.4 and 3.5)*

- Period for the injury investigation: The Appellate Body upheld the Panel's finding that Mexico violated Art. 3.1, 3.2, 3.4 and 3.5, as it based its determination of injury on a period of investigation which ended more than 15 months before the initiation of the investigation, and thus it had failed to make an injury determination based on positive evidence, and involving an objective examination of the volume and price effects of the alleged dumped imports or the impact of the imports on domestic producers at the time measures were imposed under Art. 3.
- Use of data from part of the investigation period: The Appellate Body upheld the Panel's finding that the investigating authority's injury analysis was inconsistent with Art. 3.1 because it examined only part of the data from the investigation period and the choice of the limited period of investigation reflected the highest import penetration, which therefore was not the data of "an unbiased and objective" investigating authority.
- Evidence on price effects and volumes: Having agreed with the Panel that important assumptions relied upon by Mexico's investigating authority were "unsubstantiated" and hence not based on positive evidence, the Appellate Body upheld the Panel's finding that the investigating authority's injury analysis with regard to the volume and price effects of dumped imports was inconsistent with Art. 3.1 and 3.2.

*Adverse facts available (ADA Art. 6.8 and Annex II(7))*

- The Panel found that the Mexican investigating authority's reliance on facts available for the dumping margin determination was inconsistent with Art. 6.8, read in light of Annex II(7), as it found no basis to consider that the authority undertook the evaluative, comparative assessment that would have enabled it to gauge whether the information provided by the applicant was the best available or that it used the information with "special circumspection" as required by Annex II(7).

*Notification (Art. 6.1 and 12.1)*

- Having found that the notification requirements under Arts. 6.1 and 12.1 apply only to interested parties for which the investigating authority had *actual knowledge* (not those for which it could have obtained knowledge), the Appellate Body reversed the Panel finding that Mexico's authority violated Art. 6.1 and 12.1 by not notifying all interested parties of the investigation initiation and of the information required of them. However, the Appellate Body agreed with the Panel that, pursuant to ADA Art. 6.8 and Annex II, the dumping margin for an exporter could not be calculated on the basis of adverse facts available from the petition where that firm did not receive notice of the information required by the investigating authority.

*Termination of investigation (Art. 5.8)*

- Upholding the Panel's finding that the investigation in respect of the individual exporter for which a zero or de minimis dumping margin is found should be immediately terminated under Art. 5.8, second sentence, the Appellate Body concluded that Mexico violated Art. 5.8 "by not terminating the investigation in respect of two US exporters in such a situation".

<sup>1</sup> Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice

# US – COUNTERVAILING DUTY INVESTIGATION ON DRAMS<sup>1</sup>

## (DS296)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Korea	ASCM Arts. 1, 2 and 15	Establishment of Panel	23 January 2004
			Circulation of Panel Report	21 February 2005
Respondent	United States	DSU Art. 11	Circulation of AB Report	27 June 2005
			Adoption	20 July 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: US final countervailing duty order on imports from Korea.
- Product at issue: DRAMS and memory modules containing DRAMS from Hynix of Korea.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

*ASCM Art. 1.1(a)(1)(iv) ("Entrusts or directs")*

- "Entrusts" or "directs" (interpretation): The Panel found that the ordinary meanings of "entrusts" and "directs" must contain a notion of delegation or command. The Appellate Body explained that although "direction" or "command" are two means by which a government may provide a financial contribution, the scope of actions covered by "entrustment" and "delegation" could extend beyond what is covered by the terms "direction" and "command" if strictly construed. It explained that "entrustment" occurs where a government gives responsibility to a private body, and "direction" where the government exercises its authority over a private body and that, in both cases, "the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii)." It also said that involvement of some form of "threat or inducement" could serve as evidence of entrustment or direction.
- Panel's standard of review (DSU Art. 11): The Appellate Body found that the Panel failed to apply the proper standard of review under DSU Art. 11 by (1) engaging improperly in a *de novo* review of the evidence before the United States Department of Commerce ("USDOC") by failing to consider the USDOC evidence in its totality and requiring, instead, that individual pieces of evidence, in and of themselves, establish entrustment or direction; (2) excluding certain evidence on the record from its consideration; and (3) relying on evidence that was not on the record of the USDOC. The Appellate Body found that the errors found above invalidated the basis for the Panel's conclusion that there was not sufficient evidence to support the USDOC finding of entrustment or direction, and so reversed the Panel's finding that the USDOC's determination of entrustment or direction of certain Hynix creditors was inconsistent with Art. 1.1(a)(1)(iv).

*ASCM Arts. 1.1(b) and 2 (benefit and specificity)*

- The Appellate Body found that the Panel's findings on "benefit" and "specificity" was premised exclusively on its finding on entrustment or direction. Since it had reversed the Panel's finding on entrustment or direction, it found no basis to uphold the Panel's finding on benefit and "specificity". Consequently, the Appellate Body reversed the Panel's finding that the USDOC's benefit determination was inconsistent with Art. 1.1(b) and similarly reversed the Panel's finding that the USDOC's determination of specificity was inconsistent with Art. 2. The Appellate Body did not complete the analysis in either case.

*ASCM Art. 15 (injury analysis)*

- The Panel found that the ITC violated the non-attribution requirement under Art. 15.5 for the 'decline in demand' factor, but it rejected Korea's other claims under Art. 15 in respect of the ITC injury analysis. The Panel's finding was not appealed.

<sup>1</sup> *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*

<sup>2</sup> Other issues addressed: ASCM Art. 15.2 (import volumes and price effects); Art. 15.4 (economic factors); Art. 15.5 (causation); Arts. 15.2 and 15.4 (domestic industry, subject imports, and non-subject imports); Art. 15.5 (non-attribution); Art. 12.6 (verification meetings); DSU Art. 19.1 (Panel's recommendation).

# EC – COUNTERVAILING MEASURES ON DRAM CHIPS<sup>1</sup>

## (DS299)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Korea	ASCM Arts. 1, 2, 12, 14 and 15	Establishment of Panel	23 January 2004
			Circulation of Panel Report	17 July 2005
Respondent	European Communities		Circulation of AB Report	NA
			Adoption	3 August 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: EC definitive countervailing duties.
- Product at issue: Dynamic Random Access Memory ("DRAM") Chips from Hynix of Korea.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- ASCM Art. 1.1(a)(1)(iv) (financial contribution): The Panel held that the European Communities' "financial contribution" finding with respect to one of Korea's five alleged subsidy programmes<sup>3</sup> was inconsistent with Art. 1.1(a)(1)(iv), as it considered that the evidence before the EC investigating authority (i.e. government official's presence at Hynix's Creditor Council meeting) was insufficient for it to reasonably conclude that the Korean government entrusted or directed the private banks to purchase Hynix convertible bonds. The Panel held that the European Communities' finding on the other four programmes was consistent with Art. 1.1(a).
- ASCM Arts. 1.1(b) and 14 (benefit): The Panel found that the European Communities failed to establish the "existence" of a "benefit" from the financial contribution provided under one of the programmes (i.e. Syndicated Loan) within the meaning of Art 1.1(b), as it had ignored the loans provided by some of the banks relevant to the programme. It held that the European Communities' findings with respect to the other programmes were consistent with Art. 1.1(b). The Panel also found that the calculation of the "amount" of "benefit" conferred was inconsistent with Arts. 1.1(b) and 14 because the European Communities' grant methodology treated loans, loan guarantees, and debt-to-equity swap similarly to grants even though they could not reasonably have conferred the same benefit.
- ASCM Arts. 1.2 and 2.1(c) (specificity): The Panel found that the European Communities did not act inconsistently with Arts. 1.2 and 2.1(c) in its specificity determinations for both (i) the KDB debenture programme, as it had reasons to conclude that the subsidy was *de facto* specific in the sense of Art. 2.1(c) (e.g. predominant use by certain enterprises ) and (ii) the May and October 2001 Restructuring Programmes, as these restructuring programmes were specifically undertaken for Hynix.
- ASCM Art. 12.7 (facts available): The Panel found that the European Communities did not act inconsistently with Art. 12.7 in relying on "facts available", including secondary sources such as press reports, as part of its subsidy determination, since it was not unreasonable under the circumstances for the European Communities to conclude that necessary information had been requested but not provided by Korea.
- ASCM Art. 15 (injury): The Panel found that the European Communities acted inconsistently with Art. 15.4 by not evaluating the "wages" factor in its evaluation of all relevant economic factors.
- ASCM Art. 15.1 and 15.5 (causation): The Panel found that the European Communities acted inconsistently with its obligation to not attribute to subsidized imports injuries caused by the "economic downturn in the market", "overcapacity", and "other (non-subsidized) imports", as it failed to provide a satisfactory explanation of the nature and extent of the injurious effects of these other factors causing injury. However, it rejected non-attribution and causation claims related to the "inventory burn" factor.

<sup>1</sup> EC – Countervailing Measures on DRAM Chips

<sup>2</sup> Other issues addressed: ASCM Art. 15.1 (general); Art. 15.1 and 15.2 (imports volume; price effects).

<sup>3</sup> European Communities' finding on the "May 2001 Restructuring Programme" was found inconsistent. The other four programmes at issue were "Syndicated Loan", "KEIC Guarantee", "KDB Debenture Programme" and "October 2001 Restructuring Programme".

## EC – COMMERCIAL VESSELS<sup>1</sup>

### (DS301)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Korea	GATT Arts. III:4, I:1 and III:8(b)	Establishment of Panel	19 March 2004
			Circulation of Panel Report	22 April 2005
Respondent	European Communities	DSU Art. 23.1 ASCM Art. 32	Circulation of AB Report	NA
			Adoption	20 June 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The European Communities' Temporary Defensive Mechanism for Shipbuilding (the "TDM Regulation") of 2002, under which contract-related operating aid provided by EC member States for the building of certain ships were considered compatible with the common market.
- Product at issue: Container ships, product and chemical tankers as well as LNG carriers.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

- GATT Art. III:4 and III:8(b): The Panel concluded that the state aid subject to the TDM Regulation was covered by GATT Art. III:8(b) because it provided for "the payment of subsidies exclusively to domestic producers", and therefore the TDM Regulation, the national TDM schemes (in this case, Denmark, France, Germany, the Netherlands and Spain) and the EC decisions authorizing the schemes were not inconsistent with GATT Art. III:4.
- GATT Art. I:1 and III:8(b): Based on its conclusion that the TDM Regulation was covered by GATT Art. III:8(b) and that, as a result, the subsidies under the TDM Regulation were not covered by the expression "matters referred to in paragraphs 2 and 4 of Article III" in Art. I:1, the Panel concluded that the TDM Regulation and the national TDM schemes were not inconsistent with GATT Art. I:1.
- ASCM, Art. 32.1 (specific action against a subsidy): The Panel found that the TDM Regulation was a specific action because it had a strong correlation and inextricable link with the constituent elements of a subsidy but it was not taken against a subsidy of another member (Korea in this case) within the meaning of Art. 32.1. The Panel concluded that, in addition to the measure's (TDB Regulation in this case) impact on the conditions of competition, there must be some additional element for the measure to be considered an action "against" a subsidy: an element inherent in the "design and structure" of the measure that serves to dissuade, or encourage the termination of, the practice of subsidization. Therefore, the Regulation and the national TDM schemes mentioned above were found not to be in violation of Art. 32.1.

### 3. OTHER ISSUES

- DSU Art. 23.1 (unilateral action): The Panel concluded that since "it is undisputed that the European Communities adopted the TDM Regulation without having recourse to the DSU," the European Communities acted inconsistently with DSU Art. 23.1. As a consequence, the national TDM schemes were also inconsistent with DSU Art. 23.1.

<sup>1</sup> *European Communities – Measures Affecting Trade in Commercial Vessels*

<sup>2</sup> Other issues addressed in this case: DSU Art. 19.1 (panel recommendation for expired measures); consideration of new measures by acceding EC member States; status of EC member States as respondents.

# DOMINICAN REPUBLIC – IMPORT AND SALE OF CIGARETTES<sup>1</sup>

## (DS302)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Honduras	GATT Arts. II, III:2 and 4, X:1 and 3(a), XI:1 and XX(d)	Establishment of Panel	9 January 2004
			Circulation of Panel Report	26 November 2004
Respondent	Dominican Republic	DSU Art. 19:1	Circulation of AB Report	25 April 2005
			Adoption	19 May 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: Dominican Republic's general measures relating to import charges and fees and other measures specific to import and sale of cigarettes.
- Product at issue: Cigarettes imported from Honduras as well as all imported products in the case of transitional surcharge measure and the foreign exchange fee.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

#### *Stamp requirement*

- GATT Art. III:4 (national treatment): The Panel found that the stamp requirement, which required tax stamps to be affixed to cigarette packets in the Dominican Republic, "accords less favourable treatment to imported cigarettes than that accorded to the like domestic products, contrary to GATT Art. III:4". The Appellate Body upheld the Panel's finding that this requirement was not necessary within the meaning of Art. XX(d) as, *inter alia*, there were "reasonably available" alternative WTO-consistent measures and, thus, the measure was not justified under Art. XX(d).

#### *Bond requirement*

- GATT Arts. XI:1 and III:4: The Panel found that Honduras failed to establish that the bond requirement, under which cigarette importers had to post a bond to ensure payment of taxes, operated as an import restriction contrary to Art. XI:1. The Appellate Body upheld the Panel's rejection of Honduras's claim under Art. III:4 (national treatment), and agreed with the Panel that a detrimental effect of a measure on a given imported product does not necessarily imply that the measure accords less favourable treatment to imports if the effect is explained by factors unrelated to the foreign origin of the product, such as the market share of the importer.

#### *Transitional surcharge and foreign exchange fee*

- GATT Art. II:1(b) ("other duty or charge"): The Panel found that the transitional surcharge imposing certain surcharges on all imports was a border measure that was neither an ordinary customs duty, nor a charge or duty that fell under Art. II:2, and therefore was an "other duty or charge" that was inconsistent with Art. II:1(b). Also, having concluded that the foreign exchange fee was not an ordinary customs duty, but imposed on imported products only, the Panel found that the fee was a border measure in the nature of an other duty or charge inconsistent with Art. II:1(b). The Panel also found that the fee was not an exchange measure justified by Art. XV:9(a).

#### *Selective consumption tax ("SCT")*

- GATT Art. III:2, first sentence, and Art. X: While the Panel had found that the SCT, for which the value of imported cigarettes was determined, was inconsistent with Art. III:2, first sentence, Art. X:3(a) and Art. X:1, the Panel did not recommend that the measure be brought into conformity as the measure at issue was "no longer in force".

### 3. OTHER ISSUES<sup>2</sup>

- GATT Art. XX(d) (exception): The Appellate Body upheld the Panel's finding that the tax stamp requirement was not "necessary" within the meaning of GATT Article XX(d) and therefore it was not justified under this provision.

<sup>1</sup> Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes

<sup>2</sup> Other issues addressed in this case: DSU Art. 11 (objective assessment); Appellate Body's recommendation in respect of the measure that has been already modified (DSU Art. 19.1); request of information from IMF; scope of products (panel request, DSU Art. 6.2); terms of reference (subsequent amendments to the measures after panel establishment); Honduras's claim against the timing of SCT payments in conjunction with the bond requirement (DSU Art. 6.2).

# MEXICO – TAXES ON SOFT DRINKS<sup>1</sup>

## (DS308)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GATT Arts. III and XX(d)</i>	Establishment of Panel	<i>6 July 2004</i>
			Circulation of Panel Report	<i>7 October 2005</i>
Respondent	<i>Mexico</i>		Circulation of AB Report	<i>6 March 2006</i>
			Adoption	<i>24 March 2006</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Mexico's tax measures under which soft drinks using non-cane sugar sweeteners were subject to 20 per cent taxes on (i) their transfer and importation; and (ii) specific services provided for the purpose of transferring soft drinks and bookkeeping requirements.
- Products at issue: Non-cane sugar sweeteners such as High Fructose Corn Syrup ("HFCS") and beet sugar and soft drinks sweetened with such sweeteners.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

#### *National treatment*

- GATT Art. III:2, first sentence (internal tax): As for soft drinks sweetened with HFCS, the Panel found that the tax measures were inconsistent with Art. III:2, first sentence, as these drinks were subject to internal taxes (20 per cent transfer and services taxes) in excess of taxes imposed on like domestic products – i.e. soft drinks sweetened with cane sugar (exemption from those taxes).
- GATT Art. III:2, second sentence (internal tax): As for non-cane sugar sweeteners such as HFCS, the Panel found that the tax measures were inconsistent with Art. III:2, second sentence as "the dissimilar taxation (i.e. 20 per cent transfer and services taxes)" imposed on "directly competitive or substitutable imports (HFCS) and domestic products (cane sugar)" was applied in a way that afforded protection to domestic production.
- GATT Art. III:4 (internal regulation): The Panel concluded that Mexico acted inconsistently with Art. III:4 in respect of non-cane sugar sweeteners, such as HFCS, by according them less favourable treatment (through tax measures as well as bookkeeping requirements) than that accorded to like domestic products (cane sugar).

#### *Exceptions clause*

- GATT Art. XX(d): The Appellate Body upheld the Panel's finding that Mexico's measures, which sought to secure compliance by the United States with its obligations under the NAFTA, did not constitute measures "to secure compliance with laws or regulations" within the meaning of Art. XX(d). The Appellate Body stated that the terms "laws or regulations" under Art. XX(d) refer to the rules that form part of the domestic legal order (including domestic legislative acts intended to implement international obligations) of the WTO Member invoking Art. XX(d) and do not cover obligations of *another* WTO Member. Also, the Appellate Body held that a measure can be said to be designed "to secure compliance" even if there is no guarantee that the measure will achieve its intended result with absolute certainty, and that the use of coercion is not a necessary component of a measure designed "to secure compliance".

### 3. OTHER ISSUES<sup>2</sup>

- Panel's jurisdiction: The Appellate Body upheld the Panel's decision that under the DSU, it had no discretion to decline to exercise its jurisdiction in a case that had been properly brought before it.

<sup>1</sup> *Mexico – Tax Measures on Soft Drinks and Other Beverages*

<sup>2</sup> Other issues addressed: DSU Art. 11 (*amicus curiae* submission); (Panel's findings on Art. XX(d)); preliminary ruling; burden of proof; terms of reference; Mexico's request for Panel's recommendations (DSU Art. 19.1).

# KOREA – CERTAIN PAPER<sup>1</sup>

## (DS312)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Indonesia	ADA Arts. 2, 3, 6, 9, 12 and Annex II	Establishment of Panel	27 September 2004
			Circulation of Panel Report	28 October 2005
Respondent	Korea		Circulation of AB Report	NA
			Adoption	28 November 2005

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Anti-dumping duties imposed by Korea on certain imports.
- Products at issue: "Business information paper and wood-free printing paper" from Indonesia.

### 2. SUMMARY OF KEY PANEL FINDINGS<sup>2</sup>

*Reliance on "facts available" (ADA Arts 2.2 and 6.8 and Annex II(3), (6) and (7))*

- Normal value calculation: The Panel found that the Korean investigating authority (i.e. KTC) did not act inconsistently with Art. 6.8 and Annex II(3) when it resorted to facts available for the calculation of normal value for two Indonesian exporters because the information requested (financial statements and accounting records) had not been submitted "within a reasonable period of time". In addition, the data submitted to the KTC after the deadline were not verifiable within the meaning of Annex II(3) in light of the fact that the exporters refused to submit corroborating information during the verification. The Panel also found that the KTC complied with its obligation under Annex II(6) to inform the exporters of its decision to use facts available. The Panel also found that the KTC did not act inconsistently with Art. 2.2 in basing its normal value determination on constructed value under Art. 2.2, as the data (on domestic sales) submitted by the exporters were not verifiable.
- Dumping margin determination: The Panel found that the KTC acted inconsistently with Art. 6.8 and Annex II(7) in respect of its dumping margin determination for one of the exporters by failing to compare information on normal value obtained from secondary sources (i.e. information in the application by the petitioners) against other independent sources.

*Treatment of certain exporters as a single exporter (ADA Arts. 6.10 and 9.3)*

- Having found that Art. 6.10, when read in context with Art. 9.3, does not necessarily preclude treating distinct legal entities as a single exporter for dumping determinations as long as it is shown that the structural and commercial relationship between the subject companies is sufficiently close to be considered as a single exporter, the Panel found that the KTC did not act inconsistently with Arts. 6.10 or 9.3 because one parent company had a considerable controlling power over the operations of the three subject Indonesian companies as its subsidiaries.

*Disclosure obligations (ADA Art. 6)*

- The Panel found that the KTC's disclosure of the verification results (which was confined to its decision to resort to facts available) *vis-à-vis* the subject exporters fell short of meeting the disclosure standard under Art. 6.7 because it failed to inform them of the verification results (i.e. adequate information regarding all aspects of the verification) in a manner that would have allowed them to properly prepare their case for the rest of the investigation.
- The Panel also found that the KTC acted inconsistently with the disclosure obligation under Art. 6.4 by declining the Indonesian exporters' request to access information relating to the KTC's calculation of the constructed normal value.

<sup>1</sup> Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia

<sup>2</sup> Other issues addressed: ADA Art. 3.4 (impact of dumped imports); Art. 6.5 (confidential treatment); Art. 2.4 (price comparability); Art. 2.6 (like products); Art. 3.1, 3.2 and 3.4 (price analysis); Art. 3.4 and 3.5 (Korean industry's imports); Art. 6.2, 6.4, 6.9, 12.2 and 12.2.2 (disclosure obligations); terms of reference; confidentiality.

**KOREA – CERTAIN PAPER (ARTICLE 21.5 – INDONESIA)<sup>1</sup>**  
**(DS312)**

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Indonesia	ADA Arts. 1, 2, 6 and Annex II	Establishment of Panel	23 January 2007
			Circulation of Panel Report	28 September 2007
Respondent	Korea	GATT 1994 Art. VI	Circulation of AB Report	NA
			Adoption	22 October 2007

**1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS**

- The re-determination by the Korean Trade Commission ("KTC") in the anti-dumping investigation on "business information paper and wood-free printing paper" from Indonesia, carried out for to implement DSB rulings and recommendations following the original dispute settlement proceedings.

**2. SUMMARY OF KEY PANEL FINDINGS**

- ADA Art. 6.8 and Annex II: The Panel found that the KTC acted inconsistently with its obligations under Art. 6.8 and para. 7 of Annex II in the calculation of interest expenses for two of the Indonesian companies subject to the implementation proceedings at issue. It found that the KTC failed to apply special circumspection in its determination whether using a manufacturing company's interest expenses for a trading company would be proper, and in the corroboration of such interest expense with the interest expenses of some other companies.
- ADA Art. 6.2: The Panel found that the KTC acted inconsistently with the obligation set forth under Art. 6.2 by failing to allow Indonesian exporters to comment on the KTC's injury re-determination.

**3. OTHER ISSUES**

- Prima facie case: The Panel found that Indonesia failed to make a prima facie case in connection with its claims under ADA Arts. 6.4, 6.5 and 6.9 regarding alleged disclosure violations, and its claim regarding the alleged acceptance of new information from the Korean industry.
- Judicial economy: The Panel applied judicial economy to a number of Indonesia's claims regarding the use of best information available, and those regarding alleged procedural violations in the implementation proceedings at issue.
- Request for a suggestion: The Panel rejected Indonesia's request that the Panel suggest that Korea implement the Panel's findings in these proceedings by basing the calculation of interest expenses of the two Indonesian companies at issue on the data pertaining to a certain trading company.

<sup>1</sup> Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia

## EC – SELECTED CUSTOMS MATTERS<sup>1</sup>

### (DS315)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>GATT Art. X:3(a) and (b)</i>  <i>DSU</i>	Establishment of Panel	<i>21 March 2005</i>
			Circulation of Panel Report	<i>16 June 2006</i>
Respondent	<i>European Communities</i>		Circulation of AB Report	<i>13 November 2006</i>
			Adoption by the DSB	<i>11 December 2006</i>

#### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The European Communities' administration of various customs laws and regulations, and the omission of the European Communities to provide for the prompt review and correction of administrative actions relating to customs matters.

#### 2. SUMMARY OF KEY PANEL/APPELLATE BODY FINDINGS<sup>2</sup>

Panel's terms of reference

- Measure at issue (Art. X:3(a)): The Appellate Body reversed the Panel's finding that when a violation of GATT Art. X:3(a) is being claimed, the "measure at issue" must be the "manner of administration" of a legal instrument; a WTO Member is not precluded from setting out in a panel request any act or omission attributable to another WTO Member as the measure at issue.
- The European Communities' system as a whole: The Panel rejected the United States' Art. X:3(a) challenge of European Communities' customs administration *overall*, on the grounds, *inter alia*, that the words "including, but not limited to" in its panel request did not have the legal effect of incorporating into the Panel's terms of reference *all* areas of European Communities' customs administration. The Appellate Body reversed the Panel, finding instead that the type of customs instruments included in the panel request, as well as its wording and intent, demonstrated the United States' intention to make an *as a whole or overall* challenge.
- As such challenge: The Panel concluded that the United States was precluded from making an *as such* challenge with respect to the "design and structure" of the European Communities' system of customs administration as its panel request made no explicit reference to the terms *as such* or *per se* and indicated only a concern with administration and actions by member State customs authorities. The Appellate Body did not agree that the United States was making an *as such* claim since the challenge was not to the substantive content of the relevant European Communities customs legislation in panel request, but to the overall system of customs administration. Further, the United States' arguments regarding "design and structure" were made in support of its *as a whole* challenge, which the Appellate Body had already found to be sufficiently disclosed in the panel request.

*GATT Art. X:3(a)*

- GATT Art. X:3(a) (uniform administration): Regarding the requirement of "uniform administration" in Art. X:3(a), the Appellate Body found that a distinction must be made between the legal instrument being administered and a legal instrument that regulates the application or implementation of that instrument. The Appellate Body reversed the Panel's finding that, without exception, Art. X:3(a) relates to the application of laws and regulations, but not to laws and regulations *as such*. Instead, the Appellate Body found that legal instruments that regulate the application or implementation of laws, regulations, decisions, and administrative rulings of the kind described in GATT Art. X:1 can be challenged under Art. X:3(a).

*GATT Art. X:3(b)*

- Art. X:3(b) of the GATT 1994 (review of administrative action on customs matters): The Appellate Body upheld the Panel's finding that GATT Art. X:3(b) does not require that first instance review decisions must govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO Member.

<sup>1</sup> *European Communities – Selected Customs Matters*

<sup>2</sup> Other issues addressed: GATT Arts. XXIV:12; DSU Arts. 6.2, 12 and 13; temporal limitations of a panel's terms of reference

# US – ZEROING (JAPAN)<sup>1</sup>

## (DS322)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Japan	ADA Arts. 2, 9 and 11	Establishment of Panel	28 February 2005
		GATT 1994 Arts. VI	Circulation of Panel Report	20 September 2006
Respondent	United States	DSU Art. 11	Circulation of AB Report	9 January 2007
			Adoption by the DSB	23 January 2007

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The United States' "zeroing" procedures in the context of original investigations, periodic reviews, new shipper and changed circumstances reviews, and sunset reviews; and the application of "zeroing" in an original investigation, periodic reviews, and sunset review determinations.
- Product at issue: Various carbon steel and bearing products from Japan.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

*As such claims*

- ADA Arts. 2.1, 2.4, and 2.4.2 and GATT Arts. VI:1 and VI:2 (zeroing in transaction-to-transaction comparisons in original investigations): The Appellate Body reversed the Panel's finding that the United States did not act inconsistently with ADA Arts. 2.1, 2.4, and 2.4.2 by maintaining zeroing procedures in original investigations when calculating margins of dumping on the basis of transaction-to-transaction comparisons. The Appellate Body noted that because dumping and margins of dumping can only be found to exist in relation to the product under investigation, and not at the level of an individual transaction, all of the comparisons of normal value and export price must be considered. By disregarding certain comparison results, the United States acted inconsistently with ADA Art. 2.4.2, with the "fair comparison" requirement of ADA Art. 2.4, given that zeroing artificially inflates the magnitude of dumping.
- ADA Arts. 2.1, 2.4, 9.1-9.3, and 9.5 and GATT Arts VI:1 and VI:2 (zeroing in periodic reviews and new shipper reviews): The Appellate Body reversed the Panel's finding that zeroing in periodic and new shipper reviews was not inconsistent with the ADA and relevant articles of the GATT. The Appellate Body found, instead, that the United States had acted inconsistently with ADA Arts. 9.3 and 9.5 and GATT Art. VI:2, and with the "fair comparison" requirement of ADA Art. 2.4, as explained above.

*As applied claims*

- ADA Arts. 2, 9.1-9.3, 9.5, and 11 and GATT Arts. VI:1 and VI:2 (zeroing in specific periodic and sunset review investigations): The Appellate Body reversed the Panel's finding regarding zeroing used in 11 periodic review determinations and 2 sunset reviews, and found that the United States had acted inconsistently with ADA Arts. 2.4 and 9.3, GATT Art. VI:2, and ADA Art. 11.3.

### 3. OTHER ISSUES<sup>2</sup>

- Measure: The Appellate Body upheld the Panel's finding that the United States' zeroing procedures constituted a measure that could be challenged *as such* in WTO dispute settlement proceedings, and rejected the United States' claim under DSU Art. 11 that the Panel did not assess objectively whether a single rule or norm exists by virtue of which the USDOC applies zeroing, regardless of the basis upon which export price and normal value are compared, and regardless of the type of proceeding in which margins of dumping are calculated.

<sup>1</sup> *United States – Measures Relating to Zeroing and Sunset Reviews*

<sup>2</sup> Other issues addressed: standard zeroing line (measure); ADA Art. 2.4.2 (zeroing in weighted average-to-weighted average comparisons in original investigations); prima facie case; ADA Arts. 2 and 11 (zeroing in new shipper, changed circumstances, and sunset reviews); judicial economy.

# MEXICO – STEEL PIPES AND TUBES<sup>1</sup>

## (DS331)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Guatemala	ADA Arts. 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 3.6, 3.7, 4.1, 5.2, 5.3, 5.4, 5.8, 5.10, 6.2, 6.4, 6.5, 6.7, 6.8, 6.9, 6.13, 9.1, 9.3, 12.1, 12.2, 18.1 and Annex II  GATT 1994 Art. VI	Establishment of Panel	17 March 2006
			Circulation of Panel Report	8 June 2007
Respondent	Mexico		Circulation of AB Report	NA
			Adoption	24 July 2007

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: The definitive anti-dumping duties imposed by Mexico on imports of steel pipes and tubes from Guatemala and the investigation leading thereto.
- Product at issue: Various steel pipes and tubes.

### 2. SUMMARY OF KEY PANEL FINDINGS

- A. The Panel found that the Investigating Authority (IA) acted inconsistently with Mexico's obligations under:
- ADA Arts. 5.3 and 5.8 in its assessment of the sufficiency of evidence of dumping and injury to justify the initiation of the investigation and, consequently, its failure to reject the application in the absence of sufficient evidence to justify proceeding with the investigation.
  - ADA Arts. 3.1, 3.2, 3.4 and 3.5: (i) in relying, without sufficient justification, on injury data limited to three six-month periods over three consecutive years in its determination of injury and causation; (ii) by failing to adequately analyse and properly attribute injury to the domestic industry caused by a decrease in exports; and (iii) to conduct an objective examination on the basis of positive evidence of injury to the domestic industry (as defined in Art. 4.1) by failing to gather and analyse representative and consistent data pertaining to the domestic industry as a whole, in particular, data concerning the financial indicators.
  - ADA Arts. 3.1 and 3.2 to conduct an objective examination of positive evidence by using a methodology premised on a limited sample and unsubstantiated assumptions in estimating the volume of imports from sources other than Guatemala.
  - ADA Art. 6.8 and Annex II, in particular, (i) Art. 6.8 and paras. 3 and 5 of Annex II in deciding to reject the entirety of the data that the exporter had submitted and relying instead on facts available; (ii) Art. 6.8 and para. 6 of Annex II by failing to inform the exporter that its data were being rejected and the reasons therefore, and by failing to provide the exporter with an opportunity to submit further explanations; and (iii) para. 7 of Annex II because in applying as facts available the normal value evidence provided by the applicant and used for the initiation of the investigation, the IA failed to use "special circumspection".
- B. The Panel found that Guatemala failed to establish that the IA acted inconsistently with Mexico's obligations under ADA Arts. 3.1, 3.2, 3.4 or 3.5 (i) by relying on data from a period that terminated eight months prior to the initiation and two years prior to the imposition of the definitive measures; (ii) in its consideration of costs for the injury and causation analysis; ADA Arts. 3.1, 3.2, 3.4, 3.5 or 5.4 concerning the data used for its injury analysis in light of the changes of the product definition to include 4"-6" product and certain structural tubing; and ADA Art. 6.5 or para. 6.5.1 in its treatment of confidential information in this case. It also found that Guatemala failed to make a prima facie case of inconsistency with Arts. 3.1 and 3.2 concerning the price effects of imports from Guatemala.

### 3. OTHER ISSUES

- The Panel applied judicial economy with regard to some of Guatemala's claims.
- The Panel suggested that Mexico revoke the anti-dumping measures.

<sup>1</sup> Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala

# BRAZIL – RETREADED TYRES<sup>1</sup>

## (DS332)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>European Communities</i>	<i>GATT Arts. I:1, III:4, XI:1, XIII:1, XX(b) and (d), and XXIV</i>	Establishment of Panel	<i>28 November 2005</i>
			Circulation of Panel Report	<i>12 June 2007</i>
Respondent	<i>Brazil</i>		Circulation of AB Report	<i>3 December 2007</i>
			Adoption	<i>17 December 2007</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: (i) Brazil's import prohibition on retreaded tyres ("Import Ban"); (ii) fines on importing, marketing, transportation, storage, keeping or warehousing of retreaded tyres; (iii) Brazilian state law restrictions on the marketing of imported retreaded tyres; (iv) exemptions of retreaded tyres imported from Mercosur countries from the Import Ban and fines ("MERCOSUR exemption").
- Product at issue: Retreaded tyres.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- GATT Art. XI: The Panel concluded that Brazil's import prohibition on retreaded tyres and the fines imposed by Brazil on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres were inconsistent with Art. XI:1.
- GATT Art. III:4: The Panel found that the measure maintained by the Brazilian State of Rio Grande do Sul in respect of retreaded tyres, Law 12.114, as amended by Law 12.381, was inconsistent with Art. III:4.
- GATT Art. XX(b) (exceptions): The Appellate Body upheld the Panel's finding that the Import Ban was provisionally justified as "necessary" within the meaning of Art. XX(b). The Panel "weighed and balanced" the contribution of the Import Ban to its stated objective against its trade restrictiveness, taking into account the importance of the underlying interests or values. The Panel correctly held that none of the less trade-restrictive alternatives suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban.
- The "chapeau" of GATT Art. XX: The Appellate Body reversed the Panel's findings that the MERCOSUR exemption and imports of used tyres through court injunctions (i) would not result in the Import Ban being applied in a manner that constituted "arbitrary discrimination", and (ii) would lead to "unjustifiable discrimination" and a "disguised restriction on international trade" only to the extent that they result in import volumes that would significantly undermine the achievement of the objective of the Import Ban. The Appellate Body determined that the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure, and found that the MERCOSUR exemption, as well as the imports of used tyres under court injunctions, had resulted in the Import Ban being applied in a manner that constituted arbitrary or unjustifiable discrimination and a disguised restriction on international trade within the meaning of the chapeau of Art. XX. The Appellate Body thus upheld, albeit for different reasons, the Panel's findings that the Import Ban was not justified under Art. XX of the GATT.
- GATT Art. XX(d) (designed to secure compliance): Having found that the Import Ban could not be justified by Art. XX(b), the Panel also found that the fines could not be justified under Art. XX(d) since they did not fall within the scope of measures that were designed to secure compliance with "laws or regulations that are *not themselves inconsistent* with" some provision of the GATT.

<sup>1</sup> *Brazil – Measures Affecting Imports of Retreaded Tyres*

<sup>2</sup> *Other issues addressed in this case: Panel's discretion as trier of the facts (DSU Art.11); judicial economy.*

# TURKEY – RICE<sup>1</sup>

## (DS334)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	GATT Arts. III:4, X:1, X:2, XI:1	Establishment of Panel	17 March 2006
			Circulation of Panel Report	21 September 2007
Respondent	Turkey	AA Art. 4.2  Licensing Ag Arts. 1.4(a), 1.4(b), 1.6, 3.5(a), 3.5(e), 3.5(f), 3.5(h), 5.1, 5.2(a), 5.2(b), 5.2(c), 5.2(d), 5.2(e), 5.2(g), 5.2(h), 5.41  TRIMs Art. 2.1 and para1(a) of the Annex	Circulation of AB Report	NA
			Adoption	22 October 2007

### 1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: Turkey's restrictions on the importation of rice, in particular: (i) the decision, during specific periods of time commencing September 2003 to deny or fail to grant Certificates of Control to import rice at the MFN tariff rates; (ii) the domestic purchase requirement incorporated in Turkey's TRQ regime (until July 2006), in order to import rice at lower tariff rates; (iii) the discouragement of the full utilization of tariff rate quotas through their administration; (iv) the combined effect of measures (i) and (iii); and (v) Turkey's administration of its import regime for rice, more generally.
- Product at issue: Rice, including paddy, husked and white rice, imported by Turkey.

### 2. SUMMARY OF KEY PANEL FINDINGS

- AA Art. 4.2: The Panel found that Turkey had denied or failed to grant licences to import rice at the MFN tariff rates, i.e. outside the tariff rate quotas. This was found by the Panel to be a quantitative import restriction and discretionary import licensing, within the meaning of footnote 1 to AA Art. 4.2.<sup>2</sup>
- GATT Art. III:4: The Panel found that Turkey's requirement that importers purchase domestic rice in order to be allowed to import rice under the tariff rate quotas, was inconsistent with GATT Art. III:4, because it offered less favourable treatment to imported rice than to like domestic rice. [The Panel did not make a recommendation in regard to this measure, considering that it was no longer in force and that Turkey had declared its intention not to reintroduce the measure.]

<sup>1</sup> Turkey – Measures Affecting the Importation of Rice.

<sup>2</sup> In making this finding, the Panel did not consider it necessary to assess whether the relevant Turkish documents constituted import licences as argued by the United States.

**US – SHRIMP (ECUADOR)<sup>1</sup>**  
**(DS335)**

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>Ecuador</i>	<i>ADA Art. 2.4.2</i>	Establishment of Panel	<i>19 June 2006</i>
			Circulation of Panel Report	<i>30 January 2007</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>NA</i>
			Adoption	<i>20 February 2007</i>

**1. MEASURE AND PRODUCT AT ISSUE**

- Measure at issue: United States' final anti-dumping measures including margins of dumping calculated using "zeroing" under the weighted-average-to weighted-average methodology.
- Product at issue: Certain frozen warmwater shrimp from Ecuador.

**2. SUMMARY OF KEY PANEL FINDINGS**

- ADA Art. 2.4.2 (zeroing): The Panel found that the United States Department of Commerce (USDOC) acted inconsistently with the first sentence of ADA Art. 2.4.2 by using "zeroing" in calculating margins of dumping under the weighted-average-to-weighted-average methodology in the context of an original investigation.

**3. OTHER ISSUES**

- Role of WTO panels and burden of proof in disputes where the respondent does not object to the complainant's claims: The Panel considered that, although the respondent did not contest any of the complainant's claims, its responsibilities remained as set forth under Article 11 DSU, i.e. to make "an objective assessment of the matter before it". With respect to the burden of proof, the Panel considered that merely because the respondent did not object to the claims did not absolve the claimant from having to make a prima facie case of violation.
- Status of prior adopted Appellate Body Reports: The Panel followed the reasoning of the Appellate Body in *US – Softwood Lumber V*, a dispute involving a similar claim against a similar measure. The Panel noted that while it was not, strictly speaking, bound by the reasoning of adopted Appellate Body reports, such reports create legitimate expectations among WTO Members.

<sup>1</sup> *United States – Anti-Dumping Measure on Shrimp from Ecuador*

# JAPAN – DRAMS (KOREA)<sup>1</sup>

## (DS336)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Korea	ASCM Arts. 1, 12, 14, 15 and 19 DSU	Establishment of Panel	19 June 2006
			Circulation of Panel Report	13 July 2007
Respondent	Japan		Circulation of AB Report	28 November 2007
			Adoption by the DSB	17 December 2007

### 1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Japanese investigation of and final countervailing duty order on imports from Korea.
- Product at issue: Dynamic random access memories (DRAMs) manufactured by Hynix, a Korean company.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

#### ASCM Art. 1.1(a)(1)(iv) (entrustment or direction)

- Panel's standard of review (DSU Art. 11): Having rejected one of the intermediary findings relied on by the Japanese investigating authorities (the "JIA") for finding "entrustment and direction" by the Korean government (namely, the commercial reasonableness of some Hynix creditors participating in certain restructuring transactions in December 2002), the panel found that the JIA's overall determination was thereby flawed. The Appellate Body found that the Panel had failed to comply with the required standard of review under DSU Art. 11 because it did not examine, as did the JIA, whether the evidence, in its totality, could reasonably support a finding of "entrustment or direction".

#### ASCM Arts. 1.1(b) and 14 (benefit benchmark and methods for calculating benefit)

- Regarding the benchmark for determining whether a "benefit" to Hynix had been conferred by debt-restructuring programmes in October 2001 and December 2002, the Panel considered that the JIA had identified an "insider investor" standard but nonetheless applied an "outsider investor" standard. The Panel also found that, in assigning a zero value to shares exchanged by Hynix in "debt-to-equity" swaps with its creditors, the JIA considered the issue from the perspective of Hynix's creditors, rather than from that of the recipient, Hynix, as required under ASCM Arts. 1.1(b) and 14, and thereby overstated the amount of benefit to Hynix. The Appellate Body did not consider that there were different standards applicable to inside investors and outside investors; instead the Appellate Body found that there is but one standard: the market standard. Nonetheless, the Appellate Body upheld, albeit for different reasons, the Panel's finding on the benefit determination.

#### ASCM Arts. 12. 7 and 12. 9 (interested parties)

- The Panel rejected Korea's claim that only entities that "have an interest in the outcome of a countervailing duty proceeding" can be interested parties within the meaning of ASCM Arts. 12.7 and 12.9. In upholding the Panel, the Appellate Body explained that, although not unfettered, investigating authorities have some discretion which entities to designate as interested parties for purposes of carrying out an investigation. In the circumstances of the present case, the JIA did not overstep these bounds.

#### ASCM Arts. 15.5 and 19.1 (causation of injury)

- The Appellate Body agreed with the Panel that ASCM Arts. 15.5 and 19.1 did not impose an additional requirement on an investigating authority to examine the "effects of the subsidies" as distinguished from the "effects of the subsidized imports", in addition to the requirement not to attribute injury caused by other factors to subsidized imports.

<sup>1</sup> Japan – Countervailing Duties on Dynamic Random Access Memories from Korea.

<sup>2</sup> Other issues addressed: ASCM Art. 1.1(a)(1)(i) (direct transfer of funds); ASCM Arts. 1.1(b) and 14 (benefit; methods used); ASCM Art. 2 (specificity); ASCM Art. 19.4 (allocation of benefit and levying of countervailing duty); ASCM Art. 12.7 (facts available); Panel's treatment of business confidential information; DSU Art. 11.



## APPENDIX

### Full Citation of WTO Dispute Settlement Reports and Arbitration Awards

SHORT TITLE	FULL CASE TITLE AND CITATION
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, modified by Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Argentina – Hides and Leather</i>	Award of the Arbitrator, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS155/10, 31 August 2001, DSR 2001:XII, 6013
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
<i>Argentina – Preserved Peaches</i>	Panel Report, <i>Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches</i> , WT/DS238/R, adopted 15 April 2003, DSR 2003:III, 1037
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, modified by Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407
<i>Australia – Salmon</i>	Award of the Arbitrator, <i>Australia – Measures Affecting Importation of Salmon – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS18/9, 23 February 1999, DSR 1999:I, 267
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999, modified by Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
<i>Brazil – Aircraft (Article 21.5 – Canada)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW, adopted 4 August 2000, modified by Appellate Body Report, WT/DS46/AB/RW, DSR 2000:IX, 4093
<i>Brazil – Aircraft (Article 21.5 – Canada II)</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS46/RW/2, adopted 23 August 2001, DSR 2001:X, 5481
<i>Brazil – Aircraft (Article 22.6 – Brazil)</i>	Decision by the Arbitrators, <i>Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Brazil – Desiccated Coconut</i>	Panel Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report, WT/DS22/AB/R, DSR 1997:I, 189
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007

SHORT TITLE	FULL CASE TITLE AND CITATION
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS332/AB/R
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Aircraft</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/RW, adopted 4 August 2000, modified by Appellate Body Report, WT/DS70/AB/RW, DSR 2000:IX, 4315
<i>Canada – Aircraft Credits and Guarantees</i>	Panel Report, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft</i> , WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, 849
<i>Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)</i>	Decision by the Arbitrator, <i>Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS222/ARB, 17 February 2003, DSR 2003:III, 1187
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, modified by Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
<i>Canada – Autos</i>	Award of the Arbitrator, <i>Canada – Certain Measures Affecting the Automotive Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
<i>Canada – Dairy</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/R, WT/DS113/R, adopted 27 October 1999, modified by Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, modified by Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2, DSR 2003:I, 255
<i>Canada – Patent Term</i>	Appellate Body Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093
<i>Canada – Patent Term</i>	Panel Report, <i>Canada – Term of Patent Protection</i> , WT/DS170/R, adopted 12 October 2000, upheld by Appellate Body Report, WT/DS170/AB/R, DSR 2000:XI, 5121
<i>Canada – Patent Term</i>	Award of the Arbitrator, <i>Canada – Term of Patent Protection – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS170/10, 28 February 2001, DSR 2001:V, 2031
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, modified by Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481
<i>Canada – Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April 2000, DSR 2000:V, 2289
<i>Canada – Pharmaceutical Patents</i>	Award of the Arbitrator, <i>Canada – Patent Protection of Pharmaceutical Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS114/13, 18 August 2000, DSR 2002:I, 3
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, 2739

SHORT TITLE	FULL CASE TITLE AND CITATION
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report, WT/DS276/AB/R, DSR 2004:VI, 2817
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
<i>Chile – Alcoholic Beverages</i>	Panel Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/R, WT/DS110/R, adopted 12 January 2000, modified by Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R, DSR 2000:I, 303
<i>Chile – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Chile – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2583
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, modified by Appellate Body Report, WT/DS207/AB/R, DSR 2002:VIII, 3127
<i>Chile – Price Band System</i>	Award of the Arbitrator, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS207/13, 17 March 2003, DSR 2003:III, 1237
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report, WT/DS207/AB/RW
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS302/AB/R
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Report of the Arbitrator, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS302/17, 29 August 2005
<i>EC – The ACP-EC Partnership Agreement</i>	Award of the Arbitrator, <i>European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001</i> , WT/L/616, 1 August 2005
<i>EC – The ACP-EC Partnership Agreement II</i>	Award of the Arbitrator, <i>European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001</i> , WT/L/625, 27 October 2005
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, modified by Appellate Body Report, WT/DS135/AB/R, DSR 2001:VIII, 3305
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (Ecuador)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador</i> , WT/DS27/R/ECU, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:III, 1085
<i>EC – Bananas III (Guatemala and Honduras)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Guatemala and Honduras</i> , WT/DS27/R/GTM, WT/DS27/R/HND, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 695
<i>EC – Bananas III (Mexico)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico</i> , WT/DS27/R/MEX, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 803
<i>EC – Bananas III (US)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, modified by Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
<i>EC – Bananas III</i>	Award of the Arbitrator, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS27/15, 7 January 1998, DSR 1998:I, 3

SHORT TITLE	FULL CASE TITLE AND CITATION
<i>EC – Bananas III</i> (Article 21.5 – EC)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS27/RW/EEC and Corr.1, 12 April 1999, unadopted, DSR 1999:II, 783
<i>EC – Bananas III</i> (Article 21.5 – Ecuador)	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW/ECU, adopted 6 May 1999, DSR 1999:II, 803
<i>EC – Bananas III (Ecuador)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2237
<i>EC – Bananas III (US)</i> (Article 22.6 – EC)	Decision by the Arbitrators, <i>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</i> , WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen</i> (Article 21.5 – India)	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
<i>EC – Bed Linen</i> (Article 21.5 – India)	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
<i>EC – Butter</i>	Panel Report, <i>European Communities – Measures Affecting Butter Products</i> , WT/DS72, 24 November 1999
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005, DSR 2005:XIX, 9157, and Corr.1
<i>EC – Chicken Cuts (Brazil)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil</i> , WT/DS269/R, adopted 27 September 2005, modified by Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
<i>EC – Chicken Cuts (Thailand)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand</i> , WT/DS286/R, adopted 27 September 2005, modified by Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
<i>EC – Chicken Cuts</i>	Award of the Arbitrator, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS269/13, WT/DS286/15, 20 February 2006
<i>EC – Commercial Vessels</i>	Panel Report, <i>European Communities – Measures Affecting Trade in Commercial Vessels</i> , WT/DS301/R, adopted 20 June 2005
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Computer Equipment</i>	Panel Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, modified by Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
<i>EC – Export Subsidies on Sugar</i> (Australia)	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Australia</i> , WT/DS265/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
<i>EC – Export Subsidies on Sugar</i> (Brazil)	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Brazil</i> , WT/DS266/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
<i>EC – Export Subsidies on Sugar</i> (Thailand)	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Thailand</i> , WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R
<i>EC – Export Subsidies on Sugar</i>	Award of the Arbitrator, <i>European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

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<i>EC – Hormones (Canada)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada</i> , WT/DS48/R/CAN, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
<i>EC – Hormones (US)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States</i> , WT/DS26/R/USA, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699
<i>EC – Hormones</i>	Award of the Arbitrator, <i>EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
<i>EC – Hormones (Canada) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999, DSR 1999:III, 1135
<i>EC – Hormones (US) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB, 12 July 1999, DSR 1999:III, 1105
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>EC – Poultry</i>	Panel Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/R, adopted 23 July 1998, modified by Appellate Body Report, WT/DS69/AB/R, DSR 1998:V, 2089
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, modified by Appellate Body Report, WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>EC – Scallops (Canada)</i>	Panel Report, <i>European Communities – Trade Description of Scallops – Request by Canada</i> , WT/DS7/R, 5 August 1996, unadopted, DSR 1996:I, 89
<i>EC – Scallops (Peru and Chile)</i>	Panel Report, <i>European Communities – Trade Description of Scallops – Requests by Peru and Chile</i> , WT/DS12/R, WT/DS14/R, 5 August 1996, unadopted, DSR 1996:I, 93
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report, WT/DS315/AB/R
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, modified by Appellate Body Report, WT/DS246/AB/R, DSR 2004:III, 1009
<i>EC – Tariff Preferences</i>	Award of the Arbitrator, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS246/14, 20 September 2004
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, modified by Appellate Body Report, WT/DS219/AB/R, DSR 2003:VII, 2701
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
<i>Guatemala – Cement I</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, modified by Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295

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<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>India – Patents (EC)</i>	Panel Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities</i> , WT/DS79/R, adopted 22 September 1998, DSR 1998:VI, 2661
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>India – Patents (US)</i>	Panel Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States</i> , WT/DS50/R, adopted 16 January 1998, modified by Appellate Body Report, WT/DS50/AB/R, DSR 1998:I, 41
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201
<i>Indonesia – Autos</i>	Award of the Arbitrator, <i>Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Agricultural Products II</i>	Panel Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/R, adopted 19 March 1999, modified by Appellate Body Report, WT/DS76/AB/R, DSR 1999:I, 315
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, modified by Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
<i>Japan – Alcoholic Beverages II</i>	Award of the Arbitrator, <i>Japan – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Japan – Apples</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report, WT/DS245/AB/R, DSR 2003:IX, 4481
<i>Japan – Apples (Article 21.5 – US)</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS245/RW, adopted 20 July 2005
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
<i>Japan – Quotas on Laver</i>	Panel Report, <i>Japan – Import Quotas on Dried Laver and Seasoned Laver</i> , WT/DS323/R, 1 February 2006
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Alcoholic Beverages</i>	Panel Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/R, WT/DS84/R, adopted 17 February 1999, modified by Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
<i>Korea – Alcoholic Beverages</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005
<i>Korea – Certain Paper (Article 21.5 – Indonesia)</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Recourse to Article 21.5 of the DSU by Indonesia</i> , WT/DS312/RW, adopted 22 October 2007

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<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, modified by Appellate Body Report, WT/DS98/AB/R, DSR 2000:I, 49
<i>Korea – Procurement</i>	Panel Report, <i>Korea – Measures Affecting Government Procurement</i> , WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, modified by Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, modified by Appellate Body Report, WT/DS295/AB/R
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/RW, adopted 21 November 2001, upheld by Appellate Body Report, WT/DS132/AB/RW, DSR 2001:XIII, 6717
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006
<i>Mexico – Taxes on Soft Drinks</i>	Panel Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/R, adopted 24 March 2006, modified by Appellate Body Report, WT/DS308/AB/R
<i>Mexico – Telecoms</i>	Panel Report, <i>Mexico – Measures Affecting Telecommunications Services</i> , WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007
<i>Turkey – Textiles</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, modified by Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
<i>US – 1916 Act</i>	Award of the Arbitrator, <i>United States – Anti-Dumping Act of 1916 – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS136/11, WT/DS162/14, 28 February 2001, DSR 2001:V, 2017

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<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Panel Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R, adopted 28 November 2005, modified by Appellate Body Report, WT/DS282/AB/R
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, modified by Appellate Body Report, WT/DS213/AB/R and Corr.1, DSR 2002:IX, 3833
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, modified by Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, modified by Appellate Body Report, WT/DS244/AB/R, DSR 2004:I, 85
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Cotton Yarn</i>	Panel Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/R, adopted 5 November 2001, modified by Appellate Body Report, WT/DS192/AB/R, DSR 2001:XII, 6067
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, adopted 20 July 2005, modified by Appellate Body Report, WT/DS296/AB/R
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
<i>US – Countervailing Measures on Certain EC Products</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/R, adopted 8 January 2003, modified by Appellate Body Report, WT/DS212/AB/R, DSR 2003:I, 73
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
<i>US – DRAMS (Article 21.5 – Korea)</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea – Recourse to Article 21.5 of the DSU by Korea</i> , WT/DS99/RW, 7 November 2000, unadopted
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, modified by Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, modified by Appellate Body Report, WT/DS108/AB/RW, DSR 2002:I, 119

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