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1 ARTICLE 18

1.1 Text of Article 18

Article 18

Final Provisions

18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.²⁴

*(footnote original)*²⁴ This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

18.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.

18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.

18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

18.7 The Annexes to this Agreement constitute an integral part thereof.

1.2 Article 18.1

1.2.1 "specific action against dumping"

1. In *US – 1916 Act*, the Appellate Body considered that "the scope of application of Article VI [of the GATT 1994] is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*".¹ The Appellate Body then found "that Article 18.1 of the *Anti-Dumping Agreement* requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*":

"Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any 'specific action against dumping' of exports when such specific action is not 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Since the only provisions of the GATT 1994 'interpreted' by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*.

We recall that footnote 24 to Article 18.1 refers to 'other relevant provisions of GATT 1994' (emphasis added). These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the 'provisions of GATT 1994' referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.

We have found that Article 18.1 of the *Anti-Dumping Agreement* requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping, as those provisions are interpreted by the *Anti-Dumping Agreement*. It follows that Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'.²

2. On this basis, the Appellate Body in *US – 1916 Act* concluded:

"Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to 'specific action against dumping'. Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the

¹ Appellate Body Report, *US – 1916 Act*, para. 121.

² Appellate Body Report, *US – 1916 Act*, paras. 124-126.

1916 Act is inconsistent with Article VI:2 and the *Anti-Dumping Agreement* to the extent that it provides for 'specific action against dumping' in the form of civil and criminal proceedings and penalties."³

3. In *US – Offset Act (Byrd Amendment)*, the Appellate Body reiterated its view that "a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a "specific action" in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*".⁴ This implied that the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping. According to the Appellate Body, "such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself".⁵ However, not all action taken *in response to* dumping is necessarily action *against* dumping.⁶ The Panel in *US – Offset Act (Byrd Amendment)* took the position that an action operates "against" dumping or a subsidy within the meaning of Article 18.1 of the Anti-Dumping Agreement if it has an *adverse bearing* on dumping.⁷ The Appellate Body agreed with the Panel's interpretation of the term "against" and reached the following conclusion with respect to the Continued Dumping and Subsidy Offset Act (CDSOA):

"All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors—producers of like products—through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*."⁸

4. In *US – Offset Act (Byrd Amendment)*, the Appellate Body also emphasized that in order to determine whether a specific action is "against" dumping or subsidization, it is neither necessary, nor relevant, to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, nor to assess the impact of the measure on the competitive relationship between them. An analysis of the term "against", in the view of the Appellate Body, "is more appropriately centred on the design and structure of the measure; such an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete".⁹ However, as the Appellate Body also stated, "a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent"¹⁰, such as the filing of anti-dumping applications.

1.2.2 "except in accordance with the provisions of GATT 1994"

5. The Panel in *US – 1916 Act (EC)* considered that Article 18.1 of the Anti-Dumping Agreement confirms the purpose of Article VI as "to define the conditions under which counteracting dumping *as such* is allowed."¹¹

1.2.3 Footnote 24

6. The Panel in *US – 1916 Act (Japan)* considered that:

³ Appellate Body Report, *US – 1916 Act*, para. 137. See also Panel Reports, *US – 1916 Act (Japan)*, paras. 6.214-218 and 6.264; and *US – 1916 Act (EC)*, paras. 6.197-6.199.

⁴ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

⁵ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

⁶ See Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 247.

⁷ Panel Report, *US – Offset Act (Byrd Amendment)*, paras. 7.17-7.18.

⁸ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 256.

⁹ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 257.

¹⁰ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 258.

¹¹ Panel Report, *US – 1916 Act (EC)*, para. 6.114.

"[F]ootnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement. Such a possibility does not affect our conclusion that, when a law of a Member addresses the type of price discrimination covered by Article VI and makes it the cause for the imposition of anti-dumping measures, that Member has to abide by the requirements of Article VI and the *Anti-Dumping Agreement*."¹²

7. The Appellate Body in *US – Offset Act (Byrd Amendment)* clarified that footnotes 24 and 56 are clarifications of the main provisions, and were added so as to avoid ambiguity:

"[T]hey confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* 'specific' within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*."¹³

8. In *US – 1916 Act*, the Appellate Body referred to footnote 24 in order to clarify the scope of Article VI of GATT 1994. See paragraph 1 above.

1.2.4 Relationship between Article 18.1, GATT Article VI and the Note Ad Paragraphs 2 and 3 of Article VI

9. The dispute in *US – Shrimp (Thailand) / US – Customs Bond Directive* concerned US requirements for increased bonds to secure eventual payment of duties under a retrospective assessment system. The Appellate Body, upholding the Panel, found that the enhanced bond requirement (EBR) was permitted under the Note Ad Paragraphs 2 and 3 to Article VI of the GATT 1994 and did not constitute a "specific action against dumping" under Article 18.1:

"[W]e reaffirm the Appellate Body findings in previous reports that the Anti-Dumping Agreement does not allow a fourth category of specific action against dumping. We do not, however, consider that a security taken for guaranteeing the payment of a lawfully established duty liability would necessarily constitute a 'specific action against dumping'; rather, whether a particular security constitutes a 'specific action against dumping' should be evaluated in the light of the nature and characteristics of the security and the particular circumstances in which it is applied. We wish to emphasize that, in any event, an impermissible specific action against dumping cannot be taken in the guise of a security.

Generally speaking, a security is accessory or ancillary to the principal obligation that it guarantees. A security that is taken to guarantee the obligation to pay anti-dumping or countervailing duties is intrinsically linked to that obligation. Thus, taking security for the full and final payment of duties should be viewed as a component of the imposition and collection of anti-dumping or countervailing duties. Therefore, a reasonable security taken in accordance with the *Ad Note* for potential additional anti-dumping duty liability does not necessarily, in and of itself, constitute a fourth autonomous category of response to dumping."¹⁴

10. In that dispute, the Appellate Body in *US – Shrimp (Thailand)* and *US – Customs Bond Directive* then interpreted the *Ad Note* as authorizing the taking of "reasonable security" after the imposition of an anti-dumping duty order, pending determination of the final liability for payment of the anti-dumping duty.¹⁵ The Appellate Body also upheld the Panel's findings that the security requirement at issue (a requirement for importers of shrimp to increase their bond amounts) was not "reasonable" within the meaning of the *Ad Note*, and therefore upheld the Panel's finding that

¹² Panel Report, *US – 1916 Act (Japan)*, para. 6.218.

¹³ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262.

¹⁴ Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 231.

¹⁵ Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 226-227. See also the Section on Article VI of the GATT 1994.

the application of this measure to the shrimp at issue was inconsistent with Article 18.1 of the Anti-Dumping Agreement.¹⁶ The Appellate Body rejected a claim that the security requirement at issue violated Article 18.1 "as such" because it had found that imposition of security during the period after an anti-dumping order was permitted, if the security was reasonable.¹⁷

1.3 Article 18.3

1.3.1 "reviews of existing measures"

11. Referring to its statement that the Anti-Dumping Agreement applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the Anti-Dumping Agreement for the Member concerned, the Panel in *US – DRAMS* drew a comparison with the findings of the Panel in *Brazil – Desiccated Coconut*:

"We note that this approach is in line with that adopted by the Panel on *Desiccated Coconut* in respect of Article 32.3 of the SCM Agreement, which is virtually identical to Article 18.3 of the *AD Agreement*. That Panel stated that 'Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to reviews of existing measures initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply' (*Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, para. 230, upheld by the Appellate Body in WT/DS22/AB/R, adopted on 20 March 1997)."¹⁸

12. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed Russia's claims concerning the continuous imposition and levy of anti-dumping duties on Russian ammonium nitrate (AN) imports. In Russia's view, these duties were based on WTO-inconsistent dumping margins that were extended and relied on in subsequent regulations (i.e. Regulation 999/2014 and Regulation 1722/2018). The Panel noted that it was not examining the inconsistency of the anti-dumping duties themselves, but of the continuous imposition and levy of such duties.¹⁹ Russia argued that the Anti-Dumping Agreement, including Article 18.3 thereof, and Article VI of the GATT 1994, does not set any temporal scope of applicability of the GATT 1994 and the Anti-Dumping Agreement to the "continuous levying of anti-dumping duties" which were first imposed before the entry into force of the Anti-Dumping Agreement.²⁰

13. The Panel took note of the panel report in *Brazil – Desiccated Coconut* that referred to a provision under the SCM Agreement (Article 32.3), similar to Article 18.3 of the Anti-Dumping Agreement, that outlines the temporal scope of the SCM Agreement. According to the *Brazil – Desiccated Coconut* panel, if a panel could examine the continued collection of a duty whose imposition occurred before the entry into force of the SCM Agreement, and therefore would examine the determinations on which the subsequent duties were based, this would render Article 32.3 *inutile*:

"If ... a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if ... that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply – and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist – at the time the determinations were made. In our view, such an interpretation would

¹⁶ Appellate Body Report, *US – Shrimp (Thailand)/ US – Customs Bond Directive*, paras. 268-269.

¹⁷ Appellate Body Report, *US – Shrimp (Thailand)/ US – Customs Bond Directive*, para. 275.

¹⁸ Panel Report, *US – DRAMS*, para. 6.14, fn 477.

¹⁹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.584-7.586.

²⁰ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.588.

be contrary to the object and purpose of Article 32.3 and would render that Article a nullity."²¹

14. Applying this logic to Russia's claims, the Panel considered that Russia's challenges could not succeed, as the determinations of dumping underlying the anti-dumping duties at issue were made before the Anti-Dumping Agreement was signed, and thus, the continued imposition and levy of such duties could not be made subject to the Anti-Dumping Agreement:

"In claims #12 to #15, Russia claims that it challenges the continuous levying of the anti-dumping duties and not, in themselves, the determinations of dumping and dumping margins. It is apparent however that, without a finding of violation under Article 2 of the Anti-Dumping Agreement, Russia's challenge cannot succeed. Its claims of violation regarding the continuous levying of the duties are predicated upon the allegation that various dumping determinations and dumping margins made prior to Russia's accession to the WTO were calculated in contravention of the rules of the Anti-Dumping Agreement. Having regard to the above discussion, the Panel cannot see how those pre-WTO determinations can be made subject to Anti-Dumping Agreement obligations *now*, without rendering Article 18.3 of the Anti-Dumping Agreement inutile."²²

15. For these reasons, the Panel rejected these claims by Russia.²³

1.3.2 Application of the Anti-Dumping Agreement

16. Regarding the application of the Anti-Dumping Agreement to pre- and post-WTO measures, the Panel in *US – DRAMS* emphasized that the Anti-Dumping Agreement applies only to reviews and existing measures initiated pursuant to applications made on or after the date of entry into force of the Agreement with respect to the Member concerned:

"In our view, pre-WTO measures do not become subject to the *AD Agreement* simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the *AD Agreement* applies only to 'reviews of existing measures' initiated pursuant to applications made on or after the date of entry into force of the *AD Agreement* for the Member concerned ('post-WTO reviews'). However, we do not believe that the terms of Article 18.3 provide for the application of the *AD Agreement* to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the *AD Agreement* to the post-WTO review. In other words, the scope of application of the *AD Agreement* is determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the *AD Agreement* only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the *AD Agreement* by virtue of Article 18.3 of the *AD Agreement*. By way of example, a pre-WTO injury determination does not become subject to the *AD Agreement* merely because a post-WTO review is conducted relating to the pre-WTO determination of the margin of dumping."²⁴

17. The Panel in *US – Shrimp (Viet Nam)* examined two administrative reviews of an anti-dumping order established before the date of Viet Nam's accession to the WTO. In the panel proceeding, Viet Nam did not challenge the original investigation, but did challenge an "all others" rate that had been calculated in the original investigation. In response to a US argument that this claim was barred by Article 18.3, the Panel distinguished the factual situation from the situation in *US – DRAMS*:

"We are unable to accept the United States' argument which, in our view, is not supported by the findings of the panel in *US – DRAMS*. In *US – DRAMS*, the

²¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.592.

²² Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.593.

²³ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.599.

²⁴ Panel Report, *US – DRAMS*, para. 6.14.

determination at issue – that of the product coverage of the Anti-Dumping measures at issue – was determined once, before the entry into force of the WTO Agreement, and never subsequently reconsidered. By contrast, the evidence before us shows that the USDOC made a new and distinct 'all others' rate determination in each of the administrative reviews which are before us. ... The mere fact that the "all others" rate ultimately applied was not recalculated does not change the extent of the analysis inherent in the USDOC's new determination to continue to apply that rate. ...

In sum, the evidence before us shows that the 'all others' rates applied in each of the administrative reviews at issue were subject to full consideration by the USDOC in each case. The 'all others rate' applied by the USDOC in each instance was a direct result of the margins calculated by the USDOC in *that review*. It is only because the USDOC determined that all such margins could not be relied upon that the USDOC *decided* to apply the same 'all others' rate as had been applied in the original investigation. Accordingly, the United States' citation to the findings of the panel in *US – DRAMS* is inapposite.²⁵

18. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* examined the European Union's argument that, pursuant to Article 18.3, the provisions of the Anti-Dumping Agreement and Article VI of the GATT 1994 apply only to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement. Since Russia became a WTO Member on 22 August 2012, the European Union considered that only determinations made in connection with reviews initiated after this date could then be subject to review by the Panel.²⁶

19. The Panel agreed with the interpretations of Article 18.3 of the Anti-Dumping Agreement developed by the panels in *US – DRAMS* and *US – Shrimp (Viet Nam)*, as reproduced above in paragraphs 16 and 17. Both interpretations stood for the proposition that the Anti-Dumping Agreement (or the SCM Agreement) applies only to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. Such reviews would be initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement²⁷:

"As we understand them, these interpretations indicate that where a post-WTO investigation or review modifies or re-examines only a particular aspect of a pre-WTO investigation or review, that aspect must conform with the rules of the Anti-Dumping Agreement and, therefore, may be open to challenge despite the fact that it formed part of a measure imposed prior to the entry into force of the WTO. However, where there is no re-examination of a pre-WTO measure, or a certain aspect of the pre-WTO investigation or review, Article 18.3 holds that the specific measure, or aspect of the pre-WTO measure, is not subject to the disciplines of the Anti-Dumping Agreement."²⁸

20. In the light of this interpretation, the Panel set out to examine Russia's interpretative argument that Article 18.3 is a transitional provision designed to regulate the transitional period between the application of the Tokyo Round Anti-Dumping Code and the entry into force of the Anti-Dumping Agreement.²⁹ The Panel concluded that the text of Article 18.3 gave no indication that it was designed to apply only during this transitional period, but was instead meant to apply as of the entry into force of the WTO Agreement for a WTO Member³⁰:

"Russia argues that it follows from the terms of Article 18.3 that the relevant point in time for the application of the Anti-Dumping Agreement is the time of entry into force of the WTO Agreement in 1995, because the application of Article 18.3 is explicitly limited to 'specific circumstances where [an anti-dumping] proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*'. This view, however, is not consistent with the actual wording of

²⁵ Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.221-7.222.

²⁶ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.278.

²⁷ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.284.

²⁸ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.284.

²⁹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.286-7.287.

³⁰ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.288.

Articles 18.3 and 18.3.2, which refer to the 'entry into force *for a Member* of the WTO Agreement' rather than to the 'entry into force *of the WTO Agreement*' per se. The term 'for a Member' indicates clearly that the temporal application of the Anti-Dumping Agreement – in this instance the ability to bring a claim under that agreement – is subject to the date of entry into force of the WTO Agreement for each individual WTO Member. For Russia this date is 22 August 2012. In this light, accepting that Russia is entitled to bring a claim under the Anti-Dumping Agreement against a determination made prior to Russia's accession to the WTO would effectively hold an importing Member retroactively to obligations it never had *vis-à-vis* Russian imports at the time of the relevant determinations. In our view, this is precisely the type of situation that the transition rule in Article 18.3 is intended to avoid."³¹

1.4 Article 18.4

1.4.1 Maintenance of inconsistent legislation after entry into force of WTO Agreement

21. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, which provided for a method for calculating the "all others" rate as inconsistent with Article 9.4 and, accordingly with Articles XVI:4 of the WTO Agreement and 18.4 of the Anti-Dumping Agreement. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 "in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate". The Panel further found that, in maintaining this Section following the entry into force of the Anti-Dumping Agreement, the United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.³² The Appellate Body upheld these findings.³³

1.4.2 Mandatory versus discretionary legislation

22. In *US – 1916 Act (EC)*, the Panel referred to Article 18.4 in stating that the mere fact that the initiation of anti-dumping investigations was discretionary would not make the legislation at issue non-mandatory.

1.4.3 Measures subject to dispute settlement

23. In the view of the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*, all laws, regulations and administrative procedures mentioned in Article 18.4 may, as such, be submitted to dispute settlement. The Appellate Body considered that "the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings."³⁴ If some of these types of measure could not, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of "conformity" set forth in Article 18.4."³⁵

24. As regards the concept of measures subject to WTO dispute settlement, see the Sections on Articles 6 and 7 of the DSU.

1.5 Article 18.5

25. In *US – Customs Bond Directive India* requested the Panel to find that the United States had violated Article 18.5 of the Anti-Dumping Agreement and Article 32.6 of the SCM Agreement.

³¹ Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.288.

³² Panel Report, *US – Hot-Rolled Steel*, para. 7.90.

³³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 129.

³⁴ (*footnote original*) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

³⁵ Appellate Body Report, *United States – Corrosion Resistant Steel Sunset Review*, para. 87.

The United States was of the view that it had no obligation to notify the amended customs bond directive (CBD) to either of the Committees.³⁶ The Panel disagreed with the United States:

"The EBR has been designed as a security for the collection of potential increased anti-dumping or countervailing duties and this security may only be imposed where a given product is subject to an anti-dumping or countervailing order. We also recall our findings that the Amended CBD constitutes specific action against dumping or subsidisation within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. We arrived at this conclusion by finding, *inter alia*, that the constituent elements of dumping and/or subsidisation were present in the Amended CBD. For all of these reasons, we consider that the Amended CBD 'changes ... the administration' of anti-dumping or countervailing duty laws and/or regulations and thus falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*.

... Despite the absence of a specific deadline, in our view, in order for any notification to be effective, it must be made within a reasonable time. It is also our view that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* were originally formulated to address transparency concerns surrounding the administration of anti-dumping and countervailing duty investigations and measures. A failure to properly notify changes in the anti-dumping laws or regulations, or the administration of such laws to the Anti-Dumping and SCM Committees within a reasonable time fails to address that objective.

In the matter before us, we are unaware that the United States has yet attempted to notify the Amended CBD to the Anti-Dumping and SCM Committees. The United States has failed to do so despite the fact that the Amended CBD became effective more than three years ago with publication of the July 2004 Amendment. We consider this delay to be unreasonable.

We accordingly find that the United States has failed to meet its obligation to notify the Amended CBD to the Anti-Dumping and SCM Committees."³⁷

1.6 Relationship with other provisions of the Anti-Dumping Agreement

1.6.1 General

26. The relationship between Article 18.1 and other provisions in the Anti-Dumping Agreement was discussed in *Guatemala – Cement II*. The Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with Articles 3, 5, 6, 7, 12, and paragraph 2 of Annex I of the Anti-Dumping Agreement. The Panel then opined that Mexico's claims under other articles of the Anti-Dumping Agreement, among them Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the *AD Agreement*, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the *AD Agreement*."³⁸ In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

27. The Panel in *US – 1916 Act (Japan)* stated that "[t]he meaning of Article 18.4 which immediately comes to mind when reading that Article is that when a law, regulation or administrative procedure of a Member has been found incompatible with the provisions of the *Anti-Dumping Agreement*, that Member is also in breach of its obligations under Article 18.4."³⁹

³⁶ Panel Report, *US – Customs Bond Directive*, para. 7.278.

³⁷ Panel Report, *US – Customs Bond Directive*, paras. 7.282-7.285.

³⁸ Panel Report, *Guatemala – Cement II*, para. 8.296.

³⁹ Panel Report, *US – 1916 Act (Japan)*, para. 6.286.

28. The Panel in *US – 1916 Act (Japan)* stated in a footnote that "we did not exercise judicial economy with respect to Article 18.4 because, in that context, a violation of Article 18.4 automatically results from the breach of another provision of the *Anti-Dumping Agreement*."⁴⁰

1.6.2 Article 17

29. In *US – 1916 Act*, the Appellate Body referred to Article 18.1 and 18.4 as contextual support for its reading of Article 17.4 as allowing Members to bring claims against anti-dumping legislation as such.⁴¹

1.7 Relationship with other WTO Agreements

1.7.1 Article VI of the GATT 1994

30. The relationship between Article 18 and Article VI of the GATT 1994 was discussed in *US – 1916 Act*. See paragraphs 1-6 above.

1.7.2 SCM Agreement

31. The Panel in *US – DRAMS* referred to the applicability of the SCM Agreement to measures initiated before the entry into force of the WTO Agreement, in deciding on a similar issue under the Anti-Dumping Agreement. See paragraph 11 above.

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⁴⁰ Panel Report, *US – 1916 Act (Japan)*, para. 6.286, fn 595.

⁴¹ Appellate Body Report, *US – 1916 Act*, paras. 78-82.