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1 ARTICLE 23

1.1 Text of Article 23

Article 23

Strengthening of the Multilateral System

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

2. In such cases, Members shall:

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

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

1.2 General

1.2.1 The goal of Article 23: rejection of unilateral self-help

1. In *US – Shrimp*, the Panel stated that "by its very nature, the WTO Agreement favours a multilateral approach to trade issues". In that connection, the Panel stated that "[t]his approach is also expressed in Article 23.1 of the DSU which stresses the primacy of the *multilateral* system and rejects unilateralism as a substitute for the procedures foreseen in that agreement".[1]

2. In *EC – Bananas III (United States) (Article 22.6 – EC)*, the Arbitrators stated that "the goal of Article 23" is the "multilateral determination" of whether WTO agreements have been violated and the extent of any nullification or impairment.[2]

3. In *Canada – Aircraft Credits and Guarantees*, the Panel observed that "Article 23.1 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system, to the exclusion of unilateral self-help."[3]

4. In *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, the Arbitrator suggested that Article 23 prevents a Member from "tak[ing] the law into its own hands".[4]

1.2.2 Relationship between Articles 23.1 and 23.2

5. The Panel in *US – Section 301 Trade Act* stated that Article 23.2 is "explicitly linked to, and has to be read together with and subject to, Article 23.1".[5]

6. In *US – Certain EC Products*, the Panel considered the EC argument that the United States unilaterally imposed trade sanctions and thereby violated Article 23 of the DSU. The Panel, in a finding not directly reviewed by the Appellate Body, held that both paragraphs of Article 23 provide a prohibition on "unilateral redress", but that this prohibition is more directly provided for under the second paragraph of Article 23:

> "The structure of Article 23 is that the first paragraph states the general prohibition or general obligation, i.e. when Members seek the redress of a WTO violation[6], they shall do so only through the DSU. This is a general obligation. Any attempt to seek 'redress' can take place only in the institutional framework of the WTO and pursuant to the rules and procedures of the DSU.
>
> The prohibition against unilateral redress in the WTO sectors is more directly provided for in the second paragraph of Article 23. From the ordinary meaning of the terms used in the chapeau of Article 23.2 ('in such cases, Members shall'), it is also clear that the second paragraph of Article 23 is 'explicitly linked to, and has to be read together with and subject to, Article 23.1'[7]. That is to say, the specific prohibitions of paragraph 2 of Article 23 have to be understood in the context of the first paragraph, i.e. when such action is performed by a WTO Member with a view to redressing a WTO violation."[8]

7. The Panel in *US – Certain EC Products* also agreed with the European Communities that Article 23.2 contains specific examples of conduct inconsistent with the rules of the DSU, but held

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[1] Panel Report, *US – Shrimp*, para. 7.43.
[2] Decision by the Arbitrators, *EC – Bananas III (United States) (Article 22.6 – EC)*, para. 4.12.
[3] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.170.
[4] Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 398.
[5] Panel Report, *US – Section 301 Trade Act*, para. 7.44.
[6] (*footnote original*) Article 23.1 of the *DSU* refers more accurately to "seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements", i.e. the three causes of actions under WTO. In this Panel Report, the expression "WTO violation(s)" refers to all three causes of actions mentioned in Article 23.1 of the *DSU*.
[8] Panel Report, *US – Certain EC products*, paras 6.19-6.20. This was upheld by the Appellate Body at para. 111.

that the first analytical step necessarily was to determine – before turning to Article 23.2 – whether the measure at issue falls under the scope of Article 23.1:

> "We also agree with the *US – Section 301 Trade Act* Panel Report that Article 23.2 contains 'egregious examples of conduct that contradict the rules of the DSU'[9] and which constitute more specific forms of unilateral actions, otherwise generally prohibited by Article 23.1 of the DSU.
>
> > '[t]hese rules and procedures [Article 23.1] clearly cover much more than the ones specifically mentioned in Article 23.2. There is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2. '(Footnotes omitted)[10]
>
> The same Panel identified a few examples of such instances where the DSU could be violated[11] contrary to the provisions of Article 23. Each time a Member seeking the redress of a WTO violation is not abiding by a rule of the DSU, it thus violates Article 23.1 of the DSU.
>
> In order to verify whether individual provisions of Article 23.2 have been infringed (keeping in mind that the obligation to also observe other DSU provisions can be brought under the umbrella of Article 23.1), we must first determine whether the measure at issue comes under the coverage of Article 23.1. In other words, we need to determine whether Article 23 is applicable to the dispute before addressing the specific violations envisaged in the second paragraph of Article 23 of the DSU or elsewhere in the DSU."[12]

8. In *US – Certain EC Products,* the Appellate Body agreed with the Panel and stated that:

> "Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They *all* concern the obligation of Members of the WTO not to have recourse to unilateral action. We therefore consider that, as the request for the establishment of a panel of the European Communities included a claim of inconsistency with Article 23, a claim of inconsistency with Article 23.2(a) is within the Panel's terms of reference."[13]

9. In *US/Canada – Continued Suspension*, the Appellate Body offered the following observations on the relationship between Article 23.1 and 23.2:

> "As the Appellate Body has explained, Article 23.1 lays down the fundamental obligation of WTO Members to have recourse to the rules and procedures of the DSU when seeking redress of a violation of the covered agreements.[14] Article 23 restricts WTO Members' conduct in two respects. First, Article 23.1 establishes the WTO dispute settlement system as the exclusive forum for the resolution of such disputes and requires adherence to the rules of the DSU. Secondly, Article 23.2 prohibits certain unilateral action by a WTO Member. Thus, a Member cannot unilaterally: (i) determine that a violation has occurred, benefits have been nullified or impaired, or that the attainment of any objective of the covered agreements has been impeded; (ii) determine the duration of the reasonable period of time for implementation; or (iii) decide to suspend concessions and determine the level thereof.

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[12] Panel Report, *US – Certain EC Products*, paras. 6.17-6.20.
[13] Appellate Body Report, *US – Certain EC Products*, para. 111.

> The phrase '[i]n such cases, Members shall' with which Article 23.2 begins refers back to the situation described in Article 23.1, namely, when a Member is seeking the redress of, *inter alia*, a violation of obligations under the covered agreements. We share the view of the panel in *US – Section 301 Trade Act* that the terms '[i]n such cases, Members shall' used in the chapeau of Article 23.2 make clear that Article 23.2 is 'explicitly linked to, and has to be read together with and subject to, Article 23.1'.[15] Therefore, the specific prohibitions of unilateral actions in Article 23.2 must be understood in the context of the overarching provision of Article 23.1. In other words, the unilateral actions prohibited by Article 23.2 are those taken by a Member with a view to seeking redress of a violation. Moreover, the phrase '[i]n such cases, Members shall' at the beginning of Article 23.2 indicates that the specific obligations set forth in its subparagraphs clarify and illustrate the scope of the general and ongoing obligation in Article 23.1. This does not mean, however, that the scope of Article 23.1 is exhausted by the situations described in Article 23.2.[16]"[17]

1.2.3 Article 23 as a right, in addition to an obligation, to access WTO dispute settlement procedures

10. In *Mexico – Taxes on Soft Drinks*, the Appellate Body upheld the Panel's conclusion that under the DSU, it had no discretion to decline to exercise its jurisdiction in the case that had been brought before it. In the course of its reasoning, the Appellate Body stated that "[a] decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU".[18]

11. In *EC – Chicken Cuts*, the Panel referred to Article 23.1 in the context of explaining that it lacked the authority to refer the dispute before it to the World Customs Organization:

> "We understand that, once seized of a matter, Article 11 prevents a panel from abdicating its responsibility to the DSB. In other words, in the context of the present case, we lack the authority to refer the dispute before us to the WCO or to any other body.
>
> …
>
> In the Panel's view, Article 23.1 supports the view that, in the context of this dispute, which involves the question of whether the measures at issue result in treatment that is less favourable than that provided for in the EC Schedule in contravention of Article II of the GATT 1994, the complainants have a right to recourse to the WTO dispute settlement mechanism.
>
> The Panel is mindful of the respective jurisdiction and competence of the WCO and the WTO and, in fact, we specifically raised this issue with the parties during the course of these proceedings. Nevertheless, we consider that we have been mandated by the DSB in this dispute to determine whether the European Communities has violated Article II of the GATT 1994 with respect to the products at issue. As mentioned above in paragraph 7.54, in so doing, we will need to interpret the WTO concession contained in heading 02.10 of the EC Schedule."[19]

12. Along the same lines, the Panel in *EC and certain member States – Large Civil Aircraft* concluded that, in the absence of a reservation concerning the interpretation or application of

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[16] (*footnote original*) As the panel in *US – Section 301 Trade Act* pointed out, the prohibitions mentioned in Article 23.2 are examples of conduct that contradicts the rules and procedures of the DSU which, under the obligation in Article 23.1 to "abide by the rules and procedures" of the DSU, Members are obligated to follow. These rules and procedures cover more than those specifically mentioned in Article 23.2 and "[t]here is a great deal more State conduct which can violate the general obligation in Article 23.1 to have recourse to, and abide by, the rules and procedures of the DSU than the instances especially singled out in Article 23.2." (Panel Report, *US – Section 301 Trade Act*, para. 7.45) (footnote omitted)

[17] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 371-372.

[18] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.

[19] Panel Reports, *EC – Chicken Cuts*, paras. 7.56, 7.58-7.59.

Article 23 of the DSU, a Member cannot be considered to have "waived" it rights under Article 23 of the DSU to initiate a WTO dispute by means of an agreement that it entered into *prior* to entry into force of the DSU:

> "We recall that Article 23 of the DSU states that Members *shall* have recourse to the rules and procedures of the DSU when they 'seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered Agreements.' As the Appellate Body has stated, the fact that a Member may initiate a WTO dispute whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member implies that that Member is *entitled* to a ruling by a WTO panel. Assuming, for the sake of argument, that a Member can waive its rights under the WTO Agreements pursuant to a non-WTO Agreement, we cannot conceive that a Member can be considered to have waived such rights by means of an agreement which it entered into *prior* to entering into the WTO Agreements. The SCM Agreement, which came into effect on 1 January 1995, does not make any reference to the antecedent 1992 Agreement, and as the United States points out, the European Communities has not made any reservations regarding the application or interpretation of the SCM Agreement."[20]

13. In *Peru – Agricultural Products*, the Appellate Body found that an FTA between the parties contained no clear stipulation of a "relinquishment" of Guatemala's right to have recourse to the WTO dispute settlement system with respect to the measures at issue. In the course of its analysis, the Appellate Body referred to Article 23 of the DSU:

> "While Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, we do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes. In this respect, we recall that Article 23 of the DSU mandates that '[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.'"[21]

1.3 Article 23.1

1.3.1 "seek[ing] the redress of a WTO violation"

14. In *US – Certain EC Products*, the Panel considered whether the United States was "seeking to redress" what it perceived to be a WTO violation when it decided to withhold liquidation on imports from the European Communities of a list of products and impose a contingent liability for 100 per cent duties on each individual importation of affected products ("3 March Measure"). In the course of its analysis, the Panel stated:

> "The term 'seeking' or 'to seek' is defined in the Webster New Encyclopaedic Dictionary as: 'to resort to, … to make an attempt, try'. … The term 'to redress' is defined in the New Shorter Oxford English Dictionary as 'repair (an action); atone for (a misdeed); remedy or remove; to set right or rectify (injury, a wrong, a grievance etc.); obtaining reparation or compensation'. … The term 'redress' implies, therefore, a reaction by a Member against another Member, because of a perceived (or WTO determined) WTO violation, with a view to remedying the situation.
>
> …
>
> On its face, this description of the 3 March Measure shows that, because of the US perceived WTO inconsistency of the 1998 Bananas regime put in place by the European Communities as a measure taken to implement the Panel and Appellate Body recommendations (the 'EC implementing measure'), the United States imposed an increased contingent liability on EC listed imports only. This 3 March

[20] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.92.
[21] Appellate Body Report, *Peru – Agricultural Products*, fn 106.

> Measure was, therefore, discriminatory and aimed at the European Communities exclusively. The unilateral imposition of a liability for 100 per cent duty as of 3 March (well above the bound rates of tariffs) constitutes the imposition of a debt on such imports, and adds further obligations on such imports, even if the full effect of such liability is suspended until a future liquidation date. This debt, this liability, this additional obligation imposed on listed EC imports, is evidence that the United States wanted to remedy, was 'seeking to redress', what it perceived to be a WTO violation."[22]

15. In *EC – Commercial Vessels*, the European Communities argued that the scope of Article 23.1 is confined to ensuring the exclusivity of WTO jurisdiction over WTO law and the suspension of concessions, and does not apply generally to any kind of reaction by a Member to a measure of another Member that it considers to be in violation with that Member's obligations under the WTO Agreement. The Panel did not agree, and found instead that:

> "[B]ased on an interpretation of Article 23.1 in light of the ordinary meaning of its terms and in light of its context and object and purpose, and having regard to the reasoning of the Appellate Body and panels in previous disputes concerning Article 23, we consider that the requirement 'to have recourse to' the DSU when Members 'seek the redress of a violation …' is broader in scope than suggested by the expression 'exclusive jurisdiction clause' used by the European Communities. This requirement is violated not only when Members submit a dispute concerning rights and obligations under the WTO Agreement to an international dispute settlement body outside the WTO framework but also when Members act unilaterally to seek to obtain the results that can be achieved through the remedies of the DSU. As a consequence, we reject the view of the European Communities that Article 23.1 of the DSU cannot prohibit acts other than those that are inconsistent with Article 23.2 or with other DSU rules.[23]
>
> As discussed above, the Panel considers that Article 23.1 must be interpreted to mean that Members may not seek to obtain results that can be achieved through the remedies of the DSU by means other than recourse to the DSU. The Panel in *US - Certain EC-Products* observed that the 'remedial actions' envisaged in the WTO system:
>
> > 'relate to restoring the balance of rights and obligations which form the basis of the WTO Agreement, and include the removal of the inconsistent measure, the possibility of (temporary) compensation and, in the last resort, the (temporary) suspension of concessions or other obligations authorised by the DSB (Articles 3.7 and 22.1 of the DSU). The latter remedy is essentially retaliatory in nature'.[24]
>
> This statement is consistent with our view of what 'seek the redress of a violation' means. Therefore, the phrase 'seek the redress of a violation …' covers any act of a Member in response to what it considers to be a violation of a WTO obligation by another Member whereby the first Member attempts to restore the balance of rights and obligations by seeking the removal of the WTO inconsistent measure, by seeking compensation from the other Member, or by suspending concessions or obligations under the WTO Agreement in relation to that Member. In the case of actionable subsidies, seeking the removal of the WTO-inconsistent measure includes seeking the removal by the subsidizing Member of the adverse effects of the subsidy. In our view, any unilateral attempt to obtain these results would be a violation of Article 23.1 of the DSU."[25]

16. The Panel in *EC – Commercial Vessels* also addressed the European Communities' argument that the relationship between Article 23.1 and 23.2 and between Article 23.2(a) and (c) of the DSU provides contextual support for an interpretation of Article 23.1 according to which acts not involving a suspension of WTO concessions or other obligations cannot be covered by the phrase

[22] Panel Report, *US – Certain EC Products*, paras. 6.22 and 6.26.
[23] Panel Report, *EC – Commercial Vessels*, para. 7.195.

[25] Panel Report, *EC – Commercial Vessels*, paras. 7.195-7.196.

"seek the redress of a violation …" in Article 23.1 of the DSU. The European Communities referred in particular to the close textual link between Articles 23.1 and 23.2 of the DSU and cited the view of the Panel in *US – Certain EC Products* that the term "determination" in Article 23.2(a) must "bear consequences in WTO trade relations". The European Communities inferred from this that a determination within the meaning of Article 23.2(a) must lead to the suspension of concessions or obligations within the meaning of Article 23.2(c) of the DSU and that "this confirms contextually that the general obligation not to seek redress of a WTO violation outside the WTO system cannot prohibit measures other than retaliatory measures in the form of suspension of WTO concessions or obligations".[26] The Panel disagreed:

> "In the Panel's view, the close connection between the two paragraphs of Article 23 means that, as stated by the Appellate Body in *US – Certain EC Products*, '[s]ubparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1' and that there is a 'close relationship between paragraphs 1 and 2 of Article 23 in that they all concern the obligation of Members of the WTO not to have recourse to unilateral action'.[27] The Panel is not persuaded, however, by the argument of the European Communities that the relationship between Articles 23.1 and 23.2 means that acts not amounting to a suspension of obligations or concessions are not covered by the phrase 'seek the redress of a violation' in Article 23.1, for the very reason that the Panel is not persuaded that a determination within the meaning of Article 23.2(a) must be linked to a suspension of concessions or other obligations within the meaning of Article 23.2(c). The wording of Article 23.2(a) does not support an interpretation according to which a unilateral determination that another Member has violated obligations under the WTO Agreement is only inconsistent with this provision if such a determination is made in connection with the application of a measure involving a suspension of concessions or other obligations under the WTO Agreement. If, as argued by the European Communities, Article 23.2(a) only covers determinations made for the purpose of suspending concessions or obligations under Article 23.2(c), the drafters of the DSU could easily have used a formulation to express that linkage. The fact that unilateral determinations are covered by a separate clause, without an explicit textual linkage to Article 23.2 (c), as part of an article aimed at 'strengthening the multilateral system' suggests that such determinations by themselves were viewed by the drafters as contrary to the multilateral system."[28]

17. In *US/Canada – Continued Suspension*, the Appellate Body noted that "[s]eeking the redress of a violation is of course not by itself prohibited by Article 23.1 of the DSU. Rather, to be in breach of Article 23.1, a Member must be seeking redress without having recourse to, or abiding by, the rules of the DSU."[29] The Appellate Body then considered the question of whether the continued suspension of concessions constitutes "seek[ing] the redress of a WTO violation" within the meaning of Article 23.1:

> "An initial question that arises in this case is whether the continued application of a previously authorized suspension of concessions can be said to constitute the seeking of redress. On the one hand, the authorization to suspend concessions can be said to be the result of a previous act of seeking redress that involved initiating a dispute. On the other hand, the continued application of the suspension of concessions can be said to reflect a continuous act of seeking redress for a violation found by the DSB that has not yet been rectified. In any event, the suspension of concessions that has been duly authorized by the DSB will not constitute a violation of Article 23.1, as long as it is consistent with other rules of the DSU, including paragraphs 2 through 8 of Article 22, even if the continued application of the suspension of concessions is regarded as an action or part of a process of 'seeking the redress'. This is because, before obtaining the DSB's authorization to suspend concessions, a Member must initiate a dispute settlement process in which it challenges the consistency with the

[26] Panel Report, *EC – Commercial Vessels*, para. 7.198.

[27] (*footnote original*) Appellate Body Report, *US – Certain EC Products*, para. 111. The need to read Article 23.2 together with Article 23.1 was also highlighted by the Panel Report in *US – Section 301 Trade Act*, paras. 7.44-7.45.

[28] Panel Report, *EC – Commercial Vessels*, para. 7.200.

[29] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 373.

> covered agreements of a measure taken by another Member. The Member initiating the process will only be authorized to suspend concessions when the measure is found by the panel (and the Appellate Body, if appealed) to be inconsistent with the covered agreements and the Member taking the measure fails to implement the panel's (or Appellate Body's) findings within a reasonable period of time or, if it takes a measure to comply, that measure is found by the panel (and the Appellate Body) in compliance proceedings not to have brought the Member concerned into compliance. In other words, the Member will only be able to suspend concessions pursuant to the DSB's authorization after having had extensive recourse to, and abided by, the rules and procedures of the DSU, consistent with the requirements of Article 23.1."[30]

18. In *US/Canada – Continued Suspension*, the Appellate Body ultimately found that the Panel erred in concluding that the United States and Canada were "seeking redress of a violation" within the meaning of Article 23 by maintaining the suspension of concessions authorized by the DSB after the European Communities notified a Directive that allegedly brought its measure into conformity with its WTO obligations.[31]

1.4 Article 23.2

1.4.1 Article 23.2(a): "a determination to the effect that a violation has occurred"

19. The Panel in *US – Section 301 Trade Act* addressed the question whether Article 23 of the DSU may prohibit legislation with certain discretionary elements and therefore the very fact of having in the legislation such discretion could, in effect, preclude WTO consistency. The Panel held that a statute "which … reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a)" is a violation of Article 23.2(a) read together with Article 23.1:

> "The text of Article 23.1 is simple enough: Members are obligated generally to (a) have recourse to and (b) abide by DSU rules and procedures. These rules and procedures include most specifically in Article 23.2(a) a prohibition on making a unilateral determination of inconsistency prior to exhaustion of DSU proceedings.
>
> …
>
> [T]he very discretion granted under Section 304, which under the US argument absolves the legislation, is what, in our eyes, creates the presumptive violation. The statutory language which gives the USTR this discretion on its face precludes the US from abiding by its obligations under the WTO. In each and every case when a determination is made whilst DSU proceedings are not yet exhausted, Members locked in a dispute with the US will be subject to a mandatory determination by the USTR under a statute which explicitly puts them in that very danger which Article 23 was intended to remove.
>
> …
>
> Trade legislation, important or positive as it may be, which statutorily reserves the right for the Member concerned to do something which it has promised *not* to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1."[32]

20. In *US/Canada – Continued Suspension*, the Appellate Body concluded that the Panel erred in finding that the United States and Canada made a "determination" within the meaning of Article 23.2(a) on the basis of statements made at DSB meetings, and on the basis of the fact that the suspension of concessions continued subsequent to the notification of Directive 2003/74/EC. In the course of its analysis, the Appellate Body stated that:

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[30] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 374.
[31] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 393.
[32] Panel Report, *US – Section 301 Trade Act*, paras. 7.59, 7.61, and 7.63.

> "We share the view of the panel in *US – Section 301 Trade Act* that a 'determination' within the meaning of Article 23.2(a) 'implies a high degree of firmness or immutability, i.e. a more or less final decision by a Member in respect of the WTO consistency of a measure taken by another Member'.[33] Moreover, preliminary opinions or views expressed without a clear intention to seek redress are not covered by Article 23.2(a). The statements made by delegates of the United States and Canada, on which the Panel focused its attention, were made shortly after the European Communities notified Directive 2003/74/EC to the DSB. The statements were made at the two DSB meetings held, respectively, two weeks and five weeks from the DSB meeting at which Directive 2003/74/EC was notified by the European Communities. These statements, therefore, seem no more than initial reactions to the European Communities' self-proclaimed compliance with the DSB's recommendations and rulings in *EC – Hormones*. Considering the complexity of the issues that arise with respect to the consistency of Directive 2003/74/EC (as demonstrated in sections VI and VII of the Report), it is reasonable to assume that the United States and Canada needed some time before forming a definitive view regarding whether the European Communities had brought itself into compliance. We thus share the United States' and Canada's view that the statements at the DSB meetings lack sufficient amount of 'firmness or immutability' for them to constitute a determination within the meaning of Article 23.2(a).
>
> In their statements, the United States and Canada indicated that they would be willing to engage in further bilateral discussions regarding the alleged scientific justification for Directive 2003/74/EC. This readiness to discuss Directive 2003/74/EC is difficult to reconcile with a finding that the DSB statements constituted a 'determination' with the type of firmness and immutability required by its ordinary meaning and the relevant context of Article 23, as interpreted by the panel in *US – Section 301 Trade Act*. The Panel recognized this intention to engage in bilateral discussions evidenced in the DSB statements, but found that the consultations that took place after the notification of Directive 2003/74/EC 'largely related to procedural issues'. Simply because subsequent consultations related largely to procedural issues does not mean that, *at the time the DSB statements were made*, the United States and Canada had made a unilateral determination without recourse to the DSU within the meaning of Article 23.2(a).
>
> Moreover, DSB statements are not intended to have legal effects and do not have the legal status of a definitive determination in themselves. Rather, they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute. As the United States rightly points out, '[s]tatements made by Members at DSB meetings, especially those expressing a view as to the WTO consistency of another Member's measures or actions, are generally diplomatic or political in nature' and 'generally have no legal effect or status in and of themselves'."[34]

21. The Appellate Body in *US/Canada – Continued Suspension* also pointed to the potential negative implications of finding that DSB statements could constitute a definitive determination within the meaning of Article 23.2(a) of the DSU:

> "The Panel's finding that DSB statements could constitute a definitive determination concerning the WTO-inconsistency of a Member's measure could adversely affect WTO Members' ability to freely express their views on the potential compatibility with the covered agreements of measures adopted by other Members. This would result in a 'chilling' effect on those statements, because Members would refrain from expressing their views at DSB meetings regarding the WTO-inconsistency of other Members' measures lest such statements be found to constitute a violation of Article 23. If this were the case, the DSB would be inhibited from properly carrying out its function,

[34] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 396-398.

> pursuant to Article 21.6 of the DSU, to keep under surveillance the implementation of its recommendations and rulings."[35]

22. In *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, the Panel was guided by the Appellate Body's analysis of what constitutes a "determination" in the context of Article 23 of the DSU when assessing whether certain criminal Charges constituted a "determination" under the Customs Valuation Agreement.[36]

1.4.2 Article 23.2(b): determination of reasonable period of time

23. In *US – Section 301 Trade Act*, the Panel paraphrased the obligation in Article 23.2(b):

> "It is for the WTO or both of the disputing parties, through the procedures set forth in Article 21 – not for an individual WTO Member – to determine the reasonable period of time for the Member concerned to implement DSB recommendations and rulings (Article 23.2(b))."[37]

1.4.3 Article 23.2(c): determination of level of suspension

24. In *US – Section 301 Trade Act*, the Panel paraphrased the obligation in Article 23.2(c):

> "It is for the WTO through the procedures set forth in Article 22 – not for an individual WTO Member – to determine, in the event of disagreement, the level of suspension of concessions or other obligations that can be imposed as a result of a WTO inconsistency, as well as to grant authorization for the actual implementation of these suspensions."[38]

25. The Panel in *US – Section 301 Trade Act* considered that Article 23.2(c) includes two cumulative obligations:

> "Article 23.2(c) thus includes two cumulative obligations:
>
> (a) the US has to 'follow the procedures set forth in Article 22 to *determine* the level of suspension of concessions or other obligations' (emphasis added); and
>
> (b) the US has to 'obtain DSB authorization in accordance with those procedures before *suspending* concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time'(emphasis added)."[39]

26. After determining that the so-called 3 March Measure, which imposed an increased bonding requirement upon goods from the European Communities, constituted a measure taken to redress a WTO violation (see the excerpt referenced in paragraph 14 above), the Panel in *US – Certain EC Products* examined whether the 3 March Measure violated Article 23.2(c) of the DSU. The Panel held that any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited:

> "Article 23.2(c) prohibits any suspensions of concessions or other obligations (taken as measures seeking to redress a WTO violation), prior to a relevant DSB authorization. Article 3.7 provides that suspension of concessions or other obligations should be used as a last resort, and subject to a DSB authorization. In Article 22.6, the suspension of concessions or other obligations is prohibited during the arbitration process which can only take place before the DSB authorization. …

[35] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 399.
[36] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.592.
[37] Panel Report, *US – Section 301 Trade Act*, para. 7.38.
[38] Panel Report, *US – Section 301 Trade Act*, para. 7.38.
[39] Panel Report, *US – Section 301 Trade Act*, para. 7.172.

> In the context of these provisions, any WTO suspension of concessions or other obligations without prior DSB authorization is explicitly prohibited. On 3 March there was no relevant DSB authorization of any sort."[40]

1.5 Relationship with other provisions of the DSU

1.5.1 Article 3.7

27. In *US – Certain EC Products*, the Appellate Body clarified that "[t]he *obligation* of WTO Members not to suspend concessions or other obligations *without* prior DSB authorization is explicitly set out in Articles 22.6 and 23.2(c), not in Article 3.7 of the DSU". It "consider[ed], however, that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, that Member has also, in view of the nature and content of Article 3.7, last sentence, necessarily acted contrary to the latter provision."[41]

1.5.2 Article 22.8

28. In *US/Canada – Continued Suspension*, the Appellate Body concluded that the Panel erred in finding that the United States and Canada had sought the redress of a violation with respect to Directive 2003/74/EC, within the meaning of Article 23.1 of the DSU, and had made a determination in relation to that Directive to the effect that a violation had occurred, within the meaning of Article 23.2(a) of the DSU. In the course of its analysis, the Appellate Body addressed the relationship between Article 23 and Article 22.8 of the DSU:

> "This does not mean that Article 23.1 ceases to apply once the suspension of concessions has been authorized by the DSB. Article 23.2(c) specifically refers to Article 22 of the DSU. Paragraph 8 of this provision states that the suspension of concessions shall only be applied until the inconsistent measure has been removed or one of the other two conditions in Article 22.8 is met. Thus, if the Member subject to the suspension of concessions takes an implementing measure and that measure is found in WTO dispute settlement proceedings to bring this Member into substantive compliance, the suspension of concessions would no longer be consistent with Article 22.8 of the DSU, and, as a result, would become a unilateral action prohibited by Articles 23.1 and 23.2. In other words, the requirements in Article 22.8 and Article 23 apply and must be read together in the post-suspension stage of a dispute. Therefore, Article 23 must be seen as containing an ongoing obligation and continues to apply even after the suspension of concessions has been duly authorized by the DSB.
>
> …
>
> We note that the suspension of concessions maintained by the United States and Canada were duly authorized by the DSB subsequent to its adoption of the recommendations and rulings in *EC – Hormones* and an arbitration award resulting from proceedings under Article 22.6 regarding the level of the suspension of concessions. As discussed above, where the suspension of concessions has been duly authorized by the DSB and is applied consistently with the rules of the DSU, including Article 22.8, it does not constitute a violation of Article 23.1, because it is not imposed without recourse to or without abiding by the DSU. The requirements in Article 22 and those in Article 23 must be read together, in the post-suspension stage of the dispute, to determine the legality of the continued suspension when an implementing measure has been taken. Thus, we share the view of the United States and Canada that, in order to determine whether they acted inconsistently with Article 23 by continuing the suspension of concessions subsequent to the notification of Directive 2003/74/EC, the Panel had to first determine whether the suspension of concessions was being applied consistently with Article 22.8 of the DSU.
>
> …

[40] Panel Report, *US – Certain EC Products*, paras. 6.37-6.38.
[41] Appellate Body Report, *US – Certain EC Products*, para. 120.

> The DSB's authorization does not mean that Article 23 becomes irrelevant. Rather, as Article 23.2(c) specifies, the suspension of concessions is subject to Article 22, including the requirement in Article 22.8 that it shall only be applied until such time as the measure found to be inconsistent with the covered agreements has been removed. Therefore, the suspension of concessions by the United States and Canada would be in breach of Article 23.2(c), and consequently Article 23.1, if it were established in WTO dispute settlement that the inconsistent measure has indeed been removed within the meaning of Article 22.8 and the suspension is not immediately terminated. Article 22.8 thus provides relevant context for the analysis of the issues appealed under Article 23. Moreover, the application of DSB-authorized suspension of concessions is temporary and subject to the objective conditions laid down in Article 22.8. The United States, Canada, as well as the European Communities, have the shared responsibility to ensure that the suspension of concessions is not applied beyond the time foreseen in Article 22.8. Consequently, the United States and Canada have a duty to engage actively in dispute settlement proceedings concerning whether the suspension of concessions is applied consistently with such conditions. Failing to do so could be contrary to the overarching principle in Article 23.1 prohibiting Members from seeking redress without having recourse to, or abiding by the rules of, the DSU. Nonetheless, this is not currently the case, because both the United States and Canada are actively engaged in these proceedings initiated by the European Communities to determine whether the measure found to be inconsistent with a covered agreement in *EC – Hormones* has been removed within the meaning of Article 22.8."[42]

1.5.3 Relationship to general international law

29. In *EC – Commercial Vessels*, the Panel concluded that even measures not involving a suspension of WTO concessions or other obligations may be covered by Article 23.1. In the course of its analysis, the Panel said the following:

> "While the Panel realizes that in a number of WTO dispute settlement and arbitration cases reference has been made to the public international law concepts invoked by the European Communities, the Panel can see no basis for using these concepts to read into Article 23.1 a limitation that is unsupported by an interpretation based on its text, context and object and purpose."[43]

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[42] Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 375, 378, and 384.
[43] Panel Report, *EC – Commercial Vessels*, para. 7.205.