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1 ARTICLE 3

1.1 Text of Article 3

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.
2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.
3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.
4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.
5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.
6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.
7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.
8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.
9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-

making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.²

(*footnote original*)² This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

1.2 Article 3.1

1. In *US – 1916 Act*, the Appellate Body found that legislation may be challenged "as such", and not merely as applied, in WTO dispute settlement proceedings. In support of this conclusion, the Appellate Body referred to GATT practice and Article 3.1 of the DSU:

"Thus, that a Contracting Party could challenge legislation as such before a panel was well-settled under the GATT 1947. We consider that the case law articulating and applying this practice forms part of the GATT *acquis* which, under Article XVI:1 of the *WTO Agreement*, provides guidance to the WTO and, therefore, to panels and the Appellate Body. Furthermore, in Article 3.1 of the DSU, Members affirm 'their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947'."¹

1.3 Article 3.2

1.3.1 "security and predictability"

1.3.1.1 General

2. Panels and the Appellate Body have referred to the principle of "security and predictability" in numerous cases, and in the context of a variety of issues.

3. In *Japan – Alcoholic Beverages II*, the Appellate Body examined whether the Japanese tax measure governing the taxation of alcoholic beverages violated Article III:2 of GATT 1994. After concurring with the Panel's finding that the Liquor Tax Law was not in compliance with Article III:2, the Appellate Body made the following general statement about WTO rules and the concept of "security and predictability":

¹ Appellate Body Report, *US – 1916 Act*, para. 61.

"WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."²

4. In *EC – Computer Equipment*, the Appellate Body referred to "security and predictability" as an object and purpose of the WTO Agreement generally, stating that "the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade" is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."³

5. In *US – Section 301 Trade Act*, the Panel examined the European Communities' argument that Section 301 was inconsistent with Article 23 of the DSU as well as various articles of GATT 1994. In its examination, the Panel discussed the importance of the concept of "security and predictability" and stated:

"Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself."⁴

6. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body considered that excluding claims against legislation "as such" would frustrate the objective of security and predictability:

"In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."⁵

7. In *US – Stainless Steel (Mexico)*, the Appellate Body concluded that ensuring security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.⁶

² Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 31.

³ Appellate Body Report, *EC – Computer Equipment*, para. 82.

⁴ Panel Report, *US – Section 301 Trade Act*, para. 7.75.

⁵ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

⁶ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

8. The Panel in *US – Pipes and Tubes (Turkey)* rejected the United States' argument that Türkiye, the complainant, could not establish a *prima facie* case on the basis of the Appellate Body's interpretation in a previous dispute:

"We reject the United States' argument that Turkey cannot establish a *prima facie* case by referring to the Appellate Body's interpretation in a previous dispute. A panel's task is to ascertain and apply the relevant law to the facts and evidence before it in making an objective assessment of the matter as required under Article 11 of the DSU. Turkey requests us to follow the Appellate Body's interpretation of Article 15.3 in *US – Carbon Steel (India)* in resolving its claim. We recall that panels may take into account the reasoning followed in prior adopted panel and Appellate Body reports when resolving similar legal issues. In this respect, we note that the panel and the Appellate Body in *US – Carbon Steel (India)* were confronted with the same interpretative issue that is pending before this Panel: whether Article 15.3 of the SCM Agreement permits the cumulation of subsidized and non-subsidized imports in the assessment of injury in original countervailing duty investigations. We therefore find it appropriate to consider Turkey's reliance on the Appellate Body's interpretation of Article 15.3 of the SCM Agreement in our objective assessment of Turkey's claim in this dispute."⁷

9. In *US – Continued Suspension / Canada – Continued Suspension*, the Appellate Body stated that:

"Requiring termination of the suspension of concessions simply because a Member declares that it has removed the inconsistent measure, without a multilateral determination that substantive compliance has indeed been achieved, would undermine the important function of the suspension of concessions in inducing compliance. This would significantly weaken the effectiveness of the WTO dispute settlement system and its ability to provide security and predictability to the multilateral trading system."⁸

10. In the same case, the Appellate Body also observed that:

"[W]ithout a proper identification of the time at which the continued suspension of concessions would be found to constitute a unilateral determination inconsistent with the DSU, WTO Members would be unsure as to when or for how long they could properly rely on a DSB authorization to suspend concessions. Such an outcome is contrary to the DSU's objective of providing security and predictability."⁹

11. In *China – Publications and Audiovisual Products*, the Appellate Body indicated that the use of *arguendo* assumptions by panels could be at odds with the objective "promoting security and predictability":

"We observe that reliance upon an assumption *arguendo* is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law. In doing so, panels and the Appellate Body are not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for

⁷ Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.285.

⁸ Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 381.

⁹ Appellate Body Reports, *US – Continued Suspension / Canada – Continued Suspension*, para. 404.

resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."¹⁰

12. In that case, the Appellate Body concluded that it was not appropriate to proceed on the basis of an *arguendo* assumption on the question of whether the defence in Article XX(a) of the GATT 1994 could be invoked in respect of paragraph 5.1 of China's Accession Protocol:

"In our view, assuming *arguendo* that China can invoke Article XX(a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations."¹¹

13. The Panel in *US – Differential Pricing Methodology* pointed out that it found cogent reasons to depart from previous panel and Appellate Body findings on the same legal issue:

"We are aware that our conclusions in this Report differ from those of the panel and the Appellate Body in *US – Washing Machines* as well as the panel in *US – Anti-Dumping Methodologies (China)*. This is the result of our objective assessment of the facts of this case, and the applicability of, and conformity with, the relevant covered agreements. We have carefully considered these reports of the panels and the Appellate Body, and found convincing or cogent reasons to arrive at conclusions different from those of the Appellate Body in *US – Washing Machines* as well as the panels in *US – Washing Machines* and *US – Anti-Dumping Methodologies (China)*."¹²

1.3.1.2 Use of same terminology to describe same requirements

14. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* pointed to the importance of using the same terminology to describe the same legal requirements, and added that this would further the objective of providing security and predictability to the multilateral trading system:

"The Panel recalls and fully agrees with the observation made by the Philippines, when describing the standard of review under the CVA in the context of the first recourse to Article 21.5, that 'the use of the same terminology to describe the same legal requirements is essential to promoting the objectives of security and predictability', and that 'when different panels use different terminology to describe the same requirements, in particular within a single dispute, the divergence of terminology undermines those objectives, and creates confusion'.¹³ The Panel therefore considers that insofar as it is confronted with a legal issue that was already considered in the Panel Report in the first recourse to Article 21.5, and insofar as it sees no compelling reason to deviate from a prior interpretation, the Panel may employ the technique of incorporation by reference to avoid repetition and improve the readability of this Report."¹⁴

1.3.1.3 Relationship with Article 12.7

15. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body connected the duty to provide reasons in Article 12.7 with the objective of security and predictability in Article 3.2:

"Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement

¹⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213.

¹¹ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215.

¹² Panel Report, *US – Differential Pricing Methodology*, para. 7.107.

¹³ Philippines' response to Panel question No. 4, para. 60.

¹⁴ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.21.

to provide "basic" reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements."¹⁵

16. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that the Panel erred by "refusing to undertake a more comprehensive analysis of the legal issue of how the DSB is to initiate an Annex V procedure", which "deprived Members of the benefit of a 'a clear enunciation of the relevant WTO law' and failed to advance a key objective of WTO dispute settlement, namely, the resolution of disputes 'in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law'".¹⁶

1.3.2 "clarify the existing provisions"

17. In *US – Wool Shirts and Blouses*, the Appellate Body examined whether a complaining party is entitled to a finding on each of the legal claims it makes to a panel. The Appellate Body stated:

"Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."¹⁷

18. In *US – Stainless Steel (Mexico)*, the Appellate Body found that failure by the Panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. The Appellate Body added that:

"Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case."¹⁸

1.3.3 "customary rules of interpretation of public international law"

1.3.3.1 Meaning of "customary rules of interpretation of public international law"

19. The Appellate Body in *US – Gasoline* stated that the "general rule of interpretation" contained in Article 31 of the Vienna Convention has attained the status of "customary or general international law":

"The 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law.¹⁹ As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General*

¹⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

¹⁶ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 500.

¹⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

¹⁸ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

¹⁹ (footnote original) See, e.g., *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports p. 6 (International Court of Justice); *Golder v. United Kingdom*, ECHR, Series A, (1995) no. 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases*, (1986) 70 International Law Reports 449 (Inter-American Court of Human Rights); Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours 1, p. 42; D. Carreau, *Droit International* (3^e ed., 1991) p. 140; Oppenheim's International Law (9th ed., Jennings and Watts, eds. 1992) Vol. 1, pp. 1271-1275.

Agreement and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*'). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law."²⁰

20. In *Japan – Alcoholic Beverages II*, the Appellate Body confirmed that Article 32 of the Vienna Convention has also attained the status of a rule of "customary or general international law":

"Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the *WTO Agreement* 'in accordance with customary rules of interpretation of public international law'. Following this mandate, in *United States – Standards for Reformulated and Conventional Gasoline*, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation 'has attained the status of a rule of customary or general international law'. There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status."²¹²²

1.3.3.2 Extent to which recourse may be had to principles and concepts of general international law other than "customary rules of interpretation"

21. In *Korea – Procurement*, the Panel stated that the non-violation remedy as it has developed in GATT/WTO jurisprudence should not be viewed in isolation from general principles of customary international law, and that:

"We take note that Article 3.2 of the *DSU* requires that we seek within the context of a particular dispute to clarify the existing provisions of the *WTO* agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the *WTO* Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the *WTO* Members. Such international law applies to the extent that the *WTO* treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered *WTO* agreement that implies differently, we are of the view that the customary rules of international law apply to the *WTO* treaties and to the process of treaty formation under the *WTO*."²³

22. The Panel added that:

"We should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law."²⁴

²⁰ Appellate Body Report, *US – Gasoline*, p. 17.

²¹ (footnote original) See e.g.: Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 *Recueil des Cours* p.1 at 42; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, (1994), I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, (1995), I.C.J. Reports, p. 6 at 18; *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night* (1932), P.C.I.J., Series A/B, No. 50, p. 365 at 380; cf. the *Serbian and Brazilian Loans Cases* (1929), P.C.I.J., Series A, Nos. 20-21, p. 5 at 30; *Constitution of the Maritime Safety Committee of the IMCO* (1960), I.C.J. Reports, p. 150 at 161; *Air Transport Services Agreement Arbitration (United States of America v. France)* (1963), *International Law Reports*, 38, p. 182 at 235-43.

²² Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.

²³ Panel Report, *Korea – Procurement*, para. 7.96.

²⁴ Panel Report, *Korea – Procurement*, fn 753.

23. The Panel in *EC and certain member States – Large Civil Aircraft* considered it unnecessary to resolve the disagreement between the parties on whether the principle of non-retroactivity reflected in Article 28 of the Vienna Convention can only be given effect as a rule of interpretation through Article 31.3(c) of the Vienna Convention, or whether it may be applied as a general principle of international law independently of Article 31.3(c):

"The principle of non-retroactivity embodied in Article 28 of the VCLT has been recognized by the Appellate Body to be a 'general principle of international law' relevant to the interpretation of obligations contained in the WTO Agreements in many disputes. The United States' comment appears to have given rise to a disagreement between the parties as to the basis on which Article 28 of the VCLT may be applied by the Panel. The United States maintains that Article 28 can only be given effect as a rule of interpretation through Article 31.3(c) of the VCLT, while the European Communities appears to consider this approach too narrow and suggests that Article 28 of the VCLT may be given effect as a general principle of international law, independently of Article 31.3(c) of the VCLT. In our view, it is unnecessary to engage in this debate, as neither party disputes that the interpretation of Article 5 of the SCM Agreement should be consistent with the principle of non-retroactivity embodied in Article 28 of the VCLT. We therefore have made revisions ... to clarify that we interpret Article 5 of the SCM Agreement consistently with the principle of non-retroactivity embodied in Article 28 of the VCLT, in accordance with the approach taken by the Appellate Body in prior disputes."²⁵

1.3.3.3 Good faith

1.3.3.3.1 Reasonableness and *abus de droit*

24. In *US – Shrimp*, the Panel stated that it understood prior statements by the Appellate Body regarding the interpretation of the general exceptions in Article XX of the GATT "to be an application of the international law principle according to which international agreements must be applied in good faith, in light of the *pacta sunt servanda* principle". The Panel noted:

"Good faith in the application of treaties is generally considered as a fundamental principle of treaty law. See Article 26 (*Pacta Sunt Servanda*) of the Vienna Convention, which provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' See judgement of the International Court of Justice of 27 August 1952 in the *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, ICJ Report 1952, p. 176, at p. 212, where the Court stated that 'The power of making the valuation [a power granted by the 1906 Act of Algeiras] rests with the customs authorities, but it is a power which must be exercised reasonably and in good faith' (emphasis added)."²⁶

25. In *US – Shrimp*, the Appellate Body held that the chapeau of Article XX of the GATT was "but one expression of good faith" and also reflected the notion of "*abus de droit*":

"The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.' An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional

²⁵ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 6.23.

²⁶ Panel Report, *US – Shrimp*, fn 644.

interpretative guidance, as appropriate, from the general principles of international law."²⁷

26. In *Peru – Agricultural Products*, the Panel referred to the Appellate Body's discussion of *abus de droit* in *US – Shrimp*, and stated that:

"The Appellate Body's approach indicates that a right will be exercised abusively when its assertion unreasonably interferes with the sphere covered by an obligation arising out of a treaty. This would occur when a Member initiates a dispute settlement procedure in a manner contrary to good faith, along the lines described above."²⁸

1.3.3.4 Ordinary meaning

1.3.3.4.1 Text as the foundation of interpretation

27. In *US – Gasoline*, the Appellate Body considered the principle of effective treaty interpretation (*ut res magis valeat quam pereat*)²⁹ as "one of the corollaries of the 'general rule of interpretation' in the *Vienna Convention*". In particular, the Appellate Body stated:

"One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."³⁰

28. In *Japan – Alcoholic Beverages II*, the Appellate Body stressed that "Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretative process: 'interpretation must be based above all upon the text of the treaty'."³¹

29. In *India – Patents (US)*, the Appellate Body emphasized that the principles of treaty interpretation "neither require nor condone" the importation into a treaty of "words that are not there" nor of "concepts that were not intended":

"The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended ... These rules must be respected and applied in interpreting the *TRIPS Agreement* or any other covered agreements ... Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*."³²

²⁷ Appellate Body Report, *US – Shrimp*, para. 158.

²⁸ Panel Report, *Peru – Agricultural Products*, para. 7.95.

²⁹ Appellate Body Report, *Korea – Dairy*, para. 80.

³⁰ Appellate Body Report, *US – Gasoline*, p. 23 (citing *Corfu Channel Case* (1949) *I.C.J. Reports*, p.24 (International Court of Justice); *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* (1994) *I.C.J. Reports*, p. 23 (International Court of Justice); 1966 *Yearbook of the International Law Commission*, Vol. II at 219; *Oppenheim's International Law* (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, *Droit International Public*, 5è ed. (1994) para. 17.2); D. Carreau, *Droit International*, (1994) para. 369).

³¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 11.

³² Appellate Body Report, *India – Patents (US)*, paras. 45-46. See also Appellate Body Report, *India – Quantitative Restrictions*, fn 23, para. 94.

1.3.3.4.2 Grammatical structure of the provision

30. In *US – Origin Marking (Hong Kong, China)*, the Panel noted that the grammatical structure of a sentence is part of the ordinary meaning of the relevant provision of a covered agreement.³³

1.3.3.4.3 Dictionaries

31. Panels and the Appellate Body routinely refer to dictionary definitions (most frequently the *Shorter Oxford English Dictionary*) when interpreting the terms of the WTO agreements. In *China – Publications and Audiovisual Products*, the Appellate Body recalled some of its previous pronouncements pertaining to the use of dictionaries for the purpose of establishing the ordinary meaning of a term:

"The Appellate Body has previously held that, while a panel may start with the dictionary definitions of the terms to be interpreted, in the process of discerning the ordinary meaning, dictionaries alone are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words. Dictionaries are important guides to, but not dispositive of, the meaning of words appearing in treaties. For these reasons, the Appellate Body has cautioned panels against equating the 'ordinary meaning' of a term with the definition provided by dictionaries. Under Article 31 of the *Vienna Convention*, the "ordinary meaning" of treaty terms may be ascertained only in their context and in the light of the object and purpose of the treaty. In this respect, the Appellate Body has explained that interpretation pursuant to the customary rule codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components."³⁴

1.3.3.4.4 Special meaning

32. The Panel in *India – Quantitative Restrictions* explained that:

"We identified the ordinary meaning of the terms which is confirmed by their context and the object and purpose of the WTO Agreement, whereas India's interpretation could be considered rather to support a special meaning (within the meaning of Article 31.4 of the Vienna Convention on the Law of Treaties of 1969 – hereinafter the 'Vienna Convention'), in respect of which it has not proved that there was an agreement of the negotiators."³⁵

33. In *Mexico – Telecoms*, the Panel, in the process of considering the meaning of various telecommunications terms (such as "linking" and "interconnection"), decided that they should be given a "special meaning" within the meaning of Article 31(4) of the Vienna Convention. The Panel concluded that, given that the provision at issue was a technical one that appeared in a specialized service sector, the Panel was "entitled to examine what 'special meaning' it may have in the telecommunications context".³⁶ The Panel stated that "[w]e consider that Article 31(4) includes cases in which the term at issue is a technical one that is in common use in its field, and which the parties can be presumed to have been aware of".³⁷

34. The Panel in *China – Intellectual Property Rights* considered that certain terms should be understood as a composite term when used together, but that this did not amount to saying that they had a "special meaning" in the sense of Article 31(4):

³³ Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.34.

³⁴ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348 (Appellate Body Reports, *US – Gambling*, para. 164; *US – Softwood Lumber IV*, para. 59; *Canada – Aircraft*, para. 153; *EC – Asbestos*, para. 92; *US – Offset Act (Byrd Amendment)*, para. 248; *US – Gambling*, paras. 166-167; and *EC – Chicken Cuts*, para. 176).

³⁵ Panel Report, *India – Quantitative Restrictions*, para. 4.12.

³⁶ Panel Report, *Mexico – Telecoms*, paras. 7.108-7.117, 7.169-7.177.

³⁷ Panel Report, *Mexico – Telecoms*, para. 7.169.

"The Panel observes that the general rule of treaty interpretation in Article 31 of the Vienna Convention refers in paragraph 1 to the ordinary meaning of the terms of the treaty, read in context. Where the terms are a single term, or ordinarily used together, then the treaty interpreter should refer to the ordinary meaning of that single term, or of each term in the particular context of each other. This is a distinct exercise from that in paragraph 4 of Article 31 of the Vienna Convention which requires a 'special meaning' to be given to a term if it is established that the parties so intended. No party to this dispute considers that a 'special meaning' should be given to the phrase 'on a commercial scale', and nor does the Panel."³⁸

35. The Panel in *India – Tariffs on ICT Goods (Japan)* rejected India's argument that "its WTO Schedule should be given a 'special meaning', pursuant to Article 31(4) of the Vienna Convention, because the participants to the ITA 'intended to limit the scope of Attachment A to the HS1996 Nomenclature'". The Panel based its reasoning on the fact that the ITA had not been signed by all WTO members:

"In our view, the reference in this provision to 'the parties' includes *all* parties to a treaty, and not *some* of those parties.³⁹ We note that India's WTO Schedule forms part of the GATT 1994 and the WTO Agreement. The 'parties' to the GATT 1994 and the WTO Agreement include all Members of the WTO. Moreover, India's WTO Schedule governs its tariff obligations with respect to all imports from *all* WTO Members, and not solely the participants in the ITA. We understand that the ITA was not signed by all WTO Members. Since the ITA was agreed to by only some of the Members of the WTO, we do not see how the ITA could signal the intentions of the parties to the WTO Agreement with respect to any of its treaty terms (including the terms set forth in India's WTO Schedule). We therefore consider that the present circumstances do not satisfy the requirements of Article 31(4), since the ITA does not express the intentions of the parties to the WTO Agreement."⁴⁰

1.3.3.4.5 Evolutionary interpretation

36. In *US – Shrimp*, the Appellate Body concluded that the meaning of the term "exhaustible natural resources" in Article XX(g) of the GATT is not confined to non-living (e.g. mineral) resources. In the course of its analysis, the Appellate Body stated:

"From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary.'⁴¹ ...

...

³⁸ Panel Report, *China – Intellectual Property Rights*, para. 7.558.

³⁹ (footnote original) The plain language of Article 31(4) refers to "the parties" and not "some" or "certain" of the parties to the treaty. We also note that Article 41 of the Vienna Convention concerns "[a]greements to modify multilateral treaties between certain of the parties only". We find it meaningful that this provision uses the language in its title of "certain of the parties". The drafters of the Vienna Convention could have used similar language in Article 31(4), but chose not to do so. Furthermore, regarding the content of Article 41, the drafters of the Vienna Convention specifically accounted for a situation where *certain parties* to a treaty wish to modify the treaty as between themselves. This situation is treated distinctly under the Vienna Convention from a situation where the parties to a treaty wish to give a "special meaning" to a term in that treaty. These two provisions should not be conflated. Moreover, the existence of Article 41 suggests that Article 31(4) is not a mechanism through which *some* parties to a treaty can modify the treaty for *all* parties to the treaty.

⁴⁰ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.73.

⁴¹ (footnote original) See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law ... Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an 'exhaustible natural resource' within the meaning of Article XX(g). We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g)."⁴²

37. In *China – Publications and Audiovisual Products*, the Appellate Body rejected China's argument that the Panel should have relied on the meaning of "sound recording" and "distribution" at the time of China's accession to the WTO in 2001. First, the Appellate Body was not persuaded that the meaning of the terms had changed between 2001 and the time of the dispute (which was in 2009). Second, the Appellate Body stated:

"More generally, we consider that the terms used in China's GATS Schedule ('sound recording' and 'distribution') are sufficiently generic that what they apply to may change over time. In this respect, we note that GATS Schedules, like the GATS itself and all WTO agreements, constitute multilateral treaties with continuing obligations that WTO Members entered into for an indefinite period of time, regardless of whether they were original Members or acceded after 1995."⁴³⁴⁴

38. The Panel in *India – Solar Cells* distinguished between permissible and impermissible forms of evolutionary interpretation in interpreting the terms "short supply" in Article XX(j) of the GATT 1994:

"We recall that in *US – Shrimp*, the Appellate Body rejected the view that the terms 'exhaustible natural resources' in Article XX(g) of the GATT 1994 should be interpreted as covering only mineral/non-living natural resources. The Appellate Body noted that, '[t]extually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources.'⁴⁵ The Appellate Body also considered that 'the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary''. We note that textually, Article XX(j) is not limited to situations of short supply arising from war or natural catastrophe. We therefore agree with India that the scope of Article XX(j) is not limited to post-wartime shortages or shortages arising from natural disasters. In our view, it follows from the absence of any textual limitation or qualification that it would cover shortages arising from these or any other causes, insofar as it is a shortage of the kind covered by Article XX(j). We further note that in contrast to Article XI:2(a), which refers to 'essential products', Article XX(j) refers to 'products' without any such qualification. We therefore consider that the terms 'products in general or local short supply' includes not only any situation, but also any product, in respect of which the quantity of available supply, from all sources, does not meet demand. Furthermore, we agree with India insofar as it suggests that the types of measures that are 'essential' to address situations of general or local short supply may need to be seen in the context of contemporary concerns of a country and the international community. For example, we consider that the types of measures that may have existed in 1947 for acquiring or distributing products in short supply may not be the same as the types of measures

⁴² Appellate Body Report, *US – Shrimp*, paras. 130-131.

⁴³ (*footnote original*) We consider such reading of the terms in China's GATS Schedule to be consistent with the approach taken in *US – Shrimp*, where the Appellate Body interpreted the term "exhaustible natural resources" in Article XX(g) of the GATT 1994. (Appellate Body Report, *US – Shrimp*, paras. 129 and 130)

We observe that the International Court of Justice, in *Costa Rica v. Nicaragua*, found that the term "*comercio*" ("commerce"), contained in an 1858 "Treaty of Limits" between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and trade in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods. (International Court of Justice, Judgment, *Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009)

⁴⁴ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 396.

that exist today for achieving the same purpose. In light of the foregoing, we consider that, as the Appellate Body found with respect to the provisions of Article XX(g), the terms 'products in general or local short supply' in Article XX(j) are not static in their 'content or reference', but are 'sufficiently generic that what they apply to may change over time'.

However, we do not consider that the applicable legal standard for what it means to be a 'product in general or local short supply' has changed over time. We consider that, even if a consequence of globalization and trade liberalization were the elimination of all product shortages in the world, such that the factual circumstance for invoking Article XX(j) would no longer exist and the provision would no longer have any sphere of operation, it would not be open to a treaty interpreter to change the applicable legal standard for what it means to be a 'product in general or local short supply' in the name of 'evolutionary interpretation' or ensuring that there would continue to be factual circumstances triggering the application of this provision.⁴⁶⁴⁷

1.3.3.5 Context – Article 31(1)

1.3.3.5.1 Harmonious interpretation

39. In *Korea – Dairy*, the Appellate Body emphasized the general principle that the provisions of a treaty should be interpreted harmoniously, with reference to various international legal materials:

"In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."⁴⁸

40. The Panel in *US – Section 110(5) Copyright Act* stated that:

"Reading treaty terms in their context requires that the text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part. (Cf. Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed.), Manchester (1984), p. 127.). See also: Competence of Assembly regarding admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8; Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, p. 69; Polish Postal Service in Danzig, P.I.C.J. Series B, No. 11, p. 39. Yasseen notes that "[d]'autres dispositions plus ou moins éloignées risquent d'apporter une exception à la disposition qu'il s'agit d'interpréter ou de poser une condition à la mise en œuvre de cette disposition". See Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, 151 *Recueil des Cours* (1976-III), p. 34."⁴⁹

1.3.3.5.2 Different words, different meanings

41. In *US – Gasoline*, the Appellate Body emphasized that it was necessary to give meaning to the fact that different words are used in the different paragraphs of Article XX of the GATT:

⁴⁶ (footnote original) Sir Gerald Fitzmaurice offered the following observations on the possibility of a treaty provision's "sphere of operation" being narrowed as a consequence of changing factual circumstances: "Treaties not infrequently assume or base themselves on the pre-existence of some fact or right. ... There is no *a priori* necessity for any result other than that, if the fact does actually persist, or the right remain in existence, the treaty will continue to have relevance and applicability – and if not, not: that is to say, it (or the particular clauses concerned) will to that extent become obsolete or cease to have any useful sphere of operation." G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" *The British Year Book of International Law*, Vol. 33 (1957) 203, at pp. 233-234.

⁴⁷ Panel Report, *India – Solar Cells*, paras. 7.232-7.233.

⁴⁸ Appellate Body Report, *Korea – Dairy*, para. 81.

⁴⁹ Panel Report, *US – Section 110(5) Copyright Act*, fn 49.

"Applying the basic principle of interpretation that the words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, the Appellate Body observes that the Panel Report failed to take adequate account of the words actually used by Article XX in its several paragraphs. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories:

'necessary' - in paragraphs (a), (b) and (d); 'essential' - in paragraph (j);
'relating to' - in paragraphs (c), (e) and (g); 'for the protection of' - in paragraph (f);
'in pursuance of' - in paragraph (h); and 'involving' - in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized."⁵⁰

42. In *EC – Hormones*, the Appellate Body faulted the Panel for failing to give meaning to the use of different terms in different provisions of the SPS Agreement:

"Article 2.2 uses 'based on', while Article 2.4 employs 'conform to'. Article 3.1 requires the Members to 'base' their SPS measures on international standards; however, Article 3.2 speaks of measures which 'conform to' international standards. Article 3.3 once again refers to measures 'based on' international standards. The implication arises that the choice and use of different words in different places in the *SPS Agreement* are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement. Canada has suggested the use of different terms was 'accidental' in this case, but has offered no convincing argument to support its suggestion. We do not believe this suggestion has overturned the inference of deliberate choice."⁵¹

43. In *US – Offset Act (Byrd Amendment)*, the Appellate Body clarified that two provisions that were identical in both wording and structure gave rise to a strong presumption that they contain the same obligation or prohibition:

"As pointed out above, Article 32.1 of the SCM Agreement is identical in terminology and structure to Article 18.1 of the Anti-Dumping Agreement, except for the reference to subsidy instead of dumping. We endorse Canada's contention that '[t]his identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition.'"⁵²

1.3.3.5.3 When having recourse to context is not necessary

44. In *US – Origin Marking (Hong Kong, China)*, having found that the interpretation proposed by the respondent was not supported by the text of Article XXI(b) of the GATT 1994, the Panel did not deem it necessary to test that interpretation against context and the object and purpose of the treaty:

"Our finding that the United States' reading is not supported by the text has important implications for the next steps in our interpretive analysis. As the text of Article XXI(b) does not allow for such an interpretation, there is no need to test that reading against the context and the object and purpose of the treaty. Comporting with the rules of treaty interpretation, neither the context nor the object and purpose of a treaty can

⁵⁰ Appellate Body Report, *US – Gasoline*, pp. 17-18.

⁵¹ Appellate Body Report, *EC – Hormones*, para. 164 (citing Appellate Body Report, *United States – Underwear*, p. 17).

⁵² Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 268.

validate an interpretation that is not supported by the ordinary meaning of the treaty terms and override another interpretation that *does* result from those treaty terms."⁵³

1.3.3.6 Context – Agreements and instruments under Article 31(2)

1.3.3.6.1 General

45. In *US – Gambling*, the Appellate Body found that the Panel erred in categorizing certain documents prepared by the GATT Secretariat in connection with the negotiation of the Members' GATT Schedules ("W/120" and the "1993 Scheduling Guidelines") qualified as "agreements" within the meaning of Article 31(2)(a):

"We note that Article 31(2) refers to the *agreement* or *acceptance* of the parties. In this case, both W/120 and the 1993 Scheduling Guidelines were drafted by the GATT Secretariat rather than the parties to the negotiations. It may be true that, on its own, authorship by a delegated body would not preclude specific documents from falling within the scope of Article 31(2). However, we are not persuaded that in this case the Panel could find W/120 and the 1993 Scheduling Guidelines to be context. Such documents can be characterized as context only where there is sufficient evidence of their constituting an 'agreement relating to the treaty' between the parties or of their 'accept[ance by the parties] as an instrument related to the treaty'.

We do not accept, as the Panel appears to have done, that, simply by requesting the preparation and circulation of these documents and using them in preparing their offers, the parties in the negotiations have accepted them as agreements or instruments related to the treaty. Indeed, there are indications to the contrary. As the United States pointed out before the Panel, the United States and several other parties to the negotiations clearly stated, at the time W/120 was proposed, that, although Members were encouraged to follow the broad structure of W/120, it was never meant to bind Members to the CPC definitions, nor to any other 'specific nomenclature', and that 'the composition of the list was not a matter for negotiations'. Similarly, the Explanatory Note that prefaces the Scheduling Guidelines itself appears to contradict the Panel in this regard, as it expressly provides that, although it is intended to assist 'persons responsible for scheduling commitments', that assistance 'should not be considered as an authoritative legal interpretation of the GATS.'"⁵⁴

46. In *EC – Chicken Cuts*, the Panel referred to several authorities regarding the principles underlying Article 31(2):

"Regarding other agreements or instruments that may qualify under Article 31(2), the International Law Commission stated that:

'[T]he principle on which [Article 31(2)] is based is that a unilateral document cannot be regarded as forming part of the context ... *unless not only was it made in connexion with the conclusion of the treaty, but its relation to the treaty was accepted in the same manner by the other parties.* ... What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty.' (emphasis added)

Further, a leading international law commentator suggests that, in order to be related to the treaty, and thus be part of the 'context' as opposed to the negotiating history, which is dealt with in Article 32 of the Vienna Convention, an instrument 'must be concerned with the substance of the treaty and clarify certain concepts in the treaty or

⁵³ Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.90.

⁵⁴ Appellate Body Report, *US – Gambling*, paras. 175-176.

limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty."⁵⁵

1.3.3.6.2 Agreements under Article 31(2)(a)

47. In *US – Section 110(5) Copyright Act*, the Panel found that an "agreement" within the meaning of Article 31(2)(a) had been in connection with the Berne Convention, through an agreed statement made by a Rapporteur-General reflected in a general report formally adopted by the parties to that treaty. The Panel noted that this was not merely a statement made by a chair of a drafting group in his or her personal capacity:

"When ascertaining the legal status of the minor exceptions doctrine, it is important to note that the General Report states that the Rapporteur-General had been '*entrusted with making an express mention* of the possibility available to national legislation to make what is commonly called minor reservations'.⁵⁶ We believe that the choice of these words reflects an agreement within the meaning of Article 31(2)(a) of the Vienna Convention between the Berne Union members at the Brussels Conference to retain the possibility of providing minor exceptions in national law. We arrive at this conclusion for the following reasons. First, the introduction of Articles 11*bis*(1)(iii) and 11(1)(ii) occurred simultaneously with the adoption of the General Report expressly mentioning the minor exceptions doctrine. Second, this doctrine is closely related to the substance of the amendment of the Berne Convention in that it limits the scope of the exclusive rights introduced by Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention. Third, an 'agreement' between all the parties exists because, on the one hand, the Rapporteur-General is being 'entrusted to expressly mention' minor exceptions and, on the other hand, the General Report of the Brussels Conference reflecting this express mentioning was formally adopted by the Berne Union members. We therefore conclude that an agreement within the meaning of Article 31(2)(a) of the Vienna Convention between all the parties on the possibility to provide minor exceptions was made in connection with the conclusion of a revision of the Convention introducing additional exclusive rights, including those contained in Articles 11*bis*(1)(iii) and 11(1)(ii), to which these limitations were to apply, and that this agreement is relevant as context for interpreting these Articles."⁵⁷

48. In *EC – Chicken Cuts*, the Appellate Body found that the consensus among Members to use the Harmonized System of tariff nomenclature as the basis for their WTO Schedules constitutes an "agreement" within the meaning of Article 31(2)(a) of the Vienna Convention. More precisely, the Appellate Body established that the Harmonized System serves as "context" under Article 31(2)(a) for the purpose of interpreting Member's Schedules based on a "close link" between the Harmonized System and those Schedules, and "broad consensus" among GATT Contracting Parties to use the Harmonized System when preparing their Schedules. The Appellate Body stated:

"We note that, in 1983, the GATT Contracting Parties took a Decision setting out guidelines and 'special procedures' to facilitate the 'wide adoption of the Harmonized System'; later, in 1991, they took a Decision on Procedures to Implement Changes in the Harmonized System. The close link between the Harmonized System and the WTO agreements is also clear. A number of WTO agreements that resulted from the Uruguay Round negotiations use the Harmonized System for specific purposes; the *Agreement on Rules of Origin* (in Article 9), the *Agreement on Subsidies and Countervailing Measures* (in Article 27), and the *Agreement on Textiles and Clothing* (in Article 2 and the Annex thereto) refer to the Harmonized System for purposes of defining product coverage of the agreement or the products subject to particular provisions of the agreement.

⁵⁵ Panel Report, *EC – Chicken Cuts (Brazil)*, paras. 7.153-7.154 (citing Yearbook of the International Law Commission, 1966, Vol. II, p. 221, para. 13; Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984), p. 129).

⁵⁶ (footnote original) This is not merely a statement by a chair of a drafting group made in his/her personal capacity.

⁵⁷ Panel Report, *US – Section 110(5) Copyright Act*, para. 6.53.

This close link to the Harmonized System is particularly true for agricultural products. Annex 1 to the *Agreement on Agriculture*, which forms an integral part of that Agreement, defines the product coverage of that Agreement by reference to headings of the Harmonized System, both at the level of whole chapters and at the four-digit level in respect of specific products. Moreover, it is undisputed that the Uruguay Round tariff negotiations for agricultural products were held on the basis of the Harmonized System and that all WTO Members have followed the Harmonized System in their Schedules to the GATT 1994 with respect to agricultural products.

The above circumstances confirm that, prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to use the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an 'agreement' between WTO Members 'relating to' the *WTO Agreement* that was 'made in connection with the conclusion of' that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is 'context' under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules."⁵⁸

49. The Panel in *India – Tariffs on ICT Goods (Japan)* stated that "the relevance of the HS depends on the specific interpretative question at issue (including whether the relevant concessions were based on the HS)".⁵⁹

1.3.3.6.3 Instruments under Article 31(2)(b)

50. In *EC – Chicken Cuts*, the Panel stated that the outcome of its interpretative exercise would not be affected depending on whether the Harmonized System of tariff nomenclature was classified as an agreement under Article 31(2)(a) or, instead, as an instrument under Article 31(2)(b):

"We do not consider that the outcome of the interpretative exercise we are undertaking with respect to heading 02.10 of the EC Schedule will be affected depending upon whether we classify the HS as 'context' under Article 31(2)(b) of the *Vienna Convention* as submitted by Brazil, or as 'context' under Article 31(1) as submitted by Thailand, or as a 'relevant rule of international law' under Article 31(3)(c) as submitted by Thailand and the European Communities. Therefore, we will treat the HS as if it qualifies as 'context' under Article 31(2), recalling that the Appellate Body in *EC – Computer Equipment* indicated that the HS should be taken into consideration for the interpretation of a Member's schedule."⁶⁰

51. In *EC – IT Products*, the Panel concluded that the Information Technology Agreement, an agreement among a subset of WTO Members to modify their individual Schedules (which are integral parts of the WTO agreements), qualifies as an Article 31(2)(b) "instrument" for the purpose of interpreting those Schedules. The Panel began by stating:

"Setting aside for the moment whether the ITA is a treaty or not, Article 31(2) recognizes that both 'agreements' and 'instruments' may qualify as context as long as they meet certain conditions. The Vienna Convention refers to the concepts of 'agreement' and 'instrument' within the definition of 'treaty' above.⁶¹ The statement by the International Law Commission above implies that a qualifying 'instrument' may even be a unilateral 'document' so long as it complies with the additional requirements in Article 31(2)(b) that it was 'made in connection with the conclusion of the treaty', and 'its relation to the treaty was accepted in the same manner by the other parties'. In light of this, it is useful to consider whether the ITA is concerned with the

⁵⁸ Appellate Body Report, *EC – Chicken Cuts*, para. 197-199.

⁵⁹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.65.

⁶⁰ Panel Report, *EC – Chicken Cuts (Brazil)*, para. 7.189.

⁶¹ (footnote original) Specifically, the definition in Article 2(1) seems to imply that an "agreement" may itself be composed of one or more "instruments".

substance of the treaty, clarifies concepts in the *WTO Agreement*, or otherwise limits its field of application, and the extent to which it was drawn up on the occasion of the conclusion of the treaty."⁶²

52. The Panel in *EC – IT Products* explained why the ITA qualified as an "instrument" within the meaning of Article 31(2)(b):

"At a minimum, the ITA qualifies as an 'instrument' for the purposes of Article 31(2)(b). The ITA was proposed, drafted and agreed to by a subset of WTO Members and states or separate customs territories in the process of acceding to the WTO. ITA participants in turn modified their WTO Schedules, which themselves form part of the WTO Agreement, following the conclusion and signing of the ITA. In this sense, the parties recognized the ITA as an 'instrument' as we understand that term."⁶³

53. In *EC – IT Products*, the Panel concluded that the ITA had been "made by one or more parties in connection with the conclusion of the treaty" within the meaning of Article 31(2)(b):

"The ITA also represents an instrument 'made by one or more parties in connection with the conclusion of the treaty', where the term 'parties' refers to WTO Members. The ITA (formally the Ministerial Declaration on Trade in Information Technology Products) was agreed upon on 13 December 1996 by 15 WTO Members (counting the then 15 EC member States as one), as well as States or separate customs territories in the process of acceding to the WTO. Pursuant to the provisions in the ITA, participants modified their schedules of concessions, which themselves form part of the *WTO Agreement*. Because the original ITA participants expressly agreed to a process for incorporating ITA-related concessions into their WTO Schedules, the Panel considers that the ITA was clearly made 'in connection with the conclusion of the treaty', as the WTO Members amended their Schedules (which form part of the WTO Agreement) in order to give effect to the ITA."⁶⁴

54. The Panel in *EC – IT Products* also found that the ITA met the requirement of having been accepted by the other parties as an instrument related to the treaty:

"The ITA also meets the requirement of having being 'accepted by the other parties as an instrument related to the treaty.' At least three elements demonstrate this. First, the ITA was recognized under paragraph 18 of the Singapore Ministerial Declaration of 13 December 1996 which was adopted by *all* WTO Members:

'Taking note that a number of Members have agreed on a Declaration on Trade in Information Technology Products, *we welcome* the initiative taken by a number of WTO Members and other States or separate customs territories which have applied to accede to the WTO, who have agreed to tariff elimination for trade in information technology products on an MFN basis ...' (emphasis added)

This express reference to the ITA in a WTO Ministerial Declaration adopted by consensus by all WTO Members constitutes, in our view, acceptance by WTO Members that the ITA is an instrument related to the *WTO Agreement*."⁶⁵

55. The Panel in *EC – IT Products* went on to identify two more reasons supporting its view:

"Second, following the ministerial declaration, ITA participants modified their WTO Schedules of concessions to reflect commitments undertaken pursuant to the ITA. No objections were raised by other WTO Members within the three-month period

⁶² Panel Report, *EC – IT Products*, paras. 7.376-377 (citing Panel Report on *EC – Chicken Cuts*, para. 7.154; Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984), p. 129).

⁶³ Panel Report, *EC – IT Products*, para. 377.

⁶⁴ Panel Report, *EC – IT Products*, para. 7.378.

⁶⁵ Panel Report, *EC – IT Products*, paras. 7.379-7.380.

provided for such purpose to the ITA-related modifications that were proposed by the European Communities and these were, therefore, certified by the Director General of the WTO in document WT/Let/156.

Third, the EC headnote of the Annex to the EC Schedule, which forms part of the *WTO Agreement*, makes express reference to the ITA, further suggesting that the ITA is related to the *WTO Agreement*.⁶⁶

56. The Panel in *India – Tariffs on ICT Goods (Japan)* refused to treat the ITA as context to its Schedules of concessions pursuant to Article 31(2)(b) of the Vienna Convention:

"Finally, we note India's argument that the ITA 'qualifies as context to Schedule[s] of Concessions under Article 31(2)(b) of the Vienna Convention and is therefore relevant for interpreting the tariff concessions at issue in this dispute'. In our view, however, India is not relying on the ITA as context to interpret its WTO Schedule but rather is seeking to replace the content of that WTO Schedule with the content of the ITA. The application of Articles II:1(a) and (b) of the GATT 1994 entails the application of Members' obligations as contained in their WTO Schedules, not the ITA. Those legal instruments are not the same and, for the reasons articulated above, we do not consider that the existence of the ITA replaces or modifies the content of India's WTO Schedule, or calls for a specific interpretative approach to certain tariff commitments contained in that Schedule. We also recall that the relevance of contextual aids to interpreting Members' Schedules can vary depending on the interpretative question at issue.

We understand that India relies on the ITA as context to interpret its WTO Schedule specifically to show that the concessions set forth in its WTO Schedule cover products that were not covered by the ITA. In our view, to the extent that a product is, on its face, covered by India's WTO Schedule, that legal obligation would not be changed merely because that product is not covered by the ITA. Since India's arguments invoking the ITA as 'context' for purposes of interpreting its Schedule are focused on replacing the content of the WTO Schedule with the content of the ITA (rather than on interpreting tariff commitments in that Schedule using the ITA as context), and since any differences in scope would not modify the scope of India's WTO Schedule, we do not consider it necessary to further take into account the ITA as 'context' for purposes of determining the scope of India's tariff commitments as set forth in its WTO Schedule."⁶⁷

1.3.3.7 Object and purpose

57. In *Japan – Alcoholic Beverages II*, the Appellate Body stated that the object and purpose of a treaty are to be taken into account in determining the meaning of its provisions, and then noted:

"That is, the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation: Harris, Cases and Materials on International Law (4th ed., 1991) p. 770; Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978-I) 159 Recueil des Cours p. 1 at 44; Sinclair, *The Vienna Convention and the Law of Treaties* (2nd ed, 1984), p. 130. See e.g. Oppenheims' International Law (9th ed., Jennings and Watts, eds., 1992) Vol. I, p.1273; *Competence of the ILO to Regulate the Personal Work of the Employer* (1926), P.C.I.J., Series B, No. 13, p. 6 at 18; *International Status of South West Africa* (1962), I.C.J. Reports, p. 128 at 336; *Re Competence of Conciliation Commission* (1955), 22 International Law Reports, p. 867 at 871."⁶⁸

⁶⁶ Panel Report, *EC – IT Products*, paras. 7.381-7.382.

⁶⁷ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.79-7.80.

⁶⁸ Appellate Body Report, *Japan – Alcoholic Beverages II*, fn 20.

58. In *US – Shrimp*, the Appellate Body stated that the object and purpose of a treaty may shed useful light on the meaning of a provision when the meaning imparted by the text itself is equivocal or inconclusive:

"A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."⁶⁹

59. In *Canada – Aircraft*, the Panel noted that the SCM Agreement does not contain any express statement of its object and purpose, and stated that "[w]e therefore consider it unwise to attach undue importance to arguments concerning the object and purpose of the SCM Agreement".⁷⁰

60. In *EC – Chicken Cuts*, the Appellate Body discussed the relationship between the object and purpose of particular provisions and that of the treaty as a whole:

"It is well accepted that the use of the singular word 'its' preceding the term 'object and purpose' in Article 31(1) of the *Vienna Convention* indicates that the term refers to the treaty as a whole; had the term 'object and purpose' been preceded by the word 'their', the use of the plural would have indicated a reference to particular 'treaty terms'. Thus, the term 'its object and purpose' makes it clear that the starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety. At the same time, we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the 'object and purpose of a treaty provision', it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component."⁷¹

However, the Appellate Body in *EC – Chicken Cuts* cautioned against evaluating the "object and purpose" of specific provisions of a treaty in isolation from the treaty in its entirety:

"Having said this, we caution against interpreting WTO law in the light of the purported 'object and purpose' of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole. Even if, *arguendo*, one could rely on the specific 'object and purpose' of heading 02.10 of the EC Schedule in isolation, we would share the Panel's view that 'one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis' for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the *Vienna Convention* must focus on ascertaining the common intentions of the parties."⁷²

61. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel observed:

"In their discussions of the object and purpose of the SCM Agreement, including in respect of predictability and certainty, the Appellate Body and various panels have emphasized the importance of avoiding overly-narrow interpretations of the Agreement that would create loopholes by which Members could largely, if not

⁶⁹ Appellate Body Report, *US – Shrimp*, para. 114.

⁷⁰ Panel Report, *Canada – Aircraft*, para. 9.119.

⁷¹ Appellate Body Report, *EC – Chicken Cuts*, para. 238 (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed.), Manchester (1984), pp. 130-135; Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47).

⁷² Appellate Body Report, *EC – Chicken Cuts*, para. 239 (citing Appellate Body Report, *EC – Computer Equipment*, para. 84; citing Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed.), Manchester (1984), pp. 130-131).

entirely, escape the reach of these disciplines. For example, the Appellate Body stated in *US – Softwood Lumber IV* that:

'It is in furtherance of [the Agreement's] object and purpose [of strengthening GATT disciplines] that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money'.

Similarly, the panel in *US – FSC (Article 21.5 – EC)* stated that:

'[I]t is evident that the interpretation [of 'revenue foregone'] advanced by the United States would be irreconcilable with th[e] object and purpose [of disciplining trade distorting subsidies in a way that provides security to Members], given that it would offer governments '*carte-blanche*' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability. In short, such an approach would eviscerate the subsidies disciplines in the SCM Agreement'. (emphasis original)

In keeping with this object and purpose, we consider it important to read Article 1.1(a)(1) in a manner that does not allow avoidance of the SCM Agreement's disciplines by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities."⁷³

1.3.3.8 Subsequent agreements

62. In *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, the Appellate Body discussed the relationship between Article 31(3)(a) and Article IX:2 of the WTO Agreement, which governs the adoption of interpretations of the WTO agreements by the WTO Ministerial Conference:

"Multilateral interpretations of provisions of WTO law are the next method identified above. Article IX:2 of the *WTO Agreement* sets out specific requirements for decisions that may be taken by the Ministerial Conference or the General Council to adopt interpretations of provisions of the Multilateral Trade Agreements. Such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content. Article IX:2 emphasizes that such interpretations 'shall not be used in a manner that would undermine the amendment provisions in Article X'. A multilateral interpretation should also be distinguished from a waiver, which allows a Member to depart from an existing WTO obligation for a limited period of time. We consider that a multilateral interpretation pursuant to Article IX:2 of the *WTO Agreement* can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the *Vienna Convention*, as far as the interpretation of the WTO agreements is concerned."⁷⁴

63. The Appellate Body provided further guidance on Article 31(3)(a):

"We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* 'as a further *authentic element of interpretation* to be taken into account together with the context'. In our view, by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are most akin to subsequent agreements within

⁷³ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 8.75-8.76 (citing Appellate Body Report, *US – Softwood Lumber IV*, para. 64; Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.39).

⁷⁴ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 383.

the meaning of Article 31(3)(a) of the *Vienna Convention*, but not waivers adopted pursuant to Articles IX:3 and 4 of the *WTO Agreement*.

... In our view, the term 'application' in Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be 'applied'; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation and are to expire. We find the Panel's conclusion that the Doha Article I Waiver extended the duration of the tariff quota concession beyond 31 December 2002, and thereby modified or changed the content of the European Communities' Schedule, difficult to reconcile with its conclusion that the Waiver should be considered an agreement on the *application* of existing commitments contained in that Schedule. As such, we do not consider that the Doha Article I Waiver could be regarded as an agreement on the application of the tariff quota concession in the European Communities' Schedule within the meaning of Article 31(3)(a) of the *Vienna Convention*.⁷⁵

64. In *US – Clove Cigarettes*, the Appellate Body upheld the Panel's finding that by allowing only three months between the publication and the entry into force of the technical regulation at issue, the United States acted inconsistently with Article 2.12 of the TBT Agreement, which, when interpreted in the context of Paragraph 5.2 of the "Doha Ministerial Decision on Implementation-Related Issues and Concerns", requires a minimum of six months between the publication and the entry into force of a technical regulation.⁷⁶ In reaching this conclusion, the Appellate Body found that in the absence of evidence of the existence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement, Paragraph 5.2 of the Doha Ministerial Decision did not constitute a multilateral interpretation adopted pursuant to the requirements of Article IX:2 of the WTO Agreement. However, the Appellate Body agreed with the Panel that Paragraph 5.2 of the Doha Ministerial Decision nonetheless constitutes a "subsequent agreement between the parties" within the meaning of Article 31(3)(a). In the course of its analysis, the Appellate Body discussed the elements of Article 31(3)(a). In this context, the Appellate Body identified two elements required to demonstrate that an agreement is a subsequent agreement within the meaning of Article 31(3)(a):

"Based on the text of Article 31(3)(a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.

With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO. Thus, it is beyond dispute that paragraph 5.2 of the Doha Ministerial Decision was adopted subsequent to the relevant WTO agreement at issue, the *TBT Agreement*. With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.

We recall that paragraph 5.2 of the Doha Ministerial Decision provides:

'Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase 'reasonable interval' shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.'⁷⁷

⁷⁵ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, paras. 390-391.

⁷⁶ Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

⁷⁷ Appellate Body Report, *US – Clove Cigarettes*, paras. 262-264.

65. The Appellate Body in *US – Clove Cigarettes* then turned to the second element, i.e. whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*:

"In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. The Appellate Body observed that the International Law Commission (the 'ILC') describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as 'a further *authentic element of interpretation* to be taken into account together with the context'. According to the Appellate Body, 'by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty*.' Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.

Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term 'reasonable interval' in Article 2.12 of the *TBT Agreement* and defines this interval as 'normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued' by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 *other than* to interpret the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. We consider, therefore, that paragraph 5.2 *bears specifically* upon the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an 'agreement' among Members—within the meaning of Article 31(3)(a) of the *Vienna Convention*—on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*.

We note that the text of Article 31(3)(a) of the *Vienna Convention* does not establish a requirement as to the form which a 'subsequent agreement between the parties' should take. We consider, therefore, that the term 'agreement' in Article 31(3)(a) of the *Vienna Convention* refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the *Vienna Convention* provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement* is expressed by terms—'*shall be understood to mean*'—that cannot be considered as merely hortatory."⁷⁸

66. For the foregoing reasons, in *US – Clove Cigarettes* the Appellate Body upheld the Panel's finding that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a), on the interpretation of the term 'reasonable interval' in Article 2.12 of the *TBT Agreement*. Based on that characterization, the Appellate Body then stated:

"We observe that, in its commentaries on the *Draft articles on the Law of Treaties*, the ILC states that a subsequent agreement between the parties within the meaning of Article 31(3)(a) 'must be read into the treaty for purposes of its interpretation'. As we see it, while the terms of paragraph 5.2 must be 'read into' Article 2.12 for the purpose of interpreting that provision, this does not mean that the terms of paragraph 5.2 replace or override the terms contained in Article 2.12. Rather, the terms of paragraph 5.2 of the Doha Ministerial Decision constitute an interpretative

⁷⁸ Appellate Body Report, *US – Clove Cigarettes*, paras. 265-267.

clarification to be taken into account in the interpretation of Article 2.12 of the *TBT Agreement*."⁷⁹

67. In *US – Tuna II (Mexico)*, the Appellate Body reversed the Panel's finding that the "dolphin-safe" definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program ("AIDCP") is a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement.⁸⁰ In the context of interpreting the terms "relevant international standard" in Article 2.4, the Appellate Body relied on the definition of "standard" in Annex 1.2 to the TBT Agreement, the definition of "international body or system" in Annex 1.4 to the TBT Agreement, as well as the definitions of "international standard" and "standards body" in ISO/IEC Guide 2: 1991 (which is referenced in Annex 1 to the TBT Agreement). The Appellate Body also relied on the TBT Committee "Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement", which it considered to be a "subsequent agreement between the parties" within the meaning of Article 31(3)(a). In the course of its analysis, the Appellate Body stated:

"Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are to 'clarify' the provisions of the covered agreements 'in accordance with customary rules of interpretation of public international law'. This raises the question on what basis we can take into account the TBT Committee Decision in the interpretation and application of Article 2.4 of the *TBT Agreement*. In particular, the issue is whether the Decision can qualify as a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties* (the '*Vienna Convention*'). In this respect, we note that the Decision was adopted by the TBT Committee in the context of the Second Triennial Review of the Operation and Implementation of the *TBT Agreement*, which took place in the year 2000. It was thus adopted subsequent to the conclusion of the *TBT Agreement*. We further note that the membership of the TBT Committee comprises all WTO Members and that the Decision was adopted by consensus.

With respect to the question of whether the terms and content of the Decision express an agreement between Members on the interpretation or application of a provision of WTO law, we note that the title of the Decision expressly refers to 'Principles for the Development of International Standards, Guides and Recommendations *with Relation to Articles 2, 5 and Annex 3 of the Agreement*'. We further note that the TBT Committee undertook the activities leading up to the adoption of the Decision '[w]ith a view to developing a better understanding of international standards within the Agreement' and decided to develop the principles contained in the Decision, *inter alia*, 'to ensure the effective application of the Agreement' and to 'clarify and strengthen the concept of international standards under the Agreement'. We therefore consider that the TBT Committee Decision can be considered as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the *Vienna Convention*. The extent to which this Decision will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case, however, will depend on the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision. In the present dispute, we consider that the TBT Committee Decision bears directly on the interpretation of the term 'open' in Annex 1.4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of 'recognized activities in standardization'."⁸¹

68. Drawing guidance from the Appellate Body's findings in *US – Clove Cigarettes*, the Panel in *Australia – Tobacco Plain Packaging* considered the Doha Declaration on the TRIPs Agreement and

⁷⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 269 (citing *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, para. 14).

⁸⁰ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 343-401.

⁸¹ Appellate Body Report, *US – Tuna II (Mexico)*, paras. 371-372 (citing Appellate Body Report, *US – Clove Cigarettes*, para. 265 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 390).

Public Health as "subsequent agreement" within the meaning of Article 31.3(a) of the Vienna Convention, in interpreting the TRIPS Agreement:

"This paragraph of the Doha Declaration may, in our view, be considered to constitute a 'subsequent agreement' of WTO Members within the meaning of Article 31(3)(a) of the Vienna Convention. As the Appellate Body has clarified:

Based on the text of Article 31(3)(a) of the *Vienna Convention*, we consider that a decision adopted by Members may qualify as a 'subsequent agreement between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.

In this instance, the instrument at issue is a 'declaration', rather than a 'decision'. However, the Doha Declaration was adopted by a consensus decision of WTO Members, at the highest level, on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO, subsequent to the adoption of the WTO Agreement, Annex 1C of which comprises the TRIPS Agreement. The terms and contents of the decision adopting the Doha Declaration express, in our view, an agreement between Members on the approach to be followed in interpreting the provisions of the TRIPS Agreement. This agreement, rather than reflecting a particular interpretation of a specific provision of the TRIPS Agreement, confirms the manner in which 'each provision' of the Agreement must be interpreted, and thus 'bears specifically' on the interpretation of each provision of the TRIPS Agreement.

The guidance provided by the Doha Declaration is consistent, as the Declaration itself suggests, with the applicable rules of interpretation, which require a treaty interpreter to take account of the context and object and purpose of the treaty being interpreted, and confirms in our view that Articles 7 and 8 of the TRIPS Agreement provide important context for the interpretation of Article 20."⁸²

69. The Panel in *Australia – Tobacco Plain Packaging* declined to consider a GATT Decision as "subsequent agreement" in the interpretation of Article IX:4 of the GATT 1994:

"The 1958 GATT Decision cannot, in our view, be considered to be a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention, as argued by Australia. The 1958 GATT Decision was not adopted by WTO Members but by GATT CONTRACTING PARTIES, and the 'relevant covered agreement' to be interpreted in the WTO context is not the GATT 1947 but the GATT 1994, which is 'legally distinct' from the GATT 1947."⁸³

70. However, the Panel in *Australia – Tobacco Plain Packaging* took this GATT Decision into account in discerning the terms of Article IX:4, including its scope of application, on the basis that the Decision constituted "guidance" within the meaning of Article XVI:1 of the WTO Agreement:

"We consider it appropriate, however, to take due account of this Decision, to the extent that it may inform our understanding of the terms of Article IX:4, including its scope of application. There are at least two further ways in which GATT 1947 sources may gain legal relevance in the WTO: (i) as 'other decisions of the CONTRACTING PARTIES' incorporated into the GATT 1994 on the basis of its paragraph 1(b)(iv); or (ii) as guidance pursuant to Article XVI:1 of the WTO Agreement. We do not consider the 1958 GATT Decision to have been incorporated into the GATT 1994 under its paragraph 1(b)(iv). However, we consider that it constitutes guidance under Article XVI:1 of the WTO Agreement that is relevant for the interpretive issue before us.

⁸² Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.409-7.411.

⁸³ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.3008.

Article XVI:1 provides that '[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.' While the guidance provided by decisions of the CONTRACTING PARTIES in accordance with Article XVI:1 is not legally binding, it should 'provide[] direction to the WTO' in that 'the WTO 'shall be guided' by that decision'.

One category of GATT instruments covered by Article XVI:1 is 'decisions' of the CONTRACTING PARTIES. The 1958 GATT Decision was adopted by the CONTRACTING PARTIES on 21 November 1958. The second recital of the Recommendation on Marks of Origin contained in this Decision states that the Recommendation's purpose is to 'facilitate the attainment of the objectives of the General Agreement', thus linking the purpose of this Decision, and the Recommendation on Marks of Origin it contains, to the attainment of the objectives of the GATT."⁸⁴

1.3.3.9 Subsequent practice

71. In *Japan – Alcoholic Beverages II*, the Panel found that "panel reports adopted by the CONTRACTING PARTIES constitute subsequent practice in a specific case". The Appellate Body disagreed and, in reversing the Panel's findings on this issue, considered "subsequent practice" to mean a "concordant, common and consistent" sequence of acts:

"Article 31(3)(b) of the *Vienna Convention* states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' is to be 'taken into account together with the context' in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."⁸⁵

72. In *US – Gambling*, the Appellate Body clarified that establishing "subsequent practice" within the meaning of Article 31(3)(b) involves two elements:

"[I]n order for 'practice' within the meaning of Article 31(3)(b) to be established: (i) there must be a common, consistent, discernible pattern of acts or pronouncements; and (ii) those acts or pronouncements must imply agreement on the interpretation of the relevant provision.

We have difficulty accepting Antigua's position that the 2001 Scheduling Guidelines constitute 'subsequent practice' revealing a common understanding that Members' specific commitments are to be construed in accordance with W/120 and the 1993 Scheduling Guidelines. Although the 2001 Guidelines were explicitly adopted by the Council for Trade in Services, this was in the context of the negotiation of *future* commitments and in order to assist in the preparation of offers and requests in respect of such commitments. As such, they do not constitute evidence of Members' understanding regarding the interpretation of *existing* commitments. Furthermore, as the United States emphasized before the Panel, in its Decision adopting the 2001 Guidelines, the Council for Trade in Services explicitly stated that they were to be 'non-binding' and 'shall not modify any rights or obligations of the Members under the GATS'. Accordingly, we do not consider that the 2001 Guidelines, in and of themselves, constitute 'subsequent practice' within the meaning of Article 31(3)(b) of the *Vienna Convention*."⁸⁶

⁸⁴ Panel Reports, *Australia – Tobacco Plain Packaging*, paras. 7.3009-7.3011.

⁸⁵ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 12-13. See also Panel Report, *US – FSC*, para. 7.75 (citing *Yearbook of the International Law Commission*, Vol. II, p. 222; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed.), Manchester (1984), p. 138).

⁸⁶ Appellate Body Report, *US – Gambling*, paras. 192-193.

73. In *EC – Chicken Cuts*, the Appellate Body engaged in an extensive analysis of Article 31(3)(b). The Appellate Body explained that "common" and "concordant" practice does not necessarily require practice by all parties to a treaty:

"We share the Panel's view that not each and every party must have engaged in a particular practice for it to qualify as a 'common' and 'concordant' practice. Nevertheless, practice by some, but not all parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a 'concordant, common and discernible pattern' on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the WTO Agreement. We acknowledge, however, that, if only some WTO Members have actually traded or classified products under a given heading, this circumstance may reduce the availability of such 'acts and pronouncements' for purposes of determining the existence of 'subsequent practice' within the meaning of Article 31(3)(b)."⁸⁷

74. In *EC – Chicken Cuts*, the Appellate Body addressed the question of how to establish agreement of the parties regarding interpretation of a treaty term when certain parties have not engaged in a practice:

"We agree with the Panel that, in general, agreement may be deduced from the affirmative reaction of a treaty party. However, we have misgivings about deducing, without further inquiry, agreement with a practice from a party's 'lack of reaction'. We do not exclude that, in specific situations, the 'lack of reaction' or silence by a particular treaty party may, in the light of attendant circumstances, be understood as acceptance of the practice of other treaty parties. Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it. However, we disagree with the Panel that 'lack of protest' against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members."⁸⁸

75. In *EC – Chicken Cuts*, the Appellate Body rejected the view that Article IX:2 of the WTO Agreement, which provides for the possibility of WTO Members adopting a multilateral interpretation, exhausts the manner in which Members may agree to an interpretation established through subsequent practice:

"To our mind, the existence of Article IX:2 of the *WTO Agreement* is not dispositive for resolving the issue of how to establish the agreement by Members that have not engaged in a practice. We fail to see how the express authorization in the WTO Agreement for Members to adopt interpretations of WTO provisions—which requires a three-quarter majority vote and not a unanimous decision—would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the *Vienna Convention*. In any case, we are mindful that the Appellate Body, in *Japan – Alcoholic Beverages II*, cautioned that relying on 'subsequent practice' for purposes of interpretation must not lead to interference with the 'exclusive authority' of the Ministerial Conference and the General Council to adopt interpretations of WTO agreements that are binding on all Members. In our view, this confirms that 'lack of reaction' should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice."⁸⁹

⁸⁷ Appellate Body Report, *EC – Chicken Cuts*, para. 259.

⁸⁸ Appellate Body Report, *EC – Chicken Cuts*, para. 272.

⁸⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 273.

76. The Panel in *India – Tariffs on ICT Goods (Japan)* refused to treat certain pronouncements that related only to the ITA as subsequent practice with regard to India's GATT Schedule.⁹⁰

1.3.3.10 Relevant rules of international law

77. In *US – Gasoline*, the Appellate Body, without mentioning Article 31(3)(c), stated that Article 3.2 of the DSU, which provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law, "reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law".⁹¹

78. In *EC – Approval and Marketing of Biotech Products*, the disputing parties disagreed on whether the Biosafety Protocol qualified as a relevant rule of international of international law, within the meaning of Article 31(3)(c), to be taken into account for the purpose of interpreting the SPS Agreement. In the light of that disagreement, the Panel conducted a detailed analysis of Article 31(3)(c). In the course of its analysis, the Panel considered the sources of public international law covered by "rules of international law", the meaning of the phrase "applicable in the relations between the parties", what it considered to be the separate issue of having reference to other rules of international law for the purpose of determining the "ordinary meaning" of a term under Article 31(1). The Panel also offered several observations on the function of Article 31(3)(c) more generally. Beginning with the sources of public international law covered by "rules of international law", the Panel rejected a restrictive interpretation of these terms:

"In considering the provisions of Article 31(3)(c), we note, initially, that it refers to 'rules of international law'. Textually, this reference seems sufficiently broad to encompass all generally accepted sources of public international law, that is to say, (i) international conventions (treaties), (ii) international custom (customary international law), and (iii) the recognized general principles of law. In our view, there can be no doubt that treaties and customary rules of international law are 'rules of international law' within the meaning of Article 31(3)(c). We therefore agree with the European Communities that a treaty like the *Biosafety Protocol* would qualify as a 'rule of international law'. Regarding the recognized general *principles* of law which are applicable in international law, it may not appear self-evident that they can be considered as 'rules of international law' within the meaning of Article 31(3)(c). However, the Appellate Body in *US – Shrimp* made it clear that pursuant to Article 31(3)(c) general principles of international law are to be taken into account in the interpretation of WTO provisions. As we mention further below, the European Communities considers that the principle of precaution is a 'general principle of international law'. Based on the Appellate Body report on *US – Shrimp*, we would agree that if the precautionary principle is a general principle of international law, it could be considered a 'rule of international law' within the meaning of Article 31(3)(c)."⁹²

79. In *US – Anti-Dumping and Countervailing Duties (China)* (DS379), the Appellate Body interpreted the term "public body" in Article 1.1(a)(1) of the SCM Agreement in the light of the ILC Articles on State Responsibility. In that context, the Appellate Body engaged in a discussion of Article 31(3)(c):

"We note that Article 31(3)(c) of the *Vienna Convention*, quoted above, contains three elements. First, it refers to 'rules of international law'; second, the rules must be 'relevant'; and third, such rules must be 'applicable in the relations between the parties'. We will address these three elements in turn.

First, the reference to 'rules of international law' corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as general principles of law. Second, in order to be relevant, such rules must concern the same subject

⁹⁰ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.77.

⁹¹ Appellate Body Report, *US – Gasoline*, p. 17.

⁹² Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.67 (citing Appellate Body Report, *US – Shrimp*, para. 158 and fn 157).

matter as the treaty terms being interpreted. To the extent that Articles 4, 5, and 8 of the ILC Articles concern the same subject matter as Article 1.1(a)(1) of the *SCM Agreement*, they would be 'relevant' in the sense of Article 31(3)(c) of the *Vienna Convention*. With respect to the third requirement, the question is whether the ILC Articles are 'applicable in the relations between the parties'. We observe that Articles 4, 5, and 8 of the ILC Articles are not binding *by virtue of* being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties."⁹³

80. Regarding the extensive debate surrounding the meaning of the expression "applicable in the relations between the parties" in Article 31(3)(c), in *EC and certain member States – Large Civil Aircraft* the Appellate Body offered the following observations:

"We note that the meaning of the term 'the parties' in Article 31(3)(c) of the *Vienna Convention* has in recent years been the subject of much academic debate and has been addressed by the ILC. While the participants refer to WTO panels that have addressed its meaning, the Appellate Body has made no statement as to whether the term 'the parties' in Article 31(3)(c) refers to *all* WTO Members, or rather to a subset of Members, such as the parties *to the dispute*.

An interpretation of 'the parties' in Article 31(3)(c) should be guided by the Appellate Body's statement that 'the purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty.' This suggests that one must exercise caution in drawing from an international agreement to which not all WTO Members are party.⁹¹ At the same time, we recognize that a proper interpretation of the term 'the parties' must also take account of the fact that Article 31(3)(c) of the *Vienna Convention* is considered an expression of the 'principle of systemic integration' which, in the words of the ILC, seeks to ensure that 'international obligations are interpreted by reference to their normative environment' in a manner that gives 'coherence and meaningfulness' to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members."⁹⁴

81. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body concluded that the bilateral agreement at issue was not a "relevant" rule of international law, as it was not relevant to the specific question that must be examined under Article 1.1(b) of the *SCM Agreement*. In the course of its analysis, the Appellate Body stated:

"In this dispute, the resolution of the European Union's arguments regarding the 1992 Agreement need not turn on the proper meaning to be ascribed to the term 'the parties'. Even accepting the European Union's argument that the 1992 Agreement is 'applicable in the relations between *the parties*', we recall that for the 1992 Agreement to qualify under Article 31(3)(c) of the *Vienna Convention*, it must be shown to be 'relevant'. A rule is 'relevant' if it concerns the subject matter of the provision at issue. In this dispute, the essence of the European Union's claim is that

⁹³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 308-309 (citing M.E. Villiger, "Commentary on the 1969 *Vienna Convention on the Law of Treaties*" (Martinus Nijhoff, 2009), p. 433; Appellate Body Reports, *US/Canada – Continued Suspension*, para. 382; Panel Report, *US – Gambling*, para. 6.128).

⁹⁴ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 844-845 (citing ILC Report on Fragmentation, paras. 410-480, in particular 413, 419, and fn 569; Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.65-7.89; and *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.57; Appellate Body Report, *EC – Computer Equipment*, para. 93; J. Combacau and S. Sur, "Principe d'intégration", in *Droit international public* (Paris: Montchrestien 2004), p. 175; C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279).

Article 4 of the 1992 Agreement is relevant to the interpretation of the term 'benefit' in Article 1.1(b) of the *SCM Agreement*."⁹⁵

82. In *Peru – Agricultural Products*, the Appellate Body avoided the question of whether an FTA and certain ILC articles would qualify as "relevant rules of international law" within the meaning of Article 31(3)(c), as they were not "relevant":

"In order to be 'relevant' for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) of the Vienna Convention must concern the same subject matter as the treaty terms being interpreted. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that Article 4 of the 1992 Agreement between the EEC and the United States on Trade in Civil Aircraft was not relevant to the interpretation of 'benefit' in Article 1.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), because, while imposing certain quantitative limits on the amount of government support that may be provided for the development of large civil aircraft programmes, it did not 'speak to the market-based concept of 'benefit' as reflected in Article 1.1(b) of the SCM Agreement and the market-based benchmark reflected in Article 14(b)'. The Appellate Body has also considered that agreements 'regarding the interpretation of the treaty or the application of its provisions' within the meaning Article 31(3)(a) of the Vienna Convention are 'agreements bearing specifically upon the interpretation of a treaty'.

...

The specific interpretative issues arising under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in question in this dispute are not whether Peru 'may maintain' its PRS with regard to designated products, or whether Guatemala has consented to the maintenance of the PRS or waived its right to challenge it. Rather, in order to determine whether Peru could maintain its PRS, the Panel had to interpret the meaning of the terms in Article 4.2 and footnote 1 of the Agreement on Agriculture, and find whether the additional duties resulting from the PRS could be characterized as 'variable import levies', 'minimum import prices' or 'similar border measures' rather than 'ordinary customs duties' within the meaning of footnote 1. With respect to Article II:1(b) of the GATT 1994, the Panel had to determine whether the additional duties resulting from the PRS could be characterized as 'other duties or charges' or 'ordinary custom duties'. Paragraph 9 of Annex 2.3 to the FTA and ILC Articles 20 and 45 do not provide 'relevant' interpretative guidance in this respect. Thus, we do not see how the FTA and ILC Articles 20 and 45 can be considered as rules concerning the same subject matter as Article 4.2 and Article II:1(b), or as bearing specifically upon the interpretation of these provisions."⁹⁶

83. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*) considered that the Kyoto Convention may be regarded as a relevant rule of international law within the meaning of Article 31(3)(c) or as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention:

"The Panel notes that several other panels and the Appellate Body itself have also referred either to this definition of 'Customs', or to other definitions contained in the Revised Kyoto Convention, for the purpose of interpreting related terms in the covered agreements.⁹⁷ The Panel considers that the Revised Kyoto Convention may in principle be regarded as a 'relevant rule of international law applicable in the relations between the parties' within the meaning of Article 31(3)(c) of the Vienna Convention, and that even if the number of contracting parties would be considered not to meet any

⁹⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 846 (citing M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), p. 433).

⁹⁶ Appellate Body Report, *Peru – Agricultural Products*, paras. 5.101 and 5.104.

requisite threshold⁹⁸, it still sheds light on the ordinary meaning of certain terms used in the CVA, and would at a minimum constitute a relevant 'supplementary means of interpretation' under Article 32 of the Vienna Convention.^{99"100}

1.3.3.11 Supplementary means of interpretation

1.3.3.11.1 Generally

84. In *EC – Chicken Cuts*, the Appellate Body explained that the application of Article 31 of the Vienna Convention will usually allow a treaty interpreter to establish the meaning of a term:

"The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of the term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

'... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.'

With regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."¹⁰¹

85. In *EC – Chicken Cuts*, the Appellate Body also confirmed that the list of supplementary means of interpretation identified in Article 32 is not exhaustive:

"We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties."¹⁰²

86. The Panel in *EC – IT Products* recalled the passages above, and stated that:

"It follows therefore that the fact that the HS2007 is not preparatory work of the treaty or circumstances of the conclusion of the treaty, does not *per se* disqualify it from being considered supplementary means of interpretation under Article 32. Nor

⁹⁸ (footnote original) The Revised Kyoto Convention currently has 116 Contracting Parties, including the Philippines and Thailand. The Appellate Body has observed that the meaning of the term "the parties" in Article 31(3)(c) of the *Vienna Convention* "has in recent years been the subject of much academic debate and has been addressed by the ILC", and noted that "one must exercise caution in drawing from an international agreement to which not all WTO Members are party". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 844-845.)

⁹⁹ (footnote original) There are past examples of panels and the Appellate Body having recourse to other international conventions and instruments to inform the ordinary meaning of certain terms, including certain terms contained in the covered agreements. See e.g. Appellate Body Report, *US – Shrimp*, para. 130 (interpreting the terms "exhaustible natural resources" in Article XX(g) of the GATT 1994 in the light of the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21, and the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals); and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 141-143 (interpreting the concept of "foreign-source income" in footnote 59 of the SCM Agreement taking into account certain widely recognized principles of taxation that emerge from international instruments in the field of taxation, including the United Nations Model Tax Convention, the OECD Model Tax Convention, and a range of bilateral tax treaties, and multilateral agreements adopted by member States of the Andean Community and the Caribbean Community). Indeed, as already noted earlier, the Panel in the first recourse to Article 21.5 referred to Article 1(c) of the WCO Nairobi Convention in the context of clarifying what is generally understood by the concept of "customs fraud". (Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)*, para. 7.629.)

¹⁰⁰ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, para. 7.265.

¹⁰¹ Appellate Body Report, *EC – Computer Equipment*, para. 86.

¹⁰² Appellate Body Report, *EC – Chicken Cuts*, para. 283.

can the fact that the HS2007 occurred subsequently to the conclusion of the treaty be *per se* a reason to disqualify it under Article 32, so long as it serves to indicate what were the 'common intentions of the parties' at the time of the conclusion of the treaty, i.e. at the time they bound their Schedules."¹⁰³

87. In *Canada – Dairy*, the Appellate Body considered that it was "appropriate, indeed necessary" in that case to have recourse to supplementary means of interpretation to interpret a term in a Member's Schedule:

"In our view, the language in the notation in Canada's Schedule is *not* clear on its face. Indeed, the language is general and ambiguous, and, therefore, requires special care on the part of the treaty interpreter. For this reason, it is appropriate, indeed necessary, in this case, to turn to 'supplementary means of interpretation' pursuant to Article 32 of the *Vienna Convention*."¹⁰⁴

88. In *US – Gambling*, the Appellate Body concluded that it was necessary to have recourse to supplementary means of interpretation in that case to interpret an entry in a Member's Schedule:

"[A] proper interpretation pursuant to the principles codified in Article 31 of the *Vienna Convention* does not yield a clear meaning as to the scope of the commitment made by the United States in the entry 'Other recreational services (except sporting)'. Accordingly, it is appropriate to have recourse to the supplemental means of interpretation identified in Article 32 of the *Vienna Convention*. These means include W/120, the 1993 Scheduling Guidelines, and a cover note attached to drafts of the United States' Schedule."¹⁰⁵

89. In *China – Intellectual Property Rights*, the Panel considered it necessary to have recourse to preparatory work to determine the meaning of the terms "such requests" in the context of the third sentence of Article 46 of the TRIPS Agreement. The Panel stated that:

"The third sentence of Article 46 refers to 'such requests' although the previous sentences do not refer expressly to any requests. The content of the third sentence clearly relates to materials and implements as addressed in the second sentence but it could equally relate to infringing goods as addressed in the first sentence. The text is ambiguous on this point. This ambiguity can be resolved by reference to the records of the negotiation of the TRIPS Agreement."¹⁰⁶

90. In *China – Publications and Audiovisual Products*, the Appellate Body stated that:

"The elements to be examined under Article 32 are distinct from those to be analyzed under Article 31, but it is the same elements that are examined under Article 32 irrespective of the outcome of the Article 31 analysis. Instead, what may differ, depending on the results of the application of Article 31, is the weight that will be attributed to the elements analyzed under Article 32."¹⁰⁷

91. While the Panel in *India – Export Related Measures* did not consider a recourse to supplementary means of interpretation to be necessary, it provided an assessment and took the negotiating history of Article 27.2(b) and Annex VII(b) of the SCM Agreement into consideration, noting that the text does not result in ambiguity, obscurity, absurdity, and unreasonableness and added:

"We recall that 'the purpose of treaty interpretation under Articles 31 and 32 of the Vienna Convention is to ascertain the 'common intention' of the parties', not of one or some parties. The negotiating history discussed above does not establish a common intention of the parties in favour of granting an additional transition period for graduating Annex VII(b) Members, and instead indicates that such an option failed to

¹⁰³ Panel Report, *EC – IT Products*, para. 7.694.

¹⁰⁴ Appellate Body Report, *Canada – Dairy*, para. 138.

¹⁰⁵ Appellate Body Report, *US – Gambling*, para. 197.

¹⁰⁶ Panel Report, *China – Intellectual Property Rights*, para. 7.260.

¹⁰⁷ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 403.

garner consensus support. Thus, even considering the negotiating history, we find that it does not support India's position. To the contrary, it confirms our interpretation of Article 27.2(b)."¹⁰⁸

1.3.3.11.2 Preparatory work

92. In *Canada – Periodicals*, the Appellate Body referred to the preparatory work of Article III:8(b) of the GATT to support its understanding of the object and purpose of that provision:

"Our textual interpretation is supported by the context of Article III:8(b) examined in relation to Articles III:2 and III:4 of the GATT 1994. Furthermore, the object and purpose of Article III:8(b) is confirmed by the drafting history of Article III. In this context, we refer to the following discussion in the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning the provision of the Havana Charter for an International Trade Organization that corresponds to Article III:8(b) of the GATT 1994:

'This sub-paragraph was redrafted in order to make it clear that nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article 18 would override the provisions of Section C of Chapter IV.'"¹⁰⁹

93. In *India – Quantitative Restrictions*, the Appellate Body found it difficult to give weight to arguments on negotiating history in the absence of a record of the negotiations:

"We note India's arguments relating to the negotiating history of the *BOP Understanding*. However, in the absence of a record of the negotiations on footnote 1 to the *BOP Understanding*, we find it difficult to give weight to these arguments. We do not exclude that footnote 1 to the *BOP Understanding* was 'heavily negotiated', and that it tries to accommodate opposing views held by different parties to the negotiations on the *BOP Understanding*. We are convinced, however, that the second sentence of footnote 1 does not accord with the position held by India. To interpret the sentence as proposed by India would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so."¹¹⁰

94. In *US – Carbon Steel*, the Appellate Body considered that even if it were appropriate to rely on a document constituting preparatory work to the SCM Agreement, "in accordance with the rules of interpretation set forth in the *Vienna Convention*, selective reliance on such a document does not provide a proper basis for the conclusion reached by the Panel in this regard".¹¹¹

1.3.3.11.3 Circumstances of the treaty's conclusion

95. In *EC – Computer Equipment*, the Appellate Body stated that "[w]ith regard to 'the circumstances of [the] conclusion' of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated."¹¹² In *EC – Computer Equipment*, the Appellate Body further considered that the tariff classification practice of the European Communities with respect to the product at issue prior to the negotiation of its Schedule was part of the "circumstances of the conclusion" of the WTO agreements and that this may be used as a supplementary means of interpretation to interpret the terms of that Schedule:

"In the light of our observations on 'the circumstances of [the] conclusion' of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of 'the circumstances of

¹⁰⁸ Panel Report, *India – Export Related Measures*, Annex A-2, para. 2.23.

¹⁰⁹ Appellate Body Report, *Canada – Periodicals*, pp. 33-34.

¹¹⁰ Appellate Body Report, *India – Quantitative Restrictions*, para. 94.

¹¹¹ Appellate Body Report, *US – Carbon Steel*, para. 78.

¹¹² Appellate Body Report, *EC – Computer Equipment*, para. 86.

[the] conclusion' of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*."¹¹³

96. With respect to the question whether the classification practice of one country at the time of tariff negotiation was relevant for the interpretation of a country's Schedule of concessions, the Appellate Body emphasized that while it was of more limited value than evidence of the practice followed by all of the parties, such unilateral practice was not irrelevant. However, the Appellate Body found that where such unilateral practice of one Member was inconsistent, it could not be considered relevant:

"We note that the Panel examined the classification practice of only the European Communities, and found that the classification of LAN equipment by the United States during the Uruguay Round tariff negotiations was not relevant. The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.

...

Then there is the question of the *consistency* of prior practice. Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession."¹¹⁴

97. In *EC – Poultry*, the Appellate Body found that a bilateral agreement between two WTO Members could serve as "supplementary means" of interpretation for a provision of a covered agreement, as part of the "historical background":

"[T]he Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat."¹¹⁵

98. In *EC – Chicken Cuts*, the Appellate Body engaged in an extensive analysis of what may be taken into account as part of the "circumstances of the conclusion" of a treaty. The Appellate Body clarified that a "direct link" to the treaty text and "direct influence" on the common intentions is not necessary for an event, act, or instrument to qualify as a "circumstance of the conclusion" of a treaty under Article 32 of the *Vienna Convention*, explaining:

"An 'event, act or instrument' may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision ... it should not be misconstrued as introducing a concept that an act, event, or instrument qualifies as a circumstance only when it has influenced the intent of all the parties. Thus, not only 'multilateral' sources, but also 'unilateral' acts, instruments, or statements of individual negotiating parties may be useful in ascertaining 'the reality of the situation which the parties wished to regulate by means of the treaty' and, ultimately, for discerning the common intentions of the parties."¹¹⁶

99. The Appellate Body in *EC – Chicken Cuts* pointed out that "relevance", as opposed to "direct influence" or "link", is the "more appropriate criterion" to judge the extent to which a particular event, act, or other instrument should be relied upon or taken into account when

¹¹³ Appellate Body Report, *EC – Computer Equipment*, para. 92.

¹¹⁴ Appellate Body Report, *EC – Computer Equipment*, paras. 93 and 95.

¹¹⁵ Appellate Body Report, *EC – Poultry*, para. 83.

¹¹⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 289.

interpreting a treaty provision in the light of the "circumstances of its conclusion".¹¹⁷ In the light of this, the Appellate Body explained that interpreters should employ an objective approach to determine the relevance of circumstances for interpretation:

"In our view, the relevance of a circumstance for interpretation should be determined on the basis of objective factors, and not subjective intent. We can conceive of a number of objective factors that may be useful in determining the degree of relevance of particular circumstances for interpreting a specific treaty provision. These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty."¹¹⁸

100. In *EC – Chicken Cuts*, the Appellate Body warned that the precise date of the conclusion of a treaty should not be confused with the circumstances that were prevailing at the point in time in which a treaty was concluded, thereby acknowledging that an interpreter should ascertain the circumstances of the conclusion of the treaty over a period of time:

"Events, acts, and instruments may form part of the 'historical background against which the treaty was negotiated', even when these circumstances predate the point in time when the treaty is concluded, but continue to influence or reflect the common intentions of the parties at the time of conclusion. We also agree with the Panel that there is 'some correlation between the timing of an event, act or other instrument ... and their relevance to the treaty in question', in the sense that 'the further back in time that an event, act or other instrument took place, was enacted or was adopted relative to the conclusion of a treaty', the less relevant it will be for interpreting the treaty in question. What should be considered 'temporally proximate will vary from treaty provision to treaty provision' and may depend on the structure of the negotiating process. Accordingly, we see no error in the Panels finding that the circumstances of the conclusion should be ascertained over a period of time ending on the date of the conclusion of the WTO Agreement."¹¹⁹

101. In *EC – Chicken Cuts*, the Appellate Body explained that official publication of an act or instrument, which provides interested parties with an opportunity to acquire knowledge about it, is sufficient for it to qualify as "circumstances of conclusion" under Article 32 of the Vienna Convention:

"We understand the Panel's notion of 'constructive knowledge' to mean that 'parties have deemed notice of a particular event, act or instrument through publication'. We note the European Communities' view that 'deemed knowledge' on the basis of general 'access' to a publication cannot substitute the need for demonstrating a direct link between a circumstance and the common intentions of the parties. However, we consider that the European Communities conflates the preliminary question of what may qualify as a 'circumstance' of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32. As far as an act or instrument originating from an individual party may be considered to be a circumstance under Article 32 for ascertaining the parties' intentions, we consider that the fact that this act or instrument was officially published, and has been publicly available so that any interested party could have acquired knowledge of it, appears to be enough. Of course, proof of actual knowledge will increase the degree of relevance of a circumstance for interpretation."¹²⁰

102. Finally, as to whether a Member's court judgments may be considered as supplementary means of interpretation under Article 32, the Appellate Body in *EC – Chicken Cuts* noted that

¹¹⁷ Appellate Body Report, *EC – Chicken Cuts*, para. 290.

¹¹⁸ Appellate Body Report, *EC – Chicken Cuts*, para. 291.

¹¹⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 293.

¹²⁰ Appellate Body Report, *EC – Chicken Cuts*, para. 297.

domestic court judgments may be considered if they assist in ascertaining the common intentions of the parties:

"[J]udgments of domestic courts are not, in principle, excluded from consideration as 'circumstances of the conclusion' of a treaty if they would be of assistance in ascertaining the common intentions of the parties for purposes of interpretation under Article 32. It is necessary to point out, however, that judgments deal basically with a specific dispute and have, by their very nature, less relevance than legislative acts of general application (although judgments may have some precedential effect in certain legal systems)."¹²¹

1.3.3.12 Treaties authenticated in two or more languages

103. In *US – Softwood Lumber IV*, the Appellate Body confirmed that Article 33(3) of the Vienna Convention reflects customary international law:

"[I]n accordance with the customary rule of treaty interpretation reflected in Article 33(3) of the *Vienna Convention on the Law of Treaties* (the '*Vienna Convention*'), the terms of a treaty authenticated in more than one language – like the *WTO Agreement* – are presumed to have the same meaning in each authentic text. It follows that the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language."¹²²¹²³

104. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body reversed the Panel's interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. In the course of its analysis, the Appellate Body concluded that the Panel failed to properly address China's argument based on Article 33(3) of the Vienna Convention, which involved a comparison between the English and Spanish translations of the same term in two different sets of provisions:

"As a preliminary matter, we do not consider it determinative that the term used in Article 9.1 of the *Agreement on Agriculture* and Article 1.1(a)(1) of the *SCM Agreement*, '*organismo público*', is the same only in the Spanish version. The covered agreements are authentic in all three languages. Therefore, pursuant to Article 33(3) of the *Vienna Convention*, the terms of the treaty are presumed to have the same meaning in each authentic text. Nonetheless, specific terms may not have identical meanings in every covered agreement. Where the ordinary meaning of the term is broad enough to allow for different interpretations, and the context as well as the object and purpose of the relevant agreements point in different directions, the meaning of a term used in different places of the covered agreements may differ.

We note that the Panel rejected China's argument relating to the harmonious interpretation of 'government or any public body' in Article 1.1(a)(1) of the *SCM Agreement* and 'governments or their agencies' in Article 9.1 of the *Agreement on Agriculture*, because it had found definitions and usages showing a broader possible scope of the term 'public body'. However, we do not see that China argued simply that the term 'public body' or '*organismo público*' in itself has a narrow scope. Rather, we understand China's argument to be that the same term '*organismo público*'

¹²¹ Appellate Body Report, *EC – Chicken Cuts*, para. 309.

¹²² (footnote original) See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 153 to para. 123. We also note that, in discussing the draft article that was later adopted as Article 33(3) of the *Vienna Convention*, the International Law Commission observed that the "presumption [that the terms of a treaty are intended to have the same meaning in each authentic text] requires that every effort should be made to find a common meaning for the texts before preferring one to another". (*Yearbook of the International Law Commission* (1966), Vol. II, p. 225) With regard to the application of customary rules of interpretation in respect of treaties authenticated in more than one language, see also International Court of Justice, Merits, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)* 1989, ICJ Reports, para. 132, where, in interpreting a provision of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, the International Court of Justice noted that it was possible to interpret the English and Italian versions "as meaning much the same thing", despite a potential divergence in scope.

¹²³ Appellate Body Report, *US – Softwood Lumber IV*, para. 59.

is used in Article 1.1(a)(1) of the *SCM Agreement* and Article 9.1 of the *Agreement on Agriculture*, and that, since the Appellate Body has interpreted the term '*organismo público*' in Article 9.1 of the *Agreement on Agriculture* to mean an entity which exercises powers vested in it by a government for the purpose of performing functions of a governmental character, the same term, albeit identical only in the Spanish version of the covered agreements, should be interpreted in the same way in the context of Article 1.1(a)(1) of the *SCM Agreement*.

In any event, for the purpose of the present appeal, it suffices to note that the Panel's statement that it had 'found other definitions and usages showing a broader possible scope' of the term 'public body' than the definitions suggested by China, provides no support to the conclusion of the Panel's analysis under Article 1.1(a)(1) of the *SCM Agreement*. In our view, the Panel failed to address properly the substance of China's argument about a harmonious interpretation of the term '*organismo público*' in the *SCM Agreement* and in the *Agreement on Agriculture*."¹²⁴

105. In *US – Countervailing and Anti-Dumping Duties (China)*, the Appellate Body resolved an ambiguity in the English text of Article X:2 of the GATT based on the wording used in the French and Spanish versions of that provision:

"This meaning of the preposition 'under' is reinforced by the French and Spanish versions of the text of Article X:2. We recall that, according to Article XVI:6 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the texts of the WTO covered agreements are authentic in each of the three WTO official languages, and that, in previous disputes, the Appellate Body has confirmed the ordinary meaning of terms in the English version by reference to the French and Spanish language versions of the relevant provision. The phrase 'under an established and uniform practice' reads in French '*en vertu d'usages établis et uniformes*' and in Spanish '*en virtud del uso establecido y uniforme*'. In French and in Spanish, '*en vertu de*' and '*en virtud de*' describe the manner, the means, or how something is done. Moreover, '*en vertu de*' and '*en virtud de*' can be translated literally into English as 'by virtue of'. The term 'by virtue of' can be reconciled with those definitions of 'under', such as 'in the form of' and 'in the guise of'. In contrast, translating literally the French and the Spanish texts into English, we fail to see how the term 'by virtue of' can qualify the preceding term 'rate of duty' so that the phrase 'effecting an advance in a rate of duty or other charge *by virtue of* an established and uniform practice' could be read as referring to a *comparison between* a new higher rate and a prior rate.

The French and Spanish versions of the covered agreements cannot be read as connoting the phrase 'under an established and uniform practice' as the baseline of comparison as the Panel did. Rather, the French and Spanish versions of Article X:2 suggest that the phrase 'under an established and uniform practice' describes how the measure of general application effects an advance in a rate of duty or other charge on imports, in order to fall within the scope of Article X:2. Accordingly, the Panel's interpretation of the English text of Article X:2 is not reconcilable with the meaning of the provision in the two other authentic languages of the GATT 1994. In case of differences of meanings among authentic texts, Article 33 of the Vienna Convention on the Law of Treaties (Vienna Convention) requires an interpreter to adopt 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty'. In our view, the meanings of 'under' that best reconcile the texts of Article X:2 in English, French, and Spanish are 'in the form of' and 'in the guise of'."¹²⁵

1.3.3.13 Error – Article 48 of VCLT

106. The Panel in *Korea – Procurement* applied Article 48 of the VCLT on error, to the case before it:

¹²⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 330-332.

¹²⁵ Appellate Body Report, *US – Countervailing and Anti-Dumping Duties (China)*, paras. 4.76-4.77 (citing Appellate Body Reports, *US – Upland Cotton*, para. 424, fn 510; and *US – Countervailing Duty Investigation on DRAMS*, para. 111, fn 176; *EC – Tariff Preferences*, para. 147).

"Error in respect of a treaty is a concept that has developed in customary international law through the case law of the Permanent International Court of Justice and of the International Court of Justice. Although these cases are concerned primarily with the question in which circumstances of error *cannot* be advanced as a reason for invalidating a treaty, it is implicitly accepted that error can be a ground for invalidating (part) of a treaty. The elements developed by the case law mentioned above have been codified by the International Law Commission in what became the *Vienna Convention on the Law of Treaties of 1969*. ... Since this article has been derived largely from case law of the relevant jurisdiction, the PCIJ and the ICJ, there can be little doubt that it presently represents customary international law and we will apply it to the facts of this case."¹²⁶

107. The Panel in *Korea – Procurement* stated that the conditions of paragraph 1 of Article 48 of the VCLT were present in the case before it:

"As the Appellate Body has pointed out in *European Communities – Computer Equipment* and in *Canada – Dairy*, schedules are an integral part of a treaty. Hence negotiations about schedules, in this case GPA Annexes, are fundamentally treaty negotiations. In these treaty negotiations, we have noted that the United States believed that the IIA project was covered. As we have found in section VII:B of these Findings, that was not correct. The IIA project procurement was the responsibility of a non-covered entity. Hence the US error related to a fact or situation which was assumed by the US to exist at the time when the treaty was concluded. In our view, it also appears from the behaviour of the United States that this purported concession arguably formed an essential basis of its consent to be bound by the treaty as finally agreed. Hence the initial conditions for error under Article 48(1) of the *Vienna Convention* seem to us to be satisfied."¹²⁷

108. However, the Panel in *Korea – Procurement* then found that, under paragraph 2 of Article 48 of the VCLT, the error needs to be "excusable", which it was found not to be in this case:

"This raises the question of whether the exclusionary clause of the second paragraph of Article 48 can be overcome. Although we have indicated above that the duty to demonstrate good faith and transparency in GPA negotiations is particularly strong for the 'offering' party, this does not relieve the other negotiating partners from their duty of diligence to verify these offers as best as they can. Here again the facts already recounted in the previous sub-section demonstrate that the United States has not properly discharged this burden. We do not think the evidence at all supports a finding that the United States has contributed by its own conduct to the error, but given the elements mentioned earlier (such as the two and a half year interval between Korea's answer to the US question and its final offer, the actions by the European Community in respect of Korea's offer, the subsequent four-month period, of which at least one month was explicitly designated for verification, etc.), we conclude that the circumstances were such as to put the United States on notice of a possible error. Hence the error should not have subsisted at the end of the two and a half year gap, at the moment the accession of Korea was 'concluded.' Therefore, the error was no longer 'excusable' and only an excusable error can qualify as an error which may vitiate the consent to be bound by the agreement.

For these reasons, on balance, we are of the view that the US has not demonstrated error successfully as a basis for a claim of non-violation nullification or impairment of benefits."¹²⁸

109. In *India – Tariffs on ICT Goods (Japan)*, India invoked Article 48 of the VCLT with regard to certain tariff items in its WTO Schedule:

"India submits that, at the time of the transposition of its WTO Schedule to the HS2007, it had understood that the scope of its tariff concessions would not be

¹²⁶ Panel Report, *Korea – Procurement*, para. 7.123.

¹²⁷ Panel Report, *Korea – Procurement*, para. 7.124.

¹²⁸ Panel Report, *Korea – Procurement*, paras. 7.125-7.126.

expanded from the commitments it had undertaken under the ITA. However, in India's view, the transposition of its Schedule resulted in an expansion of its tariff commitments from the ITA. India contends that it 'was not put on clear notice (via WTO communication or otherwise) as to the exact changes being effected due to the increased product complexity of the ITA product coverage via the contested sub-headings'. India argues that Article 48 of the Vienna Convention is an applicable rule of law which codifies the principle of customary international law whereby 'freedom of consent [i]s an indispensable condition for treaty validity' such that 'a State cannot have freely concluded a treaty if at the time of giving its consent it was under a misapprehension relating to the subject matter of the treaty'. India considers that 'the core issue before the Panel is whether the products at issue are entitled for exemption from customs duty as a result of informed and free consent of India, or a result of technicalities invoked by' the complainant. India further submits that, although Article 48 would ordinarily lead to the invalidation of the entire treaty, in these circumstances the contested tariff items are separable from the rest of the Schedule such that only the contested tariff items are invalid, in accordance with Article 44 of the Vienna Convention. India submits that since the contested tariff items are invalid, they are 'rendered unbound'.¹²⁹

110. The Panel in *India – Tariffs on ICT Goods (Japan)* noted the elements to be proved for a successful invocation of Article 48(1) of the VCLT:

"Article 48(1) sets forth four elements that must be demonstrated: (i) at the time when the treaty was concluded, the invoking State made an assumption; (ii) that was related to a 'fact or situation'; (iii) which formed an essential basis of the State's consent to be bound by the treaty; and (iv) the assumption was in error.

It is uncontested that the burden of demonstrating that the requirements of Article 48(1) are satisfied in a given case rests on the party invoking Article 48."¹³⁰

111. With regard to the first element of the test under Article 48(1), the Panel noted India's argument that India had assumed that "the HS2007 transposition did not expand India's tariff commitments beyond India's obligations under the ITA[]" and proceeded to examine whether India had indeed held this assumption.¹³¹ In this context, the Panel refused to take WTO-inconsistent behaviour into account in assessing whether India had held the mentioned assumption.¹³² On balance, however, the Panel found in favour of India, noting, as part of its reasoning, the difficulty in obtaining evidence of an assumption:

"Notwithstanding our reservations regarding the evidence adduced by India, we recognize that evidence of an 'assumption' may be difficult to obtain. To the extent that such an assumption is a widely held implicit understanding, there may be little to no documentary evidence. We therefore do not consider India's lack of documentary evidence sufficient to conclude that India has not met its burden of proof with respect to the existence of its assumption. We also note India's arguments and assertions in the course of these proceedings regarding the assumptions it held during the transposition process.

On balance, taking into account the necessary evidentiary limitations attached to providing proof of an assumption, we accept in good faith India's arguments and explanations in the course of these dispute settlement proceedings. Accordingly, we find that, at the time of the transposition, India assumed that the scope of its WTO commitments was limited to the scope of its ITA undertakings, with respect to those tariff commitments adopted by India in order to implement its ITA undertakings, and

¹²⁹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.84.

¹³⁰ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.104-7.105.

¹³¹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.107.

¹³² Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.116.

that the scope of those tariff commitments would not be expanded through the HS2007 transposition process.¹³³¹³⁴

112. The Panel then proceeded to the second element to be proven under Article 48(1), i.e. whether India's assumption related to a fact or situation. In this context, the Panel stated that purely legal errors do not constitute errors relating to a fact or situation.¹³⁵ In this regard, the Panel noted that since the ITA is not a covered agreement, it was not clear whether India's alleged error regarding the product scope of the ITA was of a purely legal nature. Ultimately, the Panel did not consider it necessary to make a finding with regard to the second element of the test.¹³⁶

113. After reviewing the relevant facts, the Panel found that India did not demonstrate that the third element of the test under Article 48(1) was met.¹³⁷ The Panel concluded:

"Thus, notwithstanding that the transposition was conducted in accordance with the agreed-upon correlation tables, India is (and asserts that it was at the time) unwilling to be bound by the transposed Schedule. India argues that it was only willing to be bound by its Schedule if the scope of its concessions in the transposed HS2007 Schedule was no broader than the scope of its obligations in the ITA. In our view, if India had held such condition to be fundamental to its willingness to be bound by the outcome of the transposition process, it would have made this condition obvious. Indeed, as discussed in greater detail below, India had numerous opportunities to do so. Based on the evidence before us, we can see no point at which India made such a statement or otherwise expressed that intention.

...

To sum up, we recall that the burden of proof under Article 48(1) is on India. With respect to this element of Article 48(1), India has provided no persuasive evidence that its assumption constituted an essential basis of its consent to be bound by the certified Schedule. To the contrary, India's conduct throughout the transposition process indicates that such a condition was not an essential basis of its consent. On the basis of the evidence before us, we consider that India has failed to satisfy its burden of demonstrating that its assumption (i.e. that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings) constituted an essential basis for its consent to be bound by its HS2007 Schedule."¹³⁸

114. The Panel in *India – Tariffs on ICT Goods (Japan)*, while finding that India had not met the test under Article 48(1) of the VCLT, proceeded to an *arguendo* analysis of whether or not India had contributed to the alleged error.¹³⁹ In this regard, the Panel first addressed the issue of burden of proof:

"The question before us is whether India contributed by its own conduct to that error and/or the circumstances were such as to put India on notice of a possible error. The parties have expressed differing opinions on the burden of proof under Article 48(2). Japan considers that India, as the party invoking Article 48, must demonstrate that it did not contribute to the error and the circumstances were not such as to put India on notice of a possible error. India considers that the burden is on Japan, as the party objecting to the invocation of Article 48, to demonstrate that India

¹³³ (*footnote original*) In coming to this conclusion, we note that the application of the legal standard under Article 48 not only requires that the invoking party held an assumption, but requires the invoking party to demonstrate that such assumption constituted an essential basis for its consent. ... In our view, this latter question imposes an additional evidentiary burden on the invoking party, over and above demonstrating that they made an assumption. It therefore follows, in our view, that taking India at its word with respect to this first step of the analysis does not alleviate India from its evidentiary burden under Article 48.

¹³⁴ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.117-7.118.

¹³⁵ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.122.

¹³⁶ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.123-7.124.

¹³⁷ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.125, 7.128, 7.130-7.133.

¹³⁸ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.136 and 7.139. The Panel did not make any findings on the fourth element of the test under Article 48(1). Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.156.

¹³⁹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.170.

either contributed to the error or that the circumstances were such as to put India on notice of a possible error. In our view, there is ample information before us (in the form of the arguments and evidence adduced by the parties) to apply Article 48(2), regardless of which party bears the burden of proof. As explained below, we do not consider the arguments and evidence of the parties to be in *equipoise*. We therefore do not consider it necessary to resolve the question of which party bears the burden of proof under Article 48."¹⁴⁰

115. The Panel in *India – Tariffs on ICT Goods (Japan)* identified the legal test under Article 48(2) as follows:

"In our view, Article 48(2) is clear on its face. Contrary to India's argument that a State must necessarily have known of the error in order to meet the standard of being 'put on notice of a possible error', we consider that Article 48(2) merely requires that the State was on notice of the possibility that such an error could occur."¹⁴¹

116. After reviewing the relevant facts, and applying this legal test, the Panel concluded that India had been put on notice of the possibility of an error withing the meaning of Article 48(2):

"Applying that legal standard to the facts, as described above, we recall that India alleges that its 'error' at the time of the certification of its Schedule was its mistaken assumption that the scope of its WTO tariff commitments would not be expanded beyond the scope of its ITA undertakings. We consider that India was on notice that the HS2007 transposition exercise could have implications for the classification differences of ITA participants regarding their ITA undertakings. Furthermore, in the circumstances of the HS2007 transposition exercise, India was on notice of the possibility that the scope of the concessions set forth in tariff items 8517.12, 8517.61, 8517.62, and 8517.70 of its HS2007 Schedule *may* have expanded as a consequence of the complex changes to those tariff items. If India was on notice of the possibility that its WTO tariff commitments in its HS2007 Schedule may have expanded from the scope of the commitments set forth in its HS2002 Schedule, then India was also necessarily on notice that its WTO tariff commitments may have expanded as compared to the scope of its commitments in its HS1996 Schedule, and the scope of its ITA undertakings. In our view, therefore, India was put on notice of the possibility of an 'error', as India defines its error, within the meaning of Article 48(2)."¹⁴²

117. The Panel in *India – Tariffs on ICT Goods (Japan)* then turned to the issue of whether India had contributed by its own conduct to the alleged error, and found that it had:

"In short, we consider that India had both specific and general opportunities to highlight to Members and to the WTO Secretariat any concerns that it may have had regarding the relationship between the ITA and its HS2007 Schedule. India did not do so. In our analysis of Article 48(1) above, we concluded that India's failure to raise such concerns means that there is no evidence that India's concerns in this respect constituted an 'essential basis' for its consent to be bound. For the purposes of applying Article 48(2), we moreover note that India's failure to raise those concerns would appear to have directly contributed to the alleged error arising in the first place.

We also highlight that, as a Member of the WTO, it was India's responsibility to verify the scope of its legal commitments before undertaking to accept those commitments. Indeed, the transposition procedures which had been approved by India, explicitly required the Members to assess whether the 'scope of a concession has been modified as a result of the transposition in a way that impairs the value of the concession'. This was not a minor responsibility. Moreover, India has not asserted that its customs officials or government representatives lacked sufficient expertise to properly review or understand the implications of India's commitments as set forth in the draft Schedule prepared by the WTO Secretariat. India's failure to properly review its legal commitments is not a 'minor and excusable' contribution to the creation of the alleged

¹⁴⁰ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.171.

¹⁴¹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.200.

¹⁴² Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.201.

error, and would indeed seem to be a significant contributing factor in causing the error to occur, especially taking into account that India had already approved the correlation tables relied upon by the Secretariat, and was on notice that the changes to the tariff items at issue were complex, accounted for technological developments, and, in some instances, might have increased the scope of the tariff items."¹⁴³

118. In coming to this conclusion, the Panel in *India – Tariffs on ICT Goods (Japan)* rejected India's argument that the WTO Secretariat and other WTO members had also contributed to the error.¹⁴⁴ Having concluded that India had been put on notice of the possibility of an error, the Panel did not find it necessary to address the issue whether or not India's inaction in the circumstances of its transposition satisfied the standard of "contributing by its conduct" to the error.¹⁴⁵

1.3.4 "add to or diminish the rights and obligations"

119. In *Chile – Alcoholic Beverages*, Chile claimed that through its findings, the Panel had added to the rights and obligations of WTO Members under the WTO Agreement, contrary to Articles 3.2 and 19.2 of the DSU. The Appellate Body rejected this argument:

"Chile claims that the Panel's findings on the issues of 'not similarly taxed' and 'so as to afford protection' compromise the 'security and predictability' of the multilateral trading system, provided for in Article 3.2 of the DSU, and 'add to ... the rights and obligations of Members' under Article III:2, second sentence, of the GATT 1994, in contravention of Articles 3.2 and 19.2 of the DSU. In this dispute, while we have rejected certain of the factors relied upon by the Panel, we have found that the Panel's legal conclusions are not tainted by any reversible error of law. In these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements. Chile's appeal under Articles 3.2 and 19.2 of the DSU must, therefore, be denied."¹⁴⁶

120. In *Mexico – Taxes on Soft Drinks*, Mexico argued that the Panel should have declined to exercise jurisdiction. In the context of addressing this issue, the Appellate Body observed that doing so would be contrary to Articles 3.2 and 19.2:

"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, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel 'would seem ... not to be in a position to choose freely whether or not to exercise its jurisdiction.'"¹⁴⁷

1.3.5 Article 13

121. In *US – Origin Marking (Hong Kong, China)*, the Panel agreed with the respondent's argument that a Panel can use information obtained through the use of the power granted under Article 13 of the DSU to support or confirm an interpretive result, but not to arrive at an interpretation:

"We agree with the United States that a panel is free to consider any available information. This follows directly from its right to seek information, as set out in

¹⁴³ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.209-7.210

¹⁴⁴ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.211-7.212.

¹⁴⁵ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.213.

¹⁴⁶ Appellate Body Report, *Chile – Alcoholic Beverages*, para. 79.

¹⁴⁷ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.

Article 13 of the DSU.¹⁴⁸ The question is for what purpose such information can be used or relied upon. We understand the United States to argue that it cannot be used or relied upon to arrive at an interpretation, as that exercise is governed by the customary rules of interpretation in international law; but that it may be used or relied upon to support or confirm an interpretive result. We agree. As long as such information is not used to determine the meaning of the treaty text, we do not understand the Vienna Convention rules on treaty interpretation to somehow prohibit referring to it."¹⁴⁹

1.4 Article 3.3

1.4.1 "prompt settlement of situations"

122. Panels and the Appellate Body have referred to the principle of "prompt settlement" of disputes in numerous cases. For example, in *EC – Asbestos*, the Appellate Body recalled that "[i]n previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU".¹⁵⁰

123. In *US – Offset Act (Byrd Amendment)*, the Appellate Body referred to the principle of "prompt settlement" of disputes in the context of finding that the right to separate panel reports (in disputes involving multiple complaints) is not unqualified:

"Having made these observations, we note that Article 9.2 must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement. The overall object and purpose of the DSU is expressed in Article 3.3 of that Agreement which provides, relevantly, that the 'prompt settlement' of disputes is 'essential to the effective functioning of the WTO.' If the right to a separate panel report under Article 9.2 were 'unqualified', this would mean that a panel would have the obligation to submit a separate panel report, pursuant to the request of a party to the dispute, *at any time during the panel proceedings*. Moreover, a request for such a report could be made for whatever reason – or indeed, *without any reason* – even on the day that immediately precedes the day the panel report is due to be circulated to WTO Members at large. Such an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the 'prompt settlement' of disputes."¹⁵¹

124. The Appellate Body has in several instances referred to the principle of the "prompt settlement" of disputes in the context of rejecting interpretations of procedural requirements that would lead to a complainant having to initiate multiple proceedings in respect of the same dispute. For example, in *US – Zeroing (Japan) (Article 21.5 – Japan)*, the Appellate Body found that a measure should not be excluded from an Article 21.5 panel's terms of reference merely because the measure was not completed at the time of the panel request, and stated:

"To exclude such a measure from an Article 21.5 panel's terms of reference because the measure was not completed at the time of the panel request but, rather, was completed during the Article 21.5 proceedings, would mean that the disagreement 'as to the existence or consistency with a covered agreement of measures taken to comply' would not be fully resolved by that Article 21.5 panel. New Article 21.5 proceedings would therefore be required to resolve the disagreement and establish whether there is compliance. Thus, an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings. It would also be inconsistent with the objectives of the DSU to provide

¹⁴⁸ (footnote original) See Appellate Body Report, *US – Shrimp*, para. 104 (where the Appellate Body observed the comprehensive nature of a panel's authority to seek information and technical advice and noted that "a panel also has the authority to accept or reject any information or advice which it may have sought and received, or to make some other appropriate disposition thereof. It is particularly within the province and the authority of a panel to determine the need for information and advice in a specific case, to ascertain the acceptability and relevancy of information or advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received").

¹⁴⁹ Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.182.

¹⁵⁰ Appellate Body Report, *EC – Asbestos*, para. 78.

¹⁵¹ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 311.

for the 'prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired', as reflected in Article 3.3, and to 'secure a positive solution to a dispute', as contemplated in Article 3.7."¹⁵²

125. Along the same lines, in *US – Upland Cotton (Article 21.5 – Brazil)* the Appellate Body stated that "[r]equiring a WTO Member to initiate new proceedings to challenge the same type of recurrent subsidies that were found to result in adverse effects, simply because the subsidies were provided subsequent to the original proceedings, does not promote 'prompt settlement' nor 'prompt compliance'".¹⁵³

126. In *US – Stainless Steel (Mexico)*, the Appellate Body referred to the principle of "prompt settlement" of disputes in the context of emphasizing the importance of panels following well-established Appellate Body jurisprudence and the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. The Appellate Body stated that "[t]his is essential to promote 'security and predictability' in the dispute settlement system, and to ensure the 'prompt settlement' of disputes".¹⁵⁴

127. The Panel in *Indonesia – Raw Materials* rejected the respondent's argument that a measure that was found to be an export ban rendered irrelevant another measure that could potentially also be WTO-inconsistent, and decided to assess the WTO-consistency of that measure, noting that not doing so would be at odds with the principle of prompt settlement of disputes:

"Indonesia urges the Panel to find that the export ban renders the DPR irrelevant with respect to exports. If the Panel agreed with Indonesia in this regard and, at the same time, also found that the export ban is (a) not covered by Article XI:2(a) of the GATT 1994, (b) inconsistent with Article XI:1 of the GATT 1994, and (c) not justified under Article XX(d) of the GATT 1994, the Panel would recommend that Indonesia remove the export ban. Indonesia could comply. In such a scenario the DPR would then spring back into effect. The European Union would have undertaken lengthy dispute settlement proceedings yet still be left with the DPR in place and needing to once again pursue dispute settlement to obtain findings with respect to the consistency of a measure it had sought consultations on in 2019. The Panel does not believe such a situation would constitute prompt settlement of the dispute. The Panel agrees, therefore, with the United States and the United Kingdom that for the European Union to seek a ruling on the DPR, the DPR does not have to currently be creating a limiting effect.

The Panel notes that the DPR was first referred to in Law No. 4/2009 and the European Union requested consultations on this measure in 2019 before the new export bans took effect on 1 January 2020. Nevertheless, with respect to Indonesia's arguments it is important to recall that Members may bring to WTO dispute settlement measures that have not yet been implemented as well as those that have expired or are no longer in force. Indonesia's argument that the DPR neither operates as a pre-condition for the exportation of nickel ore nor restricts exports because the exportation of nickel ore is prohibited contradicts these well-understood principles of WTO law. Accepting Indonesia's argument would mean that a Member could avoid a finding of non-compliance with respect to one measure by adopting another measure that it freely admits is inconsistent with Article XI:1, to pre-empt the effects of the first measure. Such an approach could thwart the principle of prompt settlement of disputes between Members set out in Article 3.3 of the DSU."¹⁵⁵

1.4.2 "in which a Member considers"

128. In *US – Upland Cotton*, the Appellate Body observed that "Article 3.3 envisages that disputes arise when a Member 'considers' that benefits accruing to it are being impaired by

¹⁵² Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

¹⁵³ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 246.

¹⁵⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

¹⁵⁵ Panel Report, *Indonesia – Raw Materials*, paras. 7.63-7.64.

measures taken by another Member. By using the word 'considers', Article 3.3 focuses on the perception or understanding of an aggrieved Member."¹⁵⁶

129. In *US – Continued Zeroing*, the Appellate Body addressed the relationship between Article 3.3 and certain provisions of the Anti-Dumping Agreement, namely Articles 17.3 and 17.4 of the Anti-Dumping Agreement. These articles are also relevant with respect to the question of the types of measures that can be submitted to dispute settlement under the Anti-Dumping Agreement:

"Closely resembling Article 3.3 of the DSU, Article 17.3 provides that, '[i]f any Member considers that any benefit accruing to it, directly or indirectly, under [the *Anti-Dumping Agreement*] is being nullified or impaired ... by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question.' Article 17.4 of the *Anti-Dumping Agreement* further specifies that a Member may refer a matter to the DSB if it considers that the consultations have failed to achieve a mutually agreed solution 'and if final action has been taken by the administering authorities of the importing Member to', *inter alia*, 'levy definitive anti-dumping duties'."¹⁵⁷

1.4.3 "measures taken by another Member"

1.4.3.1 General

130. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body referred to Article 3.3 of the DSU when defining which type of measures can be the subject of dispute settlement proceedings. The Appellate Body emphasized the nexus existing between the "measure" and a "Member" taking such measure:

"Article 3.3 of the DSU refers to 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member'. (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'."¹⁵⁸

131. In *US – Corrosion – Resistant Steel Sunset Review*, the Appellate Body indicated that any act or omission attributable to a State can be a measure of that Member for purposes of dispute settlement proceedings, and observed that those "acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."¹⁵⁹ The Appellate Body stated that "[b]oth specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member."¹⁶⁰

1.4.3.2 Challenging legislation taken by a customs union

132. The Panel in *Turkey – Textiles* considered, *inter alia*, whether measures involving quantitative restrictions on imports from India should be properly regarded as measures imposed by Türkiye or rather as measures taken collectively by the customs union between the European Communities and Türkiye. In its analysis, the Panel made the following statement:

"We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that

¹⁵⁶ Appellate Body Report, *US – Upland Cotton*, para. 264.

¹⁵⁷ Appellate Body Report, *US – Continued Zeroing*, para. 177.

¹⁵⁸ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

¹⁵⁹ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

¹⁶⁰ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 79.

mandatory legislation of a Member, even if not yet in force or not applied, can be challenged by another WTO Member."¹⁶¹

1.4.3.3 Private action as a "measure"

133. The Panel in *Japan – Film* characterized the problem of classifying private action as a governmental "measure" in the following terms:

"As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this 'truth' may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions."¹⁶²

134. Within the context referred to in paragraph 133 above, the Panel in *Japan – Film* had to determine whether an "administrative guidance" in Japan amounted to a governmental "measure". The Panel began by considering the ordinary meaning of the term "measure":

"The ordinary meaning of *measure* as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments. At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.

In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls 'regulatory administrative guidance', which it concedes effectively substitutes for formal government action. It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged 'measure' to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes."¹⁶³

135. The Panel in *Japan – Film* subsequently reviewed GATT practice with respect to this subject-matter and defined "sufficient government involvement" as the decisive criterion for whether a private action may be deemed to be a governmental "measure":

"[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in

¹⁶¹ Panel Report, *Turkey – Textiles*, para. 9.37.

¹⁶² Panel Report, *Japan – Film*, para. 10.52.

¹⁶³ Panel Report, *Japan – Film*, paras. 10.43-10.44.

this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."¹⁶⁴

136. In *Canada – Autos*, the Panel examined the GATT-consistency of commitments undertaken by Canadian motor vehicle manufacturers in their letters addressed to the Canadian Government to increase Canadian value added in the production of motor vehicles. Referring to the GATT Panel Reports on *Canada – FIRA* and *EEC – Parts and Components*¹⁶⁵, the Panel analysed whether the action of private parties is subject to Article III:4 as follows:

"[T]o qualify a private action as a 'requirement' within the meaning of Article III:4 means that in relation to that action a Member is bound by an international obligation, namely to provide no less favourable treatment to imported products than to domestic products.

A determination of whether private action amounts to a 'requirement' under Article III:4 must therefore necessarily rest on a finding that there is a nexus between that action and the action of a government such that the government must be held responsible for that action. We do not believe that such a nexus can exist only if a government makes undertakings of private parties legally enforceable, as in the situation considered by the Panel on *Canada – FIRA*, or if a government conditions the grant of an advantage on undertakings made by private parties, as in the situation considered by the Panel on *EEC – Parts and Components*. We note in this respect that the word 'requirement' has been defined to mean '1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with.' The word 'requirements' in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of 'requirements' in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government of action that can be effective in influencing the conduct of private parties."¹⁶⁶ (footnotes omitted)

137. In *Argentina – Hides and Leather*, the European Communities claimed that an Argentine resolution, which authorized the presence of representatives of the Argentine domestic leather tanning industry during customs clearance of exports of hides and leather, operated as a *de facto* export restriction in violation of Article XI:1 of GATT 1994. The European Communities admitted that the Argentine measure did not expressly limit exports; however, the European Communities claimed that the presence of the industry associations during the export clearance process allowed access to exporters' confidential business information, which was subsequently used – by virtue of the existence of a tanners cartel in the Argentine market – to exercise pressure on hides and leather producers not to export their products. The Panel ultimately rejected the European Communities' arguments on the basis of a lack of evidence:

"We agree with the view expressed by the panel in *Japan – Film*. However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.

...

The European Communities acknowledges that the representatives of the tanning industry do not have the *de jure* ability to halt bovine hide exports. However, according to the European Communities, having such representatives present during the export clearance process in itself restricts exports in the context of the facts of the

¹⁶⁴ Panel Report, *Japan – Film*, paras. 10.55-10.56.

¹⁶⁵ GATT Panel Reports on *Canada – FIRA*, para. 5.4; *EEC – Parts and Components*, para. 5.21.

¹⁶⁶ Panel Report, *Canada – Autos*, paras. 10.106-10.107.

case. The European Communities has advanced several reasons why this might be so. The European Communities refers to the GATT dispute of *Japan – Semiconductors* for the proposition that there can be export restrictions without overt actions by the government to physically stop exports. According to the European Communities, in that case it was sufficient for the government to set up a system where peer pressure was used to discourage exports. ...

...

[I]t is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility."¹⁶⁷

138. In *Argentina – Hides and Leather*, the Panel observed that "as an additional matter, the European Communities would also need to prove that this private action was attributable to the Argentinean government under the doctrine of state responsibility, but because the initial factual point has not been established, we do not need to reach that issue here".¹⁶⁸

139. In *Saudi Arabia – Intellectual Property Rights*, the Panel noted that the notion of "measures" is not limited or restricted as to requirements of form:

"Article 3.3 of the DSU refers to 'measures taken by another Member', without limitation as to the government agencies involved, and '[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings'. The Panel is guided by the following legal considerations in its assessment of the existence of the measures at issue, and in its assessment of the other disputed factual issues underlying all of Qatar's various claims under Parts I, II and III of the TRIPS Agreement.

For the purposes of the DSU, the notion of 'measures' is not restricted by requirements as to form. Although measures challenged in the WTO are often reflected in legal instruments such as enacted legislation, measures enacted or applied through other instruments that are legally binding in a Member's domestic legal framework (decrees, directives, regulations, notifications, judicial decisions, etc.) have also been subject to challenge. A determination of whether an instrument is a 'measure' 'must be based on [its] content and substance ... and not merely on its form or nomenclature.' The legal status of an instrument within the domestic legal system of the Member concerned is not dispositive of whether that instrument is a measure for purposes of WTO dispute settlement."¹⁶⁹

140. The Panel also considered that a measure at issue must be attributable to a WTO Member. A measure may be taken by any level of government, and where a measure is taken by a private entity, a panel may take into account the governmental connection to or endorsement of those actions, as well as the influence of the government on the private entity taking the measure:

"Only those acts or omissions attributable to a WTO Member are subject to WTO obligations. However, under Article 4(1) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles on State Responsibility), '[t]he conduct of any State organ shall be considered an act of that Member under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' As a consequence, a Member is responsible for actions at all levels of government (local, municipal, federal) and for all actions taken by any agency within any level of government. Thus, the responsibility of Members under international law

¹⁶⁷ Panel Report, *Argentina – Hides and Leather*, paras. 11.17, 11.22, and 11.51.

¹⁶⁸ Panel Report, *Argentina – Hides and Leather*, fn 342.

¹⁶⁹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.48-7.49.

applies irrespective of the branch of government at the origin of the action having international repercussions.

Additionally, Article 8 of the ILC Articles on State Responsibility provides that the conduct of a person or group of persons shall be considered an act of a State under international law 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. As one panel observed, 'what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions'. While there must be a sufficient nexus between the action of private entities and the action of a government (or other organ of the Member) for that government to be held responsible for that action, 'it is necessary to take into account that there is a broad variety of forms of government ... action that can be effective in influencing the conduct of private parties'. The fact that acts or omissions of private parties 'may involve some element of private choice' does not negate the possibility of those acts or omissions being attributable to a Member insofar as they reflect decisions that are not independent of one or more measures taken by a government (or other organ of the Member)."¹⁷⁰

1.5 Article 3.4

1.5.1 "achieving a satisfactory settlement of the matter"

141. In *EC – Chicken Cuts*, the Appellate Body observed that the objective in Article 3.4 does not override the specific requirements and obligations of Article 6.2 of the DSU:

"Brazil and Thailand also refer to Articles 3.4 and 3.7 of the DSU and argue that the principle of 'satisfactory settlement of the matter' and of 'secur[ing] a positive solution to the dispute' supports the inclusion of the two subsequent measures in the Panel's terms of reference in this case. We agree that a positive and effective resolution of a dispute is one of the key objectives of the WTO dispute settlement system. However, this objective cannot be pursued at the expense of complying with the specific requirements and obligations of Article 6.2. Moreover, in this case, we believe that the non-inclusion of the two subsequent measures in the Panel's terms of reference would not hinder a positive resolution of this dispute."¹⁷¹

142. In *Saudi Arabia – Intellectual Property Rights*, the respondent requested that the Panel decline to make any findings or recommendation with respect to the complainant's claims, on the basis that, in the circumstances surrounding the dispute, it would be impossible for there to be any WTO recommendation or ruling "aimed at achieving a satisfactory settlement of the matter" in the sense of Article 3.4 of the DSU, or that could "secure a positive solution to the dispute" in the sense of Article 3.7 of the DSU. The Panel rejected Saudi Arabia's argument, noting that the "dispute" referred to in Article 3.7 and the "matter" referred to in Article 11, like the "matter" referred to in Article 3.4, is "the narrow one currently before the Panel, and not what Saudi Arabia referred to as the 'real dispute'."¹⁷² In the course of its reasoning, the Panel stated:

"The Panel recalls that Article 3.4 of the DSU provides that recommendations or rulings made by the DSB are to be aimed at achieving a 'satisfactory settlement of the matter in accordance with the rights and obligations under [the DSU] and under the covered agreements'. The Panel considers that the 'matter' referred to in Article 3.4 is the 'matter referred to the DSB' by a complainant in its panel request, as provided under Article 7.1 of the DSU. Thus, in this dispute, the matter for which a satisfactory settlement is to be achieved is the 'matter referred to the DSB' by Qatar in its panel request, which, in turn, circumscribes the Panel's terms of reference. The Panel is therefore not persuaded by Saudi Arabia's arguments under Articles 3.7 and 11 of the DSU.

¹⁷⁰ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.50-7.51.

¹⁷¹ Appellate Body Report, *EC – Chicken Cuts*, para. 161.

¹⁷² Panel Report, *Saudi Arabia – Intellectual Property Rights*, footnote 247.

In response to a question from the Panel inviting the parties and third parties to comment on the relevance of the Appellate Body's analysis in *Mexico – Taxes on Soft Drinks* to Saudi Arabia's request that the Panel decline to make any findings or recommendation, Saudi Arabia argued that 'in the present dispute there exist stark legal impediments not present or considered in *Mexico – Taxes on Soft Drinks*'. Specifically, Saudi Arabia stated that the implications of Article 3.4 of the DSU (which provides that 'recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter') were not considered in that case and that, in its view, the provisions of Article 3.4 would amount to such a 'legal impediment' that would preclude a panel from ruling on the merits of the claims before it. However, the Panel notes that Saudi Arabia has identified no case in which a panel or the Appellate Body has found that the fairly general wording of Article 3.4 of the DSU can constitute a 'legal impediment' that would preclude a panel from ruling on a particular measure or claim."¹⁷³

1.6 Article 3.7

1.6.1 "a Member shall exercise its judgement as to whether action under these procedures would be fruitful"

143. In the context of a discussion on legal interest, the Appellate Body in *EC – Bananas III*, agreed with the Panel that "neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel". In this regard, see paragraph 155 below.

144. In *EC – Bananas III*, the Appellate Body further interpreted the phrase "a Member shall exercise its judgement as to whether action under these procedures would be fruitful" as indicating that a Member is "expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".¹⁷⁴

145. In *Mexico – Corn Syrup (Article 21.5 – US)*, Mexico challenged on appeal the Panel's silence regarding the alleged failure of the United States to satisfy its obligation under the first sentence of Article 3.7 of the DSU to exercise its judgement as to whether dispute settlement proceedings would be "fruitful". The Appellate Body then examined whether a failure to comply with the first sentence of Article 3.7 of the DSU would deprive a panel of its authority to deal with and dispose of a matter. The Appellate Body first indicated that "this sentence reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU".¹⁷⁵ It went on to point out the self-regulating nature of that sentence and concluded that the Panel was not obliged to consider this issue on its own motion:

"Given the 'largely self-regulating' nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such Member does so in good faith, having duly exercised its judgement as to whether recourse to that panel would be 'fruitful'. Article 3.7 neither requires nor authorizes a panel to look behind that Member's decision and to question its exercise of judgement. Therefore, the Panel was not obliged to consider this issue on its own motion."¹⁷⁶

146. In *Peru – Agricultural Products*, the respondent argued that Guatemala had waived in an FTA its right to challenge the measure at issue through the WTO dispute settlement mechanism, and had thus acted contrary to its good faith obligations under Articles 3.7 and 3.10 when it initiated the present proceedings. The Appellate Body rejected these arguments. In the course of its analysis, the Appellate Body suggested that panels have the authority to examine a Member's exercise of its judgement under Article 3.7:

¹⁷³ Panel Report, *Saudi Arabia – Intellectual Property Rights*, paras. 7.17-7.18.

¹⁷⁵ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73.

¹⁷⁶ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 74.

"The Appellate Body has previously held that Members enjoy discretion in deciding whether to bring a case, and are thus expected to be 'largely self-regulating' in deciding whether any such action would be 'fruitful'. The 'largely self-regulating' nature of a Member's decision to bring a dispute is 'borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, *in its own judgement*, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO'. Moreover, the Appellate Body has interpreted the first sentence of Article 3.7 as 'reflect[ing] a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the DSU.'

In our view, although the language of the first sentence of Article 3.7 of the DSU states that 'a Member shall exercise *its judgement*', the considerable deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely unbounded. For example, in order to ascertain whether a Member has relinquished, by virtue of a mutually agreed solution in a particular dispute, its right to have recourse to WTO dispute settlement in respect of that dispute, greater scrutiny by a panel or the Appellate Body may be necessary. This was the issue before the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – US)*, where it ascertained whether a Member had relinquished its right to have recourse to the WTO dispute settlement mechanism. In that case, the Appellate Body had to determine whether that Member was precluded from initiating compliance proceedings. In this dispute, Peru alleges that Guatemala waived in the FTA its right to have recourse to WTO dispute settlement in respect of the PRS, and consequently acted contrary to good faith when it initiated the present proceedings. Thus, in assessing whether Guatemala acted in conformity with its good faith obligations under Articles 3.7 and 3.10 of the DSU, we address below the issue of whether Guatemala has waived or relinquished its right to challenge the PRS before the WTO dispute settlement mechanism."¹⁷⁷

147. After reviewing the relevant provisions of the FTA at issue in the light of DSU provisions, the Appellate Body concluded that:

"[W]e do not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in this case in relation to, or within the context of, the DSU. We reach the above findings irrespective of the status of the FTA as not being ratified by both parties. Consequently, we do not see how Guatemala could be considered as having acted contrary to its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated these proceedings to challenge the consistency of the PRS with the WTO covered agreements. Therefore, we uphold the Panel's finding in paragraphs 7.96 and 8.1.a of the Panel Report, that there is 'no evidence that Guatemala brought these proceedings in a manner contrary to good faith'."¹⁷⁸

148. In *Saudi Arabia – Intellectual Property Rights*, the respondent requested that the Panel decline to make any findings or recommendation with respect to the complainant's claims, on the basis that, in the circumstances surrounding the dispute, it would be impossible for there to be any WTO recommendation or ruling "aimed at achieving a satisfactory settlement of the matter" in the sense of Article 3.4 of the DSU, or that could "secure a positive solution to the dispute" in the sense of Article 3.7 of the DSU. In this connection, Saudi Arabia further argued that, given the comprehensiveness of the diplomatic and economic measures imposed by Saudi Arabia and other Members in the region, and the underlying rationale for those measures, it was clear that Qatar had not exercised sound judgement in taking action under Article 3.7 of the DSU. Recalling prior statements by the Appellate Body concerning Article 3.7, the Panel stated that "[g]iven the discretion granted to complainants in deciding whether to bring a dispute under the DSU, the Panel does not consider that Qatar failed to exercise its judgement within the meaning of Article 3.7 in bringing this case."¹⁷⁹

¹⁷⁷ Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19.

¹⁷⁸ Appellate Body Report, *Peru – Agricultural Products*, para. 5.28.

¹⁷⁹ Panel Report, *Saudi Arabia – Intellectual Property Rights*, para. 7.19.

1.6.2 "aim of the dispute settlement mechanism is to secure a positive solution to a dispute"

149. In *US – Wool Shirts and Blouses*, the Appellate Body referred to Article 3.7 of the DSU and emphasized that a requirement to address all legal claims raised by a party is not consistent with the aim of the WTO dispute settlement system, which is to settle disputes.¹⁸⁰

150. In *Saudi Arabia – Intellectual Property Rights*, the respondent requested that the Panel decline to make any findings or recommendation with respect to the complainant's claims, on the basis that, in the circumstances surrounding the dispute, it would be impossible for there to be any WTO recommendation or ruling "aimed at achieving a satisfactory settlement of the matter" in the sense of Article 3.4 of the DSU, or that could "secure a positive solution to the dispute" in the sense of Article 3.7 of the DSU. The Panel rejected Saudi Arabia's argument. See paragraph 142 above.

1.6.3 "mutually agreed solution"

1.6.3.1 Legal effect of mutually agreed solutions

151. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body addressed the question of whether the Understandings on Bananas¹⁸¹, which the European Communities had concluded with the United States and with Ecuador, prevented the complainants from subsequently initiating compliance proceedings pursuant to Article 21.5 of the DSU with respect to the European Communities' regime for the importation of bananas introduced by Council Regulation (EC) No. 1964/2005 of 29 November 2005.¹⁸² The Appellate Body stated that:

"[N]othing in Article 3.7 establishes a condition under which a party would be prevented from initiating compliance proceedings or, indeed, dictates that the only kind of settlement envisaged in that provision is one that bars recourse to compliance proceedings under Article 21.5. Article 3.7 is not prescriptive as to the content of a mutually agreed solution, save that it must be consistent with the covered agreements. The only express limitation referred to in Article 3.7 is that 'a Member shall exercise its judgement as to whether action under these procedures would be fruitful'. The Appellate Body has interpreted this phrase to indicate that a Member is 'expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".¹⁸³ This is also borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, in its own judgement, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO."¹⁸⁴

152. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* went on to examine the concept of "solution" in Article 3.7 and described it as "the act of solving a problem". In the Appellate Body's view, the mere agreement to a "solution" does not necessarily imply that parties waive their right to have recourse to compliance panel proceedings. The Appellate Body concluded that the Panel's requirement that the Understandings must constitute a "positive solution and effective settlement" to the dispute in question to preclude recourse to Article 21.5 proceedings was not a correct interpretation of what the DSU requires:

"The term 'solution' employed in Article 3.7 refers to the 'act of solving a problem'.¹⁸⁵ There are usually different ways of solving any given problem. Pursuant to

¹⁸⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

¹⁸¹ Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1), and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

¹⁸² Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rates for bananas, *Official Journal of the European Union*, L Series, No. 316 (2 December 2005).

¹⁸⁴ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 211.

Article 19.1 of the DSU, when a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Accordingly, it is, in principle, within the Member's discretion to choose the means of implementation and to decide in which way it will seek to achieve compliance. The DSU thus recognizes that a solution leading to compliance can be implemented in various ways. Similarly, a mutually agreed solution pursuant to Article 3.7 may encompass an agreement to forego the right to initiate compliance proceedings. Or it may provide for the suspension of the right of recourse to Article 21.5 until the steps agreed upon in a mutually agreed solution have been implemented. Yet, this need not always be so. We therefore do not consider that the mere agreement to a 'solution' necessarily implies that parties waive their right to have recourse to the dispute settlement system in the event of a disagreement as to the existence or consistency with the covered agreements of a measure taken to comply. Instead, we consider that there must be a clear indication in the agreement between the parties of a relinquishment of the right to have recourse to Article 21.5. In our view, the Panel's requirement that the Understandings must constitute a 'positive solution and effective settlement' to the dispute in question to preclude recourse to Article 21.5 proceedings was not a correct interpretation of what the DSU requires."¹⁸⁶

153. The Appellate Body further stated that:

"The second reason relied upon by the Panel in support of its finding that the Understandings could not legally bar the complainants from bringing these compliance proceedings is that these Understandings were agreed upon subsequent to the adoption of recommendations, rulings, and suggestions by the DSB. We disagree with the Panel's reasoning. We see nothing in Article 3.7 or elsewhere in the DSU that prevents parties to a dispute from reaching a settlement that would preclude recourse to Article 21.5 proceedings after the adoption of recommendations and rulings by the DSB. In fact, Article 22.8 of the DSU stipulates that suspension of concessions shall only be applied until such time as a mutually satisfactory solution is reached. Thus, the DSU itself clearly envisages the possibility of entering into mutually agreed solutions after recommendations and rulings are made by the DSB. We do not consider that the factor that the Understandings were concluded only after the DSB made recommendations and rulings assists to determine whether the Understandings precluded the parties from initiating Article 21.5 proceedings."¹⁸⁷

1.6.3.2 Interpretation of mutually agreed solutions

154. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body emphasized that when interpreting the mutually agreed solution at issue in that case, the parties' obligations had to be determined first and foremost on the basis of the text of the Understandings at issue:

"The third reason relied upon by the Panel [in support of its interpretation of the Understandings at issue] is that the parties had made conflicting statements at the DSB meeting as to the legal nature of the Understandings after they were signed. We consider that these statements may be taken into account where the interpretation of the Understandings is not clear from the language used in its context. However, where the text of the Understandings is clear, these statements have limited relevance, if any, for the purpose of interpreting the Understandings. The parties' obligations must first and foremost be determined on the basis of the text of the Understandings. In any event, *ex post* communications of the parties concerning the Understandings have, at best, slight evidentiary value."¹⁸⁸

¹⁸⁶ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 212.

¹⁸⁷ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 215.

¹⁸⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 216.

1.6.4 Standing to bring dispute / legal interest

1.6.4.1 General

155. In *EC – Bananas III*, the European Communities argued that a complaining party must normally have a "legal right or interest" in the claim it is pursuing. The Appellate Body stated that no provision of the DSU contains any such explicit requirement. The Appellate Body also held that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU". While the Appellate Body stressed that Members are "self-regulating" in their decisions whether to bring a case, it also added that "[t]he United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the European Communities banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas":

"We agree with the Panel that 'neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain any explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel'. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the *WTO Agreement*. It is true that under Article 4.11 of the DSU, a Member wishing to join in multiple consultations must have 'a substantial trade interest', and that under Article 10.2 of the DSU, a third party must have 'a substantial interest' in the matter before a panel. But neither of these provisions in the DSU, nor anything else in the *WTO Agreement*, provides a basis for asserting that parties to the dispute have to meet any similar standard. Yet, we do not believe that this is dispositive of whether, in this case, the United States has 'standing' to bring claims under the GATT 1994."¹⁸⁹

156. The Appellate Body in *EC – Bananas III* went on to declare the wide discretion that Members enjoy in deciding on whether to bring a case under the DSU:

"[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'.

We are satisfied that the United States was justified in bringing its claims under the GATT 1994 in this case. The United States is a producer of bananas, and a potential export interest by the United States cannot be excluded. The internal market of the United States for bananas could be affected by the EC banana regime, in particular, by the effects of that regime on world supplies and world prices of bananas. We also agree with the Panel's statement that:

'... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.'

We note, too, that there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case."¹⁹⁰

157. The Appellate Body in *EC – Bananas III* underlined that the factors that it took into account in coming to this conclusion would not necessarily be dispositive in future cases:

"Taken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994. This does not mean, though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case. We therefore uphold the

¹⁸⁹ Appellate Body Report, *EC – Bananas III*, para. 132.

¹⁹⁰ Appellate Body Report, *EC – Bananas III*, paras. 135-137.

Panel's conclusion that the United States had standing to bring claims under the GATT 1994."¹⁹¹

158. In *Korea – Dairy*, the Panel rejected Korea's argument that there is a requirement for an economic interest to bring a matter to the Panel and that the European Communities had failed to meet that requirement:

"In *EC – Bananas*, the Appellate Body stated that the need for a 'legal interest' could not be implied in the DSU or in any other provisions of the WTO Agreement and that Members were expected to be largely self-regulating in deciding whether any DSU procedure would be 'fruitful'. We cannot read in the DSU any requirement for an 'economic interest'. We also note the provisions of Article 3.8 of the DSU, pursuant to which nullification and impairment is presumed once violation is established."¹⁹²

159. In *EC – Bananas III (Article 21.5 – US)*, the European Communities asked the Panel to determine whether the United States had standing to commence the proceedings. The Panel started by noting that current proceedings involved a "compliance" case under Article 21.5 of the DSU and commented that "by their nature, compliance cases are linked with the original proceedings in the dispute". Having noted that the United States was a complaining party in the original proceedings in which the European Communities' bananas regime was found to be inconsistent with the WTO covered agreements, the Panel went on to state:

"[T]he United States, as an original complainant, holds a particular interest in ensuring that the measure in question is brought into conformity with the WTO agreements. The European Communities has failed to rebut the existence of that particular interest. Accordingly, the Panel does not need to conduct, under the current compliance proceedings, a separate analysis of whether, in the words of the European Communities, 'the alleged violation of a WTO rule sufficiently 'touches' upon the interests of the [United States] so as to justify [that] party's 'standing' to commence dispute settlement proceedings'.

... For the reasons indicated above, and especially in view of the particular interest of the United States in the current compliance proceedings, the Panel finds that the United States had, under the DSU, the right to request the initiation of such proceedings."¹⁹³

160. The Panel in *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)* found that the Philippines had standing to challenge measures concerning, exclusively, imports of cigarettes from Indonesia into Thailand:

"The measures at issue relate to the valuation of goods for purposes of levying *ad valorem* duties on PMTL's imports of *Marlboro* and *L&M* cigarettes. PMTL currently imports substantial volumes of *Marlboro* and *L&M* cigarettes into Thailand from the Philippines. These imports are subjected to customs valuation determinations by the Thai authorities on a recurring basis. Thus, any measure that relates to customs valuation practices affecting the Thai importer that now sources from the Philippines has the very real potential to affect future exports of cigarettes from the Philippines to Thailand. Insofar as these measures threaten the continued viability of PMTL's operations in Thailand, then they have the potential to end or otherwise impair exports of cigarettes from the Philippines to Thailand.

The Panel further notes that the parties' claims and defences relating to the 2002-2003 Charges in this proceeding could be said to be inextricably interwoven with their arguments relating to the 2003-2006 Charges at issue in the first compliance proceeding, which cover imports from the Philippines. In *EC – Bananas III*, the Appellate Body's analysis of the United States' standing to challenge the EC measures at issue appeared to accord some weight to the fact that 'there is no challenge here to the standing of the United States under the GATS, and that the claims under the GATS and the GATT 1994 relating to the EC import licensing regime are inextricably interwoven in this case'.

¹⁹¹ Appellate Body Report, *EC – Bananas III*, para. 138.

¹⁹² Panel Report, *Korea – Dairy*, para. 7.13.

¹⁹³ Panel Report, *EC – Bananas III (Article 21.5 – US)*, paras. 7.34-7.35.

The Panel concludes that these factual circumstances more than suffice to establish that the Philippines has standing to challenge the 2002-2003 Charges and the 1,052 revised NoAs, notwithstanding that they concern imports into Thailand from Indonesia, and not the Philippines."¹⁹⁴

1.6.4.2 Difference with Article 3.8 (nullification or impairment) standard

161. In *EC – Bananas III (Article 21.5 – US)*, the Appellate Body stressed the broader nature of the notion of standing as compared to the notion of "nullification or impairment":

"We consider that the notion of 'standing', as interpreted by the Appellate Body in the original proceedings, is broader than the notion of 'nullification or impairment'. In other words, if there is nullification or impairment, there will also be standing to bring a complaint. However, standing may also exist in cases that result in no finding of nullification or impairment. In the original *EC – Bananas III* proceedings, the Appellate Body found that 'a Member has broad discretion in deciding whether to bring a case against another Member under the DSU', and that 'a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".¹⁹⁵ The Appellate Body further concluded that, considering that the United States was a producer and potential exporter of bananas, it was justified in bringing its claims under the GATT 1994.¹⁹⁶ The Appellate Body then used this same argument to find that the United States had suffered nullification or impairment of benefits.^{197"198}

1.6.5 "suspending the application of concessions or other obligations"

162. In *US – Certain EC Products*, the Panel had found that the measure at issue constituted an unauthorized suspension of concessions and thus violated Article 3.7 (and Articles 22.6 and 23.2(c)) of the DSU.¹⁹⁹ After describing Article 3.7, the Appellate Body agreed with the Panel that if a Member has acted in breach of Articles 22.6 and 23.2(c) of the DSU, this entails a consequential violation of Article 3.7:

"Article 3.7 is part of Article 3 of the DSU, which is entitled 'General Provisions' and sets out the basic principles and characteristics of the WTO dispute settlement system. Article 3.7 itself lists and describes the possible temporary and definitive outcomes of a dispute, one of which is the suspension of concessions or other obligations to which the last sentence of Article 3.7 refers. The last sentence of Article 3.7 provides that the suspension of concessions or other obligations is a 'last resort' that is subject to DSB authorization.

The 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 is, therefore, not surprising that the European Communities did not explicitly claim, or advance arguments in support of, a violation of Article 3.7, last sentence. The European Communities argued that the 3 March Measure is inconsistent with Articles 22.6 and 23.2(c) of the DSU. We consider, 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.

Although we do not believe that it was necessary or incumbent upon the Panel to find that the United States violated Articles 3.7 of the DSU, we find no reason to disturb

¹⁹⁴ Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines II)*, paras. 7.93-7.95.

¹⁹⁶ (footnote original) The panel and the Appellate Body in the original proceedings used the same argument to conclude that the United States had "standing" to bring the case and that it had suffered nullification or impairment of benefits (that is, that the United States is a potential exporter of bananas to the European Communities and that there could be effects on its internal market). However, the fact that nullification or impairment implies a higher standard than "legal standing" does not mean that "standing" cannot be found based on such higher standard.

¹⁹⁸ Appellate Body Report, *EC – Bananas III (Article 21.5 US)*, paras. 463-464.

¹⁹⁹ Panel Report, *US – Certain EC Products*, para. 6.73.

the Panel's finding that, by adopting the 3 March Measure, the United States acted inconsistently with 'Articles 23.2(c), 3.7 and 22.6 of the DSU'.²⁰⁰²⁰¹

1.7 Article 3.8

1.7.1 Presumption of "nullification or impairment"

163. In *EC – Bananas III*, the European Communities appealed the Panel's finding that "the infringement of obligations by the European Communities under a number of WTO agreements, are a *prima facie* case of nullification or impairment of benefits in the meaning of Article 3.8 of the DSU". The Appellate Body observed that the European Communities, in its appeal, attempted to "rebut the presumption of nullification or impairment on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage." The Appellate Body stated:

"[W]e note that the two issues of nullification or impairment and of the standing of the United States are closely related ... [T]wo points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas They are ... relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.

So, too, is the panel report in *United States – Superfund*, to which the Panel referred. In that case, the panel examined whether measures with 'only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 ...'. The panel concluded (and in so doing, confirmed the views of previous panels) that:

'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'²⁰²

The panel in *United States – Superfund* subsequently decided 'not to examine the submissions of the parties on the trade effects of the tax differential' on the basis of the legal grounds it had enunciated. The reasoning in *United States – Superfund* applies equally in this case."²⁰³

164. While upholding the finding of the Panel in *EC – Bananas III* that the European Communities had not succeeded in rebutting the presumption that its breaches of the GATT 1994 nullified or impaired the benefits of the United States, the Appellate Body did modify the Panel's finding. It considered that the Panel had erred in extending its findings on the presumption in Article 3.8 to claims made under the GATS and to claims made by complaining parties other than the United States.²⁰⁴

165. In *Turkey – Textiles*, Türkiye argued that even if its quantitative restrictions on imports of textile and clothing products from India were in violation of WTO law, India had not suffered any

²⁰¹ Appellate Body Report, *US – Certain EC Products*, paras. 119-121.

²⁰³ Appellate Body Report, *EC – Bananas III*, paras. 251-253.

²⁰⁴ Appellate Body Report, *EC – Bananas III*, para. 250.

nullification or impairment of its WTO benefits within the meaning of Article 3.8 of the DSU. Türkiye pointed out that that imports of textile and clothing from India had actually increased since the Turkish measures at issue had entered into force. The Panel rejected this argument:

"We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, is [*sic*] would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO."²⁰⁵

166. In *Guatemala – Cement II*, Guatemala argued that its alleged failure to issue proper notifications and its failure to provide the Mexican interested party with the full text of the application for anti-dumping investigations had not nullified or impaired Mexico's benefits accruing under the *Anti-Dumping Agreement*. The Panel declined to consider this preliminary objection by Guatemala, stating that "we will address the issue of nullification or impairment after we have considered whether Guatemala has acted consistently with its obligations under the AD Agreement."²⁰⁶ Subsequently, the Panel held:

"Guatemala argues that in the case of the Article 5.5 notification it did not initiate the investigation until after Mexico had been notified and that it granted Cruz Azul an extension to respond to the questionnaire and thus Mexico was not impaired in the defence of its interests. We have already found that the initiation date was 11 January 1996 and thus notification under Article 5.5 was not provided until after initiation. There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5."²⁰⁷

167. In *Argentina – Ceramic Tiles*, Argentina argued that the European Communities failed to demonstrate that Italian tile exporters were prejudiced by the failure of the Argentine anti-dumping authority to calculate individual anti-dumping margins. In this context, Argentina relied on the Appellate Body's findings in *Korea – Dairy*.²⁰⁸ The Panel rejected Argentina's argument:

"We note, however, that the Appellate Body Report in the *Korea – Dairy Safeguards* case, to which Argentina refers in support of its argument, dealt with the question of whether the request for establishment met the requirements of Article 6.2 of the DSU. The issue before the Appellate Body was whether Article 6.2 of the DSU was complied with or not. The Appellate Body, in deciding that question, concluded that one element to be considered was whether the defending Member was prejudiced in its ability to defend itself by a lack of clarity or specificity in the request for establishment. The Appellate Body did not address the question whether, once it had been established that a provision of the Agreement is violated, it needs in addition to be demonstrated that this violation had prejudiced the rights of the complaining party. Thus, we do not agree that this Appellate Body decision supports Argentina's argument that the concept of harmless error has been accepted in WTO law.

²⁰⁵ Panel Report, *Turkey – Textiles*, para. 9.204.

²⁰⁶ Panel Report, *Guatemala – Cement II*, para. 8.25.

²⁰⁷ Panel Report, *Guatemala – Cement II*, para. 8.109.

²⁰⁸ Appellate Body Report, *Korea – Dairy*, paras. 114-131.

...

Article 3.8 of the DSU thus provides that there is a presumption that benefits are nullified or impaired – i.e., there is a presumption of 'harm' – where a provision of the Agreement has been violated. Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption. In light of the presumption of Article 3.8 of the DSU, the EC having established that Argentina has acted in a manner inconsistent with the AD Agreement, it is up to Argentina to show that the failure to determine an individual dumping margin has not nullified or impaired benefits accruing to the EC under the Agreement. Argentina has failed to adduce any evidence in this respect. Accordingly, we find that the presumption of nullification or impairment of benefits caused by the violation of Article 6.10 of the AD Agreement has not been rebutted by Argentina."²⁰⁹

168. In *US – Offset Act (Byrd Amendment)*, Mexico argued that the presumption of "nullification and impairment" arising under Article 3.8 of the DSU as a consequence of the U.S. violation of certain obligations under the SCM Agreement was sufficient to establish a *prima facie* case of "nullification and impairment" for purposes of Article 5(b) of the SCM Agreement. In relation to the claims of violation nullification or impairment, the Panel stated that any presumption arising under Article 3.8 of the DSU stemming from these violations would relate to nullification or impairment caused "*by the violation at issue*". The Panel rejected the argument by Mexico on the grounds that, for the purpose of Article 5(b) of the *SCM Agreement*, Mexico must demonstrate that "*the use of a subsidy*" caused nullification or impairment."²¹⁰

169. In *EC – Export Subsidies on Sugar*, the Appellate Body upheld the Panel's finding that a complaining Member's expectations were not relevant to a finding pursuant to Article 3.8:

"The text of Article 3.8 of the DSU suggests that a Member may rebut the presumption of nullification or impairment by demonstrating that its breach of WTO rules has no adverse impact on other Members. Trade losses represent an obvious example of adverse impact under Article 3.8. Unless a Member demonstrates that there are no adverse trade effects arising as a consequence of WTO-inconsistent export subsidies, we do not believe that a complaining Member's expectations would have a bearing on a finding pursuant to Article 3.8 of the DSU. Therefore, the European Communities has failed to rebut the presumption of nullification or impairment pursuant to Article 3.8 of the DSU."²¹¹

170. In *EC – Bananas III (Article 21.5 – US)*, the Appellate Body rejected the European Communities' argument that the Panel had confused the notion of 'nullification or impairment' in Article 3.8 of the DSU with the 'interest' that a complaining party must have in order to have 'standing' to commence dispute settlement proceedings. The Appellate Body stated out by noting that "Article 3.8 of the DSU places the burden on the respondent of rebutting the presumption that the inconsistent measure nullifies or impairs the benefits accruing to the complainant under the WTO agreement concerned."²¹² It went on to find:

"In these proceedings, as in the original proceedings, the contested measure may not have actual trade effects because, at present, there are no exports of bananas from the United States to the European Communities. However, in order to determine whether the United States has suffered nullification or impairment, 'competitive opportunities' and, in particular, any potential export interest of the United States must be taken into account. We do not consider that the European Communities' argument—that, as a net importer of bananas, the United States could not credibly have a 'potential' interest in exporting bananas to the European Communities is sufficient to rebut the presumption of nullification or impairment under Article 3.8. As noted by the panel and the Appellate Body in the original proceedings, while present production in the United States is minimal, it could at any time start exporting the few bananas it produces to the European Communities. That this may

²⁰⁹ Panel Report, *Argentina – Ceramic Tiles*, paras. 6.103 and 6.105.

²¹⁰ Panel Report, *US – Offset Act (Byrd Amendment)*, paras. 7.118-119.

²¹¹ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 300.

²¹² Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 468.

be unlikely does not disprove that the United States is a potential exporter of bananas to the European Communities. In this respect, we recall the conclusion of the GATT panel in *US – Superfund*:

'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'²¹³

We do not consider it sufficient for the European Communities to allege that the Panel failed to explain what could be the effect of the inconsistent measure on the United States' internal market. In fact, it is the European Communities that bears the burden of rebutting the presumption that the measure found to be inconsistent with the GATT 1994 nullifies or impairs benefits accruing directly or indirectly to the United States under the covered agreements.

Furthermore, we recall that the DSB adopted recommendations and rulings in the original proceedings for the European Communities to bring itself into compliance with the GATT 1994 and the GATS. The measure at issue in these compliance proceedings was found to be in breach of the same provisions of the covered agreements as in the original proceedings. The Panel's mandate was to examine whether the European Communities had complied with the DSB's recommendations and rulings in the original proceedings. We agree with the Panel that '[t]he arguments advanced by the European Communities on the alleged lack of nullification or impairment have not rendered irrelevant the considerations made by the panel and by the Appellate Body in the course of the original proceedings, regarding the actual and potential trade interests of the United States in the dispute'. "²¹⁴

171. In *EC – Bananas III (Article 21.5 – US)*, the Appellate Body agreed with the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* that Articles 3.8 and 22.6 of the DSU deal with different legal issues:

"We agree with the arbitrators that the question whether nullification or impairment exists within the meaning of Article 3.8 of the DSU, and the question of what level of suspension of concessions is equivalent to the level of nullification or impairment under Article 22.6, are distinct.²¹⁵ Therefore, the question how the arbitrators calculated the level of nullification or impairment under Article 22.6 arises in a different procedural context in WTO dispute settlement."²¹⁶

172. In *Russia – Tariff Treatment*, one of the challenged measures was a duty rate of 15 per cent, which was mandated to be applied as from a future date, but which was never actually applied. The Panel found that:

"The Panel observes that under the terms of Article 3.8, since we have found a breach of the obligation contained in Article II:1(b), first sentence, there is 'normally' a

²¹⁴ Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, paras. 469-471.

²¹⁵ (footnote original) The Article 22.6 arbitrators found that:

[t]he presumption of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as evidence proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system.

(Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10)

²¹⁶ Appellate Body Report, *EC – Bananas III (Article 21.5 US)*, para. 475.

presumption that that breach has an adverse impact on the European Union and other Members. We do not consider the mere fact that the breach in respect of the sixth measure arises from the mandatory future application of a specified duty rate to be sufficient to displace the 'normal' presumption of adverse impact. Nor has Russia advanced any argument to persuade us otherwise.

Regarding the adoption of Decision No. 85, we note that the issue before the Panel is whether the duty rate required to be applied under Decision No. 77 caused nullification or impairment. Although Decision No. 85 had not been adopted at the time of the Panel's establishment, its subsequent adoption does not have the effect of eliminating any nullification or impairment that existed at the time of the Panel's establishment, as it did not have retroactive effect. Having said this, as indicated, our recommendation under Article 19 of the DSU takes account of the existence of Decision No. 85."²¹⁷

1.7.2 Relationship with other WTO Agreements

1.7.2.1 Article XXIII:1 of the GATS

173. In *EC – Bananas III*, the Appellate Body suggested that the Panel may have erred in extending the scope of the presumption of nullification or impairment in Article 3.8 of the DSU to violation claims made under the GATS:

"We observe, first of all, that the European Communities attempts to rebut the presumption of nullification or impairment with respect to the Panel's findings of violations of the GATT 1994 on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage. The attempted rebuttal by the European Communities applies only to one complainant, the United States, and to only one agreement, the GATT 1994. In our view, the Panel erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS as well as to claims made by the Complaining Parties other than the United States."²¹⁸

174. The Panel in *Mexico – Telecoms* understood these statements by the Appellate Body to mean that the GATS does not require that, in the case of a violation complaint (Article XXIII:1 of the GATS), "nullification or impairment" of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel:

"Unlike some other covered agreements (e.g. GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation complaint (GATS Article XXIII:1), 'nullification or impairment' of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a 'benefit' or the 'attainment of an objective' under that agreement are being 'nullified or impaired', the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member 'fails to carry out its obligations or specific commitments' under the GATS. In this respect, we note that the Appellate Body in *EC – Bananas III* stated that the panel in that case 'erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS'.²¹⁹ Having found that Mexico has violated certain provisions of the GATS, we are therefore bound by Article 19 of the DSU to proceed directly to the recommendation set out in that provision."²²⁰

1.8 Article 3.9

175. In *EU – Fatty Alcohols (Indonesia)*, the European Union argued that an appeal is not appropriate, and is inconsistent with Article 3 of the DSU, when the measure at issue has been

²¹⁷ Panel Report, *Russia – Tariff Treatment*, paras. 7.124-7.125.

²¹⁸ Appellate Body Report, *EC – Bananas III*, para. 250.

²²⁰ Panel Report, *Mexico – Telecoms*, para. 8.4.

withdrawn or has expired in the course of the panel proceedings. The European Union invoked several provisions of Article 3 of the DSU in support of its position, including Article 3.9 of the DSU. The Appellate Body stated that:

"Finally, the European Union refers to Article 3.9 of the DSU, and alleges that Indonesia is using the appeal procedure to seek an authoritative interpretation of particular provisions of the covered agreements, even though other procedures are set out for this purpose in the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The European Union asserts that Indonesia is requesting clarification or interpretation of certain provisions of the covered agreements in abstract terms, and that it is seeking an 'advisory opinion' in a manner disconnected from any ongoing dispute.

In the present case, Indonesia has not requested an interpretation in the abstract, but the reversal of specific findings in the Panel Report. In particular, Indonesia has requested us to reverse the Panel's finding that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement. Indonesia is requesting us to review, *inter alia*, the Panel's interpretation of a specific provision of the covered agreements, and, in this sense, it is no different from other appeals brought before the Appellate Body."²²¹

1.9 Article 3.10

1.9.1 Non-contentious dispute settlement

176. In *EC – Bananas III (Article 21.5 – Ecuador II)*, the European Communities argued that using Article 21.5 of the DSU to question a mutually agreed solution between the parties went against Article 3.10 of the DSU as it would seriously compromise the effectiveness of such mutually agreed solutions and thus foster the 'contentious' character of the dispute resolution system. The Panel held that Article 3.10 of the DSU excludes the very possibility of a contentious dispute settlement proceeding:

"As regards the contentious nature of disputes, the Panel reads Article 3.10 of the DSU to exclude on its plain terms the interpretation accorded to it by the European Communities. In particular, in the light of the language of Article 3.10 of the DSU, the Panel does not see how the European Communities could consider the current dispute settlement proceeding as a contentious act."²²²

177. In *Korea – Stainless Steel Bars*, the Panel examined Korea's allegation that Japan, the complainant, had acted in bad faith in the WTO proceedings by having made certain misleading arguments and misrepresentations of facts before the Panel:

"Korea also argues that Japan was acting in bad faith in the present WTO proceedings. This is a serious allegation. According to Korea, Japan made certain misleading arguments and misrepresentations of facts before the Panel. Korea suggested that Japan's misrepresentations did not appear to be inadvertent, and characterized certain aspects of Japan's case as a 'hoax'. Korea requests the Panel to avoid an outcome that would result in Japan's misrepresentations being rewarded in the dispute."²²³

178. The Panel stated that it had reviewed the core of Korea's argument, concerning Japan's reliance on aspects of the submissions of Japanese exporters in the underlying proceedings, which contained inaccuracies, inconsistencies, and mistakes. Having examined Japan's explanations for the discrepancies in the submissions, the Panel did not consider the explanations to have resulted from bad faith. Rather, the Panel cautioned against advancing allegations of bad faith as part of an adversarial "advocacy effort" or litigation technique in WTO dispute settlement in the light of Article 3.10:

²²¹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.184-5.185.

²²² Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paras. 7.123-7.126.

²²³ Panel Report, *Korea – Stainless Steel Bars*, para. 7.168.

"We have carefully reviewed Korea's allegations on this matter. The only evidence that Korea offers for Japan's alleged bad faith participation in the present proceedings concerns Japan's reliance on aspects of the submissions by the Japanese exporters in the underlying proceedings that contained inaccuracies, inconsistencies, and mistakes. Japan has provided explanations for these apparent discrepancies in light of the attendant procedural and evidentiary background of the review. We have examined those explanations. We see nothing in them to suggest that Japan is engaging in these proceedings in bad faith.²²⁴ We note that, with respect to the allegation of a 'hoax', Korea clarified that it has a 'responsibility as a Member of the WTO to exert its best advocacy effort in this adversarial process to prevent the Panel from accepting a premise that is so unrealistic'. In our view, advancing allegations of bad faith as part of an adversarial 'advocacy effort' or litigation technique in WTO dispute settlement would not accord with Article 3.10 of the DSU, nor would it assist in facilitating the fair, prompt, and effective resolution of the actual matter in dispute."²²⁵

1.9.2 Good faith engagement in dispute settlement procedures

1.9.2.1 Presumption of good faith engagement in dispute settlement procedures

179. The Panel in *Korea – Certain Paper* found that "we have to assume that WTO Members engage in dispute settlement in good faith, as required under Article 3.10 of the DSU."²²⁶

180. The Panel in *China – Auto Parts* exercised its discretion in accepting late evidence "on the assumption that Canada acted in good faith without the intention to deliberately withhold the evidence until the later stage of the proceeding."²²⁷

181. The Appellate Body in *US/Canada – Continued Suspension* explained that Article 3.10 of the DSU does not specifically address the question of whether a Member enjoys a presumption of good faith in respect of measures taken to implement DSB recommendations and rulings:

"The DSU makes reference to 'good faith' in two provisions, namely, Article 4.3, which relates to consultations, and Article 3.10, which provides that, 'if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.' These provisions require Members to act in good faith with respect to the initiation of a dispute and in their conduct during a dispute settlement proceedings. Neither provision specifically addresses the question of whether a Member enjoys a presumption of good faith compliance in respect of measures taken to implement."²²⁸

1.9.2.2 Good faith as a limit on use of WTO dispute settlement

182. Article 3.10 of the DSU has been recognized as one of a very limited number of explicit limitations on the right of WTO Members to bring an action under the DSU.²²⁹

183. In *EC – Sardines* the Appellate Body found that the right to withdraw an appeal must be exercised subject to the limitations in Article 3.10 of the DSU.²³⁰

184. In *US – Carbon Steel* the Appellate Body found that:

"As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these

²²⁴ (footnote original) Our review took account of the premise that "Members act in good faith in the context of dispute settlement proceedings", and we were "unwilling to assume possible malfeasance in the absence of evidence to that effect". (Panel Report, *EC – Bed Linen*, para. 6.216). In view of their nature, the threshold for proving such allegations is high, and the mere existence of an inconsistency would be ordinarily insufficient to demonstrate this. (Ibid. paras. 6.215-6.216).

²²⁵ Panel Report, *Korea – Stainless Steel Bars*, para. 7.169.

²²⁶ Panel Report, *Korea – Certain Paper*, para. 6.97.

²²⁷ Panel Report, *China – Auto Parts*, para. 6.21.

²²⁸ Appellate Body Report, *US/Canada – Continued Suspension*, para. 313.

²²⁹ Appellate Body Report, *Mexico – Soft Drinks*, fn 101.

²³⁰ Appellate Body Report, *EC – Sardines*, para. 140.

procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits."²³¹

185. The Appellate Body in *EC – Export Subsidies on Sugar* explained that there is:

"[L]ittle in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their 'judgement as to whether action under these procedures would be fruitful', by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU."²³²

186. In *Peru – Agricultural Products*, the respondent argued that Guatemala had waived in an FTA its right to challenge the measure at issue through the WTO dispute settlement mechanism, and had thus acted contrary to its good faith obligations under Articles 3.7 and 3.10 when it initiated the present proceedings. See paragraphs 146 and 147 above.

1.9.2.3 Estoppel and good faith

187. In *EC – Export Subsidies on Sugar*, the Appellate Body found an overlap between good faith under Article 3.10 of the DSU and estoppel:

"We understand the Panel to have addressed the European Communities' arguments on Article 3.10 of the DSU and good faith together with the European Communities' arguments regarding estoppel. We note, for instance, that, at the outset of its analysis, the Panel referred to the 'parties' arguments in respect to good faith and estoppel'. In summarizing those arguments, the Panel referred, *inter alia*, to the European Communities' contention that 'the Complainants were acting inconsistently with the general principle of good faith and with their obligation[s] under Article 3.10 of the DSU'."²³³

188. In the same report the Appellate Body later commented on the possibility of estoppel in WTO dispute settlement proceedings:

"The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their 'judgement as to whether action under these procedures would be fruitful', by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU."²³⁴

189. The Panel in *EC and certain member States – Large Civil Aircraft* considered the European Communities' argument "that the good faith obligation contained in Article 3.10 of the DSU, can reasonably be analysed 'in the light of the general international law principle of estoppel.'"²³⁵

1.9.2.4 Resolution of trade disputes excludes tactics and manoeuvres

190. In *US – FSC*, the Appellate Body laid down the general principle that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes." The Appellate Body stated that:

²³¹ Appellate Body Report, *US – Carbon Steel*, para. 89.

²³² Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312.

²³³ Appellate Body, *EC – Export Subsidies on Sugar*, para. 304.

²³⁴ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312.

²³⁵ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.101.

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.²³⁶ This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."²³⁷

191. Panels and the Appellate Body have consistently made use of the above cited statement from *US – FSC*.²³⁸ An illustration of this principle is provided by the Panel in *US – Upland Cotton*, which explained that a Member cannot rely on uncertainty attributable to its own inattention to avoid dispute settlement:

"If a Member is uncertain as to the scope of the measures referred to by another Member in a request for consultations, and chooses not to seek clarification, it cannot rely on its own uncertainty as a jurisdictional bar to a Panel finding on the measures. Members have an obligation under Article 3.10 of the DSU to engage in WTO dispute settlement procedures in good faith in an effort to resolve the dispute."²³⁹

192. The Panel in *EC – Fasteners (China)* followed the general principle laid down by the Appellate Body in *US – FSC* that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes", and also found that Article 3.10 of the DSU was inconsistent with "inappropriate legal manoeuvres to avoid dispute settlement."²⁴⁰

193. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*) stated that fabrication or misrepresentation of facts of which a party possesses exclusive knowledge may show lack of good faith:

"Article 3.10 of the DSU establishes that 'all Members will engage in these procedures in good faith in an effort to resolve the dispute'. The Panel considers that a Member would clearly fall short of engaging in WTO dispute settlement procedures in 'good faith' if, as either a complaining or responding party, it were to fabricate evidence or misrepresent facts of which it possesses exclusive knowledge in such a way as to induce a panel to rely on those representations for the purpose of making findings that rest on an incorrect factual basis. Accordingly, the Panel considers that the presumption that Members engage in WTO dispute settlement procedures in good faith establishes a high threshold for questioning the veracity of such factual representations. This understanding is consistent with the approach taken by panels in previous cases, including in the context of a range of issues relating to anti-dumping and subsidy measures involving information solely in the possession of the responding Member."²⁴¹

²³⁷ Appellate Body Report, *US – FSC*, para. 166.

²³⁸ Appellate Body Report, *Canada – Wheat Export and Grain Imports*, para. 205; Appellate Body Reports, *EC – Tariff Preferences*, fn. 247; *Thailand – H-Beams (Poland)*, para. 97. Other Panels have made similar findings; see Panel Reports, *EC – Bed Linen*, fn 60; *Canada – Aircraft Credit and Loan Guarantees*, fn 311.

²³⁹ Panel Report, *US – Upland Cotton*, para. 7.67.

²⁴⁰ Panel Report, *EC – Fasteners (China)*, fn 205.

²⁴¹ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines II*), para. 7.106.

1.9.2.5 Questions from panel should be fully answered

194. In *Canada – Aircraft* the Appellate Body suggested that failure to comply with the Panel's request for information could amount to a lack of good faith under Article 3.10 of the DSU. The Appellate Body stated that:

"We believe also that the duty of a Member party to a dispute to comply with a request from the panel to provide information under Article 13.1 of the DSU is but one specific manifestation of the broader duties of Members under Article 3.10 of the DSU not to consider the 'use of the dispute settlement procedures ... as contentious acts', and, when a dispute does arise, to 'engage in these procedures in good faith in an effort to resolve the dispute'."²⁴²

195. The Panel in *Canada – Aircraft Credit and Loan Guarantees* relied on Article 3.10 of the DSU in finding that although not obligated to do so "one might hope that Canada would be more forthcoming" with certain information so as to more fully answer questions from the Panel.²⁴³

1.9.2.6 Arguments to be developed at earliest possible stage and in clearest possible fashion

196. In *US – 1916 Act (EC)*, the Panel stated that:

"Article 3.10 provides that parties must engage in dispute settlement in good faith. This implies that they should not withhold until the interim review stage arguments that they could be legitimately expected to have raised at a much earlier stage of the proceedings, in light of the claims developed in the first submissions."²⁴⁴

197. In *Thailand – H-Beams*, the Appellate Body, faced with the objection that the legal basis of the complaint had not been precisely identified, noted that "nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission." According to the Appellate Body such pre-emptive clarification would be consistent with Article 3.10 of the DSU.²⁴⁵

198. The Panel in *EC – Tube or Pipe Fittings* considered that the nature of the panel process is that the claims made by a party may be progressively clarified and refined throughout the proceeding:

"[I]t is in the nature of the Panel process that the claims made by a party may be progressively clarified and refined throughout the proceeding. This may occur through the submission of supporting evidence and argumentation by the parties, commencing with their first written submission, and followed by a round of rebuttal submissions, supplemented by oral statements and answers to questions. It is, of course, clear that this process of progressive clarification would not allow a party to add additional claims (which were not included in the request for establishment of the Panel) during the course of the proceedings. The fundamental due process rights of the parties are thereby preserved."²⁴⁶

199. The Appellate Body in *EC – Tariff Preferences* found that it followed from Article 3.10 of the DSU that "India, as the complaining party, should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of this dispute...[.]"²⁴⁷

200. The Appellate Body in *US – Gambling* explained that the language of Article 3.10 of the DSU "implies the identification by each party of relevant legal and factual issues at the earliest opportunity so as to provide other parties, including third parties, an opportunity to respond."²⁴⁸

²⁴² Appellate Body Report, *Canada – Aircraft*, para. 190.

²⁴³ Panel Report, *Canada – Aircraft Credit and Loan Guarantees*, para. 7.384.

²⁴⁴ Panel Report, *US – 1916 Act (EC)*, para. 5.18.

²⁴⁵ Appellate Body Report, *Thailand – H-Beams*, para. 97.

²⁴⁶ Panel Report, *EC – Tube or Pipe Fittings*, para. 7.10.

²⁴⁷ Appellate Body Report, *EC – Tariff Preferences*, para. 117.

201. In *EC – Fasteners (China)* the Panel referred to Article 3.10 in the context of criticizing China for failing to make a clear and timely claim under Article 6.5 of the Anti-Dumping Agreement. The Appellate Body, without referring to Article 3.10, concluded that the late assertion of the claim and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrated that the European Union was not called upon to respond:

"We recall that, in reviewing the European Union's argument that China failed to substantiate its claim under Article 6.5, the Panel stated that 'the way in which China had pursued this claim in this dispute is far from ideal', and that it was 'particularly troubled by the fact that the claim was not developed at all in China's first written submission'. The Panel explained that China's 'fail[ure] to put forward a fuller explanation of and argument in support of its claim ... left the European Union in a difficult position in attempting to respond to a claim that was unclear'. ...

We too are troubled by the way in which China pursued its claim under Article 6.5 regarding the confidential treatment of 'product type' information submitted by Pooja Forge. As the Panel found, China did not articulate a 'good cause' claim or argument under Article 6.5 in its first written submission. The arguments China did make in its first submission were limited to the deficiency of the non-confidential version of Pooja Forge's questionnaire response, which is a claim under Article 6.5.1, and not related to the issue of whether 'good cause' for confidential treatment was shown under Article 6.5.

...

Rule 4 of the Panel's Working Procedures requires that, '[b]efore the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.' ... We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law. The late assertion of a claim under Article 6.5 with respect to the lack of a 'good cause' showing for confidential treatment of Pooja Forge's 'product type' information, and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrates that the European Union was not called upon to respond to China's claim under Article 6.5."²⁴⁹

1.9.2.7 Correction of factual errors and procedural deficiencies

202. The Panel in *US – 1916 Act (Japan)* also found that:

"It could be argued that for a party not to inform the Panel of a factual error in its findings may be contrary to the obligation laid down in Article 3.10 of the DSU, which provides *inter alia* that 'all Members will engage in these [DSU] procedures in good faith in an effort to resolve the dispute'."²⁵⁰

203. The Panel in *EC – Asbestos* found that:

"[I]n the letter attached to Canada's comments, the latter indicates that its request for review 'is without prejudice to Canada's position on all the aspects of the Panel's Report'. In this connection, the Panel considers that, if it had misunderstood or misrepresented some of the factual aspects of the case in its findings, the parties would need the interim review stage in order to make the necessary corrections or clarifications because, unlike errors of law, errors of fact cannot usually be modified on appeal. The parties should take advantage of this last opportunity to rectify the factual assessments of the Panel otherwise the Panel could unnecessarily be at risk of being accused of not having made an objective evaluation of the facts. It might be claimed that the fact that a party does not inform the Panel of a factual error in its

²⁴⁸ Appellate Body Report, *US – Gambling*, para. 269.

²⁴⁹ Appellate Body Report, *EC – Fasteners (China)*, paras. 567-568, and 574.

²⁵⁰ Panel Report, *US – 1916 Act (Japan)*, fn 422.

findings may be contrary to the obligation in Article 3.10 of the Understanding, which provides *inter alia* that 'all Members will engage in these procedures [settlement of disputes] in good faith in an effort to resolve the dispute'."²⁵¹

204. The Appellate Body in *US – Carbon Steel* held that "in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity."²⁵²

1.9.2.8 Breach of confidentiality

205. In *EC – Export Subsidies on Sugar (Thailand/Australia/Brazil)* the Panel referred to Article 3.10 of the DSU in reporting a breach of confidentiality whereby confidential information appeared in an *amicus curiae* submission.²⁵³

1.9.2.9 Temporal scope

206. The Panel in *Turkey – Textiles* considered India's argument that Article 3.10 of the DSU was relevant to a situation where consultations had not been successful.²⁵⁴

207. The Panel in *Canada – Exports of Wheat and Imports of Grain* found that the obligation to engage in dispute resolution in good faith extended to the possibility of establishing a new panel to address the substance of a particular claim while the present Panel prepared a preliminary ruling.²⁵⁵

208. In *EC – Exports Subsidies on Sugar* the Appellate Body found that the obligation to engage in dispute settlement in good faith under Article 3.10 of the DSU covers "the entire spectrum of dispute settlement, from the point of initiation of a case through implementation."²⁵⁶

209. Furthermore, the Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* "required the continuing cooperation of the parties, acting in good faith in accordance with Article 3.10 of the DSU" in light of the number, complexity and scope of tasks to be performed.²⁵⁷

210. The Appellate Body in *US/Canada – Continued Suspension* found that Article 3.10 of the DSU and Article 4.3 of the DSU require Members to act in good faith with respect to the initiation of a dispute.²⁵⁸

1.9.2.10 Good faith and representations made by a party

211. In *China – GOES*, the Appellate Body indicated that a panel is entitled to rely on "representations" made before it by a party, and that if a party then wished to advance a different position on appeal, that party would have to explain why its statements are no longer to be relied upon.²⁵⁹

212. In *US – Countervailing and Anti-Dumping Measures (China)*, the United States requested that the Panel make a preliminary ruling that China's panel request did not comply with the requirements of Article 6.2 of the DSU. China subsequently represented that it did not intend to pursue some of the claims at issue. In these circumstances, the Panel decided that it was not

²⁵¹ Panel Report, *EC – Asbestos*, fn 3, Section VII.

²⁵² Appellate Body Report, *US – Carbon Steel*, para. 123. See also Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 205.

²⁵³ Panel Reports, *EC – Export Subsidies on Sugar (Thailand/Australia/ Brazil)*, paras. 7.89 and 7.98-7.99.

²⁵⁴ Panel Report, *Turkey – Textiles*, para. 9.21.

²⁵⁵ Panel Report, *Canada – Exports of Wheat and Imports of Grain*, para. 6.10, sub-para. 65.

²⁵⁶ Appellate Body Report, *EC – Exports Subsidies on Sugar*, para. 312.

²⁵⁷ Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 2.13.

²⁵⁸ Appellate Body Report, *US/Canada – Continued Suspension*, para. 313.

²⁵⁹ Appellate Body Report, *China – GOES*, para. 195.

necessary for it to rule on whether, insofar as those claims were concerned, the panel request complied with Article 6.2 of the DSU.²⁶⁰ In the course of its reasoning, the Panel stated that:

"We have determined above that we are entitled to rely on China's statement for purposes of making our preliminary ruling. However, any decision by this Panel to limit the scope of its preliminary ruling in reliance on China's statement would of necessity be subject to the condition that China acts in accordance with its statement. It is apposite to recall in this respect that Article 3.10 of the DSU commits all Members, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". Thus, it is clear to us that in situations where a complaining party abandons claims during a special preliminary ruling procedure, panels should not – save, perhaps, in extraordinary circumstances and subject to a well-substantiated explanation²⁶¹ – allow that party to resurrect those claims after the preliminary phase has run its course. Otherwise, a complaining party could circumvent a preliminary ruling covering these claims.

Bearing in mind these additional observations informed by Article 3.10 of the DSU, we remain of the view that the Panel is entitled to act on China's statement for purposes of making its preliminary ruling. Given this, we conclude that we have sufficient reason at this time to consider that the Article 6.2 issue raised by the United States and pertaining to the abandoned claims is, and will remain, moot. In these circumstances, we find it appropriate to limit the scope of our preliminary ruling to take account of China's statement."²⁶²

1.9.3 Complaints and counter-complaints should not be linked

213. The Panel in *Mexico – Soft Drinks* noted that complaints and counter-complaints should not be linked:

"The Panel was mindful that, under Article 3.10 of the DSU, Members should not link 'complaints and counter-complaints in regard to distinct matters'. In other words, even conceding that there seems to be an unresolved dispute between Mexico and the United States under the NAFTA, the resolution of the present WTO case cannot be linked to the NAFTA dispute. In turn, any findings made by this Panel, as well as its conclusions and recommendations in the present case, only relate to Mexico's rights and obligations under the WTO covered agreements, and not to its rights and obligations under other international agreements, such as the NAFTA, or other rules of international law.

...

Both parties acknowledge that there is a dispute between them concerning the United States' commitments under the NAFTA regarding the access of Mexican sugar to the United States market. However, that is a separate dispute from the one that has been brought before this Panel. First, it is a dispute regarding obligations under a different international agreement, the NAFTA. Second, the DSU and the terms of reference approved by the DSB define the limits of the matter that is before of this Panel. Article 3.10 of the DSU states that WTO Members understand that 'complaints and counter-complaints in regard to distinct matters should not be linked'. Consequently, even if, *arguendo*, the dispute between Mexico and the United States regarding access of Mexican sugar in the United States market were a matter under the WTO covered agreements, a Panel could not link the complaints and counter-complaints related to distinct matters in one single case."²⁶³

²⁶⁰ See WT/DS449/4, paras. 3.1-3.16.

²⁶¹ (*footnote original*) It is noteworthy that, in *China – GOES*, the Appellate Body indicated along similar lines that in a case where a panel is entitled to rely on statements made before it by a party, and that party wishes to advance a different position on appeal, that party would have to explain why its statements are no longer to be relied upon. (See Appellate Body Report, *China – GOES*, para. 195).

²⁶² WT/DS449/4, paras. 3.13-3.14.

²⁶³ Panel Report, *Mexico – Soft Drinks*, paras. 7.15 and 8.232.

Current as of: December 2024