1 ARTICLE 32

1.1 Text of Article 32

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

(*footnote original*)[56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

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

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

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

> 32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.
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> 32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.
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> 32.8 The Annexes to this Agreement constitute an integral part thereof.

1.2 General

1. The Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* found that Articles 32.1, 32.2, 32.5, and 32.6 of the SCM Agreement impose obligations on Members. The Appellate Body stated that:

> "Article 32.1 mandates that actions against a subsidy of another Member may be taken only if it is 'in accordance with the provisions of GATT 1994'. Article 32.2 provides that reservations in respect of any of the provisions of the SCM Agreement may not be entered 'without the consent of the other Members'. Article 32.5 obligates Members to 'take all necessary steps' to ensure the conformity of its laws, regulations, and administrative procedures with the provisions of the SCM Agreement. Article 32.6 directs Members to inform the SCM Committee of 'any changes in its laws and regulations', as well as in the administration thereof, that are relevant to the SCM Agreement.
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> We observe that Article 32.1 is the only paragraph that provides an obligation with respect to the imposition of countervailing duties. Articles 32.2, 32.5, and 32.6 are not relevant in this dispute, as the obligations they impose concern reservations with, and the general implementation of, the SCM Agreement. Specifically, Article 32.2 is not pertinent, since the present dispute does not involve any reservations with respect to any of the provisions of the SCM Agreement. As regards Article 32.5, China does not allege that the United States failed to make its laws, regulations, and administrative procedures conform to the SCM Agreement. With respect to Article 32.6, China does not contend that the United States failed to inform the SCM Committee of any changes in its laws and regulations. On the basis of these considerations, we agree with the Panel that only Article 32.1 appears to be relevant in this dispute and, like Article 10, its alleged violation is merely consequential to the alleged violation of Article 19."[1]

1.3 Article 32.1

1.3.1 "in accordance with the provisions of GATT 1994, as interpreted by this Agreement"

2. The Panel in *Brazil – Desiccated Coconut* considered the relevance of Article 32.1 to the question of separability of Article VI of the GATT 1994 and the SCM Agreement. The Panel emphasized that Article 32.1 makes evident that the SCM Agreement is an "interpretation" of the subsidies provisions contained in the GATT 1994. The Panel concluded that, as a result, the meaning of Article VI of GATT 1994 cannot be established without reference to the provisions of the SCM Agreement, since Article VI of GATT 1994 "might have a different meaning if read in isolation than if read in conjunction with the *SCM Agreement*". In addition, the Panel pointed out that the general interpretive note to Annex 1A of the WTO Agreement reveals the possibility of conflict between GATT 1994 and the annexed agreements and that, therefore, there could also be conflicts "between GATT 1994 taken in isolation and GATT 1994 interpreted in conjunction with an [annexed] agreement."[2] The Appellate Body agreed with the findings of the Panel but took a slightly different approach in that it focused on the phrase "in accordance with the provisions of GATT 1994, as interpreted by this Agreement":

[1] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.20-4.21.
[2] Panel Report, *Brazil – Desiccated Coconut*, para. 238.

> "From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together[.]"[3]

3. In *US – Offset Act (Byrd Amendment*), the Appellate Body concluded that it is inappropriate to rely on the reasoning from *US – 1916 Act* to determine what is meant by 'in accordance with the provisions of the GATT 1994' as that phrase relates to permissible responses to subsidies.[4] The Appellate Body also considered that "to be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must be either in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system."[5] Consequently, the Appellate Body upheld the finding of the Panel that the Offset Act is a "non-permissible specific action against" dumping or a subsidy, contrary to Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.[6]

1.3.2 "specific action against a subsidy"

4. The Panel in *EC – Commercial Vessels* considered whether, as argued by Korea, the TDM Regulation was a specific action against a subsidy. To this end, the Panel first considered whether the measure was "specific" action, and then examined whether it was "against" a subsidy.[7] In examining the notion of "specific" action, the Panel, having recalled the Appellate Body's findings under AD Agreement Article 18.1, a provision closely related to SCM Agreement Article 32.1, in the *US – 1916 Act* case, as well as the findings of the Appellate Body in both of these provisions in *US – Offset Act (Byrd Amendment),* considered whether the TDM was inextricably linked to, or had a strong correlation with, the constituent elements of a subsidy.[8] Applying this standard, on the basis of the scope of the Regulation, the use of terminology intimately connected with the SCM Agreement, the relationship of the TDM Regulation to the findings made in the investigation under the Trade Barriers Regulation of adverse effects caused by subsidies, and the relationship between the temporal application of the TDM Regulation, the WTO dispute settlement case and the 'effective' implementation of the Agreed Minutes, the Panel found that the TDM Regulation was a specific action related to a subsidy "because it has a strong correlation and inextricable link with the constituent elements of a subsidy".[9] It disagreed with Korea, however, that the TDM Regulation was "against" a subsidy in the sense of Article 32.1 on the basis that "a counter-subsidy – will not, merely because of its impact on conditions of competition, constitute specific action "against" that subsidy and therefore be proscribed by the SCM Agreement.[10]

5. The Panel in *US- Countervailing Measures (21.5 - China)* was not convinced that a determination to use an out-of-country benchmark can be properly characterized as "an action against subsidization" and found that that the relevant characteristics of the measures at issue did not support the conclusion that "by relying on alleged subsidies granted to input producers, among other factors, as a factual basis for its preliminary and final benchmark determinations, the USDOC was taking a specific action against those alleged subsidies in the sense of Article 32.1 of the SCM Agreement."[11]

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[3] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.
[4] Appellate Body Report, *US – Offset Act (Byrd Amendment*), para. 266.
[5] Appellate Body Report, *US – Offset Act (Byrd Amendment*), para. 273.
[6] Appellate Body Report, *US – Offset Act (Byrd Amendment*), para. 274.
[7] Panel Report, *EC– Commercial Vessels*, para. 7.92.
[8] Panel Report, *EC– Commercial Vessels*, paras. 7.108-113.
[9] Panel Report, *EC– Commercial Vessels*, para. 7.143.
[10] Panel Report, *EC– Commercial Vessels*, para. 7.164.
[11] Panel Report, *US – Countervailing Measures (21.5- China)*, paras. 7.244-245.

1.3.3 Relationship with other provisions of the SCM Agreement

1.3.3.1 Article 10

6. The Appellate Body in *US – Countervailing Measures (China)* explained that "the Appellate Body has treated claims under Articles 10 and 32.1 of the SCM Agreement as consequential claims in the sense that, where it has not been established that the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are present, the right to impose a countervailing duty has not been established and, as a consequence, the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement."[12]

1.3.3.2 Article 14

7. In *US – Softwood Lumber IV*, the Appellate Body reversed the Panel's decision that the United States had acted inconsistently with Article 32.1 of the SCM Agreement, although it concluded that it was unable to complete the legal analysis on whether the Department of Commerce's determination of benefit was consistent with Article14(d) of the SCM Agreement. Neither did the Appellate Body make findings on whether the Department of Commerce's "determination of the existence and amount of benefit in the underlying countervailing duty investigation" was consistent with Articles 14 and 14(d) and whether the imposition of countervailing duties at issue were consistent with Articles 10 and 32.1.[13]

1.4 Article 32.3

1.4.1 Transitional rule

8. The Panel in *Brazil – Desiccated Coconut* described Article 32.3 as "a transition rule which defines with precision the temporal application of the SCM Agreement."[14] Addressing this temporal application of the SCM Agreement, the Appellate Body in *Brazil – Desiccated Coconut* examined Article 32.3 as "an express statement of intention" referred to in Article 28 of the *Vienna Convention*, concerning the non-retroactivity of treaties.[15] The Appellate Body stated:

> "The Appellate Body sees Article 32.3 of the *SCM Agreement* as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the *WTO Agreement* is to be determined by the date on which the application was made for the countervailing duty investigation or review. … [T]he Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new *WTO Agreement* to countervailing duty investigations and reviews at a different point in time from that for other general measures. Because a countervailing duty is imposed only as a result of a sequence of acts, a link had to be drawn, and drawn sharply, to avoid uncertainty, unpredictability and unfairness concerning the rights of states and private parties under the domestic laws in force when the *WTO Agreement* came into effect."[16]

9. While discussing Article 32.3 with reference to the issue of separability of Article VI of the GATT 1994 and the SCM Agreement, the Appellate Body in *Brazil – Desiccated Coconut* agreed that the transitional decisions approved by the Tokyo Round Subsidies and Countervailing Measures Committee and the CONTRACTING PARTIES "do not modify the scope of rights and obligations under the *WTO Agreement*". Rather, the Appellate Body held these decisions "contribute to understanding the significance of Article 32.3 of the *SCM Agreement* as a transitional rule"[17]:

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[12] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.211. See also Panel Report, *US – Supercalendered Paper*, paras. 7.274 and 7.276.
[13] Appellate Body Report, *US – Softwood Lumber IV*, paras. 119-122.
[14] Panel Report, *Brazil – Desiccated Coconut*, para. 228.
[15] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 15.
[16] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 19.
[17] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 18.

> "Like the Panel, 'we are hesitant, in interpreting the WTO Agreement, to give great weight to the effect of decisions that had not yet been taken at the time the WTO Agreement was signed'. We agree with the Panel's statement that:
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> > 'The availability of Article VI of GATT 1994 as applicable law in this dispute is a matter to be determined on the basis of the WTO Agreement, rather than on the basis of a subsequent decision by the signatories of the Tokyo Round SCM Code taken at the invitation of the Preparatory Committee.'[18]
>
> …
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> While we agree with the Panel that these transitional decisions are of limited relevance in determining whether Article VI of the GATT 1994 can be applied independently of the *SCM Agreement*, they reflect the intention of the *Tokyo Round SCM Code* signatories to provide a forum for dispute settlement arising out of disputes under the *Tokyo Round SCM Code* for one year after its legal termination date. At the time the *Tokyo Round SCM Code* signatories agreed to these decisions, they were fully cognizant of the implications of the operation of Article 32.3 of the *SCM Agreement*."[19]

1.4.2 "this Agreement"

10. After a contextual analysis of Article 32.3, the Appellate Body in *Brazil – Desiccated Coconut* concluded that "[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this Agreement and Article VI of the GATT 1994'".[20]

1.4.3 "investigations"

11. The Panel in *Brazil – Desiccated Coconut* rejected the argument that the reference in Article 32.3 to "investigations" limits the application of the SCM Agreement to the "procedural" aspects of investigations. Rather, the Panel concluded that "the concept of 'investigations' as expressed in Article 32.3 includes both procedural and substantive aspects of an investigation and the imposition of a countervailing measure pursuant thereto.[21] The Panel also held that "one object and purpose of Article 32.3 is to prevent WTO Members from having to redo investigations begun before the entry into force of the WTO Agreement in accordance with the new and more detailed procedural provisions of the SCM Agreement. In our view, however, this consideration is equally applicable to the substantive provisions of the SCM Agreement".[22]

1.4.4 "reviews of existing measures"

12. The Panel in *Brazil – Desiccated Coconut* rejected the argument that Article 32.3 does not preclude the application of the SCM Agreement to the continued collection of duties after the date of entry into force of the WTO Agreement. It stated:

> "It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply. If … a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if … that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply -- and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist -- at the time the determinations were made. In our view, such an interpretation would

[19] Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 19-20.
[20] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 17.
[21] Panel Report, *Brazil – Desiccated Coconut*, para. 229.
[22] Panel Report, *Brazil – Desiccated Coconut*, para. 229.

> be contrary to the object and purpose of Article 32.3 and would render that Article a nullity."[23]

1.5 Article 32.5

1.5.1 "to ensure … the conformity of its laws … with the provision of this Agreement"

13. In *US – Offset Act (Byrd Amendment)*, the Panel suggested that the United States bring the Act into conformity with the SCM Agreement by "repealing" the Act. The Panel had found violations of Articles 5.4 and 18.1 of the Anti-Dumping Agreement and Articles 11.4 and 32.1 of the SCM Agreement, it had also found consequent violations of Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement, and therefore Article XVI:4 of the WTO Agreement.[24] The Appellate Body upheld the Panel's findings of violations of Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement, and also of Article XVI:4 of the WTO Agreement, based on the violations of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement.[25]

14. In *US – Countervailing Measures (China)*, the Panel found that Article 32.5 is relevant to a determination of what types of measures may, "as such", be submitted to dispute settlement under the SCM Agreement. The Panel stated that:

> "Article 32.5 contains an explicit obligation for each Member to 'take all necessary steps, of a general or particular character' to ensure 'the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.' Similar to the conclusion of the Appellate Body in *United States – Corrosion-Resistant Steel Sunset Review* regarding the corresponding provision of Article 18.4 of the Anti-Dumping Agreement, the phrase 'laws, regulations and administrative procedures' seems to encompass the entire body of generally applicable rules, norms and standards, for purposes of WTO law, adopted by Members in connection with the conduct of countervailing duty investigations. If some of these types of measures could not, as such, be subject to dispute settlement under the SCM Agreement, it would frustrate the obligation of 'conformity' set forth in Article 32.5.""[26]

15. In *US – Countervailing Measures on Certain EC Products*, the Panel had found that the disputed legislation, Section 1677(5)(F), as interpreted by the US Court of Appeals for the Federal Circuit and the SAA, was inconsistent with the SCM Agreement, and, therefore, the United States had failed to ensure conformity with Article 32.5 of the SCM Agreement and Article XVI.4 of the WTO Agreement respectively. In this regard, the Panel was of the view that:

> "[T]together with the other provisions of the SCM Agreement, Article 32.5 as well as Article XVI.4 of the WTO Agreement require the United States to maintain a legislation, regulations and practices that guarantee that in cases of fair market value privatization at arm's-length no benefit *vis-à-vis* the privatized producer is determined to continue from prior subsidization or financial contributions bestowed on a state-owned producer."[27]

16. The Appellate Body, however, reversed the Panel's findings on the grounds that it did not consider that Section 1677(5)(F) had *per se* violated the SCM Agreement.[28]

1.6 Article 32.6

17. In *US – Customs Bond Directive*, India requested the Panel to find that the United States had violated Article 18.5 of the Anti-Dumping Agreement and Article 32.6 of the SCM Agreement by not making the necessary notifications to the relevant Committees. The United States was of

[23] Panel Report, *Brazil – Desiccated Coconut*, para. 230.
[24] Panel Report, *US – Offset Act (Byrd Amendment)*, paras. 7.91-7.92.
[25] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 300-301.
[26] Panel Report, *US – Countervailing Measures (China)*, para. 7.97.
[27] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.156.
[28] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 159-160.

the view that it had no obligation to notify the amended customs bond directive (CBD) to either of the Committees.[29] The Panel disagreed with the United States:

> "The EBR has been designed as a security for the collection of potential increased anti-dumping or countervailing duties and this security may only be imposed where a given product is subject to an anti-dumping or countervailing order. We also recall our findings that the Amended CBD constitutes specific action against dumping or subsidisation within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. We arrived at this conclusion by finding, *inter alia*, that the constituent elements of dumping and/or subsidisation were present in the Amended CBD. For all of these reasons, we consider that the Amended CBD 'changes ... the administration' of anti-dumping or countervailing duty laws and/or regulations and thus falls within the scope of Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement*.
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> … Despite the absence of a specific deadline, in our view, in order for any notification to be effective, it must be made within a reasonable time. It is also our view that Article 18.5 of the *Anti-Dumping Agreement* and Article 32.6 of the *SCM Agreement* were originally formulated to address transparency concerns surrounding the administration of anti-dumping and countervailing duty investigations and measures. A failure to properly notify changes in the anti-dumping laws or regulations, or the administration of such laws to the Anti-Dumping and SCM Committees within a reasonable time fails to address that objective.
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> In the matter before us, we are unaware that the United States has yet attempted to notify the Amended CBD to the Anti-Dumping and SCM Committees. The United States has failed to do so despite the fact that the Amended CBD became effective more than three years ago with publication of the July 2004 Amendment. We consider this delay to be unreasonable."[30]

1.1. On this basis, the Panel in *US – Customs Bond Directive* concluded that "the United States has failed to meet its obligation to notify the Amended CBD to the Anti-Dumping and SCM Committees."[31]

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[29] Panel Report, *US – Customs Bond Directive*, para. 7.278.
[30] Panel Report, *US – Customs Bond Directive*, paras. 7.282-7.284.
[31] Panel Report, *US – Customs Bond Directive*, para. 7.285.