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## **1 ARTICLE XVI**

### **1.1 Text of Article XVI**

#### **Article XVI**

##### *Miscellaneous Provisions*

1. Except 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.
2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.
3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.
4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

## **1.2 Article XVI:1**

### **1.2.1 "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947"**

1. In *Japan – Alcoholic Beverages II*, the Appellate Body referred to Article XVI:1 in the course of examining the legal effect of panel reports adopted by the CONTRACTING PARTIES to GATT 1947 or the Dispute Settlement Body.<sup>1</sup> The Appellate Body stated:

"Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO."<sup>2</sup>

2. In *EU – Poultry Meat (China)*, the Panel was presented with claims under Articles XXVIII and II of the GATT 1994 in connection with two tariff renegotiation exercises initiated by the European Union. In the course of its analysis of these, the Panel referred to the Procedures for Negotiations under Article XXVIII<sup>3</sup> and the Procedures for Modification and Rectification of Schedules<sup>4</sup>. The Panel noted that diverse views have been presented by the parties and third parties on the proper legal characterization of these procedures, but that it was common ground between the parties and third parties expressing a view on the matter that, at a minimum, both procedures qualify as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement. The Panel agreed:

"The Appellate Body has stated that 'Article XVI:1 of the WTO Agreement ... bring[s] the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system', and 'acknowledges the continuing relevance of that experience to the new trading system served by the WTO'.

We agree with the parties and third parties that both sets of procedures qualify as 'decisions', 'procedures' or 'customary practices' within the meaning of Article XVI:1 of the WTO Agreement. First, we see no basis to question that these procedures qualify either as 'decisions', 'procedures' or 'customary practices' within the meaning of Article XVI:1 of the WTO Agreement. Second, it is clear that both sets of procedures were 'followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947' since their adoption in 1980. Third, neither the WTO Agreement nor the GATT 1994 made provision for any new procedures to supersede these procedures. To the contrary, the Procedures for Negotiations under Article XXVIII continue to serve as the basis for all negotiations under Article XXVIII. These same procedures are expressly referred to, in whole or in

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<sup>1</sup> This issue is related to that of "legitimate expectation". See below, paragraph 279.

<sup>2</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14. In *India – Patents (US)*, the Appellate Body acknowledged the first of the paragraphs cited above; see Appellate Body Report, *India – Patents (US)*, para. 35.

<sup>3</sup> Procedures for Negotiations under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and Corr. 1, BISD 27S/26-29.

<sup>4</sup> Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25.

part, in several WTO instruments. The Procedures for Modification and Rectification of Schedules continue to apply under the WTO as well. This is evidenced, inter alia, by the fact that they have been applied in several prior disputes by WTO panels and the Appellate Body.

Article XVI:1 states that '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. This reference to the WTO would include the Dispute Settlement Body, and we therefore see no reason why the sphere of application of Article XVI:1 would not extend to a dispute settlement panel. Accordingly, we consider that we are under a duty ('shall be guided by') to take account of these procedures in our interpretation of the relevant provisions of the GATT 1994."<sup>5</sup>

### **1.2.2 Status of actions or instruments as "decisions, procedures or customary practices"**

#### **1.2.2.1 Bilateral agreements**

3. In *EC – Poultry*, the Appellate Body upheld the Panel's rejection of Brazil's argument that "the MFN principle under Articles I and XIII of GATT does not necessarily apply to TRQs opened as a result of the compensation negotiations under Article XXVIII of GATT". In so doing, the Appellate Body found that the Oilseeds Agreement, which was a bilateral agreement between the European Communities and Brazil under Article XXVIII of the GATT 1947, does not constitute part of the "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947" within the meaning of Article XVI:1. The Appellate Body stated: "[t]hese 'decisions, procedures and customary practices' include only those taken or followed by the CONTRACTING PARTIES to the GATT 1947 acting *jointly*."<sup>6</sup>

#### **1.2.2.2 Tokyo Round Agreements**

4. In *Brazil – Desiccated Coconut*, the Panel examined the legal relevance under Article XVI:1 of the Tokyo Round SCM Code and the practice of Code signatories to the interpretation of GATT Article VI and the SCM Agreement and stated:

"We recognize that the *Pork* Panel had indicated, in passing, that the Tokyo Round SCM Code represents 'practice' under Article VI of GATT 1947. Article 31.3(b) of the Vienna Convention provides that there may be taken into account, when interpreting a treaty, '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 31.3 clearly distinguishes between the use of subsequent *agreements* and of subsequent *practice* as interpretive tools. The Tokyo Round SCM Code is, in our view, in the former category and cannot itself reasonably be deemed to represent 'customary practice' of the GATT 1947 CONTRACTING PARTIES. In any event, while the practice of Code signatories might be of some interpretive value in establishing their agreement regarding the interpretation of the Tokyo Round SCM Code (and arguably through Article XVI:1 of the WTO Agreement in interpreting provisions of that Code that were carried over into the successor SCM Agreement), it is clearly not relevant to the interpretation of Article VI of GATT 1994 itself; rather, only practice under Article VI of GATT 1947 is legally relevant to the interpretation of Article VI of GATT 1994."<sup>7</sup>

#### **1.2.2.3 GATT 1947 Council decisions**

5. In *US – FSC*, the Appellate Body examined the legal relevance to the interpretation of the SCM Agreement and GATT Article XVI:4 of the 1981 decision by the GATT 1947 Council to adopt the four panel reports on *Belgium – Income Tax*, *US – DISC*, *France – Income Tax*, and *Netherlands – Income Tax*, subject to certain understandings. The Appellate Body found that the 1981 Council action did not address the issues in the *US – FSC* dispute, but it observed:

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<sup>5</sup> Panel Report, *EU – Poultry Meat (China)*, paras. 7.24-7.26.

<sup>6</sup> Appellate Body Report, *EC – Poultry*, para. 80.

<sup>7</sup> Panel Report, *Brazil – Desiccated Coconut*, para. 256.

"We recognize that, as 'decisions' within the meaning of Article XVI:1 of the *WTO Agreement*, the adopted panel reports in the *Tax Legislation Cases*, together with the 1981 Council action, could provide 'guidance' to the WTO."<sup>8</sup>

6. In *EU – Poultry Meat (China)*, the Panel considered the status of the Procedures for Negotiations under Article XXVIII and the Procedures for Modification and Rectification of Schedules, both of which were adopted under the GATT. See paragraph 2 above.

#### 1.2.2.4 Adopted panel reports

7. The Appellate Body in *Japan – Alcoholic Beverages II* noted that the Panel in that case had stated that adopted panel reports "are often considered by subsequent panels" and that "they create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."<sup>9</sup> The Appellate Body found that adopted panel reports are not binding "except with respect to resolving the particular dispute between the parties to that dispute":

"Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."<sup>10</sup> In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*

For these reasons, we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that 'panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case' as the phrase 'subsequent practice' is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute 'other decisions of the CONTRACTING PARTIES to GATT 1947' for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

However, we agree with the Panel's conclusion in that same paragraph of the Panel Report that *unadopted* panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members'. Likewise, we agree that 'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.'<sup>11</sup>

#### 1.2.2.5 Unadopted panel reports

8. In *Argentina – Textiles and Apparel*, the Appellate Body reversed the Panel's finding that "past GATT practice" generally required that a Member could not apply one type of duties if its GATT tariff bindings are expressed in terms of another type of duties. Examining three working party reports relied on by the Panel, the Appellate Body questioned their substantive relevance, and noted in particular:

"[T]he Panel relied extensively on the *unadopted* panel report in *Bananas II*. In our Report in *Japan – Taxes on Alcoholic Beverages*, we agreed with that panel that '*unadopted* panel reports have no legal status in the GATT or WTO system ... although we believe that a panel could nevertheless find useful guidance in the reasoning of an

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<sup>8</sup> Appellate Body Report, *US – FSC*, para. 115.

<sup>9</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14.

<sup>10</sup> (*footnote original*) It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

<sup>11</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 14-15. See also Panel Report, *US – Wool Shirts and Blouses*, para. 7.15.

unadopted panel report that it considered to be relevant'. In the case before us, the Panel's use of the *Bananas II* panel report appears to have gone beyond deriving 'useful guidance' from the reasoning employed in that unadopted panel report. The Panel, in fact, *relies* upon the *Bananas II* panel report."<sup>12</sup>

### **1.2.3 Relationship between Article XVI:1 and Paragraph 1(b) of GATT 1994 incorporation clause**

9. In *US – FSC*, with respect to the difference in scope between Article XVI:1 of the WTO Agreement and Paragraph 1(b) of the GATT 1994, the Panel stated:

"In our view, the difference between the more particularly defined range of actions falling within the ambit of Article XVI:1 of the *WTO Agreement* and the list of 'legal instruments' that are incorporated into GATT 1994 pursuant to the language in Annex 1A incorporating GATT 1994 into the *WTO Agreement* is explained by the different implications of the two provisions. Inclusion of a decision in the language of Annex 1A means that the decision actually becomes part of GATT 1994 and thus of the *WTO Agreement*. Inclusion of a decision within the scope of Article XVI:1 of the *WTO Agreement*, on the other hand, means that the WTO 'shall be guided' by that decision. A decision which is part of GATT 1994 is legally binding on all WTO Members (to the extent it is not in conflict with a provision of another Annex 1A agreement), while a decision which provides 'guidance' in our view is not legally binding but provides direction to the WTO. It is important to note that, as explained by the Appellate Body, adopted panel reports should be taken into account 'where they are relevant to a dispute'. In our view, this consideration applies equally to any other decision, procedure or customary practice of the CONTRACTING PARTIES to GATT 1947."<sup>13</sup>

10. In *EU – Poultry Meat (China)*, the Panel considered the status of the Procedures for Negotiations under Article XXVIII and the Procedures for Modification and Rectification of Schedules, both of which were adopted under the GATT. The Panel found that they qualified under Article XVI:1 of the WTO Agreement. Having reached that conclusion, the Panel considered it unnecessary to address the question of whether they also qualified as "decisions" within the meaning of paragraph 1(b)(v) of the GATT 1994. The Panel observed that:

"In this case, diverse views have been presented on whether one or both of these procedures might additionally be characterized as 'decisions of the CONTRACTING PARTIES to GATT 1947' within the meaning of paragraph 1(b)(iv) of the GATT 1994, 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, or form the basis for 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the meaning of Article 31(3)(b) of the Vienna Convention. Recalling that there is no disagreement that both procedures fall within the scope of Article XVI:1 of the WTO Agreement, and thus no disagreement that the Panel should take them into account in its examination of China's claims under the GATT 1994, we see no need to decide on whether any of the foregoing may constitute additional legal justifications for taking the two procedures into account. We note that there have been several prior cases in which panels and the Appellate Body referred to these procedures without elaborating on their legal status."<sup>14</sup>

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<sup>12</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 43.

<sup>13</sup> Panel Report, *US – FSC*, para. 7.78.

<sup>14</sup> Panel Report, *EU – Poultry Meat (China)*, para. 7.27.

### 1.3 Article XVI:4

#### 1.3.1 "Each Member shall ensure the conformity of its laws, regulations and administrative procedures": measures to be brought into compliance

##### 1.3.1.1 Findings of consequential violations

11. There have been a number of cases in which panels and the Appellate Body have found a "consequential violation" of Article XVI:4, arising from a finding that a law, regulation or administrative procedure is inconsistent with obligations in the covered agreements.<sup>15</sup>

##### 1.3.1.2 Legislation, regulations and tariff schedules

12. In *US – Section 301 Trade Act*, the Panel observed that Article XVI:4 confirms that "legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations":

"As a general proposition, GATT *acquis*, confirmed in Article XVI:4 of the *WTO Agreement* and recent WTO panel reports, make abundantly clear that legislation as such, independently from its application in specific cases, may breach GATT/WTO obligations:

- (a) In GATT jurisprudence, to give one example, legislation providing for tax discrimination against imported products was found to be GATT inconsistent even before it had actually been applied to specific products and thus before any given product had actually been discriminated against.
- (b) Article XVI:4 of the *WTO Agreement* explicitly confirms that legislation as such falls within the scope of possible WTO violations. It provides as follows:

'Each Member shall ensure the conformity of its *laws, regulations and administrative procedures* with its obligations as provided in the annexed Agreements' (emphasis added).

The three types of measures explicitly made subject to the obligations imposed in the *WTO Agreements* – 'laws, regulations and administrative procedures' – are measures that are applicable generally; not measures taken necessarily in a specific case or dispute. Article XVI:4, though not expanding the material obligations under *WTO Agreements*, expands the type of measures made subject to these obligations.

- (c) Recent WTO panel reports confirm, too, that legislation as such, independently from its application in a specific case, can be inconsistent with WTO rules.

Legislation may thus breach WTO obligations. This must be true, too, in respect of Article 23 of the *DSU*. This is so, in our view, not only because of the above-mentioned case law and Article XVI:4, but also because of the very nature of obligations under Article 23."<sup>16</sup>

13. In *EC – IT Products*, the Panel observed that Article XVI:4 means that "a Member is obliged to ensure that its domestic legislation is consistent with the concessions contained in its Schedule."<sup>17</sup>

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<sup>15</sup> For example, Appellate Body Report, *US – Hot-Rolled Steel from Japan*, para. 129.

<sup>16</sup> Panel Report, *US – Section 301 Trade Act*, paras. 7.41-7.42.

<sup>17</sup> Panel Report, *EC – IT Products*, fn 42.



### 1.3.1.3 Judicial decisions

14. In *US – Zeroing (Article 21.5 - Japan)*, the United States argued that liquidation of duty liability in the US retrospective system of duty assessment was outside the scope of US implementation obligations in the underlying dispute, particularly where liquidation is delayed due to domestic judicial proceedings and the timing of liquidation is controlled by an independent judiciary, not an administering authority. The Appellate Body disagreed:

"We note that a WTO Member 'bears responsibility for acts of all its departments of government, including its judiciary.' This is supported by Article 18.4 of the *Anti-Dumping Agreement*, Article XVI:4 of the *WTO Agreement*, and Article 27 of the *Vienna Convention*. The judiciary is a state organ and even if an act or omission derives from a WTO Member's judiciary, it is nevertheless still attributable to that WTO Member. Thus, the United States cannot seek to avoid the obligation to comply with the DSB's recommendations and rulings within the reasonable period of time, by relying on the timing of liquidation being 'controlled by the independent judiciary.'"<sup>18</sup>

### 1.3.1.4 Suspension of concessions authorized under DSU Article 22

15. The disputes in *Canada – Continued Suspension* and *US – Continued Suspension* concerned the continued suspension of concessions by Canada and the United States after the European Communities had notified the DSB of a measure taken to comply with the DSB's recommendations and rulings in *EC – Hormones*. The Panel in these disputes found that a party authorized by the DSB to suspend concessions was obligated "to take appropriate steps to ensure that the suspension of concessions or other obligations is only applied until such time as foreseen in [DSU] Article 22.8".<sup>19</sup> The Appellate Body reversed the Panel, finding that "a dispute concerning implementation should be subject to multilateral resolution and not be decided on the basis of a unilateral declaration of compliance or non-compliance"<sup>20</sup>, and further observed:

"We also note the Panel's statement that 'pursuant to Article XVI:4 of the [WTO Agreement], Members must ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided' in the covered agreements, 'including the DSU'. Article XVI:4 applies equally to all WTO Members. The European Communities was required to ensure the conformity of its implementing measure, just as it is the obligation of the United States and Canada to ensure the conformity of their continued application of suspension of concessions. We do not see the relevance of this provision in the Panel's analysis under Article 23.1 of the DSU, as long as the conditions for the cessation of suspension under Article 22.8 have not been established."<sup>21</sup>

### 1.3.2 Relationship between Article XVI:4, Articles 18.4 of the Anti-Dumping Agreement and 32.5 of the SCM Agreement, and "as such" violations of the Anti-Dumping or SCM Agreements

16. In *US – 1916 Act (Japan)*, the Panel read the obligation under Article XVI:4 as corresponding to the obligation under Article 18.4 of the Anti-Dumping Agreement that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure, not later than the entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question":

"With respect to Article XVI:4 of the Agreement Establishing the WTO, we note that, if some of the terms of Article XVI:4 differ from those of Article 18.4, they are identical and unqualified as far as the basic obligation of ensuring the conformity of laws, regulations and administrative procedures found in both articles is concerned. The same reasoning as for Article 18.4 applies to Article XVI:4 regarding the terms found

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<sup>18</sup> Appellate Body Report, *US – Zeroing (Japan)*(Article 21.5 – Japan), para. 182.

<sup>19</sup> Panel Report, *US – Continued Suspension*, para. 7.211; Panel Report, *Canada – Continued Suspension*, para. 7.203.

<sup>20</sup> Appellate Body Report, *Canada – Continued Suspension*, para. 389.

<sup>21</sup> Appellate Body Report, *Canada – Continued Suspension*, para. 390.

in both provisions. In other words, if a provision of an 'annexed Agreement' is breached, a violation of Article XVI:4 immediately occurs. GATT 1994 is one of the 'annexed Agreements' within the meaning of Article XVI:4. Since we found that provisions of Article VI of the GATT 1994 has been breached, we conclude that, by violating this provision, the United States violates Article XVI:4 of the *WTO Agreement*."<sup>22</sup>

17. The Appellate Body in *US – Offset Act (Byrd Amendment)* noted the similarity between the text of Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement, and the text of Article XVI:4, and found:

"As a consequence of our finding that the United States has acted inconsistently with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, we uphold the Panel's finding that the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*."<sup>23</sup>

18. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found:

"In the absence of any finding that provisions of the Sunset Policy Bulletin, as such, are inconsistent with a specific obligation under the *Anti-Dumping Agreement*, we can find no inconsistency with Article 18.4 of the *Anti-Dumping Agreement* or Article XVI:4 of the *WTO Agreement*."<sup>24</sup>

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<sup>22</sup> Panel Report, *US – 1916 Act (Japan)*, para. 6.287; upheld in Appellate Body Report, *US – 1916 Act*, paras. 134-135.

<sup>23</sup> Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 302.

<sup>24</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 211.