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THE WTO DISPUTE SETTLEMENT REPORTS

The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish. Starting with 1999, the first volume of each year contains a cumulative index of published disputes.

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Report of the Panel
WT/DS136/R

Adopted by the Dispute Settlement Body
on 26 September 2000
as Upheld by the Appellate Body Report

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I. INTRODUCTION

1.1 On 4 June 1998, the European Communities requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 (hereinafter the "GATT 1994") and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the "Anti-Dumping Agreement")

regarding failure on the part of the United States to repeal Title VIII of the US Revenue Act of 1916, also known as the US Antidumping Act of 1916 (hereinafter the "1916 Act").[1]

1.2 Consultations were held in Geneva on 29 July 1998, but did not lead to a mutually satisfactory resolution of the matter.

1.3 On 11 November 1998, the European Communities requested the Dispute Settlement Body (hereinafter the "DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.[2] The European Communities claimed that the 1916 Act was inconsistent with Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "Agreement Establishing the WTO" - the Marrakesh Agreement Establishing the World Trade Organization including its annexes being referred to as the "WTO Agreement"); Articles VI:1 and VI:2 of the GATT 1994; and Articles 1, 2.1, 2.2, 3, 4 and 5 of the Anti-Dumping Agreement.[3] In the alternative, the European Communities claimed that the 1916 Act was in breach of Article III:4 of the GATT 1994.

1.4 On 1 February 1999, the DSB established a panel pursuant to the request made by the European Communities, in accordance with Article 6 of the DSU. In document WT/DS136/3, the Secretariat reported that the parties had agreed that the panel would have the standard terms of reference. The terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS136/2, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 Document WT/DS136/3 also reported that, on 1 April 1999, the Panel was constituted as follows:

Chairman:	Mr. Johann Human
Members:	Mr. Dimitrij Grčar
	Professor Eugeniusz Piontek

1.6 India, Japan and Mexico reserved their rights to participate in the Panel proceedings as third parties. All of them presented arguments to the Panel.

1.7 The Panel met with the parties on 13 - 14 July 1999 as well as 14 - 15 September 1999. It met with third parties on 14 July 1999. The Panel issued its interim report to the parties on 20 December 1999. The Panel issued its final report to the parties on 14 February 2000.

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1 See WT/DS136/1.

2 See WT/DS/136/2.

3 The provisions listed by the European Communities in WT/DS/136/2 as being infringed by the 1916 Act are, in the view of the European Communities, not necessarily the only violations of the mentioned Agreements. See WT/DS/136/2.

II. FACTUAL ASPECTS

A. Description of the US 1916 Act

2.1 The 1916 Act at issue in the present dispute was enacted by the US Congress under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.[4] It provides as follows:

> "It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."[5]

2.2 Thus, the business activity which the 1916 Act prohibits is a form of international price discrimination, which has two basic components:

(a) An importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the country of the foreign producer.

(b) The importer must have undertaken this price discrimination "commonly and systematically."

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[4] Act of 8 September 1916. The Revenue Act of 1916 can be found at 39 Stat. 756 (1916).

[5] 15 U.S.C. § 72.

2.3 It is a condition for criminal or civil liability under the 1916 Act that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

2.4 Another characteristic of the 1916 Act is that it provides for a private right of action in federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.

2.5 The 1916 Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade".[6]

B. Description of Other Relevant US Acts

1. Antidumping Act of 1921 and Tariff Act of 1930

2.6 In 1921, the United States enacted the "Antidumping Act of 1921."[7] It empowered the Secretary of the Treasury to impose duties on dumped goods without regard to the dumper's intent. Whereas the Antidumping Act of 1921 was later repealed, it is on this Act that the United States' Tariff Act of 1930, as amended (hereinafter the "Tariff Act of 1930"),[8] is built. The Tariff Act of 1930 is implemented through proceedings governed by regulations promulgated by the US Department of Commerce[9] and the US International Trade Commission[10].

2.7 The 1921 Antidumping Act was, and the 1930 Tariff Act, as amended, is, codified in Title 19 of the United States Code, entitled "Customs Duties".

2.8 The United States has notified Title VII of the Tariff Act of 1930, as amended, and its implementing regulations to the WTO's Committee on Anti-Dumping Practices in accordance with Articles 18.4 and 18.5 of the Anti-Dumping Agreement.

2. Robinson-Patman Act

2.9 Section 2 of the Clayton Act, as amended by the Robinson-Patman Act in 1936, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States […] and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to

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6 See 15 U.S.C. §§ 71-74.
7 The Antidumping Act of 1921 was codified at 19 U.S.C. §§ 160-71 (repealed).
8 The Tariff Act of 1930 is codified at 19 U.S.C. §§ 1671 et seq.
9 See 19 C.F.R. Part 351.
10 See 19 C.F.R. Part 200.

> injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."[11]

2.10 Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, applies the same principles to the conduct of a buyer, by making it unlawful for a buyer "knowingly to induce or receive discrimination in price" prohibited by other parts of the Act.[12] A violation of this provision is subject to criminal penalties and also is actionable in a private right of action, where treble damages and injunctive relief are available.

2.11 To establish price discrimination in an action under the Robinson-Patman Act, there first must be evidence of two actual sales at different prices, with both sales occurring in US commerce.[13] Thus, the Robinson-Patman Act does not apply to cross-border price discrimination.[14] In addition, a successful price discrimination claim requires a showing of an anti-competitive effect. Case law has established that, if the claim is directed at so-called "primary line injury," meaning injury to the price discriminator's rivals, which corresponds to the situation addressed by the 1916 Act, the requisite anti-competitive effect can be demonstrated through a showing of (i) pricing below an appropriate measure of cost and (ii) the likelihood that the predator will recoup its losses in the future.[15]

2.12 The Robinson-Patman Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade."[16]

C. Instances of Application of the US 1916 Act

2.13 The 1916 Act has been invoked infrequently. Before the 1970s, there was only one reported 1916 Act court case, *H. Wagner and Adler Co. v. Mali*[17].[18]

2.14 In line with the infrequent invocation of the 1916 Act, there is a limited number of judicial interpretations of its specific provisions.[19] In this regard, it should be

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11 15 U.S.C. 13(a).

12 See 15 U.S.C. 13(f).

13 See *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, 417, citing E. Kinter, *A Robinson-Patman Primer*, 3rd ed. (1979), p. 35.

14 In answering a question of the Panel regarding, *inter alia*, whether the Robinson-Patman Act applies to imported products, the United States notes, however, that imported goods that have become a part of domestic commerce may be subject to the Robinson-Patman Act.

15 See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209, 222-23 (1993) (hereinafter "*Brooke Group*").

16 Also located in Title 15 are the Sherman Act (15 U.S.C. §§ 1-7, to be found at 26 Stat. 209 (1890)), the Clayton Act (15 U.S.C. §§ 12-27, to be found at 38 Stat. 730 (1914)) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58, to be found at 38 Stat. 717 (1914)).

17 F.2d 666 (2d Cir. 1935).

18 In response to a question of the Panel regarding whether the 1916 Act was applied before the 1970s, the United States confirmed its understanding that there was only one reported 1916 Act case before the 1970s. The United States also notes, however, that not all filed cases lead to reported decisions.

19 Those interpretations can be found in the following - final or interlocutory - court decisions: *H. Wagner and Adler Co. v. Mali, Op. Cit.*; *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese*

noted that, under the US legal system, the judicial branch of the government is the final authority regarding the meaning of federal laws, such as statutes passed by the legislative branch, i.e. the US Congress. It should also be noted, however, that no claims under the 1916 Act have ever been reviewed by the US Supreme Court, which is the highest federal court in the United States.[20] All court decisions so far have been rendered by US circuit courts of appeals or US district courts.[21]

2.15 All of the court decisions addressing the meaning of the 1916 Act and its various provisions to date also have involved private civil complaints rather than criminal prosecutions. Yet no complainant in a civil suit has so far recovered treble damages and the cost of the suit. However, in one recent civil case involving a 1916 Act claim, *Wheeling-Pittsburgh*[22], some defendants have elected to settle rather than proceed to trial.

2.16 The US Department of Justice, the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the 1916 Act.[23] Accordingly, no criminal sanctions have ever been imposed pursuant to the 1916 Act.

Electronic Products I"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2nd Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re Japanese Electronic Products III*") *Helmac Products Corp. v. Roth (Plastics) Corp.*, 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp*., 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp.*, 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*"); *Wheeling-Pittsburgh Steel Corporation v. Mitsui Co.*, 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

[20] The only reported case in which the US Supreme Court has considered the 1916 Act was *United States v. Cooper Corp*., 312 U.S. 600 (1941), although the issue in that case was whether the United States is a "person" within the meaning of Section 7 of the US Sherman Act entitled to sue for treble damages thereunder.

[21] In the United States, the federal judicial branch is established on three levels. Generally, the lowest level is the trial court level, consisting of the various US district courts. At least one district court can be found in each of the 50 States. The next level consists of the US circuit courts of appeals, which are intermediate appellate courts responsible for reviewing district court decisions. There are 12 federal court circuits. At the highest level of the federal court system is the US Supreme Court, which, at its discretion, hears appeals from decisions of the circuit courts.

[22] The case is still pending while the remaining litigants conduct discovery.

[23] In response to a question of the Panel regarding the number of cases considered for prosecution by the US Department of Justice, the United States notes that, so far as it can determine, the US Department of Justice has never prosecuted nor seriously considered prosecuting a criminal case under the 1916 Act. In *Zenith III, Op. Cit.*, p. 1212, the following is stated regarding enforcement of the 1916 Act's criminal provisions until the early 1970s:

III. CLAIMS AND MAIN ARGUMENTS

A. Requests Dealt with by the Panel in the Course of the Proceedings

1. Preliminary Objection by the United States and Request for a Ruling by the Panel

3.1 As a preliminary matter, the **United States** considers[24] that the European Communities claims for the first time in its first written submission that the 1916 Act also violates Articles 1 and 18.1 of the Anti-Dumping Agreement because these provisions make anti-dumping duties the exclusive remedy for dumping. The relevant WTO dispute settlement provisions - Articles 6.2 and 7 of the DSU and Articles 17.4 and 17.5 of the Anti-Dumping Agreement - preclude the Panel from considering these two claims because they were not included in the European Communities' request for the establishment of a panel.[25]

3.2 The United States notes that Article 7 of the DSU provides that the Panel's mandate is to examine the "matter" described in the panel request.[26] The Appellate Body has definitively described the "matter" which is properly before a panel to examine. In *Guatemala - Cement*, it explained that the complaining Member must, in its panel request,

> "identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly. [...] The "matter referred to the DSB", therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[27]

> "Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws - A* Government *Overview* 43 Antitrust L.J. 580, 581 (1974)."

[24] See the US First Written Submission, dated 3 June 1999, p.2.

[25] The United States refers to WT/DS136/3.

[26] The United States notes that Article 1.2 of the DSU explains that its rules and procedures govern a dispute subject to any special or additional rules and procedures contained in the covered agreements. The same Article provides that, to the extent that there is a "difference" between the rules and procedures of the DSU and the special or additional rules and procedures set forth in a covered agreement, the special or additional rules and procedures in the covered agreement "shall prevail." However, as established in the Appellate Body Report on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, paras. 65-66 (hereinafter "Appellate Body Report on *Guatemala - Cement*"), if there is no "difference," the rules and procedures of the DSU *apply together with* the special or additional rules and procedures of the covered agreement. The Appellate Body expressly held that there is no "difference" between Articles 6.2 and 7 of the DSU, and Articles 17.4 and 17.5 of the Antidumping Agreement. *Ibid.*, paras. 67-68. Accordingly, Articles 6.2 and 7 of the DSU apply together with Articles 17.4 and 17.5 of the Antidumping Agreement when the claims at issue are being made under the Antidumping Agreement. When applied together, these Articles permit a panel to consider only the "matter" set forth in the complaining Member's panel request where, as here, the terms of reference are exclusively defined by reference to the panel request. *Ibid.*, paras. 70-72.

[27] Appellate Body Report, *Guatemala - Cement*, *supra*, footnote 26, para. 72 (emphasis in original).

3.3 According to the United States, the Appellate Body has also settled that the complaining Member may set out the "legal basis for the complaint" - its "claims" - in a summary fashion and that the minimum requirement is simply for the complaining Member to list provisions of a WTO agreement[28].[29] Vague references to unidentified "other" provisions, however, do not satisfy the standards of Article 6.2 of the DSU.[30] If a particular "legal basis of the complaint" - a "claim" - is not set forth in the panel request, it is not properly before the panel. Likewise, Article 6.2 is not satisfied by only identifying the claims in the complaining Member's first written submission. In *European Communities - Bananas*, the Appellate Body explained that a deficiency in a panel request cannot be cured by the complaining Member's first submission:

> "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party […] to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[31]

3.4 The United States contends that, under these standards, the European Communities' panel request in the present dispute is insufficient to place claims that the 1916 Act violated Articles 1 and 18.1 of the Anti-Dumping Agreement before the Panel. The European Communities, in its panel request, characterised the 1916 Act as an anti-dumping statute and claimed that the 1916 Act was inconsistent with Article VI:2 of the GATT 1994, which, according to the European Communities, "specif[ies] that anti-dumping duties are the only possible remedy to dumping whereas the 1916 Act is having recourse to treble damages and fines and/or imprisonment."[32] The European Communities at no point claimed - in its panel request or even in its request for consultations - that the 1916 Act was similarly inconsistent with any provision of the Anti-Dumping Agreement or, in particular, with Article 1 or Article 18.1 of the Anti-Dumping Agreement.[33]

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[28] The term "WTO agreement(s)" is used hereinafter to refer to the various agreements contained in Annex 1 and 2 of the WTO Agreement.

[29] The United States refers to the Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras. 88-91 (hereinafter "Appellate Body Report on *India - Patents*"); Report of the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141 (hereinafter "Appellate Body Report on *European Communities - Bananas*").

[30] The United States refers to the Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted 25 September 1997, DSR 1997:II, 943, paras. 7.29-7.30 (hereinafter "Panel Report on *European Communities - Bananas*").

[31] Appellate Body Report, *European Communities - Bananas*, *supra*, footnote 29, para. 143 (emphasis in original).

[32] WT/DS136/1.

[33] The United States notes that the European Communities did reference Article 1 of the Anti-dumping Agreement but only with regard to a separate claim that Article 1 requires "the carrying out

3.5 The United States submits that until receipt of the European Communities' first written submission, the United States had no notice that the European Communities was asserting claims under Articles 1 and 18.1 of the Anti-Dumping Agreement. The Appellate Body has explained that a defective panel request cannot be cured by a later submission or statement. Accordingly, the European Communities' claims under Articles 1 and 18.1 of the Anti-Dumping Agreement are not properly before the Panel.

3.6 The United States therefore requests that the Panel rule that the claims are not before it and are eliminated from the instant proceeding. The United States requests that the Panel rule expeditiously and, if possible, by the time of its first meeting.

3.7 In response to a question of the Panel regarding its position *vis-à-vis* the US request, the **European Communities** states[34] that the United States requests the Panel to exclude claims that the European Communities has not made. The relevant EC claims are that by providing for a remedy other than duties against dumping the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO and Article VI:2 of the GATT 1994. The European Communities makes no separate claims that this feature of the 1916 Act violates Article 1 and 18.1 of the Anti-Dumping Agreement. These provisions were merely mentioned as arguments in support of the European Communities' claims. Accordingly, the US request for a preliminary ruling can be dismissed as being without object.

3.8 The position taken by the Panel in the course of the proceedings *vis-à-vis* the US request is reflected in section VI.B.1 of this report.

2. Request by Japan for Enhanced Third Party Rights

3.9 **Japan**, which is a third party in the present case and has requested the establishment of another panel in respect of the 1916 Act,[35] requests to be granted enhanced third party rights.[36] In particular, Japan requests to receive all the necessary documents, including submissions and written versions of statements by the parties, and that it be granted permission to attend all the meetings of the second substantive meeting of the Panel.[37]

3.10 In reply to a request by the Panel for the views of the parties, the **European Communities** states that it is happy to support the request of Japan, provided that the

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of an investigation (which has to respect a set of procedural rules) prior to the imposition of any duty." Never did the European Communities identify Article 1 of the Antidumping Agreement as the basis for a claim that antidumping duties are the sole remedy for dumping. The United States also refers to the Panel Report on *European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, adopted on 5 July 1995, ADP/137, paras. 442-447 for the proposition that if there is more than one legal basis for alleging a breach of the same provision of an agreement, a separate and distinct claim is required.

[34] See the European Communities' letter to the Chairman of the Panel, dated 6 July 1999.

[35] See WT/DS162/3. That panel was established on 26 July 1999 and composed on 11 August 1999 (WT/DS162/4).

[36] As stated in Japan's letter to the Chairman of the Panel, dated 2 September 1999.

[37] Japan made its request for enhanced third party rights after the first substantive meeting of the Panel.

European Communities' similar request in the case initiated by Japan in respect of the 1916 Act (WT/DS162) is also accepted by the Panel.

3.11 The **United States,** in reply to the same request by the Panel, notes that it strongly objects expanded third party rights for Japan in the present case, since the circumstances of the case do not warrant it.

3.12 For the United States, expanded third party rights are not needed in order to obtain access to the parties' submissions. The United States supports full transparency in the WTO and will be making its submissions and oral statements available to the public. Furthermore, the United States recalls that it has requested in both panel proceedings dealing with the 1916 Act (WT/DS136 and WT/DS162) that each party provide a non-confidential summary of the information contained in each submission that could be disclosed to the public unless the party has made the submission public. The United States further recalls that the DSU provides that parties shall make such non-confidential versions available upon request. Accordingly, both the European Communities and Japan will have access to each others' submissions as soon as they comply with the requirements of the DSU in this regard.

3.13 The United States argues, moreover, that, as individual complaining parties, Japan and the European Communities have more than adequate opportunity to present their views and respond to the arguments of the United States. In *EC Measures Concerning Meat and Meat Products (Hormones)*[38], the panel allowed expanded third party rights because the panel had stated that it intended to conduct concurrent deliberations in those cases meaning that its deliberations were going to be based upon the arguments and presentations in both cases, including presentations by experts made jointly to both panels. The panel proceeded with this approach despite the fact that the United States had expressed its unequivocal concern with the panel's "concurrent deliberations" approach. Thus, because the panel was going to consider arguments made in one case in the course of deciding another case, the United States requested and was allowed enhanced third party rights. Otherwise, without an opportunity for the United States to respond, the panel would have been considering what would have been, in effect, *ex parte* submissions.

3.14 The United States notes that, in the present case, the Panel has not stated that it intends to conduct concurrent deliberations, and for the reasons expressed in the *European Communities - Hormones* proceeding, the United States would not support concurrent deliberations. Accordingly, the European Communities will not be denied an opportunity to respond to arguments of the United States that will be considered by the Panel in making its decision in the case initiated by the European Communities. The same holds true for Japan in its case. The apparent purpose for the request for expanded third party rights is to provide the third parties with an opportunity to make an additional submission in their own panel process. There is no provision in the DSU for such additional submissions.

3.15 The position taken by the Panel in the course of the proceedings *vis-à-vis* Japan's request is reflected in section VI.B.2 of this report.

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[38] Panel Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, WT/DS48/R/CAN, adopted 13 February 1998, DSR 1998:III, 699 (hereinafter Panel Report on *"European Communities - Hormones*").

B. Overview of the Claims of the Parties and Findings Requested

3.16 The **European Communities** requests the Panel to find that by maintaining the 1916 Act the United States has violated:

(a) Article VI:1 and VI:2 of the GATT 1994 and Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement;

(b) Article III:4 of the GATT 1994[39];

(c) Article XVI:4 of the Agreement Establishing the WTO;

and that by doing so it has nullified and impaired benefits accruing to the European Communities under those Agreements.

3.17 The European Communities requests the Panel to hold that the 1916 Act is an anti-dumping measure since it is targeted at imports and at price discrimination between the exporters' market or third country market and the importing country's market in terms which are in substance identical to those laid down in Article VI:1 of the GATT 1994. Since the conditions under which action may be taken under the 1916 Act allow action to be taken which would not be allowed under Article VI of the GATT 1994 or the Anti-Dumping Agreement and in particular because the remedies provided in the 1916 Act are not those allowed under Article VI:2 of the GATT 1994, the Panel should hold that the 1916 Act as such violates Article VI:1 and VI:2 of the GATT 1994 and the cited provisions of the Anti-Dumping Agreement.

3.18 In the alternative, the European Communities asks the Panel to find that the 1916 Act violates the national treatment requirement of Article III:4 of the GATT 1994 because the 1916 Act leads to the application of stricter disciplines on imported goods than domestic goods.

3.19 Finally, the European Communities considers that the Panel should also find that the 1916 Act is in violation of Article XVI:4 of the Agreement Establishing the WTO because the United States has failed to ensure, in respect of the 1916 Act, that its laws are in conformity with its WTO obligations.

3.20 The **United States** requests the Panel to find that nothing in Article VI:2 of the GATT 1994 provides that anti-dumping duties are the exclusive remedy for dumping. If the Panel therefore rejects the European Communities' Article VI:2 claim, it need not reach the question of whether the 1916 Act is governed by Article VI and the Anti-Dumping Agreement. The United States also requests the Panel to reject the European Communities' other claims under Article VI:1 and the Anti-Dumping Agreement, because the European Communities has failed to demonstrate that the procedures in Article VI:1 and the various other provisions asserted under the Anti-Dumping Agreement are required to be followed in response to injurious dumping.

3.21 The United States moreover requests the Panel to hold that the 1916 Act is in any event not inconsistent with either Article VI of the GATT 1994 or the Anti-Dumping Agreement because the 1916 Act is not an anti-dumping statute under US law and therefore is not governed by Article VI of the GATT 1994 or the Anti-Dumping Agreement. The United States submits that the 1916 Act is specifically

[39] This claim is made in the alternative. See section III.G.1 below.

targeted at a very narrow type of objectionable business activity involving antitrust-like predatory intent.

3.22 The United States further requests the Panel to dismiss the European Communities' claim that the 1916 Act accords less favorable treatment to imported goods than the Robinson-Patman Act accords to like domestic goods. The Panel's decision in this regard should be informed by the fact that the 1916 Act establishes a standard for relief which has never been met in the case of importers and imported goods.

3.23 The United States also asks the Panel to conclude that the 1916 Act as such is in any event WTO-consistent because it is susceptible to an interpretation that permits action consistent with the United States' WTO obligations.

3.24 Finally, the United States requests the Panel to find no violation of Article XVI:4 of the Agreement Establishing the WTO. Article XVI:4 of the Agreement Establishing the WTO is not relevant, unless the 1916 Act is shown to be inconsistent with a separate WTO obligation of the United States. The United States submits that this is not the case.

C. The Distinction between Discretionary and Mandatory Legislation and its Relevance to the Present Case

3.25 In response to a question of the Panel to both parties regarding whether the 1916 Act should be viewed as mandatory or non-mandatory legislation within the meaning given to those terms by GATT 1947/WTO practice, the **United States** notes that both the civil and the criminal provisions constitute non-mandatory legislation in the context of the European Communities' claims under Articles III:4 and VI:2 of the GATT 1994.

3.26 The United States recalls that GATT 1947 and WTO panels have uniformly drawn a distinction between mandatory and discretionary legislation. Only legislation which mandates WTO-inconsistent action can itself be WTO-inconsistent. In this regard, the panel in *Canada - Measures Affecting the Export of Civilian Aircraft* recently stated:

> "We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States - Tobacco*, the panel "recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority [...] to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge" [citation omitted]."[40]

[40] Panel Report on *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, DSR 1999:IV, 1443, para. 9.124 (hereinafter "Panel Report on *Canada - Aircraft*"), citing the Panel Report on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted on 4 October 1994, BISD 41S/131, para 118 (hereinafter "*United States - Tobacco*").

3.27 The United States further notes that in *EEC - Regulation on Imports of Parts and Components*[41], the panel found that "the mere existence" of the anti-circumvention provision of the European Communities' anti-dumping legislation was not inconsistent with the European Communities' GATT 1947 obligations, even though the European Communities had taken GATT-inconsistent measures under that provision.[42] The panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions"[43]. In the present dispute, the European Communities is challenging no specific measures taken under the 1916 Act. Rather, it is challenging the mere existence of the 1916 Act. Thus, for that challenge to succeed, the European Communities must demonstrate not only that the 1916 Act authorizes WTO-inconsistent action, but that it mandates such action. In other words, it must show that this legislation is not susceptible to an interpretation that would permit the US government to comply with its WTO obligations.

3.28 The United States further recalls that, in applying the discretionary/mandatory distinction, panels have found that legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action. For example, in *United States - Taxes on Petroleum and Certain Imported Substances*,[44] the Superfund Act required importers to supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise, a penalty tax would be imposed in the amount of five percent *ad valorem* or a different rate to be prescribed in regulations by the Secretary of the Treasury by a different methodology. The regulations in question had not yet been issued. Nevertheless, the panel concluded:

> "[W]hether [the regulations] will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement."[45]

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41 Panel Report on *EEC - Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132 (hereinafter "*EEC - Parts and Components*").

42 The United States refers to *EEC - Parts and Components*, *Op. Cit.*, paras. 5.9, 5.21, 5.25-5.26.

43 *Ibid.*, para. 5.25.

44 Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 (hereinafter "*US - Superfund*").

45 *Ibid.*, para. 5.2.9.

3.29 The United States also notes that, in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*[46] the panel examined Thailand's Tobacco Act, which established a higher ceiling tax rate for imported cigarettes than for domestic cigarettes. While the Act explicitly gave Thai officials the authority to implement discriminatory tax rates, this did not render the statute mandatory. The panel concluded that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."[47]

3.30 The United States recalls, finally, the findings of the panel in the *United States - Tobacco* case. That case is factually analogous to the instant case and therefore offers guidance to the Panel. The panel in the *United States - Tobacco* case found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including meanings permitting GATT-consistent action. Specifically, the panel examined the question whether a statute requiring that "comparable" inspection fees be assessed for imported and domestic tobacco mandated that these fees had to be identical for each, without respect to differences in inspection costs. If so, the statute was inconsistent with Article VIII:1(a) of the GATT 1947, which prohibited the imposition of fees in excess of services rendered.[48] The United States argued that the term "comparable" need not be interpreted to mean "identical," and that the law did not preclude a fee structure commensurate with the cost of services rendered.[49] The panel agreed with the United States:

> "[T]he Panel noted that there was no clear interpretation on the meaning of the term "comparable" as used in the 1993 legislative amendment. It appeared to the Panel that the term "comparable", including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which could potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of [the US law]."[50]

The United States adds that the panel therefore found that the complaining party had "not demonstrated that [the US law] *could not* be applied in a manner ensuring that fees charged for inspecting tobacco were not in excess of the cost of services rendered."[51]

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[46] Panel Report on *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, BISD 37S/200 (hereinafter "*Thailand - Cigarettes*").

[47] *Ibid.*, para. 86. The United States further notes that the panel, at para. 88, found that the actual implementation of the tax rates through regulations was also consistent with Thai obligations, since these rates were non-discriminatory.

[48] The United States refers to *United States - Tobacco, Op. Cit.*, para. 118.

[49] The United States refers to *United States - Tobacco, Op. Cit.*, para. 122.

[50] *Ibid.*, para. 123.

[51] *Ibid.* (emphasis added by the United States).

3.31 In the view of the United States, there is thus a strict burden on a complaining party seeking to establish that a Member's legislation *as such* mandates a violation of WTO obligations: the complaining party must demonstrate that the legislation, as interpreted in accordance with the domestic law of the Member, precludes any possibility of action consistent with the Member's WTO obligations. Moreover, where legislation is susceptible of multiple interpretations, the complaining party must demonstrate that none of these interpretations permits WTO-consistent action.

3.32 The United States contends that, in the present case, the European Communities has failed to meet that burden. The 1916 Act is susceptible to an interpretation that is WTO-consistent. In fact, all final judicial decisions that have considered the 1916 Act have interpreted it as such. Indeed, US courts have repeatedly admonished that the 1916 Act should be interpreted whenever possible to parallel the unfair competition law applicable to domestic commerce.[52] Interpreting the 1916 Act to parallel domestic unfair competition law is clearly consistent with WTO obligations because the WTO does not govern competition laws. Moreover, any susceptibility that particular elements of a 1916 Act claim may have to a range of possible meanings is ultimately of no consequence because the 1916 Act remains different from an anti-dumping statute under the entire range of conceivable interpretations.

3.33 Turning to the basis for the distinction, the United States notes that the distinction in GATT 1947/WTO jurisprudence between discretionary and mandatory legislation is not based upon a particular provision of the WTO Agreement, nor is it limited in its application to a particular WTO provision. In the cases discussed above, for example, this distinction was applied in the context of both Article III and Article VIII of the GATT 1947. The distinction is a general principle developed by panels that most likely has its origin in the presumption against conflicts between national and international laws. It is both general international practice and that of the United States that statutory language is to be interpreted so as to avoid conflicts with international obligations. There is thus a presumption against a conflict between international and national law. In general,

> "[a]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict."[53]

3.34 The United States recalls that, under US law, it is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"[54]. While international obligations cannot override inconsistent requirements of domestic law, "ambiguous

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[52] The United States refers to *Zenith III*, *Op. Cit.*, p. 1223.

[53] *Oppenheim's International Law*, 9th ed., pp. 81-82 (footnote omitted).

[54] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

statutory provisions […] [should] be construed, where possible, to be consistent with international obligations of the United States"[55].

3.35 According to the United States, GATT 1947 jurisprudence distinguishing between mandatory and discretionary legislation does no more than apply the general principle that there is a presumption against conflicts between national and international law. If a law is susceptible to an interpretation that is WTO-consistent, there is a presumption that domestic authorities will interpret that law so as to avoid a conflict with WTO obligations. This presumption may be seen as underlying the *United States - Tobacco* panel's finding that a domestic law susceptible of multiple interpretations would not violate a state's international obligations so long as one possible interpretation permits action consistent with those obligations.[56] This principle applies with equal force in the present case. The 1916 Act is a discretionary statute susceptible of an interpretation that permits action consistent with the United States' WTO obligations under both Article III:4 and Article VI:2, as all judicial decisions to date establish as a matter of fact. Accordingly, the Panel should rule that the 1916 Act, as such, is fully consistent with the United States' WTO obligations.

3.36 In response to the Panel's question and the US arguments, the **European Communities** notes that the provisions of the 1916 Act are "mandatory" legislation as this term is used in GATT 1947/WTO practice. According to that practice, mandatory measures are those which, under national law, require the executive authority to impose a measure. For example, in *Denial of Most-Favoured-Nation Treatment As To Non-Rubber Footwear From Brazil*, the following definition can be found:

> "[…] the Panel examined whether this legislation as such is consistent with Article I:1. The Panel noted that the CONTRACTING PARTIES had decided in previous cases that legislation mandatorily *requiring the executive authority to impose a measure* inconsistent with the General Agreement was inconsistent with that Agreement *as such*, whether or not an occasion for the actual application of the legislation had arisen. The Panel recalled that the backdating provisions of the two Acts *are mandatory legislation*, that is *they impose on the executive authority requirements which cannot be modified by executive action*, and it therefore found that these provisions *as such, not merely their application in concrete cases*, have to be consistent with Article I:1."[57]

3.37 The European Communities recalls that the United States relies in particular on the *EEC - Parts and Components* case. However, that case concerned authorising provisions in respect of which there was discretion for the administration. Whether

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[55] *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 1994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988). The United States also refers to the Restatement (Third) of the Foreign Relations of the United States, s. 114 (1987).

[56] The United States refers to *United States - Tobacco*, *Op. Cit.*, para. 123.

[57] Panel Report on *Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, para. 6.13 (footnote omitted; emphasis added by the European Communities).

these provisions produced any effects in practice depended on the discretion of an administration. There is no such discretion in the case of the 1916 Act.

3.38 In light of the foregoing, the European Communities considers that there are two main reasons why the 1916 Act is mandatory legislation. First, when a private party brings an action under the 1916 Act there is no room at all for government discretion.[58] Second, once a court has found that the 1916 Act standard is met, it is required to grant relief to the complainant. The wording of paragraph 2 of the 1916 Act is unequivocal:

> "Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, *on conviction thereof, shall* be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court."[59]

3.39 The European Communities notes that the only margin of discretion left to a court is concerned with the type and level of the sanction that will be applied. And even that discretion can be exercised only within statutory limits. Moreover, if it is true, as the United States submits, that the actual meaning of the 1916 Act depends on courts' interpretation of its provisions, it is even clearer that the government has no discretion at all to influence courts' decisions. Nor can the government modify the 1916 Act's legal requirements. This further confirms that the 1916 Act is "mandatory".

3.40 The European Communities further recalls that, in response to a question of the Panel regarding what discretion a US court has in dismissing a 1916 Act case or in deciding not to impose treble damages, for example, because doing so would be contrary to international law obligations of the United States, the United States replies that

> "[a] court would not have discretion to dismiss a well-founded case under the 1916 Act […] nor would a court have discretion not to impose treble damages that had been properly established."

The European Communities thus considers that neither the administration nor the courts have discretion over civil claims.

3.41 The European Communities points out, moreover, that the situation concerning the criminal liability provisions is somewhat different but that the legislation is still not discretionary within the meaning of GATT 1947/WTO jurisprudence. In this connection, it is important to note that the 1916 Act makes "unlawful" and "misdemeanours" the offences that it describes. The most pertinent analogy under GATT 1947 case law is the report of the panel on *United States - Measures Affecting Alcoholic and Malt Beverages.*[60] One of the many measures examined in that case concerned the maximum price laws in Massachusetts and Rhode Island. The panel held

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[58] The European Communities notes that criminal prosecution under the 1916 Act is the only case within the discretion of the US government.

[59] Emphasis added by the European Communities.

[60] Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206 (hereinafter "*United States - Malt Beverages*").

those laws to violate the GATT 1947 even though they were not being enforced, saying:

> "Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators."[61]

3.42 The European Communities argues that the reason why the panel in *United States - Malt Beverages* considered the legislation in issue in that case to have legal effects is that good corporate citizens, like all good citizens, avoid acting unlawfully and indeed committing misdemeanours, whether or not the law is being actively enforced and they risk actual punishment. The same reasoning is applicable to the present case.

3.43 The European Communities notes, in addition, that the US Department of Justice may only decline to bring a criminal case under certain defined conditions, none of which include a consideration of whether or not the action would be WTO-compatible. Also, once the decision to bring a case has been taken by the US Department of Justice, the courts are obliged to try it and impose a penalty if the conditions and criteria of the 1916 Act are met. That is, courts are obliged to do in criminal cases what the United States said that they are obliged to do in civil cases. In other words, it is mandatory for them to take action against dumping which is inconsistent with WTO rules. Thus, both the civil and criminal provisions of the 1916 Act create legal effects and in neither case does this depend on the administration taking some discretionary action.

3.44 The European Communities submits, finally, that the unadopted report of the panel on *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*[62] as well as the adopted report of the panel on *United States - Definition of Industry concerning Wine and Grape Products*[63] support its view that the 1916 Act is not discretionary legislation as this term is used in GATT 1947/WTO jurisprudence.[64]

3.45 In response, the **United States** reiterates its view that the 1916 Act should be viewed as discretionary legislation. In reply to a question of the Panel regarding the discretion enjoyed by the US Department of Justice as to whether to bring a criminal case or not, the United States states that the Department of Justice, an executive branch agency, has the discretion to decide whether or not to bring a criminal prosecution under the 1916 Act. In other words, while the 1916 Act authorises the Department of Justice to bring a criminal prosecution, it does not mandate it.

3.46 The United States notes, in this regard, that the standards used by the Department of Justice in deciding whether to conduct criminal proceedings, including investigative measures, are set out in a public document known as the "United States

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61 *Ibid.*, para. 5.60.

62 Panel Report on *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136 (unadopted), dated 28 April 1995 (hereinafter "*EC - Audio Cassettes*").

63 Panel Report on *United States - Definition of Industry concerning Wine and Grape Products*, adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1992, BISD 39S/436 (hereinafter "*United States - Definition of Wine Industry*").

64 See section III.H.2 below.

Attorneys' Manual", specifically, Ch. 9-27 of that Manual entitled "Principles of Federal Prosecution." This document explains that the Department enjoys wide discretion regarding whether, when and how it will bring criminal charges. For example, section 9-27.220 states that, where there is sufficient admissible evidence of a federal offence, the government may nonetheless decline to prosecute because (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. In section 9-27.230, "Substantial Federal Interest" is defined to include, *inter alia*, "federal law enforcement priorities" and "the nature and seriousness of the offense."[65]

3.47 The United States further notes that in cases where the United States, acting through the Department of Justice, is itself a party to litigation, it has direct responsibility for ensuring that its own claims and actions comport with US laws and obligations, and for informing the court of such considerations. Also, where appropriate, the Department can seek to intervene in a private civil litigation in order to protect a federal government interest. The Department does not routinely intervene in private litigation, however, and it remains a matter of judgment when and before what courts it should be done.

3.48 As concerns civil cases, the United States contends that the European Communities misses the point with its argument that when a private party brings an action under the 1916 Act there is no room for government discretion. The question in these circumstances is not whether the executive authority has discretion, but whether the law mandates a violation of a WTO obligation. In the instant case, to answer that question the Panel must determine whether the law is susceptible to an interpretation that is WTO-consistent. Although prior cases applying the mandatory/discretionary distinction have involved executive enforcement of a measure, there is no reason that the principle cannot apply to a measure that is enforced through the judicial branch.

3.49 The United States argues, finally, that the European Communities' reliance on the *United States - Malt Beverages* case is misplaced. The issue in that case was whether the non-enforcement of mandatory legislation rendered the legislation non-actionable. Indeed, this is plainly reflected in the section quoted by the European Communities. Yet, that is not the question in the instant case. The question in the instant case is whether the law is mandatory, not whether the law is being enforced.

3.50 In response to a question of the Panel regarding whether the mandatory/discretionary distinction applies also to cases of judicial enforcement of a measure, the **European Communities** states that, contrary to the view expressed by the United States, the mandatory/discretionary distinction does not apply to such cases. Courts only declare what the law is. Or, as Montesquieu noted, the judiciary is "la bouche de la loi". Accordingly, a court does not make law, it only applies it.

3.51 The European Communities further notes that the US constitution is founded on the principle of the separation of powers. The United States cannot argue that its courts regard themselves in general as having discretion as to whether or not to apply

[65] The United States notes in this connection that Sections One and Two of the Sherman Antitrust Act of 1890 can be and often are enforced through criminal as well as civil proceedings, while the Clayton Antitrust Act is enforceable only through civil actions.

the law, similar to that possessed by the executive arm of government when powers are delegated. Even if this were to be the case in some special areas, such as awarding specific remedies, it does not apply to the adjudication of a dispute under the 1916 Act.

3.52 The European Communities does acknowledge that it may sometimes appear that courts have a number of options in interpreting the law. However, that is simply a reflection of the difficulty of predicting the outcome of a complex debate. No court would admit to being free to choose between a number of options for interpreting the law. All courts endeavour in good faith to establish the true meaning of the law on the basis of the text and established principles of interpretation.

3.53 The European Communities considers that the most pertinent WTO decision for the present case is *India - Patent Protection*. In that case, the Appellate Body concluded that the Indian courts would apply the (mandatory) law even in the face of directly contradictory administrative practice. This conclusion reflects the principle that courts do not have discretion in the same way as administrations do.

3.54 The European Communities argues, moreover, that the cases that have been invoked by the United States all concern cases where the administration was taking action and also had the power to complete, amend or add to the legislation so as to avoid a violation. Clearly, courts are not in the same position and do not have the power to adopt additional or amending rules. In any event, even if one could imagine situations where courts are given discretionary powers to amend or add to legislation in the same way as an administration typically might, that certainly is not the case with the 1916 Act.

3.55 The European Communities also points out that the provisions of the 1947 Protocol of Provisional Application demonstrate that, historically, it was administrative discretion that was considered relevant. That is also one reason why Article XVI:4 of the Agreement Establishing the WTO speaks of "domestic laws, regulations and *administrative* procedures".[66]

3.56 The European Communities notes, finally, that the United States apparently attempts to confuse the issue before the Panel by assimilating discretion in the application of legislation with ambiguity in the interpretation of legislation, which allegedly exists in the instant case. However, there is no basis even under the GATT 1947 to defend legislation which is on its face GATT-inconsistent on the ground that courts might one day interpret it in a GATT-consistent manner.

3.57 The European Communities recalls that the only GATT 1947 case in which there is any reference to interpretation is *United States - Tobacco*, which the United States claims is particularly pertinent to the present dispute. The *United States - Tobacco* case involved a situation in which domestic legislation was incomplete.[67] There was a requirement on the administration to promulgate fees for the inspection of imported tobacco at a level "comparable" to that for domestic tobacco but at the same time the administration had the power to adjust the level of fees for the inspec-

[66] Article XVI:4 of the Agreement Establishing the WTO reads as follows: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." (no emphasis in the original)

[67] The European Communities refers to *United States - Tobacco*, *Op. Cit.*, paras. 114-118.

tion of domestic tobacco. The panel therefore understandably held that there was no basis to hold that the administration, in fixing the level of fees for imported tobacco, would do so at a level inconsistent with Article VIII:1(a) of the GATT 1947. In other words, the panel held that at such stage there was no mandatory legislation inconsistent with the GATT 1947. In the instant case, there is of course no power for the US administration to complete or amend the 1916 Act which would allow it to make it compatible with WTO rules. All the requirements are already laid down in the 1916 Act.

3.58 The **United States** takes issue with the European Communities' description of the *United States - Tobacco* case as involving domestic legislation that was "incomplete," meaning according to the European Communities that the agency had not yet promulgated its regulations. The United States does not agree that that somehow distinguishes the panel's application of the mandatory/discretionary distinction from the present case. In the *United States - Tobacco* case, the panel considered whether a term in a statute could be interpreted by the relevant government authorities - which happened to be executive branch authorities - in a WTO-consistent manner. Thus, the only difference is that executive branch authorities were involved instead of judicial branch authorities. There is no reason why the same principle should not apply in the present case. The focus in a mandatory/discretionary analysis is not on which branch of government is applying the law, but whether there is room in the application of the law for the relevant government authorities to act in a WTO-consistent manner. In the present case, not only is there room for such an interpretation, but the law has already been so interpreted. Accordingly, the Panel should find that the 1916 Act as such is WTO-consistent.

3.59 The **European Communities** considers that, even if there were any basis for arguing on the basis of the GATT 1947 that any aspect of the 1916 Act is discretionary and not a *per se* violation of the US obligations, the situation is in any event different under the WTO Agreement, since Article XVI:4 of the Agreement Establishing the WTO expressly requires Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations" under the WTO agreements.[68]

3.60 The **United States** replies that the mandatory/discretionary distinction is still being applied in cases brought under the WTO, as is evidenced by the report of the panel on *Canada - Aircraft.*

D. Applicability of Article VI of the GATT 1994 and the Anti-Dumping Agreement

1. The Meaning and Scope of Article VI of the GATT 1994 and The Anti-Dumping Agreement

3.61 The **European Communities** submits that Article VI of the GATT 1994[69] acknowledges the existence of a particular problem in international trade and then

[68] See also part III. H. below.

[69] Article VI:1 of the GATT 1994 provides as follows: