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1 GENERAL

1.1 Object and purpose of the Anti-Dumping Agreement

1. In *US – 1916 Act (Japan)*, the Panel stated that:

"[T]he preambles of the WTO Agreement and the GATT do not provide precise directives. We note however that both preambles refer to the 'substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'. We also note that the WTO preamble refers to the development of a 'more viable and durable multilateral trading system'. We consider that the approach of the United States which would allow Members to take any type of measure against dumping as such outside the framework of Article VI, as long as they are not incompatible with other provisions of the WTO Agreement, does not seem to be commensurate with the objectives highlighted above."¹

2. The Panel in *US – Corrosion-Resistant Steel Sunset Review* noted that "[t]he *Anti-dumping Agreement* itself does not contain provisions which specify its object and purpose".²

3. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body considered it unnecessary to engage in an analysis of the object and purpose of the Anti-Dumping Agreement for the purposes of resolving the issue before it:

"We turn to examine what guidance is provided by the object and purpose of the *Anti-Dumping Agreement* for the interpretation of Article 2.4.2. The *Anti-Dumping Agreement* does not contain a preamble or an explicit indication of its object and purpose. Neither participant referred to the object and purpose in its written submission. At the oral hearing, Canada and certain third participants indicated that the object and purpose of the *Anti-Dumping Agreement* could be discerned from Article 1 of the *Anti-Dumping Agreement*. The United States and New Zealand, in contrast, said guidance could be found in Article VI of the GATT 1994. We do not consider it necessary for purposes of resolving the issue before us on appeal to engage in an in-depth analysis of the object and purpose of the *Anti-Dumping Agreement*."³

4. In *US – Zeroing (EC)*, the Panel offered several observations on arguments relating to the object and purpose of the Anti-Dumping Agreement:

"[S]ince the *AD Agreement* contains no discrete statement of objectives, one can only derive or deduce its objectives from the operational provisions of the Agreement. While it is perhaps possible at a very high level of generality to deduce from the

¹ Panel Report, *US – 1916 Act (Japan)*, para. 6.223.

² Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.44.

³ Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118.

operational provisions of the *AD Agreement* as a whole that for instance, one of the 'objectives' of the *AD Agreement* is to provide a multilaterally agreed framework of rules governing actions against injurious dumping, claims of more specific objectives are difficult to discern with any facility or compelling force due to the lack of anything that could properly be described as constituting a clear statement of the objectives of the *AD Agreement*."⁴

1.2 Relationship with other WTO Agreements

1.2.1 Article VI of the GATT 1994

5. Regarding the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement, the Panel in *US – 1916 Act (EC)*, referring to the Appellate Body Report on *Argentina – Footwear (EC)*, used the term an "inseparable package of rights and disciplines":

"In our opinion, Article VI and the Anti-Dumping Agreement are part of the same treaty or, as the panel and the Appellate Body put it in *Argentina – Footwear (EC)* with respect to Article XIX and the Agreement on Safeguards, an 'inseparable package of rights and disciplines'. In application of the customary rules of interpretation of international law, we are bound to *interpret* Article VI of the GATT 1994 as part of the WTO Agreement and the Anti-Dumping Agreement is part of the context of Article VI. This implies that Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning. Rather, we should give meaning and legal effect to all the relevant provisions. However, the requirement does not prevent us from making *findings* in relation to Article VI only, or in relation to specific provisions of the Anti-Dumping Agreement, as required by our terms of reference."⁵

6. The Panel in *US – 1916 Act (EC)* considered the Anti-Dumping Agreement as context in interpreting Article VI of the GATT 1994 and explained its reasoning as follows:

"The official title of the Anti-Dumping Agreement is 'Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994'. This agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 confirm the close link between Article VI and the Anti-Dumping Agreement. Moreover, as was recalled by the Appellate Body in the *Brazil – Coconuts* case, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a single undertaking. As a result, Article 18.1 of the Anti-Dumping Agreement is part of the context of Article VI since Article 31.2 of the Vienna Convention provides that 'the context for the purpose of the interpretation of a treaty shall comprise, ... the text [of the treaty], including its preamble and annexes ...'. We are therefore not only entitled to consider Articles 1 and 18.1 of the Anti-Dumping Agreement even though the European Communities did not mention those provisions as part of its claims in its request for establishment of a panel, but we are also *required* to do so under the general principles of interpretation of public international law."⁶

7. In examining the scope of Article VI of the GATT 1994, the Panel in *US – 1916 Act (EC)* stated that Article 1 of the Anti-Dumping Agreement "supports the view that Article VI is about what Members are entitled to do when they counteract dumping within the meaning of Article VI ... by referring to 'anti-dumping *measure[s]*' which may be applied by Members."⁷ The Panel concluded that "a law that would counteract 'dumping' as defined in Article VI:1 would fall within the scope of Article VI."⁸

8. The Appellate Body in *US – 1916 Act* concluded that "[s]ince an 'Anti-Dumping measure' must, according to Article 1 of the Anti-Dumping Agreement, be consistent with Article VI of the

⁴ Panel Report, *US – Zeroing (EC)*, fn 292.

⁵ Panel Report, *US – 1916 Act (EC)*, para. 6.97. See also *US – 1916 Act (Japan)*, para. 6.93.

⁶ Panel Report, *US – 1916 Act (EC)*, para. 6.195. See also Panel Report, *US – 1916 Act (Japan)*, para. 6.108.

⁷ Panel Report, *US – 1916 Act (EC)*, para. 6.106.

⁸ Panel Report, *US – 1916 Act (EC)*, para. 6.107.

GATT 1994 and the provisions of the *Anti-Dumping Agreement*, it seems to follow that Article VI would apply to 'an anti-dumping measure', i.e., a measure against dumping."⁹

9. The Panel in *US – 1916 Act (EC)* considered that the first sentence of Article 1 of the Anti-Dumping Agreement confirms the purpose of Article VI as "to define the conditions under which counteracting dumping *as such* is allowed."¹⁰

10. Regarding the relationship between Article VI of the GATT 1994 and the Anti-Dumping Agreement, the Panel in *US – 1916 Act (Japan)* noted that "Article 1.1 of the Anti-Dumping Agreement establishes a link between Article VI and the Anti-Dumping Agreement."¹¹

11. The Appellate Body in *US – 1916 Act* agreed with the Panel's conclusion that "[g]iven the link between Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, we find that the applicability of Article VI to the 1916 Act also implies the applicability of the *Anti-Dumping Agreement*."¹²

1.2.2 Article I of the GATT 1994

12. In *EU – Footwear (China)* the Panel found that "rules and formalities applied in anti-dumping investigations ... fall within the scope of the 'rules and formalities in connection with importation' referred to in Article I:1".¹³

13. In *EU – Footwear (China)* the Panel assessed whether a provision of the European Union's anti-dumping regulations violated Article I:1 on the basis that it subjected certain "[non-market economy (NME)] WTO Members, including China, to additional conditions in order for exporting producers to receive [individual treatment (IT)], while WTO Members with market economies automatically receive IT".¹⁴ The Panel found that:

"[T]he automatic grant of IT to imports from market economy countries is an 'advantage' within the meaning of Article I:1. In our view, individual treatment ensures that producers and exporters receiving such treatment will not be subject to a duty higher than their own dumping margin, as would be the case for some producers or exporters subject to a country-wide duty imposed on the basis of a margin calculated on average export prices. Moreover, Article 9(5) of the Basic AD Regulation lists the WTO Members, including China, whose producers are not automatically accorded the right to individual dumping margins and anti-dumping duties, but must fulfil the conditions of that provision in order to benefit from that right. Thus, the application of Article 9(5) of the Basic AD Regulation will, in some instances, result in import of the same product from different WTO members being treated differently in anti-dumping investigations by the European Union. This to us establishes that the advantage of automatic IT is conditioned on the origin of the products. We therefore consider that Article 9(5) of the Basic AD Regulation violates the MFN obligation set forth in Article I:1 of the GATT 1994."¹⁵

1.2.3 Article 3.2 of the DSU

14. The Panel in *US – DRAMS* discussed the interpretation of provisions of the Anti-Dumping Agreement in the light of the wording of Article 3.2 of the DSU.

⁹ Appellate Body Report, *US – 1916 Act*, para. 120.

¹⁰ Panel Report, *US – 1916 Act (EC)*, para. 6.114. See also Panel Report, *US – 1916 Act (Japan)*, para. 6.240.

¹¹ Panel Report, *US – 1916 Act (Japan)*, para. 6.108. See also Panel Report, *US – 1916 Act (EC)*, para. 6.165.

¹² Appellate Body Report, *US – 1916 Act*, para. 133.

¹³ Panel Report, *EU – Footwear (China)*, para. 7.100.

¹⁴ Panel Report, *EU – Footwear (China)*, para. 7.98.

¹⁵ Panel Report, *EU – Footwear (China)*, para. 7.100.

1.2.4 Article 11 of the DSU

15. As regards the different standard of review under Article 17.6 of the Anti-Dumping Agreement and the general standard of review of Article 11 of the DSU, see the Section on Article 17.

1.3 Decision on Anti-Circumvention

1.3.1 Text of the Decision

DECISION ON ANTI-CIRCUMVENTION

Ministers,

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution.

1.3.2 Interpretation and application

16. At its meeting of 28-29 April 1997, the Committee on Anti-Dumping Practices decided to establish an "Informal Group on Anti-Circumvention". The Committee agreed that the Informal Group would be open to all Members, and could not make any decisions on the issues discussed, but would make recommendations for consideration by the Committee.¹⁶ Documents pertaining to the Informal Group on Anti-Circumvention are contained in the series G/ADP/IG.

17. The Panel in *China – Auto Parts* discussed the Decision on Anti-Circumvention in the context of examining a claim under Article II of the GATT 1994. In that case, China argued that the measures at issue were anti-circumvention measures, aimed at addressing the evasion of certain tariff rates under China's tariff schedule. In support of its position that the measures at issue were consistent with its obligations under Article II of the GATT 1994, China invoked the Decision on Anti-Circumvention. The Panel did not consider the Decision to be relevant to the claim before it:

"The Panel notes that as submitted by the complainants, the notion of anti-circumvention measures applied in connection with anti-dumping duties is recognized in the Ministerial Decision on Anti-Circumvention. The Decision provides: ...

As shown in the text of the Decision, WTO Members referred issues relating to circumvention of anti-dumping duties to the Committee on Anti-Dumping Practices at the time of the Uruguay Round negotiations. Since then, WTO Members have continued to discuss the relevant issues in accordance with the mandate under the Decision and as part of the Doha negotiations. In contrast, we have no evidence or document showing that comparable recognition or discussion has ever taken place in the context of ordinary customs duties or interpretation of Members' Schedules of Concessions within the scope of Article II of the GATT 1994. In the absence of any specific indication or legal basis that the Members' discussions on the notion of circumvention in relation to anti-dumping duties can be also related to ordinary customs duties, we do not find that the circumstances surrounding the notion of anti-circumvention of anti-dumping measures can be extended to the interpretation of Members' Schedules of Concessions.

¹⁶ G/L/204, para. 15.

In this regard, China argues that since 'nothing' in the Decision implies that the same problem does not exist in the ordinary customs duty context, it should be presumed that it also exists in the ordinary customs duty context. We are not persuaded by China's argument. The Decision explicitly notes that WTO Members could not agree on specific text relating to the problem of circumvention of *anti-dumping duty measures*, which formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, which is an agreement on anti-dumping duties. It also expresses the negotiators' 'desirability of the applicability of the uniform rules *in this area*' (in the area of anti-dumping measures) (emphasis added). We do not find any basis in the language of the Decision, which is specifically aimed at the negotiators' recognition of the circumvention problem with respect to anti-dumping duty measures, for extending the same consideration to ordinary customs duties."¹⁷

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¹⁷ Panel Report, *China – Auto Parts*, paras. 7.498-7.500.