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## **1 ARTICLE 19**

### **1.1 Text of Article 19**

#### **Article 19**

##### *Panel and Appellate Body Recommendations*

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned<sup>9</sup> bring the measure into conformity with that agreement.<sup>10</sup> In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

*(footnote original)*<sup>9</sup> The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

*(footnote original)*<sup>10</sup> With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

### **1.2 Article 19.1**

#### **1.2.1 "bring the measure into conformity with that agreement"**

##### **1.2.1.1 Recommendation where measure no longer in existence**

1. In *US – Certain EC Products*, the Panel had recommended that the DSB request the United States to bring its measure into conformity with its obligations under the WTO Agreement. However, the Appellate Body, having upheld the Panel's finding that the "measure at issue in this dispute [was] no longer in existence", concluded that the Panel erred in making a recommendation:

"[T]here is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists."<sup>1</sup>

2. In *Chile – Price Band System*, the Panel refrained from making a recommendation on the grounds that the measures at issue were no longer in existence. The Panel considered that this fact did not preclude it from making *findings* on those measures.<sup>2</sup>

3. In *Dominican Republic – Import and Sales of Cigarettes*, the Appellate Body considered in its recommendations the changes in the measure at issue during the appeal proceedings that could affect the existence of the measure. The Appellate Body qualified its recommendation, noting that Dominican Republic should bring its measure into conformity with its obligations under the GATT 1994 to the extent that the modifications made so far to that measure "have not already done so".<sup>3</sup>

4. In *EC – Commercial Vessels*, the Panel refrained from recommending that the European Communities bring some measures into conformity, referring to the Appellate Body decision in *US – Certain EC Products* on measures that no longer exist. However, the Panel observed that:

"[T]he notion of a measure that no longer 'exists' is not always straightforward. In the present case, it is clear from the information before the Panel that where national aid schemes have expired, no new applications for TDM aid can be submitted. On the other hand, however, we cannot determine with certainty whether and to what extent it is possible that subsidies continue to be provided pursuant to applications made before the expiry of those schemes. Therefore, the Panel considers that its recommendation does not apply to the schemes that have expired, except to the extent that those schemes continue to be operational."<sup>4</sup>

5. In *EC – Approval and Marketing of Biotech Products*, the Panel made a qualified recommendation under Article 19.1, recommending that the DSB request the European Communities to bring the general de facto moratorium on approvals into conformity with its obligations under the SPS Agreement "if, and to the extent that, that measure has not already ceased to exist".<sup>5</sup>

6. In *EC – IT Products*, the European Communities submitted two documents at the interim review stage, allegedly demonstrating that two of the measures at issue had been modified, and another entirely repealed. The European Communities requested that, on the basis of these documents, the Panel modify the interim report so as to remove any recommendation under Article 19.1 in relation to those measures. The Panel denied the European Communities' request on the grounds that such evidence could not properly be introduced for the first time at the interim review stage.<sup>6</sup>

7. In *US – Poultry (China)*, the Panel concluded that "given that the measure at issue, Section 727 has expired, we do not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the *SPS Agreement* and the GATT 1994".<sup>7</sup>

8. In *Thailand – Cigarettes (Philippines)*, the Panel had, in its interim report, declined to make a recommendation under Article 19.1 in respect of certain measures that were no longer in force. At the interim review stage, the Philippines requested that the Panel make a recommendation, arguing that a measure that is no longer in force because, for example, it has been superseded or

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<sup>1</sup> Appellate Body Report, *US – Certain EC Products*, paras. 81 and 129.

<sup>2</sup> Panel Report, *Chile – Price Band System*, paras. 7.112 and 7.124.

<sup>3</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 129.

<sup>4</sup> Panel Report, *EC – Commercial Vessels*, para. 8.4.

<sup>5</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 8.16 and 8.36.

<sup>6</sup> Panel Report, *EC – IT Products*, paras. 6.48-6.50, 8.14, 8.25, 8.37.

<sup>7</sup> Panel Report, *US – Poultry (China)*, para. 8.7.

replaced, may still continue to exist for purposes of Article 19.1 of the DSU if the respondent Member takes further action in relation to the measure later on, or if the measure will otherwise continue to have effects in domestic law. The Panel largely agreed with the Philippines:

"Although a measure can normally be considered to have ceased to exist if it has been superseded or replaced by a subsequent measure or reaching the end of the period of effect, we consider that the measure's expiration in such circumstances would not in itself make it automatically fall outside the scope of panels' obligation to make a recommendation under Article 19.1. As the Philippines submits, there may be situations where despite the expiry nature of a measure, it must still be brought into compliance to the extent that the measure continues to exist by being subject to a further action by the responding Member or by continuing to have effects on the concerned imported goods."<sup>8</sup>

9. The Panel in *Thailand – Cigarettes (Philippines)* went on to ultimately conclude that:

"[I]t is not entirely clear to us whether and, if so, to what extent, these MRSP Notices will have effects on the subsequent MRSP Notices. Our recommendations with respect to these MRSP Notices, therefore, apply only to the extent they continue to have effects. We do not make a recommendation for the December 2005 MRSP Notice as it is not disputed that it has expired and does *not* continue to exist for purpose of Article 19.1 of the DSU."<sup>9</sup>

10. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Panel found that the United States had granted Boeing FSC/ETI subsidies that were prohibited under Article 3.1(a) of the SCM Agreement. However, the Panel declined to make any recommendation under Article 4.7 of the SCM Agreement, explaining that:

"[T]he FSC/ETI measure in force at the time of the Panel's establishment has been substantially changed during the course of the present proceedings and indeed it appears that the measure is no longer in force with respect to Boeing. The Panel considers that it is well established in WTO dispute settlement practice that when a measure has expired, it is appropriate for a panel to refrain from making a recommendation with respect to such a measure."<sup>10</sup><sup>11</sup>

11. In *China – Raw Materials*, the Appellate Body found that Panel did not make findings on a "matter" that was not before it, and therefore dismissed China's claim that the Panel acted inconsistently with Article 7.1 of the DSU, as well as China's consequential claims under Article 11 and Article 19.1 of the DSU.<sup>12</sup> More specifically, China argued that although complainants asked the Panel to consider only the series of measures at issue as they existed in 2009, and to exclude certain 2010 replacement measures from the scope of the dispute, the Panel nonetheless proceeded to make a recommendation that extended to measures specifying export duty rates and quota amounts for 2010. China claimed that, in so doing, the Panel acted inconsistently with its terms of reference under Article 7.1 of the DSU. The Appellate Body found that, in the circumstances of that case, the Panel did not err in recommending that China bring its measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result. The Appellate Body did not consider that it was necessary for the complainants to include claims with regard to the specific export duty and quota measures applied in 2010, in addition to those that were in force when the Panel was established in 2009, in order to obtain a recommendation with prospective effect. Thus, the Appellate Body did not consider that the Panel's recommendation implied that the Panel made findings on a "matter" that was not before it.

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<sup>8</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 6.15.

<sup>9</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.8.

<sup>10</sup> (footnote original) See, for example, Appellate Body Report, *US – Certain EC Products*, paras. 81-82. The panel in *EC – Approval and Marketing of Biotech Products* concluded that "WTO jurisprudence supports the inference that panels are to avoid making recommendations which would apply to measures that are no longer in existence or have been amended." Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1316.

<sup>11</sup> *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 8.6.

<sup>12</sup> Appellate Body Reports, *China – Raw Materials*, paras. 236-269.

12. In the course of its analysis, the Appellate Body provided some clarification on recommendations that are prospective in nature, and it also clarified that a panel is not necessarily precluded from making a recommendation on an "expired" measure (or series of measures). Regarding the "prospective" nature of recommendations, the Appellate Body stated that:

"Pursuant to Article 19.1 of the DSU, when a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring its measure into conformity with that agreement. While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB. As the Appellate Body noted in *US – Continued Zeroing*, 'it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments'.

At issue in this case are several groups, or series, of measures—that is, the relevant framework legislation, the implementing regulations, and the specific measures in force at the date the Panel was established imposing export duties or quotas on each raw material. As the Panel noted, these groups of measures operate collectively to impose export duties or export quotas on the raw materials at issue. The object of the complainants' challenge was the legal situation prevailing in 2009, that is, the 'series of measures' pursuant to which China imposed export quotas and duties on the raw materials at issue at the time the Panel was established. As the Panel found, such measures include China's *Customs Law* and the *Regulations on Import and Export Duties*, which authorize the imposition of export duties; China's *Foreign Trade Law*, which confers the authority to restrict or prohibit the exportation of goods through export quotas and subjects those goods to an export quota administration; as well as the regulations implementing this framework legislation. In addition to these standing measures, each series of measures also includes the specific measures imposing export duty rates or quota amounts in force at a particular time. These latter measures are, as the Panel found, of varying duration. In a particular year, China may, for example, increase or decrease the amount of export duty imposed on a particular product, or it may even eliminate that duty altogether, while the framework legislation and implementing regulations remain in place. Against this background, we do not consider that it was necessary for the complainants to include claims with regard to the specific export duty and quota measures applied in 2010, in addition to those that were in force when the Panel was established in 2009, in order to obtain a recommendation with prospective effect."<sup>13</sup>

13. The Appellate Body noted that, in making its recommendations, the Panel was concerned about making recommendations on what it viewed to be "expired" measures, and had expressed the view that previous panels had found that it would not be appropriate to make recommendations on measures that no longer exist.<sup>14</sup> The Appellate Body offered the following observations:

"The DSU does not specifically address whether a WTO panel may or may not make findings and recommendations with respect to a measure that expires or is repealed during the course of the panel proceedings. Panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them. In the present dispute, China takes issue with the recommendations made by the Panel, and not with its findings on particular measures. In *US – Upland Cotton*, the Appellate Body drew a distinction between the question of whether a panel can make findings with respect to an expired measure and the question of whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU:

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<sup>13</sup> Appellate Body Reports, *China – Raw Materials*, paras. 260-261.

<sup>14</sup> Panel Reports, para. 7.28 (referring to Panel Reports, *EC – Trademarks and Geographic Indications*, para. 7.14; and *US – Poultry (China)*, para. 7.56).

'The Appellate Body in *US – Certain EC Products* confirmed that the 3 March Measure had ceased to exist. It noted that there was an obvious inconsistency between the finding of the panel that 'the 3 March Measure is no longer in existence' and the panel's subsequent recommendation that the Dispute Settlement Body (the 'DSB') request the United States to bring the 3 March Measure into conformity with its WTO obligations. Thus, the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure.' (footnote omitted)

Contrary to the Panel's approach in this dispute, the Appellate Body indicated that the fact that a measure has expired 'may affect' what recommendation a panel may make. The Appellate Body did not suggest that a panel was precluded from making a recommendation on such a measure in a particular case. In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute. The same considerations do not apply, in our view, when a challenge is brought against a group or 'series of measures' comprised of basic framework legislation and implementing regulations, which have not expired, and specific measures imposing export duty rates or export quota amounts for particular products on an annual or time-bound basis, as is the case here. The absence of a recommendation in such a case would effectively mean that a finding of inconsistency involving such measures would not result in implementation obligations for a responding member, and in that sense would merely be declaratory. This cannot be the case."<sup>15</sup>

14. In *EU – Fatty Alcohols (Indonesia)*, the Appellate Body offered the following general observations regarding the obligation to make a recommendation under Article 19.1, and how it applies in the context of "expired" measures:

"Article 6.2 refers to 'measures at issue'. The Appellate Body has noted that the words 'at issue' further qualify the 'measure' in Article 6.2. The Appellate Body has also expressly rejected the proposition that an expired measure could not be a measure 'at issue' in terms of Article 6.2 of the DSU. Instead, referring to the relevant context provided by Article 3.3 of the DSU, the Appellate Body has highlighted that this provision does not refer to 'existing' measures or measures 'currently in force', but to 'measures taken' by a Member. Accordingly, the Appellate Body considered this reference to encompass measures taken in the past. We consider that Article 3.3 also has contextual relevance for the interpretation of Article 19.1, similarly suggesting that the term 'measures' in that provision is not limited to 'existing', but also covers expired measures.

Article 19.1 further stipulates that panels and the Appellate Body 'shall recommend' that the Member concerned bring the measure into conformity with the covered agreements when they conclude that a measure is inconsistent with a covered agreement. We attach significance to the fact that Article 19.1 is expressed in mandatory terms and linked directly to the findings made by a panel. This suggests that it is not within a panel's or the Appellate Body's discretion to make a recommendation in the event that a finding of inconsistency has been made.

At the same time, the Appellate Body has found that the expiry of the measure may affect what recommendations a panel may make. In this vein, some panels have found it not appropriate to make a recommendation to the DSB after they had found that the measure was no longer in force. Other panels have made a recommendation in such circumstance, albeit limited in scope. In *US – Certain EC Products*, the Appellate Body found an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations."<sup>16</sup>

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<sup>15</sup> Appellate Body Reports, *China – Raw Materials*, paras. 263-264.

<sup>16</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.198-5.200.

15. Having made these general observations, the Appellate Body concluded that the Panel in this dispute did not err in making a recommendation pursuant to Article 19.1 of the DSU because the Panel never made a finding that the measure had expired:

"We note that those cases differ from the present case in that the Panel in the present case made *no* finding on, or mention of, the expiry of the measure at issue in the Panel Report. Absent any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements. In this vein, we note that, while the Appellate Body has held that, as a general matter, it is within the panel's discretion to decide how to take into account subsequent modifications to, or the repeal of, the measure at issue, the Appellate Body has also clarified that, where a measure has expired, a panel is not precluded from making a recommendation on such a measure."<sup>17</sup>

16. The Panel in *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)* declined to make findings on a measure that had been repealed after the panel's establishment. In rejecting the complainant's request for findings on the repealed measure, the Panel noted:

"The Panel is not convinced by this argument of Panama. First, the Panel has already determined that Decree No. 2218/2017 falls within its terms of reference, so that Panama's concern is baseless. Secondly, Panama has accepted that it is not necessary to make recommendations with regard to Decree No. 1745/2016, and has thus recognized that these measures are no longer producing effects. Moreover, in the Panel's opinion, Panama has not sufficiently demonstrated the risk of Colombia re-imposing the specific bond and the special import regime with the characteristics provided for in Decree No. 1745/2016. Therefore, the Panel considers that making findings on the repealed measures would amount to a purely academic exercise and that, in order to fulfil its mandate to resolve the matter before it, it must examine and make findings and, where appropriate, recommendations, with regard to the specific bond and the special import regime with the characteristics provided for in Decree No. 2218/2017 and not those provided for in Decree No. 1745/2016."<sup>18</sup>

17. The Panel in *India – Iron and Steel Products* made recommendations on an expired measure on the ground that the measure had certain retrospective effects on trade:

"Article 19 of the DSU is entitled 'Panel and Appellate Body Recommendations'. In relevant part it provides in paragraph 1 that '[w]here a panel ... concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement'. Despite what Article 19.1 provides, panels generally refrain from making recommendations on measures found to be inconsistent with provisions of the covered agreements when these measure are no longer in existence. Having said that, to the extent that an expired measure may continue to have an effect on the operation of a covered agreement, it would be appropriate for a panel to provide recommendations with regard to the measures at issue.

We have already noted that, despite the expiry of the measure at issue, there are potential lingering effects of the measure with respect to imports that occurred before that date. Accordingly, in the circumstances of the present case, it is appropriate for the Panel to provide recommendations with regard to the measure at issue to the extent that there may continue to be effects with respect to imports occurred when the measure was in force."<sup>19</sup>

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<sup>17</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.201.

<sup>18</sup> Panel Report, *Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)*, para. 7.114.

<sup>19</sup> Panel Report, *India – Iron and Steel Products*, paras. 7.27-7.28.

### 1.2.1.2 Recommendations by the Panel or Appellate Body that remain operative

18. In *US – FSC (Article 21.5 - EC II)*, the Panel noted that procedures under Article 21.5 refer to a post-recommendation period, which does not require any additional recommendation by panels or the Appellate Body:

"In this respect, an Article 21.5 compliance procedure occurs after the DSB has already made recommendations and rulings based on Article 19.1 of the DSU (and/or Article 4.7 of the SCM Agreement). It is linked to the post-recommendation implementation period envisaged in Articles 21.1 and 21.3 of the DSU. This necessarily implies that the textual reference in Article 21.5 of the DSU to have 'recourse to these dispute settlement procedures' cannot include the requirement to, once again, formulate additional recommendations under Article 19 of the DSU (and/or Article 4.7 of the SCM Agreement)."<sup>20</sup>

19. The Appellate Body agreed, stating that:

"These second Article 21.5 proceedings before us concern a situation where the measure taken to comply with the DSB recommendations from the original and first Article 21.5 proceedings—the Jobs Act—has in large part withdrawn the prohibited subsidies. However, to the extent that the Jobs Act, by virtue of its transition and grandfathering provisions, does not fully withdraw the ETI subsidies found in the previous proceedings to be prohibited under the *SCM Agreement*, it was sufficient for the second Article 21.5 Panel to conclude that the original Article 4.7 recommendation adopted by the DSB has not been complied with entirely and remains in effect for the part that has not been implemented."<sup>21</sup>

20. In *US/Canada – Continued Suspension*, the Appellate Body referred to the recommendations and rulings adopted in the previous case on *EC – Hormones*, declaring that they remain operative because it was unable to complete the analysis "as to whether Directive 2003/74/EC has brought the European Communities into substantive compliance within the meaning of Article 22.8 of the DSU".<sup>22</sup>

21. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Panel found that FSC-related subsidies provided to Boeing were inconsistent with Article 3.1 of the SCM Agreement. However, the Panel declined to make a recommendation in the light of the fact that the recommendations from the prior *US – FSC* dispute remained operative:

"[T]o the extent that FSC/ETI tax benefits remained applicable to Boeing at the time of the establishment of this Panel, pursuant to the transition and grandfather clauses of the AJCA, the Panel notes that the panel and Appellate Body reports in *US – FSC (Article 21.5 - ECII)* concluded that the recommendation made by the panel in *US – FSC* remained operative. The Panel considers it important not to disturb this recommendation. A new recommendation under Article 4.7 of the SCM Agreement would not add to the legal force of the existing recommendation. The findings made in prior cases regarding the legal provisions as such necessarily imply that the application of these provisions in individual cases was also inconsistent with Article 3. The obligation of the United States to withdraw the prohibited subsidies at issue thus also entails an obligation to cease applying the measures in individual cases. If anything, a new recommendation could detract from the legal force of the existing obligation insofar as it would give rise to a new period for implementation."<sup>23</sup>

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<sup>20</sup> Panel Report, *US – FSC (Article 21.5 - EC II)*, para. 7.43.

<sup>21</sup> Appellate Body Report, *US – FSC (Article 21.5 - EC II)*, para. 85.

<sup>22</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 737.

<sup>23</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 8.6.

### **1.2.2 "the panel ... may suggest ways in which the Member concerned could implement the recommendation"**

#### **1.2.2.1 General**

22. In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body confirmed that "[t]he second sentence of Article 19.1 of the DSU confers a discretionary right, authorizing panels and the Appellate Body to suggest ways in which the recommendations and rulings could be implemented".<sup>24</sup>

23. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the complainant requested that the Panel make a suggestion pursuant to Article 19.1, and then claimed on appeal that the manner in which the Panel "summarily" dismissed its request was inconsistent with the Panel's duties under Articles 11 and 12.7 of the DSU. The Appellate Body stated:

"The Panel addressed Argentina's request for a suggestion in paragraph 9.4 of the Panel Report. The Panel's explanation is brief, but it is sufficient to convey that the Panel considered Argentina's request and that, in the light of the discretionary nature of the authority to make a suggestion, the Panel declined to exercise that discretion. The discretionary nature of the authority to make a suggestion under Article 19.1 must be kept in mind when examining the sufficiency of a panel's decision not to exercise such authority. However, it should not relieve a panel from engaging with the arguments put forward by a party in support of such a request. In the present case, Argentina offered several reasons in support of its request for a suggestion. Although it would have been advisable for the Panel to articulate more clearly the reasons why it declined to exercise its discretion to make a suggestion, this does not mean that Panel's exercise of its discretion was improper, and, thus, even assuming *arguendo* that Articles 11 and 12.7 were applicable to a request for suggestion, we do not consider that, in the circumstances of this case, the Panel failed to fulfil its duties under those provisions."<sup>25</sup>

#### **1.2.2.2 Cases in which panels made suggestions**

24. Panels have made suggestions pursuant to Article 19.1 in a number of cases, including but not limited to the cases summarized below.

25. In *US – Underwear*, the Panel recommended the DSB to request the United States bring its measure into compliance with its obligations under the Agreement on Textiles and Clothing by removing the measure inconsistent with the United States' obligation. The Panel went further in suggesting the following:

"We find that such compliance can best be achieved and further nullification and impairment of benefits accruing to Costa Rica under the ATC best be avoided by prompt removal of the measure inconsistent with the obligations of the United States. We further suggest that the United States bring the measure challenged by Costa Rica into compliance with US obligations under the ATC by immediately withdrawing the restriction imposed by the measure."<sup>26</sup>

26. In *EC – Bananas III (Article 21.5 – Ecuador)*, the Panel made the following suggestions to the European Communities to bring its banana import regime into conformity with WTO rules after noting that previous implementation attempts had been only partly successful:

"First, the European Communities could choose to implement a tariff-only system for bananas, without a tariff quota. This could include a tariff preference (at zero or another preferential rate) for ACP bananas. If so, a waiver for the tariff preference may be necessary unless the need for a waiver is obviated, for example, by the

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<sup>24</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 466.

<sup>25</sup> Appellate body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 183.

<sup>26</sup> Panel Report, *US – Underwear*, para. 8.3

creation of a free-trade area consistent with Article XXIV of GATT. This option would avoid the need to seek agreement on tariff quota shares.

Second, the European Communities could choose to implement a tariff-only system for bananas, with a tariff quota for ACP bananas covered by a suitable waiver.

Third, the European Communities could maintain its current bound and autonomous MFN tariff quotas, either without allocating any country-specific shares or allocating such shares by agreement with all substantial suppliers consistently with the requirements of the chapeau to Article XIII:2. The MFN tariff quota could be combined with the extension of duty-free treatment (or preferential duties) to ACP imports."<sup>27</sup>

27. In *India – Patents (US)*, the Panel declined the United States' request to the Panel to suggest the manner in which India should implement its obligation, since in its opinion it would have infringed upon India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1.<sup>28</sup> However it did suggest that India take into account the interests of persons who would have filed patent applications if India had had an appropriate mechanism in place:

"[I]n establishing a mechanism that preserves novelty and priority in respect of applications for product patents in respect of pharmaceutical and agricultural chemical inventions during the transitional period, India should take into account the interests of those persons who would have filed patent applications had an appropriate mechanism been maintained since the expiry of the Patents Ordinance 1994, as well as those who have already filed such applications under that Ordinance or the administrative practices currently in place."<sup>29</sup>

28. In *Guatemala – Cement I*, the Panel concluded that Guatemala had violated the provisions of the Anti-Dumping Agreement by initiating an investigation when there was not sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. Therefore, it suggested that the anti-dumping measure be revoked. The Panel stated:

"[T]he entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."<sup>30</sup>

29. In *India – Quantitative Restrictions*, the Panel suggested that a reasonable period of time be granted to India in order to remove the imports restrictions which were not justified under Article XVIII:B. The Panel also brought to the attention of the DSB some factors to be taken into consideration that had an added importance for the principle of special and differential treatment. The Panel suggested:

"[T]hat the parties negotiate an implementation/phase-out period. Should it be impossible for them to do so, we suggest that the reasonable period of time, whether determined by arbitration (Article 21.3(c) of the DSU) or other means, be set in light of the above-listed factors."<sup>31</sup>

30. In *US – Lead and Bismuth II*, the European Communities requested the Panel "to suggest that the United States amend its countervailing duty laws to recognize the principle that a privatization at market price extinguishes subsidies". However, according to the Panel, the European Communities had not identified any provision of the United States' law that required the imposition of countervailing duties in the circumstances of the present dispute. Thus, the Panel was unable to make the suggestion requested by the European Communities. However, it noted

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<sup>27</sup> Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.155–6.158.

<sup>28</sup> Panel Report, *India – Patents (US)*, para. 5.65.

<sup>29</sup> Panel Report, *India – Patents (US)*, para. 6.2.

<sup>30</sup> Panel Report, *Guatemala – Cement I*, para. 8.6.

<sup>31</sup> Panel Report, *India – Quantitative Restrictions*, paras. 7.5–7.7.

that the United States had continued to apply its change-in-ownership methodology during the course of the dispute. It therefore suggested:

"[T]hat the United States takes all appropriate steps, including a revision of its administrative practices, to prevent the aforementioned violation of Article 10 of the SCM Agreement from arising in the future."<sup>32</sup>

31. In *Guatemala – Cement II*, the Panel suggested that Guatemala revoke its anti-dumping measure on imports of grey portland cement from Mexico. However, it declined Mexico's request that the Panel suggest to Guatemala that it should refund the anti-dumping duties:

"In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, we note that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. ... Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, we decline Mexico's request to suggest that Guatemala refund the anti-dumping duties collected."<sup>33</sup>

32. In *US – Cotton Yarn*, Pakistan requested the Panel to suggest that the most appropriate way for the United States to implement the Panel's ruling would be to rescind the safeguard action forthwith. The Panel agreed, and stated as follows:

"In this case, we recommend that the Dispute Settlement Body request that the United States bring the measure at issue into conformity with its obligations under the ATC. We suggest that this can best be achieved by prompt removal of the import restriction."<sup>34</sup>

33. In *US – Offset Act (Byrd Amendment)*, the Panel considered that, "although there could potentially be a number of ways in which the United States could bring the [concerned measure] into conformity", it found it "difficult to conceive of any method which would be more appropriate and/or effective than the repeal of the ... measure". Therefore, the Panel suggested that the United States repeal the WTO-inconsistent measures.<sup>35</sup>

34. In *Argentina – Poultry Anti-Dumping Duties*, the Panel "[could] not perceive how Argentina could properly implement [the] recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, [the Panel suggested] that Argentina repeals Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil."<sup>36</sup>

35. In *US/Canada – Continued Suspension*, after finding that the United States and Canada committed procedural violations under Article 23 of the DSU, the Panel suggested that "[i]n order to implement its findings under Article 23 and in order to ensure the prompt settlement of this dispute", the United States and Canada "should have recourse to the rules and procedures of the DSU without delay".<sup>37</sup>

36. In *Mexico – Steel Pipes and Tubes*, after finding that Mexico had acted in a manner inconsistent with its obligations under the Anti-Dumping Agreement, the Panel noted that these inconsistencies were of a "fundamental and pervasive"<sup>38</sup> nature and suggested that Mexico should "revok[e] the anti-dumping measures applied to steel pipes and tubes from Guatemala in order to implement properly the conclusions and recommendations identified in this case".<sup>39</sup>

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<sup>32</sup> Panel Report, *US – Lead and Bismuth II*, para. 8.1.

<sup>33</sup> Panel Report, *Guatemala – Cement II*, para. 9.7.

<sup>34</sup> Panel Report, *US – Cotton Yarn*, para. 8.5.

<sup>35</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 8.6.

<sup>36</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 8.7.

<sup>37</sup> Panel Reports, *US/Canada – Continued Suspension*, para. 8.3.

<sup>38</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.13.

<sup>39</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.12.

37. In *EC – Export Subsidies on Sugar*, after noting the concern of several developing countries with regard to their preferential access to the EC market for their sugar exports, the Panel suggested that:

"[I]n bringing its exports of sugar into conformity with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, the European Communities consider measures to bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries".<sup>40</sup>

38. In *EC – Trademarks and Geographical Indications*, after recommending that the European Communities bring its Regulation into conformity with the TRIPS Agreement and GATT 1994, the Panel suggested that:

"[O]ne way in which the European Communities could implement the above recommendation with respect to the equivalence and reciprocity conditions, would be to amend the Regulation so as for those conditions not to apply to the procedures for registration of [Geographical Indications] located in other WTO Members which, it submitted to the Panel, is already the case."<sup>41</sup>

39. In *EC – Selected Customs Matters*, the Panel elaborated, in general terms, on the possible ways to bring a measure into compliance when there is a violation of Article X:3(a) of GATT 1994:

"In this regard, the Panel recalls that it is evident from Articles 6.2 and 19.1 of the DSU that it is the 'measure at issue' in the request for establishment of a panel that must be brought into conformity in the event that that measure is found to be in violation of a WTO obligation. If a WTO Member were found to be in violation of Article X:3(a) of the GATT 1994, this would mean that the manner in which laws, regulations, decisions and/or rulings of the kind described in Article X:1 of the GATT 1994 are being administered by that Member is not uniform, impartial and/or reasonable. If, in the light of such a violation, a panel or the Appellate Body has recommended to the DSB that the Member bring the measure in question into conformity, the Member would need to alter the manner in which the relevant laws, regulations, decisions and/or rulings are being administered in order to abide by that recommendation."<sup>42</sup>

40. The Panel in *Ukraine – Passenger Cars* stated that:

"Article 19.1 of the DSU states that WTO panels may suggest ways in which the Member concerned could implement their recommendations. However, a panel is not required to make such a suggestion. In the light of the nature and number of inconsistencies with the Agreement on Safeguards and the GATT 1994 that we have found in this case, we suggest that Ukraine revoke its safeguard measure on passenger cars."<sup>43</sup>

41. In *Pakistan – BOPP Film (UAE)*, the UAE requested that, pursuant to Article 19.1 of the DSU, the Panel "suggest that Pakistan 'terminate the duties imposed' and 'refund the anti-dumping duties collected,' in order to bring the measures into conformity with its WTO obligations".<sup>44</sup> The Panel suggested that Pakistan withdraw the anti-dumping measures in the light of the fundamental nature and pervasiveness of the inconsistencies found. The Panel declined, however, to suggest that Pakistan refund the anti-dumping duties already paid:

"In the case before us, we have found fundamental and pervasive inconsistencies, extending to the evidence on the basis of which the authority initiated the investigation, the chosen POI for the original investigation, multiple aspects of the determination of injury in the original investigation, and multiple aspects of the sunset determination.

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<sup>40</sup> Panel Reports, *EC – Export Subsidies on Sugar*, para 8.7.

<sup>41</sup> Panel Reports, *EC – Trademarks and Geographical Indications*, para. 8.5.

<sup>42</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.21.

<sup>43</sup> Panel Report, *Ukraine – Passenger Cars*, para. 8.8.

<sup>44</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 9.2.

Because of the fundamental nature and pervasiveness of the inconsistencies we have found, we suggest that Pakistan implement our recommendation by withdrawing the anti-dumping measures it has imposed on BOPP film from the United Arab Emirates. We decline however to suggest that Pakistan refund the anti-dumping duties already paid."<sup>45</sup>

### 1.2.2.3 Cases in which panels declined to make suggestions

42. Panels have declined to make suggestions pursuant to Article 19.1 in a number of cases, including but not limited to the cases summarized below.

43. In *India – Patents (US)*, the Panel declined the United States' request to the Panel to suggest a manner in which India should implement its obligation, since in its opinion it would impair India's right to choose how to implement the TRIPS Agreement pursuant to Article 1.1.<sup>46</sup>

44. In *US – DRAMS*, the Panel declined to make any suggestions on the grounds that there was a range of possible ways through which the United States could appropriately implement the Panel's recommendation.<sup>47</sup>

45. In *US – Lead and Bismuth II*, the European Communities had requested the Panel to suggest that the United States amend its countervailing duty laws to recognize the principle that a privatization at market price extinguishes subsidies. However, according to the Panel, the European Communities had not identified any provision of the United States' law that required the imposition of countervailing duties in the circumstances of that dispute; and thus, it was unable to make the suggestion requested by the European Communities.<sup>48</sup>

46. In *Guatemala – Cement II*, the Panel declined Mexico's request that the Panel suggest to Guatemala that it should refund the anti-dumping duties. The Panel stated that:

"In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey portland cement from Mexico."<sup>49</sup>

47. In *US – Stainless Steel*, Korea requested the Panel to suggest that the United States revoke its anti-dumping orders on stainless steel plate and sheet from Korea. The Panel noted that the Anti-Dumping Agreement comprised 18 separate articles and numerous obligations, thus violations may have different forms and implications. The Panel further recalled that Korea's claims related to the determinations of the Department of Commerce regarding the margin of dumping. It found that the determinations were inconsistent with the Anti-Dumping Agreement in a number of respects, but it could not say that had the Department of Commerce acted consistently with the Anti-Dumping Agreement, it would not have found the existence of dumping. In this case the Panel concluded:

"Under these circumstances, while there can be little doubt that revocation would be *one* way that the United States could implement our recommendation, we are not prepared to conclude at this time that it is the only way to do so. Accordingly, we decline Korea's request to suggest that the United States revoke the anti-dumping duties at issue in this dispute."<sup>50</sup>

48. In *US – Hot Rolled Steel*, the Panel declined to make specific suggestions in accordance with Japan's requests. It considered that the modalities of the implementation of its recommendations were for the United States to determine.<sup>51</sup> It further noted that Japan's request

<sup>45</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 9.5-9.6.

<sup>46</sup> Panel Report, *India – Patents (US)*, para. 5.65.

<sup>47</sup> Panel Report, *US – DRAMS*, para. 7.4. See also Panel Report, *US – Steel Plate*, para. 7.110.

<sup>48</sup> Panel Report, *US – Lead and Bismuth II*, para. 8.2.

<sup>49</sup> Panel Report, *Guatemala – Cement II*, para. 9.6.

<sup>50</sup> Panel Report, *US – Stainless Steel*, para. 7.10.

<sup>51</sup> Panel Report, *US – Hot Rolled Steel*, para. 8.11.

for reimbursement raised important systemic issues that had not been fully explored in the dispute.<sup>52</sup>

49. In *EC – Sardines*, Peru requested the Panel to make a specific suggestion i.e. that the European Communities permit Peru without any further delay to market its sardines in accordance with the naming standard consistent with the TBT Agreement. However, the Panel declined to make the suggestion stating that the authority under Article 19.1 was a discretionary one.<sup>53</sup>

50. In *Brazil – Aircraft (Article 21.5 – Canada)*, Canada requested that the Panel suggest that the parties develop mechanisms that would allow Canada to verify compliance with the original recommendation of the DSB. The Panel stated:

"In our view, Article 19.1 appears to envision suggestions regarding what could be done to a measure to bring it into conformity or, in case of a recommendation under Article 4.7 of the *SCM Agreement*, what could be done to 'withdraw' the prohibited subsidy. It is not clear if Article 19.1 also addresses issues of surveillance of those steps. That said, any agreement that WTO Members might reach among themselves to improve transparency regarding the implementation of WTO obligations can only be encouraged."<sup>54</sup>

51. In *US – Countervailing Measures on Certain EC Products*, the European Communities requested the Panel to suggest possible means of implementation by the United States, *inter alia*, the revocation of a number of countervailing duty orders. According to the European Communities, the Panel should do this on the grounds that the United States had shown a lack of good faith with respect to their previous dispute settlement proceedings. The Panel declined to do so and explained that its findings were sufficiently clear and that WTO Members have discretion in how they bring their measures into conformity with their WTO obligations.<sup>55</sup>

52. In *EC – Tariff Preferences*, India requested the Panel to suggest to the European Communities that it bring its measure into conformity with its obligations under GATT 1994 by obtaining a waiver. The Panel did not consider it appropriate to make such a suggestion to the European Communities in light of the fact that there was more than one way that the European Communities could bring its measure into conformity and because the European Communities had requested a waiver which was still pending.<sup>56</sup>

53. In *Korea – Certain Paper*, the Panel declined to make suggestions regarding the implementation noting that such suggestions are "exceptional". Given the circumstances of the dispute, the Panel considered it was not necessary "to depart from the general rule" of not making any suggestions regarding implementation.<sup>57</sup>

54. The Panel in *EC – Fasteners (China)* reviewed past practice relating to suggestions under Article 19.1 in the context of trade remedies. The Panel stated:

"Most panels reviewing anti-dumping (and countervailing duty) measures have declined requests for suggestions. Where the panel has explained its reasoning, it has generally noted that, in view of the different violations found, while revocation of the measure is a possible means of implementation, other means might also be available.<sup>58</sup> Several panels, in declining to make a suggestion, have noted that

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<sup>52</sup> Panel Report, *US – Hot Rolled Steel*, para. 8.13.

<sup>53</sup> Panel Report, *EC – Sardines*, para. 8.3.

<sup>54</sup> Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 7.3.

<sup>55</sup> Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 6.43.

<sup>56</sup> Panel Report, *EC – Tariff Preferences*, para. 8.3.

<sup>57</sup> Panel Report, *Korea – Certain Paper*, paras. 9.3 and 9.4.

<sup>58</sup> (*footnote original*) Panel Report, *US – Hot Rolled Steel*, para. 8.11 (panel declined to make specific suggestions, observing that the variety of different violations found might necessitate differing responses in order to bring the measure concerned into conformity with obligations under the AD Agreement); Panel Report, *US – DRAMS*, para. 7.4 (panel declined to make any suggestions on the grounds that there was a range of possible ways through which the United States could appropriately implement the panel's recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel saw "no particular need to suggest a means of implementation"); Panel Report, *US – Stainless Steel (Korea)*, para. 7.10 (panel found the determination regarding the margin of dumping inconsistent with the AD Agreement in a number of respects, but observed

Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation.<sup>59</sup> Many other panels have declined requests for suggestions as well.<sup>60</sup> In the few cases in which panels have made a suggestion in an anti-dumping dispute, the panels have focussed on the conclusion that one of the violations found concerned initiation, and thus vitiated the entire proceeding, which should never have been initiated, or on the "fundamental and pervasive nature" of the violations, leading the panel to conclude that revocation was the only means of implementation.<sup>61</sup><sup>62</sup>

55. In *EU –Safeguard Measures on Steel (Turkey)*, Türkiye requested the Panel to suggest, pursuant to the second sentence of Article 19.1 of the DSU, that the European Union revoke the safeguard measures at issue. The Panel, after observing that some panels had made suggestions under Article 19.1 of the DSU while others had preferred to decline to do so, stated without further elaboration that "[i]n this case, we decline to make a suggestion under Article 19.1 of the DSU".<sup>63</sup>

#### 1.2.2.4 Legal effect of suggestions

56. In *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, the complainants argued that the only effective way for the United States to comply with the recommendations and rulings of the DSB was to repeal the measure. In this regard, the complainants noted that the Panel in *US – Offset Act (Byrd Amendment)* had made a suggestion, pursuant to Article 19.1, that the United States repeal the measure. The Arbitrator responded:

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that it could not say that had the investigating authority acted consistently with the AD Agreement, it would not have found dumping. Noting that while revocation would be one way in which the United States could implement the recommendation to bring its measure into conformity, the panel was not prepared to conclude that it was the only way to do so, and declined to make a suggestion); Panel Report, *US – Line Pipe*, para. 8.6 (panel declined Korea's request for a specific suggestion on ways in which the United States might implement the recommendations, stating that there may be other ways in which the United States could implement its recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel indicated that it was "free to suggest ways in which [it believed] the [defendant] could appropriately implement [the panel's] recommendation" but decided not to do so).

<sup>59</sup> (footnote original) E.g., Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan ("US – Hot-Rolled Steel")*, WT/DS184/R, adopted 23 August 2001, as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769, para. 8.13. The panel in this dispute observed that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance.

<sup>60</sup> (footnote original) Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US – Corrosion-Resistant Steel Sunset Review")*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, 85, para. 8.2; Panel Report, *US – Softwood Lumber V*, para. 8.6; Panel Report, *US – Softwood Lumber VI*, para. 8.8; Panel Report, *Korea – Certain Paper*, para. 9.4; Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea ("EC – Countervailing Measures on DRAM Chips")*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, paras. 8.6-8.7; and Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico ("US – Anti-Dumping Measures on Oil Country Tubular Goods")*, WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, 10225, para. 8.18.

<sup>61</sup> (footnote original) In *Guatemala – Cement I*, the panel concluded that Guatemala had violated the provisions of the AD Agreement by initiating an investigation when there was not sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. With respect to the request for a suggestion on implementation, the panel stated:

"[T]he entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."

Panel Report, *Guatemala – Cement I*, para. 8.6. The second panel to hear the same dispute also suggested revocation of the measure, for similar reasons. Panel Report, *Guatemala – Cement II*, para. 9.7.

In *Argentina – Poultry Anti-Dumping Duties*, the panel concluded that the violations it had found were of a "fundamental nature and pervasive", stated "[i]n light of the nature and extent of the violations in this case, [the panel does] not perceive how Argentina could properly implement [the panel's] recommendation without revoking the anti-dumping measure at issue in this dispute" and suggested that Argentina repeal the measure. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.6-8.7.

<sup>62</sup> Panel Report, *EC – Fasteners (China)*, para. 8.8.

<sup>63</sup> Panel Report, *EU –Safeguard Measures on Steel (Turkey)*, paras. 8.6-8.7.

"With respect to the suggestion of the Panel that the United States repeal the CDSOA, I note, first, that the Panel, in making its suggestion, also recognized that 'there could potentially be a number of ways in which the United States could bring the CDSOA into conformity'. Moreover, although the suggestion by the Panel, as part of a panel report adopted by the DSB, could serve as a useful contribution to the decision-making process in the implementing Member, I do not believe that the existence of such a suggestion ultimately affects the well-established principle that 'choosing the means of implementation is, and should be, the prerogative of the implementing Member'."<sup>64</sup>

57. In *EC – Bananas III (Ecuador) (Article 21.5 – Ecuador II) / EC – Bananas III (US) (Article 21.5 – US)*, the European Communities argued that, once a panel or an Appellate Body report containing suggestions made pursuant to the second sentence of Article 19.1 of the DSU has been adopted, the consistency of the measures suggested by the original panel with the covered agreement cannot be challenged by the complaining party before an Article 21.5 panel. The Appellate Body agreed with the Panel that the complainants had the right to challenge before an Article 21.5 panel the European Communities' measure taken to comply, whether or not such measure implemented a suggestion made by an earlier panel or the Appellate Body. In the course of its analysis, the Appellate Body stated:

"Suggestions made by panels or the Appellate Body pursuant to Article 19.1 of the DSU regarding ways of implementation form part of panel or Appellate Body reports adopted by the DSB in previous proceedings. The DSU does not expressly address the question of the legal status of suggestions that form part of a report adopted by the DSB, nor does it specify the legal consequences when a Member chooses to implement DSB recommendations and rulings by following a suggestion for implementation. A Member may choose whether or not to follow a suggestion. The use of the term 'could' in Article 19.1 clarifies that Members are not obliged to follow suggestions for implementation.

...

We consider that suggestions made by panels or the Appellate Body may, if correctly and fully implemented, lead to compliance with the DSB's recommendations and rulings. However, full compliance with DSB rulings and WTO-consistency of the measures actually taken to comply cannot be presumed simply because a Member declares that its measures taken to comply conform to a suggestion made under Article 19.1 of the DSU. As pointed out above, Article 21.5 proceedings focus on the measure actually taken to comply, not the ways in which the Member could implement the recommendations and rulings. Following a suggestion does not guarantee substantive compliance with the recommendations and rulings by the DSB. Whether such compliance has been achieved needs to be determined through Article 21.5 proceedings. The adoption of a panel or Appellate Body report by the DSB makes the recommendations and rulings therein binding upon the parties. As noted earlier, such adoption by the DSB does not make suggestions for implementation binding upon the parties (especially, where, as in this case, the first Ecuador Article 21.5 panel made several suggestions); nor does DSB adoption mean that actions taken to implement suggestions must be presumed to be WTO-consistent or shielded from review in Article 21.5 proceedings.

...

Suggestions made by panels or the Appellate Body may provide useful guidance and assistance to Members and facilitate implementation of DSB recommendations and rulings, particularly in complex cases. However, the fact that a Member has chosen to follow a suggestion does not create a presumption of compliance in Article 21.5 proceedings. The fact that a Member has chosen to follow a suggestion is part of the history and background of the measure at issue in Article 21.5 proceedings, but it should not in itself pre-empt a panel's assessment of compliance under Article 21.5. In our view, suggestions provide guidance, which is necessarily prospective in nature

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<sup>64</sup> Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 52.

and cannot, therefore, take account of all circumstances in which implementation may occur.<sup>65</sup>

### 1.2.3 Relationship with other provisions

#### 1.2.3.1 Article 6.2 of the DSU

58. In *China – Raw Materials*, the Appellate Body touched upon the relationship between Articles 19.1 and 6.2 of the DSU:

"A panel is required, under Article 7 of the DSU, to examine the 'matter' referred to the DSB by the complainant in the request for the establishment of a panel, and to make such findings as will assist the DSB in making recommendations. The language in a complainant's panel request is therefore important because 'a panel's terms of reference are governed by the request for establishment of a panel'. Article 19.1 of the DSU establishes a link between a panel's finding that 'a measure is inconsistent with a covered agreement', and its recommendation that the respondent 'bring the measure into conformity'. The 'measures' that may be the subject of recommendations in Article 19.1 are limited to those measures that are included within a panel's terms of reference."<sup>66</sup>

#### 1.2.3.2 Article 4.7 of the SCM Agreement

59. In *Australia – Automotive Leather II (Article 21.5 – US)*, the Panel addressed the issue of the relationship between the recommendation to "bring the measure into conformity" under Article 19.1 and the recommendation to "withdraw the subsidy" under Article 4.7 of the SCM Agreement. In this context and considering whether Article 4.7 allowed "retroactive" remedies, the Panel rejected the argument that "Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action". The Panel held that:

"An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.

...

... Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies, such as this one. Rather, the recommendation to 'withdraw the subsidy' is required by Article 4.7 of the SCM Agreement ... Thus, to the extent that 'withdraw the subsidy' requires some action that is different from 'bring the measure into conformity', it is that different action which prevails."<sup>67</sup>

60. In *EC and certain member States – Large Civil Aircraft*, the Panel stated that:

"[W]e note that the special and additional rules applicable under Parts II and III of the SCM Agreement do not require a panel to specify how the implementation of recommendations under Articles 4.7 and 7.8 should be effected by the subsidizing Member(s). In this context, we recall that the second sentence of Article 19.1 of the DSU provides that a panel 'may' suggest ways in which a recommendation could be implemented. Assuming that this provision also applies to recommendations under Articles 4.7 and 7.8 of the SCM Agreement, we note the observation of the panel in *US – Hot Rolled Steel* that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance."<sup>68</sup>

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<sup>65</sup> Appellate Body Reports, *EC – Bananas III (Ecuador) (Article 21.5 – Ecuador II) / EC – Bananas III (US) (Article 21.5 – US)*, paras. 321-325.

<sup>66</sup> Appellate Body Reports, *China – Raw Materials*, para. 251.

<sup>67</sup> Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.31 and 6.41.

<sup>68</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 8.8.

### **1.3 Article 19.2: "cannot add to or diminish the rights and obligations"**

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

"Chile claims that the Panel's findings on the issues of 'not similarly taxed' and 'so as to afford protection' compromise the 'security and predictability' of the multilateral trading system, provided for in Article 3.2 of the DSU, and 'add to ... the rights and obligations of Members' under Article III:2, second sentence, of the GATT 1994, in contravention of Articles 3.2 and 19.2 of the DSU. In this dispute, while we have rejected certain of the factors relied upon by the Panel, we have found that the Panel's legal conclusions are not tainted by any reversible error of law. In these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements. Chile's appeal under Articles 3.2 and 19.2 of the DSU must, therefore, be denied."<sup>69</sup>

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

"A decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel 'would seem ... not to be in a position to choose freely whether or not to exercise its jurisdiction.'"<sup>70</sup>

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<sup>69</sup> Appellate Body Report, *Chile – Alcoholic Beverages*, para. 79.

<sup>70</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.