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1 ARTICLE VI

1.1 Text of Article VI

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or

countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
- (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

1.2 Text of note *ad* Article VI

Ad Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be

met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

1.3 Scope and applicability of Article VI

1.3.1 Subject matter applicability

1. In *US – 1916 Act*, the EC and Japan brought a dispute concerning the US Antidumping Act of 1916 ("1916 Act"), a US statute providing for penalties of imprisonment, fines or the award of treble damages against importers who had sold foreign-produced goods in the United States at prices "substantially less" than the prices at which the same products are sold in a relevant foreign market, if the importation or sale was done with the intent of destroying or injuring a US industry, of preventing establishment of a US industry, or of restraining or monopolizing trade or commerce in such articles in the United States. The Appellate Body confirmed the Panels' finding that Article VI applied to the 1916 Act. The Appellate Body observed:

"Whether Article VI of the GATT 1994 is applicable to the 1916 Act depends on whether Article VI regulates all possible measures Members can take in response to dumping. If Article VI regulates *only* the imposition of anti-dumping duties and neither prohibits nor regulates other measures which Members may take to counteract dumping, then, since the 1916 Act does not provide for anti-dumping duties, Article VI would not apply to the 1916 Act."¹

2. The Appellate Body further noted that "Article VI:1 of the GATT 1994 must be read together with the provisions of the *Anti-Dumping Agreement*"² and referred to the text of Article 1 of the *Anti-Dumping Agreement*; specifically, the Appellate Body stated that "[s]ince 'an anti-dumping measure' must, according to Article 1 of the *Anti-Dumping Agreement*, be consistent with Article VI of the 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."³

3. The Appellate Body went on to state that "the scope of application of Article VI is clarified, in particular, by Article 18.1 of the *Anti-Dumping Agreement*"⁴, and indicated that "Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'":

"[T]he ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'. 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present. Since intent is not a constituent element of 'dumping', the *intent* with which action against dumping is taken is not relevant to the determination of whether such action is 'specific action against dumping' of exports within the meaning of Article 18.1 of the *Anti-Dumping Agreement*."

Article 18.1 of the *Anti-Dumping Agreement* contains a prohibition on the taking of any 'specific action against dumping' of exports when such specific action is not 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Since the only provisions of the GATT 1994 'interpreted' by the *Anti-Dumping Agreement* are those provisions of Article VI concerning dumping, Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another

¹ Appellate Body Report, *US – 1916 Act*, para. 109.

² Appellate Body Report, *US – 1916 Act*, para. 118.

³ Appellate Body Report, *US – 1916 Act*, para. 120.

⁴ Appellate Body Report, *US – 1916 Act*, para. 121.

Member be in accordance with the relevant provisions of *Article VI* of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*."

... It follows that Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'.⁵

4. The Appellate Body commented on this finding in its later report on *US – Offset Act (Byrd Amendment)*:

"The criterion we set out in *US – 1916 Act* for specific action in response to dumping is not whether the constituent elements of dumping or of a subsidy are explicitly referred to in the measure at issue, nor whether dumping or subsidization triggers the application of the action, nor whether the constituent elements of dumping or of a subsidy form part of the essential components of the measure at issue. Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy. ... we did not require that the language of the measure include the constituent elements of dumping or of a subsidy. ... we required that the constituent elements of dumping (or of a subsidy) be 'present', which in our view can include cases where the constituent elements of dumping and of a subsidy are implicit in the measure."⁶

1.3.2 Temporal applicability

5. In *Brazil – Desiccated Coconut*, the Appellate Body upheld the Panel's finding that Article VI of GATT 1994 does not apply to countervailing duty measures imposed as a result of an investigation initiated pursuant to an application made before the entry into force of the WTO Agreement. Having found that pursuant to Article 28 of the Vienna Convention on the Law of Treaties, "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force", the Appellate Body based its finding on Article 32.3 of the SCM Agreement, which provides that "the provisions of this Agreement shall apply to investigations ... initiated pursuant to applications have been made on or after the date of entry into force for a WTO Agreement of the WTO Agreement". The Appellate Body stated that "[i]f Article 32.3 is read in conjunction with Articles 10 and 32.1 of the *SCM Agreement*, it becomes clear that the term 'this Agreement' in Article 32.3 means 'this [SCM] Agreement and Article VI of the GATT 1994'.⁷ With reference to Articles 10 and 32.1 of the SCM Agreement, the Appellate Body went on to state:

"From reading Article 10, it is clear that countervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together."⁸

⁵ Appellate Body Report, *US – 1916 Act*, paras. 122 and 124-126. The Panel, which reached the same conclusion on the scope of Article VI:2, discussed the object and purpose of the GATT 1994, of the Anti-Dumping Agreement, or of the WTO Agreement, and the preparatory work for Article VI:2. See Panel Reports, *US – 1916 Act (Japan)*, paras. 6.223-6.229; *US – 1916 Act (EC)*, paras. 6.200-6.203.

⁶ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 244.

⁷ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 17. The Appellate Body later noted that Article 18.3 of the Anti-Dumping Agreement is an identical provision to Article 32.3 of the SCM Agreement. See Appellate Body Report, *Brazil – Desiccated Coconut*, fn. 23.

⁸ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

1.4 Article VI:1

1.4.1 Definitional nature and elements of paragraph 1

6. In *US – Zeroing (Japan)*, the Appellate Body reversed a finding that "simple zeroing" in original investigations was *consistent* with Article VI:1, and declined to make a finding of *inconsistency*, remarking that:

"Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of 'dumping' for the purposes of the *Anti-Dumping Agreement* and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations."⁹

7. The Appellate Body in *US – Stainless Steel (Mexico)* found that the definition of dumping is consistent throughout Article VI; that this definition is carried into the *Anti-Dumping Agreement* by Article 2.1 of that agreement; that the term "margin of dumping" is also consistent in Article VI:2 and the *Anti-Dumping Agreement*; that Article VI:1 and Article 2.1 "address the pricing practice of an exporter"; and that "dumping" and "margin of dumping" are exporter-specific concepts.

"The term 'margin of dumping' is defined in Article VI:2 of the GATT 1994 as the difference between the 'export price' and the 'normal value' (that is, 'the domestic price' of the like product in the exporting country) determined in accordance with Article VI:1. Article VI:2 further clarifies that the 'margin of dumping' is in respect of the dumped 'product'. The 'margin of dumping' thus measures the 'degree'—as used in Article 5.1 of the *Anti-Dumping Agreement*—or the 'magnitude'—as used in Article 3.4 of the *Anti-Dumping Agreement*—of dumping. As the 'margin of dumping' is only a measure of dumping, it also has the same meaning throughout the *Anti-Dumping Agreement* by virtue of Article 2.1.

The elements of the definition of 'dumping' contained in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*—namely, that 'dumping' occurs when a product is 'introduced into the commerce of *another country*' at an 'export price' that is less than the 'comparable price for the like product in the *exporting country*'—suggest to us that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* address the pricing practice of an exporter. Article 2.2 of the *Anti-Dumping Agreement* as well as Article VI:1(b) of the GATT 1994 also point in the same direction because they indicate that, if sales of the like product in the domestic market of the exporting country do not permit a proper comparison, the comparison may be made with the price at which the product is exported to an appropriate third country. Similarly, Article 2.3 of the *Anti-Dumping Agreement* allows the 'export price' to be constructed in cases where it appears to the authorities that the *export price* is unreliable.

The context found in various other provisions of the *Anti-Dumping Agreement* confirms that 'dumping' and 'margin of dumping' are exporter-specific concepts."¹⁰

8. The Appellate Body stated further:

"To sum up the above analysis, it is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) 'dumping' and 'margin of dumping' are exporter-specific concepts; 'dumping' is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) 'dumping' and 'margin of dumping' have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin

⁹ Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

¹⁰ Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 85-87.

of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied in respect of an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract 'injurious dumping' and not 'dumping' per se. It must be stressed that, under the Anti-Dumping Agreement, the concepts of 'dumping', 'injury', and 'margin of dumping' are interlinked and that, therefore, these terms should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement.

Based on the above analysis, we disagree with the proposition that importers 'dump' and can have 'margins of dumping'. Dumping arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets. The fact that 'dumping' and 'margin of dumping' are exporter-specific concepts under the Anti-Dumping Agreement is not altered by the fact that the export price may be the result of negotiation between the importer and the exporter. Nor is it altered by the fact that it is the importer that incurs the liability to pay anti-dumping duties."¹¹

1.4.2 Irrelevance of "intent" in determining dumping

9. In *US – 1916 Act*, the Appellate Body noted that:

"[U]nder Article VI:1 of the GATT 1994 and Article 2 of the *Anti-Dumping Agreement*, neither the intent of the persons engaging in 'dumping' nor the injurious effects that 'dumping' may have on a Member's domestic industry are constituent elements of 'dumping'."¹²

1.5 Note 2 *Ad Article VI:1*

10. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered issues regarding the concurrent application of anti-dumping duties calculated under a non-market economy (NME) methodology and of countervailing duties. The Appellate Body characterized Note 2 *Ad Article VI:1* as an "exceptional method for the calculation of normal value":

"Article VI:1(a) of the GATT 1994, like Article 2.1 of the *Anti-Dumping Agreement*, provides that the usual method for calculating normal value will be based on the comparable price for the like product in the exporter's domestic market. Thus, in anti-dumping investigations, normal value will typically be based on domestic sales prices and any domestic subsidy will have no impact on the calculation of the dumping margin. Nonetheless ...[t]he second *Ad Note* to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations... authorizes recourse to exceptional methods for the calculation of normal value in investigations of imports from NMEs. In case of domestic subsidization, it is only in these exceptional situations that there is any possibility that the concurrent application of anti-dumping and countervailing duties on the same product could lead to 'double remedies'."¹³

11. In *EC – Fasteners*, the EU argued that Section 15 of the Protocol of Accession of China allows the EU to treat China as a non-market economy (NME) for the purpose of applying Article 9(5) of the EU's Basic Anti-Dumping Regulation and "permits a flexible application of the rules". China responded that Section 15 was only a temporary and limited derogation from the rules.¹⁴ The Panel and the Appellate Body agreed that Section 15 derogates only from the rules on determining normal value, not other rules such as those on determining export prices or individual versus country-wide margins and duties. The Appellate Body remarked concerning Note 2 *Ad Article VI:1*:

"Section 15 of China's Accession Protocol contains a similar acknowledgment of the difficulties in determining price comparability as the one contained in the second *Ad*

¹¹ Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 94-95.

¹² Appellate Body Report, *US – 1916 Act*, para. 107.

¹³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 569.

¹⁴ Appellate Body Report, *EC – Fasteners*, para. 284.

Note to Article VI:1 of the GATT 1994, in respect of imports from China. The second *Ad Note* to Article VI:1 recognizes that, in the cases of imports from countries where the State has a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, importing Members may determine that a comparison with domestic prices in such a country may not be appropriate due to special difficulties in determining price comparability. This provision allows investigating authorities to disregard domestic prices and costs of such an NME in the determination of normal value and to resort to prices and costs in a market economy third country. Article 2.7 of the *Anti-Dumping Agreement* states that Article 2 is without prejudice to the second *Ad Note* to Article VI:1 of the GATT 1994, and thus incorporates the second *Ad Note* to Article VI:1 into the *Anti-Dumping Agreement*.

...

... paragraph 15(a) of China's Accession Protocol places the burden on the Chinese producers clearly to show that market economy conditions prevail in the industry producing the like product with respect to its manufacture, production, and sale. If such a showing is made, the importing Member shall use Chinese prices and costs in determining price comparability. Like the second *Ad Note* to Article VI:1 of the GATT 1994, paragraph 15(a) of China's Accession Protocol permits importing Members to derogate from a strict comparison with domestic prices or costs in China, that is, in respect of the determination of the normal value. This is indicated by the text of paragraph 15(a), which, in respect of the determination of price comparability, refers to "*Chinese prices or costs*" or "*a methodology that is not based on a strict comparison with domestic prices or costs in China*".

We do not consider that the references in paragraph 15(a)(i) and (ii) to producers having to show that 'market economy conditions prevail ... with regard to the manufacture, production and *sale*' of a product means that paragraph 15(a) permits any derogations also with respect to the determination of export prices. We reach this conclusion because, when producers are not able to show that market economy conditions prevail (including with regard to the *sale* of the product), paragraph 15(a) makes it clear that all an importing WTO Member is allowed to do as a consequence is to 'use a methodology that is not based on a strict comparison with *domestic prices or costs in China*'.

... paragraph 15(a) contains special rules for the determination of normal value in anti-dumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.

In our view, therefore, Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value. We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the *Anti-Dumping Agreement* and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties."¹⁵

12. The Appellate Body further discussed Note 2 *Ad Article VI:1* and Section 15 of China's Accession Protocol:

"The second *Ad Note* to Article VI:1 of the GATT 1994 reads as follows:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in

¹⁵ Appellate Body Report, *EC – Fasteners*, paras. 285-290.

determining price comparability for the purposes of paragraph 1, and in such cases importing Members may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

We observe that the second *Ad Note* to Article VI:1 refers to a 'country which has a complete or substantially complete monopoly of its trade' and 'where all domestic prices are fixed by the State'. This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad Note* to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

Furthermore, the reference in the second *Ad Note* to Article VI:1 to a strict 'comparison with domestic prices' not always being 'appropriate' provides flexibility only in respect of the determination of normal value. The recognition of special difficulties in determining price comparability in the second *Ad Note* to Article VI:1 does not mean that importing Members may depart from the provisions regarding the determination of export prices and the calculation of dumping margins and anti-dumping duties set forth in the Anti-Dumping Agreement and in the GATT 1994. While the second *Ad Note* to Article VI:1 refers to difficulties in determining price comparability in general, the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison. This is indicated by the operative part in the third sentence of this provision, which only allows importing Members to depart from a 'strict comparison with domestic prices'.¹⁶

13. See also the Section on the Anti-Dumping Agreement regarding *US – Shrimp (Viet Nam)*, in which Viet Nam brought a claim regarding anti-dumping calculations and the United States pointed to paragraphs 254 and 255 of Vietnam's Accession Working Party Report. The Panel noted these provisions and found that they only affect calculation of normal value, but do not modify any other provisions of the Anti-Dumping Agreement.

14. See also the *GATT Analytical Index* at page 228, concerning the circumstances of the insertion of Note 2 *Ad Article VI:1* in 1955, and provisions in the accession protocols of Poland and Romania regarding NME anti-dumping procedures.

1.6 Article VI:1(b)(ii)

15. In *EU – Biodiesel (Argentina)*, the Appellate Body upheld the Panel's finding that Article VI:1(b)(ii) of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement do not limit the sources of information that may be used in establishing the cost of production of the product to the sources inside the country of origin. The Appellate Body stated that although the investigating authorities have the right to resort to any information outside the country of origin, such information may need to be adapted to reflect the cost of production in the country of origin:

"We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production 'in the country of origin' from sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to 'in the country of origin', however, indicates that, whatever information or evidence is used to determine the 'cost of production', it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a 'cost of production' 'in the country of origin'.¹⁷

¹⁶ Appellate Body Report, *EC – Fasteners*, fn 460 to para. 285.

¹⁷ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

1.7 Article VI:2

1.7.1 "a contracting party may levy ... an anti-dumping duty": Permissible responses to dumping

16. In *US – 1916 Act*, the Appellate Body interpreted Article VI:2 in conjunction with Article 18.1 of the Anti-Dumping Agreement, addressing the question of whether Members may choose to impose other types of anti-dumping measures than anti-dumping duties. The Appellate Body stated:

"[T]he verb 'may' in Article VI:2 of the GATT 1994 is, in our opinion, properly understood as giving Members a choice between imposing an anti-dumping duty *or not*, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty. ...

... Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to 'specific action against dumping'. Article VI of the GATT 1994, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the *Anti-Dumping Agreement* to the extent that it provides for 'specific action against dumping' in the form of civil and criminal proceedings and penalties."¹⁸

17. In *US – Offset Act (Byrd Amendment)*, the Appellate Body referred to this finding in holding that "As CDSOA offset payments are not definitive anti-dumping duties, provisional measures or price undertakings, we conclude, in the light of our finding in *US – 1916 Act*, that the CDSOA is not 'in accordance with the provisions of the GATT 1994, as interpreted by' the *Anti-Dumping Agreement*."¹⁹

18. In *Canada – Welded Pipe*, the Panel agreed with Chinese Taipei's argument that the existence of a *de minimis* margin of dumping means that there is no dumping to offset or prevent for the purposes of Article VI:2 of the GATT 1994 and therefore, the imposition of the anti-dumping duty violates Article 9.2 of the Anti-Dumping Agreement as well as Article VI:2 of the GATT 1994.²⁰

19. See also the *GATT Analytical Index*, pages 237-238, concerning the permissible scope of measures against dumping or subsidization under GATT 1947, including the preparatory work of the GATT on this issue.

1.7.2 Methodology of investigation

1.7.2.1 No obligation to choose a particular methodology

20. In *EC – Tube or Pipe Fittings* the Panel examined whether Article VI:2 prescribes a certain methodology for the investigation of dumping. In the anti-dumping investigation at issue, the EC authorities had used a period of investigation of one year, during which the Brazilian currency was devalued by 42 per cent. Brazil argued that the devaluation had eliminated any dumping and that the Commission had failed to consider whether dumping existed 'in the present'. The Panel concluded that events occurring during the period of investigation did not require the authorities to reassess their determination. The Appellate Body upheld the Panel's finding and rejected Brazil's argument that Article VI:2 of the GATT 1994 required investigating authorities to "anticipate the level of anti-dumping duty that is strictly necessary to prevent dumping in the future [by making] a reasonable assumption for the future on the basis of the data collected in the [Period of Investigation]". According to the Appellate Body, the words "in order to offset or prevent dumping"

¹⁸ Appellate Body Report, *US – 1916 Act*, paras. 116 and 137.

¹⁹ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 265.

²⁰ Panel Report, *Canada – Welded Pipe*, paras. 7.74 and 7.76.

in Article VI:2 do not prescribe the selection of a particular methodology in the anti-dumping investigation:

"We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a 'reasonable assumption for the future', or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2."²¹

1.7.2.2 Price comparisons and zeroing

21. In *US – Zeroing (EC)*, the Appellate Body considered the application of the dumping margin calculation methodology known as "zeroing".²² The Appellate Body reversed the Panel's finding that the application of zeroing in the administrative reviews at issue was not inconsistent with Article 9.3 of the *Anti-Dumping Agreement* or Article VI:2. The Appellate Body explained that Article 9.3 and Article VI:2 require investigating authorities to ensure that the total amount of anti-dumping duties collected on all entries of a product from a given exporter or foreign producer shall not exceed the margin of dumping established for that exporter or foreign producer. The Appellate Body found instead that in the administrative reviews at issue in this case, the United States acted inconsistently with this requirement because, by disregarding the results of comparisons for which the export price of specific transactions exceeded the average normal value, it assessed anti-dumping duties in excess of the foreign producers' or exporters' margins of dumping:

"We move now to the question of whether the zeroing methodology applied by the USDOC in the administrative reviews at issue is consistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. It follows from our analysis that, in order to make this determination, it is necessary to compare the anti-dumping duties collected on all entries of the subject product from a given exporter or foreign producer with that exporter's or foreign producer's margin of dumping for the product as a whole. We recall that, if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole. Therefore, the margins of dumping with which the assessed anti-dumping duties have to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 are foreign producers' or exporters' margins of dumping that reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation.

Furthermore, we recall that, in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the

²¹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 76.

²² Zeroing may be described as the practice of calculating an *amount* of dumping on the basis of one or more comparisons of normal value(s) with export price(s) that are below normal value, while simply treating as undumped (and thus representing a zero amount of dumping) export prices that are above normal value. To arrive at a *margin* of dumping, the amount of dumping is divided by the total value of all export price transactions (both above and below normal value).

administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994."²³

22. In *US – Stainless Steel (Mexico)*, the Appellate Body found regarding price comparisons and zeroing, in relation to Article VI:2:

"[U]nder Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter.

We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the *Anti-Dumping Agreement* for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter. ...

In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the *Anti-Dumping Agreement*. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*, do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned."²⁴

23. In *US – Continued Zeroing*, the Appellate Body pointed to the need for consistent treatment of price comparisons in original investigations and in reviews:

"We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as 'dumped', for purposes of determining the existence and magnitude of dumping in the original investigation, and as 'non-dumped', for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. If, as a consequence of zeroing, the results of certain comparisons are disregarded only for purposes of assessing final liability for payment of anti-dumping duties in a periodic review, a mismatch is created between the product considered 'dumped' in the original investigation and the product for which anti-dumping duties are collected. This is not consonant with the need for consistent treatment of a product at the various stages of anti-dumping duty proceedings."²⁵

24. In *US – Washing Machines*, the Appellate Body upheld the Panel's finding that the use of zeroing under the W-T comparison methodology in respect of administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994:

"Article 9.3 refers to the 'margin of dumping' as established under Article 2. This 'margin of dumping' represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, if margins of dumping are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that should have been established under Article 2. We, therefore, agree with the Panel that, since the use of zeroing in the context of the W-T comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive.

We further note that, if zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative

²³ Appellate Body Report, *US – Zeroing (EC)*, paras. 132-133.

²⁴ Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 102-103 and 136.

²⁵ Appellate Body Report, *US – Continued Zeroing*, para. 285.

reviews. In this respect, we recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body stated that it did not consider that there was 'a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as 'dumped' for purposes of determining the existence and magnitude of dumping in the original investigation and as 'non-dumped' for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review."²⁶

1.8 Article VI:3

1.8.1 Relationship between paragraph 3 and the SCM Agreement

25. In *Brazil – Desiccated Coconut*, the Appellate Body observed:

"A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. ... the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together."²⁷

1.8.2 Permissible responses to subsidization

26. In *US – Offset Act (Byrd Amendment)*, the Appellate Body found that there are only four permissible responses to a countervailable subsidy, under the GATT and the SCM Agreement:

"In our view, Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* encompass *all* measures taken against subsidization. To be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must be either in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system."²⁸

1.8.3 Calculation of subsidies

27. The Appellate Body Report on *US – Countervailing Measures on Certain EC Products* set out the principle that the investigating authorities must determine the amount of subsidies before imposing countervailing duties:

"[U]nder Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation. In furtherance of this obligation, Article 10 of the *SCM Agreement* provides that Members must 'ensure' that duties levied for the purpose of offsetting a subsidy are imposed only 'in accordance with' the provisions of Article VI:3 of the GATT 1994 and the *SCM Agreement*. Moreover, Article 19.4 of the *SCM Agreement*, consistent with the language of Article VI:3 of the GATT 1994, requires that '[n]o countervailing duty shall be levied on any imported product in excess of the amount of the *subsidy found to exist*'. ... In sum, these provisions set out the obligation of Members to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority."²⁹

28. In *US – Softwood Lumber IV*, the US authorities conducting a countervailing duty investigation of softwood lumber from Canada had failed to conduct a "pass-through" analysis to examine whether subsidies provided to timber harvesters were passed through in their sales of logs to unrelated sawmills and lumber remanufacturers. The Appellate Body upheld the Panel's finding that Article VI:3, and Articles 10 and 32 of the SCM Agreement, require a pass-through analysis in respect of such log sales:

²⁶ Appellate Body Report, *US – Washing Machines*, paras. 5.188-5.189.

²⁷ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

²⁸ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 273.

²⁹ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.

"Because Article VI:3 permits *offsetting*, through countervailing duties, no more than the 'subsidy determined to have been granted ... directly or indirectly, on the manufacture [or] production ... of such *product*', it follows that Members must not impose duties to offset an amount of the input subsidy that has *not* passed through to the countervailed processed products. It is only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties.

... where countervailing duties are used to offset subsidies granted to producers of input products, while the duties are to be imposed on *processed* products, and where input producers and downstream processors operate at *arm's length*, the investigating authority must establish that the benefit conferred by a financial contribution directly on input producers is passed through, at least in part, to producers of the processed product subject to the investigation."³⁰

29. In *China – Broiler Products*, the United States argued that China's investigating authorities acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement when they included the non-subject merchandise in the calculation of subsidy. The Panel agreed, emphasizing investigating authorities' obligation to actively seek out the relevant information:

"Under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, MOFCOM has an obligation to ascertain the precise amount of subsidy attributed to the imported products under investigation. This requires more effort on the part of an investigating authority than simply accepting data and using it. We find contextual support for our understanding in Article 10 of the SCM Agreement which requires Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with the provisions of Article VI and the terms of the SCM Agreement. Furthermore, the Appellate Body has clarified in *US – Wheat Gluten*, that authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted.' Thus, MOFCOM needed to ensure that it had calculated the correct subsidy amount, rather than simply accept the information submitted by respondents, particularly as the respondents had alerted MOFCOM that they may have misunderstood the question and provided incorrect data."³¹

1.8.3.1 Identification of products for calculation of subsidies

30. In *US – Washing Machines*, the investigating authority determined that the subsidy was not tied to any particular product on the grounds that the government of Korea had no way to know the intended use of the subsidy, and the tax credits received by the recipient company were not claimed in connection with any particular product. Therefore, the investigating authority calculated the amount of subsidy by dividing the total amount of tax credits received by the total value of all products.³² Korea argued that the investigating authority's calculation violated Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement since it resulted in the imposition of a countervailing duty in excess of the subsidy found to exist. The Panel disagreed, noting that the subsidies at issue were not tied to a product and therefore rejected Korea's argument.³³ The Appellate Body disagreed with the Panel's finding, and found that "the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying a flawed test for ascertaining whether the tax credits bestowed under Articles 10(1)(3) and 26 of the RSTA were tied to particular products[.]"³⁴

³⁰ Appellate Body Report, *US – Softwood Lumber IV*, paras. 141 and 146.

³¹ Panel Report, *China – Broiler Products*, para. 7.261.

³² Appellate Body Report, *US – Washing Machines*, para. 5.250.

³³ Panel Report, *US – Washing Machines*, para. 7.307.

³⁴ Appellate Body Report, *US – Washing Machines*, para. 5.285.

1.9 Note 1 Ad Article VI:2-3

31. In *US – Shrimp (Thailand)/US – Customs Bond Directive*, Thailand and India each argued that an enhanced Customs bonding requirement applied by the US, to ensure collection of anti-dumping and countervailing duties imposed on shrimp, was "specific action against dumping" inconsistent with Article 18.1 of the Anti-Dumping Agreement. The Panel found that the measure was inconsistent with Article 18.1 because it was specific to dumping, it acted "against" dumping, and it had not been taken in accordance with the provisions of the GATT 1994 as interpreted by the Anti-Dumping Agreement. On appeal, the main issue was whether the application of the enhanced bond requirement to subject shrimp was in accordance with the GATT 1994 – specifically, whether it was consistent with Note 1 Ad Article VI:2-3 to apply this bonding requirement not just during an anti-dumping investigation, but afterward.

32. The Appellate Body found that the *Ad Note* authorizes taking security against the risk of non-payment of duties, and that the "final determination" referred to includes the duty assessment process in the US retrospective duty assessment system:

"The obligation that is intended to be secured under the *Ad Note* is the 'payment of anti-dumping or countervailing duty'. In other words, the *Ad Note* recognizes the right of WTO Members to take reasonable security against the risk of non-payment of an anti-dumping or countervailing duty that is lawfully established. This risk might exist during the period of an original investigation, and a provisional measure in the form of a security may be taken in accordance with Article 7 of the *Anti-Dumping Agreement* to protect against this risk. In a retrospective duty assessment system, this risk might also exist after the anti-dumping duty order has been imposed, arising from the difference between the amount collected at the time of import entry and the final liability assessed in an assessment review. The *Ad Note* also suggests that the reasonable security envisaged by it fulfils the same function as the securities taken 'in many other cases in customs administration'. As the United States points out, in most other cases in customs administration, security is required upon entry of merchandise when there is some uncertainty about the actual amount of liability that may be lawfully owed by the importer. Such a security is intended to provide a protection against the non-payment risk that might arise from the differences between the amount collected at the time of importation and the liability that may be finally determined. Accordingly, we are of the view that the term 'final determination' in the *Ad Note* includes the determination that is made to assess the final liability for payment of anti-dumping duties under Article 9.3.1 in a retrospective duty assessment system. The 'facts' are those that are necessary to be determined in order to assess properly the amount of final liability of the duty in accordance with the *Anti-Dumping Agreement*."³⁵

33. The Appellate Body then found that in the US retrospective system, after an anti-dumping order has been imposed, the "existence" of dumping is no longer "suspected", but that the *Ad Note* authorizes taking security until the magnitude of liability for anti-dumping duties is determined:

"[T]he term 'dumping' in the *Ad Note* covers both the *existence* of dumping and the *amount* or margin of dumping... [in the US retrospective system] dumping remains "suspected" within the meaning of the *Ad Note* as regards its *magnitude* for the import entries occurring after the anti-dumping duty order is imposed. ...

For these reasons, we find that the *Ad Note* authorizes the taking of a reasonable security after the imposition of an anti-dumping duty order, pending the determination of the final liability for payment of the anti-dumping duty.³⁶

34. The Appellate Body went on to find that the taking of security did not constitute an impermissible fourth category of response to dumping:

"Generally speaking, a security is accessory or ancillary to the principal obligation that it guarantees. A security that is taken to guarantee the obligation to pay anti-dumping

³⁵ Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 221.

³⁶ Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, paras. 226-227.

or countervailing duties is intrinsically linked to that obligation. Thus, taking security for the full and final payment of duties should be viewed as a component of the imposition and collection of anti-dumping or countervailing duties. Therefore, a reasonable security taken in accordance with the *Ad Note* for potential additional anti-dumping duty liability does not necessarily, in and of itself, constitute a fourth autonomous category of response to dumping.³⁷

35. Finally, the Appellate Body examined whether the application of the enhanced bond requirement was a "reasonable" security within the meaning of the *Ad Note*. It outlined the following general considerations:

"In our view, a two-step approach is necessary to assess the 'reasonableness' of a security such as the EBR. The first step involves a determination of the 'likelihood' of an increase in the margin of dumping of an exporter as a result of which there will be a *significant additional liability* to be secured. This determination should have a rational basis and be supported by sufficient evidence. The second step involves a determination of the 'likelihood of default' on the part of importers in respect of whom such additional liability is likely to arise. ... Taking security from an importer who may have no additional liability to pay or from an importer who presents no risk of default, as revealed by available and pertinent evidence, would obviously be unreasonable. Finally, security requirements that impose excessive additional costs on the importers may convert the security into an impermissible specific action against dumping."³⁸

36. In *EU – Biodiesel (Argentina)*, the European Union argued that "multiple currency practices" under *Ad Note* Articles VI:2 and VI:3 proves that the notion of dumping is not limited to the producers/exporters' voluntary pricing behaviour since it involves the governmental manipulations. The Panel disagreed, noting:

"We are not convinced by these arguments. The second *Ad Note* to Articles VI:2 and VI:3 is, on its own terms, limited to 'multiple currency practices', and its very existence indicates that it should be treated as an exceptional and specialized provision. We therefore see no reason to extrapolate from this provision that the concept of 'dumping' is generally intended to cover any distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel."³⁹

1.10 Article VI:4

37. In *EC – Tube or Pipe Fittings*, Brazil argued that an EC countervailing duty determination violated Article VI:4. An exporter had obtained a refund of indirect taxes borne in Brazil by inputs used to produce the exported product, but the EC denied an allowance for the refund because the exporter had not demonstrated that the refund was for internal taxes. The Panel examined the issue in relation to Article VI:4 and Article 2.4.2 of the Anti-Dumping Agreement and concluded that the facts in the record showed that the export prices used had already netted out the indirect taxes, and the record did not otherwise support Brazil's claim.⁴⁰

38. See also the Sections on items (g) and (h) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement, as well as Annex II of the SCM Agreement (Guidelines on the Consumption of Inputs in the Production Process).

1.11 Article VI:5

39. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel and Appellate Body considered a claim that concurrent application of anti-dumping duties calculated under a non-market economy (NME) methodology and of countervailing duties resulted in a double remedy for the subsidies concerned.

³⁷ Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 231.

³⁸ Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 258.

³⁹ Panel Report, *EU – Biodiesel (Argentina)*, para. 7.240.

⁴⁰ Panel Report, *EC – Tube or Pipe Fittings*, paras. 7.152-7.167.

"As the Panel explained, the dumping margin calculated under an NME methodology 'reflects not only price discrimination by the investigated producer between the domestic and export markets ('dumping')', but also 'economic distortions that affect the producer's costs of production', including specific subsidies to the investigated producer of the relevant product in respect of that product. An anti-dumping duty calculated based on an NME methodology may, therefore, 'remedy' or 'offset' a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price.⁴¹ Put differently, the subsidization is 'counted' within the overall dumping margin. When a countervailing duty is levied against the same imports, the same domestic subsidy is also 'counted' in the calculation of the rate of subsidization and, therefore, the resulting countervailing duty offsets the same subsidy a second time. Accordingly, the concurrent imposition of an anti-dumping duty calculated based on an NME methodology, and a countervailing duty may result in a subsidy being offset more than once, that is, in a double remedy. Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and an unsubsidized, constructed, or third country normal value is used in the anti-dumping investigation."⁴²

40. The Panel had interpreted the reference to "export subsidization" in Article VI:5 as support for its findings that SCM Articles 19.3 and 19.4 do not address the issue of double remedies. The Appellate Body reversed the Panel, holding that:

"Article VI:5 prohibits the concurrent application of anti-dumping and countervailing duties to compensate for the *same situation* of dumping or export subsidization. In our view, the term 'same situation' is central to an understanding of the rationale underpinning the prohibition contained in Article VI:5, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent.

We recall that, in principle, an export subsidy will result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product. That is, the subsidy will lead to increased price discrimination and a higher margin of dumping. In such circumstances, the situation of subsidization and the situation of dumping are the 'same situation', and the application of concurrent duties would amount to the application of 'double remedies' to compensate for, or offset, that situation. By comparison, domestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization. In such circumstances, the concurrent application of duties would not compensate for the same situation, because no part of the dumping margin would be attributable to the subsidization. Only the countervailing duty would offset such subsidization.

To the extent that these assumptions hold true, then the presence, in Article VI, of an express prohibition on the concurrent application of duties to counteract the 'same situation' of dumping or *export* subsidization, along with the absence of an express prohibition in connection with situations of *domestic* subsidization appears logical—at least when normal value is calculated on the basis of domestic sales prices. We note that Article VI:1(a) of the GATT 1994, like Article 2.1 of the *Anti-Dumping Agreement*, provides that the usual method for calculating normal value will be based on the comparable price for the like product in the exporter's domestic market. Thus, in anti-dumping investigations, normal value will typically be based on domestic sales prices and any domestic subsidy will have no impact on the calculation of the dumping margin. Nonetheless, Article VI:1(b), like Article 2.2 of the *Anti-Dumping Agreement*, sets out exceptional methods for the calculation of normal value, which are *not* based

⁴¹ (*footnote original*) Panel Report, para. 14.70. The potential for double remedies is even greater in the context of export subsidies, which benefit only exported goods and therefore presumably lower the export price. (*Ibid.*, footnote 972 to para. 14.72)

⁴² Description in Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 543.

on actual prices in the exporter's domestic market. The second *Ad Note* to Article VI:1, which provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations, also authorizes recourse to exceptional methods for the calculation of normal value in investigations of imports from NMEs. In case of domestic subsidization, it is only in these exceptional situations that there is any possibility that the concurrent application of anti-dumping and countervailing duties on the same product could lead to 'double remedies'.⁴³

1.12 Article VI:6

1.12.1 Article VI:6(a): material injury

41. In *US – 1916 Anti-Dumping Act*, the Panel agreed with Japan that the measure at issue (described in paragraph 1 above) violated Article VI:6(a), because this law contained no requirement similar to "material injury" within the meaning of Article VI. The Panel observed:

"We note that Article VI:1 of the GATT 1994 requires the existence of material injury or a threat thereof to an established industry or material retardation of the establishment of a domestic industry. The 1916 Act does not refer to material injury or threat of material injury or material retardation of the establishment of a domestic industry but to the *intent* of, *inter alia*, 'destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States'.
...

For these reasons, we find that the 1916 Act, to the extent that it provides for the identification of an 'intent' on the part of the defendant rather than for the actual injury requirements of Article VI, is not compatible with Article VI:1 of the GATT 1994. We note that Article VI:6(a) does not, in substance, contain additional obligations with respect to the existence of material injury, threat of injury or material retardation of the establishment of a domestic industry. However, from the terms of Article VI:6(a), it seems to us that the objective of that paragraph is to require a *determination* by the authorities of the importing Member that dumping is such as to cause material injury, threat thereof or material retardation. Having regard to the evidence before us, we do not consider that Japan has established a *prima facie* case of violation of Article VI:6(a) based on the fact that the 1916 Act would not provide for a *determination* by the US authorities.⁴⁴

42. In *Mexico – Olive Oil*, the EC challenged countervailing duties imposed on imports of olive oil. At the time of the application for these duties, Fortuny, the company submitting the application did not produce olive oil, and it was not a producer of olive oil during the period of investigation; Mexico imposed these duties based on material retardation of the establishment of a domestic industry. The EC claimed that the duties violated Article 16.1 of the SCM Agreement and consequently Article VI:6 of the GATT. The Panel opined:

"By its own terms, Article 16.1 provides a definition of the term 'domestic industry' 'for the purposes of this Agreement', i.e., the definition applies to the entire *SCM Agreement*. As such, this term must be given a consistent meaning throughout the *SCM Agreement* including for the purposes of the term 'domestic industry' as used in Article 11.4 ... The definition in Article 16.1, therefore, also informs the meaning of the term 'domestic industry' as used in Article VI:6(a) of the *GATT 1994*, and an enterprise or group of enterprises that qualifies as a 'domestic industry' within the meaning of Article 16.1 of the *SCM Agreement* will also constitute the domestic industry for the purposes of Article VI:6(a) of the *GATT 1994*."⁴⁵

43. The Panel found that "Article 16.1 does not require that an enterprise or group of enterprises seeking countervail remedies must actually produce output around the date of filing of an application or during the subsidy POI to be considered a 'producer' or 'producers' and therefore

⁴³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 567-569.

⁴⁴ Panel Report, *US – 1916 Anti-Dumping Act (Japan)*, paras. 6.252-6.253.

⁴⁵ Panel Report, *Mexico – Olive Oil*, para. 7.190.

part of or the entire 'domestic industry' within the meaning of that Article"⁴⁶, and that the Mexican authorities had reached a reasoned and adequate determination that Fortuny was in fact a producer of a domestic like product.⁴⁷ The Panel consequently rejected the EC claim under Article VI:6(a).⁴⁸

1.13 Relationship with other GATT provisions

1.13.1 Article I

44. The Panel in *Brazil – Desiccated Coconut* found that because Article VI of GATT 1994 did not constitute applicable law for the purposes of the dispute, the claims made under Article I (and II) of GATT 1994, which were derived from claims of inconsistency with Article VI of GATT 1994, could not succeed.⁴⁹ The Appellate Body in *Brazil – Desiccated Coconut* confirmed this finding.⁵⁰

1.13.2 Article II

45. The Panel in *Brazil – Desiccated Coconut* found that because Article VI of GATT 1994 did not constitute applicable law for the purposes of the dispute, the claims made under Article II (and I) of GATT 1994, which were derived from claims of inconsistency with Article VI of GATT 1994, could not succeed.⁵¹ The Appellate Body in *Brazil – Desiccated Coconut* confirmed this finding.⁵²

1.13.3 Article III

46. In *US – 1916 Act (EC)* and *US – 1916 (Japan)*, exercising judicial economy, the Panel found that the United States' 1916 Act was inconsistent with Article VI of the GATT 1994. However, the Panel did not also examine the EC claim that it was inconsistent with Article III of GATT 1994.⁵³

1.13.4 Article XI

47. In *US – 1916 Act (Japan)*, exercising judicial economy, the Panel did not examine a claim under Article XI of GATT 1994, after having found a violation of Article VI.⁵⁴

1.14 Relationship with other WTO Agreements

1.14.1 Anti-Dumping Agreement

48. As the complainant had not established a *prima facie* case of a violation of Articles 2.1 and 2.2 of the Anti-Dumping Agreement, the Panel in *US – 1916 Act (EC)* stated that "[t]he fact that we found a violation of Article VI:1 of the GATT 1994 is not as such sufficient to conclude that Articles 2.1 and 2.2 of the Anti-Dumping Agreement have been breached, in the absence of more specific arguments and evidence."⁵⁵

49. In *US – 1916 Act (Japan)*, the Panel was faced with the question whether it could make findings under Article VI, without, at the same time, making a finding under a provision of the Anti-Dumping Agreement or whether "the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only". The Panel referred to the findings of the Panel in *India – Quantitative Restrictions* and of the Appellate Body in *Brazil – Desiccated Coconut* and distinguished these two cases from the issue before it. The Panel then

⁴⁶ Panel Report, *Mexico – Olive Oil*, para. 7.205.

⁴⁷ Panel Report, *Mexico – Olive Oil*, para. 7.214.

⁴⁸ Panel Report, *Mexico – Olive Oil*, para. 7.216.

⁴⁹ Panel Report, *Brazil – Desiccated Coconut*, para. 281.

⁵⁰ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 21.

⁵¹ Panel Report, *Brazil – Desiccated Coconut*, para. 281.

⁵² Appellate Body Report, *Brazil – Desiccated Coconut*, p. 21.

⁵³ Panel Report, *US – 1916 Act (EC)*, paras. 6.76-6.78; Panel Report, *US – 1916 Act (Japan)*, paras. 6.75-6.76.

⁵⁴ Panel Report, *US – 1916 Act (Japan)*, para. 6.281.

⁵⁵ Panel Report, *US – 1916 Act (EC)*, para. 6.209.

concluded that it could "make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*":

"In the present case, the issue is whether the Panel can make findings in relation to Article VI only or whether the link between Article VI and the Anti-Dumping Agreement is such as to make impossible a finding under Article VI only.

... Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. 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, pursuant to Article 31 of the Vienna Convention, the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an "inseparable package of rights and obligations" and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning. However, this obligation does not prevent us from making findings in relation to Article VI only, as the panel did in its report on *India – Quantitative Restrictions*.

We conclude that we can make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*. However, the fact that Article VI and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines requires that we interpret each of the provisions invoked by Japan in its claims in conjunction with the other relevant provisions of this 'inseparable package', so as to give meaning to all of them."⁵⁶

50. Also, the Panel in *US – 1916 Act (EC)* explained its exercise of judicial economy with respect to Article 3 as follows:

"Since we found above that the 1916 Act violated Article VI:1 by not providing for an injury test compatible with the terms of that Article and since Article 3 simply addresses in more detail the requirement of 'material injury' contained in Article VI:1, we do not find it necessary to make specific findings under Article 3 and therefore exercise judicial economy, as we are entitled to do under GATT panel practice and WTO panel and Appellate Body practice."⁵⁷

1.14.2 SCM Agreement

51. In the *Brazil – Desiccated Coconut* dispute, the Panel was faced with the question "whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction."⁵⁸ In phrasing this issue, the Panel in *Brazil – Desiccated Coconut* made clear that the SCM Agreement did not supersede Article VI of GATT 1994 as the basis for the WTO discipline of countervailing measures. The Panel stated:

"It is evident that both Article VI of GATT 1994 and the SCM Agreement have force, effect, and purpose within the WTO Agreement. That GATT 1994 has not been superseded by other Multilateral Agreements on Trade in Goods ... is demonstrated by a general interpretive note to Annex 1A of the WTO Agreement. The fact that certain important provisions of Article VI of GATT 1994 are neither replicated nor elaborated in the SCM Agreement further demonstrates this point. Thus, the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994."⁵⁹

⁵⁶ Panel Report, *US – 1916 Act (Japan)*, paras. 6.92-6.94.

⁵⁷ Panel Report, *US – 1916 Act (EC)* para. 6.211. See also Panel Report, *US – 1916 Act (Japan)*, para. 6.254.

⁵⁸ Panel Report, *Brazil – Desiccated Coconut*, para. 227.

⁵⁹ Panel Report, *Brazil – Desiccated Coconut*, para. 227.

52. The Appellate Body in *Brazil – Desiccated Coconut* confirmed the statement by the Panel that the SCM Agreement did not supersede Article VI of GATT 1994⁶⁰, and stated:

"The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994."⁶¹

53. The Appellate Body in *Brazil – Desiccated Coconut*, in addressing the issue of the scope of Article VI of the GATT 1994, noted that "[t]he relationship between the *SCM Agreement* and Article VI of *GATT 1994* is set out in Articles 10 and 32.1 of the *SCM Agreement*."⁶² With respect to the Appellate Body's other findings on this issue, see the Section on the SCM Agreement.

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⁶⁰ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

⁶¹ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

⁶² Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.