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1 GENERAL

1.1 Relationship between GATT 1994 and other Annex 1A agreements

1.1.1 Text of the General Interpretative Note

General Interpretative Note to Annex 1A

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.

1.1.2 The concept of "conflict" and the cumulative application of the Annex 1 agreements

1. In *Brazil – Desiccated Coconut*, the Appellate Body noted that "[t]he general interpretative note to Annex 1A of the *WTO Agreement* indicates that the GATT 1994 and the other agreements are to be considered together".¹ The Appellate Body added that "[a] general interpretative note was included in Annex 1A in order to clarify the legal relationship of the GATT 1994 with the other agreements in Annex 1A".² The Appellate Body further clarified that:

"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. As the Panel has said:

... the question for consideration is not whether the SCM Agreement supersedes Article VI of GATT 1994. Rather, it is 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."³

¹ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 8.

² Appellate Body Report, *Brazil – Desiccated Coconut*, p. 12.

³ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

Finally, the Appellate Body confirmed that "[i]f there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A".⁴

2. In *Canada – Periodicals*, the Panel rejected Canada's argument that the measure at issue should be scrutinized under the GATS, to the exclusion of the GATT 1994. In the course of its analysis, the Panel observed that:

"The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two."⁵

3. In *EC – Bananas III*, given the existence of claims raised under GATT 1994, the Licensing Agreement and the TRIMs Agreement, the Panel was required to consider the interrelationship of these three agreements. After setting out the text of the General Interpretative Note to Annex 1A, the Panel set forth its understanding of the concept of a "conflict":

"As a preliminary issue, it is necessary to define the notion of 'conflict' laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits."⁶

However, we are of the view that the concept of 'conflict' as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.

Proceeding on this basis, we have to ascertain whether the provisions of the Licensing Agreement and the TRIMs Agreement, to the extent they are within the coverage of the terms of reference of this Panel, contain any conflicting obligations which are contrary to those stipulated by Articles I, III, X, or XIII of GATT 1994, in the sense that Members could not comply with the obligations resulting from both Agreements

⁴ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

⁵ Panel Report, *Canada – Periodicals*, para. 5.17.

⁶ (*footnote original*) For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.

at the same time or that WTO Members are authorized to act in a manner that would be inconsistent with the requirements of GATT rules. Wherever the answer to this question is affirmative, the obligation or authorization contained in the Licensing or TRIMs Agreement would, in accordance with the General Interpretative Note, prevail over the provisions of the relevant article of GATT 1994. Where the answer is negative, both provisions would apply equally.

Based on our detailed examination of the provisions of the Licensing Agreement, Article 2 of the TRIMs Agreement as well as GATT 1994, we find that no conflicting, i.e. mutually exclusive, obligations arise from the provisions of the three Agreements that the parties to the dispute have put before us. Indeed, we note that the first substantive provision of the Licensing Agreement, Article 1.2, requires Members to conform to GATT rules applicable to import licensing."⁷

4. In *EC – Hormones*, the complainants advanced claims under both the GATT 1994 and the SPS Agreement. The Panel stated that:

"The parties to the dispute present diverging views with respect to whether we should first address GATT or the SPS Agreement. However, neither of the parties claims that the relevant provisions of the SPS Agreement and GATT are in conflict. Therefore, we do not need, as a preliminary matter, to address the General Interpretative Note to the Multilateral Agreements on Trade in Goods which only applies '[i]n the event of conflict between a provision of [GATT] and a provision of another Agreement in Annex 1A [*inter alia*, the SPS Agreement]'.⁸

5. In *Argentina – Footwear (EC)*, the Panel addressed the relationship between Article XIX of the GATT 1994 and Article 2.1 of the Agreement on Safeguards. In the course of its analysis, the Panel stated that it saw no "outright conflict" between these provisions:

"In arriving at this conclusion, we wish to emphasise that the issue before this Panel is not really whether the criterion of unforeseen developments of Article XIX is in outright conflict⁹ - in the sense of being mutually exclusive or mutually inconsistent, quod non, with Article 2.1 or any other provision of the Safeguards Agreement. In this respect, we recall the statement of the *Indonesia – Automobiles* panel that in international law there is a presumption against conflict.¹⁰ Nevertheless, if we were to assume that a conflict exists, the General Interpretative Note to Annex 1A to the Agreement Establishing the WTO would resolve the issue in the sense that the provisions of the Safeguards Agreement would prevail over Article XIX of GATT to the extent of that conflict.¹¹¹²

⁷ Panel Reports, *EC – Bananas III*, paras. 7.159-7.162.

⁸ Panel Reports, *EC – Hormones (United States)*, para. 8.32, and *EC – Hormones (Canada)*, para. 8.35.

⁹ (*footnote original*) The most recent Appellate Body report to address the concept of "conflict" is the *Guatemala – Cement* case. However, in the *Guatemala – Cement* case the Appellate Body dealt with the question of the relationship between the special or additional dispute settlement provisions of the Anti-dumping Agreement as contained in Annex 1A to the *WTO Agreement* and the DSU as incorporated in Annex 2 to the *WTO Agreement*, whereas the present dispute concerns the relationship between the substantive provisions of an Annex 1A agreement and the GATT 1994.

¹⁰ (*footnote original*) The Panel on *Indonesia – Certain Measures Affecting the Automobiles Industry* (WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R), adopted on 23 July 1998, para. 14.28: "... In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject-matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. ... The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing evidence to the contrary."

¹¹ (*footnote original*) General Interpretative Note: "In the event of *conflict* between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the WTO ..., the provisions of the other agreement shall *prevail* to the extent of the conflict."

¹² Panel Report, *Argentina – Footwear (EC)*, para. 8.68.

6. In *Argentina – Footwear (EC)*, the Appellate Body reached a different conclusion from the Panel on the relationship between Article XIX of the GATT 1994 and Article 2.1 of the Safeguards Agreement, but agreed that there was no "conflict":

"[I]t is clear from Articles 1 and 11.1(a) of the *Agreement on Safeguards* that the Uruguay Round negotiators did not intend that the *Agreement on Safeguards* would entirely replace Article XIX. Instead, the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*, except to the extent of a conflict between specific provisions.¹³ We do not see this as an issue involving a conflict between specific provisions of two Multilateral Agreements on Trade in Goods. Thus, we are obliged to apply the provisions of Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 *cumulatively*, in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures."

7. In *India – Autos*, the Panel decided to first examine the claims under the GATT 1994, rather than beginning with those under the TRIMs Agreement. In the context of discussing this question of the order of analysis, the Panel noted that:

"Determining order of analysis is different to the question of resolution of conflict between provisions. The latter entails the use of conflict resolution rules or interpretative techniques. The Panel notes that both GATT 1994 and the TRIMs Agreement are part of Annex 1A of the WTO Agreement. A general interpretative note to Annex 1A provides that '[i]n the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A (...) the provision of the other agreement shall prevail to the extent of the conflict.' No conflict has been alleged to exist in this instance, in the absence of any issue relating to any TRIMs which would have been notified under the TRIMs Agreement."¹⁴

8. In *US – Softwood Lumber IV*, Canada claimed that the United States investigating authority failed to conduct a proper analysis of whether subsidies "passed through" to the subject goods under investigation. In that context, the Appellate Body stated that the requirements of the provisions of the SCM Agreement and the GATT 1994 apply on a cumulative basis:

"At the outset, we observe that provisions in both the GATT 1994 and the *SCM Agreement* are relevant to this dispute. We note the Appellate Body's earlier ruling that a provision of an agreement included in Annex 1A of the *WTO Agreement* (including the *SCM Agreement*), and a provision of the GATT 1994, that have identical coverage, both apply, but that the provision of the agreement that 'deals specifically, and in detail' with a question should be examined first.¹⁵ The Appellate Body has also ruled that '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'¹⁶, and that '[i]f there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994 ... the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A.'¹⁷ No conflict between Articles 10 and 32.1 of the *SCM Agreement* on the one hand, and Article VI:3 of the GATT 1994 on the other hand, is alleged in this appeal, nor do we see any such conflict. Therefore, the requirements of these provisions of the *SCM Agreement* and the GATT 1994 apply on a cumulative basis."¹⁸

¹³ (footnote original) As set out in the General Interpretative Note to Annex 1A of the *WTO Agreement*.

¹⁴ Panel Report, *India – Autos*, footnote 380.

¹⁵ (footnote original) Appellate Body Report, *EC – Bananas III*, para. 204.

¹⁶ (footnote original) Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, 167, at 181. (original italics; underling added)

¹⁷ (footnote original) *Ibid*.

¹⁸ Appellate Body Report, *US – Softwood Lumber IV*, para. 134.

9. In *US – Upland Cotton*, the Panel was presented with claims under the SCM Agreement, the Agreement on Agriculture, and the GATT 1994. In the context of discussing the order of analysis, the Panel stated that:

"An appropriate order of analysis of the claims requires careful consideration due to the interlocking nature of the *SCM Agreement* and the *Agreement on Agriculture*, the relationship between the *SCM Agreement* and Article XVI of the *GATT 1994*, and the relationship between the *SCM Agreement* and the *Agreement on Agriculture*, and Article III:4 of the *GATT 1994*. The respective texts of the covered agreements expressly provide for a general order of precedence among them. The general interpretative note to Annex 1A of the *WTO Agreement* provides that:

'In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of the other agreement shall prevail to the extent of the conflict.'

This note only applies '[i]n the event of conflict'. It does not exclude the *GATT 1994* from the scope of application of the agreements set out in Annex 1A, including the *SCM Agreement* and the *Agreement on Agriculture*, in any other circumstances."¹⁹

10. In *EC – Export Subsidies on Sugar*, the Appellate Body rejected the European Communities' argument that it could depart from its obligations under the Agreement on Agriculture by virtue of a commitment contained in its goods schedule to the GATT 1994. The Appellate Body referred to the General Interpretative Note and the hierarchy between these two agreements:

"In any event, we note that Article 21 of the *Agreement on Agriculture* provides that: '[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.' In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A to the WTO Agreement* states that, '[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict.' The *Agreement on Agriculture* is contained in Annex 1A to the *WTO Agreement*.

As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1. We, therefore, do not agree with the European Communities that 'there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*.'²⁰

11. In *US – Shrimp (Thailand) / US – Customs Bond Directive*, the Panel found that the challenged measure was inconsistent with Article 18.1 of the Anti-Dumping Agreement. The Panel referred to the General Interpretative Note and related jurisprudence pertaining to *lex specialis* in the context of declining to rule on certain additional claims raised under the GATT 1994:

"Even if the Panel would have found that the application of the EBR is not inconsistent with Article 18.1 of the *Anti-Dumping Agreement*, the Panel is of the view that it would not be appropriate to proceed and rule on India's additional *GATT 1994* claims. We note that the text of Article 18.1 of the *Anti-Dumping Agreement* provides that '[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of the *GATT 1994*, as interpreted by this Agreement.' We recall that this reference to the provisions of *GATT 1994* has been interpreted by the

¹⁹ Panel Report, *US – Upland Cotton*, para. 7.255.

²⁰ Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 221-222.

Appellate Body as referring to Article VI of the *GATT 1994*. We further recall that the Ad Note is an integral part of Article VI of the *GATT 1994*. We therefore interpret these provisions to mean that the *WTO Agreements* allow for the imposition of measures which are considered to be specific action against dumping provided they are in accordance with Article VI of the *GATT 1994*, including its Ad Note. Accordingly, we are unable to accept that a measure which constitutes specific action against dumping in accordance with the provisions of the Ad Note, can nevertheless be found inconsistent with other provisions of the *GATT 1994*. For example, if we were to find that the Amended CBD violates the MFN provision of Article I of the *GATT 1994*, such a finding would, as a consequence, render *inutile* the provision in Article 18.1 of the *Anti-Dumping Agreement*, and by reference, Article VI of the *GATT 1994* and the Ad Note.

We find additional support for our conclusion in the *General Interpretative Note to Annex 1A* of the *WTO Agreement*, which provides that in the event of conflict between a provision of the *GATT 1994* and another Agreement of Annex 1A, the provision of the other Agreement prevails. We have found that the Amended CBD constitutes specific action against dumping or subsidisation in accordance with Article VI of the *GATT 1994*, as interpreted by the *Anti-Dumping Agreement*, and thus, is consistent with Articles 1 and 18.1 of the *Anti-Dumping Agreement*. Therefore, our findings under these provisions of the *Anti-Dumping Agreement* must prevail over any potential finding of violation under Articles X:3(a), XI:1 and XIII, I:1, II:1(a) and (b) of the *GATT 1994*.

Finally, we consider the Panel's discussion in *US – 1916 Act (Japan)* further relevant to this issue. After finding a violation of Article VI of the *GATT 1994*, the Panel considered whether it must also analyse a claim under Article III:4 of the *GATT 1994*. It held that, in the case before it, Article VI addressed the 'basic feature' of the measure at issue more directly than Article III:4. In doing so, the Panel referred to the international law principle *lex specialis derogat legi generali* in support of its reasoning.²¹ The Panel did so by virtue of the Appellate Body's finding in *EC – Bananas III* that:

'Although Article X:3(a) of the *GATT 1994* and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the *GATT 1994*.'²²

We agree that the principle of *lex specialis* should apply in such circumstances. Since Article VI of the *GATT 1994*, including the Ad Note, 'deals specifically, and in detail', with the issue of security for definitive anti-dumping and countervailing duties, those provisions address the 'basic feature' of the measure at issue more directly than the other *GATT 1994* provisions cited by India. Article VI and the Ad Note therefore constitute *lex specialis* that should prevail over the more general *GATT 1994* provisions cited by India."²³

12. In *US – Poultry (China)*, the Panel was confronted with the issue of the relationship between Article XX(b) of the *GATT 1994* and the SPS Agreement. In the course of its analysis, the Panel stated that "[i]s not uncommon for the specific agreements on trade in goods to be elaborations on provisions of the *GATT 1994*". The Panel found support for its understanding of such a relationship in the way WTO Members have elaborated other provisions of the *GATT 1994* through specific covered agreements. By way of example, the Panel stated that the Customs Valuation Agreement elaborates the provisions of Article VII of the *GATT 1994*, the Anti-Dumping Agreement and SCM Agreement provide that they explain the implementation and application of Article VI of the *GATT 1994*, and the Agreement on Safeguards provides that it clarifies and reinforces the disciplines of *GATT 1994*, specifically those of Article XIX. In that context, the Panel noted that:

²¹ (footnote original) Panel Report, *US – 1916 Act (Japan)*, para. 6.269.

²² (footnote original) Appellate Body Report, *EC – Bananas III*, para. 204.

²³ Panel Reports, *US – Shrimp (Thailand)*, paras. 7.159-7.162, and *US – Customs Bond Directive*, paras. 7.168-7.171.

"We acknowledge the existence of a general interpretative note in Annex 1A of the *WTO Agreement* which, in the words of the Appellate Body in *Brazil – Desiccated Coconut*, was included 'in order to clarify the legal relationship of the GATT 1994 with the other agreements in Annex 1A (Appellate Body Report, *Brazil – Desiccated Coconut*, p. 12). It provides that in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the latter shall prevail to the extent of the conflict. We are not referring to this note since we do not understand this situation as a conflict."²⁴

13. In *Thailand – Cigarettes (Philippines)*, the Panel was not persuaded by Thailand's argument that Article 11.1 of the Customs Valuation Agreement is *lex specialis* to Article X:3(b) of the GATT 1994. In the course of its analysis, the Panel noted that:

"Finally, we recall that the general interpretative note to Annex 1A of the WTO Agreement provides that "[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in [the WTO Agreement], the provision of the other agreement shall prevail to the extent of the conflict". In our understanding, however, Thailand is *not* arguing that there is a conflict between Article X:3(b) of the GATT 1994 and Article 11.1 of the Customs Valuation Agreement. In any event, our reading above of both provisions in their specific context does not indicate a conflict between these two provisions either. Accordingly, we do not consider the principles under the general interpretative note to Annex 1A as applicable to the relationship between Article X:3(b) of the GATT 1994 and Article 11.1 of the Customs Valuation Agreement."²⁵

14. The Panel in *US – Tuna II (Mexico)* referred to the General Interpretative Note in the context of discussing its order of analysis to claims presented under the TBT Agreement and the GATT 1994. The Panel concluded that "taking into account the specificity of the TBT Agreement and its precedence over GATT 1994 in the event of a conflict between provisions of the two agreements, we find it appropriate to consider first Mexico's claims under the TBT Agreement".²⁶

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²⁴ Panel Report, *US – Poultry (China)*, para. 7.477 and fn 724.

²⁵ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.1051.

²⁶ Panel Report, *US – Tuna II (Mexico)*, para. 7.46.