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UNITED STATES – ANTI-DUMPING ACT OF 1916

Complaint by Japan

Report of the Panel

Addendum

The following Sections should be inserted in the Panel Report (WT/DS162/R) in accordance with the statements contained in pages 6 and 7 thereof:

- Section III CLAIMS AND MAIN ARGUMENTS

- Section IV THIRD PARTY SUBMISSIONS

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III. CLAIMS AND MAIN ARGUMENTS

A. REQUEST BY THE EUROPEAN COMMUNITIES FOR ENHANCED THIRD PARTY RIGHTS

3.1 The **European Communities**, which is a third party in the present case and has requested the establishment of another panel in respect of the 1916 Act,[23] requests to be granted enhanced third party rights.[24] In particular, the European Communities requests to be present throughout both substantive meetings of the Panel and be able to make a submission on each occasion.

3.2 In response, **Japan** states that it accepts the European Communities' request that it be accorded enhanced third party rights. On the same basis, Japan requests that it in turn receive all the necessary documents, including submissions, and written versions of statements by the parties in the case initiated by the European Communities in respect of the 1916 Act (WT/DS136).

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

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

3.5 The United States argues, moreover, that, as individual complaining parties, Japan and the European Communities have more than adequate opportunity to present their views and respond to the arguments of the United States. In *EC Measures Concerning Meat and Meat Products (Hormones)*[25], the panel allowed expanded third party rights because the panel had stated that it intended to conduct concurrent deliberations in those cases meaning that its deliberations were going to be based upon the arguments and presentations in both cases, including presentations by experts made jointly to both panels. The panel proceeded with this approach despite the fact that the United States had expressed its unequivocal concern with the panel's "concurrent deliberations" approach. Thus, because the panel was going to consider arguments made in one case in the course of deciding another case, the United States requested and was allowed enhanced third party rights. Otherwise, without an opportunity for the United States to respond, the panel would have been considering what would have been, in effect, *ex parte* submissions.

3.6 The United States notes that, in the present case, the Panel has not stated that it intends to conduct concurrent deliberations, and for the reasons expressed in the *European Communities - Hormones* proceeding, the United States would not support concurrent deliberations. Accordingly, the European Communities will not be denied an opportunity to respond to arguments of the

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

[24] As stated in the European Communities' letter to the Chairman of the Panel, dated 25 August 1999.

[25] Panel Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1999, WT/DS26/R/USA, WT/DS48/R/CAN (hereinafter "Panel Report on *European Communities – Hormones*").

United States that will be considered by the Panel in making its decision in the case initiated by the European Communities. The same holds true for Japan in its case. The apparent purpose for the request for expanded third party rights is to provide the third parties with an opportunity to make an additional submission in their own panel process. There is no provision in the DSU for such additional submissions.

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

B. OVERVIEW OF THE CLAIMS OF THE PARTIES AND FINDINGS REQUESTED

3.8 **Japan** contests the maintenance and application of the 1916 Act by the United States. Specifically, the maintenance and enforcement of the 1916 Act violates the following US obligations under the WTO agreements:

(a) Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement by allowing the application of penalties other than anti-dumping duties to remedy dumping;

(b) Article VI of the GATT 1994 and Article 1 of the Anti-Dumping Agreement by applying an anti-dumping measure without conducting the requisite investigation and establishing the requisite facts;

(c) Article VI of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, *inter alia*, by specifying a comparison for normal value that is not compatible with the comparison set forth in those articles;

(d) Article VI of the GATT 1994 and Article 3 of the Anti-Dumping Agreement by providing for application of an anti-dumping measure without establishing material injury or threat thereof;

(e) Article VI of the GATT 1994 and Articles 4 and 5 of the Anti-Dumping Agreement, *inter alia*, by not limiting the parties that may pursue an anti-dumping claim;

(f) Article VI of the GATT 1994 and Article 9 of the Anti-Dumping Agreement by providing for the imposition of impermissible penalties outside the scope and directives of Article 9;

(g) Article VI of the GATT 1994 and Article 11 of the Anti-Dumping Agreement by not limiting the duration of an anti-dumping measure and not providing for periodic reviews of the need for its continued imposition;

(h) Articles 1 and 18.1 of the Anti-Dumping Agreement by failing to comply with Article VI of the GATT 1994 and Articles 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement;

(i) Article III:4 of the GATT 1994 by providing less favourable treatment to imports via the 1916 Act versus domestic goods, which are subject to the far less restrictive, nearly moribund, Robinson-Patman Act;

(j) Article XI of the GATT 1994 by providing for, via the 1916 Act, the improper application of an impermissible prohibition or restriction; and

(k) Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement by failing to conform its laws to WTO provisions.

3.9 For these reasons, Japan requests that the Panel find that the 1916 Act is neither consistent with nor justified by Articles III:4, VI and XI of the GATT 1994, the provisions of the Anti-Dumping Agreement and the WTO Agreement[26], and to recommend that the United States bring 1916 Act into conformity with these provisions. Japan further requests that the Panel recommend that the United States repeal the 1916 Act in order to bring the Act into conformity with US obligations under these provisions.

3.10 The **United States** requests that the Panel rule that Japan has failed to show that Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement mandate that anti-dumping duties are the exclusive remedy for dumping.[27] If the Panel rejects this claim, Japan's entire challenge under Article VI and the various provisions of the Anti-Dumping Agreement would fail and the Panel would not need to reach the question of whether Article VI and the Anti-Dumping Agreement govern the 1916 Act.

3.11 According to the United States, if the Panel reaches the question of whether the 1916 Act is subject to Article VI:2 and the Anti-Dumping Agreement, it should conclude that Japan, as the complaining party, has failed to show that the 1916 Act is not susceptible to an interpretation that would permit action consistent with US WTO obligations. In contrast, the United States has demonstrated that the 1916 Act is clearly susceptible to an interpretation that would parallel domestic competition law and, in fact, has been so interpreted to date. As a competition law, the 1916 Act is not subject to Article VI:2 of the GATT 1994 or the Anti-Dumping Agreement.

3.12 The United States also requests that the Panel rule that the 1916 Act is consistent with Article III:4 because interpreting the 1916 Act to parallel domestic competition law does not raise any national treatment concerns as parallel treatment obviously does not constitute less favourable treatment. The United States reiterates that the Panel's decision in this regard should be informed by the fact that the 1916 Act establishes a standard for relief which has *never* been met in the case of importers and imported goods.

3.13 The United States requests, furthermore, that the Panel rule that the 1916 Act is consistent with Article XI of the GATT 1994 because, in light of the fact that the only relief available under the 1916 Act is monetary in nature, the Act does not fall within the purview of the prohibition on quantitative restrictions as set out in Article XI of the GATT 1994.

3.14 The United States asserts, finally, that because the 1916 Act is susceptible to an interpretation that is fully consistent with all US WTO obligations and, in fact, has been so interpreted to date, there is no requirement under Article XVI:4 of the WTO Agreement that the United States take action to change the law.

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[26] Japan notes that, even if the 1916 Act were not an anti-dumping law (which it is), the United States still would be in violation of Articles III:4 and XI of the GATT 1994 and Article XVI:4 of the WTO Agreement.

[27] The United States recalls that Japan, as the complainant in the present dispute, has the burden of establishing a violation of a provision of the WTO Agreement. The United States refers to the Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, para. 14 (hereinafter Appellate Body Report on "*United States – Shirts and Blouses*").

C. TRADE EFFECTS OF THE 1916 ACT AND THEIR RELEVANCE TO THE PRESENT CASE

3.15 **Japan** asserts that the 1916 Act has a substantial negative impact on Japan-US trade. One is the "chilling effect" on exports from Japan. Even if the *Wheeling-Pittsburgh* case does not result in criminal or civil penalties, the potential threat and liability under the 1916 Act discourages defendants (in the present case Japanese trading firms) from importing products once litigation begins. Litigation of this kind is protracted and costly. Also, apart from fines and attorneys' costs, the potential of treble damage[28] or criminal sanctions is very threatening. The risk an importer bears if it continues to import is tremendous and prohibitive. Thus, the greatest impact on trade of the 1916 Act, and litigation under it, is not necessarily the risk of a negative judicial judgement, but the significant deterrent of *potential* legal action and the possibility of very substantial civil and/or criminal liability.

3.16 Japan argues that, to completely avoid the potential for paying treble damages, defendants are likely to cease any activity that possibly could be construed as violating the law. Because the amount of treble damages a defendant faces in a 1916 Act claim depends on the amount of sales it makes, an importer named in litigation under the 1916 Act that continues to import goods increases its potential liability. Given the punitive nature of the remedy in the 1916 Act, Japanese companies naturally have decreased shipments of steel into the United States.[29]

3.17 Japan contends that the chilling effect of the 1916 Act is magnified by the exceedingly lax pleading and proof requirements of the Act, which prevent the Japanese steel companies from assessing if they are engaged in an activity prohibited under the law. Rather than estimate the threshold price that triggers liability (and face treble damages if they are incorrect), the companies chose to significantly decrease or stop their imports.

3.18 Japan recalls, second, that the three defendant Japanese trading firms[30] have found the litigation process to be extraordinarily expensive, burdensome and otherwise disruptive to their businesses. Indeed, the effect of this burden is so substantial that six non-Japanese defendants in this litigation conceded to out-of-court settlements with Wheeling-Pittsburgh. Although the precise terms of the settlements are not publicly available, it is known that the defendants settled with the plaintiff, Wheeling-Pittsburgh, by agreeing, among other things, to:

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[28] Japan notes that the theory behind providing for treble damages in any law is to make the penalty for violating the law so severe that people will refrain from any activity that *potentially* could violate the law. As the US Supreme Court has acknowledged, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future unlawful conduct, not to ameliorate the liability of wrongdoers." Japan refers to *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 639 (1981).

[29] Japan states that, according to data provided by the companies, the total volume (in thousand MT) of exports from Japan to the United States of the three Japanese defendants declined as follows:

April to September 1998:	149/month (average)
October 1998:	154
November 1998 (petition filed):	39
December 1998:	0.4
January 1999:	0.7
February 1999:	0.0

[30] Japan notes that, on 20 November 1998, Wheeling-Pittsburgh Steel Corporation, a US company, filed a complaint under the 1916 Act against nine companies, including three Japanese trading firms, Mitsui & Co., Marubeni America Corp., and Itochu International Inc. Japan is a major steel-producing country, and, in 1998, the US steel market was the largest export market for Japanese steel. The Japan Iron and Steel Exporters Association and other exporters' associations requested the Japanese government to take appropriate action. They are concerned not only with the Act's inconsistency with relevant WTO provisions, but also about the negative impact on trade in steel products, including "hot-rolled steel", and the possibility that the 1916 Act will remain a substantial barrier to Japan's steel exports to the United States.

- buy a certain amount of steel from the plaintiff during 1999; and
- restrict their imports of foreign steel.[31]

3.19 In the view of Japan, these settlements demonstrate the third type of negative impact of the 1916 Act. The Act is being used by US companies to extort settlements from foreign companies. The settlements disrupt free trade and further undermine the world trading order. If left unchecked, the practice will compromise the WTO regime.

3.20 Japan argues, in addition, that litigation under the 1916 Act is likely to multiply. This is because individual US companies can initiate cases (without the majority support of the remaining industry or evidence of dumping and material injury, as required under the WTO and the other US anti-dumping law) and because US companies have seen how easily Wheeling-Pittsburgh and Geneva Steel were able to burden and extract settlements from their foreign competitors.

3.21 Japan considers that, for these reasons, the lack of a determination of liability by the courts at the present moment is beside the point. Injury has accrued and is continuing and the mere existence of the 1916 Act does great damage to Japan's legitimate trading interests.

3.22 The **United States** considers that Japan's allegations that the 1916 Act is having a "negative impact on Japanese companies" are unsubstantiated. These allegations should be disregarded by the Panel as they are without proof and, in any event, are not relevant to the legal questions before the Panel. First, Japan has presented no evidence that the 1916 Act is the actual cause of the decrease in steel exports from Japan to the United States. In fact, a dumping petition involving Japanese steel was filed with the Department of Commerce in September 1998 with the Commerce Department making a preliminary finding of critical circumstances in November 1998. This meant that if the injury finding were confirmed by the International Trade Commission (which it was), the imports would be subject to anti-dumping duties from November 1998. Thus, the decline in steel imports is more likely attributable to this injury finding than the 1916 Act case. Furthermore, there are many factors that go into the business decision of how much to export to another country. Japan simply has not shown that the 1916 Act was the factor that caused the Japanese trading firms to decrease their imports into the United States.

3.23 The United States notes, second, that even if it is assumed for the sake of argument that the allegations are credible, they are not material to the Panel's determination in the present case. Even if the 1916 Act were affecting trade between Japan and the United States, that is not relevant to whether the 1916 Act is inconsistent with the WTO obligations raised by Japan in its panel request. Whether or not there are any trade effects would only be relevant in the event that Japan was in the position of seeking compensation for failure of the United States to implement an adverse panel finding. Outside of that context, the trade effects are not relevant in the present case.

D. THE DISTINCTION BETWEEN DISCRETIONARY AND MANDATORY LEGISLATION AND ITS RELEVANCE TO THE PRESENT CASE

3.24 The **United States** argues that if the complaining party is challenging a statute, *as such*, as Japan is doing in the present case, the first question for the Panel is whether the statute is mandatory or discretionary. It is well established under GATT 1947 and WTO jurisprudence that only legislation which mandates WTO-inconsistent action can itself be WTO-inconsistent. In this regard, the panel in *Canada - Measures Affecting the Export of Civilian Aircraft* recently stated:

> "We recall the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation. For example, in *United States* -

[31] Japan refers to Wheeling-Pittsburgh Steel Corporation press releases.

> *Tobacco*, the panel "recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority [...] to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge"[citation omitted]."[32]

3.25 According to the United States, this settled distinction between mandatory and discretionary legislation was the basis for the panel's decision in *EEC - Regulation on Imports of Parts and Components*.[33] In that case, the panel found that "the mere existence" of the anti-circumvention provision of the European Communities' anti-dumping legislation was not inconsistent with the European Communities' GATT 1947 obligations, even though the European Communities had taken GATT-inconsistent measures under that provision.[34] The panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."[35]

3.26 The United States notes that, in applying the discretionary-mandatory distinction, panels have even found that legislation explicitly directing action inconsistent with GATT 1947 principles does not mandate inconsistent action so long as it provides the possibility for authorities to avoid such action. For example, in *United States - Taxes on Petroleum and Certain Imported Substances*.[36] The Superfund Act required importers to supply sufficient information regarding the chemical inputs of taxable substances to enable the tax authorities to determine the amount of tax to be imposed; otherwise, a penalty tax would be imposed in the amount of five percent *ad valorem* or a different rate to be prescribed in regulations by the Secretary of the Treasury by a different methodology. The regulations in question had not yet been issued. Nevertheless, the panel concluded:

> "[W]hether [the regulations] will eliminate the need to impose the penalty tax and whether they will establish complete equivalence between domestic and imported products, as required by Article III:2, first sentence, remain open questions. From the perspective of the overall objectives of the General Agreement it is regrettable that the Superfund Act explicitly directs the United States tax authorities to impose a tax inconsistent with the national treatment principle but, since the Superfund Act also gives them the possibility to avoid the need to impose that tax by issuing regulations, the existence of the penalty rate provisions as such does not constitute a violation of the United States obligations under the General Agreement."[37]

3.27 The United States points out that, similarly, in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*[38] the panel examined Thailand's Tobacco Act, which established a higher ceiling tax rate for imported cigarettes than for domestic cigarettes. While the Act explicitly gave Thai officials the authority to implement discriminatory tax rates, this did not render the statute

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

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

[34] Ibid., paras. 5.9, 5.21, 5.25-5.26.

[35] Ibid., para. 5.25.

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

[37] Ibid., para. 5.2.9.

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

mandatory. The panel concluded that "the possibility that the Tobacco Act might be applied contrary to Article III:2 was, by itself, not sufficient to make it inconsistent with the General Agreement."[39]

3.28 The United States recalls, finally, that in *United States – Tobacco*, a case of which the facts more closely resemble those in the present dispute, the panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. The panel examined the question of whether a statute requiring that "comparable" inspection fees be assessed for imported and domestic tobacco mandated that these fees had to be identical for each, without respect to differences in inspection costs. If so, the statute would be inconsistent with Article VIII:1(a) of the GATT 1947, which prohibits the imposition of fees in excess of services rendered.[40] The United States argued that the term "comparable" need not be interpreted to mean "identical", and that the law did not preclude a fee structure commensurate with the cost of services rendered.[41] The panel agreed with the United States:

> "[T]he Panel noted that there was no clear interpretation on the meaning of the term "comparable" as used in the 1993 legislative amendment. It appeared to the Panel that the term "comparable", including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which could potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of [the U.S. law]."[42]

3.29 The Panel therefore found that the complaining party had "not demonstrated that [the US law] *could not* be applied in a manner ensuring that fees charged for inspecting tobacco were not in excess of the cost of services rendered."[43]

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

> "[a]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict."[44]

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

[40] Ibid., para. 118.

[41] Ibid., para. 122.

[42] Ibid., para. 123.

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

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

3.31 The United States further argues that, under US law, it is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[45] While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions […] [should] be construed, where possible, to be consistent with international obligations of the United States."[46] Thus, GATT 1947 jurisprudence distinguishing between mandatory and discretionary legislation does no more than apply the general principle that there is a presumption against conflicts between national and international law. If a law is susceptible to an interpretation that is WTO-consistent, there is a presumption that domestic authorities will interpret that law so as to avoid a conflict with WTO obligations. This presumption may be seen as underlying the *United States - Tobacco* panel's finding that a domestic law susceptible of multiple interpretations would not violate a party's international obligations so long as one possible interpretation permits action consistent with those obligations.[47]

3.32 In the view of the United States, this principle applies with equal force in the instant case. In the present dispute, Japan is not challenging a specific application of the 1916 Act. Rather, it is challenging the mere existence of the 1916 Act. Thus, for that challenge to succeed, Japan must demonstrate not only that the 1916 Act authorizes WTO-inconsistent action, but that it mandates such action. In other words, it must show that this legislation is *not* susceptible to an interpretation that would permit the US government to comply with its WTO obligations.

3.33 The United States asserts that Japan has failed to meet that burden. The 1916 Act is clearly susceptible to an interpretation that is WTO-consistent and, in fact, all final judicial decisions that have considered the 1916 Act have interpreted it as such.[48] Indeed, US courts have repeatedly admonished that the 1916 Act "should be interpreted whenever possible to *parallel the unfair competition law applicable to domestic commerce*."[49] Interpreting the 1916 Act to parallel domestic unfair competition law is clearly consistent with WTO obligations - particularly, Article VI of the GATT 1994 and the Anti-Dumping Agreement - because the WTO does not govern competition laws.[50] In addition, a law regarding imports that "parallels" a domestic law would not raise any national treatment concerns under Article III of the GATT 1994.

3.34 The United States points out that the elements of the 1916 Act and the relevant case law, which demonstrate the anti-trust nature and purpose of the Act are discussed more fully below. The point here is that the statute is susceptible to an interpretation that is consistent with WTO obligations. Again, because Japan has challenged the 1916 Act *as such* and not any specific application of the Act, Japan must demonstrate that there is no interpretation of the 1916 Act that would be WTO-consistent. This has not been the case. Not only have the US courts interpreted the 1916 Act consistently as an anti-trust statute whose elements are not the same as the "dumping" and "injury" elements of the Anti-Dumping Agreement, but also any susceptibility that particular elements of a 1916 Act claim may have to a range of possible meanings is ultimately of no consequence because the 1916 Act remains different from an anti-dumping statute under the entire range of conceivable interpretations.

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

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

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

[48] In response to a question of Japan, the United States notes that in making this argument it is not implicitly admitting that the 1916 Act is capable of being interpreted in a manner that is WTO-inconsistent.

[49] 494 F. Supp. at 1223 (emphasis added by the United States).

[50] In this regard, the United States notes that even Japan acknowledges that the *Zenith III* court "applied anti-trust standards to determine liability". Japan does not dispute that the WTO agreements do not prohibit anti-trust measures.

3.35 **Japan** considers that, contrary to what the United States may assert, the 1916 Act is "mandatory" in the sense that the term is used in the WTO. If a court finds that a plaintiff has established the elements of the offence (the dumping element and the injury element[51]), the court "shall" impose penalties under the Act. It must impose sanctions. This is required by the text of the Act, and is not contested by the United States.

3.36 Japan notes that the fact that a US court has stated that the 1916 Act has anti-trust as well as anti-dumping elements is inapposite. The 1916 Act applies to conduct commonly understood to be dumping and it mandates that a court finding a violation impose penalties specified in the 1916 Act. The court has no discretion; once it has found the defendant guilty, it must impose penalties.

3.37 Japan recalls the recent statement by the panel in *Canada - Measures Affecting the Export of Canadian Aircraft* that in contrast to legislation granting executives authority to act inconsistently with the WTO

> "[…] panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such […]."[52]

Thus, the 1916 Act is mandatory.

3.38 Japan contests the US claim that the 1916 Act is not mandatory because it is susceptible to WTO-consistent interpretation. In Japan's view, the United States implies that if there is room for interpreting the 1916 Act in a GATT/WTO-consistent manner, the 1916 Act is not WTO-inconsistent. Making use of this mandatory or discretionary argument, the United States seems to insist that a domestic law susceptible to multiple interpretations would not violate GATT 1947/WTO obligations. The United States tries to justify its inconsistent application of the 1916 Act, using as a disguise an argument regarding whether the 1916 Act is mandatory or discretionary in nature.[53]

3.39 Japan argues, first, that the terms of the 1916 Act are quite clear. The 1916 Act penalises a certain type of international price discrimination. Regardless of whether a US court calls the 1916 Act an anti-trust measure or an anti-dumping measure, the conduct the Act regulates remains the same. No court has interpreted the 1916 Act so that the 1916 Act did not apply to international price discrimination in which an importer sells at a lower price in the United States than in its home markets, i.e. dumping.

3.40 Japan argues, second, that the United States emphasizes the conclusion of the court in *Zenith III* that, for a limited purpose, the 1916 Act should be treated as an anti-trust law. But, far from exonerating the United States, this US assertion is additional proof of the US violation. The conduct regulated - that subset of international price discrimination commonly called dumping - did not change. But the court applied anti-trust standards to determine liability. This, of course, is the core of Japan's case. To regulate and remedy dumping, a Member must follow the standard for determining and remedying liability set out in the Anti-Dumping Agreement. A Member may not import standards from other sources.

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[51] In response to a question of the United States, Japan explains that by "injury element" it means "the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States" as set forth in the text of the 1916 Act.

[52] Panel Report on *Canada – Aircraft*, Op. Cit., para. 9.124.

[53] Japan considers that this argument is inapposite. According to Japan, it would allow a Member to avoid its WTO obligations simply by wording a law so that it could be interpreted in a WTO-consistent fashion, even though the Member always or usually applied it in a WTO-inconsistent fashion.

3.41 Japan asserts that, contrary to the US assertion, the instant case does not closely resemble *United States – Tobacco.*[54] The text of the 1916 Act is not susceptible to a range of meanings. It requires WTO-inconsistent action. Thus, the US claim that the 1916 Act is susceptible to WTO-consistent interpretation is completely without merit.

3.42 Japan further argues that, even if the US assertion were correct - which it is not - it would be irrelevant and would not justify the WTO inconsistency of the 1916 Act. The United States cannot hide its WTO violations behind inconsistent enforcement of one of its laws by US courts. The position urged by the United States would completely undermine the goals of consistency and predictability which the GATT 1947/WTO system seeks to achieve.

3.43 Japan notes, moreover, that it contradicts Article XVI:4 of the WTO Agreement and, in the present proceedings, Article 18.4 of the Anti-Dumping Agreement. Each Member must conform its laws, regulations and administrative procedures to the provisions of the WTO agreements. The US courts' inconsistent interpretations of the 1916 Act is a blatant challenge to this important, systemic WTO principle.

3.44 Japan considers that the United States has not conformed its laws to its WTO obligations. Thus, it is in violation of Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, which establish similar and specific obligations. Article XVI:4 sets forth Members' obligation to ensure the consistency of domestic laws, regulations and administrative procedures with the WTO agreements. This Article is general in scope, applying to all WTO agreements, including the GATT 1994 and the Anti-Dumping Agreement. Article 18.4 is reflective of the general obligation set out by Article XVI:4 as it applies to anti-dumping. In addition to the general obligation to "ensure the conformity" of domestic laws, regulations and administrative procedures, Article 18.4 imposes an additional obligation to ensure conformity by "tak[ing] all necessary steps, of a general or particular character".

3.45 According to Japan, the 1916 Act is inconsistent with US obligations under WTO provisions and, thus, the United States has violated Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement by failing to conform the Act to its WTO obligations. The fact that a law provides for WTO-inconsistent action is sufficient to establish a violation, even if there is a possibility of WTO-consistent action. If the Panel for some reason were to find that the 1916 Act is not mandatory, then this obligation, rather than the mandatory/discretionary dichotomy drawn from GATT 1947 precedent, should apply in the present dispute.

3.46 Japan asserts, furthermore, that the US position contradicts previous GATT 1947 and WTO panel and Appellate Body judgements. In this connection, the "sound legal basis" principle set forth in the *India - Patents* Appellate Body Report is instructive. In *India - Patents*, the panel and the Appellate Body upheld the US claim that a domestic law can violate a WTO provision not simply because it mandates WTO-inconsistent action, but also because it fails to provide "a sound legal basis" for the administrative procedure required to implement WTO obligations.[55] The panel and Appellate Body found that Members' laws and regulations must have "sound legal basis" for enforcement that creates the predictability needed to plan future trade. The Appellate Body reversed portions of the panel report on the issue of legitimate expectations, but clearly upheld the "sound legal basis" principle.[56]

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[54] Japan refers to *United States - Tobacco*, Op. Cit., para. 118.

[55] Japan refers to the Panel Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/R, para. 7.28; and the Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* adopted on 16 January 1998, WT/DS50/AB/R, para. 36 (hereinafter "Appellate Body Report on *India – Patents*").

[56] Japan refers to the Appellate Body Report on *India – Patents*, paras. 56-57.

3.47 Japan claims that its position is supported not only by *India - Patents*, but also by the *United States - Superfund* proceeding.[57] The fact that the US courts have interpreted the 1916 Act in a WTO-inconsistent fashion demonstrates the absence of a "sound legal basis". Accordingly, the mere potential of WTO-inconsistency is sufficient to establish a violation in the context of the WTO's provisions relating to anti-dumping.[58]

3.48 Japan reminds the Panel and the United States of the fact that the United States itself successfully advanced a similar argument in *India – Patents.* The panel noted that, in that proceeding, the United States argued as follows:

> "[…] The *Superfund* case was thus relevant to this matter because it clarified that Members were obligated "to protect expectations" of other Members as to the "competitive relationship" between their respective products. […] [T]here was no need to wait for a violation to take place or speculate on whether it would take place, since the present case concerned a failure to take an affirmative action to implement a specific obligation in a WTO agreement."[59]

3.49 The **United States** notes that both Japan and the European Communities argue that the 1916 Act mandates a violation of WTO obligations. Although Japan did not further elaborate on this point, the European Communities argues in its third party submission that "several panel reports under GATT 1947 have found domestic legislation to run afoul of Article III GATT even before it had actually been applied, and, therefore, before any actual discrimination had taken place."

3.50 The United States considers that the European Communities misses the point with this argument. The European Communities is confusing an unenforced mandatory measure with a non-mandatory measure. The United States does not dispute that a mandatory measure may be found to be WTO-inconsistent before actual application or enforcement. The key question is whether the measure is mandatory or non-mandatory.

3.51 The United States recalls that the European Communities also argues that "mandatory measures are those which, under national law, require the executive authority to impose a measure" implying that only measures enforced through the executive branch could ever be considered under the mandatory/non-mandatory distinction. The European Communities cites the *United States - Denial of Most-Favoured-Nation Treatment As to Non-Rubber Footwear from Brazil* case as support.[60]

3.52 The United States argues that, although the panel report in *United States - Non-Rubber Footwear* mentions the "executive authority", the panel's decision did not turn on which branch of government enforced the measure.[61] In fact, the United States is not aware of any panel report having

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[57] Japan refers to *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2. Japan notes that the panel emphasized the need for certainty and predictability.

[58] In response to a question of the United States regarding what is the legal basis for Japan's statement that "the mere potential of WTO inconsistency is sufficient to establish a violation […]," Japan notes that the legal basis can be found in the panel and the Appellate Body reports on *India - Patents* (on "sound legal basis") and *United States – Tobacco* (and panel reports cited therein) as well as Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement. The mere potential of WTO-inconsistency establishes a violation in light of these WTO provisions and precedents.

[59] Panel Report on *India - Patents*, Op. Cit., para. 4.28.

[60] The United States refers to the Panel Report on *United States - Denial of Most-Favoured-Nation Treatment As to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128 (hereinafter "*United States – Non-Rubber Footwear*").

[61] The United States notes that the panel mentions the executive authority in the context of explaining that legislation may be challenged *as such* (before actual application) if it mandates inconsistent action.

considered this question. Neither Japan nor the European Communities offer any reason why the mandatory/non-mandatory distinction should not apply to measures which are enforced through the judicial branch. The European Communities argues that courts are charged with interpreting legislation, not with exercising discretion in respect of legislation. However, the EC does not address the fact that, in interpreting legislation, the court is applying the legislation just as the executive branch would had it been charged with the legislation's enforcement (putting aside the criminal provisions of the 1916 Act for which the executive branch is charged with enforcing).

3.53 Thus, for the United States, the question again becomes: is there room in the application of the law for the government authority to act in a WTO-consistent manner? This is the fundamental test that has been applied in all cases considering the mandatory/discretionary distinction and there is no reason not to apply it when the judicial branch is charged with the application of a measure.[62] Indeed, in applying the discretionary/mandatory distinction in *United States - Superfund*, the panel found that legislation explicitly directing action inconsistent with GATT 1947 principles did not mandate inconsistent action so long as it provided the possibility for authorities to avoid such action.

3.54 The United States recalls that the European Communities attempts to distinguish the *United States - Tobacco* case as involving domestic legislation that was "incomplete", (meaning that the agency had not yet promulgated its regulations). In that case, the panel considered whether a term in a statute could be interpreted by the relevant government authorities (which happen to be executive branch authorities) in a WTO-consistent manner. Thus, the only distinction is again that executive branch authorities were involved instead of judicial branch authorities.

3.55 In the view of the United States, there is no reason not to apply the same principle in the present case. The focus in a mandatory/discretionary analysis should not be on which branch of government is applying the law, but whether there is room in the application of the law for the relevant government authorities to act in a WTO-consistent manner. This is consistent with the presumption against conflicts between international and national laws. In the instant case, the United States has shown that, not only is there room for such an interpretation, as a matter of fact, the law has been so interpreted. Accordingly, the present Panel should find that the 1916 Act, *as such*, is WTO-consistent.[63]

3.56 The United States also points out that there is a separate reason, solely applicable to the criminal context, for viewing the 1916 Act as non-mandatory legislation. The Department of Justice, an executive branch agency, has the discretion to decide whether or not to bring a criminal prosecution under the 1916 Act. In other words, while the 1916 Act authorizes the Department of Justice to bring a criminal prosecution, it does not mandate it. In fact, there is no record of the Department of Justice as having filed, or even considered, a criminal case under the law.

3.57 **Japan** maintains that, despite continued US protestations, the 1916 Act is a mandatory law. The United States cannot rebut the critical fact that the 1916 Act requires punitive action where a US

[62] In response to an observation by Japan that in the present case the US Administration does not appear to possess the power to secure uniform, WTO-consistent interpretation of the 1916 Act because the enforcement mechanism is up to US courts, the United States argues that the relevant question is not which branch of government is acting, but whether the law mandates a violation.

[63] In response to a question of Japan regarding what measures are available for the US Administration to secure that all domestic laws be interpreted in line with international treaties in the US court system, the United States notes that in cases where the United States is itself a party to a civil or criminal litigation (acting through the Department of Justice), it has direct responsibility for ensuring that its own claims and actions comport with US laws and obligations, including international obligations, and for informing the court of such considerations. In addition, where appropriate, the Department of Justice can seek to intervene in a private civil litigation in order to protect a federal government interest. The Department of Justice does not routinely intervene in private civil litigation, however, and it remains a matter of judgment when and before which courts it should be done.

court finds that the elements of the offence (the dumping element and the injury element) have been established. Since the 1916 Act clearly regulates dumping (international price discrimination), there is no room for interpretation in line with international obligation (in this case Article VI of the GATT 1994 and the Anti-Dumping Agreement). Doctrines such as that established by *Murray v. The Schooner Charming Betsy*[64] can provide no succour to the United States. The *Charming Betsy* doctrine stands for the proposition that where "fairly possible", courts should construe legislation to avoid conflicts with US treaty obligations. The doctrine does not apply to the present case for two reasons. First, the 1916 Act is clear; the court has no discretion under the 1916 Act. Once the elements of the Act are proven, the court must impose the statutory sanctions. The court lacks any discretion in this situation to fulfill the *Charming Betsy* directive that, "where fairly possible", courts will construe an Act of Congress so as not to conflict with a treaty of the United States. It is not "fairly possible" for a US court to construe the 1916 Act to conform to the United States' WTO obligations.[65]

3.58 Japan notes, second, that the *Charming Betsy* doctrine does not apply, because the Uruguay Round Agreements Act (hereinafter the "URAA" - the US implementing legislation) expressly precludes US courts from altering US laws to conform them to US WTO obligations. According to Section 102(a)(1) of the URAA:

> "No provision of any of the Uruguay Round Agreements, nor the application of any such provision, to any person or circumstance, that is inconsistent with the law of the United States shall have effect."

3.59 According to Japan, this language is underscored by the decision of the US Court of Appeals for the Federal Circuit in *Suramericana de Aleaciones Laminadas, C.A. v. United States* where the court found that:

> "The GATT is not controlling. […] The GATT does not trump domestic legislation; if the statutory provisions at issue are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." [66]

3.60 Japan submits, finally, that regardless of these telling points, the Panel should reject the US invitation to mire itself in the various judicial opinions. Instead, the Panel should base its decision on the unambiguous text of the 1916 Act.

3.61 The **United States** disagrees with Japan's contention that the 1916 Act is a "mandatory" measure because, if the requirements of the law are fulfilled, the court must impose a remedy. This argument misses the point. The relevant question for determining whether there is a WTO violation when a measure is challenged as such is: does the measure mandate a violation of any WTO obligations? The question is not: does the measure mandate the imposition of a remedy? To answer the question of whether the measure mandates a violation of any WTO obligations, the Panel must ask: what are the requirements of the law? The United States has shown that the requirements of the l916 Act are subject to interpretation by the courts and that the courts have interpreted and applied the law as an anti-trust statute. In other words, the discretionary nature of the 1916 Act is found in how the elements of a violation of the 1916 Act can be interpreted, not in the remedy that must be imposed

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[64] Japan refers to *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (hereinafter "*Charming Betsy*").

[65] Japan notes, in this context, that the United States attempts to characterize Japan's position on the mandatory/discretionary issue as being based on whether the judicial branch or the executive branch is enforcing the measure. This statement is not Japan's position. Japan's position is that neither the US executive branch nor US courts have any discretion in applying the WTO-inconsistent remedy that the 1916 Act mandates.

[66] Japan refers to *Suramericana de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667-68 (Fed. Cir. 1992) (citations omitted by Japan).

once such a violation has been established. That is enough for the present Panel to find that the law is susceptible to an interpretation that is WTO-consistent.

3.62 **Japan** considers that the United States attempts to mischaracterise its position as being that the 1916 Act is mandatory for purposes of the WTO simply because it "mandates the imposition of a remedy." This statement does not reflect Japan's argument. Japan's argument is that the question before the Panel is whether the measure mandates a violation of a WTO obligation. The answer to this question is "yes". The 1916 Act mandates the imposition of a remedy – a remedy that violates a WTO obligation.

3.63 The **United States** adds that Japan contradicts itself in arguing that the 1916 Act is a mandatory measure. First, it argues that the 1916 Act is not susceptible of differing interpretations. However, Japan also argues that the *Zenith III* court's interpretation is different and should be disregarded in favour of two recent preliminary district court opinions. This argument just serves to underscore the point that the 1916 Act is susceptible to a range of interpretations and any differences between the *Zenith III* decision and the two preliminary decisions demonstrate how much discretion the courts retain in applying the law.

3.64 With regard to the *Charming Betsy* doctrine, the United States notes that Japan's statement that it does not apply to the Uruguay Round Agreements is incorrect. The *Charming Betsy* doctrine holds that, absent express congressional language to the contrary, statutes should not be interpreted to conflict with international obligations. This time-honoured canon of statutory interpretation was first applied in *Charming Betsy*, wherein the Supreme Court explained:

> "It has also been observed that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."[67]

3.65 The United States points out that the Uruguay Round Agreements have been held to be international obligations for purposes of the *Charming Betsy* doctrine.[68] In applying this doctrine, the court first must determine whether there is an express conflict between the US law and the international obligation. If there is an express conflict, then US law prevails. This is exactly what section 102(a)(1) of the URAA provides, and no more. However, if there is no express conflict, then the court will apply the *Charming Betsy* doctrine to adopt an interpretation of the statute that is consistent with the international obligation. Thus, the *Charming Betsy* doctrine is perfectly consistent with Section 102(a)(1) of the URAA. For instance, in *Federal Mogul*, the court of appeals ascertained that the statute permitted alternative interpretations and that there was no express statutory language conflicting with the relevant international obligation. The court then held that the interpretation by the Commerce Department of the relevant statute as allowing a tax neutral methodology for calculating dumping margins was consistent with GATT principles and therefore permissible.

3.66 The United States submits that, in another case, *Caterpillar Inc. v. United States*[69], the Court of International Trade applied the *Charming Betsy* doctrine in holding that the Customs Service's interpretation of a statute was impermissible because it conflicted with Article VII:3 of the GATT. The court first determined that there was no express language in the statute conflicting with this GATT provision. The court then held that, in accordance with the *Charming Betsy* doctrine, the

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[67] *Charming Betsy*, Op. Cit., 2 L.Ed. 208 (1804).

[68] The United States refers to *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (hereinafter "*Federal Mogul*").

[69] The United States refers to *Caterpillar Inc. v. United States*, 941 F. Supp. 1241 (CIT 1996).

statute should be construed in a manner consistent with international obligations. Because the Customs Service's interpretation was inconsistent, it was held to be impermissible.

3.67 The United States considers, finally, that, even without regard to judicial interpretations, the plain language of the 1916 Act is WTO-consistent. Although the Third Circuit has held that the possibility of recoupment must be established under the 1916 Act, that is not the only WTO-consistent interpretation. A review of the plain language of the 1916 Act shows that it is not a specific action against dumping. Rather, it is a measure directed at private predatory pricing practices. This reading of the plain language is confirmed by the statute's legislative history.

3.68 In response to a question of the Panel to both parties regarding whether there would be reasons to distinguish between, on the one hand, the situation where the terms of a law would make that law fall within the scope of a given provision of the WTO Agreement (e.g. Article VI of the GATT 1994) depending on the interpretation of those terms and, on the other hand, the situation where the applicability of a WTO provision is not in question (as was the case in *United States – Tobacco*), but where the law could be interpreted in such a way that it would violate that WTO provision, **Japan** notes that there would be.[70]

3.69 In Japan's view, "the situation where the terms of a law would make that law fall, or not, within the scope of a given provision of the WTO Agreement depending on the interpretation of those terms," is the situation where the authorities cannot apply the law in line with WTO obligations, because the terms of the law are so ambiguous that authorities cannot consistently interpret the law in line with WTO obligations. In this situation, since the law lacks the "sound legal basis" needed for domestic legislation to create the predictability to plan future trade, the law violates provisions of the WTO Agreement, as the Appellate Body found in *India - Patents* regarding the TRIPS Agreement.

3.70 Japan submits that, on the other hand, "the situation where the applicability of a WTO provision is not in question, but where that law could be interpreted in such a way that it would violate that WTO provision," is the situation that the authorities may have some discretion to apply the law in line with WTO obligations, because a range of meaning of the law is susceptible of WTO-consistent interpretation, as was the case with the *United States - Tobacco* panel's finding regarding Article VIII of the GATT 1947.

3.71 Japan recalls that, in the *United States - Tobacco* case, the panel found no violation because, due to the ambiguity in the terms of the law, the US Administration was not mandated to act in a manner that was inconsistent with the GATT 1947. However, this situation should be distinguished from "the situation where the terms of a law would make that law fall, or not, within the scope of a given provision of the WTO Agreement depending on the interpretation of those terms," particularly if that WTO provision relates to the positive obligations of a WTO Member to provide for a certain procedural mechanism, such as in the TRIPS Agreement or the Anti-Dumping Agreement. In Japan's view, the refusal to comply with those obligations would *per se* constitute a violation of the WTO Agreement.

3.72 In its reply to the Panel's question, Japan also recalls, however, that the hypothesized situations in the Panel's question do not apply to the present case and that the question has no relevance in the present proceedings. The 1916 Act is clearly mandatory legislation that requires the US government to act in a manner that is inconsistent with its obligation under the WTO Agreement. According to Japan, the present case should be distinguished from the *United States – Tobacco* case, in that the text of the 1916 Act is quite clear and not at all vague.

[70] Japan notes, however, that the present case falls under neither of the situations hypothesized by the Panel.

3.73 The **United States**, in reply to the same question of the Panel, agrees with Japan that there is a reason to differentiate between the two situations. In the first scenario, the Panel should be guided by the interpretative principle of *in dubio mitius*. In *EC Measures Concerning Meat and Meat Products (Hormones)*, the Appellate Body applied this principle in finding that the panel erred in adopting a "far-reaching" interpretation of the SPS Agreement.[71] The Appellate Body, quoting Oppenheim's International Law, described this principle in footnote 154 as follows:

> "The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."

3.74 The United States notes that, as a result, if the 1916 Act can be interpreted so as to fall outside the scope of Article VI and the Anti-Dumping Agreement, according to the principle *in dubio mitius*, that is the interpretation that should be adopted by the Panel. The 1916 Act can be and has been interpreted as an anti-trust statute. There is no dispute in the present case that Article VI and the Anti-Dumping Agreement do not apply to anti-trust measures.

3.75 The United States considers that the second scenario should be governed by the principle laid down in the *United States - Tobacco* case.

3.76 In response to another question of the Panel regarding the relationship between the GATT 1947/WTO practice in respect of mandatory/non-mandatory legislation and Article XVI:4 of the WTO Agreement, **Japan** notes that the obligation set out at Article XVI:4 "to ensure […] the conformity" of laws, regulations and administrative procedures, rather than the mandatory/discretionary dichotomy drawn from GATT 1947 practice, should apply in the present dispute. Article XVI:4 establishes that Members must alter laws, regulations and administrative procedures that do not conform to WTO provisions. The 1916 Act has been applied in a manner that has been applied in a manner that is inconsistent with US WTO obligations and, thus, the United States has violated Article XVI:4 by failing to conform the law the 1916 Act to its WTO obligations.[72]

3.77 In reply to the same question, the **United States** submits that Article XVI:4 did not affect the distinction between mandatory and non-mandatory measures that existed under GATT 1947 jurisprudence and continues to exist under WTO practice. Article XVI:4 provides an overarching statement in the WTO Agreement, applicable to all annexed agreements and not just the GATT 1994, that no measures are grandfathered. Article XVI:4 imposed an obligation on Members to review whether existing laws, regulations and administrative procedures did, in fact, conform to the Members' WTO obligations, and where those laws did not, to bring them into conformity. Article XVI:4 thus served to remove any doubt that may have existed in its absence that all measures must be brought into conformity as from 1 January 1995.

3.78 In response to a follow-up question of the Panel regarding the relationship between the GATT 1947/WTO practice in respect of mandatory/non-mandatory legislation and the GATT 1947/WTO

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[71] Report of the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted on 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para.165 (hereinafter "Appellate Body Report on *European Communities – Hormones*").

[72] In reply to a similar question of the United States, Japan states that, depending on the specific circumstances, the mandatory/non-mandatory distinction can still be a useful tool for analysing the WTO consistency of a domestic law or regulation. Japan considers that, in the present proceeding, it is not required to establish a general guideline as to the circumstances in which the distinction could be properly considered by the Panel.

practice concerning the protection of expectations of the contracting parties/Members as to the competitive relationship between their products[73] and the "security and predictability of the WTO system"[74], **Japan** notes first of all that it does not see the relevance of this question to this dispute. As made most clear in Paragraph 5.2.2 of *United States - Superfund*, the issue of protection of expectations versus the need to prove actual trade effects arose in the context of "mandatory" legislation. Japan does not see the relevance of this question to this dispute. In any event, Japan considers that and the obligation to ensure the conformity of US laws set out in Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement, rather than the mandatory/discretionary dichotomy applicable to the GATT 1947, applies in the present dispute.

3.79 Japan is of the view, moreover, that even if the mandatory/discretionary dichotomy were to apply, the 1916 Act is mandatory. It requires action inconsistent with US WTO obligations.

3.80 The **United States**, in its response to the same question of the Panel, submits, first, that it is important to note that the panel in *United States – Superfund* refers to the objective of the "protection of the expectations of contracting parties as to the competitive relationship between products" in the context of two specific provisions, Article III and Article XI of the GATT 1947. The panel reasoned that "that objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade."[75] Obviously, the panel considered that the concepts were compatible because it based its conclusion that mandatory legislation is actionable even if not yet in effect in part on helping to achieve that objective.

3.81 The United States considers that, similarly, in more general terms, the mandatory/non-mandatory distinction is consistent with the "legitimate expectations of parties." The Appellate Body explained in *India - Patents* that "the legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself."[76] Thus,

> "[…] the duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles neither require nor condone the imputation of a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[77]

3.82 The United States contends that, likewise, the mandatory/non-mandatory distinction is consistent with the "security and predictability of the WTO system." First, it is important to note that the "security and predictability of the WTO system" is not an obligation, but an objective of Article 3.2 of the Dispute Settlement Understanding. Article 3.2 provides, in pertinent part, that: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." Security and predictability are thus the objective which the DSU itself helps to achieve. In other words, the substantive obligations in the text of the WTO Agreement and its annexes, enforced through the DSU, provide security and predictability.

3.83 In the view of the United States, to discard a fundamental principle of jurisprudence and create uncertainty as to the WTO consistency of an indeterminate number of domestic laws heretofore

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[73] The Panel refers to, e.g., *United States – Superfund* and the Panel Report on *Japanese Measures on Import of Leather*, adopted on 15/16 May 1984, BISD 31S/113.

[74] The Panel refers to, e.g., the Panel Report on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R (hereinafter "Panel Report on *Argentina – Footwear*").

[75] *United States – Superfund*, Op. Cit., para. 5.2.2.

[76] Appellate Body Report on *India - Patents*, Op. Cit., para. 45.

[77] Ibid.

considered discretionary would seriously undermine the security and predictability of the WTO system. As the Appellate Body noted in *Japan - Taxes on Alcoholic Beverages*, "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute."[78]

3.84 The United States notes, finally, that, in *Argentina - Footwear*, the panel does no more than affirm that mandatory legislation is actionable. The panel states, "GATT/WTO case law is clear that a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect."[79] The panel refers to "security and predictability" in the context of the aim of tariff bindings and Article II of the GATT 1994, which are not at issue in the present case.

E. ROLE OF THE PANEL IN THE PRESENT CASE

3.85 **Japan** recalls that Article 11 of the DSU requires panels to conduct an "objective assessment" of the facts of each dispute. Panels have found that panels cannot meet this obligation if they defer to a Member's findings in this regard.[80]

3.86 Japan also notes the Appellate Body opinion in *European Communities - Hormones*, which makes clear that the existence and characteristics of domestic law are questions of fact that are "left to the discretion of a panel as a trier of facts". In contrast, the "consistency or inconsistency of a given fact or set of facts" (the 1916 Act in the present case) with the requirements of a given treaty provision (relevant WTO Articles in the present case) would be a legal question.[81]

3.87 Japan recalls, furthermore, that, in *India - Patents*, the Appellate Body concluded that:

> "It is clear that an examination of the relevant aspects of Indian municipal law […] is essential to determining whether India has complied with its obligations."[82]

3.88 In the view of Japan, this quoted passage reflects the position consistently taken by the Appellate Body and panels that, in order to fulfil the obligation under Article 11 of the DSU to make an objective assessment of the facts and to assess the conformity of the challenged measure with the relevant WTO agreements, a panel must conduct its own examination of the challenged law.[83]

3.89 Japan considers that it is also very instructive that the Appellate Body in *India - Patents* cites *United States - Section 337 of the Tariff Act of 1930* for the proposition that a panel must conduct "a detailed examination of the domestic law" in order to assess its WTO/GATT conformity.[84] Thus, the word "examination" indicates that the Panel must analyse the law to determine its substance and

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[78] Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS11/AB/R, p.14.

[79] Panel Report on *Argentina - Footwear*, Op. Cit., para. 6.45.

[80] Japan refers to the Panel Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 12 January 2000, WT/DS98/R, para. 7.30 (hereinafter "Panel Report on *Korea – Safeguards*", where the Panel states as follows: "We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU."

[81] Japan refers to *EC Measures Concerning Meat and Meat Products* (*Hormones*), adopted on 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 132 (hereinafter "Appellate Body Report on *European Communities – Hormones*").

[82] Appellate Body Report on *India—Patents*, Op. Cit., para. 66.

[83] Japan refers to the Appellate Body Report on *European Communities - Hormones*, Op. Cit., paras. 110-119; *Korea - Safeguards*, Op. Cit., paras. 7.26-7.31; Panel Report on *Argentina - Safeguard Measures on Imports of Footwear*, adopted on 12 January 2000, WT/DS121/R, paras. 8.117-8.121.

[84] Japan refers to *India – Patents*, Op. Cit., para. 67.

import. "Examination" encompasses all the aspects of the "objective assessment of the matter" provided in Article 11 of the DSU. Thus, it falls to the Panel, not the United States, to interpret the 1916 Act and determine whether it is WTO-inconsistent. The Panel should not accept the US judicial interpretation of the 1916 Act as binding. Any other position would allow the Member defending against a complaint simply to declare its law WTO-consistent, which would be an absurd result.

3.90 The **United States** notes that Japan acknowledges that the "characteristics" of the 1916 Act are questions of fact for the present Panel. The United States agrees. It is an accepted principle of international law that municipal law is a fact to be proven before an international tribunal.[85] In *India - Patents*[86] the Appellate Body directly addressed the proper review of municipal law. In that case, the Appellate Body affirmed the panel's review of India's domestic law as a question of fact, citing the Permanent Court of International Justice (hereinafter "PCIJ") decision in *Certain German Interests in Polish Upper Silesia*. The Appellate Body held that it was proper for the panel to conduct an extensive review of the Indian law at issue to determine whether India had met its obligations under the TRIPS Agreement. The Appellate Body noted approvingly that the panel had not interpreted Indian law *as such*, but, rather, had reviewed the law to determine whether it was WTO-consistent.

3.91 The United States argues that, likewise, in the present case, the Panel is not called upon to interpret or opine upon the meaning of the 1916 Act itself. Rather, the Panel must determine the fact of the 1916 Act under US law, which includes US judicial decisions interpreting the Act. The danger in the Panel interpreting the 1916 Act is that the Panel might adopt an interpretation that does not match the true application of the law in the United States. To do so would result in a panel report based upon hypothetical facts. In order to avoid such an outcome, the Panel should deem the case law interpreting the 1916 Act as dispositive for purposes of determining the fact of US law.[87]

3.92 The United States recalls that, for example, in the *Brazilian Loans* case, the PCIJ attached controlling weight to the manner in which French courts had interpreted French legislation. The PCIJ admonished that a tribunal of international law should "pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which in actual fact, are applied in the country the law of which is recognized as applicable in a given case."[88] This principle "rests in part on the concept of the reserved domain of domestic jurisdiction, and in part on the practical need of avoiding contradictory versions of the law of a state from different sources."[89]

3.93 In response to a question of the Panel regarding the import of the Appellate Body report in *India – Patents* in terms of the Panel's consideration of domestic law and case law, the United States notes that the term "examination" as used by the Appellate Body in *India - Patents* means that the Panel must review the domestic law (including relevant court decisions law interpreting the law) to determine the fact of domestic law. The Appellate Body's statement on this point was in response to India's argument that the panel should have "sought guidance" from India as a party to the dispute on matters relating to the interpretation of Indian law implying that the panel should have deferred to

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[85] The United States refers to *Case Concerning Certain German Interests in Polish Upper Silesia* [1926], PCIJ Rep., Series A, No. 7, p. 19; *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, PCIJ Rep., Series A, No. 21, pp. 124-25 (hereinafter "*Brazilian Loans*").

[86] The United States refers to Appellate Body Report on *India – Patents*, Op. Cit., paras. 65-66.

[87] The United States refers to Judge Lauterpacht, *Case Concerning the Guardianship of an Infant* [1958], ICJ Rep., Sep. Op., p. 91. According to the United States, it is settled practice among States that international judicial bodies should accept, and treat as binding, questions of municipal law and practice decided by competent municipal courts. The United States refers to *Case Concerning the Payment of Various Serbian Loans Issued in France* [1929], PCIJ Rep., Series A, No. 20, p. 46; *Brazilian Loans*, Op. Cit., pp. 124-25.

[88] The United States refers to *Brazilian Loans*, Op. Cit., pp. 124-25.

[89] The United States refers to I. Brownlie, Principles of Public International Law, 4th ed., Clarendon Press (1990), p.41.

India and not examined the law itself. The Appellate Body rejected this argument and noted approvingly that the panel examined Indian law to determine the fact of the law and that "the Panel was not interpreting Indian law 'as such.'"[90]

3.94 The United States considers that, similarly, in the present case, it is not for the Panel to interpret the 1916 Act itself, but the Panel must examine the domestic law and relevant case law to determine how the law is interpreted and applied in the United States. The United States is not advocating that the Panel refrain from "examining" US law and accept the US interpretation as a party in the present dispute. To the contrary, the United States provided copies of the relevant decisions and other materials to assist the Panel in examining the 1916 Act and the US case law interpreting the Act. However, it is not the role of the Panel to agree or disagree with the final judicial decisions interpreting and applying the Act.

3.95 The United States emphasizes, however, that it is not suggesting that the Panel has no interpretative role. As noted by the Appellate Body in *India - Patents*, once the Panel has determined the interpretation of the municipal law as a factual matter, it is the Panel's function to determine the applicability of the relevant WTO agreements to those facts. These determinations are questions of WTO law to be made by the Panel in the first instance.

3.96 **Japan** recalls the US assertion that the Panel should defer to the US characterisation of the 1916 Act in the present case. This is incorrect. A WTO Panel must conduct its own examination and assessment of a challenged law (in the instant case the 1916 Act) to fulfill its obligation under Article 11 of the DSU. The present Panel should not accept US unilateral assertions or interpretations about this law and its WTO-consistency. It must itself determine the conformity of the challenged law with the relevant WTO agreements. The present Panel's role is clear. It is to examine the 1916 Act's WTO-consistency; to accept the US characterisation would be to ignore this duty.

3.97 In response to the same question of the Panel regarding the import of the Appellate Body report in *India – Patents* in terms of the Panel's consideration of domestic law and case law, Japan states that *India – Patents* calls upon a WTO panel, at the very least, to analyse the text of a national law in question. A WTO panel should not accept a nation's judicial interpretations of a law as binding, but must review the text of the law itself. In doing so, a WTO panel may also analyse how courts and administrative agencies have applied the law and the effects the law's existence and/or application has on imports. Case law may inform a panel about possible interpretations of a statute. Again, however, case law should not be taken as the final word of a statute's effect on imports, particularly if other evidence (the statute's text and its real world effects) outweighs the prior contrary judicial interpretation of the statute.

3.98 The **United States** maintains its view that it is not the function of the present Panel to interpret US law. The United States submits that it is not advocating either that the Panel accept its interpretation of the 1916 Act as a party in the present dispute. It is the role of the Panel to determine as a matter of fact how the law is applied in the United States. Because the 1916 Act is applied through the judicial branch, the Panel must look to the judicial interpretations. Otherwise, the Panel runs the risk of basing its decision upon hypothetical facts if it should adopt its own interpretation of the 1916 Act that does not comport with how the law is actually applied in the United States. It is not for the Panel to decide the manner in which it believes that the 1916 Act *should* be applied which would entail interpreting the Act itself. Even if the Panel might disagree with how the courts have interpreted the text of the 1916 Act, it should not affect the Panel's decision in the present dispute. In the US legal system, the 1916 Act means what the courts say it means, and this is the relevant fact for purposes of the present dispute.

[90] The United States refers to the Appellate Body Report on *India - Patents*, Op. Cit., para. 66.

F. APPLICABILITY OF ARTICLE VI OF THE GATT 1994 AND THE ANTI-DUMPING AGREEMENT

1. Introduction

3.99 **Japan** considers that the 1916 Act is an anti-dumping statute and, thus, must comply with Article VI of the GATT 1994 and with the provisions of the Anti-Dumping Agreement.

3.100 Japan notes that, as indicated by its short-form title, the 1916 Act regulates dumping. This fact is confirmed by the text of the Act, the conduct the Act targets and the effect and impact of the 1916 Act when applied. Moreover, the fact that the 1916 Act is an anti-dumping law is further confirmed by its legislative history, US court decisions that have interpreted it and the views of the US executive branch, including the current Administration. Apparently, only before the present Panel does the US executive branch argue that the 1916 Act is not an anti-dumping law.

3.101 The **United States** considers that Japan's formulation of the statute's legislative history and relevant case law is distorted and misleading. A review of the relevant case law and the statute's legislative history demonstrates that the 1916 Act can be and, in fact, has been interpreted as a predatory pricing statute with anti-trust objectives, not an anti-dumping measure within the purview of Article VI and the Anti-Dumping Agreement.

3.102 According to the United States, Article VI simply does not govern the 1916 Act. Japan's various claims under Article VI and the Anti-Dumping Agreement therefore must be rejected.

2. The text of the 1916 Act

3.103 In the view of **Japan**, analysis of the text of the 1916 Act demonstrates that the Act regulates dumping. The text of the Act provides as follows:

> "It shall be unlawful for any person importing or assisting in importing any Articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such Articles within the United States *at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported* after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of *destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States*, or of restraining or monopolizing any part of trade and commerce in such Articles in the United States."[91]

3.104 Japan recalls that under Article VI of the GATT 1994, dumping occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products", and "normal value" means the home market prices, third country prices, or the constructed cost of the product at issue.[92] These requirements are the core concept of dumping as prescribed in Article VI of the GATT 1994.[93] Article VI of the GATT 1994 prohibits Members from taking measures against dumping other than the anti-dumping duties prescribed by this Article, irrespective

[91] 15 U.S.C. § 72 (1999) (emphasis added by Japan).

[92] Japan notes that this is the core of the concept of international price discrimination.

[93] Japan notes in this regard that material injury is a necessary additional requirement to take measures against dumping, but that dumping is defined only in terms of price differentials.

of "intent to injure" or "material injury". As the text of the 1916 Act quoted above shows, the 1916 Act targets precisely this conduct.

3.105 Japan notes that the 1916 Act sets out two basic elements that trigger a violation. First, the US price must be lower than the benchmark price (normal value), which can be based either on home market prices or on third country prices. Second, the price discrimination must be accompanied by an intent to injure, destroy or prevent the establishment of a US industry. Thus, the 1916 Act targets imports and is designed to protect US industries. The conduct which it prohibits or regulates is dumping, defined as a "substantial" difference between US prices and home market or foreign market prices. Therefore, the Act is intended to regulate dumping every bit as much as would a law that complied with Article VI of the GATT 1994 and the Anti-Dumping Agreement.

3.106 Japan argues that the provisions of the 1916 Act show that the conduct the Act targets is the same as dumping as defined by Article VI of the GATT 1994 and by the Anti-Dumping Agreement:

(a) The US price must be lower than normal value (the comparison price).

(b) The US price must be adjusted for freight, customs duty and other expenses incident to importation to ensure comparability to the comparison price.

(c) The comparison price can be based either on home market prices or on third country prices.

3.107 Japan further submits that beyond the core concept of dumping, the 1916 Act also mirrors expressions stipulated in Article VI of the GATT 1994 by requiring injury to a domestic industry to warrant relief.

3.108 Japan considers that this comparison shows that the precise wording used in the 1916 Act and in Article VI:1 of the GATT 1994 may vary, but their essential concepts are identical. The addition of other qualifying elements on the core features of the law does not alter the fundamental nature of the 1916 Act as an anti-dumping law.[94] For example, requiring the US price to be "substantially" less than the comparison price does not change the fundamental nature of the international price discrimination targeted.[95] Likewise, whether the "injury" to the domestic industry is intentional or not, the fundamental requirement of injury to the US industry remains the same. The 1916 Act may reach only a subset of commercial instances of dumping - that is why the US Congress later passed other laws - but the Act provides for action against that subset and, thus, constitutes a remedy against dumping.

3.109 Japan argues, moreover, that if such additional qualifications could somehow change the fundamental nature of the law, then virtually no anti-dumping law in the world could be considered an anti-dumping law. Many national anti-dumping laws vary from Article VI of the GATT 1994 and the Anti-Dumping Agreement. These variations, however, do not change their fundamental nature as anti-dumping remedies.

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[94] Japan argues that, just as a WTO Member can choose not to have a domestic anti-dumping law, it can choose to limit its ability to impose anti-dumping duties by including in its national law criteria and conditions stricter than those required by the GATT 1994 and the Anti-Dumping Agreement. Thus, the fact that the 1916 Act addresses only dumping that occurs "commonly and systematically" at a "substantially less" price does not alter the conclusion that the Act is an anti-dumping law and is subject to the requirements of Article VI of the GATT 1994 and the Anti-Dumping Agreement.

[95] Japan argues, moreover, that the Anti-Dumping Agreement has an analogous concept. The Anti-Dumping Agreement clarifies that insubstantial price differences - those that produce only *de minimis* dumping margins - do not constitute dumping. Japan refers to Article 5.8 of the Anti-Dumping Agreement. The Anti-Dumping Agreement thus includes the requirement that the margin be substantial, just like the 1916 Act.

3.110 The **United States** submits that Japan cannot dispute that there are significant differences between the 1916 Act and the anti-dumping rules. As a trade remedy, the anti-dumping rules are triggered only in response to the practice of "dumping", i.e. a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost, which causes "material injury" to producers of the product in the importing country. Once these facts are established, the investigating authorities may impose duties to offset prospectively the injurious dumping.

3.111 The United States argues that, in contrast, under the 1916 Act, mere dumping is not enough.[96] The complainant must show price discrimination which is common and systematic as well as substantial, and the complainant must demonstrate a predatory intent.[97] There is also no requirement that actual or threatened "material injury" to a domestic industry be shown. The complainant instead is required to show damages to its business or property. Thus, while an importer may violate the 1916 Act, it cannot be said that the same facts would satisfy the requirements for the imposition of anti-dumping duties.

3.112 In response to a question of the Panel regarding which criteria other than the "commonly and systematically" and "price substantially below" requirements are different from the Article VI definition of dumping, the United States notes that the 1916 Act addresses a particular type of price discrimination, namely, predatory pricing. For that reason, the price discrimination test in the 1916 Act includes not just the language quoted by the panel, but also the additional language describing the predatory intent that is required to be shown.

3.113 The United States concedes that the 1916 Act, like the Article VI definition of dumping, requires a showing that the product at issue has been sold in the United States at a price that is lower than the price at which that product has been sold abroad. However, the US price and the foreign price under the 1916 Act are not the same as the US price and the foreign price under the Article VI definition of dumping. The basic differences are as follows:

(a) As to the US price, the 1916 Act provides only that the US price is the "price" at which the product at issue is imported or sold "within" the United States. In contrast, the US price found in the Article VI definition of dumping, as further described in

[96] The United States notes, in addition, that neither the heading of the 1916 Act nor its text uses the word "dumping".

[97] In response to a question of Japan regarding whether the United States would still consider Title VII of the Tariff Act of 1930 to be an anti-dumping law within the meaning of Article VI and the Anti-Dumping Agreement if the phrases "commonly and systematically" and "substantially" were added to the pertinent paragraph of Section 731, the United States notes that the hypothetical amendment would not seem to remove that law, as amended, from the coverage of Article VI. According to the United States, it would still be an anti-dumping law, as it requires findings of "dumping" and "injury," and it would still impose a border adjustment in the form of a duty. A Member may impose, as some Members currently do, requirements for the imposition of anti-dumping duties which go beyond the minimum requirements of "dumping" and "injury" set forth in Article VI, provided that those additional requirements serve to limit, rather than expand, the availability of anti-dumping duties, without necessarily removing the law from the coverage of Article VI. In response to a follow-up question of Japan regarding whether the answer would be the same if the requirement of intent is further added, the United States notes that, if the hypothesized intent is simply an intent to "dump" and cause "injury" within the meaning of Article VI, then the hypothesized law would seem to remain within the coverage of Article VI for the reasons discussed above. If the hypothesized intent is a predatory intent, the answer depends on how the inquiry into predation is incorporated into the law. If, for example, the law now required a finding of injury to competition instead of a finding of "injury" within the meaning of Article 3 of the Anti-Dumping Agreement, it would no longer seem to be an anti-dumping measure governed by Article VI. If, on the other hand, the law somehow retained the finding of "injury" within the meaning of Article 3 of the Anti-Dumping Agreement and did not require any finding of injury to competition, it would seem to remain within the coverage of Article VI for the reasons discussed above.

Article 2 of the Anti-Dumping Agreement, is normally the price in the United States that is "made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time" as the price used for the foreign price, known as "normal value," with "[d]ue allowance […] made […], on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."[98] In certain circumstances, however, a "constructed export price" is used to determine US price, and in that event "allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should [...] be made" in addition to the allowances described above.[99]

(b) As to the foreign price, the 1916 Act provides that it is "the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States." This price is similar to, but nevertheless different from, the foreign price found in the Article VI definition of dumping, as further described in Article 2 of the Anti-Dumping Agreement. This foreign price, or "normal value," the price in the exporting country that is "made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time" as the price used for the US price, with "[d]ue allowance [...] made [...], on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."[100] In certain circumstances, however, instead of the price in the exporting country, "normal value" is based on the price in "an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[101]

3.114 The United States further argues that a review of the various substantive and procedural requirements of the 1916 Act confirms that they are the same as, or similar to, the requirements applicable under US anti-trust statutes.[102] In particular, a comparison of the 1916 Act with US anti-trust statutes shows, either on the basis of the plain language of the statutes or as interpreted by the courts, as follows:

(a) The 1916 Act requires a finding of price differences, like the Robinson-Patman Act.[103] The price differences under the 1916 Act, of course, must be "substantial" in amount and undertaken "commonly and systematically", while the Robinson-Patman Act only requires two sales to different buyers at different prices.[104]

[98] The United States refers to Article 2.4 of the Anti-Dumping Agreement.
[99] The United States refers to Articles 2.3 and 2.4 of the Anti-Dumping Agreement.
[100] The United States refers to Article 2.4 Anti-Dumping Agreement.
[101] The United States refers to Article 2.2 of the Anti-Dumping Agreement.
[102] In response to a question of Japan, the United States answers, however, that the 1916 Act is not among those laws regularly enforced by the Department of Justice and the Federal Trade Commission. Hence the United States sometimes uses the term "anti-trust-type statute" when referring to the 1916 Act.
[103] The United States refers to 15 U.S.C. 13(a).
[104] The United States refers to *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, p. 417, citing E. Kintner, A Robinson-Patman Primer, 3d ed. (1979), p. 35.

(b) The 1916 Act requires a finding that the pricing at issue be undertaken with a specific predatory intent. This predatory pricing requirement is similar to that found in Section 2 of the Sherman Act and in so-called primary line cases under the Robinson-Patman Act.[105]

(c) The 1916 Act applies to Articles of "like grade and quality", just as that term is used in the Robinson-Patman Act.[106]

(d) The statute of limitations for bringing a lawsuit under the 1916 Act is the same as that under the Clayton Act and the Robinson-Patman Act, i.e. 4 years.[107]

(e) The 1916 Act provides for enforcement through either a civil lawsuit brought by a private party before a US court or a criminal prosecution brought by the US Department of Justice. These remedies mirror those available under the anti-trust laws including the Sherman Act, the Clayton Act and the Robinson-Patman Act.

(f) The issue of whether a private party has the requisite standing to bring a 1916 Act lawsuit is determined by reference to anti-trust standing principles.[108]

(g) The 1916 Act authorizes the award of treble damages to a successful private litigant. This remedy is somewhat unusual under US civil law, but it is a common remedy for violations of US anti-trust statutes. Indeed, in the third paragraph of the 1916 Act, the US Congress basically replicated the then-existing language of Section 4 of the Clayton Act[109] and Section 7 of the Sherman Act[110] which authorized treble damages for "any person who shall be injured in his business or property" by reason of any conduct proscribed by US anti-trust laws.

(h) With regard to its criminal provisions, the 1916 Act is virtually identical to, and specifies the same penalties as, the criminal provisions of the Sherman Act in force in 1916.

3.115 **Japan** considers that the addition of qualifying elements to the core features of the law does not alter the fundamental nature of the 1916 Act as a anti-dumping law. The fact that the 1916 Act addresses only dumping that occurs "commonly and systematically" at a "substantially less" price does not alter the conclusion that the 1916 Act is an anti-dumping law and is subject to the requirements of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Just as a WTO

[105] The United States notes that neither of those Acts normally requires proof of intent, at least in civil cases. There is an intent requirement in some anti-trust (Sherman Act) criminal cases. The United States refers to ABA, *Anti-trust Law Developments (Fourth)*, p. 662-64.

[106] The United States refers to *Zenith III*, Op. Cit., p. 1223. The United States recalls that the *Zenith III* court explained that "we find that the same standard of 'like grade and quality' limited product comparisons under section 2 of the Clayton Act prior to the Robinson-Patman amendments. Since the Clayton Act was passed in 1914, the same standard is applicable under the Antidumping Act of 1916." The United States refers to ibid., pp. 1226-27.

[107] The United States refers to *Helmac I*, Op. Cit., pp. 566-67, where, according to the United States, the court relied on the purpose of US Congress in enacting the 1916 Act to interpret the 1916 Act as having same statute of limitations as other anti-trust statutes, where the 1916 Act did not set forth applicable statute of limitations.

[108] The United States refers to, e.g., *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, Op. Cit., pp. 988-89; *Jewel Foliage Co. v. Uniflora Overseas Florida*, Op. Cit., p. 516; *Schwimmer v. Sony Corp.*, Op. Cit., pp. 796-97.

[109] The United States notes that the relevant Clayton Act language can be found at 38 Stat. 731 (1914).

[110] The United States notes that the relevant Sherman Act language can be found at 26 Stat. 210 (1890). The US Congress later amended this part of the Sherman Act.

Member can choose not to have a domestic anti-dumping law, it can choose to restrict its ability to impose anti-dumping duties beyond the limits imposed by the Anti-Dumping Agreement. Any Member is free to include in its national law criteria and conditions stricter than those required by Article VI and the Anti-Dumping Agreement. However, a Member may not, as the United States has done, depart from Article VI and the Anti-Dumping Agreement to make it easier to impose anti-dumping duties or to allow other remedies.

3.116 Japan is of the view that the text of the 1916 Act is unequivocal. That is why Japan believes that the United States intentionally avoids a textual interpretation of the 1916 Act. However, as the Appellate Body has made clear on numerous occasions, under the rules of treaty interpretation, the Panel's primary focus should be the text.

3.117 The **United States** considers that Japan makes several unsupportable statements with regard to the text of the 1916 Act. At one point, Japan states that "[t]he issue is not what US courts say […]." Japan even states that the text of the 1916 Act is "unequivocal," despite the fact that it later discusses the differing interpretations of that text reached by US courts in the *Zenith* line of cases and the preliminary decisions in *Geneva Steel* and *Wheeling-Pittsburgh*.

3.118 In the United States' view, an examination of the text of the 1916 Act is sufficient to show that the 1916 Act is outside the scope of Article VI. First, at the very least, the 1916 Act can be seen from its text to be an "internal" law. It imposes damages on importers; it does not impose a border adjustment in the form of a duty on imported products. That aspect of the 1916 Act - the nature of the measure imposed in application of the law - removes any doubt as to whether Article VI governs the 1916 Act. An "internal" law is only subject to Article III of the GATT 1994. It cannot be subject to Article VI. Article VI only governs a Member's use of a border adjustment in the form of an anti-dumping duty. Second, the text of the 1916 Act also indicates, very plainly, that it is not an anti-dumping law or measure attempting to counteract injurious dumping based on findings of "dumping" and "injury". The true nature of the 1916 Act, as an anti-trust statute, may be more difficult to discern simply from the text of the 1916 Act, but the case law interpreting the 1916 Act removes any doubt on this point.

3.119 The United States recalls that Japan attempts to characterise the 1916 Act as an anti-dumping law not by addressing the distinctions between anti-trust and anti-dumping, but rather by arguing that the "essential concepts" of the 1916 Act and Article VI are "identical". According to Japan, both the 1916 Act and Article VI regulate international price discrimination. In making this argument, Japan never addresses the obvious absence of the essential Article VI requirement of "injury" from the 1916 Act. Furthermore, in attempting to characterise the 1916 Act as simply a law addressing international price discrimination, Japan tries to minimise the significance of the predatory intent element of the 1916 Act, among others. It states that "the addition of qualifying elements on the core features of the law does not alter the fundamental nature of the Anti-Dumping Act of 1916 as an anti-dumping law." Nevertheless, however it is characterised, the fact remains that to succeed under the 1916 Act, a plaintiff must plead and prove many elements that make it qualitatively different from a measure designed to remedy injurious dumping. Foremost among these elements is the required showing of predatory intent.

3.120 The United States notes that, essentially, Japan is reading into Article VI the limitation that all laws with any kind of international price discrimination component must conform to the anti-dumping rules. If this were true, it would extend the anti-dumping rules far into a realm which pre-dated them and whose objectives, underlying principles and targeted conduct are quite different, namely, the realm of anti-trust laws.

3.121 **Japan** notes that, although the United States now asserts that the textual interpretation of the Act is important, the United States persists in arguing that the Panel is bound by one particular interpretation of the 1916 Act by one of its courts. This is inconsistent.

3.122 Japan also recalls the 1916 Act's proviso that its sanctions apply only when the dumping is undertaken with the intent to injure or destroy or prevent the establishment of a US industry. The dumping element is the exclusive criterion for determining whether the 1916 Act falls under the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Injury is an additional element that is required in order to impose anti-dumping duties when dumping exists. The 1916 Act indisputably is directed at protection of competitors rather than protection of competition. It is clear that the 1916 Act regulates dumping, not anti-trust. The United States seems to argue that "intent to injure" is different from "injury to domestic industry", and therefore the 1916 Act is not an anti-dumping law but an anti-trust law. This is incorrect. "Predatory intent" is a concept that exists in anti-trust laws; it is not a 1916 Act concept.

3.123 Japan also notes that in reply to Japan's questions, the United States concedes that anti-dumping laws do not cease to be anti-dumping laws merely because they contain "additional requirements [that] serve to limit, rather than expand, the availability of antidumping duties […]."

3.124 The **United States** submits that Japan's assertion that "predatory intent" is not a 1916 Act concept, is clearly contradicted not only by the US court decisions such as *Zenith III* and the legislative history they discuss, but even by the preliminary *Geneva Steel* and *Wheeling-Pittsburgh* decisions on which Japan relies. Judge Sargus in *Wheeling-Pittsburgh* characterised the intent required under the 1916 Act as a "predatory intent". And, Judge Benson in *Geneva Steel*, recognized that proof of a monopolistic "recoupment" scenario would be sufficient and relevant, but decided that other sorts of injurious "intent" might also be shown.

3. The distinction between anti-dumping laws and anti-trust laws

3.125 **Japan** contends that in the United States, as elsewhere, anti-trust (or competition policy) statutes protect "competition, not competitors".[111] In the landmark US anti-trust case *Brown Shoe*, Supreme Court Chief Justice Earl Warren opined that the Cellar-Kefauver Amendment to the Clayton Act was created to "restrain mergers only to the extent that such mergers may tend to lessen competition."[112] The Chief Justice looked to the legislative history of the Amendment and found that Congress had intended to protect competition in markets, not companies competing in the markets (much less domestic industries). In *Brunswick*[113] the Supreme Court reaffirmed 25 years later that anti-trust laws protect "competition not competitors"[114].

3.126 Japan argues that anti-dumping statutes, on the other hand, protect domestic industries from the unfair trade practice of dumping by foreign competitors.[115] For example, under Article VI of the GATT 1994, the Anti-Dumping Agreement and the US Tariff Act of 1930, anti-dumping duties

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[111] Japan refers to *Brown Shoe Co., Inc. v. United States*, 370 US 294, p. 319 (1962) (hereinafter "*Brown Shoe*"), where the court upheld action to enjoin merger of two shoe corporations. Japan also refers to *Brunswick Corp. v. Bowl-O-Mat, Inc*., 429 US 477, p. 490 (1977) (hereinafter "*Brunswick*")

[112] Japan refers to *Brown Shoe*, Op. Cit., p. 319.

[113] Japan refers to *Brunswick*, Op. Cit., p. 488, where the court rejected as not cognizable under US anti-trust law Pueblo Bowl-O-Mat's claim of injury (reduced profits) due to Brunswick's purchase and reinvigoration of a near-bankrupt competitor.

[114] Japan refers to ibid.

[115] Japan refers to *J.C. Penney Co. v. Department of the Treasury*, 319 F. Supp. 1023, 1024 (S.D.N.Y 1970), aff'd, 439 F.2d 63 (2d Cir.), cert. denied, 404 US 869 (1971) where it is stated that anti-dumping laws prevent "actual or threatened injury to a domestic industry resulting from the sale in the United States market of merchandise at prices lower than in the home market." Japan also refers to *Timken v. Simon*, 539 F. 2d 221, 223 (1976).

cannot be imposed unless the dumping is causing material injury or threat thereof to (or is retarding the establishment of) a US industry. The International Trade Commission, in evaluating claims under the Tariff Act, follows the statutory test and bases its decision on whether there is material injury to the relevant US industry.[116]

3.127 Japan considers that, like the Tariff Act of 1930 and its predecessor, the Anti-dumping Act of 1921, the 1916 Act was enacted to protect domestic industries from dumping by foreign companies. As discussed above, this is evident from the plain language of the statute, which forbids the dumping of products "with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States."[117] The text of the 1916 Act text confirms that the Act protects domestic industries and this fact, in turn, confirms that the 1916 Act is an anti-dumping law.

3.128 The **United States** notes that Japan draws a complete dichotomy between anti-trust laws and their pursuit of consumer welfare, and trade laws and their focus on producer welfare in an apparent attempt to argue that any hint of US Congressional concern for the welfare of individual enterprises removes a law from the anti-trust ambit. Such a dichotomy exaggerates and distorts reality. The United States agrees entirely that the principal aim of United States anti-trust laws is to protect competition, not competitors or particular industries.[118] However, while the purpose of many, if not most, anti-trust laws is to preserve the competitive process in order to enhance economic efficiency and increase consumer welfare, it is also true that quite a number of anti-trust laws, in the United States and other countries, may have additional purposes, including the protection of small enterprises or other individual competitors. Anti-trust laws that pursue objectives other than just economic efficiency are not thereby deprived of their "anti-trust" character.

3.129 The United States states that one example of alternative anti-trust purposes can be found in the United States' Robinson-Patman Act, where, in the "secondary line" context (in which certain distributors of a good receive less advantageous sales terms than other distributors), the statutory concern is for adverse effects on individual competitors rather than competition itself.

3.130 The United States argues that other examples can readily be found in Japan's own anti-trust laws and enforcement guidelines. Section 19 of the Anti-Monopoly Act prohibits "unfair business practices", including price discrimination and "unjust low-priced sales" or "unfair price-cutting". The Japan Fair Trade Commission (hereinafter "JFTC") has defined these terms as:

> "Without proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs."[119]

3.131 According to the United States, the JFTC further defined "tending to cause difficulties to other entrepreneurs" to include "a recognized possibility of such disruption"; an "actual disruption" is not necessarily required. In FY 1998 the JFTC reported that it had issued one warning and 506 "cautions" to enterprises regarding "unjustified" low prices. These rules apply to imported as well as domestic goods; in addition, the JFTC is now applying the Anti-Monopoly Act to cross-border

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[116] Japan refers to, e.g., *Copperweld v. United States*, 682 F. Supp. 552 (Ct. Int' l Trade 1988). Japan also refers to *Gerald Metals v. United States*, 937 F. Supp. 930 (Ct. Int'l Trade 1996).

[117] Japan refers to 15 U.S.C. § 72 (1999).

[118] The United States refers to, e.g., *Brooke Group*, Op. Cit., and *Brown Shoe*, Op. Cit., p. 320.

[119] JFTC, Executive Bureau, Guidelines Concerning Unfair Price Cutting (Nov. 20, 1984).

transactions.[120] Clearly, some provisions of Japan's anti-trust law seem to be designed to protect competitors as well as competition.[121]

3.132 **Japan** maintains its view that there are clear and fundamental differences between anti-dumping laws and anti-trust laws.[122] Anti-trust statutes protect competition, not competitors, and regulate competition within a country.[123] In contrast, anti-dumping statutes protect domestic industries from the unfair practice of dumping by foreign competitors. More particularly, anti-dumping regulates price differentials between sales in two countries.

3.133 Japan considers that anti-trust laws have the primary and essential concern of protecting competition in the single domestic market. "International price discrimination", or price differentials between goods in the exporting country's market and the importing country's market (here, the United States) does not fall within the scope of this concern. Anti-trust laws prohibit domestic price discrimination in order to protect competition in the domestic market only. And, as discussed below regarding the United States' Article III:4 violations, this is true regardless of whether goods are imported or domestic. A careful comparison of the differences between anti-dumping and anti-trust laws demonstrates that the 1916 Act does not address anti-trust concerns.

3.134 In the view of Japan, the 1916 Act clearly focuses on "international price discrimination"[124]; therefore, in no way can it be interpreted as an anti-trust law. It is very clear that the conduct addressed by the 1916 Act includes the essential concepts of dumping; therefore, the 1916 Act must comply with Article VI of the GATT 1994 and the provisions of the Anti-Dumping Agreement.

3.135 Japan submits that, in any event, the present proceeding does not require the Panel to promulgate a rule of general application or otherwise burden itself by trying to elucidate the distinction between anti-trust laws and anti-dumping laws.[125] Japan clarifies these distinctions only to

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[120] The United States refers to BNA, Int'l Trade Reporter, Vol.15 No. 26, p. 1131 (1 July 1998), entitled "US, Canadian Companies Involved in Cases Launched Under Japan's Antimonopoly Law".

[121] The United States notes that a similar example is provided by the very recent decision of the German Supreme Court to uphold a German agency's ban on "unfair" US exports of consumer goods by the Lands End catalogue operation to Germany that were accompanied by the company's usual unconditional refund guarantee, a guarantee that the German authorities reportedly found "economically irrational." The United States refers to The Washington Post ("Business Digest"), September 25, 1999; Associated Press, "US Retailer's Advertisements Banned," September 24, 1999.

[122] In response to a question of the United States regarding whether there is a commonly accepted international standard for what constitutes an anti-trust law, Japan notes that such a standard is being developed, as shown by the discussions on trade and competition in the WTO. Whatever the precise terms of the standard eventually agreed upon, it is clear from the current state of discussions that the 1916 Act is a trade law and will not fall within the standard. More importantly, there *is* a commonly accepted international standard for an anti-dumping law – Article VI of the GATT 1994 and the Anti-Dumping Agreement.

[123] Japan considers that the United States attempts further to cloud this issue by calling attention to Japan's Anti-Monopoly Law. First, the topic of how Japan determines and enforces its anti-trust laws is irrelevant to the present proceeding. Second, the US presentation is factually inaccurate. Japan's law is designed to protect competition, not competitors. Specifically, as stated in Section 1 of the Law, the Law is intended to "promote fair and freer competition, […] to assure the interests of Japan's consumers." Moreover, it does not apply to "cross-border price discrimination" or dumping. Also, for the record, Japan notes that in FY1998 the JFTC issued 599 cautions to enterprises regarding unjust low-price sales, not 506, as the US claims.

[124] Japan refers to, e.g., "Overview and Compilation of U.S. Trade Statutes", US House of Representatives, US Government Printing Office (Washington: 1997), p. 65.

[125] Japan refers to the Appellate Body Report on *United States - Shirts and Blouses*, Op. Cit., p. 23, where it is stated that "Article 3.2 of the DSU states that the Members of the WTO "recognize" that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and *to clarify the existing provisions of those agreements* in accordance with customary rules of interpretation of public international law" (emphasis added). Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body

help the Panel better understand the 1916 Act's inconsistency. When one focuses on the conduct regulated by the clear, unambiguous text of the 1916 Act, the character of the Act is manifest. It regulates dumping. The issue is not one of anti-trust, and this Panel's judgement in Japan's favour will have no bearing on Members' anti-trust laws.

3.136 The **United States** considers that Japan's conclusion that competition laws never protect competitors, but only the competitive process is simplistic. First, the Robinson-Patman Act arguably addressed the protection of competitors, as well as competition, in "primary line" cases prior to the 1993 *Brooke Group* decision, and still does so in the "secondary line" context. Second, the United States finds it difficult to grasp how the Japan Fair Trade Commission's "Guidelines Concerning Unfair Price Cutting" protect competition rather than competitors, as Japan claims. This one measure led to 599 "cautions" to enterprises in FY 1998 alone, according to Japan. The Guidelines themselves state at Section 3(2) that

> "[…] the second characteristic of unfair price-cutting is the fact that it "tend[s] to cause difficulties to the business activities of other entrepreneurs."

3.137 In response to a question of the Panel regarding the basic features of anti-dumping laws as opposed to anti-trust laws, **Japan** reiterates its view that anti-trust statutes protect competition, not competitors and regulate competition within a country. In contrast, anti-dumping statutes protect domestic industries from the unfair practice of dumping by foreign competitors. More particularly, anti-dumping laws regulate the price differential between sales in two countries. Careful comparison of those fundamental differences between anti-dumping and anti-trust laws enables one to conclude that the 1916 Act is not intended for anti-trust purposes.

3.138 The **United States**, in reply to the same question of the Panel, considers that anti-dumping rules and competition laws have different objectives, are founded on different principles, and seek to remedy different problems. Anti-dumping rules are not based on the economic assumptions that underlie most Members' competition laws, nor are they intended as a remedy for the predatory pricing practices of firms or as a remedy for any other private anti-competitive practices typically condemned by competition laws. Rather, the anti-dumping rules are a trade remedy which WTO Members have agreed is necessary to the maintenance of the multilateral trading system. Without this and other trade remedies, there could have been no agreement on broader GATT 1947 and later WTO packages of market-opening agreements, especially given the imperfections which remain in the multilateral trading system.

3.139 The United States argues that, as a trade remedy, the anti-dumping rules are triggered only in response to the practice of "dumping," i.e. a situation where an exporter sells its product abroad at lower prices than it does at home or at prices that are below cost, which causes "material injury" to producers of the product in the importing country. Once these facts are established, the investigating authorities may impose duties to offset prospectively the injurious dumping.

3.140 The United States considers that, while this simple definition of injurious dumping may suggest comparisons with competition laws addressing price discrimination, any careful analysis shows major differences between the anti-dumping rules and the competition laws**.**

3.141 The United States notes, first of all, that the relatively straightforward nature of the test for injurious dumping contrasts with the complexities of the imperfections in the multilateral trading system which give rise to the need for the anti-dumping rules in the first place. Although some dumping may be due to business advantages and market segmentation which have arisen in response

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to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel needs only address those claims which must be addressed in order to resolve the matter in issue in the dispute." (emphasis in original).

to commercial forces, more typically it is a government's industrial policies or key aspects of the national economic system which a government has created, promoted or tolerated that enables injurious dumping to take place.

3.142 The United States contends that principally of concern in this regard are certain government industrial policies or practices which in most instances are not directly or fully subject to any type of WTO prohibitions or disciplines. In other instances, these policies or practices may not fully conform to WTO disciplines or, even if they do, may not leave all Members on an equal footing. These policies still are objectionable because they distort market structures or processes and, as a result, provide artificial advantages to home market producers (often at the expense of home market consumers). These artificial advantages generally translate into increased profits for these producers in their home market, which make it possible and, for various reasons, may encourage these producers to engage in injurious dumping abroad.

3.143 The United States submits that one broad category of objectionable policies can be found in government industrial policies which combine limits on domestic competition with market access barriers that keep out foreign competitors. Here, the possible combinations are quite extensive. On the one hand, the existence of only limited domestic competition may be due to many different types of industrial policies falling under the umbrella of government actions intended to influence the structure of the home market with the aim of affecting the number or type of producers, including (1) government policies limiting the number of producers in a particular industry, such as through the restrictive award of licenses, (2) state monopolies, (3) government policies favouring a "national champion" firm within an industry, (4) government policies which divide up and stabilize market shares, and (5) any of a variety of other government policies which regulate commerce by creating, promoting or tolerating monopolies or oligopolies or by favouring some domestic competitors over other domestic (and foreign) competitors. Protection against foreign competition, meanwhile, may be due to either high tariffs or any number of non-tariff barriers, such as (1) import charges, quantitative restrictions, import licensing and customs barriers; standards, testing, labelling and certification, including, for example, the acquiescence of a government in unwarranted regulations sought by industry, a government's unnecessarily restrictive application of sanitary and phytosanitary standards, and a government's refusal to accept foreign manufacturers' self-certification of conformance to home market product standards, (2) investment barriers, such as limitations on foreign equity participation and on access to government-funded research and development programs, local content and export performance requirements, and restrictions on transferring earnings and capital, (3) State trading rights, (4) services barriers, such as limits on the range of financial services offered by home market financial institutions, regulation of international data flows and restrictions on the use of foreign data processing, (5) lack of intellectual property protection, including inadequate patent, copyright and trademark regimes, (6) government procurement practices such as closed bidding and (7) bribery and corruption. Other general categories of objectionable policies include domestic price controls, government subsidization and certain state trading arrangements.

3.144 In the view of the United States, the anti-dumping rules are a practical, albeit indirect, response to these trade-distorting policies. The anti-dumping rules allow Members to respond through the imposition of offsetting duties when confronted with one harmful result of these policies, namely, injurious dumping in export markets by the producers that benefit from these policies. From this perspective, the anti-dumping rules represent an effort to maintain a "level playing field" among producers in different countries. Anti-dumping duties are designed to offset, quantitatively, the artificial advantages realized by the exporting country's producers so that producers in the importing country may compete, at least in the importing country's market, on equal footing with the exporting country's producers.

3.145 The United States considers that anti-dumping rules also help to neutralize inequities that may arise from differences in national economic systems, even as international trade liberalises. For

example, differing social and legal arrangements for employment and under-employment, or differing debt-equity structures and debt burdens, often made possible by indirect government intervention in the banking system, can favour the exporting country's producers over the importing country's producers and lead to injurious dumping. Other circumstances that can lead to injurious dumping can include certain competition-inhibiting private conduct, cross-subsidization that can result from the legal organization and operation of foreign business groupings and, in the case of non-market economies or some economies in transition, export directives and prices and costs not entirely based on market principles.

3.146 The United States notes, therefore, that the anti-dumping rules implicitly recognize that there is an accepted norm for the behaviour of governments in the broad multilateral trade context, i.e. a government should not pursue industrial policies which distort market structures or processes and thereby provide artificial advantages to domestic producers to the detriment of producers in other countries. The anti-dumping rules also recognize that there should be a remedy for certain harms caused when different economic systems interact.

3.147 According to the United States, competition laws, on the other hand, appropriately do not take these matters into consideration, and they do not address the underlying problems at which the anti-dumping rules are directed. Instead, competition laws remedy private pricing practices which, in themselves, are objectionable because they are anti-competitive in an anti-trust sense.

3.148 The United States points out that the primary objectives of competition policy, as expressed in competition laws, are to promote economic efficiency and to maximize consumer welfare through the optimal allocation of resources in competitive markets. Through the protection of the competitive process, competition law helps to ensure productive, allocative, and distributional efficiencies throughout the economy. Healthy competition, including potential competition, results in pressures to reduce costs and prices (static efficiency) and to introduce new and better products on the market (dynamic efficiency).

3.149 The United States argues that competition laws therefore are largely directed at the competitive practices of private firms and market structures, with the objective of assuring a competitive market. In some countries, the competition laws have additional, less central objectives, such as the preservation of a decentralized economy, support of small businesses or maintenance of economic and social stability.

3.150 The United States acknowledges that the anti-dumping rules address certain private pricing practices as do the competition laws. However, dumping practices are not anti-competitive in an anti-trust sense. The anti-dumping rules provide a remedy against injurious dumping as an indirect response to a foreign government's market-distortive industrial policies or differences in national economic systems. As a result, although dumping by foreign producers can, for example, send false signals to the importing country's market that distort investment patterns, dumping practices will not normally qualify as "anti-competitive" when analysed under the distinct rules of most national competition laws.

3.151 The United States recalls that, in the Working Group on the Interaction between Trade and Competition Policy in 1998, the European Communities addressed the distinction between anti-dumping and competition rules:

> "Anti-dumping law and competition law apply in different economic, legal and institutional contexts. Competition law prohibits and subjects to strict penalties certain forms of pricing behaviour by firms. While competition law applies in principle within the context of an integrated market, Antidumping law applies in an

economic setting which is still characterized by border measures and other regulatory obstacles and distortions of trade."[126]

3.152 The United States notes that, in addition, during the meeting at which the Working Group considered these papers, a representative of the European Communities "reiterated that the submission by his delegation argued that anti-dumping rules and competition rules applied in different economic, legal and institutional contexts and that therefore there could be no question of the replacement of one set of rules for the other, and no question of simply making a mechanical transposition from competition law into anti-dumping law of concepts which were intended to deal with a totally different kind of problem and underlay a totally different type of instrument."[127]

4. The reach of Article VI of the GATT 1994 and the Anti-Dumping Agreement

3.153 According to the **United States**, there is no support in the text of Article VI or the Anti-Dumping Agreement for Japan's implicit contention that those disciplines govern any measure based in any respect on the concept of international price discrimination. Nowhere does the text of Article VI or the Anti-Dumping Agreement state that its disciplines govern *any* law based upon the concept of price discrimination *regardless* of any other elements required to be proven under the law.

3.154 The United States argues, moreover, that to read into the text of Article VI the limitation that all laws with any kind of international price discrimination component must conform to the anti-dumping rules would extend the anti-dumping rules far into a realm which pre-dated them and whose objectives, underlying principles and targeted conduct are quite different - namely, the realm of anti-trust (or competition) laws.

3.155 The United States considers that the anti-dumping rules and anti-trust laws have different objectives, are founded on different principles, and seek to remedy different problems. The anti-dumping rules are not intended as a remedy for the predatory pricing practices of firms or for any other private anti-competitive practices typically condemned by anti-trust laws.

3.156 The United States argues that, in contrast, anti-trust laws remedy, among other things, private pricing practices which are objectionable because they are instruments of cartelization, monopolisation or abuse of dominant position. Broadly speaking, anti-trust laws target conduct which restricts economic freedom for consumers and competitors.[128] While it is true that the anti-dumping rules address certain private pricing practices, it is not because these pricing practices - that is, injurious dumping practices - are anti-competitive in an anti-trust sense. Injurious dumping practices will not normally qualify as "anti-competitive" when analysed under the distinct rules of most national anti-trust laws.

3.157 The United States notes, in summary, that a review of the text and the objectives of the two sets of rules confirms that Article VI and the Anti-Dumping Agreement do not govern every single rule that references price discrimination regardless of the law's other requirements. The 1916 Act is not directed at the simple price differences that constitute dumping under the anti-dumping rules, nor is it based on the notion of material injury to a domestic industry. Therefore, because the 1916 Act is an anti-trust-type statute, it is not governed by Article VI and the Anti-Dumping Agreement.

3.158 The United States considers, furthermore, that if the Panel were to accept Japan's argument and rule that Article VI and the Anti-Dumping Agreement apply to all forms of international price discrimination, and regardless of the nature of the injury sustained, the 1916 Act would not be the only casualty. Such a ruling would seem to mean that other Members' attempted monopolisation or

[126] The United States refers to document WT/WGTCP/W/78.
[127] Report on the Meeting of 27-28 July 1998, WT/WGTCP/M/5, 25 September 1998, para. 71.
[128] The United States refers to *Northern Pacific Railway v. United States*, 356 US 1, p. 4 (1958).

abuse of dominance laws, such as those in Japan and the European Communities, would be WTO-illegal to the extent that those laws address attempted monopolisation or an abuse of dominance undertaken through predatory, cross-border pricing practices. That result could not have been intended by Article VI or the Anti-Dumping Agreement.

3.159 In reply to a request of the Panel for clarification of its argument, the United States notes that the broad interpretation of Article VI advocated by Japan and the European Communities would seem to preclude any legal remedies whatsoever against international price discrimination other than the imposition of offsetting duties particularly described in the WTO agreements. Logically, this would render inoperative any aspect of a Member's anti-trust/competition law applicable to cross-border predatory pricing practices. In the United States this would include at least Sections 1 and 2 of the Sherman Act[129], or perhaps even predatory pricing claims under the Robinson-Patman Act, if the goods in question were imports (and sold at predatory levels by US affiliates or agents of the exporters). In the EU it would encompass Article 82 of the Treaty of Amsterdam and similar Member State legislation (German and French law, for example), and, in Japan, aspects of the Anti-Monopoly Act. Even where low prices in the enforcing state's territory are not expressly and consistently compared with higher prices in the exporting state, an anti-trust law might proscribe predatory selling prices for imported (as well as domestic) goods.[130] If "anti-dumping duties" are suddenly deemed to be the exclusive remedy in all circumstances against low-priced imports, then the future of these kinds of anti-trust remedy is questionable.

3.160 The United States further notes that, to the extent that its Anti-Monopoly Act proscribes low-pricing of imported goods, Japan's own competition enforcement policies could be jeopardized by arguments for the exclusivity of Article VI. This could include enforcement of the Act's provisions against monopolisation and "unfair trade practices." According to the Japan Fair Trade Commission, such unfair trade practices include "refusal to deal, discriminatory pricing, dumping and resale price maintenance."[131] The exclusive scope argued for Article VI of the GATT 1994 might also prevent continued use of the JFTC's "Guidelines Concerning Unfair Price Cutting" insofar as they are applied against low-priced imported goods.

3.161 The United States argues that, likewise, European Union "abuse of dominance" cases such as *TetraPak II*[132] or even actions such as the Commission's 1997 decision on Boeing's acquisition of McDonnell Douglas[133] could be suspect, since they included allegations that foreign enterprises used dominant positions in international markets to engage in predation within the EU. Given the motivations of the European Communities to integrate previously separate national markets, geographic price-discrimination is often regarded with concern by Brussels.[134]

3.162 **Japan** responds that, regardless of precisely where anti-trust laws begin and end, the global trading community has decided where anti-dumping law begins and ends and the two types of laws

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[129] In response to a question of the Panel, the United States notes that the Sherman Act does not expressly mention price discrimination, but it indirectly addresses international price discrimination when it is a factual element in a monopolisation case based upon predatory pricing (including cases involving attempts or conspiracies to monopolise).

[130] The United States considers that the enforcement concern necessarily would be upon adverse economic effects within the enforcing state, not outside of it. As the Panel is aware, monopolisation (and abuses of dominance) cases require the identification of an appropriate relevant market within national anti-trust jurisdiction. Such a market could, in geographic terms, encompass a part of the enforcing state's territory, or all of it, or even a broader area in which the enforcing state would be a part (e.g., "regional" or "global" markets).

[131] The United States refers to the "Overview of the Anti-Monopoly Act," found at "www.jftc.admix.go.jp/e-page/ama.htm")

[132] The United States refers to [1997] 4 CMLR 662 (ECJ 1996).

[133] The United States refers to Decision of 30 July 1997, C (97) 2598.

[134] The United States refers to Springer, Borden and United Brands Revisited: a Comparison of the Elements of Price Discrimination under E.C. and U.S. Law, 1 ECLR 42 (1997).

are distinct. When one focuses on the conduct regulated by the clear, unambiguous text of the 1916 Act, the character of the 1916 Act is manifest. It regulates dumping.[135] The issue is not one of anti-trust, and this Panel's judgement in Japan's favour will have no bearing on Members' anti-trust laws.[136]

3.163 Japan also recalls that the issue in the present proceeding is not the scope of other Members' anti-trust laws, but whether the 1916 Act is inconsistent with WTO provisions. The United States attempts to once again shift the Panel's attention to Japan's and the EU's anti-trust or competition laws. This is irrelevant and, moreover, is not within the present Panel's terms of reference.

3.164 Japan notes, finally, that the United States claims, in its answer to a question of the Panel, that Japan's own competition policies could be jeopardised by Japan's argument for the exclusivity of Article VI. The United States quotes the word "dumping" completely out of the context in which it is used in the Japan Fair Trade Commission's unofficial English language home page and makes a misguided assertion. Examination of the authentic Japanese version of "'Unfair Trade Practices' Fair Trade Commission Notification No.15, June 18, 1982" demonstrates with absolute clarity that Japan's Anti-Monopoly Act regulates "unfair low price sales" and not "international price discriminations" as alleged by the United States. The word "dumping" is used in the alleged home page of the Japan Fair Trade Commission only in a generic sense to denote "unfair low price sales" for the sake of ease of understanding by the general public.[137]

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[135] Japan notes, in response to a question of the Panel regarding the scope of Article VI and the Anti-Dumping Agreement, that they address international price discrimination where prices in the importing market are lower than prices in the exporting market. Where these conditions giving rise to this type of international price discrimination are met, a law, whatever it may be called, is an anti-dumping measure and must conform to Article VI and the Anti-Dumping Agreement. In response to a similar question of the United States regarding whether Article VI and the Anti-Dumping Agreement would apply to any law based upon the concept of international price discrimination regardless of any other elements to be proven under the law, Japan notes that Article VI of the GATT 1994 and the Anti-Dumping Agreement govern any and all laws and regulations that are aimed at countering international price discrimination as defined under those provisions. Requiring that other elements be proven does not change whether a law is governed by Article VI and the Anti-Dumping Agreement. A Member cannot avoid its obligations under Article VI and the Anti-Dumping Agreement simply by adding, altering or deleting an element. In addition, a Member cannot avoid its obligations by adding impermissible penalty provisions different from or more stringent than that allowed by Article VI and the Anti-Dumping Agreement.

[136] In response to a question of the United States, Japan notes that "predatory pricing practices" as that phrase is used in anti-trust laws need not comport with the requirements of Article VI and the Anti-Dumping Agreement.

[137] In response to a question of the United States regarding whether Japan agrees that the word "dumping" may be used in a context that does not fall within Article VI or the Anti-Dumping Agreement, Japan notes that the word "dumping" can include various concepts and does not necessarily mean "international price discrimination" under Article VI of the GATT 1994. For example, in the panel report on *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/R, the term "dumping" refers to the act of a refiner, blender or importer mixing into conventional gasoline fuel components that are restricted in reformulated gasoline. Japan refers to paragraph 2.4 of the panel report. However, here Japan is focusing on the issue of dumping as defined by Article VI of the GATT 1994 and the Anti-Dumping Agreement. Thus, all other definitions of "dumping" are irrelevant. In response to another question of the United States, regarding whether the JFTC is responsible for the content of the English language web site, Japan confirms that this is the case. However, the reference to "dumping" occurs only once in its English home page, where the JFTC gives a very general overview of the Anti-Monopoly Act of Japan for the sake of ease of understanding by the general public. In any event, Japan considers the type of semantic debate the United States has initiated here is totally irrelevant to the present case and only serves to cloud the important issues the present proceeding raises. Japan argues that in order to ascertain the legal meaning and connotation of a Japanese Act, one must always refer to the authentic copy of the Act and the Notification, which is available only in Japanese. Thus, the US assertion is misguided and unwarranted.

3.165 The **United States** rejects Japan's attempt to downplay the necessary implications of its position in the present case with regard to other anti-trust laws. Japan's argument seems to boil down to its contention that anti-trust laws govern only *domestic* price discrimination and therefore no anti-trust rules would be affected by a finding by this Panel that *international* price discrimination measures must comport with Article VI and the Anti-Dumping Agreement.

3.166 The United States notes that it cannot agree. Japan's broad statement that anti-trust rules govern only domestic price discrimination does not comport with reality. In the United States, the Sherman Act and parts of the Clayton Act clearly apply to foreign conduct with direct and foreseeable anti-competitive effects in the United States. This has been the case for many years and is no longer particularly controversial. For example, the US Sherman and Clayton Acts have long been applied - when appropriate - to international pricing conduct by American and foreign parties. Two early Sherman Act cases are *United States v. American Tobacco Co.*[138] and *United States v. Pacific and Arctic Ry. Co.*[139]. Other examples are the Justice Department's complaint in *United States v. United Fruit Company*[140] and the private case *Laker Airways Ltd. v. Pan American World Airways*[141].

3.167 The United States notes that, more recently, in its 1986 *Matsushita Electrical* decision, the US Supreme Court evaluated Sherman Act claims against Japanese television exporters that were based on the same facts as the plaintiffs' unsuccessful 1916 Act claims. The Supreme Court rejected the Sherman Act claims for a failure to provide evidence that predatory losses would be recouped through future monopoly rents, not for a lack of anti-trust jurisdiction over such conduct. Perhaps the most recent example is the anti-trust consent decree that the Department of Justice obtained in 1995 against the planned joint venture of an American and two European telecom firms. That decree settled concerns based upon those firms' possible use of foreign monopoly facilities to engage in exclusionary and discriminatory conduct in international telecom markets.[142] Similarly, in *Silicon Graphics, Inc.*, the Federal Trade Commission approved a consent order settling allegations in an accompanying complaint that a proposed acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complainant alleged, *inter alia*, that the proposed acquisition would facilitate the unilateral exercise of market power through price discrimination by the acquiring firm in the world-wide market for entertainment graphics workstations.[143] As these cases demonstrate, dealing with international price-discrimination is not an aberration from other anti-trust concerns.

3.168 The United States submits that many other Members' anti-trust laws have a similar international jurisdiction - for example, the anti-trust Articles of the Treaty of Amsterdam. The United States recognizes that Japan for many years considered its Anti-Monopoly Act to have no international scope, but the United States understand that that policy is now changing. Japan will now apply the Act to some conduct beyond its borders, such as the use of exclusive dealing contracts by foreign suppliers and foreign mergers with significant consequences in Japan. There is no obvious reason why anti-trust rules regarding price discrimination or predatory conduct should stop "at the water's edge" either. Indeed, the United States reminds the Panel that on its web site the Japan Fair Trade Commission defines "unfair trade practices" to include "dumping". It is interesting that in trying to explain away the use of the word "dumping" by the Fair Trade Commission, Japan now apparently concedes that the word "dumping" may be used in a context that does not fall within Article VI and the Antidumping Agreement.

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[138] The United States refers to 221 U.S. 106 (1911).

[139] The United States refers to 228 U.S. 87 (1913).

[140] The United States refers to E.D. La., Civ. Action No. 4560, 1954; amended complaint, 1956, consent decree, 1958.

[141] The United States refers to 559 F.Supp. 1124 (D.D.C. 1983).

[142] The United States refers to *United States v. Sprint Corporation*, Competitive Impact Statement (D.D.C. 1995), available at "www.usdoj.gov/atr/cases/".

[143] The United States refers to *Silicon Graphics, Inc.*, 120 F.T.C. 928, 930, 933 (1995).

3.169 **Japan** disagrees with the US contention that "Japan for many years considered its Anti-Monopoly Act to have no international scope, but the policy is now changing". This is not only mischaracterizing Japan's position, but irrelevant. Japan has never asserted that Japan's Anti-Monopoly Act has no international dimension.[144]

5. The historical context and legislative history of the 1916 Act

3.170 According to **Japan**, the historical context and legislative history of the 1916 Act show that Congress sought to enact an anti-dumping law to address the commercial problem of dumping, i.e. international price discrimination.[145] US government officials, legislators and industries feared that the end of World War I would wreak injury on US companies and industries as foreign companies and industries sought to revive themselves and recapture or increase their former share of the US market through unfair methods of competition, including dumping. Some Senators and Congressmen proposed higher tariffs to fend off the threat. The Wilson Administration advocated free, but fair, trade and proposed anti-dumping legislation instead.

3.171 Japan points out that the formal legislative history of the 1916 Act is sparse. The hearings records do, however, contain correspondence regarding the 1916 Act and the correspondence confirms that the legislation was considered to be anti-dumping legislation. For example, US hosiery manufacturers wrote that "[w]e are very anxious to have some anti-dumping law that will protect our hosiery manufacturers from an expected flood of cheap hosiery following the foreign war […]."[146] The manufacturers cautioned, however, that they were "confident that the proposed section [601] as written in H.R. 16763 will have no effect whatever in controlling such low priced importations."[147]

3.172 Japan further notes that the records of the Congressional floor debates on the 1916 Act also are sparse. Certain legislators, however, indicated that the 1916 Act was a protectionist trade measure added to the larger Revenue Act to attract Republican votes. For example, Representative Denison stated:

> "I consider as childish that provision of this bill prohibiting what is called "unfair competition": it is commonly referred to as "anti-dumping", and pretends to protect American industries […]. The democratic leader […] in making his statement to the House said that the Republicans should support this bill because this provision against unfair competition is a protective measure and is a Republican policy."[148]

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[144] In response to a question of the United States regarding whether anti-trust laws may apply to conduct outside their borders but affect competition inside their borders, Japan notes that some WTO Members' anti-trust laws may apply to conduct that occurs outside their borders but affects competition inside their borders. However, any so-called "anti-trust" law that addresses anti-competitive international business practices, as that conduct is also regulated by Article VI of the GATT 1994 and the Anti-Dumping Agreement, must be consistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement if the relevant government is a WTO Member. Thus, Article VI of the GATT 1994 and the Anti-Dumping Agreement apply to the 1916 Act. Even though the United States is now attempting to characterize the 1916 Act as a pure anti-trust statute (despite many official remarks to the contrary), the 1916 Act is inconsistent with these obligations as Japan has demonstrated. However, Japan does not deny the possibility that there may be laws addressing anti-competitive international business practices to which Article VI of the GATT 1994 and the Anti-Dumping Agreement might not apply. No such laws are at issue in the present case.

[145] Japan refers to, e.g., *Geneva Steel*, Op. Cit., pp. 1223-24.

[146] Japan refers to the Hearings on H.R. 16763 Before the Senate Comm. on Finance, 64th Cong., 1st Sess. at 274 (1916).

[147] Japan refers to ibid.

[148] 53 Cong. Rec. App. 1475 (1916). Japan notes that others also perceived the 1916 Act as a concession to protectionist Republicans. Japan refers to, e.g., 53 Cong. Rec. 10761 (1916), where Rep. Fess described the anti-dumping clause as one of "many specific sops" in the larger Revenue Act to gain Republican

3.173 Japan states that other Members looked to the anti-dumping laws of other countries for guidance in how to address dumping in the United States. During Congressional debate on the "anti-dumping clause" of the Revenue Act (the 1916 Act), Senator Penrose argued that a "more effective dumping law is that one which has proved the test of time and experience and is contained in the tariffs laws of Canada."[149] Arguing that the anti-dumping legislation should contain no intent requirement, the Senator explained how the Canadian anti-dumping law operated and noted that South Africa and Australia had similar anti-dumping laws.[150] Senator Penrose's comments demonstrate that Congress was familiar with and sought to remedy the problem of dumping when it passed the 1916 Act.

3.174 Japan argues that events following passage of the 1916 Act confirm that it is an anti-dumping law. A number of parties opposed the Act's intent requirement; they were vindicated by subsequent developments. The US Tariff Commission (now the US International Trade Commission) issued a report in 1919 which concluded that the 1916 Act was not deterring dumping. The Commission recommended addressing the problem by adopting a statute modelled on the 1904 Canadian anti-dumping law (providing for the assessment of dumping duties on imported goods comparable to Canadian goods if the imports were sold below their foreign market value).

3.175 Japan notes that a bill providing for the assessment of anti-dumping duties was subsequently introduced and passed by the House of Representatives in 1919.[151] The House bill "provided for the imposition, on all imported merchandise sold by the exporter at a price less than the foreign home value and of a class or kind produced in the United States or competing with American products, of dumping-duties equal to the difference between the foreign home value and the export price."[152] Representative Kitchin, who sponsored the 1916 Act, stated: "[i]n the act of 1916 […] we have as stringent and as drastic an anti-dumping proposition as is contained in this bill."[153]

3.176 Japan further recalls that the Senate Finance Committee substituted another measure for the House provision. The Senate version provided that anti-dumping duties should apply only after the Secretary of the Treasury found that a US industry was being or was likely to be injured or was prevented from being established by dumping.[154] The measure was not voted on by the Senate. The Senate version, however, served as the model for legislation that later became the Antidumping Act of 1921.

3.177 Japan points out that the 1921 Act was a comprehensive administrative statute designed to address price discrimination between foreign and US markets that caused or threatened injury to a US industry. Unlike the 1916 Act, the 1921 Act did not include an intent requirement and relief took the form of the assessment of special anti-dumping duties instead of treble damages in a private civil action or criminal prosecution.

3.178 Japan notes that, in 1975, when defendants in a US court proceeding argued that the 1916 Act should be struck down as an unconstitutionally vague criminal statute, a US court used the common understanding of the concept of dumping as one of the major reasons for rejecting the argument:

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votes needed to implement a controversial income tax; ibid., p. 10751, where Rep. Green stated that "the purpose and object of an anti-dumping clause embodies good Republican doctrine"); ibid., p. 10616, where Rep. Bailey complained that the clause would "shut[] out […] competition from abroad" and was "contrary to Democratic doctrine [and] a concession to Republicanism".

[149] Japan refers to 53 Cong. Rec. S13080 (1916) (statement of Senator Penrose).

[150] Japan refers to ibid.

[151] Japan refers to 59 Cong. Rec. 351.

[152] J. Viner, Dumping: A Problem in International Trade, University of Chicago Press (1979 ed.), p. 259.

[153] 59 Cong. Rec. 346.

[154] Japan refers to Viner, Op. Cit., p. 259.

> "[…] the phenomenon described by the terms of the [1916 Act] has a meaningful referent in business usage and practice. […] The practice itself long predated the passage of the Antidumping Act of 1916 […] which clearly implies that Congress knew whereof it wrote when it enacted the statute. The popular title of the Act itself is a further indication that the conduct described has a meaningful business referent. An economic regulatory statute could scarcely acquire the designation of an "anti-dumping" act unless the business community to which the statute was addressed knew what "dumping" was."[155]

3.179 The **United States** submits that the 1916 Act was one of a series of anti-trust-related statutes enacted by the US Congress between 1914 and 1916 in order to supplement the United States' then existing anti-trust laws, principally the Sherman Act, which had been enacted in 1890 and represents the United States' first, and most basic anti-trust law.[156] In 1914, Congress enacted the Clayton Act[157] and the Federal Trade Commission Act[158]. Two years later, Congress enacted the 1916 Act.

3.180 The United States further points out that when the 1916 Act was later codified in the United States Code, it was placed under title 15, entitled "Commerce and Trade." Also located in title 15 are the Sherman Act, the Clayton Act and the Federal Trade Commission Act, which are all anti-trust laws. In contrast, anti-dumping laws are codified in title 19.[159]

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[155] *Zenith II*, Op. Cit., pp. 258-59, aff'd, 723 F.2d 319, p. 326 (3d Cir. 1983) (citations omitted by Japan)

[156] The United States refers to 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7).

[157] The United States refers to 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27).

[158] The United States refers to 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-58).

[159] In response to a question of Japan regarding the significance of the placement of a statute under a certain title in the US Code system and whether the codification actually reflects the legislative intent, the United States notes that, ordinarily, when a bill has passed the US Congress and been enacted into law, the law itself does not provide under which title of the US Code it should be placed. The task of placing the new law in the proper title falls to the Office of the Law Revision Counsel, which was created pursuant to section 285 of title 2 of the US Code (2 U.S.C. § 285). The person who heads this office, known as the Law Revision Counsel, is appointed by the Speaker of the US House of Representatives on a non-partisan basis (See 2 U.S.C. § 285c, where it is stated that "[…] the Law Revision Counsel […] shall be appointed by the Speaker without regard to political affiliation and solely on the basis of fitness to perform the duties of the position."; 2 U.S.C. 285a, where it is stated that the Office of Law Revision Counsel "shall maintain impartiality as to issues of legislative policy to be determined by the House."). The duties of the Office of the Law Revision Counsel, which are overseen by the Committee on the Judiciary of the US House of Representatives, are set out in section 285. These duties include the preparation of "a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent and purpose of the Congress in the original enactments […] with a view to the enactment of each title as positive law," and "[t]o prepare and submit periodically such revisions in the titles of the code which have been enacted into positive law as may be necessary to keep such titles current." (2 U.S.C. § 285b) In addition, the Office of the Law Revision Counsel is "[t]o classify newly enacted provisions of law to their proper positions in the code where the titles involved have not yet been enacted into positive law." (ibid.) By way of background, the distinction between whether a particular title of the US Code is or is not "positive law" largely has relevance only for technical legislative drafting purposes and to establish, as a matter of legal evidence, the exact wording of a statute. A title of the US Code is the "positive law" when the title itself has been enacted into law. A title of the US Code is not the "positive law" when it is a collection of certain general and permanent laws of the United States placed there by the Office of the Law Revision Counsel, acting under the supervision of the House Judiciary Committee. In that event, the "positive law" is each of the general and permanent laws of the United States that have been placed in the title. For example, both title 15 and title 19 currently are not "positive law." This means simply that, for example, with regard to the 1916 Act, sections 71-74 of title 15 of the US Code are not "positive law"; rather, the "positive law" is sections 801-04 of the Revenue Act of 1916. Similarly, with regard to the Tariff Act of 1930, as amended, the United States' current anti-dumping law, sections 1671 *et seq.* of title 19 of the US Code are not the "positive law"; rather, the "positive law" is sections 701 *et seq.* of the Tariff Act of 1930, as amended. Currently, the Office of the Law Revision Counsel is engaged in a continuing, comprehensive project

3.181 The United States considers that Japan's description of the 1916 Act's legislative history is incomplete and misleading. Japan chooses to rely upon isolated fragments of Congressional and even private industry testimony that go against the clear weight of the record. Some of Japan's historical references date from years after the Act was passed, amounting to *post hoc* commentary, not the actual legislative history of the Act.

3.182 The United States argues that the history of the 1916 Act actually dates back to 1912. In that year, President Woodrow Wilson was elected on a party platform that promised major reductions in tariffs; reductions to a level adequate to generate sufficient revenue for the functions of government, but not so high as to provide unnecessary protection to domestic industry. His party, the Democratic party, also promised more vigorous anti-trust enforcement.[160] During President Wilson's first term in office, the Tariff Act of 1913, known as the Underwood Tariff Act, was enacted along with the Clayton Act (15 U.S.C. §§ 12 *et seq.*) and the Federal Trade Commission Act (15 U.S.C. §§ 41 *et seq.*).

3.183 The United States notes that, in 1915, the Secretary of Commerce, a member of President Wilson's Cabinet, concluded that additional competition legislation was needed.[161] He stated that while "[u]nfair competition" was forbidden by law in domestic trade, "[…] [t]he door, however, is still open to 'unfair competition' from abroad which may seriously affect American industries for the worse. It is not normal competition of which I speak, but abnormal. […] If it shall pass beyond fair competition and exert or seek to exert a monopolistic power over any part of our commerce, we ought to prevent it." The Secretary concluded that he would "prefer […] to deal with it by a method other than tariffs, classing it rather as an offense similar to the unfair domestic competition we now forbid." Specifically, he

> "recommend[ed] that legislation supplemental to the Clayton Anti-trust Act be enacted which shall make it unlawful to sell or purchase Articles of foreign origin or manufacture where the prices to be paid are materially below the current rates for such Articles in the country of production or from which shipment is made, in case such prices substantially lessen competition on the part of the American producers or tend to create a monopoly in American markets in favour of the foreign producer."[162]

3.184 The United States recalls that, in 1916, Congress enacted legislation implementing the suggestion of the Secretary of Commerce[163] that the Clayton Act should be extended to import trade. On 1 July 1916, Representative Claude Kitchin introduced H.R. 16763, an extensive piece of legislation designed to raise additional revenue through expansion of the income tax and inauguration of a federal estate tax. It also contained, in a section entitled "Unfair Competition", the provision

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authorized by law to revise and codify, for enactment into "positive law," each title of the US Code. So far, twenty-two of fifty titles of the US Code have been converted into "positive law." The United States notes that, for purposes of the present dispute, the US Code itself first came into existence in 1926, ten years after the enactment of the 1916 Act and well before the creation of the Office of the Law Revision Counsel. Up until that point, the laws of the United States had simply been set forth in a compilation known as the Statutes at Large, which was organized by the chronological order of enactment. The creation of the US Code in 1926 was undertaken by the House Committee on the Revision of the Laws, with assistance from a Senate Select Committee. It was then that the laws of the United States were first assembled and classified. The United States also notes that the House Judiciary Committee more recently, in 1994, issued a "Compilation of Selected Anti-trust Laws," which expressly lists the 1916 Act as one of the principal anti-trust laws. The House Judiciary Committee is the same committee that oversees the work of the Office of the Law Revision Counsel.

[160] The United States refers to *Zenith III*, Op. Cit., p. 1218.

[161] The United States refers to the Annual Report of the Secretary of Commerce 1915 40-41 (1915).

[162] Ibid.

[163] The United contends that Congress was aware of the Secretary's recommendation. The United States refers to 53 Cong. Rec. 13,079 (1916)(Sen. Penrose); 53 Cong. Rec. App. 1475 (1916)(extension of remarks of Rep. Denison).

which became 15 U.S.C. § 72. During debate of the bill in the House of Representatives, Representative Kitchin described this provision in terms that made it clear that the section was intended as a supplement to existing anti-trust laws, and not as a form of protection for individual industries:

> "Then there is an unfair competition provision in this bill which ought to be good Republicanism and good Democracy. The Republican Party, in all of its 50 years of tariff writing, never had the wisdom and the judgment and the patriotism to incorporate in any of its legislation an unfair competition proposition. We believe that the same unfair competition law which now applies to the domestic trader should apply to the foreign import trader."[164]

3.185 The United States further recalls that Representative Kitchin's bill was reported favourably to the whole House by the House Committee on Ways and Means. The Committee's report affirmed that the bill applied the same unfair competition law to the foreign import trader as to the domestic trader. The report stated that the bill "place[s] […] persons, partnerships, corporations, and associations in foreign countries, whose goods are sold in this country […] in the same position as our manufacturers with reference to unfair competition."[165]

3.186 The United States notes that, during debate on H.R.16763, numerous Republican congressmen criticized the approach taken by the anti-dumping provision, insisting that entire industries needed protection and that higher tariffs were the only adequate method of protecting American industry from the expected post-war competition.[166] Thus, the critics of the legislation recognized that it was not directed at protecting particular US industries, as tariffs and duties would be, but rather at unfair competition. Indeed, one Republican Congressman suggested that his colleagues should rewrite the provision "as a protective measure", incorporating a provision debated (but not enacted) in a previous Congress that assessed duties for dumping.[167] As previously stated, the provision that became 15 U.S.C. § 72, a Democratic initiative, was intended to protect competition.[168]

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[164] 53 Cong. Rec. App. 1938 (1916)

[165] H.R. Rep. 922, 64th Cong., 1st Sess. 9-10 (1916).

[166] The United States refers to, e.g., 53 Cong. Rec. 10,531 (1916) (Rep. Longworth) (arguing, according to the United States, that provision should be coupled with a protective tariff); ibid., p. 10,587 (Rep. Green) (arguing, according to the United States, that higher tariffs were needed); ibid., p. 10,607 (Rep. Meeker) (arguing, according to the United States, the same); ibid., p. 10,619 (Rep. Switzer) (arguing, according to the United States, that the provision should be supplemented by higher tariffs); ibid., pp. 13,079-80 (Sen. Penrose) (arguing, according to the United States, that the provision is make-shift and that a protective tariff is needed); ibid., p. 13,490 (Sen. Colt) (arguing, according to the United States, that only duties can safeguard American industries; provision is "manifestly inadequate").

[167] The United States refers to ibid., p. 10,761 (Rep. Fess). The United States notes that, in the previous Congress, anti-dumping legislation based on a Canadian statute, which presaged modern anti-dumping laws by providing for an administrative process, with duties assessed without inquiry into the importer's intent, had been considered and rejected. The United States refers to *Zenith III*, Op. Cit., p. 1217; 53 Cong. Rec. 10,619 (1916) (Rep. Switzer); ibid., p. 13,077 (Sen. Penrose); ibid., p. 13,080 (text of Canadian statute). The United States contends, therefore, that the Congress was aware of the possibility of such an approach, and chose instead to enact Section 72 - which requires anti-competitive intent, and provides for judicial, not administrative, remedies.

[168] The United States concedes that it is also true that some congressmen characterised the provision as "protectionist" or a "sop" to the protectionist Republicans, which was intended to get them to vote for the unpalatable revenue provisions of the bill. The United States refers to, e.g., 53 Cong. Rec. 10,588, pp. 10,594-95, 10,619, 10,747, 10,749-50, 10,761 (1916). However, in the view of the United States, these comments do not outweigh the characterisation of the bill by the Administration that proposed it, by its sponsor, and by the House Report, as a bill intended only to prevent unfair competition. The United States refers to *Zenith III*, Op. Cit., p. 1223, where the court collects cases concerning greater weight to be given reports of Congressional committees and statements of the bill's sponsor.

3.187 The United States argues that Japan's description of events in 1919-1921 is correct insofar as it shows that the Tariff Commission found that the 1916 Act had no protectionist effects and that the 1921 Antidumping Act was very much "unlike" the 1916 Act. Japan, however, also quotes a 1919 floor statement from Representative Kitchin, as proof that he believed the Act was an "anti-dumping proposition". The quote is, however, three years after the fact, and taken out of context. Other remarks by Representative Kitchen in the same floor debate show that he believed that the 1916 Act only dealt with anti-competitive conduct.[169] For example, he stated that:

> "We tried to guard against unfair competition by the foreigner by the passage of the Act of 1916. We are willing to have foreign goods coming over here in competition with American-made goods, but there must not be such a competition that will destroy the American industry and thus give the foreigner the monopoly.
>
> In the Clayton Anti-trust Act, which we Democrats passed, we provided against unfair competition among our domestic industries.
>
> Now, if it be proper and just to protect our domestic industries against unfair competition by other domestic industries, why is it improper and unjust to protect our domestic industries against the unfair competition of foreign industries."[170]

3.188 The United States notes that, during the same House debate, another Congressman, Rep. Fordney gave as an example of unfair foreign competition German exports of a particular chemical:

> "Take the case of oxalic acid, which sold at 6.5 cents a pound when our producers at home were compelled to go out of business because of that unfair competition. When that was accomplished, the Germans immediately put the price up to 9 cents a pound - higher than ever before."[171]

3.189 The United States points out that a similar example was used during the 1921 Senate debates over the 1921 Antidumping Act, where Senator Simmons asserted that the "German dye monopoly" had "deliberately, purposefully and intentionally" pursued a course to destroy the US dye industry:

> "The [1916 Act] provision was to meet a case like that, where a foreign monopoly or a foreign industry was selling its products in this country, not for the purpose of profit, nor in the ordinary course and way of business, but with a view to destroying an industry already established in the United States or so as to prevent the establishment of a business in the United States. That was entirely different from the situation as we find it in connection with this bill."[172]

3.190 The United States notes, furthermore, that the agency responsible for prosecuting criminal violations of the 1916 Act, the US Department of Justice, made a public announcement regarding the nature of the 1916 Act at the time of its passage. Assistant Attorney General Samuel J. Graham stated that the "purpose" of the 1916 Act "should be to prevent unfair competition. Just as we have said to our own people by the Clayton Act that they should not indulge in unfair competition, so we propose to say the same to the foreigner."[173]

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[169] The United States refers to 59 Cong. Rec., p. 346 (not p. 351).
[170] Ibid.
[171] Ibid., p. 346.
[172] 61 Cong. Rec., pp. 1100-110l (May 6, 1921).
[173] Letter from Samuel J. Graham, Assistant Attorney General, US Department of Justice, dated 30 June 1916 (published in *N.Y. Times*, 4 July 1916, p. 10).

3.191 The United States notes, finally, and controlling for the United States' purposes, the fact that the 1916 Act's legislative history shows that it was intended as competition legislation is also confirmed by judicial decisions construing the 1916 Act. For example, the court in *Zenith III* specifically found that its conclusion that the 1916 Act was an anti-trust statute was "strongly corroborated by the political and legal history of the relevant era, and the legislative history of the 1916 Act."[174]

6. US judicial interpretations of the 1916 Act

(a) Relevance of judicial interpretations of the 1916 Act

3.192 In the view of **Japan**, the text of the 1916 Act is unambiguous. The Panel's analysis thus should end with the text.[175] What a US court has labelled the Act is irrelevant.[176] In any event, if the Panel considers US judicial interpretations, it will find that they confirm that the 1916 Act is a protectionist dumping remedy.

3.193 The **United States** considers that it is the role of the Panel to determine as a matter of fact how the law is applied in the United States. Because the 1916 Act is applied through the judicial branch, the Panel must look to the judicial interpretations. Even if the Panel might disagree with how the courts have interpreted the text of the 1916 Act, it should not affect the Panel's decision in the present dispute. In the US legal system, the 1916 Act means what the courts say it means, and this is the relevant fact for purposes of the present dispute.

(b) Statutory interpretation under US law

3.194 In response to a question of the Panel to the United States regarding the relative weight to be accorded - by a US court and the present Panel - to the legislative history of a statute compared to the case law interpreting the statute, the **United States** notes that legislative history is something that US courts look to in interpreting a statute. However, courts vary in their use of legislative history. Generally, where the statutory language is ambiguous or the plain meaning of the statutory language leads to absurd results, a court will look to the statute's legislative history.[177] Nonetheless, some courts have considered legislative history regardless of the clarity of the statute to ensure that the

[174] The United States refers to *Zenith III*, Op. Cit., p. 1215.

[175] Japan notes that the United States may assert that the Panel should defer to the US characterisation of the Act as an anti-trust remedy. According to Japan, this is incorrect. The existence and characteristics of the Act are questions of fact that are "left to the discretion of a panel as a trier of facts." Japan refers to the Appellate Body Report on *European Communities – Hormones*, Op. Cit., para. 132. Japan notes that, in contrast, the "consistency or inconsistency of a given fact or set of facts" with the requirements of the Act would be a legal question. Japan refers to ibid. Japan also refers to *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, adopted on 12 January 2000, WT/DS98/R, para. 7.30, where the panel stated that "[w]e consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an 'objective assessment' as foreseen by Article 11 of the DSU." Japan notes that, obviously, if the United States were to advance such an argument and the Panel were to accept it, the result would be absurd - any Member complained against would have nearly complete control of the outcome of the case. Its law would be found to conform to the WTO agreements merely because the Member said it did.

[176] Japan further notes that US courts generally use interpretative guidelines very much akin to those in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The primary focus is the express words of the statute in their context. Only when the meaning is unclear, may a court resort to legislative history or other secondary means of ascertaining meaning. Japan refers to, e.g., *Connecticut National Bank v. Germain*, 503 US 250, 254 (1992).

[177] The United States refers to *American Trucking Associations, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957 (5th Cir. 1982); *United States v. Smith*, 957 F.2d 835, p. 836 (11th Cir. 1992).

perceived clarity is not superficial.[178] The weight such history is given in construing a statute may vary according to such factors as whether the legislative history is sufficiently specific, clear and uniform to be a reliable indicator of intent.[179] With regard to statements made by the sponsor of the legislation, the Supreme Court has held that, although they are neither controlling nor dispositive, they are "entitled to weight" and considered "an authoritative guide to the statute's construction."[180]

3.195 The United States notes that the relative weight of legislative history compared to the case law interpreting the statute depends upon whether the case law is binding precedent. For instance, if an appellate court has opined upon the statute, a district court in that circuit is bound by that decision. If the precedent is not binding, the weight afforded to the case law will depend upon the persuasive value of the opinion's reasoning.

3.196 The United States contends that the role of a statute's legislative history is different for the present Panel. Here, the legislative history has been cited only as confirmation or to help explain the courts' holdings. Because the interpretation of the 1916 Act is a question of fact for the present Panel, it is not the role of the present Panel to consider and weigh the statute's legislative history itself. The present Panel must look to the judicial case law in determining how the 1916 Act is interpreted and applied in the United States because the law is applied through the judicial branch.

3.197 The United States further notes that usually, US courts give more weight to the meaning of the term at the time the law was passed. But sometimes laws are written expansively to give courts more discretion in interpreting the meaning of terms because Congress realizes that the meaning can evolve over time. This is generally true of US anti-trust laws. The Court of Appeals for the First Circuit has aptly described the "special interpretative responsibility" placed upon the judiciary in the anti-trust context:

> "The broad, general language of the federal anti-trust laws and their unilluminating legislative history place a special interpretative responsibility upon the judiciary. The Supreme Court has called the Sherman Act a 'charter of freedom' for the courts, with a 'generality and adaptability comparable to that found […] in constitutional provisions.' *Appalachian Coals Inc. v. United States*, 288 U.S. 344, 359-60 (1933). [T]he federal courts have been invested 'with a jurisdiction to create and develop an 'anti-trust law' in the manner of the common law courts.' [citation omitted] The courts are aided in this task by canons of statutory construction, such as the presumption against violating international law, which serve as both guides and limits in the absence of more explicit indicia of congressional intent."[181]

3.198 **Japan**, replying to the same question of the Panel, notes that the US Supreme Court is the final arbiter of a statute's meaning. Where it has not addressed an issue, a subsidiary court generally must follow the precedent set by the appellate court overseeing it or risk reversal. Where no binding appellate court precedent exists, a court uses interpretive guidelines very much akin to those in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The primary focus is the express words of the statute in their context. Only when the statute's text is unclear or ambiguous, may a court resort to other elements such as legislative history as a supplementary means of ascertaining meaning.

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[178] The United States refers to *Hunt v. Nuclear Regulatory Comm'n*, 611 F.2d 332, p. 336 (10th Cir. 1979).

[179] The United States refers to *Miller v. C.I.R.*, 836 F.2d 1274, p. 1282 (10th Cir. 1988).

[180] The United States refers to *Simpson v. United States*, 435 U.S. 6, p. 13 (1978); *North Haven Board of Education v. Bell*, 456 U.S. 512, pp. 526-27 (1982).

[181] *United States v. Nippon Paper Industries*, 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, concurring).

3.199 Japan also contends that, if the statute's text is ambiguous, US courts may refer to supplementary means of interpretation. If necessary, both the meaning of that term at the time the law was passed and at the time the interpretation takes place may be considered. It depends upon the court, the statute and the circumstances of the case. Often, as is the case in the WTO[182], US courts interpret statutory terms based on contemporary concerns.

(c) *United States v. Cooper Corp*.

3.200 **Japan** contends that the US Supreme Court has never addressed the substance of the 1916 Act, but has described it as "[t]he anti-dumping provisions of the Revenue Act of 1916"[183]. Thus, to the extent the Supreme Court has said anything about the 1916 Act, it recognized the 1916 Act as an anti-dumping measure.

3.201 The **United States** argues that, contrary to Japan's assertion, the US Supreme Court has never recognized "the [1916] Act as an antidumping measure." In fact, *United States v. Cooper Corp*., a 1941 Supreme Court decision construing the Clayton Act, expressly described the 1916 Act and the Clayton Act as "supplemental" to the original, 1890 Sherman Act.[184] Moreover, in the same decision, the Supreme Court also described the Clayton Act as supplemental to the Sherman Act.[185] Thus, this 58 year old Supreme Court decision supports, not refutes, the points that the United States has made here.

(d) *Zenith Radio Corp. v. Matsushita Electric Industrial Co*. and *In re Japanese Electronic Products Anti-trust Litigation*

3.202 **Japan** notes that the United States no doubt will characterise *Zenith III* and perhaps other, even more dated cases, as evidence that the 1916 Act is an anti-trust law. In *Zenith III*, the court concluded that the 1916 Act should be thought of as a competition law statute, not an anti-dumping statute. However, in *Geneva Steel* and *Wheeling-Pittsburgh*, the judges carefully considered the reasoning of *Zenith III* and rejected that reasoning as ignoring the text of the Act.

3.203 Japan recalls that, in *Geneva Steel*, the judge made several observations about *Zenith III*. First, the court noted that *Zenith III* did not focus on the nature of the 1916 Act itself, whereas the court in *Geneva Steel* had no other issues before it: the entire focus of the court's attention was the nature of the 1916 Act. Second, the court noted that *Zenith III* actually sought only to interpret a single phrase in the 1916 Act - the phrase "such articles" - and decided that the Robinson-Patman Act provided a useful context in which to interpret this phrase. Third, the court noted that the critical statement in *Zenith III* - that the 1916 Act "is an anti-trust, not a protectionist statute" - was at most *dictum* and not a persuasive legal statement.[186]

3.204 Japan also notes that the court in *Wheeling-Pittsburgh* concluded that *Geneva Steel* was correct, and *Zenith III* was wrong. Like the court in *Geneva Steel*, the court in *Wheeling-Pittsburgh* rejected the logic of *Zenith III* as flawed and inconsistent with the plain meaning of the statutory

[182] Japan refers to, e.g., the Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R, para. 129.

[183] Japan refers to *United States v. Cooper Corp*., 312 U.S. 600, p. 609 (1941).

[184] The United States refers to ibid., pp. 608-10.

[185] The United States refers to ibid.

[186] Japan refers to *Geneva Steel*, Op. Cit., pp. 1218-19. Japan notes that *dictum* refers to an opinion expressed by a court concerning a particular rule, principle, or application of law that is not relevant to the case or essential to its determination. Japan refers to *Black's Law Dictionary*, 6th ed. (1991), p. 313.

language at issue. The court characterised *Zenith III* as an effort to rewrite, rather than interpret, the statutory text.[187]

3.205 Japan argues, moreover, that *Zenith III* is not unequivocal. The court noted that "Congress borrowed language from contemporary customs appraisement law" to draft the 1916 Act and that Congress specifically incorporated into the 1916 Act provisions of the Tariff Act of 1913.[188] One of the court's holdings expressly recognized the importance of customs laws in the 1916 Act. The court stated that "[b]ecause of the use of language taken from the 1913 Tariff Act in the 1916 Anti-Dumping Act, we will hold that there is no violation of the 1916 Act unless the standards of similarity of customs appraisement law are met."[189] Despite its conclusion that the 1916 Act was meant to complement anti-trust statutes, the court declined to use anti-trust standards in evaluating claims brought under the 1916 Act. Instead, the court used standards from customs law, which are protectionist in nature.[190]

3.206 Japan points out, finally, as the court in *Geneva Steel* noted, the court in *Zenith III* even admitted that the 1916 Act is not exclusively an anti-trust statute, but has anti-dumping elements.[191]

3.207 The **United States** argues that *Zenith III* is the leading lower court case addressing how specific provisions of the 1916 Act should be interpreted. There, the US District Court for the Eastern District of Pennsylvania described in detail the anti-trust origins of the 1916 Act and explained how these origins should affect the interpretation of specific 1916 Act provisions.

3.208 The United States notes that the *Zenith III* court provided its views during the course of ruling on summary judgment motions challenging the sufficiency of the complainants' 1916 Act allegations. As part of this exercise, the district court specifically considered the character of the 1916 Act because, according to the court, "the character of the statute is of salient concern in its construction." The court expressly stated that its threshold task was "to ascertain whether the 1916 Act was intended to be part of the corpus of anti-trust law, or whether the 1916 Act was intended to be 'protectionist' legislation, as that term is used in discussion of tariff barriers to free trade."[192]

3.209 The United States considers, therefore, that, far from being *dicta*, the *Zenith III* court obviously considered that an analysis of the character of the 1916 Act was necessary to its holding. After reviewing the provisions of the 1916 Act and comparing them in detail to US anti-trust statutes such as the Clayton Act and the Robinson-Patman Act, the *Zenith III* court "conclude[d] [...], on the basis of the statutory text, that *the 1916 Act is an anti-trust, not a protectionist statute*."[193] The court also explained that "[t]hat conclusion is strongly corroborated by the political and legal history of the relevant era, and the legislative history of the 1916 Act," which the court also discussed at length.[194]

3.210 The United States points out that the court also quoted the relevant congressional report, which states that the purpose of the 1916 Act was to adopt a provision "[i]n order that persons, partnerships, corporations, and associations in foreign countries, whose goods are sold in this country,

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[187] Japan refers to *Wheeling-Pittsburgh*, Op. Cit., p. 605.
[188] Japan refers to *Zenith III*, Op. Cit., p. 1197.
[189] Ibid.
[190] Japan notes that, in *Zenith III*, the court used customs appraisement law to determine that the term "such" as used in the 1916 Act means "similar" which in turn means commercially interchangeable. The court reasoned that "by incorporating in the 1916 Act a phrase from contemporary customs law, Congress must have intended to direct that the appraisement of imported merchandise under the 1916 Act follow the principles set forth in the Tariff Act of 1913." Japan refers to *Zenith III*, Op. Cit., p. 1216.
[191] Japan refers to *Geneva Steel*, Op. Cit., p. 1218.
[192] *Zenith III*, Op. Cit., p. 1212.
[193] Ibid., p. 1215 (emphasis added by the United States).
[194] Ibid.

may be placed in the same position as our manufacturers with reference to unfair competition […].[195] The court recounted that Representative Kitchin, the chairman of the House Committee on Ways and Means and the House sponsor of the 1916 Act, stated "in unambiguous terms" that the 1916 Act was "intended to do no more than to impose on importers the same pricing restrictions which had already been imposed on domestic businesses by the Clayton Anti-trust Act of 1914."[196] The court stated that:

> "Representative Kitchin, explaining his bill at the outset of its consideration by the full House of Representatives, explained:
>
> We believe that the *same* unfair competition law which now applies to the domestic trader should apply to the foreign import trader."[197]

3.211 The United States further notes that the *Zenith III* court also explained that, at the time of the enactment of the 1916 Act, "unfair competition" - which also is the caption of the title under which the 1916 Act was enacted - referred to the activities addressed by the anti-trust laws of the era. As the Secretary of Commerce, William Redfield, explained in 1915:

> "'Unfair competition' is forbidden by law in domestic trade, and the Federal Trade Commission exists to determine the facts and takes steps to abate the evil wherever found. The door, however, is still open to 'unfair competition' from abroad which may seriously affect American industries for the worse. It is not normal competition of which I speak, but abnormal. […] If it shall pass beyond fair competition and exert or seek to exert a monopolistic power over any part of our commerce, we ought to prevent it."[198]

3.212 The United States points out that the *Zenith III* court ultimately concluded that it would be guided by the following principles when interpreting the 1916 Act:

> "The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first [Woodrow] Wilson Administration, is that the statute should be interpreted whenever possible to parallel the 'unfair competition' law applicable to domestic commerce. Since the 1916 Antidumping Act is a price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936. And, in order to be faithful to the intention of Congress to subject importers to the 'same unfair competition law,' *we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises.*"[199]

3.213 The United States notes that the *Zenith III* court's analysis was affirmed on appeal in 1983.[200] In that opinion, the appellate court stated that the 1916 Act was enacted "to do with unfair competition" and the court then held that "we will interpret the Act in light of its motivating purpose."[201]

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[195] Ibid., p. 1221 (quoting H.R. Rep. No. 922, 64th Cong., 1st Sess. 9-10 (1916)).
[196] Ibid., p. 1222.
[197] Ibid., p. 1222 (footnote omitted by the United States) (quoting 53 Cong. Rec. App. 1938 (1916)) (emphasis added by the United States).
[198] Ibid., p. 1219 (quoting Annual Report of the Secretary of Commerce 43 (1915).
[199] Ibid., p. 1223 (footnote omitted and emphasis added by the United States).
[200] The United States refers to *In re Japanese Electronic Products Litigation II*, Op. Cit.
[201] Ibid., p. 325, n.4.

3.214 The United States recalls that, in 1986, the Third Circuit Court of Appeals again had an opportunity to consider the plaintiffs' 1916 Act claims in *Zenith III* when the case was remanded from the US Supreme Court. Some background information is helpful to fully understand the Third Circuit's 1986 decision.

3.215 The United States points out that Zenith (and another US company named NEU) commenced litigation against Japanese television set manufacturers in the early 1970s, complaining of Sherman Act, Robinson-Patman Act, 1916 Act and other violations of federal law. During a series of decisions by the district court and the court of appeals in the years 1980-83, which are discussed above, the Sherman Act and 1916 Act claims were first dismissed by the district court for lack of evidentiary support and then reinstated by the Third Circuit. The US Supreme Court then accepted the Sherman Act anti-trust claims for review. Those claims were based on the theory that defendants had conspired to monopolise the US market by using excess profits in the Japanese home market to launch a predatory pricing attack on the United States.

3.216 The United States notes that the Supreme Court reversed the court of appeals and remanded, stating that the plaintiff had not developed any credible proof of an illegal conspiracy to monopolise. The Supreme Court held that claims under the Sherman Act for conspiracies or attempts to monopolise through predatory low pricing could only be established by proof that such prices were below some appropriate measure of costs as well as evidence of a realistic expectation of recouping prior losses through future monopoly rents.[202]

3.217 The United States recalls that the court of appeals was ordered to consider its prior orders in the *In re Japanese Electronic Products II* case in light of the Supreme Court's decision. On remand, the Third Circuit dismissed the plaintiffs' 1916 Act claims upon the basis that, like the Sherman Act claims, there was no evidence of the possibility of recoupment. The court reasoned that "[s]ince the Sherman Act conspiracy charge failed in the Supreme Court, our holding on the Antidumping [1916] Act conspiracy claim must fail with it."[203]

3.218 The United States notes that the Supreme Court's decision in *Matsushita Electrical* actually laid the groundwork for the high court's decision in *Brooke Group*[204] some 7 years later. In *Brooke Group*, the Supreme Court re-examined the so-called "primary line"[205] price discrimination provisions of the Robinson-Patman Act and held that proof of both sales at prices below an appropriate measure of cost and the likelihood of recoupment were required in order to establish the requisite predatory pricing needed to create primary line liability. In doing so, the Supreme Court relied heavily upon its decision in *Matsushita Electrical*.

3.219 The United States submits, therefore, that, in *In re Japanese Electronic Products III*, the 1916 Act claims were dismissed by the court of appeals based upon the same predatory pricing/recoupment standards that were established for the Robinson-Patman Act by *Brooke Group*

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[202] The United States refers to *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (hereinafter "*Matshushita Electrical*"). The United States notes that the Supreme Court reiterated this standard that same year in another anti-trust case, *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), where it decided, according to the United States, what constitutes proof of injury to competition in the Clayton Act context of mergers and acquisitions.

[203] *In re Japanese Electronic Products III*, Op. Cit., pp. 48-49.

[204] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, 509 U.S. 209 (1993) (hereinafter "*Brooke Group*").

[205] The United States recalls that "primary line" price discrimination refers to adverse effects upon direct competitors of the defendant seller, while "secondary line" price discrimination refers to adverse effects upon competitors of the defendant seller's favoured downstream customers.

some years later.[206] The Supreme Court's 1986 *Matsushita Electrical* decision was and remains a foundation of US anti-trust jurisprudence on predatory pricing issues.

3.220 In response to a question of the Panel regarding whether the predatory pricing recoupment test of *Brooke Group* would be applied in all instances of international price discrimination which are alleged to constitute a violation of the 1916 Act, the United States notes that this would seem to be the case. The same recoupment requirements that apply to Sherman Act Section 2 and primary line Robinson-Patman Act cases apply to the 1916 Act as well.[207]

3.221 The United States argues that, as a consequence, even a firm that possesses predatory intent and engages in predatory conduct would not be found to have violated the 1916 Act without proof, *inter alia*, that its predatory campaign is likely to succeed, because anti-competitive intent and conduct without a likelihood of success will not produce the anti-competitive effects which the 1916 Act is intended to prevent. Thus, for example, mere incantations in internal memoranda of an intent to injure or destroy a United States industry are meaningless unless the defendant at issue actually has a reasonable expectation of recouping its losses within a particular relevant geographic market in the United States. As the Supreme Court concluded in *Brooke Group*:

> "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal anti-trust laws […] [a]lthough some of [the defendant's] corporate planning documents speak of a desire to slow the growth of the [generic cigarette] segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anti-competitive means."[208]

3.222 The United States notes that the first step in determining whether recoupment is likely both to be feasible and to occur is to establish the relevant geographic market within which the product at issue under the 1916 Act is sold. Because the 1916 Act also requires a showing of price discrimination - that is, that the allegedly predatory price charged within the United States is also substantially lower than the prices charged by the same firm in its home country - the relevant geographic market must also be the market within the United States within which the lower prices are charged. Recoupment will be possible only if this geographic area is in fact a relevant geographic market; that is, it is sufficiently insulated from competition from firms operating in other geographic areas so that a small but significant increase in prices within that area will not produce new entry

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[206] *In re Japanese Electronic Products III*, Op. Cit., pp. 48-49.

[207] At the request of the Panel, the United States further clarifies its position in this regard. The United States notes that its statement that the *Brooke Group* predation requirement "would" be applied in all instances was really addressing whether there is a factual situation where the *Brooke Group* predation test would be inapplicable. The United States meant to convey that it can think of no factual situation where the test would be inapplicable. The United States has not taken a position on whether *Brooke Group* predation *should* be required under the 1916 Act as that is a matter for the courts to decide. If a court were not to apply the *Brooke Group* predation test in a particular case, the United States cannot predict what the test would be. However, the only other articulation provided by the courts is that the plaintiff must prove a specific intent and that standard has been described as virtually impossible to satisfy. The United States further notes that there were almost no 1916 Act decisions taken after the Supreme Court's 1993 *Brooke Group* decision until the recent *Geneva Steel* and *Wheeling-Pittsburgh* decisions. In those two cases, the courts made preliminary decisions not to require use of the recoupment test. In 1995, a US federal court dismissed a 1916 Act claim for failure by the plaintiff to prosecute it, not reaching the merits of that claim (the United States refers to *Geneva Steel*, Op. Cit., footnote 2, referring to the case of *Consolidated Inter. Automotive, Inc. v. Chen*). A recoupment test was applied by the Third Circuit in its 1986 *In re Japanese Electronic Products III* decision. It was the recoupment test previously announced by the Supreme Court in the same case, not the later *Brooke Group* version of the test, which was based in large part on the high court's earlier *Matsushita Electrical* opinion.

[208] *Brooke Group*, Op. Cit., p. 241.

sufficient to defeat the price increase. The same standard is in general used to define relevant geographic markets under the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

3.223 The United States points out that the second step is to determine whether recoupment is in fact likely both to be feasible and to occur within this relevant market. The crucial question is whether there is evidence of a realistic expectation of recouping prior losses through future monopoly rents.[209] In general, a firm can expect to recoup prior losses only if it possesses substantial market power within the relevant market within the United States, so that it can sell its products at prices substantially above competitive levels without losing sales to competing firms. The fact that a firm exporting to the United States may charge higher prices in a foreign market because it possesses market power in that market ordinarily would not be necessary to establishing the possibility of recoupment under the 1916 Act. Of course, the price in the foreign market would be necessary to establishing - as the 1916 Act requires - that the prices charged in the United States are "substantially less" than the prices the firm charges in the foreign market.

3.224 With regard to the *Zenith III* decision, the United States further argues that the court's analysis in the seminal *Zenith III* case has been supported by other US courts which have considered the nature of the 1916 Act.[210]

3.225 The United States also argues that Japan's characterisation of an early decision in the *Zenith II* litigation is equally misleading. In that case, the district court determined that the 1916 Act was not unconstitutionally vague because, *inter alia*, it achieved definitional specificity from related terms like "dumping" which have commonly used meanings.[211] The court found the common meaning of "dumping" to be "price discrimination between purchasers in different national markets". This is, of course, a colloquial definition of "dumping", not one based on examination of "fair value" and "material injury" concepts. More importantly for present purposes, the district court went on to stress that the Act contains the additional element of "specific, predatory, anti-competitive intent". In this regard, the court stated:

> "As I read the Act, it forbids regular, continued price discrimination between purchasers in different national markets whenever the discrimination is motivated by a desire to destroy *competition*. This, I submit, is a more than adequate definition of the conduct proscribed by the Act."[212]

3.226 **Japan** argues that, with the exception of a single, dated and rejected opinion - *Zenith III* - the US court precedents support Japan's position. Ironically, the analysis of the court in *Zenith III* has been most heavily criticised for failing to follow the tenets of statutory interpretation.[213] In US jurisprudence, as in the WTO, the analysis begins with the text and ends with the text, wherever (as with the 1916 Act) the text is unambiguous.

3.227 In this connection, Japan points out that *Zenith III*'s judgement has limited binding effect in the US judicial system. It is at most a non-binding decision except perhaps in subsidiary district

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[209] The United States refers to *Matsushita Electrical*, Op. Cit. The United States recalls that the Supreme Court reiterated this standard that same year in another anti-trust case, *Cargill, Inc. v. Monfort of Colorado, Inc.*, Op. Cit.

[210] The United States refers to *Western Concrete*, Op. Cit., p. 1019 (9th Cir. 1985); *Helmac I*, pp. 590-91; *Helmac II*, Op. Cit., pp. 565-66; *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, 631 F. Supp. 984, pp. 988-89 (S.D.N.Y. 1986); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513, p. 516 (M.D. Fla. 1980); *Schwimmer v. Sony Corp.*, 471 F. Supp. 793, pp. 796-97 (E.D.N.Y. 1979). The United States also refers to *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, pp. 408-09 (D. Del. 1978).

[211] The United States recalls that, in fact, the 1916 Act itself nowhere uses the word "dumping".

[212] *Zenith II*, Op. Cit., p. 259 (emphasis added by the United States).

[213] Japan refers to *Geneva Steel*, Op. Cit., pp. 1218-19; *Wheeling-Pittsburgh*, Op. Cit., p. 605.

courts in its circuit[214] (though, given the criticisms of other courts, it might very well be reversed in the Third Circuit if the issue arises again). Also, modern courts have heavily criticised the court's analysis in *Zenith III*, noting, in particular, that it ignores the text of the Act (as the United States does in the present proceeding).

3.228 The **United States** submits that Japan provides no support for its assertion that the relatively recent and extensively researched *Zenith III* decisions are "discredited", other than to point out that the District Courts in *Geneva Steel* and *Wheeling-Pittsburgh* disagreed with some aspects of *Zenith III*. It is not the function of the present Panel to interpret US law, but only to ascertain what US courts and other relevant authorities understand it to be. Moreover, there is simply no basis for such a negative characterisation of the *Zenith III* precedents, which include not one but three decisions by a court of appeals and a very important Supreme Court construction of the Sherman Act. The District Court decision in *Zenith III* was cited and followed by the District Court in *Helmac I* and the Supreme Court based its 1993 *Brooke Group* decision in part on its own 1986 decision in *Matsushita Electrical*.

(e) *Western Concrete Structures v. Mitsui & Co*.

3.229 With regard to the treatment of the 1916 Act by the US Circuit Courts of Appeal, **Japan** recalls that, in 1985, the Ninth Circuit noted that the "express purpose of the Act is to protect domestic industries from dumping by their foreign competitors."[215]

3.230 The **United States** considers that the Ninth Circuit's 1985 *Western Concrete* decision limiting who has "standing" to bring a 1916 Act claim does not establish that the Act is an "antidumping" law. The court of appeals cited the Clayton Act as analogous to the 1916 Act[216] and noted that plaintiff had alleged that defendants intended to injure their preferred customers' competitors and to drive them out of the market. The court stated that "in every reported case, the statute has been applied or restricted to domestic producers (or importers […] where there were no domestic producers […]) of the dumped good, prohibiting restraint or monopolization of the dumped good."[217]

3.231 The United States also recalls that, in 1983, the Third Circuit Court of Appeals similarly concluded that the "primary aim of the 1916 Act is to prohibit *anti-competitive pricing*" and held that the plaintiff must show a specific, not just general, *predatory* intent to injure or destroy an industry.[218]

3.232 The United States further recalls that, in 1986, on remand from the Supreme Court, the Third Circuit Court of Appeals in *In re Japanese Electronic Products III* dismissed the plaintiffs' 1916 Act claims upon the basis that, like the Sherman Act claims, there was no evidence of the possibility of recoupment. The court reasoned that "[s]ince the Sherman Act conspiracy charge failed in the

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[214] In this regard, Japan notes that, although the United States claims the decision is a Third Circuit opinion, the US discussion focuses on a District Court case which was affirmed in part and reversed in part by the Third Circuit. Thus, most of the US argument on this point is based on dicta from a 20-year-old, much criticised District Court opinion, not a 3rd Circuit opinion. The Third Circuit never found that the 1916 Act has only anti-trust elements; rather, it found that it has both anti-trust and anti-dumping elements, and that its "primary aim" is to prohibit anti-competitive pricing. Japan refers to *In re Japanese Electronic Products II*, Op. Cit., p. 325. Thus, according to Japan, the United States juggles the two (actually three) opinions and confuses the issue.

[215] *Western Concrete*, Op. Cit., p. 1019. Japan notes that the Third Circuit twice addressed issues arising from the district court decision in *Zenith III* (both before and after the case went to the Supreme Court), but in neither decision did the Circuit Court address the specific issue of whether the law should be construed as an anti-dumping or anti-trust statute. Japan refers to *In re Japanese Electronic Products II*, Op. Cit.; *In re Japanese Electronic Products III*, Op. Cit. The Second Circuit once addressed the issue of who would have standing under the 1916 Act. Japan refers to *Isra Fruit Ltd. v. Agrexco Agr. Export Co.*, Op. Cit.

[216] The United States refers to *Western Concrete*, Op. Cit., p. 1019.

[217] Ibid.

[218] The United States refers to *In re Japanese Electronic Products II*, Op. Cit., p. 325.

Supreme Court, our holding on the Anti-Dumping [1916] Act conspiracy claim must fail with it."[219] In other words, the Third Circuit Court of Appeals has held that the 1916 Act is a predatory pricing statute requiring, among other things, proof of the possibility of recoupment and is aimed at anti-competitive behaviour.

3.233 The United States considers, therefore, that, contrary to Japan's statement, US appellate courts (including the Ninth Circuit) have not uniformly treated the 1916 Act as an anti-dumping measure.[220] Indeed, the facts show that quite the opposite is true.

(f) *Geneva Steel Co. v. Ranger Steel Supply Corp*. and *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co*.

3.234 **Japan** submits that several federal district courts have addressed to varying degrees the specific issue of whether the 1916 Act should be considered a protectionist anti-dumping remedy or a competition-oriented anti-trust remedy. In the two most recent decisions, each of the courts concluded that the 1916 Act is a protectionist anti-dumping law, based on an analysis of its text. These cases rely explicitly on the plain meaning of the text of the 1916 Act to reject limitations imported from US anti-trust law that defendants sought to graft onto the 1916 Act. In *Geneva Steel*, the judge summarized his views succinctly:

> "The [1916 Act] means what its plain language says. […] the Act has a protectionist component that prohibits dumping designed to injure the domestic industry […]."[221]

3.235 Japan notes that the judge analysed the five forms of harm the statute contemplates, and noted that only the last two - to "restrain" or to "monopolize" trade and commerce in the United States - were in the nature of competition law harms. The first three - to "destroy", to "injure", or to "prevent the establishment of" a US industry - were all in the nature of dumping harms.[222] The judge could have bolstered this point by noting that the notions of "to injure" and "to prevent the establishment of" a US industry are precisely parallel to the definition of dumping set forth in Article VI:1 of the GATT 1994 and the Anti-Dumping Agreement. In reaching the decision, the judge considered and rejected the analysis and holding of the court in *Zenith III*.

3.236 Japan recalls that in *Wheeling-Pittsburgh* the court reached the same conclusion, explaining that:

> "In this Court's view, the conclusion reached by the district court in *Geneva Steel* was correct. The Court held that the Anti-dumping Act of l916 did not require the type of predatory intent defined in [competition law] because the statute 'has a protectionist

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[219] *In re Japanese Electronic Products III*, Op. Cit., pp. 48-49.

[220] The United States notes that Japan quotes a line from *Western Concrete*, stating that the 1916 Act's "express purpose […] is to protect domestic industries from dumping by their foreign competitors." Yet, in the view of the United States, the Ninth Circuit also expressly cited the Clayton Act as context for the 1916 Act. The United States refers to *Western Concrete*, Op. Cit., p. 1019. The court noted that the plaintiff had alleged that defendants had an "intent to injure [their preferred customer's] competitors and to drive them out of the market." The court stated that "in every reported case, the statute [1916 Act] has been applied or restricted to domestic producers (or importers […] where there were no domestic producers […]) of the dumped good, prohibiting restraint or monopolization of the dumped good." Ibid.

[221] *Geneva Steel*, Op. Cit., p. 1215. Japan considers that this passage also serves to demonstrate that, like WTO panels and the Appellate Body, the United States interprets laws and agreements on the basis of their text, whenever possible.

[222] Japan refers to *Geneva Steel*, Op. Cit., p. 1215. Indeed, they mirror the provisions of the US Tariff Act of 1930, as amended (19 U.S.C. § 1673d(b) (1999)).

> reach beyond anti-trust and traditional predatory price-discrimination pleading requirements.'"[223]

Like the court in *Geneva Steel*, the court in *Wheeling-Pittsburgh* stressed the five specific harms enumerated by the statute. The court confirmed that the first three of them protected competitors (as an anti-dumping statute).[224]

3.237 Japan points out that, although *Geneva Steel* and *Wheeling-Pittsburgh* are still in litigation, the district judges have clearly and unequivocally expressed their views on the characteristic of the 1916 Act, and that issue, if not the issue of liability, has been finally resolved. Moreover, a review of these decisions indicates that each is thoughtful and well reasoned.

3.238 The **United States** recalls that in *Geneva Steel* the US District Court for the District of Utah addressed the elements of the 1916 Act in the course of ruling on the defendants' motion for dismissal of the complaint. Its decision viewed the requisite intent element of the 1916 Act differently from the *Zenith III* court. In the *Geneva Steel* court's view, a complainant could show *either* the traditional anti-trust type predatory intent or an intent to injure an US industry.[225] However, the court did observe regarding the requirement of intent:

> "[T]he burden of proving such improper intent may not be easy. Absent some compelling evidence, it may be *nearly impossible*."[226]

3.239 The United States notes that in *Wheeling-Pittsburgh*, the US District Court for the Southern District of Ohio recently ruled on a motion to dismiss a civil complaint. In the course of its ruling, it stated that the 1916 Act does require proof of predatory intent, albeit of a different kind than is required under the Sherman Act or the Robinson-Patman Act. Like *Geneva Steel*, the court held that a complainant must prove an intent to injure, destroy or prevent the establishment of a domestic industry, but does not have to establish the reasonable prospect of resultant market control and price recoupment. Although some defendants have elected to settle rather than proceed to trial, the case is still pending while the remaining litigants conduct discovery.[227]

3.240 The United States points out that, under US law, neither the *Geneva Steel* decision nor the *Wheeling-Pittsburgh* decision is considered "final" or "conclusive." Both cases are currently in the discovery stage which means that no trial has taken place.[228] A district court decision on a motion to dismiss is "final" only once all of the claims in the case have been tried or otherwise adjudicated and

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[223] *Wheeling-Pittsburgh*, Op. Cit., p. 604 (citations omitted by Japan).

[224] Japan refers to ibid., p. 603.

[225] The United States refers to *Geneva Steel*, Op. Cit., p. 1217, 1224.

[226] The United States refers to ibid., p. 1224 (emphasis added by the United States).

[227] It should be noted that, since the second substantive meeting of the Panel with the parties, there have, according to the United States, been further developments in the *Wheeling-Pittsburgh* case. According to the United States, the plaintiff in *Wheeling-Pittsburgh* has voluntarily dismissed its claims against the remaining defendants at the trial court level so that all that remains is an appeal of an interlocutory opinion regarding injunctive relief currently pending before the US Court of Appeals for the Sixth Circuit.

[228] In response to a question of the Panel regarding the current status of the *Geneva Steel* case and the *Wheeling-Pittsburgh* case as far as the non-settled cases are concerned, the United States notes that the cases are still pending in the discovery stage and no final decisions have been issued, although an appeal of the decision in *Wheeling-Pittsburgh* that the 1916 Act does not allow for injunctive relief was taken. Wheeling-Pittsburgh's appeal of that decision is pending in the Court of Appeals for the Sixth Circuit. It should be noted that, after the second substantive meeting of the Panel with the parties, there have, according to the United States, been further developments in the *Wheeling-Pittsburgh* case. According to the United States, the plaintiff in *Wheeling-Pittsburgh* has voluntarily dismissed its claims against the remaining defendants at the trial court level so that all that remains is the above-mentioned appeal of an interlocutory opinion regarding injunctive relief currently pending before the US Court of Appeals for the Sixth Circuit.

the district court has entered judgment.[229] At that point, the district court decision becomes "appealable," meaning that a party to the case may take an appeal to a circuit court of appeals. If no party appeals the case, the district court's decision becomes "conclusive" and therefore binding on the parties. However, even a final district court decision is not binding on other district courts or appellate courts; it does not even have persuasive value unless it has been soundly reasoned.[230] If a party does appeal the case, the appellate court, in turn, will conduct a review and either affirm, modify or reverse the district court's decision. The appellate court's decision then is the "conclusive" decision in the case (assuming that it is not subsequently reviewed by the US Supreme Court).[231]

3.241 The United States argues, moreover, that Japan's discussion of the holdings in *Geneva Steel* and *Wheeling-Pittsburgh* are in any event irrelevant to the present Panel's analysis. Japan seems to take the position that those two decisions are "right" and that the *Zenith* line of cases are "wrong". Yet, it is not the role of Japan, the United States or the present Panel to agree or disagree with any particular judicial decision.[232] Rather, the present Panel must determine whether the 1916 Act is susceptible to an interpretation that is WTO-consistent. In the view of the United States, in the present case, the Panel need not struggle with speculating regarding possible WTO-consistent interpretations of the 1916 Act. There are judicial decisions already applying the 1916 Act to parallel the domestic anti-trust laws in the US. The series of decisions in *Zenith* demonstrate that the 1916 Act is clearly susceptible to an interpretation that is WTO-consistent and, in fact, has been so interpreted.

3.242 **Japan** notes that, in an interesting twist, after attempting to eviscerate *Wheeling-Pittsburgh* and *Geneva Steel en route* to elevating the dated and rejected *Zenith* analysis over them, the United States later raises *Wheeling-Pittsburgh* from the dead as controlling precedent. The

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[229] The United States refers to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, pp. 545-47 (1949) which interprets 28 U.S.C. § 1291; also *International Society for Krishna Consciousness, Inc. v. Air Canada*, 727 F.2d 253, pp. 254-55 (2d Cir. 1984) which states, according to the United States, that a motion to dismiss for failure to state a claim is not a final decision.

[230] The United States refers to *Threadgill v. Armstrong World Industries Inc.*, 928 F.2d 1366, p. 1371 (3d Cir. 1991).

[231] The United States refers to *Metropolitan Water Co. v. Kaw Valley Drainage District*, 223 U.S. 519, p. 524 (1912) where, having failed to seek review from a higher court, the judgment was "conclusive" and binding on the parties. In this context, Japan asks the United States to respond to the following observation: Since the *Zenith III* case - which the United States claims is the authoritative interpretation of the 1916 Act - involved the 3d and 9th circuits, it does not appear to be a binding precedent in other circuits. Since the State of Utah belongs to the 10th circuit and the State of Ohio belongs to the 6th circuit, there is no reason to believe that courts in *Geneva Steel* and *Wheeling-Pittsburgh* will be guided by the *Zenith III* precedent. The United States responds that this observation is irrelevant because the question is whether the 1916 Act is susceptible to a WTO-consistent interpretation.

[232] In response to a question of Japan regarding whether the United States disagrees with the views expressed in *Geneva Steel* and *Wheeling-Pittsburgh* and whether it has taken any action in the two court cases to influence their decisions, the United States notes, first of all, that, as a general matter, it is not the role of the United States (or the Panel) in the present dispute to agree or disagree with any US judicial decision relevant to the interpretation of the 1916 Act. In any event, the preliminary decisions in *Geneva Steel* and *Wheeling-Pittsburgh* are not even part of the relevant case law, given that they are neither final nor conclusive under the US legal system. Furthermore, the United States is not a party to the *Geneva Steel* case or the *Wheeling-Pittsburgh* case, and it has taken no action in terms of intervening or filing briefs in either case. In fact, the United States does not agree that these decisions are inconsistent with US WTO obligations. In response to a follow-up question of Japan, the United States further notes that in cases where the United States is itself a party to a civil or criminal litigation (acting through the Department of Justice), it has direct responsibility for ensuring that its own claims and actions comport with US laws and obligations, including international obligations, and for informing the court of such considerations. In addition, where appropriate, the Department of Justice can seek to intervene in a private civil litigation in order to protect a federal government interest. The Department of Justice does not routinely intervene in private civil litigation, however, and it remains a matter of judgment when and before which courts it should be done.

United States relies on *Wheeling-Pittsburgh* for the proposition that US courts have held that the 1916 Act does not provide for injunctive relief. Japan never argued that it did and, to be sure, the point in any case is irrelevant to Japan's Article XI argument. However, the United States' reliance on *Wheeling-Pittsburgh* highlights the inability of the United States to mount a consistent defence.

3.243 The **United States** considers it noteworthy that Japan has placed itself in the position of defending the legal reasoning of precisely those preliminary trial court decisions in *Geneva Steel* and *Wheeling-Pittsburgh* that it claims threaten WTO-illegal injury to its interests.

7. Statements by US executive branch officials

3.244 **Japan** argues that the US government's denial in this proceeding that the 1916 Act is an instrument to counter dumping directly contradicts many official statements and positions of US executive branch officials, including officials of the current Administration.

3.245 Japan notes that several telling statements focus on the issue of whether the 1916 Act would be "grandfathered" under the WTO agreements, as it was under the GATT 1947. In a 1997 letter to Representative Ralph Regula, current USTR Charlene Barshefsky stated:

> "In responding to one of your questions at the March 14 hearings, I mistakenly indicated that the 1916 Act is 'grandfathered' under WTO rules. This is not the case. Under the GATT 1947, the United States was permitted to maintain practices that were inconsistent with the GATT in 1947 when the United States signed the GATT Protocol of Provisional Application, which 'grandfathered' pre-existing mandatory legislation. However, with entry into force of the GATT 1994, the GATT 1947 'grandfather clause' became no longer applicable."[233]

3.246 Japan notes that this issue had been addressed in 1986 by then-USTR Clayton Yeutter, who acknowledged in a letter to Congress that the 1916 "act was 'grandfathered' upon US accession to the GATT and is therefore GATT-legal."[234] These statements clarify that, prior to the WTO agreements, the United States could maintain the 1916 Act only because of the grandfather clause.

3.247 According to Japan, these statements demonstrate that the United States, for years, has viewed the Act as GATT-inconsistent and as requiring grandfathering. Coupled with the statements discussed below, they confirm that, for years, the US executive branch has considered the Act to be an anti-dumping law.

3.248 Japan submits that other relevant statements were made during the 1985 and 1987 attempts by some Congressmen to amend the 1916 Act. S. 236 and S. 1655, which were not adopted, would have weakened the criteria for applying the 1916 Act. USTR Clayton Yeutter and Assistant Attorney General John Bolton confirmed that the provisions of the 1916 Act establish liability against foreign

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[233] Letter from USTR Charlene Barshefsky to Rep. Ralph Regula, dated 4 Apr. 1997, p. 1.

[234] Japan refers to the Letter from USTR Clayton Yeutter to Sen. Strom Thurmond, dated 18 Feb. 1986, p. 10 (emphasis added by Japan). Japan also references the letter from Assistant Attorney General John Bolton to Sen. S. Thurmond, dated 4 February 1986, which states that "[t]o the extent that any provisions of the current 1916 Act are inconsistent with the GATT, they are protected by the 'grandfather clause,' paragraph 1(b) of the 1947 Protocol of Provisional Application of the GATT." Japan further refers to the Testimony of USTR General Counsel Alan Holmer to the US Senate Finance Committee, dated 18 July 1986, p. 5, which states that "the Anti-Dumping Act of 1916 […] was grandfathered by the Protocol of Provisional Application when the US joined the GATT in 1947. Because of this legal technicality, the 1916 Act in its present form is legal under the GATT."

companies that dump goods, as described in the 1916 Act, i.e. dumping calculated as the difference between the price in the US and the price in a foreign country.[235]

3.249 For Japan, the statements quoted above show that the US government consistently has viewed the Act as an anti-dumping law and that, absent grandfathering, it would have been GATT-illegal. In this connection, the analysis of the 1916 Act presented by USTR General Council Alan Holmer to the US Senate Finance Committee (18 July 1986) is useful:

> "We believe that our reading flows logically from the letter and spirit of the GATT and the Anti-Dumping Code. It also follows that S. 1655 would violate the Code by imposing additional sanctions on top of normal anti-dumping duties. *While the same criticism can be levelled at the 1916 Act, the Act was "grandfathered"* by the Protocol of Provisional application when the US joined the GATT in 1947. Because of this legal technicality, the 1916 Act in its present form is legal under the GATT."[236]

3.250 In the view of the **United States**, the statements of various government officials regarding whether the 1916 Act was "grandfathered" under the GATT 1947 and whether proposed amendments to the 1916 Act would be GATT-consistent as evidence that the 1916 Act is an anti-dumping statute deserve no weight in the Panel's consideration for two reasons. First, statements with respect to whether an amendment to the 1916 Act would be GATT-consistent are not relevant to the instant case because the amendments were never enacted. Second, with respect to the statements on the "grandfather" exception, the simple answer to Japan's argument is that these government officials were mistaken as a matter of fact as to whether the 1916 Act was "grandfathered" under the GATT 1947.[237]

3.251 According to the United States, GATT 1947 document L/2375/Add. 1 (19 March 1965) shows that the United States government did not include the 1916 Act anywhere in the survey of existing mandatory legislation not in conformity with Part II of the GATT 1947. Indeed, at one point, the United States government specifically notified statutes that were not in conformity with Articles III and VI - the two Articles which Japan claims the 1916 Act violates - and the 1916 Act was not among them. The plain import of L/2375/Add.1 is that, in the United States' view, the 1916 Act was *GATT-legal* and therefore did not require "grandfathering".

3.252 The United States argues that its notification in L/2375/Add.1 is an official statement of the United States government's position regarding the GATT-legality of the 1916 Act in a GATT 1947 forum. The United States did not have the occasion to address the GATT-legality of the 1916 Act in the only other possible GATT 1947 forum, i.e. a dispute resolution proceeding, because no contracting party challenged the 1916 Act under the GATT 1947 (despite the fact that the United States had never invoked the "grandfathering" protection made available by the Protocol of Provisional Application).

3.253 The United States submits that, because this notification by the United States contained in L/2375/Add.1 (19 March 1965), which is an official statement of the US government, contradicts, as a factual matter, the statements cited by Japan, the Panel should attach no weight to those statements

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[235] Japan refers to the letter from Assistant Attorney General John Bolton to Sen. Strom Thurmond, dated 4 February 1986.

[236] Testimony of USTR General Counsel Alan Holmer to the US Senate Finance Committee, dated 18 July 1986, p. 5 (emphasis added by Japan).

[237] In response to a question of Japan whether the United States is negating the veracity of these statements, the United States notes that it is not negating the truthfulness of the statements in question; the officials who made them believed them to be correct. The United States is simply saying that, to the extent that those statements may be construed as inconsistent with the positions taken by the United States in the instant dispute, those statements are mistaken as a matter of fact.

when deciding whether the 1916 Act is WTO-consistent. The present Panel must review the current weight of judicial authority and decide for itself whether the 1916 Act is inconsistent with any WTO obligations.

3.254 **Japan** considers that the US contention that the US statement cited by Japan "deserve no weight" is unbelievable and wrong as a matter of law. It is simply not credible for the United States to assert that the authors of these statements are "mistaken" and that they do not reflect the official opinion of the United States. These statements were made by senior US government officials with unmatched expertise in the matter. Obviously, the statements of senior US government officials and US government documents reflect the official US interpretations of the 1916 Act.

3.255 In response to a question of the Panel to the United States regarding in which circumstances the statement of a US government official could be considered as the expression of the opinion of the United States, the **United States** notes that, generally, if the US government official is speaking on behalf of the whole United States in a capacity in which he or she has the authority to do so, then the statement would reflect the opinion of the United States. In the present case, the statements cited by Japan reflect the only opinion of the official's respective agency.

3.256 The United States considers that the International Court of Justice (hereinafter the "ICJ") cases referenced by the Panel, however, address a different issue. In those cases, the issue was whether a declaration by a government official created a binding legal obligation, not whether the declaration could be considered an expression of an opinion of a party to the dispute. In the *Nuclear Test* case, the ICJ held that repeated declarations by, among other high-ranking officials, the President of France that it would cease conducting atmospheric nuclear tests was a unilateral act creating a binding legal obligation. In a later case, *Frontier Dispute*, the ICJ held that a declaration by the Head of State of Mali did not constitute a unilateral act creating a binding legal obligation for purposes of the dispute. The ICJ explained that

> "[…] since it has to determine the frontier line on the basis of international law, it is of little significance whether Mali's approach may be construed to reflect a specific position towards, or indeed to signify acquiescence in, the principles held by the Legal Sub-Commission to be applicable to the resolution of the dispute. If those principles are applicable as elements of law, they remain so whatever Mali's attitude."

3.257 According to the United States, there is no question that the statements relied upon by Japan (and the European Communities) do not constitute a unilateral act by the United States creating a binding legal obligation in the present dispute. Like the statements at issue in *Frontier Dispute*, these statements do not purport to commit the United States to undertake or refrain from undertaking any kind of action. Rather, they are statements regarding whether, in the opinion of the particular author, the 1916 Act was grandfathered under the GATT 1947, and whether the 1979 Anti-Dumping Code and Article VI of the GATT 1947 provide that anti-dumping duties are the exclusive remedy for dumping. In both instances, statements by government officials cannot determine or change whether the 1916 Act was in fact grandfathered under GATT 1947 or whether, as a legal matter, Article VI of the GATT 1947 and the 1979 Anti-Dumping Code provided that anti-dumping duties were the exclusive remedy for dumping. These are questions that the Panel must determine pursuant to the mandate set forth in Article 11 of the Dispute Settlement Understanding. Article 11 requires that a panel "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." If a panel were legally bound by statements of the parties concerning the facts in dispute or the conformity of their measures, it would be not be able to carry out its mandate under Article 11.

8. Statements in relevant US government documents

3.258 **Japan** recalls that the US Department of Justice's and the US Federal Trade Commission's "Anti-trust Enforcement Guidelines for International Operations" expressly state: "the 1916 Act is not an anti-trust statute […]. It is a trade statute that creates a private claim against importers […]."[238] Thus, the two US government agencies that enforce US anti-trust law agree that the Act is not an anti-trust law, but is an anti-dumping law.

3.259 In response to a question of Japan regarding how the US position in the present proceeding can be reconciled with the statement in the above-mentioned Anti-trust Enforcement Guidelines for International Operations, according to which "the 1916 Act is not an anti-trust statute," the **United States** notes that, first of all, the quote excerpted by Japan is incomplete and misleading. The full quote is as follows: "The Revenue Act of 1916, better known as the Antidumping Act, 15 U.S.C. §§ 71-74, is not an anti-trust statute, *but its subject matter is closely related to the anti-trust rules regarding predation*."[239] Secondly, the United States notes that the Guidelines are not regulations with the force of law but rather "are intended to provide anti-trust guidance to businesses engaged in international operations on questions that relate specifically to the [enforcement] Agencies' international enforcement policy."[240] The Justice Department and the Federal Trade Commission continue to refer to them in speeches and policy statements, and to refer practitioners to them. They have not been withdrawn or superseded by any later guidelines.

3.260 **Japan** notes, in addition, that the Panel correctly points out that the 1916 Act is listed as an anti-dumping measure in the US government's "Overview and Compilation of U.S. Trade Statutes". The inclusion and explanation of the 1916 Act in the US government's Overview is telling.[241] The Overview is prepared for the US House of Representatives by the US Government Printing Office. The text of the 1916 Act is included in Section A, "Authorities to respond to foreign subsidy and dumping practices", of Chapter 9, "Trade Remedy Laws".[242] Of even greater relevance to the present proceeding is the discussion of the 1916 Act in Chapter 2 of the Overview. There, the Overview cites three provisions of US law which address dumping practices. The 1916 Act and Title VII of the Tariff Act of 1930 are two of the three.

3.261 According to Japan, this serves as a clear statement of the nature of the 1916 Act. In the words of the US government, the 1916 Act regulates "dumping practices" or "international price discrimination, whereby goods are sold in one export market (such as the United States) at prices lower than the prices at which comparable goods are sold in the home market of the exporter."[243] Japan cannot imagine how the United States possibly can try to explain away this clear statement.

3.262 In response to a question of the Panel regarding the fact that the 1916 Act figures both in the "Compilation of Selected Anti-trust Laws" of 20 December 1994 and in the "Overview and Compilation of U.S. Trade Statutes" of 4 August 1995, the **United States** notes that the Committee on the Judiciary of the US House of Representatives periodically issues a Compilation of Selected Anti-trust Laws. It has done so in 1950, 1959, 1965, 1978 and, most recently, 1994. The 1994 compilation is an official document of the House Judiciary Committee, and it includes an Introduction by the Chairman of the House Judiciary Committee describing it as "a reference source for the official text of our Nation's anti-trust laws." It also expressly lists the 1916 Act as one of the "principal" anti-trust laws.

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[238] Japan refers to US Department of Justice and US Federal Trade Commission, Anti-trust Enforcement Guidelines for International Operations, April 1995, Section 2.82.

[239] Emphasis added by the United States.

[240] Anti-trust Enforcement Guidelines for International Operations, April 1995, p. 1.

[241] Japan refers to the Overview and Compilation of US Trade Statutes, pp. X, 65 and 519.

[242] Japan refers to ibid., pp. X and 519.

[243] Japan refers to ibid., p. 65.

3.263 The United States notes that the House Judiciary Committee is the same committee that is responsible for the "[r]evision and codification of the Statutes of the United States" under Rule 10 of the Rules of the US House of Representatives and for the supervision of the work of the Office of the Law Revision Counsel regarding the placement of laws in their proper titles of the US Code, as set out in section 285 of title 2 of the US Code (2 U.S.C. § 285). The 1916 Act has been placed in title 15 of the US Code, along with the United States' other anti-trust laws.

3.264 With regard to the Overview and Compilation of U.S. Trade Statues, the United States notes that, on its cover, this compilation explains that it has been "[p]repared for the use of Members of the Committee on Ways and Means [of the US House of Representatives] by members of its staff." It adds that "[t]his document has not been officially approved by the committee and may not reflect the views of its Members." The Ways and Means Committee staff has prepared this unofficial compilation biannually since 1987, with the most recent unofficial compilation being issued on 25 June 1997 (without relevant amendments to the 1995 unofficial compilation). As the Panel notes, this unofficial compilation does list the 1916 Act as a trade statute. The United States also notes, however, that, on page 63, the unofficial compilation describes the 1916 Act in relation to the United States' first anti-dumping law, enacted in 1921[244], which forms the basis of the United States' current antidumping law. The unofficial compilation states that the two statutes address "*different* types of dumping practices."[245] In other words, unlike the United States' anti-dumping law, the 1916 Act does not address the dumping addressed by Article VI of the GATT 1994 and the Anti-Dumping Agreement. The unofficial compilation also explains that Congress found "the need for a different type of AD law" from the 1916 Act because "[t]he requirements under [the 1916 Act], particularly the need to show evidence of intent, are difficult to meet [...]."

3.265 According to the United States, the reason why the 1916 Act appears in two different compilations, in all likelihood, relates to the jurisdiction of House committees. A House committee normally would place in its compilation those statutes over which it has jurisdiction under the House Rules, and the House Judiciary Committee and, very possibly, the House Ways and Means Committee would seek to have a bill to amend the 1916 Act referred to them.[246]

3.266 The United States notes that, in the case of a bill to amend the 1916 Act, the House Judiciary Committee would certainly have jurisdiction, given that the 1916 Act is an anti-trust statute, included in title 15 of the US Code, and Rule 10 of the House Rules gives the House Judiciary Committee jurisdiction over the "[p]rotection of trade and commerce against unlawful restraints and monopolies." While the House Ways and Means Committee would normally not have jurisdiction over a bill proposing or amending an anti-trust statute, whether international in scope or solely domestic, it may have jurisdiction over a bill to amend the 1916 Act (along with the House Judiciary Committee) because of the circumstances surrounding the 1916 Act's enactment. In this regard, the 1916 Act was passed at a time when the House Rules only allowed a bill to be referred to one House committee. Because the provisions that were to become the 1916 Act were one part of a much larger bill proposing the Revenue Act of 1916, and the House Ways and Means Committee was the House committee that had jurisdiction over all Revenue Acts under the House Rules at that time (as it is today), the House Ways and Means Committee was the House committee to which the entire bill was referred, even though the provisions that were to become the 1916 Act, if proposed in a separate bill

[244] The United States refers to the Antidumping Act of 1921, 19 U.S.C. §§ 160-71 (repealed).

[245] The United States refers to the Overview and Compilation of US Trade Statutes (emphasis added by the United States).

[246] The United States notes, in this regard, that when a bill is first introduced in the House, it is often referred to more than one House committee for consideration and review before there is a vote on the House floor regarding its passage. The House committees to which the bill is referred are those which are considered to have jurisdiction over one or more provisions of the bill under Rule 10 of the House Rules. The decision regarding which House committees to refer a bill to is made by the Speaker of the House, and sometimes it can be contentious.

by themselves, would have been referred to the House Judiciary Committee. It is possible but not definite that, because of the role that the House Ways and Means Committee played in the enactment of the 1916 Act, the Speaker of the House today might refer a bill to amend the 1916 Act to the House Ways and Means Committee (along with the House Judiciary Committee). It is for these same reasons, in all likelihood, that the House Ways and Means Committee staff placed the 1916 Act in its unofficial compilation.

3.267 In the United States' view, the House Judiciary Committee compilation confirms that the 1916 Act is an anti-trust statute, and it is noteworthy that this compilation was put together by the House committee most familiar with US anti-trust laws. The unofficial House Ways and Means Committee compilation is not necessarily inconsistent with the House Judiciary Committee's characterisation of the 1916 Act as an anti-trust statute because it also includes the 1916 Act among US trade statutes. For one thing, the unofficial House Ways and Means Committee compilation expressly states that the 1916 Act is a "different type" of statute from the United States' antidumping law. Moreover, if this unofficial compilation is understood from the standpoint of House committee jurisdiction, it can be seen that the inclusion of the 1916 Act by the House Ways and Means Committee staff is likely based on its view of the House Ways and Means Committee's jurisdiction, not based on a view that the 1916 Act is not an anti-trust statute. Indeed, the unofficial House Ways and Means Committee compilation discusses the 1916 Act (at page 63) in the context of historical background.

G. VIOLATIONS OF ARTICLE VI:2 OF THE GATT 1994 AND ARTICLE 18.1 OF THE ANTI-DUMPING AGREEMENT

3.268 **Japan** argues that Article VI of the GATT 1994 and the many provisions of the Anti-Dumping Agreement set forth the only WTO-consistent means of addressing dumping. They define dumping and set out the investigation a Member must conduct and the specific findings and determinations which a Member must make before it may impose an anti-dumping measure. Also, they narrowly define the measure a Member may take.

3.269 Japan considers that Article VI of the GATT 1994 authorizes *only one* measure in response to dumping: the imposition of an anti-dumping duty.[247] Thus, assuming a Member has followed the requirements of Article VI:2 of the GATT 1994 and the Anti-Dumping Agreement, a Member has two options: (i) it "may levy" an anti-dumping duty less than or equal to the margin of dumping on the dumped product; or (ii) it may decide to take no action. Any other action would violate Article VI of the GATT 1994.[248]

3.270 Japan argues that its view is also supported by the negotiating history of Article VI of the GATT 1994. After the close of the Havana Conference, at the second session of the contracting parties, the relevant Working Party in its Report "agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization

[247] Japan refers to the text of Article VI:2 which reads:

> "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 […]."

[248] In response to a question of the Panel regarding how the parties understand the phrase "[i]n order to offset dumping […]" in Article VI:2 of the GATT 1994, Japan notes that this term informs the purpose of and rationale behind anti-dumping duty procedures. The phrase and its context establish the reason why the measure to counter dumping is limited to a duty not greater than the dumping margin. An anti-dumping duty not exceeding the margin of dumping is the sole authorized remedy for dumping.

except insofar as such other measures are permitted under other provisions of the General Agreement."[249]

3.271 Japan submits that the overall purpose of the GATT 1994 bolsters this interpretation of Article VI:2 of the GATT 1994. One of the main purposes of the GATT 1994 regime is to eliminate trade barriers among countries and to promote free trade. Article VI of the GATT 1994 allows Members to do what they would not normally be allowed to do - to impede trade by imposing duties on imports in contravention of Article II of the GATT 1994. Because Article VI of the GATT 1994 gives Members the right to impede trade in specified circumstances, it is only logical that Article VI of the GATT 1994 establishes the right to restrict dumped imports only by a single authorized remedy, namely imposing an "anti-dumping duty".

3.272 Japan considers that the text of Article 18.1 of the Anti-Dumping Agreement reaffirms the understanding that Article VI of the GATT 1994 is the sole GATT-authorized remedy for dumping.[250] The plain meaning of this provision could not be more explicit. "No specific action" can be taken to address dumping except action that follows the requirements of Article VI of the GATT 1994.

3.273 Japan notes that senior US officials recognize that the imposition of an anti-dumping duty is the only permissible means of remedying dumping. In his 18 February 1986 letter to Senate Judiciary Committee Chairman Strom Thurmond, then-USTR Clayton Yeutter unambiguously declared:

> "Both the [Tokyo Round Anti-Dumping] Code and the GATT authorize a signatory to impose antidumping duties to counteract foreign dumping. This remedy represents a special exception to normal GATT rules regarding tariffs. The Code, however, expressly limits this remedy to the prospective collection of antidumping duties to offset the margin of dumping. *It prohibits the use of additional sanctions, such as anti-trust damages.*"[251]

3.274 Japan recalls that, similarly, in a 4 February 1986 letter to the Chairman Strom Thurmond, then Assistant Attorney General John Bolton stated:

> "Thus any private remedy for dumping must also be consistent with GATT. The Code permits a signatory to impose, in response to dumping, only antidumping duties limited to the margin of dumping."[252]

3.275 Japan submits further that it can scarcely improve on the analysis of the 1916 Act presented by USTR General Counsel Alan Holmer to the US Senate Finance Committee (18 July 1986):

> "The Antidumping Code, however, expressly *limits* the remedy for dumping to the prospective collection of antidumping duties *to offset the margin* of dumping. Article 16 of the Code [now Article 18.1 of the Anti-Dumping Agreement] states: "No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by

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[249] Japan refers to the Report of the Working Party on "Modifications to the General Agreement," adopted on 1 and 2 September 1948, BISD II/39, para. 12.

[250] Japan recalls that Article 18.1 provides as follows:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

[251] Japan refers to the letter from USTR Clayton Yeutter to Sen. Thurmond, dated 18 February 1986, p. 9-10 (emphasis added by Japan).

[252] Japan refers to the letter from Assistant Attorney General John Bolton to Sen. Thurmond, dated 4 February 1986, p. 17.

> this Agreement." *This language prohibits the use of additional sanctions, such as fines, embargoes, imprisonment or other draconian measures.*
>
> It has also been argued that "the Code also does not affect other actions that are not in the nature of 'duties' that may affect goods that are 'dumped'." The thrust of this argument is that if a government chooses to address dumping through the imposition of duties, it must do so under the procedures set out in the Anti-Dumping Code, but at the same time, a government is free to use any other means that it chooses to punish dumping. This interpretation of Article 16, however, appears rather implausible if one considers its consequences. Under this view, *a foreign government would be perfectly within its rights to convict an American businessman of dumping and imprison him for a period of 10 years, since the government would have a right to use whatever alternative sanctions for dumping it pleased.*
>
> *It follows that Article 16 must stand for the proposition that a government can provide its citizens one, and only one, remedy for dumping. That remedy is the collection of duties in a manner consistent with the Anti-Dumping Code*." [253]

3.276 Japan considers that this simple explanation demonstrates the obviousness of the many inconsistencies of the 1916 Act with the WTO anti-dumping regime. The 1916 Act is an anti-dumping law. Thus, it must comply with Article VI of the GATT 1994 and the provisions of the Anti-Dumping Agreement. However, it quite obviously does not.

3.277 Japan asserts, therefore, that the 1916 Act violates US obligations under Paragraph 2 of Article VI of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement because it provides that various penalties, including fines, imprisonment and treble damages, may be imposed for violations of the Act. Article VI:2 limits the remedy applicable to dumping to one remedy - anti-dumping duties of a specified amount.[254] In contrast, the 1916 Act provides for fines, treble damages and imprisonment and, thus, violates paragraph 2 of Article VI and Article 18.1 of the Anti-Dumping Agreement.

3.278 The **United States** argues that Article VI of the GATT 1994 and the Anti-Dumping Agreement do not govern all measures directed at dumping. Japan's interpretation that Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement establish that anti-dumping duties are the exclusive remedy for injurious dumping is contradicted by the ordinary meaning of the terms used by the two Articles in question. In addition, Japan conveniently ignores the footnote to Article 18.1 of the Anti-Dumping Agreement. These Articles - and, in particular, Article 18.1 - provide that a Member may take a measure against injurious dumping even when such measures are not explicitly set forth in Article VI of the GATT 1994 or the Anti-Dumping Agreement, as long as the measure is not inconsistent with other provisions of the GATT 1994.

3.279 In the view of the United States, nothing in Article VI:2 of the GATT 1994 addresses whether anti-dumping duties are the exclusive remedy for dumping. Japan itself argues that Article VI was meant to provide an exception to the prohibition on tariffs above the bound rate as laid down in Article II of the GATT 1994 – i.e. not to provide the only remedy for dumping. Moreover, paragraph 2 simply states that a Member "may" levy an anti-dumping duty to offset or prevent dumping. It does not in any way suggest that remedies for dumping other than anti-dumping duties are prohibited.

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[253] Japan refers to the testimony by Alan F. Holmer, General Counsel Office of the USTR, before the Subcommittee on International Trade of the US Senate, dated 18 July 1986, p. 4 (emphases added by Japan).

[254] Japan also refers to Article 18.1 of the Anti-Dumping Agreement which states that "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this agreement." (footnote omitted by Japan)

For example, it does not state that a Member "may only" levy anti-dumping duties. If the word "only" had been intended, the text could and would have said so.

3.280 The United States contends that, contrary to Japan's argument, the negotiating history of Article VI does not support its position that anti-dumping duties are the exclusive remedy for dumping. The negotiating history shows that the GATT 1947 originally included a paragraph in Article VI - paragraph 7 - providing in pertinent part:

> "No measures other than anti-dumping […] duties shall be applied by any contracting party […] for the purpose of offsetting dumping […]."[255]

However, paragraph 7 lasted only about one year. Article VI was modified soon after the GATT 1947 came into force, with the initial relevant discussions on this matter taking place in early 1948 during the "Havana Conference", which addressed the draft charter of the International Trade Organization ("ITO"), a document which was similar in many respects to GATT 1947.

3.281 The United States notes that at that time, members of the Subcommittee on Article 34 considered a provision in the draft ITO charter, identical to the original paragraph 7 of GATT 1947 Article VI, and decided to remove it. The record of these discussions explains:

> "The Subcommittee agreed to the deletion of paragraph 6 of the Geneva draft which expressly prohibited the use of measures other than anti-dumping or countervailing duties against dumping or subsidization. It did so with the definite understanding that measures other than compensatory anti-dumping […] duties may not be applied to counteract dumping […] *except insofar as such other measures are permitted under other provisions of the Charter*."[256]

3.282 The United States further recalls that, later that year, during the Second Session of the GATT 1947, the Working Party on Modifications to the General Agreement referenced the work of the ITO Subcommittee on Article 34 and agreed, *inter alia*, to replace the entire then-existing Article VI with its counterpart under the draft ITO charter, which in final form contained no provision like paragraph 7 of Article VI of the GATT 1947. In a report, the Working Party explained:

> "The working party, endorsing the views expressed by [the ITO Subcommittee on Article 34], agreed that measures other than compensatory anti-dumping […] duties may not be applied to counteract dumping […] *except insofar as such other measures are permitted under other provisions of the General Agreement*."[257]

3.283 The United States notes that, many years later, a paragraph similar in many respects to the original paragraph 7 of Article VI of the GATT 1947 appeared in Article 16.1 of the Tokyo Round Anti-Dumping Code. It provided:

> "No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."

In an accompanying footnote, Article 16.1 added that this provision "is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate."

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[255] Reproduced in GATT, Analytical Index: Guide to GATT Law and Practice, 6th ed. (1995), p. 238.

[256] Reports of Committees and Principal Sub-Committees, ICITO I/8, p. 74, para. 25 (Geneva, September 1948), quoted in GATT, Analytical Index: Guide to GATT Law and Practice, 6th ed. (1995), p. 238 (emphasis added by the United States).

[257] BISD II/41, 42, para. 12 (emphasis added by the United States).

3.284 The United States recalls that a provision virtually identical to Article 16.1 of the Tokyo Round Anti-Dumping Code now appears in the Anti-Dumping Agreement, in Article 18.1, except that now it refers to the GATT 1994 instead of the GATT 1947. Article 18.1 and its footnote provide as follows:

> "18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[24]
>
> […]
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> ———————
>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate."

3.285 The United States points out that, in the "Dunkel Draft" text of the Anti-Dumping Agreement dated 20 December 1991, the Article on final provisions was left blank. In the course of the work of the Legal Drafting Group in April 1992, the Secretariat then inserted a new Article on final provisions, paragraph 1 of which was constituted of the text of former Article 16.1, with the words "General Agreement" mechanically transposed to "GATT 1993".[258] "GATT 1993" was then later mechanically transposed to "GATT 1994".

3.286 The United States submits that, in the context of the 1979 Anti-Dumping Code, the meaning of the footnote to Article 16.1 was clear. No action against dumping could be taken except consistently with the General Agreement. This merely restates the basic principle of *pacta sunt servanda*: every treaty in force is binding on the parties to it and must be performed by them in good faith. However, it is also clear that there was never any intention to eliminate the other GATT-consistent options available to address a factual situation that constituted a case of injurious dumping.[259] Thus, for example, a contracting party that was a Party to the 1979 Anti-Dumping Code retained the option to address such dumping by eliminating the injury, for instance by raising the duty on the product concerned on an MFN basis to a level not in excess of the relevant tariff binding. Or it could renegotiate the duty on the product consistent with Article XXVIII. Or it could provide adjustment assistance for the industry or workers injured by the dumping. Or, if the factual situation also supported the taking of a safeguard action under Article XIX or a countervailing duty under Article VI, the contracting party concerned could pursue those avenues.

3.287 The United States argues that, read literally, Article 16.1 alone might have been misinterpreted to lock any government into levying anti-dumping duties whenever it was faced with a factual situation constituting injurious dumping. The footnote preserved flexibility to take any other measure that was otherwise GATT-consistent.

3.288 The United States considers that the same conclusions hold today. If a Member is faced with a factual situation constituting injurious dumping, it is not locked into levying anti-dumping duties, but has the option of taking other measures that are in accordance with the GATT 1994. If the measure is of a nature that is simply not regulated by the GATT 1994, as is the case for the 1916 Act, the measure is *a fortiori* consistent with the GATT 1994.

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[258] The United States refers to room document no. 625, dated 6 April 1992, p. 30.

[259] The United States refers to J. H. Jackson, World Trade and the Law of GATT, The Bobbs-Merrill Co. (1969), p. 411 where it is stated that "although Article VI carves out an exception to GATT obligations for antidumping and countervailing duties, nevertheless, measures that do not violate other GATT provisions can also be used to counteract dumping or subsidies."

3.289 It is the United States' position in the present case, of course, that the 1916 Act should not be viewed as an action against dumping in the first place. Rather, under US law, the 1916 Act has been interpreted as an anti-trust statute. More fundamentally, it is a statute whose elements are not the same as the "dumping" and "injury" elements of Article VI of the GATT 1994 and the Anti-Dumping Agreement and therefore is not subject to Article VI:2 and Article 18.1.

3.290 **Japan** maintains its view that Article VI of the GATT 1994 and the Anti-Dumping Agreement set forth the only WTO-consistent means of addressing dumping. First of all, the US interpretation of footnote 24 is incorrect. The text of Article 18.1 and footnote 24 of the Anti-Dumping Agreement reaffirm the understanding that Article VI of the GATT 1994 is the sole GATT-authorized remedy for dumping. The plain meaning of Article 18.1 could not be more explicit. "No specific action" can be taken to address dumping except action that follows the requirements of Article VI of the GATT 1994. Footnote 24 provides that "appropriate" action under other provisions of the GATT 1994, such as a safeguard remedy, may be imposed where the WTO requirements for doing so are met. In other words, a Member may affect imports through actions authorized by other provisions of the GATT 1994. For example, in a situation involving dumping (i.e. where the requirements for imposing an anti-dumping duty were met), a Member could impose a safeguard measure after complying with the provisions of the WTO Safeguards Agreement.[260]

3.291 Japan notes, however, that the footnote does not authorize remedies other than anti-dumping duties to counteract dumping. The only "specific action" permitted "in accordance" with Article VI is imposition of anti-dumping duties after certain requirements have been met. In the instant case, no provision of the GATT 1994 justifies the procedures and penalties provided for by the 1916 Act. If the US interpretation were correct, a Member could take any measure in addition to anti-dumping duties after completing an investigation in accordance with the Anti-Dumping Agreement.[261]

3.292 Japan considers that the US interpretation in the present proceeding clearly departs from previous official US positions. The analysis by USTR General Counsel Alan Holmer to the US Senate Finance Committee clearly supports Japan's position. He testified that "the use of additional sanctions, such as fines, embargoes, imprisonment or other draconian measures" was not permitted, and that Article 16 (now Article 18.1 of the Anti-Dumping Agreement) allows a government to provide its citizens only one remedy for dumping - the collection of anti-dumping duties.

3.293 The **United States** responds that, first of all, Article VI does not govern all laws and measures that impose border adjustments or even all laws and measures that impose border adjustments in the form of duties. It only governs laws and measures that attempt to counteract injurious dumping through the imposition of duties, based on findings of "dumping" and "injury", as is clear from the GATT 1947 panel report in *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*.[262] There, the panel report first discusses one of two basic GATT 1947 provisions that prohibits duties from being imposed. That provision is Article I:1, and it provides that duties and charges of any kind imposed in connection with importation must meet the most-favoured-nation

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[260] In response to a question of the Panel regarding the interpretation of footnote 24, Japan notes that, for example, safeguard action consistent with Article XIX of the GATT 1994 might well have the incidental effect of stopping "dumped" imports as a result of the action, but the objective of the action itself would not be to address the dumping. According to Japan, footnote 24 thus simply avoids the possible conflict between other WTO actions against imports and the obligation under Article 18.1 of the Anti-Dumping Agreement not to take other actions against dumping.

[261] Japan notes, in this regard, that, under the US interpretation, footnote 24 would completely contradict the main point of Article 18.1 – that countries may not take any action against dumping other than the imposition of anti-dumping duties.

[262] The United States refers to the Panel Report on in *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, adopted on 11 July 1991, BISD 38S/30, para. 4.4 (hereinafter "*United States – Pork*").

standard. The other one, according to the panel report, is Article II:1, which provides that an importing Member shall not impose duties on another Member's products in excess of the rate set forth in the importing Member's Schedule of Concessions, i.e. the bound rate. Specifically, Article II:1(b) provides that a Member's products

> "[…] shall […] be exempt from ordinary customs duties in excess of those set forth and provided [in the importing Member's Schedule of Concessions]. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

3.294 According to the United States, Article II:2 does recognize certain situations where duties may be imposed in excess of the bound rate, and one of them is "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI". Otherwise, according to the panel report, duties in excess of the bound rate (or duties provided on a non-most-favoured-nation basis) are prohibited.[263]

3.295 The United States argues that, when Article VI is read in the context of Article I:1 and Article II:1, it can be seen how the coverage of Article VI is limited. Article VI itself applies only to laws or measures that attempt to counteract injurious dumping through the imposition of anti-dumping duties.

3.296 The United States submits that, given the limited coverage of Article VI and, in particular, its status as a carve-out from the most-favoured-nation obligation of Article I:1 and Article II:1, it does not follow that Article VI (or Article 18.1 of the Anti-Dumping Agreement) would itself act as a prohibition against actions that a Member may take. Rather, Article VI is properly viewed as establishing a right that a Member has, and that is the right to impose duties to counteract injurious dumping. Article VI and the Anti-Dumping Agreement do require a Member to follow the rules set forth in the Anti-Dumping Agreement when imposing anti-dumping duties. But, they do not prohibit the imposition of other measures to counteract injurious dumping. Indeed, Article VI does not even address that issue. It is Article 18.1 of the Anti-Dumping Agreement that addresses that issue, and it makes clear that a Member may take whatever other action is consistent with other GATT 1994 provisions.

3.297 In the view of the United States, it is for precisely this reason that Professor Jackson opined that "although Article VI carves out an exception to GATT obligations for antidumping and countervailing duties, nevertheless, measures that do not violate other GATT provisions can also be used to counteract dumping or subsidies."[264]

3.298 In reply to the Japanese argument that "[i]f the US interpretation were correct, a Member could take any measure in addition to antidumping duties after completing an investigation in accordance with the Anti-Dumping Agreement", the United States maintains its position that

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[263] In response to the question of the Panel regarding how the parties understand the phrase "In order to offset dumping […]" in Article VI:2 of the GATT 1994, the United States argues that the phrase "[i]n order to offset dumping […]" is used in Article VI:2 of the GATT 1994 in order to differentiate the type of duty that a Member may impose under Article VI from the types of duty that would run afoul of Article I:1 and Article II:1 of the GATT 1994. As explained by the panel report in *United States - Pork*, Article I:1 prohibits duties on imported products that do not meet the most-favoured-nation standard. Article II:1 prohibits duties in excess of the bound rate. Within this context, the phrase "In order to offset dumping […]" in Article VI:2 can be seen as an attempt to specify a situation in which it is proper for a Member to impose duties in excess of the bound rate and on a non-most-favoured-nation basis.

[264] The United States refers to J. H. Jackson, Op. Cit., p. 411.

Article 18.1 allows remedies for dumping other than duties as long as those remedies do not run afoul of other GATT 1994 provisions. However, that requirement poses a severe limitation on the actions available to a Member. For example, the national treatment obligation of Article III, by itself, substantially restricts the actions that a Member might take. If a law imposed damages on an importer based on findings of "dumping" and "injury", it would not be governed by Article VI, given that it did not impose duties. Instead, it would be an internal law, governed by Article III:4, and the treatment accorded to imported products by that law would have to be no less favourable than the treatment accorded to domestic products by any comparable domestic law. In all likelihood, moreover, that law would violate Article III:4, given that national anti-trust regimes generally base liability for low pricing on factors such as the possession of a large market share and predation.

3.299 The United States argues that, for these reasons, even if the Panel somehow were to rule that the 1916 Act was governed by Article VI of the GATT 1994, it should nevertheless find that nothing in Article VI or Article 18.1 of the Anti-Dumping Agreement makes anti-dumping duties the exclusive remedy for injurious dumping. Rather, the only requirement emanating from Article VI and the Anti-Dumping Agreement is that any other action taken by a Member with respect to injurious dumping must be consistent with other GATT 1994 provisions. As Article III:4 is the only other GATT 1994 provision under which Japan makes a claim in the present proceeding, any violation of Article VI and the Anti-Dumping Agreement in the present proceeding would have to be predicated on a violation of Article III:4, and that is not something that Japan has established.[265]

3.300 **Japan** argues that Article III is irrelevant in this context. It does not enable a Member to take specific measures against dumping. A Member may take measures permitted under other WTO provisions in a situation where there exists dumping. However, the United States does not and cannot identify any other WTO provision to justify the imposition of imprisonment, treble damages etc. The United States again attempts to escape from its burden to prove that imposition of imprisonment, treble damages, etc. are WTO-consistent and that anti-dumping duties are not the exclusive remedy for dumping. The United States refers to Professor Jackson's assertion that "measures that do not violate other GATT provisions can also be used to counteract dumping". This statement is in line with Japan's statement and does not support the US argument.

3.301 Japan notes that, in a contorted new argument in support of its contention, the United States asserts that the 1916 Act is not within the scope of Article VI of the GATT 1994 and the Anti-Dumping Agreement, but rather is governed by Article III:4 of the GATT 1994. Thus, since it would be a measure permitted by another WTO provision, anti-dumping duties are not the exclusive remedy for dumping. The logical fallacy is obvious.[266] If a law is not an anti-dumping law, the fact that other provisions may be violated is not relevant to the issue of whether measures other than anti-dumping duties are permitted in order to offset dumping. In all of its argumentation, the United States has been unable to explain how the 1916 Act's penalties - imprisonment, treble damages, fines and costs - are measures permitted under other WTO provisions. In answer to Japan's question, the United States says that if there is an analogous domestic statute providing capital punishment or life-term imprisonment, a Member can provide such remedies against dumping. This US interpretation runs counter not only to relevant WTO provisions but also to the objectives of the WTO regime.

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[265] In response to a question of Japan regarding whether the 1916 Act would be a GATT-consistent measure if sanctions against injurious dumping included capital punishment or life-term imprisonment, the United States notes that the question wrongly implies that the 1916 Act is a sanction against injurious dumping. Apart from this, if those remedies were allowed under the 1916 Act, it would be inconsistent with Article III:4 as there is no analogous domestic statute providing for those remedies.

[266] In response to a question of the United States, Japan confirms its view that Article VI governs any and all measures taken in order to offset dumping regardless of whether the measure is applied at the border or within the border.

3.302 The **United States**, in reaction to Japan's hypothetical examples of capital punishment or life imprisonment as remedies for 1916 Act violations, states that these are not among the (unused) criminal remedies provided in the 1916 Act itself. If they were, they would violate the national treatment provisions of Article III of the GATT 1994 unless and until the United States began to execute domestic price discriminators. The United States does not do that.

3.303 In response to a question of the Panel regarding the meaning of the word "measure" in Article 1 of the Anti-Dumping Agreement as opposed to that of the word "action" in Article 18.1 of the Anti-Dumping Agreement and footnote 24 attached thereto, **Japan** notes that the term "measure" in Article 1 of the Anti-Dumping Agreement refers to provisional measures pursuant to Article 7, price undertakings pursuant to Article 8, and anti-dumping duties pursuant to Article 9 of the Anti-Dumping Agreement. All of these types of actions must comply with the Anti-Dumping Agreement.

3.304 Japan argues that the term "action" in Article 18.1, in contrast, is intentionally broader. Because "action" is not defined in the Anti-Dumping Agreement, its meaning should be determined by "reference to its ordinary meaning, read in light of its context, and the object and purposes" of the Anti-Dumping Agreement.[267] The drafters recognized that countries might be tempted to take other actions targeted at "dumping," and therefore drafted a clear statement that any such actions were not permitted. "Action" thus covers any type of border measures, internal measures, procedural steps, or any other conduct to discipline dumping. This distinction also is echoed by the use of the narrower term "applied" in Article 1 versus the broader term "taken" in Article 18.1.

3.305 The **United States**, in reply to the same question of the Panel, submits that, in interpreting the term "measure" in Article 1 of the Anti-Dumping Agreement, it is first necessary to consider that this term is modified by the term "anti-dumping." When the term "anti-dumping measure" is read together with the plain meaning of the remainder of Article 1, it becomes clear that it means any of the measures provided for under the Anti-Dumping Agreement, which includes (1) provisional measures under Article 7, (2) price undertakings under Article 8 and (3) the imposition of anti-dumping duties under Article 9. A review of the history of Article 1 further confirms this meaning. In this regard, Article 1 of the 1979 Tokyo Round Anti-Dumping Code only expressly addressed a measure in the form of an anti-dumping duty. It provided that "[t]he imposition of an anti-dumping duty is a measure to be taken only" in the circumstances provided in Article VI and pursuant to the rules set forth in the Anti-Dumping Code. As a technical correction, Article 1 of the Anti-Dumping Agreement was subsequently clarified to read that any measure provided for by the Anti-Dumping Agreement could be taken only in the circumstances provided in Article VI and pursuant to the rules set forth in the Anti-Dumping Agreement. It is for this reason that it now refers to "[a]n anti-dumping measure" instead of only an anti-dumping duty.

3.306 The United States further notes that, with this meaning given to the term "anti-dumping measure," Article 1 of the Anti-Dumping Agreement can properly be interpreted as providing that if a Member takes a measure provided for by the Anti-Dumping Agreement, it may only do so in the circumstances provided in Article VI - which means that findings of "dumping" and "injury" must be made - and if it follows the rules set forth in the Anti-Dumping Agreement. Article 1 does not explain what a Member can do if it takes action against dumping other than by resorting to one of the measures provided for under Article VI and the Anti-Dumping Agreement. However, it plainly implies that measures other than those provided for in the Anti-Dumping Agreement can be taken against dumping. That is why the second sentence of Article 1 explains that it is only addressing what can happen "in so far as action is taken under anti-dumping legislation or regulations."

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[267] Japan refers to the Appellate Body Report on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, adopted on 25 November 1998, WT/DS60/AB/R, para.70 (hereinafter Appellate Body Report on "*Guatemala – Cement*").

3.307 The United States points out that Japan has not challenged the United States' taking of any of the three types of measures set forth in the Anti-Dumping Agreement. It has only challenged the 1916 Act as such. What this means is that in the absence of a challenge to one of the three specific measures identified in the Anti-Dumping Agreement, the Panel has no jurisdiction to make any findings with respect to any claims under the Anti-Dumping Agreement. As the Appellate Body has made clear in *Guatemala - Cement*, the only matters that may be challenged under the Anti-Dumping Agreement are the three types of anti-dumping measures set forth in the Anti-Dumping Agreement. In the Appellate Body's words:

> "According to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measure at issue – in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 – and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement."[268]

3.308 The United States argues that, similarly, in light of the reasoning of the panel in *Brazil - Measures Affecting Desiccated Coconut* which was affirmed by the Appellate Body, the Panel has no jurisdiction to decide a claim under Article VI of the GATT 1994. The panel in that case found that: "Article VI of GATT 1994 is not independently applicable to a dispute to which the SCM Agreement is not applicable,"[269] relying on language parallel to Article 1 of the Anti-Dumping Agreement.

3.309 **Japan** considers that the particular finding of the Appellate Body in *Guatemala - Cement* cited by the United States has no relevance to the present panel proceeding. The *Guatemala - Cement* case dealt with the issue of whether a provisional or definitive anti-dumping *duty* had been levied before the relevant panel process was initiated. In the present case, however, the subject of the deliberations is not an anti-dumping duty or a price undertaking, but action other than anti-dumping duties or price undertakings. Thus, the findings of the panel or the Appellate Body in *Guatemala-Cement* on this particular issue do not apply here.

3.310 With regard to the term "action" in Article 18.1 and footnote 24 of the Anti-Dumping Agreement, the **United States** notes that, like the term "measure" in Article 1 of the Anti-Dumping Agreement, the term "action" in Article 18.1 and footnote 24 of the Anti-Dumping Agreement is modified. In particular, Article 18.1 refers to a "specific action against dumping." A "specific" action against dumping is one that regulates particular import transactions, such as can take place through the imposition of duties, an injunction, a quantitative restriction or valuation procedures. An action is one that is "against dumping," meanwhile, if it is designed to counteract dumping.

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[268] The United States refers to the Appellate Body Report on *Guatemala - Cement*, Op. Cit., para. 79. (emphasis added by the United States).

[269] The United States refers to the Panel Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/R, para. 278 (hereinafter "*Brazil – Desiccated Coconut*").

3.311 The United States considers that, when Article 18.1 and footnote 24 are read together, it can be seen that they mean that a Member can take a specific action against dumping if it is consistent with, and not in violation of, the provisions of the GATT 1994.

3.312 The United States argues that it should be clear that Article 18.1 and footnote 24 do not even purport to address or place any limitation on a measure like the 1916 Act. First, the 1916 Act does not regulate particular import transactions or even imports generally; it only imposes liability on an importer. Second, the 1916 Act is not directed at dumping; it is directed at private anti-competitive conduct typically condemned by anti-trust laws. Of course, the Panel need not reach any of these issues because the 1916 Act, in the first place, is not even subject to Article VI of the GATT 1994 or the Anti-Dumping Agreement.

H. VIOLATIONS OF ARTICLE VI:1 OF THE GATT 1994 AND ARTICLES 1, 2, 3, 4, 5, 9 AND 11 OF THE ANTI-DUMPING AGREEMENT

3.313 Japan asserts that the 1916 Act violates the requirements set forth in Article VI of the GATT 1994 and in numerous provisions of the Anti-Dumping Agreement because it requires the imposition of impermissible anti-dumping remedies in situations where the procedural requirements for applying the one permitted remedy are not met.

3.314 Japan asserts, first, that the 1916 Act provides for the application of remedies against dumping outside the circumstances specified at Article VI:1 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement. Specifically, the 1916 Act provides for the imposition of measures in the absence of an investigation (i) initiated and conducted in accordance with the provisions of and (ii) which establishes facts required by Article 1 of the Anti-Dumping Agreement.[270] Therefore, the Act is inconsistent with Article VI of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.

3.315 Japan recalls, second, that the 1916 Act prohibits importation of a product at a price "substantially less" than the "actual market value or wholesale price of [the product] […] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported […]." Article VI:1(a) of the GATT 1994 and Articles 2.1 and 2.2 of the Anti-Dumping Agreement, in contrast, require that the first benchmark against which the price of the imported product is compared be the actual price of the product in the exporting country.[271]

3.316 Japan notes that, in addition, Article 2.4.1 of the Anti-Dumping Agreement provides those against whom dumping is alleged, protection against currency fluctuations. The 1916 Act provides no such protection. Japan considers, therefore, that the 1916 Act is inconsistent with Article VI:1(a) of the GATT 1994 and Article 2 of the Anti-Dumping Agreement, because it deviates from their requirements.

3.317 Japan argues, third, that Articles VI:1 and VI:6(a) of the GATT 1994, and Article 3 of the Anti-Dumping Agreement, require a Member to find that the dumping has caused or threatens to cause material injury to its domestic industry (or retards the establishment of a domestic industry) before applying an anti-dumping measure.[272] These Articles also set forth criteria which define and

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[270] Japan refers to the Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, adopted on 18 July 1985, BISD 32S/55, para. 4.4, where it is stated that "it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established".

[271] Japan recalls that, under Article VI:1(a) and Article 2.1, the primary and preferred benchmark for comparison is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

[272] Japan refers to the Panel Report on *Swedish Anti-Dumping Duties*, adopted on 26 February 1955, BISD 3S/81, para. 8, where it is states that "[t]he importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry […].".

govern the determination of injury. For example, paragraphs 1, 2 and 4 of Article 3 of the Anti-Dumping Agreement set forth factors which a Member must examine in determining whether injury has occurred—volume and impact of prices of dumped imports, etc..

3.318 Japan notes that, in contrast, the 1916 Act requires only a showing of *intent*. Moreover, the intent requirement is defined as an intent to destroy or injure a United States industry or to prevent its establishment; thus, the 1916 Act has no "materially" requirement. The 1916 Act also provides for the application of penalties based merely upon a showing of the price differential discussed above and intent, a requirement that differs substantially from that set forth in the WTO agreements. This directly contravenes the United States' obligations under Article VI of the GATT 1994 and Article 3 of the Anti-Dumping Agreement.

3.319 Japan points out, fourth, that Articles 4 and 5 of the Anti-Dumping Agreement set forth requirements limiting the party or parties that properly may pursue an anti-dumping claim. Specifically, they require that a request be made "by or on behalf of the domestic industry".[273] In contrast, as shown by *Geneva Steel* and *Wheeling-Pittsburgh*, a single United States producer of a like product may advance a claim under the Anti-Dumping Act of 1916.[274] Japan notes, in addition, that Article 5 requires that petitions contain evidence of the three elements of dumping, injury and causation, and set a *de minimis* threshold applicable to the dumping element. The 1916 Act contains none of these requirements. Rather, an 1916 Act plaintiff needs only to present a "short and plain statement" of its claim.[275] Finally, Article 5.10 of the Anti-Dumping Agreement requires Members to complete their investigations and decide whether or not to impose duties within 18 months. The 1916 Act contains no such deadline. Therefore, the Act is inconsistent with Article VI of the GATT 1994 and Articles 4 and 5 of the Anti-Dumping Agreement.

3.320 Japan submits, fifth, that Article 9 of the Anti-Dumping Agreement sets forth the regime which Members must apply when imposing and collecting anti-dumping duties. The 1916 Act, however, ignores this regime. It provides for the US government to collect fixed monetary penalties and for private litigants to collect treble damages and attorneys costs without complying with any of the requirements of Article 9. Moreover, it ignores the Article 9.3 command that the penalty not exceed the margin of dumping and, further, imposes imprisonment as a penalty. In addition, the 1916 Act violates Article VI and Article 9 because it imposes retroactive, punitive penalties on importers, including treble damages and imprisonment. In contrast, Article 9, and especially Article 9.2, specifies that the remedy of anti-dumping duties is a prospective measure. A review of Article 11 of the Anti-Dumping Agreement further confirms this fact. Thus, the Act violates Article VI of the GATT 1994 and Article 9 of the Anti-Dumping Agreement.

3.321 Japan argues, finally, that Article 11 of the Anti-Dumping Agreement limits the duration of anti-dumping measures and requires periodic reviews of the need for continued imposition of

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[273] Japan refers to Article 5.1 of the Anti-Dumping Agreement. Japan also notes that Article 4.1 defines "domestic industry" as "the domestic producers as a whole of the like products or […] those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products" and that Article 5.4 requires authorities to determine that a petition is supported by "those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product" of those producers supporting or opposing the petition. Japan notes that under no circumstances can an investigation be initiated if those supporting it account for less than 25 per cent of total domestic production of the like product.

[274] Japan refers to the 1916 Act which states that "[*a*]*ny* person injured […] may sue therefor in the district court […]" (emphasis added by Japan). Japan notes the contrast with the Report of the Group of Experts on 'Anti-Dumping and Countervailing Duties,' adopted on 13 May 1959, BISD 8S/145, para. 18 where it is stated that "the use of anti-dumping duties to offset injury to a single firm within a large industry […] would be protectionist […]".

[275] Japan refers to the US Federal Rule of Civil Procedure 8(a)(2).

anti-dumping duties. The 1916 Act has no provisions regarding either duration or review. Thus, the Act violates Article VI of the GATT 1994 and Article 11 of the Anti-Dumping Agreement.

3.322 The **United States** argues that the claims raised by Japan under various other provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement rest on the assumption that the Panel has already found the 1916 Act to be in violation of Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. Thus, each of these claims has the same mistaken premise, namely, that Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement make anti-dumping duties the exclusive remedy for dumping and, further, that the 1916 Act is an anti-dumping statute that provides remedies for dumping other than anti-dumping duties.

3.323 The United States contends that Japan has failed to establish that Article VI and the Anti-Dumping Agreement govern anti-trust measures such as the 1916 Act, or that these provisions even govern all anti-dumping measures. Japan's various claims under Article VI and the Anti-Dumping Agreement therefore must be rejected.

I. VIOLATIONS OF ARTICLES 1 AND 18.1 OF THE ANTI-DUMPING AGREEMENT

3.324 **Japan** contends that, by applying the 1916 Act without meeting the requirements of Article VI of the GATT 1994 and Articles 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement, the United States also has violated its obligation under Articles 1 and 18.1 of the Anti-Dumping Agreement.

3.325 Japan recalls that Article 1 of the Anti-Dumping Agreement provides as follows:

> "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."[276]

3.326 Japan also recalls that Article 18.1 reads as follows:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

3.327 Japan recalls, finally, that, as previously demonstrated, the United States has violated many provisions of Article VI of the GATT 1994 and Articles, 2, 3, 4, 5, 9 and 11 of the Anti-Dumping Agreement. Thus, the United States has violated Articles 1 and 18.1 of the Anti-Dumping Agreement.

3.328 The **United States** argues that the claims raised by Japan under various other provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement rest on the assumption that the Panel has already found the 1916 Act to be in violation of Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement. Thus, each of these claims has the same mistaken premise, namely, that Article VI:2 of the GATT 1994 and Article 18.1 of the Anti-Dumping Agreement make anti-dumping duties the exclusive remedy for dumping and, further, that the 1916 Act is an anti-dumping statute that provides remedies for dumping other than antidumping duties.

3.329 The United States contends that Japan has failed to establish that Article VI and the Anti-Dumping Agreement govern anti-trust measures such as the 1916 Act, or that these provisions

[276] Footnote omitted by Japan.

even govern all anti-dumping measures. Japan's various claims under Article VI and the Anti-Dumping Agreement therefore must be rejected.

J. VIOLATION OF ARTICLE III:4 OF THE GATT 1994

1. The relationship between Article III:4 and Article VI of the GATT 1994

3.330 In response to a question of the Panel to both parties regarding the relationship between Article III:4 and Article VI of the GATT 1994, **Japan** argues that Articles III:4 and VI are not related in the sense of necessarily being either dependent upon one another or mutually exclusive. Thus, as in the present case, a domestic measure can violate both Articles. More specifically, if a measure conforms with Article VI, it is a permitted border measure (a measure imposed on or in connection with importation) and so is not within the scope of Article III. In the instant case, however, the measure violates Article VI as an anti-dumping law not in conformity therewith; it also violates Article III by regulating imported products under a separate, less favourable regime than is applicable to domestic products.

3.331 The **United States**, in reply to the Panel's question, considers that a specific law or measure falls under Article III:4 of GATT 1994 when it can be characterised as an "internal" law or measure. Basically, an "internal" law or measure is one, like the 1916 Act, that affects the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product. Although it is possible for an internal charge or regulation to be collected or enforced in the case of an imported product at the time or point of importation and still be subject to Article III[277], an "internal" law or measure nevertheless does not include a law or measure making a border adjustment, such as the imposition of duties on an imported product.

3.332 In the view of the United States, for a specific law or measure to fall under Article VI of the GATT 1994, two requirements must be satisfied. First, it must involve a particular type of border adjustment, not just any border adjustment; it must be one that imposes duties on an imported product. Second, it must also be an anti-dumping law or measure, in the sense that it attempts to counteract injurious dumping based on findings of "dumping" and "injury."

3.333 The GATT 1947 panel report in *United States - Pork*[278] confirms that Article VI does not govern all laws and measures that impose border adjustments or even all laws and measures that impose border adjustments in the form of duties, but rather only laws and measures that attempt to counteract injurious dumping through the imposition of duties, based on findings of "dumping" and "injury." As the panel report explains, one of two basic GATT provisions that prohibits duties from being imposed is Article I:1 of the GATT 1994, which provides that duties and charges of any kind imposed in connection with importation must meet the most-favoured-nation standard. The other one, according to the panel report, is Article II:1, which provides that an importing Member shall not impose duties on another Member's products in excess of the rate set forth in the importing Member's Schedule of Concessions, i.e. the bound rate. Specifically, Article II:1(b) provides that a Member's products "shall […] be exempt from ordinary customs duties in excess of those set forth and provided [in the importing Member's Schedule of Concessions]. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date." Article II:2 does recognize certain situations where duties may be imposed in excess of the bound rate, such as "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI," but otherwise duties in excess of the bound rate (or duties provided on a non-most-favoured-nation basis) are prohibited. When Article VI therefore is read in the context of Article I:1 and Article II:1, it can

[277] The United States refers to the Interpretative Note *ad* Article III.
[278] The United States refers to *United States - Pork*, Op. Cit., para. 4.4.

be seen how the coverage of Article VI is limited. Article VI itself applies only to laws or measures that attempt to counteract injurious dumping through the imposition of duties, based on findings of "dumping" and "injury."

3.334 The United States further argues that an anti-trust law or measure addressing private anti-competitive conduct, such as predatory pricing, through the imposition of treble damages - as does the 1916 Act - is not governed by Article VI for two independent reasons. First, it is not a law or measure that imposes any type of border adjustment; it is an internal law or measure. Second, it is not an anti-dumping law or measure; it addresses private anti-competitive conduct rather than injurious dumping.

3.335 The United States asserts that, if an anti-trust law or measure addressed private anti-competitive conduct, such as predatory pricing, through the imposition of duties on the imported product, it still would not be governed by Article VI, given that it is not an anti-dumping law or measure. It would, however, be governed by - and inconsistent with - Article II:1(b), which provides that an importing Member shall not impose duties on another Member's products in excess of the bound rate. Article II:2 does recognize certain situations where duties may nevertheless be imposed, as discussed above, such as "any anti-dumping […] duty applied consistently with the provisions of Article VI," but there is no provision that would apply to an anti-trust law or measure addressing private anti-competitive conduct.

3.336 The United States contends, finally, that, if an anti-dumping law or measure addressed injurious dumping through the imposition of damages, it, too, would not be governed by Article VI, given that it did not impose duties and therefore would not even be any type of border measure. Instead, it would be governed by Article III:4, and the treatment accorded to imported products by that anti-dumping law or measure would have to be no less favourable than the treatment accorded to domestic products by any comparable domestic law or measure. In all likelihood, moreover, the anti-dumping law or measure would violate Article III:4, given that national anti-trust regimes generally base liability for low pricing on factors such as the possession of a large market share and predation.

3.337 In summing up, the United States notes that, in the case of Article III:4, it is the nature of the measures imposed in application of the law that is dispositive as to whether or not Article III:4 governs. As discussed above, a specific law or measure falls under Article III:4 when it can be characterised as an "internal" law or measure, and an "internal" law or measure is one that affects the internal sale, offering for sale, purchase, transportation, distribution or use of an imported product. An "internal" law or measure is not one that imposes duties at the border. The fact that the law may target specific practices, such as in the anti-dumping sense or the anti-trust sense, is irrelevant under Article III:4.

3.338 The United States notes that, in contrast, in the case of Article VI, both the nature of the measures imposed in application of the law and the fact that the law may target specific practices must be considered to determine whether or not Article VI governs. As discussed above, Article VI governs a particular type of law or measure, namely, one that makes a border adjustment, and then only if it is in the form of the imposition of duties on an imported product. Second, the law or measure must also be an anti-dumping law or measure, in the sense that it attempts to counteract injurious dumping based on findings of "dumping" and "injury."

2. The 1916 Act standing alone and in comparison to the Robinson-Patman Act

3.339 **Japan** considers that the 1916 Act regulates prices of imported products under a regime separate from the analogous US law regulating prices of domestic products, i.e. the Robinson-Patman

Act. The resulting differential and less favourable treatment is inconsistent with the United States' national treatment obligation under Article III:4 of the GATT 1994.[279]

3.340 Japan notes that, to establish a violation of Article III:4, the complaining party must demonstrate that the 1916 Act (i) is a "law, regulation or requirement", (ii) "affecting" the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported products, and (iii) which accords less favourable treatment to imports than is accorded to domestic like products.

3.341 Japan considers that these three criteria are met in the present case. Japan notes, first of all, that the 1916 Act is a statute, i.e. a law, of the United States. The 1916 Act affects the sale of imported products within the United States because it regulates, by prohibiting, the sale or causing to be sold of imported products below the price threshold set out in the 1916 Act (home market price or third market price). The fact that the 1916 Act applies also to importers is inapposite. The 1916 Act applies not merely to the importing of products but also to the domestic US sale ("internal sale") of imported products.[280]

3.342 Japan recalls, moreover, that panels commonly apply Article III:4 of the GATT 1994 in cases where conditions of competition are affected. For years, panels have interpreted Article III:4 to have an exceedingly broad scope by virtue of its use of "affecting" – "[…] all laws, regulations and requirements *affecting* the internal sale, offering for sale, purchase, transportation distribution or use of products […]." For example, in the 1958 Report on *Italian Discrimination Against Imported Agricultural Machinery*, the panel said:

> "The selection of the word 'affecting' would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the *conditions of competition between the domestic and imported products* on the internal market."[281]

This is precisely the case in the present dispute; the 1916 Act sets minimum price levels on a product-specific basis that are applicable *only* to imports.

3.343 Regarding the "no less favourable treatment" standard laid down in Article III:4 of the GATT 1994, Japan argues that the situation in the present case is very similar to that resolved by the panel in *United States – Section 337*. In *United States - Section 337*, the panel found that the United States was in violation of its obligations under Article III:4 of the GATT 1994. Section 337 is a US law administered by the US International Trade Commission that provides a remedy for US patent holders against imported goods (but not domestic goods) infringing on US patents. A US patent holder also may pursue an infringement claim against imported (and domestic) goods in a federal district court.

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[279] The first sentence of Article III:4 of the GATT 1994:

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

[280] Japan also refers to the Panel Report on *United States - Section 337*, adopted on 7 November 1983, BISD 36S/345, para. 5.10 (hereinafter "*United States – Section 337*"), which according to Japan, found inconsistent with Article III:4 a US measure that applied to importers, concluding that it nonetheless affected imported products within the meaning of Article III:4.

[281] Panel Report on *Italian Discrimination Against Imported Agricultural Machinery*, adopted on 23 October 1958, BISD 7S/60, para. 12 (emphasis added by Japan).

3.344 Japan recalls that the panel found this scheme to be inconsistent with Article III:4 of the GATT 1994 in several ways. First, the panel found that:

> "[…] to provide the complainant with the choice of forum where imported products are concerned and to provide no corresponding choice when domestically-produced products are concerned is in itself less favourable treatment of imported products and therefore is inconsistent with Article III:4."[282]

Second, the panel found that several differences between the Section 337 and federal district court proceedings disadvantaged or treated less favourably, foreign patent holders defending against Section 337 claims.[283] Among the differences noted by the panel as significant were:

(i) a foreign Section 337 defendant could not raise counterclaims, but a defendant in a federal district court proceeding could;

(ii) Section 337 provides for penalties (exclusion orders) that are not available against US-origin products; and

(iii) a foreign patent holder could be subject to two claims, one under Section 337 and one in federal district court, but a domestic patent holder could be sued only in federal district court.[284]

3.345 Japan argues that, as in *United States - Section 337*, in the present case, the United States is in violation of Article III:4 of the GATT 1994 because it has established a separate legal regime solely for imports, in addition to the regime that applies to imports and domestic goods. Imports are required to meet a legal requirement, the 1916 Act, which does not apply to domestic US products. Thus, US law permits a US entity, but not a foreign entity, to engage in international price discrimination.

3.346 Japan further notes that the United States consistently has argued that the 1916 Act is the equivalent of the Robinson-Patman Act, which is the basic US price-discrimination statute. It prohibits sellers from discriminating in price between or among purchasers of goods so as to substantially limit competition or tend to create a monopoly. The existence of the Robinson-Patman Act cannot, however, be invoked to establish that domestic products are treated in the same way.[285]

3.347 Japan recalls that imported products are *also* subject to the Robinson-Patman Act in the same way as domestic products. This Act, like any legitimate competition or anti-trust measure, does not distinguish between imported and domestic products. Discriminatory sales are prohibited by the Act whether they involve US products or products of foreign origin. The Robinson-Patman Act is entirely origin-neutral, unlike the 1916 Act, which is entirely origin-specific. Japan acknowledges that the Robinson-Patman Act only applies to price discrimination committed in the United States and that the 1916 Act may be considered to complement it in that it applies to *dumping*, which is a price discrimination practiced between the domestic market of the producer and an export market.

3.348 According to Japan, this complementarily does not avoid a violation of Article III:4 of the GATT 1994. The complementarily does not relate to the origin of the goods, but to the discrimination. Japan considers that the situation is similar to that addressed by the panel in *United States - Section 337*. Less favourable treatment is inherent because, due to the two avenues for

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[282] *United States – Section 337*, Op. Cit., para. 5.18.
[283] Japan refers to ibid., para. 5.19.
[284] Japan refers to ibid., paras. 5.19-5.20.
[285] Japan notes that in its discussion of the Robinson-Patman Act, it focuses on "primary-line cases", where the plaintiff is a competitor of the defendant (as in a 1916 Act case).

liability, the importer or seller of imports is regulated by a separate regime. The seller of domestic goods need comply only with the Robinson-Patman Act.

3.349 Japan argues that subjecting US goods to no more favourable treatment than imported goods receive under the 1916 Act would require that the United States apply similar penalties and make available similar remedies for equivalent cases involving US goods. This would require legislation which would render US producers liable for equivalent penalties when they sold their goods in the United States at lower prices than on foreign markets under similar conditions to those set out in the 1916 Act. In its third party statement, the European Communities explained that this would require legislation along the following lines:

> "It shall be unlawful for any person producing any Articles in the United States, commonly and systematically to sell such Articles within the United States at a price substantially less than the actual market value or wholesale price of such Articles in the market of any foreign country to which they are commonly exported, after deducting from such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolising any part of trade and commerce in such Articles in the United States."

3.350 Japan notes that the 1916 Act does not apply to such acts of US producers and nor does the Robinson-Patman Act. Such acts may in fact be conducted with impunity by producers of US goods (or at least not be subject to any other than the generally applicable laws). In other words, producers of US goods may do what producers of foreign goods may not. They may seek to use isolated non-US markets to obtain the high profits needed to allow them to sell at low prices in the United States. Imported goods are therefore treated less favourably than US goods and this is contrary to Article III:4 of the GATT 1994.

3.351 Japan argues, furthermore, that the 1916 Act violates Article III:4 of the GATT 1994 because it otherwise causes imported products to be treated less favourably than domestic products with respect to the US regulation of price discrimination. As the court in *Wheeling-Pittsburgh* succinctly stated, "there is no requirement under the Constitution or elsewhere that Congress impose the same standards of conduct on the importers of goods as it does on domestic producers of goods".[286] The quick comparison below of the 1916 Act with the Robinson-Patman Act demonstrates that the US Congress has not hesitated to take advantage of this rule.

3.352 Specifically, Japan contends that:

(a) bringing a 1916 Act claim is easier than bringing a Robinson-Patman Act claim because of the differing pleading requirements;

(b) establishing and winning a 1916 Act claim is easier than establishing a Robinson-Patman Act claim, because the standards for obtaining relief under the 1916 Act are much lower than those for obtaining relief under the Robinson-Patman Act;

(c) the conduct subject to penalties under the 1916 Act exceed the conduct under the Robinson-Patman Act; and

(d) because a plaintiff can more easily prove a violation of the 1916 Act than of the Robinson-Patman Act, a domestic competitor can more easily impose significant

[286] Japan refers to *Wheeling-Pittsburgh*, Op. Cit., p. 602.

litigation costs and business burdens on foreign producers than on domestic competitors.

3.353 Japan argues that even if the United States could establish (which, Japan believes, it cannot) that in some respects treatment under the 1916 Act is more favourable than under the Robinson-Patman Act, it would not prevail. As ruled by the panel in *United States - Section 337*, more favourable treatment of imported products in some areas cannot offset less favourable treatment in other areas.[287] Moreover, whether less favourable treatment actually has been suffered in a particular instance is irrelevant. As was the case in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, a regulation which does not necessarily discriminate against imported products but is capable of doing so violates Article III of the GATT 1994.[288] Thus, the mere possibility that a measure may in some circumstances result in less favourable treatment of imported products is sufficient to establish a violation. Such is clearly the case in the present case.[289]

3.354 The **United States** argues that, in order to determine whether the 1916 Act violates the national treatment guarantee of Article III:4, Japan must establish that the 1916 Act treats foreign products less favourably than any similar domestic statute treats like domestic products. Japan correctly recognizes that the comparable statute applicable to domestic goods is Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.[290]

3.355 The United States notes that Japan suggests, however, that "the mere possibility that a measure may in some circumstances result in less favourable treatment of imported products is sufficient to establish a violation". Moreover, Japan suggests that "[l]ess favourable treatment is inherent" because the 1916 Act purportedly creates "a separate regime" for importers and sellers of imports. In short, Japan argues in effect that the mere existence of the 1916 Act - which of course

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[287] Japan refers to *United States - Section 337*, Op. Cit., para. 5.14.

[288] Japan refers to the Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted on 25 January 1990, BISD 37S/86, para. 141 (hereinafter "*EEC – Oilseeds*").

[289] In response to a question of the United States regarding how Japan reconciles its position that the mandatory/non-mandatory distinction may be applied to a measure under Article III:4 of the GATT 1994 with its reading of the *EEC – Oilseeds* case, Japan argues that, when a law or a regulation is mandatory, the simple fact that it merely exposes imported products to a risk of discrimination constitutes less favourable treatment and thus is in violation of Article III:4. Since the 1916 Act is clearly mandatory on its face, the mere possibility of discrimination is sufficient to establish an Article III:4 violation. In the *EEC - Oilseeds* case, the panel made the following findings: "[…] the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is capable of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4." (*EEC – Oilseeds*, Op. Cit., para. 141; emphasis in original). The panel report on *United States - Tobacco*, citing this precedent, also notes that "an internal regulation which merely exposed imported products to a risk of discrimination had previously been recognized by GATT panels to constitute, by itself, a form of discrimination, and therefore less favourable treatment within the meaning of Article III" (*United States – Tobacco*, Op. Cit., para. 96). Thus, Japan's proposition that the mere possibility of discrimination is enough to establish an Article III:4 violation is confirmed by well-established GATT 1947 precedents. Where, as in the present case, the legislation at issue is mandatory, there can be no other conclusion. This proposition is fully compatible with the mandatory/non-mandatory distinction. In fact, the panel report on *United States - Tobacco* applied both principles to the case. As noted above, regarding Article III, the panel found a violation because of the mere possibility of discrimination. It did so because the regulation at issue was of a mandatory nature. However, regarding Article VIII, it applied the mandatory/non-mandatory distinction, and ultimately concluded that there was no violation. Thus, there is no conflict between mandatory/non-mandatory distinction and "the mere possibility" theory in Japan's argument.

[290] The United States refers to *Zenith III*, Op. Cit., pp. 1213-14.

was enacted years before Article III:4 of the GATT 1994, and has never been amended since then - is sufficient to establish a violation of that Article.

3.356 The United States submits that these arguments, and the standard of liability under Article III:4 of the GATT 1994 that they appear to suggest, are not correct. Article III:4 does not require every statute of every Member that applies in any way to imported products to apply in exactly the same way to domestic products as well. It rather requires WTO Members to accord products of foreign origin no less favourable treatment than products of domestic origin. In short, Article III:4 focuses on the treatment of imported products across the whole spectrum of the "laws, regulations and requirements" of WTO Members. Thus, in order to establish that the 1916 Act violates the national treatment guarantee of Article III:4, it is not sufficient to establish simply that the 1916 Act exists and that it does not apply to domestic products. Japan must establish that the United States relies on the 1916 Act to treat foreign products less favourably than any similar domestic statute treats like domestic products.[291]

3.357 The United States notes that, consistent with this standard, the panel report in *United States - Section 337* specifically rejected the argument that different treatment necessarily translates into unfavourable treatment. Thus, the panel explained that

> "[...] the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment."[292]

3.358 The United States notes, second, that if Japan's arguments were accepted, any statute or portion of a statute in any country that expressly applied just to importers - regardless of when and under what circumstances it was enacted - could be found to violate Article III:4 of the GATT 1994 without any review or analysis whatsoever. These arguments cannot and should not be accepted as a substitute for the type of careful review and analysis that should be conducted under Article III:4 of the GATT 1994.[293]

3.359 In the view of the United States, a careful review and analysis of the historical applications of the 1916 Act and the Robinson-Patman Act conclusively demonstrate that the 1916 Act raises no national treatment concerns under Article III:4 of the GATT 1994. The 1916 Act has rarely been invoked by private parties, and has never been invoked by the US government. More importantly, the 1916 Act establishes a standard for relief which has *never* been met in the case of importers and imported goods. The Robinson-Patman Act, by contrast, has been successfully invoked in thousands of federal court and administrative cases, including a substantial number pursued administratively by the Federal Trade Commission. In short, the historical applications record clearly establishes that the

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[291] The United States recalls that the European Communities suggests a reversal of this burden of proof; that is, that the United States must "show that [the 1916 Act] prevents less favourable treatment of imported products." This is not correct; the burden of proof rests with Japan.

[292] *United States - Section 337*, Op. Cit., para.5.11.

[293] In this connection, the United States disagrees with Japan's argument (as well as the European Communities' similar argument) that US law permits a US enterprise, but not a foreign one, to engage in international price discrimination. The United States argues that, even setting aside the question whether this perspective is the right one under Article III, such conduct would in fact be prohibited by the Sherman Act whenever it has a predatory effect in a relevant US market. The Sherman Act has a very broad but flexible mandate for courts to prevent anti-competitive conduct in the foreign commerce as well as the domestic commerce of the United States. Also, Japan fails to recognize that the 1916 Act does apply to US companies that import goods. For example, one of the defendants in the *Geneva Steel* case is a US company headquartered in Houston, Texas.

1916 Act treats importers and imported goods *more favourably* than the Robinson-Patman Act treats US sellers and their goods.

3.360 The United States recalls, furthermore, that the 1916 Act is intended to prevent unfair competition by extending the prohibitions of unfair competition in domestic commerce embodied in Section 2 of the Clayton Act of 1914 to importers.[294] Consistent with that construction, the prevailing interpretation among the courts that have considered the 1916 Act is either an explicit or implicit endorsement of the following principles enunciated by the District Court in *Zenith III*:

> "The principal lesson which we draw from the legislative history of the 1916 Act, viewed against the historical background of the first Wilson administration, is that the statute should be interpreted whenever possible to parallel the "unfair competition" law applicable to domestic commerce. Since the 1916 Antidumping Act is a price discrimination law, it should be read in tandem with the domestic price discrimination law, section 2 of the Clayton Act, which was amended by the Robinson-Patman Act in 1936."[295]

3.361 According to the United States the prevailing judicial interpretation therefore is that the 1916 Act should not be applied to importers and imported goods more rigorously than the Clayton Act - as amended by the Robinson-Patman Act - is applied to domestic sellers and goods. Thus, for example, in *Zenith III*, the District Court expressly determined:

> "[The 1916 Act] was intended to complement the anti-trust laws by imposing on importers substantially the same legal strictures relating to price discrimination as those which had already been imposed on domestic businesses by the Clayton Anti-trust Act of 1914.[296]
>
> […]
>
> [I]n order to be faithful to the intention of Congress to subject importers to "the same unfair competition law" [that is applicable to domestic commerce], we should not interpret the 1916 Act to impose on importers legal strictures which are more rigorous than those applied to domestic enterprises."[297]

3.362 The United States notes that, on appeal, the Third Circuit Court of Appeals noted that under Article XVI of the 1953 Treaty of Friendship, Commerce, and Navigation with Japan, "national treatment" was defined as "treatment accorded within the territories of a Party upon terms no less favourable than the treatment accorded therein, in like situations, to […] products […] of such Party." The Court of Appeals concluded that:

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[294] The United States notes that the European Communities recognizes that the Robinson-Patman Act "only applies to price discrimination committed in the US", and that the 1916 Act "may be considered to complement it" by virtue of its applicability to "price discrimination practised between the domestic market of the producer and an export market". In fact, with respect to imported products, the 1916 Act and the Robinson-Patman Act do address different sets of factual circumstances in a complementary way. The 1916 Act applies only to imported products that are, *inter alia*, sold in the United States at prices "substantially less" than their prices in certain foreign markets. As a consequence, establishing liability under the 1916 Act requires, *inter alia*, comparing prices in foreign markets with prices in the US market. By contrast, the Robinson-Patman Act applies only to domestic and imported products that are sold at different prices within the United States; the prices of these products in foreign markets are irrelevant.

[295] *Zenith III*, Op. Cit., p. 1223; the United States also refers to ibid., p. 1214 where it is stated that "[a]s a price discrimination statute, the Antidumping Act of 1916 is functionally similar to the price discrimination statutes which are applicable to domestic business."

[296] Ibid., p. 1197.

[297] Ibid., p. 1223.

> "[…] application of the 1916 Act to goods imported into or sold in the United States [did not violate] the mandate of Article XVI to accord "national treatment" to Japanese products sold in the United States. […] For the reasons stated above, we hold that application of the 1916 Act to Japanese-made [consumer electronics products] sold in the United States does not violate Article XVI of the Treaty."[298]

3.363 The United States argues that, consistent with these pronouncements, comparing the provisions of the 1916 Act with those of the Robinson-Patman Act clearly establishes that the 1916 Act actually provides *more* favourable treatment than the Robinson-Patman Act in many ways - which Japan fails to address - and, in any event, does not in any instance provide less favourable treatment.

3.364 **Japan** points out, first of all, that the United States has the burden to prove that national treatment for imported products is secured even though there is a separate regime for imported goods. The United States, however, fails to prove why a separate legal scheme is necessary in spite of the fact that both domestic and imported goods are subject to the Robinson-Patman Act.

3.365 In response to a question of the United States regarding the basis for the Japanese assertion that the United States carries the burden of proof, Japan argues that it has demonstrated that, as a textual matter, the 1916 Act constitutes a *prima facie* violation of Article III:4 of the GATT 1994. Under the rules on burden of proof established by the Appellate Body in *United States - Shirts and Blouses*[299], the onus of disproving Japan's claim has shifted to the United States. Unfortunately, rather than accepting and attempting to meet this burden, the United States has tried to mire both Japan and the Panel in an unnecessary procedural debate. This is yet another attempt by the United States to avoid the important issues of the instant dispute.

3.366 Japan further considers the US argument regarding the historical applications of the 1916 Act to be irrelevant. As stated in the *EEC - Oilseeds* panel report, the mere possibility that a measure may in some circumstances result in less favourable treatment of imported products is sufficient to establish a violation.[300] Such is clearly the case in the instant case. Japan also notes that if the US assertions are correct, there should be no obstacle to repeal the 1916 Act.

3.367 Japan also argues that the issue is not which law plaintiffs use more often – the two laws are not interchangeable and do not even apply to the same conduct. Rather, the issues are: (i) does the 1916 Act provide a separate form of liability applicable to foreign but not todomestic traders? and (ii) if a company were to proceed with equivalent claims under each law, which would be easier to prove? The 1916 Act does impose additional liability on foreign traders and a plaintiff more easily can establish a claim under the 1916 Act. Moreover, in regard to the second issue, the US logic is confused. The 1916 Act historically has not been used a great deal because industries relied on the Tariff Act of 1930 to address dumping. Now, however, interest in using the 1916 Act is increasing as companies realise its many advantages. And, of course, analogous primary-line Robinson-Patman Act cases have ground to a halt since *Brooke Group*, due to the added pleading and proof requirements.

3.368 The **United States** notes that it has *not* argued in the present dispute that Japan's claim under Article III:4 should be dismissed because the 1916 Act has not had any trade effects. Although there may be some merit to that argument, the United States has chosen not to make it. With regard to Japan's suggestion that "there should be no obstacle to repeal the 1916 Act", the United States considers that it should be summarily rejected. Japan has failed to establish that the 1916 Act violates

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[298] *In re Japanese Electronic Products II*, Op. Cit., p. 324.
[299] Japan refers to the Appellate Body Report on *United States – Shirts and Blouses*, Op. Cit.
[300] Japan refers to *EEC – Oilseeds*, Op. Cit., para. 141.

Article III:4, either on its face or as applied. In the complete absence of such a showing, there is no reason to consider what, if any remedy, might otherwise be appropriate.

3.369 The United States also insists that it is not arguing, contrary to what Japan attempts to suggest, that the 1916 Act on the whole treats imported goods more favourably than the Robinson-Patman Act treats domestic goods and only in a few instances treats imported goods less favourably than the Robinson-Patman Act treats domestic goods. In the instant dispute, the United States is arguing essentially that one element of a 1916 Act claim - the requirement of a malicious or predatory intent - renders the 1916 Act more favourable to importers and imported goods than is the Robinson-Patman Act to US sellers and their goods in every instance. The courts have interpreted this requirement as virtually impossible to satisfy, and the historical applications of the 1916 Act squarely support this view, as there has never been a successful case brought under the 1916 Act. The Robinson-Patman Act, in contrast, has been successfully invoked on innumerable occasions to obtain relief involving US sellers and their goods. When this factor is taken into account to the extent that it might be capable of exerting an offsetting influence in each individual case, as it should be, the only reasonable conclusion is, again, that the 1916 Act treats importers and imported goods *more favourably* than the Robinson-Patman Act treats US sellers and their goods.

3.370 The United States notes, moreover, that this approach was followed by the panel in the *United States - Section 337* case. There, the panel explained that "an element of more favourable treatment would only be relevant if it would always accompany and offset an element of differential treatment causing less favourable treatment".[301] The panel found that some of the procedural advantages given to foreign respondents under Section 337 operate in all cases, and therefore it "took these factors into account to the extent that they might be capable of exerting an offsetting influence in each individual case of less favourable treatment resulting from an element cited by the Community".[302]

3.371 Thus, in the view of the United States, it would be entirely appropriate for the Panel to begin and end its analysis of Japan's Article III claim based upon the fact that the intent requirement is virtually impossible to satisfy.

3.372 Finally, the United States disagrees with Japan inasmuch as Japan claims that the panel report in *EEC - Oilseeds* stands for the proposition that "the mere possibility that a measure may result in less favourable treatment of imported products is sufficient to establish a violation of Article III:4 of GATT 1994". This case does not stand for such a broad proposition. If that were the test, that would mean that the mandatory/non-mandatory distinction could not apply in Article III cases. By definition, the mandatory/non-mandatory distinction asks the question whether a WTO-consistent application is *possible*. As we have pointed out, however, this distinction has been applied by panels considering Article III claims - including, for example, *United States - Superfund* and *Thailand – Cigarettes.* In the *EEC - Oilseeds* case, the question was one of *de facto* discrimination under Article III. The panel considered whether the facts could result in less favourable treatment even though on its face the measure treated imported products no less favourably. In the present case, there is no possibility that the facts may result in unfavourable treatment because, as the United States has repeatedly explained, the legal standards for recovery under the 1916 Act are more stringent than, or at least as stringent, as those applicable under the Robinson-Patman Act. And those standards would be applicable in every factual scenario. Indeed, that is why there have been no recoveries under the 1916 Act.

[301] The United States refers to *United States – Section 337*, Op. Cit., para. 5.16.
[302] The United States refers to ibid., para. 5.17.

3. Element-by-element comparison of the 1916 Act and the Robinson-Patman Act

(a) The pleading requirements

3.373 **Japan** asserts that an easier pleading burden is imposed on a 1916 Act plaintiff than on a Robinson-Patman Act plaintiff. This translates to a greater burden on a 1916 Act defendant. For example, as reflected in the *Geneva Steel* and *Wheeling-Pittsburgh* cases, a typical plaintiff alleging predatory pricing under the Robinson-Patman Act must satisfy special, more particularized pleading and proof requirements. These requirements address whether, through below-cost pricing, a defendant could reasonably expect to gain market dominance to the point that it could later raise prices and recoup its earlier losses. Under the 1916 Act, in contrast, a plaintiff need only allege and prove that a defendant is engaged in systematic dumping with the intent of injuring, destroying, or preventing the establishment of a domestic industry, or of restraining or monopolising trade or commerce.

3.374 Japan argues, moreover, that in a Robinson-Patman Act case, a plaintiff's general allegations of a traditional anti-trust violation and injury are insufficient; an anti-trust complaint must include enough hard data so that each element of an alleged violation can be identified.[303] Thus, a 1916 Act plaintiff faces a lower hurdle in filing its initial complaint because the pleading requirements not only are fewer, but also are less particular.

3.375 Japan notes that a federal district court in the state of Ohio - the same state in which a federal district court is handling the *Wheeling-Pittsburgh* case - recently dismissed a primary-line Robinson-Patman Act claim. The court granted the defendants' motion to dismiss the Robinson-Patman claim because a "reasonable expectation" of recoupment had not been adequately pleaded.[304] In addition, the court held that the plaintiff had failed to plead that the defendant will recoup more than the losses it originally incurred with its allegedly below-cost pricing.[305]

3.376 According to Japan, the lower pleading threshold for a 1916 Act action makes it easier to bring such an action. Regardless of the likelihood of the plaintiff ultimately succeeding in the case, this makes the 1916 Act a tool for harassment. For these reasons, the United States is in violation of Article III:4 of the GATT 1994.

3.377 The **United States** considers that there are two reasons to reject Japan's argument. First, with respect to comparative pleading requirements, it is important to note that under the Federal Rules of Civil Procedure, complaints filed in all federal district courts in the United States are notice pleadings. This means that a particular complaint need simply recite allegations which - if proven - would be sufficient to establish the violations of law the complaint alleges. As the Supreme Court has indicated, "the liberal system of 'notice pleading' set up by the Federal Rules of Civil Procedure" simply requires "a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"[306]. As a consequence, from the

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[303] Japan refers to, e.g., a case from the Federal District Court in Ohio, *The Zeller Corp. v. Federal-Mogul Corp.*, 3:95CV7501, 1996 US Dist. LEXIS 21198 (N.D. Ohio) (hereinafter "*Zeller Corp.*"). In *Zeller Corp.*, the court granted defendants' motion to dismiss a Robinson-Patman claim because plaintiff had not adequately pled a "reasonable expectation" of recoupment. (Ibid., p. *8). The court held that plaintiff had "pled only conclusory allegations in support of its claim that Neapco is capable of obtaining sufficient market power to allow it to recoup alleged below-cost sales." (Ibid., p. *6). In addition, the court held that plaintiff had "failed to plead that Neapco will recoup more than the losses it originally incurred with its allegedly below-cost pricing." (Ibid., p. *8). In contrast, in *Wheeling-Pittsburgh*, another Ohio district court judged the conclusory allegations contained in Wheeling-Pittsburgh's 1916 Act complaint sufficient to withstand a motion to dismiss. (*Wheeling-Pittsburgh*, Op. Cit., p. 603).

[304] Japan refers to *Zeller Corp.*, Op. Cit., n. 74.

[305] Japan refers to ibid.

[306] The United States refers to *Leatherman v. Tarrant County NICU*, 507 US 163, p. 168 (1993).

perspective of the content of the pleadings, it is no more difficult to file a complaint alleging one or more violations of the Robinson-Patman Act than to file a complaint alleging one or more violations of the 1916 Act. In either situation, it is sufficient for the complaint to recite the facts which, if proven, would establish the violations of law alleged.

3.378 The United States contends that the conclusion that pleading requirements have not in any way discouraged the filing of complaints under the Robinson-Patman Act is borne out by the relative numbers of 1916 Act and Robinson-Patman Act cases filed in the recent past. Since the issuance of the Supreme Court decision in *Brooke Group* in 1993, more than forty reported Court of Appeals and District Court opinions in more than forty different cases have addressed allegations that the price discrimination provisions of the Robinson-Patman Act have been violated, including cases leading to more than ten Court of Appeals and District Court decisions in 1998 alone. Moreover, during that same time period there have been fourteen federal district court decisions addressing allegations of primary line Robinson-Patman Act violations. By contrast, only two complaints under the 1916 Act have been filed during that same period. In short, these data strongly support the conclusion that it is far easier for a plaintiff to satisfy the pleading requirements under the Robinson-Patman Act than those under the 1916 Act.

3.379 In response to this US argument in respect of the US Federal Rules of Procedure, **Japan** notes that the issue is not the similarity of the form of the "notice of claim" but the difference of burden of pleading imposed on complainants.

3.380 The **United States** notes further that its second reason for rejecting Japan's argument is that, with respect to the comparative difficulty of defeating a motion to dismiss or for summary judgment, the case law establishes that it is no easier for a plaintiff to do so under the 1916 Act than under the Robinson-Patman Act. Indeed, since the *Brooke Group* decision, four Court of Appeals decisions - arising from three cases addressing allegations of primary line price discrimination - have been issued.[307]

3.381 The United States recalls that, for example, in *Rebel Oil v. Atlantic Richfield*, two gasoline retailers alleged that ARCO had, *inter alia*, engaged in primary line price discrimination

> "by executing a pricing policy in Las Vegas of charging predatory prices in an attempt to increase its market share and eventually monopolise the Las Vegas gasoline market."[308]

The District Court granted a motion for summary judgment against ARCO, but the Court of Appeals for the Ninth Circuit reversed.[309] The Court noted the distinction in *Brooke Group* between the "reasonable prospect" of recoupment needed to show primary line discrimination and the "dangerous probability" of recoupment needed to show attempted monopolisation.[310] The Court relied on this distinction to reverse the grant of summary judgment as to the primary line discrimination allegation, concluding that:

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[307] The United States refers to *Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F.3d 691, p. 694-95 (9th Cir. 1998), amended, No. 96-56341, 1999 WL 19636 (9th Cir. Jan. 20, 1999); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp*., 79 F.3d 182, p. 188 (1st Cir. 1996); *Rebel Oil Co. v. Atlantic Richfield Co*., 146 F.3d 1088, p. 1091 (9th Cir. 1998), cert. denied, 119 S.Ct. 541 (1998), and 51 F.3d 1421, p. 1429 (9th Cir. 1995).

[308] *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 957 F.Supp. 1184, p. 1192 (D. Nev. 1997), aff'd, 146 F.3d 1088 (9th Cir.), cert. denied, 119 S. Ct. 541 (1998).

[309] The United States refers to *Rebel Oil Co., Inc. v. Atlantic Richfield Co*., 51 F.3d 1421 (9th Cir. 1995).

[310] The United States refers to ibid., pp. 1442, 1445, 1447.

> "Rebel's evidence is sufficient, however, to raise a disputed question of material fact as to whether ARCO achieved sufficient market power to enforce supracompetitive oligopoly pricing. This showing is sufficient to allow Rebel to survive summary judgment on the issue of anti-trust injury resulting from price discrimination under the Clayton Act."[311]

3.382 The United States also recalls a second case, *Anti-Monopoly, Inc. v. Hasbro, Inc.*, in which the District Court considered allegations that Hasbro had, *inter alia*, engaged in primary line price discrimination by

> "providing substantial discounts, terms and services to major family board game retailers which are not made available on equal terms to competing smaller family board game retailers and wholesalers and which are not either cost justified or otherwise permitted under § 2 [of the Clayton Act]."[312]

The Court noted the *Brooke Group* standard for primary line liability; noted that the plaintiff had alleged, *inter alia*, that Hasbro "prices its products below an appropriate measure of its costs […]"; concluded that the plaintiff "has stated a claim for a primary-line injury […]"; and therefore denied Hasbro's motion to dismiss the primary line discrimination allegation.[313]

3.383 The United States notes that, in a third case, *En Vogue v. UK Optical, Ltd., the District Court* denied a motion by one of the defendants to dismiss the plaintiff's primary line price discrimination allegations.[314]

3.384 In conclusion, the United States notes that in each of these three cases - decided after *Brooke Group* - allegations of primary line price discrimination survived motions to dismiss or motions for summary judgment. The fact that such motions may have been granted in other cases cited by Japan - such as *Zeller Corp.* - does not in any way reduce the respective risks of liability bestowed by the 1916 Act and the Robinson-Patman Act. It rather simply reflects the fact that every case is different, and while some plaintiffs may be able to adduce evidence sufficient to ensure that they can move from the preliminary phase of a trial to the trial itself, other plaintiffs are not able to do so.

(b) Intent requirement vs. effect requirement

3.385 **Japan** argues that another key difference between the 1916 Act and the Robinson-Patman Act is the burden of proving intent versus effect. The 1916 Act requires a plaintiff to prove that

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[311]The United States compares ibid., pp. 1432-43 with ibid., pp. 1444-48. The United States notes that the court sustained the grant of summary judgment as to the attempted monopolisation allegation, concluding that "Rebel has failed to provide sufficient evidence to support a jury verdict on the issue of ARCO's "market power" under the Sherman Act […]." (Ibid., p. 1448). On remand, the District Court granted a new motion for summary judgment filed by ARCO, noting that "[i]n order to meet the requirements of predatory pricing, the plaintiff must present some evidence that the defendant priced below *its* costs," and that Rebel had made "no showing of ARCO's actual costs of producing gasoline." The Court of Appeals affirmed that decision on the same basis. (*Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 957 F.Supp. 1184, 1196, 1197, 1203 (D. Nev. 1997), aff'd, 146 F.3d 1088 (9th Cir.), cert. denied, 119 S. Ct. 541 (1998).

[312] *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995-2 Trade Cas. ¶ 71,095 (S.D.N.Y. 1995), p. 75,241.

[313] The United States refers to ibid. The United States notes that, subsequently, the plaintiff reached a settlement with two retailer defendants, Toys R Us and K Mart Corporation. Two years later, the District Court granted a motion by Hasbro for summary judgment, concluding, *inter alia*, that the plaintiff "has not provided factual support for either element of a below-cost pricing anti-trust claim." The United States refers to *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 958 F.Supp. 895, pp. 897-98 note 1, 906 (S.D.N.Y. 1997), aff'd per curiam, 130 F.3d 1101 (3d Cir. 1997), cert. denied, 119 S. Ct. 48 (1998).

[314] The United States refers to *En Vogue v. UK Optical, Ltd. and British Optical Import Company*, 843 F.Supp. 838, pp. 845-47 (E.D.N.Y. 1994).

discriminatorily low prices are set with the *intent* to injure, destroy, or prevent the creation of a domestic industry or to restrain or monopolise commerce in the United States.[315] In contrast, the Robinson-Patman Act prohibits price discrimination "where the *effect* of such discrimination may be substantially to lessen competition or tend to create a monopoly […] or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of such discrimination"[316]. US courts, including the Supreme Court, have interpreted this to require proof, not merely of intent, but of *effect*.[317] Thus, where a foreign defendant has intent *but* is unsuccessful in injuring, destroying or preventing competition, it could not be successfully prosecuted under the Robinson-Patman Act, but could be successfully prosecuted under the 1916 Act.[318]

3.386 Japan notes that US government officials themselves have concurred with this analysis, acknowledging that proving a 1916 Act claim is easier than proving a Robinson-Patman Act claim. In 18 July 1986 testimony before the US Senate Finance Committee, USTR General Counsel Alan Holmer said:

> "Under the rules in S. 1655 [a legislative proposal to amend the 1916 Act], the same conduct by two firms, one domestic and one foreign, could be deemed unfair competition subject to treble damages in the case of a foreign firm [under the 1916 Act], and not punishable at all in the case of the domestic firm [under the Robinson-Patman Act]. This is a denial of national treatment."[319]

3.387 Japan argues that apart from the differences in the substance of the standards, proving intent to injure under the 1916 Act is easier because the subjective intent standard is easier to prove than the objective effect standard. For example, a single internal memorandum stating that prices should be lowered to capture market share from a competitor could be sufficient evidence of an intent to injure; but, proving effect (and reasonable probability of recoupment) requires a complex economic inquiry into the competitive dynamics of the market in question. Indeed, in *Brooke Group*, the plaintiffs had shown subjective intent, but not effect, and the Supreme Court ruled that the subjective proof, alone, is insufficient.

3.388 According to Japan, this distinction establishes that the United States is violating its national treatment obligation under Article III:4 of GATT 1994.

3.389 The **United States** notes that the need to prove the requisite intent under the 1916 Act has for more than 80 years made it virtually impossible to establish violations of the 1916 Act. Thus, as the Tariff Commission stated in 1921:

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[315] Japan refers to the text of the 1916 Act. Japan further notes that, in *Geneva Steel*, the court held that "by its express language, the 1916 Act is not limited only to anti-trust injury or predatory price discrimination." (*Geneva Steel*, Op. Cit., p. 1215) Therefore, claimants need not prove actual predatory pricing, but only that "defendants acted as importers for the systematic dumping of [a product] with the intent of injuring, by any means, the domestic […] industry." (Ibid.) Japan also refers to *Wheeling-Pittsburgh*, Op. Cit., pp. 604-606.

[316] Emphasis added by Japan.

[317] Japan contends that, in *Brooke Group*, Op. Cit., p. 225, the US Supreme Court confirmed the comparatively high proof requirements of the Robinson-Patman Act by specifically rejecting the notion that proof of bad "intent" or "malice" might, by itself, establish predatory pricing. The Court required, in addition, proof of *effect*, i.e. proof that competition has been injured.

[318] According to Japan, this fact, in and of itself, establishes a US violation of Article III:4. Japan refers to, e.g., *United States - Section 337*, Op. Cit., paras. 5.13-5.14, where the panel finds that the key to an Article III:4 violation is whether the differential treatment "may" lead to less favourable treatment, based on an analysis of the "potential impact" of the laws.

[319] Testimony of USTR General Counsel Alan Holmer, Op. Cit., p. 4.

> "[The 1916 Act] is not workable, for the reason that it is almost impossible to show the intent on the part of the importer to injure or destroy business in the United States by such importation and sale."[320]

Similarly, in *Geneva Steel*, on which Japan relies extensively for other arguments, the district court noted that it may be "'nearly impossible' to prove the requisite intent given that evidence of normal pricing cuts […] would be insufficient to establish liability under the 1916 Act."[321]

3.390 For the United States it is clear from the history of litigation under the 1916 Act that the anti-competitive intent required to establish a violation of the Act is at least as difficult to prove as the corresponding anti-competitive intent required to establish the offences of monopolisation and attempted monopolisation under Section 2 of the Sherman Act. Contrary to Japan's contention that the basis of the US position is that US courts "should or will" read predation into the 1916 Act, as shown above in the factual section, the courts that have considered the intent element of the 1916 Act have already read precisely those requirements into the statute. As a factual matter, it is the US case law interpreting the 1916 Act that is dispositive in determining the nature of the 1916 Act.

3.391 The United States notes, moreover, that the case law indicates that it is even more difficult to establish that a particular defendant intended to destroy, injure, or prevent the establishment of an industry in the United States. Thus, in *Zenith II*, the district court concluded that satisfying the 1916 Act intent requirement requires establishing that the defendant possesses a "specific, predatory, anti-competitive intent"; that is, an intent "to destroy competition".[322]

3.392 The United States points out that Japan's only response to this argument is to suggest that proving "intent to injure" under the 1916 Act is "easier to prove than the objective effect standard. For example, a single internal memorandum stating that prices should be lowered to capture market share from a competitor could be sufficient evidence of an intent to injure […]." Japan does not, however, provide any evidence or case analysis to support this suggestion.

3.393 The United States submits that, in fact, it is highly unlikely that any court would find such an internal memorandum to be particularly relevant to the intent issue under the 1916 Act. In general, United States courts have been reluctant to rely on inflammatory statements at meetings or in internal memoranda as a basis for establishing predatory intent precisely because such statements are of little or no relevance if the individual or firm making them is not likely to succeed in the purportedly predatory campaign. As the Supreme Court indicated in *Brooke Group*:

> "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal anti-trust laws […] [a]lthough some of [the defendant's] corporate planning documents speak of a desire to slow the growth of the [generic cigarette] segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anti-competitive means."[323]

Moreover, even if such a campaign might conceivably succeed, such statements are frequently ambiguous because they are frequently made to convey perfectly competitive objectives. Thus, for example, in *Geneva Steel*, the district court noted:

> "Mere knowledge on the part of the importer that his sales will capture business away from his United States competitors, standing alone, will not be sufficient to

[320] 56 Cong. Rec. 346 (Dec. 9, 1919).
[321] *Geneva Steel*, Op. Cit., p. 1220.
[322] The United States refers to *Zenith II*, Op. Cit., p. 259.
[323] *Brooke Group*, Op. Cit., p. 225, 241.

> demonstrate an intent to injure the entire United States steel industry and will therefore be inadequate to establish a violation of the Act."[324]

3.394 The United States argues that, by contrast, establishing civil liability under the Robinson-Patman Act does not require proving that the defendant intended to injure competition or competitors. As a consequence, the same conduct by two different firms could be found to violate the Robinson-Patman Act but not the 1916 Act. In short, the 1916 Act's intent requirement - because it is so difficult to satisfy - without more, serves to render the 1916 Act considerably more favourable to importers than the Robinson-Patman Act is to domestic firms. This conclusion is supported by the fact that there has *never* been a successful case brought under the 1916 Act in its 82-year history, while plaintiffs have secured relief in thousands of cases filed under the Robinson-Patman Act.

(c) The recoupment requirement

3.395 **Japan** notes that, in a landmark decision, *Brooke Group*, the US Supreme Court substantially increased the evidentiary burden on plaintiffs seeking to demonstrate violations of the Robinson-Patman Act in primary-line cases. The Supreme Court abolished the long-standing ability of a plaintiff to demonstrate that the "lessening of competition" requirement was satisfied by offering evidence of the defendant's intent and imposed a much higher evidentiary threshold for proving a violation requiring in addition proof of effect and recoupment.

3.396 Japan recalls that, with respect to primary line cases, the Supreme Court adopted a market-based analysis in which a plaintiff must prove "that the competitor had a reasonable prospect […] of recouping its investment in below-cost prices".[325] The Court concluded that to prove recoupment, a plaintiff must show that the below-cost pricing must be capable: (i) of achieving its intended effects on the defendant's rivals (i.e. putting them out of business); and (ii) restraining competition long enough for the defendant to raise its prices and recapture the profits it lost during the period of price cutting.[326]

3.397 According to Japan, this imposes on Robinson-Patman Act plaintiffs a requirement that is exceedingly difficult, indeed, nearly impossible, to meet. Japan notes that since *Brooke Group*, not one primary-line price discrimination lawsuit under the Robinson-Patman Act has succeeded. Of the twelve cases adjudicated, five were dismissed because the plaintiff had proven neither below cost sales nor possibility for recoupment[327], two were dismissed because the plaintiff had failed to show

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[324] *Geneva Steel*, Op. Cit., p. 1224.

[325] Japan refers to *Brook Group*, Op. Cit., pp. 222-24.

[326] Japan refers to ibid., pp. 225-26 (citations omitted by Japan). Japan notes that several US Circuit Courts of Appeal have observed that proving competitive injury through predatory pricing under *Brooke Group* is exceedingly difficult. The Court of Appeals for the Eighth Circuit has noted that the sales below cost and possibility of recoupment requirements "make it extremely difficult for plaintiffs to prove predatory pricing in anti-trust cases. That difficulty, however, reflects the economic reality that predatory pricing schemes are rarely tried, and even more rarely successful." Japan refers to *International Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, p. 1396 (8th Cir. 1993) (quoting *Matsushita Elec. Indus. Co.*, 475 U.S., p. 589). The Court of Appeals for the First Circuit has similarly observed that "the requisites for proving predatory pricing are demanding because the conditions under which it is plausible are not common, and because it can easily be confused with merely low prices which benefit consumers." Japan refers to *Tri-State Rubbish Waste, Inc. v. Waste Management, Inc.*, 998 F.2d 1073, p. 1080 (1st Cir. 1993). This is inconsistent with the national treatment obligation of Article III:4.

[327] Japan refers to *Taylor Publishing Company v. Jostens, Inc*., 36 F. Supp. 2d 360, p. 369 (E.D.Tex. 1999); *Sally Bridges v. Maclean-Stevens Studios, Inc*., 35 F. Supp. 2d 20, p. 28 (D.C. Maine 1998); *Anti-Monopoly, Inc. v. Hasbro, Inc*., 958 F. Supp. 895, p. 906 (S.D.N.Y. 1997); *Clark. v. Flow Measurement, Inc*., 948 F. Supp. 519, p. 529 (D.S.C. 1996); *C.B. Trucking, Inc. v. Waste Management, Inc*., 944 F. Supp. 66, p. 69 (D. Mass. 1996).

below cost sales[328], two were dismissed for failure to plead sales below cost or possibility of recoupment[329], one was dismissed for failure to plead possibility of recoupment[330], and two were dismissed for lack of standing[331].

3.398 Japan points out that a federal district court in the state of Ohio recently dismissed a primary-line Robinson-Patman Act claim. The Robinson-Patman Act case, *Zeller Corp.*, underscores the nearly insurmountable obstacles facing plaintiffs in such cases. Indeed, the court intimated that the predatory pricing requirements established by *Brooke Group* are extremely difficult to meet: '"the standard announced in Brooke Group has presented almost an impregnable fortress to [a] plaintiff claiming injury by reason of his rival's low prices."'[332]

3.399 Japan asserts that, in contrast, claims under the 1916 Act, as in *Geneva Steel* and *Wheeling-Pittsburgh*, have a much better chance of success. A 1916 Act plaintiff need not prove recoupment. This differential treatment violates Article III:4.

3.400 The **United States** denies that recovery under the Robinson-Patman Act has ceased following the 1993 Supreme Court decision in *Brooke Group.* The evidence is to the contrary. While liability for an importer under the 1916 Act can arise only from injury to the firms with which it competes, domestic firm liability under the Robinson-Patman Act can arise both from that type of injury and from injury to one or more downstream purchasers. As a consequence, cases involving secondary line liability - as well as those involving primary line liability - are relevant to any comparison of the Robinson-Patman Act to the 1916 Act. Since the 1993 Supreme Court decision in *Brooke Group,* there have been more than forty reported Court of Appeals and District Court opinions in more than forty different cases that have addressed allegations that the price discrimination provisions of the Robinson-Patman Act have been violated, including cases leading to more than ten Court of Appeals and District Court decisions in 1998 alone.[333] By comparison, only two District Court decisions - at very early stages in their respective proceedings - have during that same period addressed allegations that the 1916 Act has been violated. This vast disparity alone establishes that the price discrimination proscriptions of the Robinson-Patman Act create far more danger of liability for domestic firms than the 1916 Act creates for importers, and therefore treat domestic firms less favourably than the 1916 Act treats importers.

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[328] Japan refers to *Stearns Airport Equipment Co. v. FMC Corp*., 977 F. Supp. 1269, p. 1273 (N.D. Tex. 1997); *Rebel Oil Co. v. Atlantic Richfield Company*, 957 F. Supp. 1184, p. 1204 (D.C. Nev. 1997).

[329] Japan refers to *Malek Wholesaler, Inc. v. First Film Extruding, Ltd*., 97 C 7087, 1998 U.S. Dist. LEXIS 3674, p. *9 (N.D. Ill.); *Cardinal Indus. Inc. v. Pressman Toy Corp*., 96 Civ. 4590 (MBM), 1996 U.S. Dist. LEXIS 18714, p. *18 (S.D.N.Y.) .

[330] Japan refers to *Zeller Corp.*, Op. Cit., pp. *6-8 (N.D. Oh.).

[331] Japan refers to *The City of New York v. Coastal Oil New York, Inc*., 96 Civ. 8667 (RPP), 1998 U.S. Dist. LEXIS 2049, p. *19 (S.D.N.Y.); *Lago & Sons Dairy, Inc. v. H.P. Hood, Inc*., Civ. No. 92-200-SD, 1994 U.S. Dist. LEXIS 12909, pp. *13-14 (D.N.H.).

[332] Japan refers to *Zeller Corp.*, Op. Cit., p. *6 (quoting defendants' motion to dismiss).

[333] The United States refers to, e.g., *Godfrey v. Pulitzer Publishing Co*., 161 F.3d 1137 (8th Cir. 1998); *George Haug Co. v. Rolls Royce Motor Cars, Inc*., 148 F.3d 136 (2d Cir. 1998); *Kentmaster Manufacturing Co. v. Jarvis Products Corp*., 146 F.3d 691 (9th Cir. 1998), amended, No. 96-56341, 1999 WL 19636 (9th Cir. Jan. 20, 1999); *Metro Ford Truck Sales, Inc. v. Ford Motor Co*., 145 F.3d 320 (5th Cir. 1998); *Sally Bridges v. MacLean-Stevens Studios, Inc*., 35 F.Supp. 2d 20, p. 28 (D. Me. 1998*); Malek Wholesaler, Inc. v. First Film Extruding, Ltd*., 1998 U.S.Dist. LEXIS 3674 (N.D. Ill. Mar. 20, 1998); *City of New York v. Coastal Oil New York, Inc*., 1998-1 Trade Cas. (CCH) ¶ 72,087 (S.D.N.Y. 1998); *Liberty Lincoln-Mercury v. Ford Motor Co*., 134 F.3d 557 (3d Cir. 1998); *Hoover Color Corp. v. Bayer Corp*., 24 F. Supp. 2d 571 (W.D. Va. 1998); *Bell v. Fur Breeders Agricultural Cooperative*, 3 F. Supp. 2d 1241 (D. Utah 1998*); Precision Printing Co. v. Unisource Worldwide, Inc*., 993 F. Supp. 338 (W.D. Pa. 1998); *Rebel Oil Co., Inc. v. Atlantic Richfield Co*., 957 F.Supp. 1184, p. 1192 (D. Nev. 1997), aff'd, 146 F.3d 1088 (9th Cir.), cert. denied, 119 S. Ct. 541 (1998).

3.401 The United States maintains that that conclusion remains valid even if one considers only the number of primary line price discrimination cases since *Brooke Group*. In particular, since that decision, four Court of Appeals decisions - arising from three cases addressing allegations of primary line price discrimination - have been issued.[334] To the extent that the success of a particular case can be measured by the level of the federal court system to which it rises, all of these lawsuits alleging primary line discrimination were more successful than either of the two 1916 Act lawsuits. Moreover, fourteen District Court decisions addressing primary line discrimination - in addition to those which led to some of the above Court of Appeals decisions - have been issued.[335] Although most of these cases remain pending and have not yet been finally resolved, these figures suggest that allegations of primary line discrimination under the Robinson-Patman Act - even without considering allegations of secondary line discrimination - have continued to pose far more of a threat of liability to domestic firms than the 1916 Act poses to foreign firms.

3.402 The United States argues, in addition, that a number of cases establish, either directly or by implication, that the same predatory pricing and recoupment requirements applicable to Sherman Act Section 2 and primary line Robinson-Patman Act cases apply to the 1916 Act as well. Thus, in *Brooke Group* itself, the Supreme Court determined that for predatory pricing to constitute either a violation of Section 2 of the Sherman Act or a violation of the Robinson-Patman Act (under a primary line injury theory), (1) the challenged prices must lie "below an appropriate measure of [the defendant's] costs", and (2) the defendant must have a "reasonable prospect" [for Robinson-Patman Act liability] or a "dangerous probability" [for Sherman Act liability] of "recouping its investment in below-cost prices".[336] This determination derived, in part, from the Supreme Court's 1986 decision in *Matsushita Electrical*, in which the Court held that conspiracies or attempts to monopolise through predatorily low prices could only be established by proof that such prices were below some appropriate measure of costs, and that the defendants possessed a realistic expectation of recouping prior losses through future monopoly rents.[337] On remand, the court of appeals in *In re Japanese Electronic Products III* applied precisely this predatory pricing standard to the plaintiff's 1916 Act claims - which were based on an alleged "intent to injure or destroy an industry in the United States" - and found that they had to be dismissed based on the same failure to adduce proof of recoupment which led to dismissal of the Sherman Act claims.[338]

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[334] *Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F.3d 691, 694-95 (9th Cir. 1998), amended, No. 96-56341, 1999 WL 19636 (9th Cir. Jan. 20, 1999); *Rebel Oil Co. v. Atlantic Richfield Co*., 146 F.3d 1088, p. 1091 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 541 (1998), and 51 F.3d 1421, p. 1429 (9th Cir. 1995); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp*., 79 F.3d 182, p. 188 (1st Cir. 1996).

[335] The United States refers to *J&S Oil, Inc. v. Irving Oil Corp*., 1999-2 Trade Cas. (CCH) ¶ 72,615 (D.Me. August 4, 1999), paras. 85551-54; *Wynn ex rel. Alabama v. Philip Morris Inc*., 51 F.Supp. 2d 1232, p. 1247 (N.D. Ala. 1999); *Malek Wholesaler, Inc. v. First Film Extruding, Ltd.*, 1998 U.S. Dist. LEXIS 3674 (N.D. Ill. March 24, 1998); *Taylor Publishing Company v. Jostens, Inc*., 36 F.Supp. 2d 360, pp. 372-73 (E.D. Tex. 1999); *Sally Bridges v. MacLean-Stevens Studios, Inc.*, 35 F.Supp. 2d 20, pp. 27-28 (D. Me. 1998); *City of New York v. Coastal Oil New York*, Inc., 1998-1 Trade Cas. (CCH) ¶ 72,087 (S.D.N.Y. 1998); *Stearns Airport Equip. Co. v. FMC Corp*., 977 F.Supp. 1269, p. 1273 (N.D. Tex. 1997); *Cardinal Indus., Inc. v. Pressman Toy Corp*., 1997-1 Trade Cas. (CCH) ¶ 71,738 (S.D.N.Y. Dec. 17, 1996); *Zeller Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,805 (N.D. Ohio June 25, 1996); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 958 F.Supp. 895, p. 906 (S.D.N.Y. 1997), and 1995-2 Trade Cas. ¶ 71,095 (S.D.N.Y. 1995), para. 75,241; *Clark v. Flow Measurement, Inc.*, 948 F.Supp. 519, pp. 522-29 (D. S.C. 1996); *C.B. Trucking, Inc. v. Waste Management, Inc. and WMX*, 944 F.Supp. 66, pp. 68-69 (D. Mass. 1996); *En Vogue v. UK Optical, Ltd. and British Optical Import Company*, 843 F.Supp. 838, pp. 845-47 (E.D.N.Y. 1994); *Lago & Sons Dairy, Inc. v. H.P. Hood, Inc*., 1994 U.S. Dist. LEXIS 12909 (D. N.H. 1994).

[336] *Brooke Group*, 509 U.S., p. 224.

[337] The United States refers to *Matsushita Electrical*, Op. Cit., p. 574; the United States also refers to *Cargill, Inc. v. Monfort of Colorado, Inc*., 479 U.S. 104 (1986).

[338] The United States refers to *In re Japanese Electronic Products III*, Op. Cit., pp. 48-49.

3.403 In response, **Japan** notes that the Supreme Court in its 1986 decision in the *Zenith* litigation expressly states that its ruling did not apply to the petitioners' 1916 Act claims and the Court of Appeals decision was based on the petitioners' failure to prove its conspiracy claim. Thus, there is no support for the US assertion.

3.404 The **United States** concedes that the Supreme Court only decided the plaintiffs' Sherman Act claims (because those were the claims upon which the Supreme Court granted *certiorari*, or in other words, those were the only claims that the petitioner requested that the Supreme Court review). However, the Supreme Court remanded the entire case, including the 1916 Act claims, for the Court of Appeals' consideration in light of its decision. The Court of Appeals acted upon the Supreme Court's instructions by deciding that a failure to show a possibility of recoupment under the Sherman Act also constituted a failure to make out a 1916 Act claim, thus equating the two. Had the 1916 Act claim required lesser, or different evidence, it would not have been dismissed.

3.405 The United States recalls, moreover, that in the one instance in which a plaintiff was able to reach the question of what, if any damages, it might be entitled to - in *Helmac II*, as the consequence of a default discovery determination - the court indicated that damages would be available only for sales at prices below average cost. This determination and the other court decisions under the 1916 Act indicate that even if a plaintiff has extensive evidence on the subject of predatory intent, it is not likely to be able to establish a 1916 Act violation, to the satisfaction of a US court, without also being able to provide the same type of evidence of anti-competitive conduct and effects required in Sherman Act monopolisation and Robinson-Patman Act cases.

(d) The available defences

3.406 **Japan** contends that a Robinson-Patman defendant that has engaged in price discrimination has available several affirmative defences. In contrast, no defences are provided to 1916 Act defendants. The Robinson-Patman defences include:

(a) "cost justification", i.e. the price difference can be based on differences in the cost of manufacture, sale, or delivery where those differences result from differing methods or quantities in the sale or delivery of products to various purchasers[339];

(b) "changing conditions", i.e. price changes are permitted in response to changing conditions affecting the market for, or marketability of, a product (e.g. deterioration of perishable goods, obsolescence of seasonal goods, distress sales, outdated or damaged goods)[340]; and

(c) "meeting competition", i.e. a seller may reduce its prices to meet an equally low price of a competitor[341].[342]

[339] Japan refers to 15 U.S.C. § 13a (1997).
[340] Japan refers to 15 U.S.C. § 13(a) (1997).
[341] Japan refers to 15 U.S.C. § 13(b) (1997).
[342] In addition, Japan notes that under long-standing court decisions, two other affirmative defences are available to a defendant in a Robinson-Patman case. There is the judicially recognized "availability defense," according to which it is not an act of price discrimination for a seller to offer two prices, one normal and the other reduced on certain reasonable terms being met, where both prices are realistically available to the allegedly disfavoured customer. Japan refers to, e.g., *Boise Cascade Corp. v. Federal Trade Commission*, 837 F.2d 1127, p. 1163 (D.C. Cir. 1988). There also is the judicially recognized "functional discount" defence, according to which sellers are permitted to use price differentials to compensate certain classes of customers (e.g., wholesalers) for distributional services they perform. Japan refers to, e.g., *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, p. 561 (1990).

3.407 Thus, according to Japan, even where a plaintiff has met the Robinson-Patman Act's stricter pleading and proof requirements, a defendant still can avoid liability simply by establishing any of these defences. In stark contrast, a 1916 Act defendant has no such escapes available. If the plaintiff meets the comparatively loose pleading and proof requirements, the defendant is liable under the 1916 Act. The provision by the United States of affirmative defences to domestic but not to foreign price discrimination defendants, is inconsistent with Article III:4 of the GATT 1994.

3.408 The **United States** concedes that the 1916 Act, on its face, does not specifically authorize any defences. The Robinson-Patman Act, on the other hand, allows three principal defences: a "meeting competition" defense, a defense based upon "changing market conditions", and a "cost justification" defence.[343] The defences are designed to ensure that pricing differentials employed for pro-competitive reasons are not prevented or discouraged. Nevertheless, these differences do not undermine the conclusion that the 1916 Act accords no less favourable treatment to foreign products than the Robinson-Patman Act accords domestic products because these defences are inherent in the 1916 Act's requirement that an intent to injure, destroy, or prevent the establishment of an industry in the United States - or to restrain or monopolise any part of trade and commerce - must be proven.

3.409 The United States asserts that, in a 1916 Act case, any evidence which would support the Robinson-Patman Act defences would be equally and directly relevant to determining whether the showing of the requisite predatory intent can be made in the first place. Thus, as Professor Hawk recognized in his treatise on US and EC competition laws, while the 1916 Act does not expressly provide for meeting competition and cost justification defences, "[t]hese considerations would appear relevant to predatory intent and thus should implicitly be included in the 1916 Act".[344] In particular, if the defendant charged the prices at issue with the intent of meeting competition in the form of comparable prices charged by other sellers, it is unlikely that a court would conclude that the defendant nevertheless intended to restrain or monopolise the line of commerce at issue, or intended to injure, destroy, or prevent the establishment of an US industry. Similarly, if the defendant charged the prices at issue in order to respond to changing market conditions, such as the deterioration of perishable commodities, it is unlikely that the requisite level of predatory intent could be established. In addition, if the defendant charged the prices at issue in order to account for cost savings, and in effect to pass those cost savings on to consumers, it is unlikely that a court would nevertheless conclude that the defendant acted with predatory intent. Indeed, in *Geneva Steel*, the court explained that one reason why it is difficult to prove the requisite intent under the 1916 Act is that "evidence of normal pricing cuts […] would be insufficient to establish liability under the 1916 Act".[345]

3.410 In short, the United States considers that the affirmative defences to which Japan refers, which are available to defendants in Robinson-Patman Act cases, are also, in effect, available to defendants in 1916 Act cases. The evidence establishing these defences does not, however, have to be presented as a defence. It instead can be presented to rebut any evidence the plaintiff may otherwise have on the subject of the defendant's intentions in charging the prices at issue.

3.411 **Japan** replies that, as a factual matter, the US arguments are incorrect. Evidence which establishes the "meeting competition" or "changing conditions" defences under the Robinson-Patman Act will not be sufficient to negate the "intent requirement" under the 1916 Act. In addition, the US assertion is mere speculation. There is a huge difference between explicit provision of stipulated defences under the Robinson-Patman Act and the speculative possibility of asserting defences under the 1916 Act.

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[343] The United States refers to 15 U.S.C. 13(a),(b).

[344] The United States refers to B. Hawk, United States, Common Market and International Anti-trust (1996-1 Suppl.), p. 357.

[345] *Geneva Steel*, Op. Cit., p. 1220.

3.412 The **United States** maintains its view that the affirmative defences which are available to defendants in Robinson-Patman Act cases are also, in effect, available to defendants in 1916 Act cases.

(e) The conduct subject to penalties

3.413 **Japan** asserts that the conduct subject to penalties under the 1916 Act exceed those conduct under the Robinson-Patman Act. Both the 1916 Act and US anti-trust laws (through section 4 of the Clayton Act) provide for treble civil damage actions and recovery of the cost of the suit, including reasonable attorney's fees. However, the 1916 Act provides for *all types of violations* criminal fines of up to $5,000 or imprisonment not more than one year, or both. Section 3 of the Robinson-Patman Act, in contrast, provides the same penalties *only for a limited subset* of price discrimination practices that overlap with Section 2(a) of the Robinson-Patman Act and for "selling at unreasonably low prices" for the purpose of destroying competition or eliminating a competitor.[346]

3.414 According to Japan, the application by the US of criminal penalties to a broader range of foreign than domestic conduct is inconsistent with Article III:4 of the GATT 1994.

3.415 The **United States** recalls that the Robinson-Patman Act, like the 1916 Act, contains a criminal liability provision. In brief, Section 3 of the Act, 15 U.S.C. § 13a, prohibits

> "(1) territorial price discrimination 'for the purpose of destroying competition, or eliminating a competitor;' (2) charging 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor'; and (3) granting discounts, rebates, or allowances that are not made available to a recipient's competitors in the sale 'of goods of like grade, quality, and quantity.'"[347]

3.416 The United States notes that the Supreme Court has determined that "unreasonably low prices" are prices "below cost" and Section 3 thus prohibits sales at prices "below cost" that are made with the requisite predatory intent.[348] Both statutes provide that one who violates the criminal proscriptions can be fined up to $5,000, imprisoned for up to one year, or both. Moreover, as the District Court in *Zenith* stated:

> "The clause of the 1916 Act which creates criminal penalties is virtually identical to, and specifies the same penalties as, the corresponding clauses of the Sherman Anti-trust Act as then in force."[349]

Thus, from the perspective of both substantive scope and penalties, the criminal component of the 1916 Act treats importers no less favourably than the criminal provisions of the Robinson-Patman

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[346] The United States refers to 15 U.S.C. § 13a (1997).

[347] Section of Anti-trust Law, American Bar Association, Anti-trust Law Developments (Fourth) (1997), p. 490, quoting 15 U.S.C. § 13a.

[348] The United States refers to *United States v. National Dairy Products Corp*., 372 U.S. 29, pp. 36-37 (1963). The Court also determined that such sales do not violate Section 3 of the Act:

> "when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor."

The United States further notes that, earlier, the Tenth Circuit had determined that such sales do not violate Section 3 of the Act if they are made "to increase volume and decrease unit cost in order to retain [one's] proportionate share of a diminishing market." (*Ben Hur Coal Co. v. Wells*, 242 F.2d 481, p. 486 (10th Cir.), cert. denied, 354 U.S. 910 (1957)).

[349] *Zenith III*, Op. Cit., p. 1214.

Act. That conclusion is further strengthened by the fact that the United States has never pursued a criminal case under the 1916 Act. By contrast, there have been a number of criminal prosecutions under Section 3 of the Robinson-Patman Act.

3.417 The United States notes that Japan nevertheless argues that the criminal component of the 1916 Act is less favourable, based on its suggestion that Section 3 of the Robinson-Patman Act covers only "a limited subset of price discrimination practices that overlap with Section 2(a) […] and for selling at unreasonably low prices […]." There does not, however, appear to be any basis for this suggestion. In fact, as the language of Section 3 itself indicates, it applies to "territorial price discrimination"; to charging "unreasonably low prices"; and to granting discounts, rebates, or allowances that are not made available to a recipient's competitors in the sale "of goods of like grade, quality, and quantity". In short, the coverage of this section actually appears to be broader than that of both the 1916 Act and of Section 2(a) of the Robinson-Patman Act, clearly establishing that the criminal provisions of the 1916 Act are, at a minimum, no less favourable to importers than the criminal provisions of Section 3 of the Robinson-Patman Act.

(f) The litigation costs and business burdens

3.418 **Japan** contends that, because plaintiffs more easily can prevail in lawsuits against importers and imported products under the 1916 Act than against domestic competitors under the Robinson-Patman Act, they are more likely to file suit against importers than against domestic competitors for the same alleged conduct. As a consequence, importers face a higher risk of legal and business harassment under the 1916 Act than domestic producers face under the Robinson-Patman Act.[350]

3.419 Japan notes that these transaction and business costs take the form of legal expenses, disrupted business, uncertainty in the marketplace and a chilling effect on imports. In addition, using the threat of protracted lawsuits to seek to force defendants to accept out-of-court settlement is commonplace in the United States. The defendants in the *Geneva Steel* case have incurred the expense and uncertainty of being involved in litigation for nearly three years. The defendants in the *Wheeling-Pittsburgh* litigation have suffered even more dramatic consequences. Of the nine defendants in the case, six have reached out-of-court settlements.[351] Although these settlements remain confidential, most of them include certain restrictions on the importation of foreign steel and agreements to purchase undisclosed amounts of steel from the plaintiff.[352] According to statements from the plaintiff in that case, one defendant even agreed to pay it an undisclosed amount of money to settle the litigation.[353]

3.420 Japan argues that the settlements themselves distort trade. Importers have been forced to purchase steel from an US producer.[354] They have been forced to agree to curb their purchases of imported steel all to the benefit of an US steel producer.[355] Touting the successes of the 1916 Act actions brought by *Geneva Steel* and *Wheeling-Pittsburgh*, one even agreed to simply pay the plaintiff to end the legal harassment.[356]

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[350] Japan notes that litigation under Robinson-Patman has come to a virtual standstill since the US Supreme Court handed down its ruling in *Brooke Group*. By comparison, the 1916 Act has seen a recent revival in activity, imposing trade-inhibiting transaction and business costs on the defendants named in recent cases.

[351] Japan notes that only three defendants, all Japanese, remain active in the litigation, opting thus far to continue to bear the costs and uncertainty associated with the litigation rather than the costs of settling.

[352] Japan refers to Wheeling-Pittsburgh Steel Corporation press releases.

[353] Ibid.

[354] Ibid.

[355] Ibid.

[356] Ibid.

3.421 In the view of Japan, what is perhaps even more troubling is that these recent cases and resulting settlements raise the potential for similar lawsuits and class action suits. Touting the success of *Geneva Steel* and *Wheeling-Pittsburgh*, at least one American law firm has solicited plaintiffs to bring a class action lawsuit under the 1916 Act against steel importers.[357]

3.422 The **United States** disagrees with Japan's argument that domestic firms can "more easily impose significant litigation costs and business burdens on foreign producers [through lawsuits under the 1916 Act] than on domestic competitors [through lawsuits under the Robinson-Patman Act]". Japan offers no support for this bald statement and none exists. The cases described establish that this theory is not valid; clearly, the far greater number of Robinson-Patman Act cases imposes far more significant litigation costs and business burdens on domestic firms than the two 1916 Act cases could ever impose on foreign firms.

3.423 The United States recalls in this regard that the 1916 Act has rarely been invoked by private parties, and has never been invoked by the US government. More importantly, the 1916 Act establishes a standard for relief which has *never* been met in the case of importers and imported goods. The Robinson-Patman Act, by contrast, has been successfully invoked in thousands of federal court and administrative cases, including a substantial number pursued administratively by the Federal Trade Commission.

3.424 Finally, in respect of Japan's complaints that the fact that the ongoing *Geneva Steel* and *Wheeling-Pittsburgh* cases have compelled the defendants in both cases to incur the "expense and uncertainty" of litigation and that six of the nine defendants in the *Wheeling-Pittsburgh* case have reached "out-of-court settlements" (presumably voluntarily), the United States argues that these two complaints have nothing to do with the issues at hand. They are rather a product of the fact that if firms of one country choose to do business in another country, they must comply with the laws of that country, as well as their own.

(g) The requisite price differences and relative price levels

3.425 According to the **United States**, when it comes to establishing the requisite price discrimination - as a function of both price differences and price levels relative to costs - the 1916 Act treats foreign products more favourably than the Robinson-Patman Act treats domestic products, because it is more difficult to establish price discrimination that violates the 1916 Act than to establish price discrimination that violates the Robinson-Patman Act.

3.426 The United States argues, first, that the 1916 Act requires proof of a far larger number of illegal price differences - imposed in a systematic way - in order to establish liability. In particular, the plaintiff must show that the defendant "commonly and systematically" made the sales prohibited by the Act. By contrast, under the Robinson-Patman Act, liability can be established on the basis of as few as two consummated sales.[358]

3.427 The United States further argues that the 1916 Act requires proof of a larger price difference than the Robinson-Patman Act in an absolute sense. In particular, under the 1916 Act the plaintiff must establish that the Articles at issue are sold within the United States at a price "substantially less than actual market value or wholesale price of such Articles […] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported".

3.428 The United States notes that, by contrast, the Robinson-Patman Act simply requires a showing of a "cognizable" difference in price, which need only be greater than a *de minimis*

[357] Japan refers to advertising material of a San Francisco law-firm.

[358] The United States refers to *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, p. 417, citing E. Kintner, A Robinson-Patman Primer, 3d ed. (1979), p. 35.

difference. Thus, for example, one circuit court of appeals recently held that a 2.38 per cent price difference provided a basis for liability under the Robinson-Patman Act.[359] Such a small difference would hardly satisfy the requirement that the price be "substantially less" under the 1916 Act.

3.429 The United States asserts, third, that even if the 1916 Act requirements with respect to price levels relative to costs are compared only to the corresponding requirements for establishing primary line liability under the Robinson-Patman Act - and such an approach ignores the substantial and far-reaching risk of liability for secondary line discrimination under the Robinson-Patman Act that domestic firms must confront under that statute - the 1916 Act is more favourable to importers than the Robinson-Patman Act is to domestic firms. Under the Robinson-Patman Act, the US Supreme Court has only stated that the plaintiff needs to "prove that the prices complained of are below an appropriate measure of the rival's cost".[360] Lower courts, meanwhile, have not agreed on what the appropriate measure of a rival' s costs should be. For example, while some courts have held that the prices complained of need only be below average cost, other courts have held that they must be below average variable cost.

3.430 The United States notes that, in the 1916 Act context, on the other hand, the one court that has squarely addressed this issue - in the context of establishing possible damages - required the plaintiff to prove that the defendant sold the products at issue at prices below its own average variable costs. As this court explained:

> "It is somewhat of a stretch to suggest the [1916] Act justifies damages when [the defendant's] prices equaled or exceeded average variable cost […]. Therefore, this Court shall limit damages to those cases where [the defendant] set prices below average variable cost."[361]

3.431 The United States points out that Japan has failed to address any aspect of these arguments, presumably because it has recognized that the price difference and relative price level components of establishing liability under the 1916 Act are more difficult to satisfy than the corresponding components of the Robinson-Patman Act. Indeed, Japan's only reference to price differences and relative price levels arises in its discussion of dumping margins, where it recognizes that the "substantial" price differences required to establish liability under the Anti-Dumping Agreement and the 1916 Act are greater than the "*de minimis"* dumping margins that do not constitute dumping under the Anti-Dumping Agreement.

3.432 **Japan** argues that, to establish infringement under the Robinson-Patman Act in a so-called primary line case, it must be shown that the defendant is charging a price below the average variable cost of production. If prices are above the average variable cost of production, there is no infringement under the Robinson-Patman Act regardless of the existence of price discrimination. However, the 1916 Act is applicable whenever goods are imported into the United States at "a price substantially less than the actual market value […]", regardless of the average variable cost of production.[362] This difference presents the potential for 1916 Act defendants to face liability for prices above average variable cost. In contrast, domestic producers face no such risk under the Robinson-Patman Act. As the United States itself admits, "some lower courts [in Robinson-Patman Act cases] have held that the prices complained of need only be below average cost, while other

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[359] The United States refers to *Chroma Lighting v. GTE Products Corp.*, 1997-1 Trade Cas (CCH) ¶ 71,836 (9th Cir. 1997), para. 79,885.

[360] The United States refers to *Brooke Group*, Op. Cit., pp. 222-23.

[361] *Helmac II*, Op. Cit., p. 583.

[362] Japan notes that the *Helmac II* case says the liability standard under the 1916 Act is sales at prices below average variable cost and the *Brooke Group* standard for Robinson-Patman Act cases is sales below an appropriate measure of cost. However, other cases, including *Geneva Steel* and *Wheeling-Pittsburgh*, did not require that sales at prices below average variable cost be established for there to be liability under the 1916 Act.

courts have held that they must be below average variable cost". With this concession, the United States acknowledges that establishing price discrimination in Robinson-Patman Act cases can be more difficult than establishing a 1916 Act violation. Under the *Oilseeds* decision, this is all that is necessary to establish a violation of Article III:4 of the GATT 1994.

3.433 The **United States** disagrees with Japan's suggestion that sales at prices below average variable cost are a prerequisite to a finding of liability under the Robinson-Patman Act but not under the 1916 Act.[363] Under the Robinson-Patman Act, proof of sales at prices below some measure of the defendant's costs is not a prerequisite to a finding of secondary line liability. Moreover, with respect to primary line liability, the Supreme Court has expressly declined to require a showing of sales at prices below average variable cost. Instead, the Court stated, in *Brooke Group*, that the plaintiff needs to "prove that the prices complained of are below an appropriate measure of the rival's cost"[364], without specifying any particular measure. By contrast, in *Helmac II*, the only case that proceeded anywhere near a finding of liability under the 1916 Act - and only on a default basis, as a consequence of discovery problems - the District Court concluded that the defendant would be liable only for sales at prices below its own average variable costs.[365] Thus, as these cases establish, a showing that a defendant made sales at prices below average variable cost is required in order to establish 1916 Act liability, but is not required to establish primary line liability under the Robinson-Patman Act.[366]

K. VIOLATION OF ARTICLE XI OF THE GATT 1994

3.434 **Japan** contends that the 1916 Act violates the United States' obligations under Article XI of the GATT 1994 because it establishes impermissible import "prohibitions or restrictions other than duties, taxes or other charges".[367]

3.435 According to Japan, to establish a violation of Article XI, the complaining party must show (i) that the 1916 Act is an "other measure" maintained by the United States, (ii) that the measure makes "restrictions other than duties, taxes or other charges" effective, and (iii) that the measure is applied on the "importation" of products into the United States. Each of these elements is demonstrated below.

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[363] The United States notes that, similarly, the European Communities suggests that sales at prices below average variable costs are a prerequisite to Robinson-Patman Act liability but not to liability under the 1916 Act.

[364] *Brooke Group*, Op. Cit., pp. 222-23.

[365] The United States refers to *Helmac II*, Op. Cit., p. 583. The United States notes that the European Communities "contests the importance given by the US to the *Helmac II* case." For the United States, this position is somewhat surprising, inasmuch as requiring a showing of sales at prices below average variable cost in 1916 Act cases helps to ensure that the 1916 Act is more favourable to importers than the Robinson-Patman Act is to domestic firms. In any event, the European Communities does not provide any support for this position other than the suggestion that requiring a showing of sales at prices below average variable costs is not consistent with the court's decision in *Helmac I*.

[366] The United States notes that, as the European Communities indicates, in *Helmac I* the District Court indicated that the 1916 Act applies to offers to sell, as well as to consummated sales, while the Robinson-Patman Act applies to consummated sales. Contrary to the view of the European Communities, however, that determination does not diminish the difficulty of establishing liability under the 1916 Act, relative to the Robinson-Patman Act. Under the 1916 Act, the plaintiff still must show that the offers to sell were made "commonly and systematically," while as few as two sales may serve as a basis for liability under the Robinson-Patman Act.

[367] Article XI:1 states:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

3.436 Japan asserts, first, that the 1916 Act unquestionably is a measure within the meaning of Article XI of the GATT 1994. It is a statute of the United States with binding effect.[368]

3.437 Japan argues, second, that the 1916 Act imposes "restrictions other than duties, taxes or other charges", thereby making the restrictions effective. Specifically, the 1916 Act provides for "a fine not exceeding $5,000, or imprisonment not exceeding one year, or both" as penalties. In addition, a person injured by a violation may recover treble damages and the cost of the suit, including a reasonable attorney's fee. Obviously, "imprisonment not exceeding one year" is neither a tax, nor a duty, nor a type of other charge. Equally obvious is the fact that the fine, treble damages and cost recovery are not duties or taxes. Likewise, they are not the type of "other charges" contemplated by Article XI:1.[369] Thus, this second element is satisfied, not merely by the imprisonment penalty, but also by the other impermissible penalties.

3.438 Japan submits, third, that the 1916 Act applies to the importation of products into the United States. The 1916 Act makes it unlawful to "import or cause to be imported or sold" any goods "from any foreign country into the United States" under certain conditions.

3.439 Japan notes, moreover, that one of the conditions for the importation to be unlawful is that the goods be dumped, or imported or sold in the United States at a price substantially less than their "actual market value or wholesale price". Specifically, the Act applies to goods

> "[…] imported or sold […] within the United States at a price substantially less than the actual market value or wholesale price […] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale […]."

This requirement highlights the fact that the 1916 Act is a measure applying to the importation of products into the United States. In essence, the 1916 Act establishes product-specific minimum price levels to protect US industries. Thus, it functions similarly to the minimum import price system declared inconsistent with Article XI of the GATT 1994 by the panel in *EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*.[370] Furthermore, the application of the Act is not limited to a specific product, but is open to any product. The 1916 Act is a restriction that applies to imports within the meaning of Article XI of the GATT 1994.

3.440 Japan argues that the fact that the 1916 Act applies to "any person importing or assisting in importing any articles" is immaterial. As held by the panel in *United States - Section 337*, in the context of Article III of the GATT 1994, a measure applied to importers by imposing penalties on

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[368] Japan refers to, e.g., *Japan - Trade in Semi-conductors*, adopted on 4 May 1988, BISD 35S/116, paras. 104-09 (hereinafter "*Japan – Semi-conductors*") (finding, according to Japan, that "measure" as used in Article XI is a broad word encompassing not only laws and regulations, but also certain "non-mandatory requests").

[369] Japan points out that Article VIII of the GATT 1994 enumerates the types of permissible charges contemplated by Article XI, as well as Articles I and II, of the GATT 1994.

[370] Japan refers to the Panel Report on *EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, adopted on 18 October 1978, BISD 25S/68, para. 4.9 (hereinafter "*EEC – Minimum Import Prices*") (holding, according to Japan, that the EEC's minimum import price system was a "restriction 'other than duties, taxes or other charges' within the meaning of Article XI:1"). Japan also refers to *Japan - Semi-conductors*, para. 29 (extending, according to Japan, the principle that restrictions on *imports* of goods *below* certain prices violate Article XI:1 to a situation in which restrictions applied to *exports* of goods *below* certain prices.).

them also affects imported products.[371] In the context of Article XI, it does so by imposing restrictions on them.

3.441 Japan considers, therefore, that, as demonstrated above, the 1916 Act violates Article XI:1 of the GATT 1994.

3.442 The **United States** notes that, in general, Article XI prohibits, with certain exceptions, quantitative restrictions on imports or exports. Because the 1916 Act contains no provision which would enable a court to impose any sort of prohibition or restriction upon the importation of products, the Panel should reject this claim. In fact, the only court to have specifically considered whether the 1916 Act authorizes the imposition of a quantitative restriction on imports, *Wheeling-Pittsburgh*[372] held that no injunctive relief is available under the 1916 Act.

3.443 According to the United States, at most, a court may enter a *monetary judgment* (or impose a criminal sentence) against the particular *defendants* in a case for the amount of damage that the plaintiff's business has sustained. A monetary judgment (or a criminal sentence) against a party obviously does not apply to any particular product. In fact, the defendants in the case are free to continue importing their product. Furthermore, the judgment obviously does not apply to persons importing the same product that are not a party to the lawsuit. Thus, there is no basis for Japan's unsupported assertion that the 1916 Act "establishes product-specific minimum price levels".

3.444 The United States is of the view that even a cursory review of the panel report in *EEC - Minimum Import Prices* shows that there is no similarity between the 1916 Act and the minimum import pricing scheme at issue in that case. There, the questioned measure *prohibited* the importation of specific products (tomato concentrates) below a certain price. As such, it easily fell within the ambit of Article XI. Indeed, the EEC did not even dispute that the scheme was covered by Article XI.[373] Thus, the only real issue in that case was the application of the exceptions in Article XI:2.

3.445 The United States considers that Japan's reliance upon the panel report in *United States - Section 337* is similarly misplaced. At issue in that case was whether Article III:4 applied to the Section 337 proceedings. The panel found that the application of Article III:4 could not be avoided based upon the fact that Section 337 proceedings applied to persons rather than products.

3.446 In the present case, the United States does not dispute that Article III applies to the 1916 Act. However, the analysis under Article III is wholly different from an Article XI analysis. As noted by Japan, Article III has been interpreted to have an exceedingly broad scope based upon whether the measure "affects" the conditions of competition between the domestic and imported product. There is no language in Article XI concerning whether the measure "affects" the imported product nor any basis to conduct an analysis comparable to the changing conditions of competition analysis under Article III.

3.447 **Japan** replies that the fact that the 1916 Act does not provide for injunctive relief is irrelevant. The United States asserts that the 1916 Act is consistent with Article XI because, the United States claims, the 1916 Act does not allow a court to impose a "prohibition or restriction" on trade. However, the 1916 Act is a measure that applies to and restricts the importation of products. Because it allows for the imposition of fines, imprisonment, treble damages and costs, it violates Article XI.

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[371] Japan refers to *United States – Section 337*, Op. Cit., para. 5.10.
[372] The United States refers to *Wheeling-Pittsburgh*, Op. Cit.
[373] The United States refers to *EEC – Minimum Import Prices*, Op. Cit., para. 3.3.

3.448 Japan also notes that imprisonment is not "monetary" in nature. In Japan's view, imprisonment obviously has serious restriction on imports and imposes even more severe effect on imports than monetary punishment or administrative guidance. In a previous panel case – *Japan - Semiconductors* – the panel affirmed that in certain special circumstances such a soft instrument as administrative guidance could be regarded as a "governmental measure" enforcing trade policies. Japan does not believe that Article XI allows Members to take such measures as imprisonment with stronger enforcement effect and implication.

3.449 The **United States** reiterates its argument that a judgment under the 1916 Act against a party defendant (civil or criminal) does not apply to and therefore cannot restrict any particular product. The United States also notes that Japan did not address the distinctions raised by the United States between this case and the measures and claims at issue in *EEC - Minimum Import Prices* and *United States - Section 337*. Rather, Japan cites a different panel report - *Japan - Semiconductors* - for the proposition that, "in certain special circumstances such a soft instrument as administrative guidance could be regarded as a 'governmental measure' enforcing trade policies".

3.450 In the view of the United States, like *EEC - Minimum Import Prices* and *United States - Section 337*, the issues in *Japan - Semiconductors* are distinguishable from this case. At issue in *Japan – Semiconductors* was whether the legal status of the practices in question rendered Article XI inapplicable. The panel concluded that:

> "[…] the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control. The only distinction in this case was the absence of formal legally binding obligations in respect of exportation or sale for export of semi-conductors. However, the Panel concluded that this amounted to a difference in form rather than substance because the measures were operated in a manner equivalent to mandatory requirements. The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other that the United States, inconsistent with Article XI."[374]

3.451 The "complex of measures" in question included "such measures as repeated direct requests by MITI, combined with the statutory requirement for exporters to submit information on export prices, the systematic monitoring of company and product-specific costs and export prices and the institution of the supply and demand forecasts mechanism and its utilization in a manner to directly influence the behaviour of private companies"[375].

3.452 The United States considers that it is obvious that the 1916 Act cannot be compared to the measures at issue in *Japan - Semiconductors* or *EEC - Minimum Import Prices*.[376]

L. VIOLATION OF ARTICLE XVI:4 OF THE WTO AGREEMENT AND ARTICLE 18.4 OF THE ANTI-DUMPING AGREEMENT

3.453 **Japan** contends that the United States is in violation of its obligations under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement. According to Article XVI:4 of the WTO Agreement:

> "Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."

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[374] *Japan – Semiconductors*, Op. Cit., para. 117.
[375] The United States refers to *Japan – Semiconductors*, Op. Cit., para. 117.
[376] In this regard, the United States refers to its earlier arguments.

3.454 Japan recalls that paragraph 4 of Article 18 of the Anti-Dumping Agreement sets forth a similar obligation that applies specifically to obligations under the Anti-Dumping Agreement:

> "Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

3.455 In the view of Japan, these provisions clarify that the WTO agreements extend to all "laws, regulations and administrative procedures". Inconsistent future legislation is prohibited; inconsistent existing legislation must be amended so as to conform to the obligations under the WTO agreements.[377]

3.456 Japan asserts that the United States is in violation of each of these provisions because, as demonstrated above, it has failed to conform the 1916 Act to the obligations under the relevant provisions of the GATT 1994 and the Anti-Dumping Agreement.

3.457 The **United States** considers that, because the 1916 Act is susceptible to an interpretation that is fully consistent with all US WTO obligations and, in fact, has been so interpreted to date, there is no requirement under Article XVI:4 of the WTO Agreement that the United States take action to change the law.

3.458 In response to a question of the Panel to the United States regarding how the obligations contained in Article XVI:4 of the WTO Agreement are transposed into the US legal order, the United States notes that when the United States prepared its negotiating positions in the Uruguay Round, this preparation included a review of whether US law could be affected by those positions or by the proposals made by other Uruguay Round participants. In addition, after the Uruguay Round Final Act the United States undertook a comprehensive review of US law to determine which laws, regulations or administrative procedures might need to be changed in order to comply with US obligations under the WTO Agreement (including Article XVI:4). Where a statutory change was necessary, it was proposed to Congress and enacted as part of the Uruguay Round Agreements Act, which was signed into law on December 8, 1994. All changes in regulations and administrative procedures that were necessary to bring the United States into conformity with its obligations under the WTO Agreement were described in the Statement of Administrative Action which was submitted by the executive branch and approved by Congress as part of the Uruguay Round Agreements Act.

3.459 In reply to the same question of the Panel, **Japan** states that, in the United States, there is no direct application of international obligations. This is especially true in the context of WTO obligations. The obligations are transposed if and only if the US Congress decides to do so in passing a new law or an amendment to an existing law which then is enacted into law by the President.

3.460 In response to another question of the Panel to both parties regarding whether the requirements of Article XVI:4 of the WTO Agreement differ from those under Article 18.4 of the Anti-Dumping Agreement, Japan argues that they differ in two relevant respects. First, Article XVI:4 is more general in scope, applying to all WTO agreements, including the GATT 1994 and the Anti-Dumping Agreement. In other words, Article 18.4 is reflective of the general obligation set out by Article XVI:4 as it applies to anti-dumping. Second, in addition to the general obligation to "ensure the conformity" of laws, regulations and administrative procedures, Article 18.4 imposes an

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[377] Japan notes that, under the GATT 1947, existing laws, including the 1916 Act, were "grandfathered." Under the WTO agreements, in contrast, only specified laws are exempted. The United States did not specify the 1916 Act for exemption and, thus, it is not grandfathered. The only measure grandfathered by the United States was the Jones Act, relating to exclusion of foreign-built vessels in US commerce. Japan refers to the introductory language of the GATT 1994, para. 3(a).

additional obligation to do so by "tak[ing] all necessary steps, of a general or particular character." These differences bolster Japan's view that the mere potential of WTO inconsistency is sufficient to establish a violation in the context of provisions relating to anti-dumping.

3.461 The **United States**, in response to the same question, submits that, like any other US law, regulation or administrative procedure, under Article XVI:4, anti-dumping laws, regulations and procedures (assuming they are mandatory) must conform with the requirements of the covered agreements. With regard to Article 18.4 of the Anti-Dumping Agreement, the United States notes that, although the language is not identical to Article XVI:4, there were similar provisions in the Tokyo Round Agreements on Anti-Dumping and Subsidies which have generally been interpreted as requiring the Parties to those agreements to adopt laws, regulations and procedures that permit them to act in conformity with their obligations under those Agreements. The United States submits that Article 18.4 of the Anti-Dumping Agreement should be interpreted in the same way.

3.462 In reply to yet another question of the Panel to both parties regarding whether, in light of Article 18.4 of the Anti-Dumping Agreement, there are grounds under the WTO provisions relating to anti-dumping for making a distinction between mandatory and non-mandatory laws, **Japan** notes that each Member must conform its laws, regulations and administrative procedures to the provisions of the WTO agreements. The United States has not done so and, thus, is in violation of Article 18.4. The WTO obligation is "to ensure […] the conformity," by taking "all necessary steps, of a general or particular character." Given the ordinary meaning of these terms in their context, and in light of their object and purpose, that a law provides for WTO-inconsistent action is sufficient, even if there is the possibility of WTO-consistent action. This obligation, rather than the mandatory/discretionary dichotomy drawn from GATT 1947 precedent, should apply in the present dispute.

3.463 Japan argues that, in any case, the 1916 Act is mandatory. Japan has demonstrated that the 1916 Act mandates action inconsistent with Article VI and the Anti-Dumping Agreement.

3.464 The **United States**, in its answer to the Panel's question, argues that there is nothing inherent in the anti-dumping context that renders the generally applicable distinction between mandatory and non-mandatory legislation inapplicable. The distinction in GATT 1947/WTO jurisprudence between discretionary and mandatory legislation is not based upon a particular provision of any WTO agreement, nor is it limited in its application to a particular WTO provision. For example, this distinction has been applied in the Article III context and the Article VIII context. It has also been applied in the context of Article XI[378] and also, it appears, in the context of Articles I, II and X.[379]

3.465 According to the United States, this distinction is consistent with the presumption against conflicts between national and international laws. It is both general international practice and that of the United States that statutory language is to be interpreted so as to avoid conflicts with international obligations. In general:

> "[a]lthough national courts must apply national laws even if they conflict with international law, there is a presumption against the existence of such a conflict. As international law is based upon the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be so interpreted as to avoid such conflict."[380]

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[378] The United States refers to the Panel Report on *United States - Restrictions on Imports of Tuna*, dated 3 September 1991 (unadopted), BISD 39S/155.

[379] The United States refers to the Panel Report on *EEC - Parts and Components*, Op. Cit., paras. 5.25-5.26.

[380] Oppenheim's International Law, 9th ed., pp. 81-82 (footnote omitted by the United States).

Thus, GATT 1947 jurisprudence distinguishing between mandatory and discretionary legislation does no more than apply the general principle that there is a presumption against conflicts between national and international law. If a law is susceptible to an interpretation that is WTO-consistent, there is a presumption that domestic authorities will interpret that law so as to avoid a conflict with WTO obligations. This presumption may be seen as underlying the finding of the panel in *United States – Tobacco* that a domestic law susceptible of multiple interpretations would not violate a party's international obligations so long as one possible interpretation permits action consistent with those obligations.[381]

3.466 The United States also notes that two cases cited by the Panel, *EEC - Parts and Components* and *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*[382], support the conclusion that the 1916 Act is a non-mandatory measure and, therefore, the existence of the 1916 Act *as such* does not constitute a violation of any WTO obligation.

3.467 The United States recalls that, in *EEC - Parts and Components*, the panel noted that the anti-circumvention provision at issue did not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorized the authorities to take certain actions.[383] The panel recalled that in a prior panel report adopted by the contracting parties (*United States - Superfund*), the panel had concluded that "legislation merely giving the executive authorities the possibility to act inconsistently with Article III:2 cannot, by itself, constitute a violation of that provision."[384] Thus, the panel concluded that the mere existence of the anti-circumvention provision was not inconsistent with the EEC's obligations under the General Agreement.

3.468 The United States points out that, similarly, the panel report in *EC - Audio Cassettes* concludes that the regulatory provision at issue was non-mandatory because the term "normally" was ambiguous and therefore left room for the EEC to act in a consistent manner.[385] The panel declined to base its finding upon the fact that obligations under the anti-dumping legislation were dependent on whether certain factual prerequisites were fulfilled.

3.469 The United States argues that, likewise, the mere existence of the 1916 Act does not run afoul of any WTO obligations because the 1916 Act does not mandate that government authorities act in an inconsistent manner. The 1916 Act is clearly susceptible to an interpretation that is WTO-consistent and, in fact, all final judicial decisions that have considered the 1916 Act have interpreted it as such. Indeed, US courts have repeatedly admonished that the 1916 Act "should be interpreted whenever possible to *parallel the unfair competition law applicable to domestic commerce*."[386] Interpreting the 1916 Act to parallel domestic unfair competition law is clearly consistent with WTO obligations - particularly, Article VI of the GATT 1994 and the Anti-Dumping Agreement - because the WTO does not govern competition laws. In addition, a law regarding imports that "parallels" a domestic law would not raise any national treatment concerns under Article III of the GATT 1994.

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

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

[383] The United States refers to *EEC – Parts and Components*, Op. Cit., para. 5.25.

[384] The United States refers to ibid., para. 5.25.

[385] The United States refers to the Panel Report on *EC – Audio Cassettes*, Op. Cit., paras. 362-364.

[386] The United States refers to 494 F. Supp., p. 1223.

IV. THIRD PARTY SUBMISSIONS

A. THE EUROPEAN COMMUNITIES

1. Violation of Article VI of the GATT 1994 and the Anti-Dumping Agreement

(a) The applicability of Article VI of the GATT 1994 and the Anti-Dumping Agreement

4.1 As concerns the meaning and scope of Article VI of the GATT 1994, the **European Communities** considers that Article VI clearly goes beyond creating an exception from other provisions of the GATT 1994; it has a broader scope. It is clear from its opening words[387] that its purpose is to provide a body of rules for dealing with the problem of dumping in international trade.

4.2 The European Communities notes that Article VI of the GATT 1994 acknowledges the existence of a particular problem in international trade and then proceeds to provide the solution. Three steps are envisaged in this respect: First, Article VI defines the practice of dumping. Second, it sets out certain other conditions that need to be fulfilled for the application of remedial measures, such as the existence of injury. And third, it authorizes the remedial measures which can be taken to deal with dumping.

4.3 Concerning the definition of dumping, the European Communities notes that its essential feature is that it is defined as relating exclusively to imports and to price discrimination in the form of higher prices on the market of the exporting country than on the market of the importing country. As concerns the pre-conditions for taking action against dumping, the most important one is stated to be injury. Article VI:1 provides that dumping as defined 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 […]". Thereafter Article VI :2 proceeds to authorize the measure that can be taken against dumping:

> "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."

4.4 According to the European Communities, this language establishes the application of anti-dumping duties as the sole means authorized by the GATT 1994 by which a contracting party can seek to deal with the problem of dumped imports.

4.5 The European Communities further points out that it is only dumping meeting the definition in Article VI:1 of the GATT 1994 that is to be condemned, and then only in the stated circumstances of injury, threat of injury or material retardation. Anti-dumping duties may be applied "in order to offset or prevent dumping", but only in an amount no greater than the margin of dumping as defined. The reference to "offsetting" as well as "preventing" also makes clear that anti-dumping duties are the sole remedy established by the GATT 1994 for dealing with the problem of dumping, whether past, present or future.

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[387] The European Communities refers to the following language used in Article VI:

> "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 […]."

4.6 The European Communities considers that the Anti-Dumping Agreement is fully consistent with this scheme of Article VI and defines in greater detail the conditions and in particular the requirements for an investigation that need to be fulfilled to allow anti-dumping action to be taken. Article 1 of the Agreement confirms that an anti-dumping measure can be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations conducted in accordance with the Agreement, while Article 18 of the same Agreement (which says that "no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994 as interpreted by this Agreement") confirms that action can be taken against the import of dumped products from another GATT 1994 Member *only if* the dumping causes or threatens material injury, and that no other measures can be taken than those provided for by Article VI of the GATT 1994 and the Anti-Dumping Agreement.

4.7 The European Communities notes that the purpose of Article VI and the Anti-Dumping Agreement would be thwarted if parties were allowed to apply measures other than anti-dumping duties – for example, civil liability for damages or criminal penalties – to deal with the problem for which Article VI establishes anti-dumping duties as the sole remedy. Likewise it would be thwarted if the Members could justify the application of such other measures on the basis that the conduct to which they are applied is defined in a manner which, while incorporating the essential elements of the definition of dumping, differs by the addition of one or another additional condition – for example, providing that the additional remedy is available in case of aggravated or "predatory" dumping. This is exactly what the 1916 Act does. Of course it was not enacted in order to circumvent the discipline of Article VI of the GATT 1994, which was only adopted three decades later. But to accept that the 1916 Act is compatible with Article VI of the GATT 1994 would entail accepting that Article VI can be circumvented by national legislation simply by resorting to the expedient of "bolting on" a few additional definitional elements or providing a remedy other than anti-dumping duties.

4.8 Separately, the European Communities notes that the GATT 1994 contains rules on anti-dumping (Article VI) and that these rules establish the sole system of remedies authorized by the GATT for dealing with the problem of dumping. By contrast, the GATT 1994 does not contain any specific discipline on anti-trust matters. The question posed by the 1916 Act is therefore: is the 1916 Act of such a nature as to be subject to the rules of Article VI and the Anti-Dumping Agreement?

4.9 The European Communities considers that this question is to be answered by the Panel by reference to the principles of GATT 1994 and WTO law. It is not to be determined on the basis of national legislation or case law of any particular Member. The Panel cannot be bound by the views of national courts of WTO Members on this question. Words like "anti-trust", "unfair competition", and "predatory" may have different meanings in different Member States. They may be used in different ways at different times. Allowing their use to determine the scope of application of the discipline of Article VI would effectively invite Members themselves to choose to withdraw their legislation from WTO disciplines simply by choosing the right label. On the other hand, judgments of national courts are relevant insofar as they offer guidance on the meaning or interpretation of national laws as distinct from the legal categorisation for WTO purposes, and it is appropriate for the Panel to take them into account for that purpose.

4.10 Thus, according to the European Communities, it is Article VI itself which gives the answer as to whether the 1916 Act is subject to its provisions or not. It provides a definition of dumping "by which products of one country are introduced into the commerce of another country at less than the normal value of the products". A first essential feature of the definition is that it refers to rules *relating exclusively to imports.* The definition is based on the concept of price discrimination in the form of higher prices on the market of the exporting country than on the market of the importing

country.[388] This analysis yields the definition of the kinds of rules which are anti-dumping rules subject to the discipline of Article VI of the GATT 1994:

(a) The rules are targeted at imports and by the fact of their importation.

(b) The practice is defined by reference to discrimination which takes the form of higher prices in the domestic market of the exporter than in the import market.

4.11 For the European Communities the 1916 Act is clearly a law which is subject to Article VI of the GATT 1994:

(a) It is targeted at imports. Its prohibition is directed to "any person importing or assisting importing any Articles in the United States". Such persons who breach the prohibition are guilty of a misdemeanour, and are liable for treble damages to persons who are injured by the prohibited conduct.

(b) The regulated conduct is defined by reference to discrimination between the price of the imported products and "the actual market value or wholesale price of such Articles […] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported".

4.12 The European Communities argues that the 1916 Act does not escape the discipline of Article VI because it requires the prohibited conduct to be "common and systematic", or because the price differential must be "substantial". Article VI applies whether the dumping is limited in occurrence and sporadic, or frequent and systematic; whether the dumping margin is large or small. It takes into account the magnitude and frequency of the dumping only through the rule that the level of anti-dumping duty imposed may not exceed the level of dumping found.

4.13 Moreover, in the view of the European Communities, the 1916 Act does not escape the discipline of Article VI because sanctions can only be imposed under the 1916 Act if one or more of the enumerated specific intents are found. The discipline of Article VI applies to any rule directed at dumping. Once it is established that the rule or law is subject to Article VI, then the sole remedy permitted by Article VI (the imposition of anti-dumping duties) is conditional on a finding of (i) dumping in accordance with the definition of Article VI and (ii) injury, threat of injury, or material retardation. Substituting the specific intent tests incorporated in the 1916 Act for the injury tests required by Article VI in no way serves to take the 1916 Act out of the discipline of Article VI; quite the contrary, it is one of the grounds which cause the 1916 Act to infringe Article VI, since the 1916 Act permits the application of sanctions in circumstances other than the only ones envisaged by Article VI – namely where there is injury, threat of injury or material retardation.

4.14 With respect to the relevance of US case law, the European Communities reiterates its view that the legal categorisation of the 1916 Act is a matter of WTO law and therefore it should be made by the Panel and not by national (in the present case, US) courts. In any event, courts' views on the matter are far from consonant.[389] It is sufficient to note that while some judgments (i.e. those of the

[388] The European Communities points out, in this connection, notably in light of the US argument that Japan's and the European Communities' claim under Article VI would entail bringing all regulation of international price discrimination under Article VI, that dumping as defined in Article VI constitutes only a subcategory of international price discrimination.

[389] In this respect, the European Communities draws attention to a pronouncement by the ICJ, which, referring to an earlier judgment by the PCIJ, noted the following:

> "Where the determination of a question of municipal law is essential to the Court's decision in a case, the Court will have to weigh the jurisprudence of the municipal courts, and 'If this is

District Court and the Circuit Court of Appeals in the *Zenith III* case) suggest that the 1916 Act is an anti-trust law and not a trade law, this view has been strongly contested. For example, the District Court in *Geneva Steel* held:

> "The 1916 Act means what its plain language says. In addition to its anti-trust prohibitions, the Act has a protectionist component that prohibits conduct designed to injure the domestic steel industry".

4.15 But, in the view of the European Communities, even those Courts that claim that the 1916 Act is solely an anti-trust statute acknowledge that establishing that dumping took place remains the first prerequisite to apply the 1916 Act. For instance, in the *In re Japanese Electronic Products II* case, which is described as "complex anti-trust litigation", the Court of Appeals for the Third Circuit held that:

> "[t]he 1916 Act makes it illegal to *dump* imported goods on the US market with the purpose of destroying or injuring US industry […]. The first element necessary to a finding of *dumping* under the 1916 Act is proof that a price differential exists between two comparable products, one of which is imported or sold in the US and the other of which is sold in the exporting country."[390]

4.16 The European Communities argues that the fact that the conduct targeted by a statute is defined by reference to discrimination between the price of the imported products and a benchmark which is (generally) the price of the product in the exporting country, is sufficient to determine that the statute is directed at dumping and is subject to the disciplines of Article VI of the GATT 1994. While the European Communities does not accept that applicability of Article VI of the GATT 1994 requires examination of the question whether the law protects competitors as distinct from competition, or whether the specific intent requirement relates to an intent to injure industry as opposed to an intent to injure competition, the language just quoted makes clear that US courts themselves have taken sharply different positions on these questions, and there is nothing to suggest that greater clarity will be brought in the foreseeable future.

4.17 Finally, the European Communities agrees with Japan that the United States' denial in the present proceeding that the 1916 Act is an instrument to counter dumping directly contradicts many official statements and positions of US executive branch officials, including officials of the current Administration.

(b) Violation of Article VI:2 of the GATT 1994

4.18 The European Communities submits that the WTO anti-dumping rules, laid down in Article VI of the GATT 1994 and in the Anti-Dumping Agreement, establish a comprehensive and complete multilateral regime to define and address the issue of dumping in international trade. This comprehensive character also pertains to the regulation of the measures that can be taken once injurious dumping within the meaning of Article VI of the GATT 1994 is found. In that case, "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an

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> uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law' (*Brazilian Loans*, PCIJ, Series A, Nos. 20/21, p. 124)" (*Elettronica Sicula S.p.A. (ELSI)*, Judgment, ICJ Reports 1989, p. 47, para. 62).

The European Communities claims that it has shown throughout its argumentation, and that the United States has not denied, that the views of US courts which have interpreted the 1916 Act are far from consonant.

[390] *In re Japanese Electronic Products II*, Op. Cit., p. 322 and 324 (emphasis added by the European Communities); the European Communities also refers to, e.g., *Zenith I*, Op. Cit.; *Wheeling-Pittsburgh*, Op. Cit.; *Geneva Steel*, Op. Cit., pp. 1212-14.

anti-dumping duty not greater in amount than the margin of dumping in respect of such product", as made clear already by Article VI:2 of the GATT 1994. This exclusive character cannot but be clearer if the several provisions included in Article VI are examined together. That Article *inter alia* assigns a specific function to anti-dumping measures and repeatedly sets precise maximum quantitative limits to their permissible level. The function of anti-dumping measures is to "offset" dumping (or "prevent" in the case of threat of material injury). This is then further emphasized in Article 9.1 of the Anti-Dumping Agreement, where it is suggested to limit the duty to the amount necessary to offset the *injury* suffered by the domestic industry, which may be less than the full dumping margin. The imposition of duties is additionally limited in those paragraphs of Article VI of the GATT 1994 that prohibit parties from cumulating anti-dumping and countervailing duties to counter the same practice. It cannot go unnoticed that all those limitations and qualifications applying to the imposition of anti-dumping duties would have absolutely no purpose and absolutely no result if WTO Members were free to choose any other type of measure and then with no maximum limits as to amount and impact.

4.19 The European Communities recalls that the remedial measures provided for by the 1916 Act are treble damages and/or criminal penalties (fines and/or imprisonment). These remedies are not duties. As made clear above, they do not fall into the only type of measures allowed under multilateral anti-dumping rules to counter dumping practices, nor are they authorized by other WTO provisions.

4.20 In the view of the European Communities, recognition of the foregoing was again made by the US authorities. In that respect, the European Communities simply refers the Panel to the testimony of USTR General Counsel Alan Holmer to the US Senate Finance Committee, dated 18 July 1986. The only comment that may be added to this eminently clear statement made by Mr. Holmer is that Article 16 of the 1979 Anti-Dumping Code is identical to Article 18 of the WTO Anti-Dumping Agreement.

4.21 The European Communities considers that the compensatory, remedial objective (in economic terms) of the measure authorized in Article VI assumes that only a quantifiable price measure offsetting a precisely quantified dumping margin (or possibly, lower injury level) may be adopted. In other words, only a measure increasing the costs of the exporters up to the point of somehow forcing them to raise prices on their export markets where they have been found to dump is really fit to "offset" dumping (in the sense of a dumping margin, or possibly an injury level). On the other hand, this remedial objective can certainly not be served by criminal liability. The presence of pecuniary criminal sanctions bears no relation to the margin of dumping.

4.22 In the view of the European Communities, the United States is reading Article VI:2 of the GATT 1994 out of context and contrary to its clear object and purpose. A provision in an Agreement such as the GATT 1994 stating that something "may" be done does not necessarily mean that any alternative action, which could be more or less restrictive of trade, is in no way restricted. Whether it has this meaning or whether it implies on the contrary that no other action may be taken depends on the context in which the word "may" is being used. The context of Article VI comprises the structure of the GATT 1994. It is important to note that Articles III to XIX of the GATT 1994 regulate problems in international trade. Thus, Article VI regulates the action that Members may take against dumping and the conditions under which they may take this action. Article VI:2 expressly states that the action which may be taken is to levy an anti-dumping duty. When read in context and in the light of its object and purpose, Article VI prevents Members to take other action than duties to counter dumping, for example imprisoning the importers.

4.23 Addressing the negotiating history of Article VI, the European Communities notes that, despite attempts by some contracting parties to the GATT 1947 to provide for other types of offsetting measures than duties, both during the preparatory work and the Review Session of 1955, Article VI

was intentionally limited to anti-dumping duties. The European Communities notably recalls that the 1948 Working Party on "Modifications to the General Agreement" noted, in respect of the current text of Article VI (corresponding to Article 34 Havana Charter):

> "While agreeing that there is no substantive difference between Article VI of the General Agreement and Article 34 of the Charter, the working party recommends the replacement of that article, as the text adopted at Havana contains a useful indication of the principle governing the operation of that Article and constitutes a clearer formulation of the rules laid down in that article. The working party, endorsing the views expressed by [the Subcommittee on Article 34 at the Havana Conference] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except in so far as such other measures are permitted under other provisions of the General Agreement."[391]

4.24 According to the European Communities, by expressly stating that there was no substantive change, the Working Party has made it quite clear that there was no intention, in changing the text of Article VI of the GATT 1947, to allow other remedies than duties against dumping.

4.25 The European Communities also points out that the Working Party further noted that it:

> "[…] agreed that measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except insofar as such other measures are permitted under other provisions of the General Agreement."[392]

4.26 The European Communities adds that, in doing so, the Working Party confirmed the "definite understanding" of the relevant Subcommittee of the Havana Conference, from which the text of Article VI was taken. Therefore, it results not only from the negotiating history of the GATT 1947, but also from subsequent interpretation that duties are the only authorized remedy to counter dumping practices under Article VI of the GATT 1994.

4.27 The European Communities argues, in addition, that the adoption of the WTO Anti-Dumping Agreement has not changed the content of Article VI in respect of the limitation to duties because it includes no derogation or conflicting rule on this point. To the contrary, the WTO Anti-Dumping Agreement, and specifically Article 18.1 thereof, does nothing but confirm Article VI in this respect. Therefore, it is sufficient to rely on Article VI to claim that the 1916 Act violates WTO rules by providing for remedies other than duties in order to counter dumping practices.

4.28 On the interpretation of the footnote to Article 18.1 of the Anti-Dumping Agreement, the European Communities notes that the ordinary meaning of the footnote to Article 18.1 and of its predecessor in Article 16.1 of the Tokyo Round Anti-Dumping Code is that the Anti-Dumping Agreement does not prevent Members from taking appropriate action under other trade defence instruments provided for in the GATT 1994, such as countervailing duty action and safeguard action.

4.29 According to the European Communities, this interpretation is confirmed by the negotiating history. The factors taken into account by the negotiators in deciding to delete a corresponding provision when drafting the Havana Charter, and when amending the GATT 1947, were exactly the same. It is true that in the first case the negotiators used the phrase "other provisions of the Charter" whereas those in the second spoke of "other provisions of the General Agreement". However, it is clear that the Charter negotiators had in mind the Charter provisions that were incorporated in the

[391] BISD II/41, 42, para. 12.
[392] Reprinted in GATT, Analytical Index: Guide to GATT Law and Practice (1994), pp. 216-217.

General Agreement. The Report of the Working Party established by Sub-Committee C of the Third Committee of the Havana Conference further supports this conclusion. Paragraphs 3(iv) and 6 clearly show that the express prohibition of other measures against dumping was agreed to be unnecessary, removed and replaced by a statement to the minutes that other measures were not allowed because of concerns that some parties had about the implications for enforcing their rights under Articles 13 and 14 which correspond to what is now Article XVIII of the GATT 1994.[393] Moreover, even if it could be argued that the Charter negotiators intended to preserve a wider range of possible measures, those who negotiated the 1948 amendments to the GATT 1947 clearly did not, since they explicitly refer to "other provisions of the General Agreement". The GATT 1947 negotiators were prepared to refer to the Havana Charter where that was their intention, as is apparent, for instance, from the Note *ad* Article II:4 of the GATT 1947.

4.30 In conclusion, for the European Communities, the fact that this footnote was considered necessary merely confirms that alternative action against dumping such as treble damages, fines and imprisonment is not compatible with WTO rules.

2. Violation of Article III:4 GATT 1994

(a) The Robinson-Patman Act as an equivalent measure applying to US goods

4.31 The European Communities considers that to the extent that the 1916 Act is not inconsistent with Article VI of the GATT 1994 and the Anti-Dumping Agreement, the 1916 Act infringes Article III:4 of the GATT 1994 since it accords to products of WTO Members imported into the United States treatment less favourable that that accorded to like products of US origin.

4.32 The European Communities notes that there is no dispute about the fact that the 1916 Act is a "law" within the meaning of Article III:4 "affecting the internal sale of products" because it prohibits, *inter alia*, the sale or offering for sale of products below a certain price. Also, although the 1916 Act nominally applies to importers, this does not prevent the applicability of Article III:4.[394] Furthermore, the circumstances under which a product is imported do not affect the characterization of domestic and imported products as "like".

4.33 As regards the "less favourable treatment" accorded by the United States to imported products, the European Communities submits that the very fact that the 1916 Act applies exclusively to imported products already establishes a *prima facie* breach of Article III:4, since domestic products are not subject to the requirements of the Act. Therefore, the European Communities agrees with Japan that the 1916 Act violates Article III:4 by establishing a separate and additional legal regime for imports and subjecting imports to separate legal requirements not applicable to domestic goods.

4.34 The European Communities notes that the United States seeks to defend the 1916 Act by claiming that domestic products are subject to a comparable legislation regulating price discrimination on the US market and therefore imported products are not treated "less favourably". In this respect the United States refers to the Robinson-Patman Act. However, the United States has failed to show that this Act prevents less favourable treatment of imported products.

4.35 In this regard, the European Communities argues, first of all, that imported products are *also* subject to the Robinson-Patman Act in the same way as domestic products. This Act, like any legitimate competition or anti-trust measure, does not distinguish between imported and domestic products. It is true that the Robinson-Patman Act only applies to price discrimination committed in the United States and that in the 1916 Act may be considered to complement it in that it applies to

[393] The European Communities refers to document E.CONF.2/C.3/C/18, paras. 3(iv) and 6.

[394] The European Communities refers to the Panel Report on *United States – Section 337*, Op. Cit., para. 5.10 in particular.

dumping, which is a price discrimination practised between the domestic market of the producer and an export market. It is not however possible to say that the 1916 Act and the Robinson-Patman Act are complementary in a manner which could possibly avoid a violation of Article III:4 of the GATT 1994. The complementarity does not relate to the origin of the goods, but to the discrimination. Subjecting US goods to no less favourable treatment than imported goods would therefore require that the United States apply similar penalties and make available similar remedies for equivalent cases involving US goods. This would require legislation which would render US producers liable for equivalent penalties when they sold their goods in the US at lower prices than on foreign markets under similar conditions to those set out in the 1916 Act, for example, along the following lines:

> "It shall be unlawful for any person producing any Articles in the United States, commonly and systematically, to sell such Articles within the United States at a price substantially less than the actual market value or wholesale price of such Articles in the market of any foreign country to which they are commonly exported, after deducting from such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such Articles in the United States."

4.36 The European Communities points out that the 1916 Act does not apply to such acts and nor does the Robinson-Patman Act. Such acts may in fact be conducted with impunity by producers of US goods (or at least not be subject to any other than the generally applicable laws). In other words, producers of US goods may do what producers of foreign goods may not. They may seek to use isolated non-US markets to obtain the high profits needed to allow them to sell at low prices in the United States. Imported goods are therefore treated less favourably than US goods and this is contrary to Article III:4 of the GATT 1994.[395]

(b) Element-by-element comparison of the 1916 Act and the Robinson-Patman Act

4.37 The European Communities considers that even if the Robinson-Patman Act were considered to be an equivalent measure applying to US goods, imported products are still treated "less favourably" than domestic products.[396] A careful comparison of the two laws, taking into account not only the respective texts but also the additional requirements read into the Robinson-Patman Act as a condition for finding primary line violations, demonstrates that it is substantially more difficult to prove a violation of the Robinson-Patman Act than it is to prove a violation of the 1916 Act. As a consequence, the 1916 Act allows the application of measures (like awarding damages) under less favourable conditions for imported products than those resulting for domestic products from the

[395] The European Communities asserts in this connection that its arguments also demonstrate the fallacy of the US argument that the 1916 Act is properly regarded as an "anti-trust" measure. Even if there were some basis for saying that once a measure is classified as an "anti-trust" measure it falls outside certain GATT 1994 disciplines, for the European Communities it is clear that a *bona fide* "anti-trust" measure would not apply only to imported products.

[396] As a preliminary point, the European Communities recalls that among Robinson-Patman Act cases a distinction is made between the probable impact of price discrimination (i) on direct competitors of the discriminating seller (primary line injury), (ii) on the favoured and disfavoured buyers of the discriminating seller (second-line injury) and (iii) on the customers of either of them (third-line injury). Primary line discrimination is the only direct domestic analogue of international price discrimination as condemned in the 1916 Act. The US Supreme Court has held in the *Brooke Group* case that in order for the requisite effect on competition to be present in primary line cases, it must be shown that (i) the defendant charged prices below an appropriate measure of cost, and (ii) it had a reasonable prospect of recouping its investment in below cost prices.

application of the Robinson-Patman Act. Therefore, less favourable treatment is accorded to imported products in violation of Article III:4 of the GATT 1994.

4.38 The European Communities submits that the reason why the application of the "no less favourable treatment" standard requires an element-by-element comparison of the laws at issue rather than of the frequency of their concrete applications lies in the purpose of Article III. It is longstanding practice that Article III protects competitive opportunities. Hence, in order to establish a violation of Article III:4 it is not necessary to show that the measure challenged has had any actual effects. The mere *possibility* that a measure may result in some circumstances in less favourable treatment being afforded to imported products is already sufficient to establish a violation of Article III:4. Thus, in the *EEC – Oilseeds* case:

> "[…] the Panel examined whether a purchase regulation which does not necessarily discriminate against imported products but is *capable* of doing so is consistent with Article III:4. The Panel noted that the exposure of a particular imported product to a *risk* of discrimination constitutes, by itself, a form of discrimination. The Panel therefore concluded that purchase regulations creating such a risk must be considered to be according less favourable treatment within the meaning of Article III:4"[397]

4.39 On the other hand, the European Communities contests the value and relevance to the present case of the US contention that the 1916 Act has rarely been invoked by private parties and has never been invoked by the US government. The analysis of the "no less favourable treatment" standard must be carried out on the basis of the two sets of rules, and reference to the history of the application of one of them is therefore irrelevant. Taking into account the history of the application of the 1916 Act could suggest that less favourable treatment resulting from the application of the 1916 Act at one point in time[398] could be offset by more favourable treatment resulting from the application of it at another point in time. Such a reasoning was clearly rejected by the Panel in the *United States - Gasoline* case and the same conclusion should apply to the present case.[399]

4.40 The European Communities argues that, in any event, the difficulties of practical application have been recognized in respect of predatory pricing generally and precisely in connection with a claim under the Robinson-Patman Act. In its *Brooke Group* judgment, the Court held that "predatory pricing schemes are rarely tried and even more rarely successful" and "the costs of erroneous liability are high"[400]. In addition, the European Communities considers that the fact that the 1916 Act has not often been invoked is due to a number of factors which do nothing to demonstrate that it provides more favourable treatment to imports than the Robinson-Patman Act does to domestic goods. More importantly, the 1916 Act has (i) a "harassment value" because it gives to complainants (i.e. competitors of the importer in the domestic market) a private right of action in federal district courts and (ii) a "chilling effect" on importers because of its own terms, including the nature of the remedies which it provides (i.e., imprisonment and treble damages).

4.41 The European Communities submits further that a comparison between the texts of the Robinson-Patman Act and the 1916 Act reveals that they differ as regards the elements which must be proved in order for an infringement of the law to be present, which results in unfavourable treatment

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[397] Panel Report on *EEC – Oilseeds*, Op. Cit., para. 141 (emphasis added by the European Communities).

[398] The European Communities refers to the *Geneva Steel*, Op. Cit., and *Wheeling-Pittsburgh*, Op. Cit., cases.

[399] For the European Communities it is therefore clear that an analysis under Article III:4 has to be carried out at the level of an individual product, not at the level of the application of the law to all possible products. Any individual product must be treated no less favourably than a like domestic product – and this in all cases.

[400] *Brooke Group*, Op. Cit.

being afforded to imported products in violation of Article III:4 of the GATT 1994. They concern, *inter alia*, (i) the intent requirements under each Act, (ii) the measurement of price discrimination, (iii) the sufficiency of offers for sale for supporting claims under each Act.

4.42 With regard to the intent requirements, the European Communities notes that, under the Robinson-Patman Act, a primary line complainant, in order to successfully demonstrate predatory pricing, must establish that (i) the defendant is charging prices below an appropriate measure of cost, namely, average variable costs and (ii) that it has a reasonable prospect to recoup its investment in below cost price.[401] These two conditions and especially the second one represent a burden of proof which is very difficult to be sustained by the plaintiff as the Supreme Court itself has recognized.[402]

4.43 The European Communities argues that the intent requirements under the Robinson-Patman Act are not present in the framework of a 1916 Act case. Under the 1916 Act, discriminatory pricing must rather be conducted with the intent of injuring, destroying or preventing the establishment of a US industry. The practical result of the difference between the "predatory pricing" test under the Robinson-Patman Act and the "intent to injure" test under the 1916 Act is that the same conduct by two firms, one selling imported products and the other selling domestic products, could be deemed to infringe the 1916 Act in the case of the imported products, and not to infringe the Robinson-Patman Act in the case of the domestic products. This was recognized by the US Court in the *Helmac I* case.

4.44 Furthermore, the European Communities agrees with Japan that the subjective intent standard under the 1916 Act is easier to prove than the objective effect standard under the Robinson-Patman Act. As Japan correctly points out, in *Brooke Group*, the plaintiffs had shown subjective intent, but not effect, and the Supreme Court ruled that the subjective proof, alone, is insufficient.

4.45 With regard to the measurement of price discrimination, the European Communities notes that the 1916 Act is applicable whenever goods are imported into the United States at prices *substantially below the prices charged in the country* of production or other countries where the goods are commonly exported. By contrast, under the Robinson-Patman Act, it must be shown that the defendant *is charging prices below a certain measure of its costs.* In the practice of the courts, that measure is the average variable cost of production. Where prices are above average variable cost of production, there is no infringement, even if the accused company is applying different prices to different customers.

4.46 In the view of the European Communities, in many if not most cases of international price discrimination, prices of imported products are still above average variable costs of production. In such cases, importers may have to face legal proceedings under the 1916 Act for price practices above average variable cost while domestic producers would not be at risk under the Robinson-Patman Act for sales made at similar level.[403] The fact that sanctions can be imposed and damages awarded in situations involving foreign goods sold at a price which bears a given relation to cost of production, while the same price having the same relation to cost of production charged by domestic producers cannot be challenged under the Robinson-Patman Act, amounts to less favourable treatment of imported products prohibited under Article III:4 of the GATT 1994.

4.47 What matters, in the opinion of the European Communities, is that the test of the 1916 Act concerns differences in sales prices alone, whereas the Robinson-Patman Act after the Supreme Court's *Brooke Group* decision requires not only differences in price but also a price below costs. Whatever the "appropriate measure of costs" is, it is clear that there can be situations where a price in the United States is "substantially" below the sales price applied in the domestic market but is not

[401] The European Communities refers to *Brooke Group*, Op. Cit.
[402] The European Communities refers to *Matsushita Electrical*, Op. Cit.
[403] According to the European Communities, the *Geneva Steel*, Op. Cit., and the *Wheeling-Pittsburgh*, Op. Cit., proceedings are two concrete examples.

below costs. In such a situation, the 1916 Act could apply, whereas in the comparable situation involving domestic products, the Robinson-Patman Act could not.

4.48 Finally, the European Communities contests the importance given by the United States to the *Helmac II* case, essentially because the same Court, in the same case, a few months earlier, explicitly held that the other element of anti-trust predation – reasonable prospect of recoupment of losses from sales below cost – did not have to be proved in claims under the 1916 Act.[404]

4.49 The European Communities submits that another reason why dumping is easier to establish under the 1916 Act than under the Robinson-Patman Act is that under the former a simple offer to sell foreign goods is sufficient to entitle a request for treble damages, while cases against price discrimination under the Robinson-Patman Act require actual sales. As observed in the *Helmac I* case:

> "It is obvious that a sale must take place to state a Robinson-Patman Act claim. It is a requirement born from the type of conduct that is being prohibited by the statute, one supplier giving a competitive edge to one competitor by charging a lower price. There is no way the favoured purchaser could gain the competitive advantage until that sale from the supplier to the favoured purchaser takes place. Without the sale the favoured purchaser has received no cost benefit, and no competitive advantage. This explains the sales requirement of a claim under Robinson-Patman [sic] claim."[405]

4.50 The European Communities considers that for the reasons set out above, by maintaining the 1916 Act in effect, the United States accords "less favourable treatment" to foreign products than to its own domestic products.

3. The distinction between discretionary and mandatory legislation and its relevance to the present case

(a) Claims against domestic legislation as such

4.51 The European Communities takes issue with the US contention that in order to challenge a Member's legislation as such as WTO-inconsistent there would be a general requirement to show that legislation is mandatory. This is refuted by the text of WTO provisions as well as by GATT 1947 and WTO practice. Both elements have now made abundantly clear that legislation can be declared *per se* inconsistent with WTO provisions, and the European Communities submits that this in particular applies to the WTO obligations at issue in the instant dispute. For example, several panel reports under GATT 1947 have found domestic legislation to run afoul of Article III of the GATT 1947 even before it had actually been applied, and therefore before any actual discrimination had taken place.[406] Additionally, that domestic measures may be challenged as such has also been confirmed by WTO practice.

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[404] The European Communities refers to *Helmac I*, Op. Cit.

[405] *Helmac I*, Op. Cit., p. 15.

[406] The European Communities refers to, for example, the Panel Reports on *United States – Superfund*, Op. Cit., para. 5.2.2, where the legislation imposing the tax discrimination only had to be applied by the tax authorities at the end of the year after the panel examined the matter, and *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206, paras. 5.39, 5.57, 5.60 and 5.66, where the legislation imposing the discrimination was, for example, not being enforced by the authorities. The European Communities also refers to Panel Reports on *EEC – Parts and Components*, Op. Cit., paras. 5.25-5.26, and *Thailand – Cigarettes*, Op. Cit., para. 84, and *United States – Tobacco*, Op. Cit., para. 118.

4.52 The European Communities submits that the fact that laws as such may be inconsistent with WTO provisions is further confirmed by Article XVI:4 of the WTO Agreement.[407] The types of provisions referred to in Article XVI:4, and certainly laws, like the one at issue in the present dispute, are by definition measures of general application. Therefore, Article XVI:4 recognizes in general terms that laws must *per se* conform with WTO provisions - and may thus be challenged as *per se* inconsistent if Members fail to bring them into conformity. In doing so, Article XVI:4 draws no distinction between mandatory or "non-mandatory" and "discretionary" laws.

4.53 The European Communities argues that in the present case the possibility to challenge the 1916 Act regardless of its concrete applications also results from the very nature of the WTO obligations on which Japan's claims are based. As regards the WTO provisions on dumping, the European Communities has already pointed out that they constitute a complete regulation of whether and under which conditions action against dumping can be taken. Within that regulation, in view of the dangerous impact on the market of a practice that the WTO drafters have, under certain conditions, considered objectionable and therefore "to be condemned", the same drafters have also authorized individual Members to react and *unilaterally* sanction a violation of those provisions.[408] The WTO Members have however committed not to take anti-dumping action outside the conditions laid down in the relevant WTO provisions, including those relied upon in the present dispute. Approving or maintaining legislation which is *per se* contrary to this commitment effectively removes the guarantee, offered by the United States when accepting Article VI of the GATT 1994 and the Anti-Dumping Agreement, that it will not take anti-dumping action outside the conditions laid down in such rules.[409]

4.54 The European Communities further contends that the US approach according to which "Japan must demonstrate that there is no interpretation of the 1916 Act that would be WTO-consistent" and "the Panel must determine whether the 1916 Act is susceptible to an interpretation which is WTO-consistent" is fundamentally flawed. Even if it is possible to imagine an interpretation of the 1916 Act which is WTO-consistent (*quod non*), the European Communities contests that this disposes of the matter. The United States has not sought to argue that the interpretation given to the 1916 Act in *Geneva Steel* and *Wheeling-Pittsburgh* is consistent with the WTO, only that these are not "final decisions" and that other courts have expressed different views. For the European Communities, the mere fact that the 1916 Act *is susceptible to* an interpretation that is contrary to Article VI of the GATT 1994 would be sufficient to establish its inconsistency with that provision because it removes the commitment not to take anti-dumping action outside the conditions laid down in WTO provisions.

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[407] The European Communities refers to the text of Article XVI:4 of the WTO Agreement. The text reads as follows:

> "Each Member shall ensure the conformity of its *laws*, regulations and administrative procedures with its obligations as provided in the annexed Agreements." (emphasis added by the European Communities)

[408] The European Communities notes that this, however, constitutes a departure from the general rule that violations of the WTO agreements, and therefore their sanctioning, should not be done unilaterally. In this regard, the European Communities refers to Article 23.1 of the DSU which states the following:

> "When Members seek the *redress of a violation of obligations* or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall *have recourse to* and abide by, the rules and procedures of this Understanding." (emphasis added by the European Communities).

[409] The European Communities notes, with regard to Article III of the GATT 1994, that the reason why a law as such can result in a violation have already been sufficiently clarified in GATT 1947 and WTO practice. The European Communities recalls that Article III protects competitive opportunities and the expectations not to be put at a disadvantage on the market.

4.55 In the view of the European Communities, this is in particular the case of measures such as the 1916 Act, which have enormous harassment value in the hands of domestic producers who wish to intimidate importers. The *Geneva Steel* and *Wheeling-Pittsburgh* cases illustrate this eloquently. These cases which will take years, if not decades, to complete present importers with the prospect of enormous but uncertain potential liability – treble damages plus attorney fees. In these cases, the more unclear the law is, that is the more interpretations it is susceptible of, the more disruptive it is for importers. Indeed, as Japan has explained, many importers prefer to settle than go through this process. But they pay a high price.[410]

4.56 In view of the foregoing the European Communities submits that the 1916 Act, as such, precludes compliance with WTO anti-dumping provisions relied upon in the present dispute as well as with Article III:4 of the GATT 1994.

(b) The nature of the 1916 Act

4.57 The European Communities considers that the 1916 Act is mandatory legislation within the meaning of GATT 1947 and WTO practice. According to that practice, mandatory measures are those which, under national law, require the executive authority to impose a measure. For example, in the *United States - Non-Rubber Footwear* case:

> "[…] the Panel examined whether this legislation as such is consistent with Article I:1. The Panel noted that the CONTRACTING PARTIES had decided in previous cases that legislation mandatorily *requiring the executive authority to impose a measure* inconsistent with the General Agreement was inconsistent with that Agreement *as such*, whether or not an occasion for the actual application of the legislation had arisen. The Panel recalled that the backdating provisions of the two Acts *are mandatory legislation*, that is *they impose on the executive authority requirements which cannot be modified by executive action*, and it therefore found that these provisions *as such, not merely their application in concrete cases*, have to be consistent with Article I:1."[411]

4.58 For the European Communities, it is apparent from the foregoing that the definition of mandatory legislation in WTO practice does not correspond to the really extraordinary one which the United States has repeatedly put forward in its submissions. In other words, not only it is not necessary for legislation to be "mandatory" to be challenged *per se* as inconsistent with WTO obligations. The "mandatory legislation" class is also not limited to laws "susceptible to no interpretation which would be consistent with U.S. WTO obligations".

4.59 In the view of the European Communities, the United States appears to be invoking (and confusing) two different issues. The first is the *discretion in the application of legislation* and the second is the pretended *ambiguity in the interpretation of the legislation*. On the second issue, the simple truth is that not even one of the possible interpretations referred to by the United States is curing the WTO incompatibility of the 1916 Act. On the first issue the United States relies in particular on the case *EEC - Parts and Components*. However, that case concerned authorising

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[410] On the same issue, the European Communities queries what would be the position if a WTO Member were to adopt an anti-dumping law that was so outrageous or unclear that no importer or exporter ever bothered to defend itself but stopped selling its products immediately it was threatened with action. According to the United States, no WTO action could be taken unless a duty is actually imposed (which does not happen) or another Member can prove that there is no possible way of interpreting or applying the law that would be compatible with WTO provisions. In the view of the European Communities, not only is this result unacceptable as such, it is also completely contrary to Article XVI:4 of the WTO Agreement.

[411] *United States – Non-Rubber Footwear*, Op. Cit., para. 6.13 (emphasis added and footnote omitted by the European Communities).

provisions in respect of which there was discretion for the administration to take or not to take measures. Whether these provisions produced any effects in practice depended on the discretion of an administration. There is no such discretion for the administration in the case of the 1916 Act.

4.60 The European Communities contends that the reasons why the 1916 Act is mandatory legislation are manifold. A first reason is that the 1916 Act is simply not applied by the US executive authorities. Its administration is conferred to the judiciary. It is the courts, and only the courts that can take measures under the law at issue in the present dispute. Additionally, the 1916 Act does not "impose on the executive authority requirements", and in any event its requirements "cannot be modified by executive action".

4.61 According to the European Communities, courts by definition are charged with interpreting legislation, not with exercising discretion in respect of legislation. Their mission is to tell what the law is and in doing so they are subjected to the law and to the law only. Moreover, if it is true, as the United States submits, that the actual meaning of the 1916 Act depends on courts' interpretation of its provisions, it is even clearer that the government has no discretion at all to influence courts' decisions nor can it modify the 1916 Act's legal requirements. In other words, even if courts could apply the 1916 Act consistently with WTO obligations, *quod non*, the US government can do nothing to force recalcitrant courts to do so when they do not. This further confirms that the 1916 Act is "mandatory".

4.62 The European Communities further submits that a court does not have discretion to dismiss a well-founded case under the 1916 Act. This results from the language of the 1916 Act and applies to any claim brought under the 1916 Act. The type of remedy which is requested has no bearing on this. For example, in respect of criminal liability, the 1916 Act states:

> "Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, *on conviction thereof*, *shall* be *punished* by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court."[412]

The European Communities considers therefore that it is mandatory for courts to take action against dumping under the 1916 Act once a case has been properly established.

4.63 The European Communities notes that, likewise, in respect of civil liability, the 1916 Act states:

> "Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and *shall recover threefold the damages* sustained, and the cost of the suit, including a reasonable attorney's fee."[413]

For the European Communities, therefore, a court does not have discretion not to award treble damages that had been properly established.

4.64 The European Communities considers that, as a result, both the civil and criminal provisions of the 1916 Act create legal effects and in neither case does this depend on the administration taking some discretionary action. These legal effects are contrary to the provisions invoked by the European Communities in the present case. In both cases courts are required to take measures.

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[412] Emphasis added by the European Communities.
[413] Emphasis added by the European Communities.

4.65 The European Communities submits that, contrary to what the United States pretends, there is no basis even under the old GATT 1947 to defend legislation which is on its face GATT-inconsistent on the ground that courts might one day interpret it in a GATT-consistent manner. The only GATT 1947 case in which there is any reference to *interpretation* is *United States - Tobacco* which the United States claims is particularly pertinent to the present dispute.

4.66 According to the European Communities, the *United States – Tobacco* case involved a situation in which domestic legislation was *incomplete*.[414] There was a requirement to promulgate fees for the inspection of imported tobacco at a level "comparable" to that for domestic tobacco but at the same time power to adjust the level of fees for the inspection of domestic tobacco. The Panel therefore understandably held that there was no basis to hold that the administration in fixing the level of fees for imported tobacco would do so at a level inconsistent with Article VIII:1(a) of the GATT 1947 – in other words, that at such stage there was no mandatory legislation inconsistent with the GATT 1947. In the present case, there is of course no power for the US administration to complete or amend the 1916 Act, in particular so as to make it compatible with the WTO. All the requirements are already laid down in the 1916 Act.

(c) The content of the obligation laid down in Article XVI:4 of the WTO Agreement

4.67 The European Communities submits that Article XVI:4 of the WTO Agreement lays down a new and additional obligation in the framework of the multilateral trading system. It imposes a positive obligation to ensure the conformity of a Member's domestic laws, regulations and administrative procedures with its WTO obligations. As a result of this obligation, in cases where pre-existing domestic legislation may be inconsistent with new WTO obligations, including those arising under Article VI of the GATT 1994, and Articles 1, 2.1, 2.2, 3, 4 and 5.5 of the Anti-Dumping Agreement, a Member was required to amend its domestic legislation so as to avoid any conflict as from 1 January 1995.

4.68 The European Communities notes that the new principle governing the relationship between domestic laws, regulations and administrative procedures that is embodied in Article XVI:4 of the WTO Agreement is a fundamental one.[415] Because it is laid down in the basic agreement of the system, it covers the whole set of the annexed agreements, whether or not they may contain specific expressions of the same principle. Furthermore, by virtue of Article XVI:3 it is a superior rule to provisions in the annexed agreements.

4.69 In the view of the European Communities, Article XVI:4 applies over and above similar obligations under general public international law as enshrined in Article 26 and 27 of the Vienna Convention on the Law of Treaties. The Vienna Convention on the Law of Treaties codifies the customary principle of good faith implementation of international treaty obligations (Article 26) and spells out a negative obligation, i.e. to refrain from invoking domestic law in order to justify any departure from an international obligation undertaken by a State (Article 27). The obligation to respect WTO rules thus results directly from the presence of those rules in the Agreement and its annexes and Article XVI:4 of the WTO Agreement would be reduced to redundancy if interpreted as not containing an additional and different obligation. The European Communities further contends that Article XVI:4 of the WTO Agreement also goes beyond the elimination of the "grandfather

[414] The European Communities refers to *United States – Tobacco*, paras. 114–118.

[415] The European Communities refers to the Report of the Arbitrator on *Japan - Taxes on Alcoholic Beverages*, Arbitration under Article 21(3)(c) of the DSU, 14 February 1997, WT/DS11/13, para. 9, where it is stated at para. 9 that "[a]s a general and fundamental obligation imposed on all WTO Members, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") requires that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the *WTO Agreement*."

clause" of the Protocol of Provisional Application (PPA), since this is effected in the introductory text of the GATT 1994.

4.70 For the European Communities, Article XVI:4 of the WTO Agreement is not simply an obligation to avoid violating the WTO agreements. It is also an obligation to take positive action to ensure that nothing in the "laws, regulations and administrative procedures" is not in conformity with the WTO agreements, that is nothing in them contains conditions or criteria or powers to take action which conflict with those agreements.[416]

4.71 According to the European Communities, this has already been recognized by the Appellate Body in the *India patent* case. In that case both the Panel and the Appellate Body upheld an US claim that domestic law can be inconsistent with WTO provisions not merely because it mandates WTO-inconsistent actions, but also because it fails to provide "a sound legal basis"[417] for the administrative procedures (or any other executive action) required to implement WTO obligations. The underlying rationale was that in the absence of a sound legal basis for mailbox patent applications in domestic law, the basic objective of WTO law, namely to create predictable conditions of competition, could not be achieved.

4.72 For the European Communities, it is clear that the 1916 Act also does not provide such "sound legal basis" for implementation of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Its wording conflicts with Article VI of the GATT 1994 and the Anti-Dumping Agreement in the ways that the European Communities has explained. The United States seeks to deflect attention from this obvious fact by arguing that certain courts have suggested that the 1916 Act may have some characteristics of anti-trust legislation. However, this kind of categorisation is irrelevant because it does not address – let alone solve – the basic issue in the present dispute: whether the price discrimination practice described in the 1916 Act is also covered by WTO rules on dumping and whether the discipline of that practice laid down in the 1916 Act is consistent with WTO obligations.

4.73 The European Communities considers that the above-mentioned case law, even taken together with the extrapolations thereof which the United States seeks to make and suggest may be adopted in the future, are a long way from "ensuring conformity" with Article VI of the GATT 1994 and the Anti-Dumping Agreement. On the contrary, by granting remedies which are not allowed by WTO anti-dumping rules and under conditions which are not those established in WTO anti-dumping rules, that case law is in itself a violation of US obligations.

4.74 The European Communities further contends that the two most recent decisions of US courts[418] actually interpret and allow the 1916 Act to be applied in a way which even the United States implicitly accepts would violate those provisions (since its only defence of them is to suggest that they do not represent the prevailing weight of US judicial interpretation). These decisions constitute, for the time being, the final expression of the judicial authority in the cases in which they have been pronounced. Up until their reversal by a contrary decision, they stand.

4.75 The European Communities notes that the cases that the United States portrays as prevailing weight of US judicial interpretation are witnesses of the legal insecurity and unpredictability resulting

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[416] The European Communities again refers to the text of Article XVI:4 which reads:

"Each Member *shall ensure the conformity* of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." (emphasis added by the European Communities)

[417] The European Communities refers to *India – Patents*, Op. Cit., para 58.

[418] The European Communities refers to *Geneva Steel*, Op. Cit.; *Wheeling-Pittsburgh*, Op. Cit.

from the 1916 Act. On the contrary, in these latter decisions one is not even any longer in the realm of lack of security and predictability for the respect of WTO obligations. One has entered the realm of secure and predictable violations of those obligations.

4.76 The European Communities argues that Article XVI:4 of the WTO Agreement makes clear that the United States has an obligation to ensure that such conflicts cannot arise by amending the 1916 Act and intervening to correct interpretations which it considers to be erroneous and in conflict with WTO obligations. The United States has taken no steps to fulfil its obligation under Article XVI:4. It has not amended the 1916 Act, it has not intervened in the cases referred to to ensure that the 1916 Act is not applied in a manner contrary to the United States' WTO obligations. It has not even said that it disagrees with the decisions adopted by its courts in these two cases. Its very defence is to deny that there is any step to take.

4.77 For the European Communities, this is even more evident since the 1916 Act is definitely a mandatory piece of legislation within the meaning of GATT 1947 and WTO practice. But even aside from this, Article XVI:4 confirms what was already made clear by GATT 1947 panel practice, i.e. that a Member's legislation may breach GATT 1947/WTO obligations independent of concrete applications (this is precisely why Article XVI:4 requires the elimination of inconsistencies which are already on Members' statute books). Article XVI:4 provides this confirmation on a general basis. It draws no distinction between mandatory and discretionary legislation. It makes no exception for discretionary legislation. It is not limited to final judgments.

4. Good faith application of treaty obligations

4.78 The European Communities first of all recalls that the fundamental rule of treaty interpretation in Article 31 of the Vienna Convention on the Law of Treaties starts off by providing that "[a] treaty shall be interpreted in good faith […]".

4.79 Second, the European Communities notes that Article VI of the GATT 1994 is not a prohibition in the same way as most other GATT 1994 provisions, such as Article III or Article XI or even Article I. Article VI acknowledges the existence of a particular problem in international trade and then proceeds to provide the solution. It regulates what may be done about it by defining the conditions that need to be fulfilled for the application of remedial measures, such as the existence of injury and authorising the remedial measures which can be taken to deal with dumping.

4.80 The European Communities asserts that, as a consequence, the rationale for the mandatory/discretionary distinction, assuming it still to be valid, does not apply to regulatory measures as opposed to prohibitions. When a provision regulates behaviour, it is not a good faith interpretation of the text to claim that if a Member's measure deviates from it in one important respect, or allows its authorities to take alternative measures on a discretionary basis, then the other disciplines automatically do not apply. Yet this is exactly what the United States is claiming.

4.81 For this reason the European Communities considers that both the US claim that the 1916 Act escapes the disciplines of Article VI and the Anti-Dumping Agreement because it specifies a remedy other than duties, as well as the US claim that it escapes WTO inconsistency because it is in some sense discretionary, must fail.

4.82 The European Communities also argues that when a text regulates a certain problem, there is a legitimate expectation by a party that other parties will not reserve for themselves the option of taking non-infringing measures. The US approach to the interpretation of its obligations under Article VI of the GATT 1994 and the Anti-Dumping Agreement is not in good faith and it is therefore wrong.

5. Conclusion

4.83 For the reasons set out above, the European Communities supports Japan's claims that the 1916 Act is neither consistent with nor justified by any of the WTO provisions mentioned above.

B. INDIA

1. Violation of Article VI of the GATT 1994 and the Anti-Dumping Agreement

4.84 According to **India**, Article VI of the GATT 1994 establishes the only GATT-compatible means of dealing with dumping. Three steps are envisaged in this Article. Firstly, what constitutes dumping; secondly, what conditions must be fulfilled for the application of remedial measures; and thirdly, what steps a Member can take once dumping has been established. As regards this third step, Article VI:2 provides for the levying of anti-dumping duties. It is therefore clear that under Article VI the concerned Members can levy anti-dumping duties provided that the material injury to the domestic industry is established and the procedures as laid down are followed. Hence Article VI clearly establishes that the application of anti-dumping duties shall be the sole and only means authorized by the GATT 1994 to deal with the problem of dumped imports.

4.85 India notes, however, that, under the 1916 Act, the United States can apply measures other than anti-dumping duties – for example, civil liability for damages and/or criminal penalties.[419] Thus the very purpose and intent of Article VI and that of the Anti-Dumping Agreement is thwarted. The remedial measures provided for by the 1916 Act are treble damages and/or criminal penalties, including fines and/or imprisonment. These remedies are not duties and do not therefore fall into the type of measures allowed under the multilateral anti-dumping rules to counter dumping practices.

4.86 India recalls that the United States has tried to justify these 1916 Act remedies under footnote 24 of Article 18.1 of the Anti-Dumping Agreement. The footnote provides: "This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate." But the United States has failed to cite any GATT 1994 provision under which the 1916 Act remedies could be justified. It has merely stated that the 1916 Act "measure is *a fortiori* consistent with the GATT 1994", if it is not regulated by the GATT 1994. It may be noted that a footnote cannot override the main provision. The provision in this case, Article 18.1, is so worded that the Members cannot take any "specific action […] except in accordance with the provisions of GATT 1994 […]". Thus the US argument that the GATT 1994 does not regulate the measure is not correct. The GATT 1994 in fact prohibits any measure (including the measures under the 1916 Act) other than the anti-dumping duty, unless it is in accordance with the GATT 1994 and the Anti-Dumping Agreement.

4.87 India notes that the United States has also argued that the use of the phrase "may" levy an anti-dumping duty in Article VI:2 does not preclude the use of other remedies for dumping. This argument is not valid. Article VI of the GATT 1994 was specifically incorporated to address the problems of dumping and provides for the levying of anti-dumping duties as the sole remedy. It would be totally unacceptable if Members could not only impose anti-dumping duties, but also such other civil or criminal penalties as are prescribed by the 1916 Act. The word "may" in Article VI:2 endows the Members with discretionary authority whether or not to invoke the remedial action in case of dumping. However, if the Member concerned decides to take action, it must be by way of imposing anti-dumping duties only. Clearly therefore, the 1916 Act violates Article VI:2 of the GATT 1994 as well as Article 18.1 of the Anti-Dumping Agreement.

[419] India notes, in this regard, that the 1916 Act can be invoked and has been invoked over the years by complaining parties desirous of using the judicial remedies offered by it as an alternative and/or supplement to the Antidumping Act of 1921 and later US anti-dumping legislation.

4.88 India does not agree with the US contention that the application of measures other than anti-dumping duties is justified on the grounds that the conduct to which the 1916 Act applies is defined in a manner which, while incorporating the essential elements of dumping, differs by the addition of one or more conditions. It is India's view that as long as the 1916 Act provides remedial action for dumping of products into the domestic market, it must be in conformity with the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Since this is not the case, the 1916 Act is inconsistent with the principles and objectives laid down in Article VI of the GATT 1994 and the Anti-Dumping Agreement.

4.89 India is also of the view that the 1916 Act is inconsistent with Article VI:1 of the GATT 1994 and Article 3 of the Anti-Dumping Agreement because it does not require there to be actual injury, let alone material injury, to the domestic industry as a precondition for taking action. It only stipulates that action under the 1916 Act can be taken as long as there is intent to injure the domestic industry. Moreover, the absence of administrative procedures within the 1916 Act means that no investigation conforming to the requirements of the Anti-Dumping Agreement needs to be carried out when taking action under the 1916 Act. Thus, judicial decisions under the 1916 Act can be made without the procedural safeguards otherwise provided for in the Anti-Dumping Agreement. Finally, it is India's view that the 1916 Act fails to respect a number of procedural and due process requirements as set forth in the Anti-Dumping Agreement, *inter alia* including (i) the requirements that the competent authority verify the information given in any complaint before initiating an investigation; (ii) the requirement that notice be given to the government of the exporting country before such an investigation is started; (iii) the requirement that only a complaint supported by a minimum percentage of the domestic industry will be entertained; (iv) the possibility for the governments of exporting countries to make comments on the proposed findings; and (v) the requirement that the measures not be restrictive. The 1916 Act is therefore clearly violative of the procedural provisions of the Anti-Dumping Agreement.

4.90 As regards the alternative US argument that the 1916 Act is not an anti-dumping law at all, but is an anti-trust law, India does not agree. As accepted by the United States, the 1916 Act clearly targets products which are being sold within the United States allegedly at a price substantially less than the actual market value or wholesale price of the products. This is entirely in consonance with the definition of dumping given in Article VI, according to which dumping is said to occur when "products of one country are introduced into the commerce of another country at less than the normal value of products". Clearly therefore, the 1916 Act is a law which deals with "dumping" and as a result should be subject to the disciplines of Article VI of the GATT 1994 and of the Anti-Dumping Agreement.

4.91 India further argues that the 1916 Act cannot escape the discipline of Article VI simply because it requires the prohibited conduct to be "common and systematic". Article VI applies whether the dumping is limited in occurrence or sporadic, and whether the dumping is frequent or systemic. Once it is established that the concerned rule or law, in this case the 1916 Act, is subject to Article VI, then the only remedy permitted is the imposition of anti-dumping duties subject to a finding of dumping in accordance with the definition of Article VI and the existence of injury, or threat of injury, to the domestic industry. Thus, any anti-dumping law which goes beyond providing relief in the form of anti-dumping duties, such as the 1916 Act, is inconsistent with the GATT 1994.

4.92 Finally, India recalls the US argument that the US courts' interpretation of the 1916 Act is dispositive as a factual matter of the nature of 1916 Act and that the Panel cannot depend upon its own interpretation. In this connection, India would simply like to invite the attention of the Panel to the Appellate Body's decision in *India – Patents*.[420]

[420] *India – Patents*, Op. Cit., paras. 65-66.

2. Violation of Article III of the GATT 1994

4.93 Regarding the requirement of national treatment under Article III of the GATT 1994, India notes that the United States has argued that the 1916 Act is the equivalent of the Robinson-Patman Act. India considers that these two Acts establish two different regimes for pursuing claims against imported products and domestic products, respectively. The United States has, however, argued that treatment under the 1916 Act in certain aspects is more favourable than under the Robinson-Patman Act. But a comparison of these Acts and their operation reveals the following differences:

(a) Bringing a 1916 Act claim is easier than bringing a Robinson-Patman Act claim because of the differing pleading requirement;

(b) establishing and winning a 1916 Act claim is easier than establishing a Robinson-Patman Act claim because the standards for obtaining relief under the 1916 Act are much lower than those for obtaining relief under the Robinson-Patman Act;

(c) the conduct subject to penalties under the 1916 Act exceeds the conduct under the Robinson-Patman Act; and

(d) because a plaintiff can more easily prove a violation of the 1916 Act than of the Robinson-Patman Act, a domestic competitor can more easily impose significant litigation costs and business burdens on foreign producers than on domestic competitors.

4.94 India further argues that, even if the US argument that the 1916 Act is more favourable in certain respects is true, it is not justified. As ruled by the GATT 1947 Panel in *United States – Section 337*, a more favourable treatment of imported products in some areas cannot be justified by less favourable treatment in other areas. Moreover, whether any less favourable treatment has actually been suffered in a particular instance is irrelevant. In *EEC - Oilseeds*, the GATT 1947 panel held that a regulation which does not necessarily discriminate against imported products, but is capable of doing so, is violative of Article III of the GATT 1994. The comparison of the 1916 Act and the Robinson-Patman Act shows that imported products could get less favourable treatment under the regime of the 1916 Act than domestic products. Therefore, the 1916 Act should be held to be violative of Article III of the GATT 1994.

3. Conclusion

4.95 In conclusion, it is India's view that the 1916 Act is a statute providing relief against alleged dumping and that it does not conform to the provisions of Articles III and VI of the GATT 1994 and those of the Agreement on Anti-Dumping. The 1916 Act thereby nullifies and impairs the benefits accruing to the United States' trading partners under the above Agreements. India therefore urges the Panel to find the 1916 Act to be violative of these provisions and requests the Panel to recommend that the United States bring its domestic law in conformity with its obligations under the GATT 1994.

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