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## The World Trade Organization's Dispute Settlement Resolution in United States--Anti-Dumping Act of 1916

Jeffrey S. Beckington

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# Commentary

## The World Trade Organization's Dispute Settlement Resolution in *United States—Anti-Dumping Act of 1916*

Jeffrey S. Beckington\*

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## I. INTRODUCTION AND BACKGROUND

The evolving jurisprudence of the World Trade Organization (WTO) is a fascinating phenomenon still in its early stages. That it exists is testament to a recognition by the WTO's Member States that a substantial ceding of national sovereignty to the WTO is necessary, or at least advisable, in order to support an international mechanism designed to facilitate and maintain orderly trade in goods and services across national boundaries. This partial relinquishment of jurisdiction, however, understandably has been accompanied by certain misgivings and hedging by Member States individually and particularly by the United States.

The boldness and tension underlying the political leap of faith involved here are evident in the structure and working of the WTO's dispute settlement system. Since its inception in 1947 the General Agreement on Tariffs and Trade (GATT) has provided for dispute settlement under Articles XXII and XXIII.<sup>1</sup> Experience with this system over almost five decades, however, revealed a number of structural flaws that eroded its utility and effectiveness. To one degree or another, these shortcomings reflected an unwillingness by the GATT's Contracting Parties more fully to empower the GATT as an international organization.

By the time of the Uruguay Round, almost half a century removed from World War II, the situation had changed significantly. With global trade burgeoning, largely due to successive reductions in tariffs under the GATT's auspices, the Uruguay Round's negotiations in mid-April 1994 yielded an agreement establishing the WTO and a slew of far-reaching and detailed multilateral trade agreements to bolster open markets and curtail protectionism. To enforce and give vitality to this expanded legal regime, a Dispute Settlement Understanding (DSU) was crafted.<sup>2</sup>

Building on and improving the GATT's system for settling disputes, the DSU exhibits a greater resolve than previously by the Member States to address dispositively conflicts arising from interpretation and implementation of the WTO's many new, substantive rules and requirements that entered into force for most of

1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404 (1994) [hereinafter RESULTS OF THE URUGUAY ROUND], 33. I.L.M. 1226 (1994) [hereinafter DSU].

the world's countries on January 1, 1995. Thus, for example, the DSU includes strict time limits to move the process along; provides for review by an Appellate Body of panels' decisions on legal questions; replaces the ability of the losing party to block the GATT as a whole from adopting a panel's report with automatic adoption of reports by panels and the Appellate Body unless there is a consensus of the Member States against doing so; and sets guidelines for prevailing parties to retaliate in the event of either non-compliance with recommendations by a panel (or the Appellate Body) or of no mutually satisfactory resolution.<sup>3</sup>

These features of the DSU have been instrumental in encouraging more frequent resort to dispute settlement under the WTO than was true under the GATT. In the abstract, the DSU gives promise of decisions carefully rendered and meaningfully carried out within a reasonable timeframe. On the other hand, whether this potential is realized depends to a considerable degree upon the soundness and integrity of the legal reasoning expressed in each decision reached under the DSU. Both to assist in this regard and to guard against poorly considered opinions adversely affecting the United States, the legislation executing the Uruguay Round's agreements as U.S. domestic law contains various provisions that call for Congress and the President to take a number of steps.<sup>4</sup> These provisions require, for example:

- (a) annual reports from the United States Trade Representative (USTR) to Congress on the status of completed and pending dispute settlement proceedings;<sup>5</sup>
- (b) consultations by USTR with the appropriate congressional committees (principally the House Ways & Means Committee and the Senate Finance Committee)<sup>6</sup> during dispute settlement and thereafter regarding implementation of a panel or the Appellate Body's recommendations;<sup>7</sup> and
- (c) five-year reports to Congress with USTR's analysis, *inter alia*, of the costs and benefits to the United States of participating in the WTO and the value of its continued participation in the WTO.<sup>8</sup>

These requirements leave the impression that the United States intends to monitor closely whether it is realizing the expected benefit of its bargain with the WTO's other Member States—enforcement of U.S. rights under the Uruguay Round's agreements in return for U.S. assignment of what is essentially significant judicial authority to the

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3. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. DOC. NO. 103-316, at 1008 (1994) [hereinafter SAA].

4. *E.g.*, 19 U.S.C. §§ 3532-3538 (1994).

5. *Id.* § 3534(5)-(6).

6. *Id.* § 3531(3).

7. *Id.* §§ 3533(d)-(g), 3538.

8. *Id.* § 3535(a).

WTO's Dispute Settlement Body (the Member States acting *in plenum*).

It is against this backdrop that in separate, but related actions the European Communities (EC) and Japan in mid-1998 and early 1999, respectively, requested formal consultations with the United States regarding Title VIII of the U.S. Revenue Act of 1916 (the 1916 Act),<sup>9</sup> pursuant to Article 4 of the DSU, Article XXII:1 of the GATT 1994, and Article 17.2 of the Agreement on Implementation of Article VI of the GATT 1994 (the Antidumping Agreement).<sup>10</sup> These consultations did not lead to a mutually satisfactory resolution. The formation of a three-person panel, comprised of the same individuals, followed in each case. The report of the panel in the EC's complaint was issued in *United States—Anti-Dumping Act of 1916: Complaint by the European Communities*, WT/DS136/R (Mar. 31, 2000) (EC Report),<sup>11</sup> while the report of the panel in Japan's complaint was issued in *United States—Anti-Dumping Act of 1916: Complaint by Japan*, WT/DS162/R (May 29, 2000) (Japan Report).<sup>12</sup> As the result of appeals by the United States, the EC, and Japan of certain similar legal questions, a single division of the WTO's Appellate Body was assigned to hear and decide the appeals from both panel reports and handed down its report in *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R and WT/DS162/AB/R (Aug. 28, 2000) (Appellate Body Report).<sup>13</sup>

At the heart of their complaints both the EC and Japan contended that the 1916 Act *per se* and "as such"—apart from any application of its provisions in a given case—violated various obligations of the United States under the GATT 1994, chief among them being Article VI along with related sections of the WTO's Antidumping Agreement and Article III:4.<sup>14</sup> For the reasons

9. Pub. L. No. 64-271, 39 Stat. 756 (1916) (codified at 15 U.S.C. § 72 (1994)).

10. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 1A, RESULTS OF THE URUGUAY ROUND, *supra* note 2, at 168.

11. WTO Panel, *United States—Anti-Dumping Act of 1916: Complaint by the European Communities*, WT/DS136/R (Mar. 31, 2000), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm), 2000 WL 347837 [hereinafter EC Report].

12. WTO Panel, *United States—Anti-Dumping Act of 1916: Complaint by Japan*, WT/DS162/R (May 29, 2000), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm), 2000 WL 688018 [hereinafter Japan Report].

13. WTO Appellate Body, *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm), 2000 WL 1225267 [hereinafter Appellate Body Report].

14. EC Report, *supra* note 11, para. 6.4; Japan Report, *supra* note 12, para. 6.13. Article III:4 of the GATT 1994 incorporates the rudimentary notion of national treatment—that products imported into the territory of one contracting party from another contracting party shall be accorded treatment no less favorable than that accorded to like products of the importing contracting party in terms of laws,

specified below, the panel and Appellate Body in each dispute settlement proceeding agreed that the 1916 Act of the United States nullified or impaired benefits accruing to the other Member States under the WTO's agreements. In the final analysis, the Appellate Body recommended that the Dispute Settlement Body request the United States to bring the 1916 Act into conformity with its obligations under Article VI of the GATT 1994 and the Antidumping Agreement.<sup>15</sup> Notably, the panel in the Japanese challenge went so far as to suggest that one way in which the United States could do so would be to repeal the 1916 Act.<sup>16</sup> As logical as this observation is, its importance should not be lost or obscured.

The invalidation under public international law of a U.S. federal statute over eighty years old is a significant event by any measure, especially because that pronouncement was made under the DSU and the WTO's auspices, not by a court of the United States. It is true, of course, as the SAA sets forth, that the DSU does not grant panels or the Appellate Body the jurisdiction to direct a Member State to amend its laws.<sup>17</sup> As a practical matter, however, this distinction loses at least some of its force in light of the fact that the DSU authorizes panels and the Appellate Body through the Dispute Settlement Body to judge and find a Member State's actions unlawful in the first place, thus necessitating consideration by an unsuccessful defending country of unpalatable responses. With so much at stake and the U.S. sensibilities over national sovereignty in play, it appears from their reports' deliberateness that the panel and Appellate Body evaluating the 1916 Act were at pains to inspire as much confidence as possible in their scholarship and balanced thoroughness and thereby in the fairness of the DSU's adjudicatory system.

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regulations and requirements affecting those products' internal sale, offering for sale, purchase, transportation, distribution or use. Multilateral Agreements on Trade in Goods, Apr. 15, 1994, WTO Agreement, *supra* note 2, Annex 1A, RESULTS OF THE URUGUAY ROUND, *supra* note 2, at 490, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

15. Appellate Body Report, *supra* note 13, para. 156.

16. Japan Report, *supra* note 12, paras. 6.300-6.302.

17. SAA, *supra* note 3, at 1008. How the United States chooses to respond in this instance, consequently, is for the United States to decide. It may opt for repeal, offer compensation, agree on some other action acceptable to the EC and Japan, or do nothing and invite retaliation. *See id.* at 1009.

II. THE PANEL REPORTS<sup>18</sup>A. *Preliminary Issues Considered By the Panel*

In somewhat confusing fashion, for most of the last eighty years the United States has had two antidumping statutes, the 1916 Act and what originally was the Anti-Dumping Act of 1921,<sup>19</sup> now found in a much-expanded and revised form in Title VII of the Tariff Act of 1930.<sup>20</sup> The 1930 Act's antidumping law is administered by the U.S. Department of Commerce and the U.S. International Trade Commission, largely mirrors Article VI of the GATT 1994 and the WTO's Antidumping Agreement, and was not at issue in these cases. It is the 1930 Act that is the statutory basis for virtually all antidumping proceedings in the United States. On the other hand, the 1916 Act is less well known and less frequently employed, and its nature is open to dispute. Indeed, whether the 1916 Act is an antitrust law, as the United States urged in these dispute settlement proceedings, or an antidumping law subject to the discipline of Article VI of the GATT 1994 and the Antidumping Agreement, as the EC and Japan submitted, was the crux of the matter to be resolved. Understandably, therefore, the EC Report and the Japan Report devote considerable attention to the history and characteristics of the 1916 Act and, in the first instance, discuss the standards and methodological framework for that evaluation.

Conscious of the "additional dimension" of the 1916 Act's longevity,<sup>21</sup> the panel in each case emphasized that objective assessment of the facts called for an analysis of the terms of the 1916 Act and then, even if the text of the statute were clear on its face, to look at its historical context, legislative history, and subsequent declarations of U.S. authorities so as to understand the 1916 Act as it has been and is actually understood and applied by the U.S. courts and authorities.<sup>22</sup> Importantly, in examining the 1916 Act under this

18. Taken together, the EC Report, Japan Report, and Appellate Body Report total more than 400 pages of text. This commentary, accordingly, is not comprehensive but attempts to summarize selectively the central aspects of these dispute settlement proceedings.

19. The Anti-Dumping Act of 1921 was codified through 1979 as 19 U.S.C. §§ 60-71.

20. 19 U.S.C. §§ 1671-1677n [hereinafter 1930 Act].

21. EC Report, *supra* note 11, para. 6.41; Japan Report, *supra* note 12, para. 6.47.

22. EC Report, *supra* note 11, para. 6.48; Japan Report, *supra* note 12, para. 6.57.

procedure, the panel determined that it need not accept at face value the characterization attached by the United States to the law, but was free to analyze the operation of the domestic legislation<sup>23</sup> and, while not independently interpreting U.S. law, to weigh the jurisprudence of municipal U.S. courts if the relevant judgments were uncertain or divided.<sup>24</sup> With respect to the historical context of the 1916 Act, the panel decided that it would “pay attention” to the statute’s legislative history as appropriate, that it should not “lose sight of” the state of antitrust and trade law concepts at the time of the 1916 Act’s enactment, and that public declarations and studies of the period might be relevant as well.<sup>25</sup>

As a second preliminary issue, the panel in each case grappled with “whether the 1916 Act could, by its nature, fall within the scope of Article VI only, of Article III:4 only, or partly or wholly within the scope of both.”<sup>26</sup> Relying on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*<sup>27</sup> and *Case Concerning the Payment of Various Serbian Loans Issued in France*,<sup>28</sup> the panel was guided in answering this question by the general principle of international law “that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it.”<sup>29</sup> Noting the parties’ agreement that the 1916 Act deals with transnational price discrimination, the panel correctly deemed Article III:4’s focus on internal national treatment for imports less specific than Article VI’s scope as to transnational price discrimination.<sup>30</sup> The panel therefore proceeded to review the applicability of Article VI to the 1916 Act.<sup>31</sup>

In regard to a third preliminary issue, the panel in each case considered the relationship between Article VI of the GATT 1994 and the Antidumping Agreement. On this score, the United States argued that only definitive antidumping duties, acceptance of price

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23. EC Report, *supra* note 11, para. 6.51; Japan Report, *supra* note 12, para. 6.60.

24. EC Report, *supra* note 11, para. 6.53; Japan Report, *supra* note 12, para. 6.62.

25. EC Report, *supra* note 11, para. 6.60; Japan Report, *supra* note 12, para. 6.69.

26. EC Report, *supra* note 11, para. 6.71. *See also* Japan Report, *supra* note 12, para. 6.79.

27. WTO Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, para. 204, WT/DS27/AB/R (Sept. 25, 1997), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm).

28. (Fr. v. Serb.) 1929 P.C.I.J. (ser. A) No. 20/21, at 5, 30 (July 12).

29. EC Report, *supra* note 11, para. 6.76 & n.344; Japan Report, *supra* note 12, para. 6.85 & n.70.

30. EC Report, *supra* note 11, para. 6.78; Japan Report, *supra* note 12, para. 6.86.

31. EC Report, *supra* note 11, para. 6.81; Japan Report, *supra* note 12, para. 6.87.



undertakings, and provisional measures may be challenged under Article 17.4 of the Antidumping Agreement. Further, according to the United States, the panel was without jurisdiction to decide a claim under Article VI because that article does not apply independently to a dispute in which the Antidumping Agreement does not apply.<sup>32</sup>

While addressing nominally preliminary matters, these portions of the EC Report and Japan Report are critical in setting the tone and direction of the panel's thinking. In short order, the panel rejected the jurisdictional charges of the United States. First, the panel commented, the dispute settlement provisions in Article 17 of the Antidumping Agreement do not replace the DSU as a "coherent system" of dispute settlement for the Antidumping Agreement.<sup>33</sup> Nothing in Article 17.4 expressly limits the DSU's scope of application except in relation to the specific issue of Member States' antidumping actions.<sup>34</sup> Moreover, the panel continued, this reading of Article 17 and the DSU is confirmed also by Article 18.4 of the Antidumping Agreement, pursuant to which each Member State is bound to take all necessary steps to ensure, by the date of entry into force of the WTO Agreement for the given Member State, the conformity of its laws, regulations, and administrative procedures with the Antidumping Agreement. Thus, the panel concluded:

[A] Member's anti-dumping legislation must be compatible with the WTO Agreement continuously, whether that legislation is applied or not. If dispute settlement could be initiated in relation to some specific anti-dumping *action* only, i.e. if the conformity of a domestic anti-dumping law could only be reviewed when that law is applied, the provisions of Article 18.4 would be deprived of their meaning and useful effect. A Member could maintain a WTO-incompatible law in total impunity as long as none of the measures referred to in Article 17.4 is adopted.<sup>35</sup>

On the topic of the relationship between Article VI of the GATT 1994 and the Antidumping Agreement, the panel in the Japan Report observed that the two are part of the same treaty, the WTO Agreement, and so, by implication under Article 31 of the Vienna Convention on the Law of Treaties,<sup>36</sup> constitute an "inseparable package of rights and obligations" such that "Article VI should not be

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32. EC Report, *supra* note 11, para. 5.15; Japan Report, *supra* note 12, para. 6.89.

33. EC Report, *supra* note 11, para. 5.21; Japan Report, *supra* note 12, para. 6.95.

34. EC Report, *supra* note 11, para. 5.24; Japan Report, *supra* note 12, para. 6.98.

35. Japan Report, *supra* note 12, para. 6.99. *See also* EC Report, *supra* note 11, para. 5.25.

36. U.N. Doc. A/CONF. 39/27 (1969), May 23, 1969, 8 I.L.M. 679 (entered into force Jan. 27, 1980).

interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning."<sup>37</sup> While the panel felt that it could make findings under Article VI without simultaneously having to make findings under the Antidumping Agreement, and vice versa, it stressed that the inseparability of the two required the panel to interpret the provisions invoked by Japan so as to give meaning to all of them.<sup>38</sup>

With the stage set and the decks cleared, the panel in each case was ready to proceed to the parties' remaining legal issues.

### B. *The Panel's Evaluation of Applicability*

In its defense, the United States took the position that the 1916 Act does not fall within the scope of Article VI of the GATT 1994 or the Antidumping Agreement. According to the United States, Article VI should be construed narrowly as applying only when a Member State addresses injurious dumping merely by means of offsetting antidumping duties levied at the border, whereas the 1916 Act is concerned with punishing dumping having predatory intent through the imposition of damages on importers.<sup>39</sup>

In rejecting this view, the panel began by finding that dumping exists under Article VI when there is a price difference between like products sold in two different national markets, with the price in the country to which the product is exported being less than the price in the producing country or a third country to which the product is exported.<sup>40</sup> Likewise, the panel determined, the 1916 Act's text contains a price discrimination test very similar to the requirement of Article VI—a comparison between two prices, one in the United States and the other in the country of production or a third country where the product is also sold.<sup>41</sup> Furthermore, in the panel's judgment, the predatory intent specified as an element in the 1916 Act does not affect the 1916 Act's requirement of a price difference between the referent markets, a basic requirement identical to that in Article VI.<sup>42</sup> More precisely, the panel determined, the type of prices on which the 1916 Act is based satisfies the criteria of the prices relied upon in Article VI and the Antidumping Agreement,

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37. Japan Report, *supra* note 12, para. 6.103 (footnote omitted).

38. Japan Report, *supra* note 12, para. 6.104.

39. EC Report, *supra* note 11, para. 6.94; Japan Report, *supra* note 12, para. 6.120.

40. EC Report, *supra* note 11, para. 6.104; Japan Report, *supra* note 12, para. 6.127.

41. EC Report, *supra* note 11, para. 6.108; Japan Report, *supra* note 12, para. 6.129.

42. EC Report, *supra* note 11, para. 6.113; Japan Report, *supra* note 12, para. 6.135.

and, thus, “the 1916 Act addresses the same type of price discrimination as Article VI of the GATT 1994.”<sup>43</sup>

The panel next explored the allegation of the United States that Article VI’s disciplines are applicable only to the extent that a Member State intends to address material injury, threat thereof, or material retardation of the establishment of a domestic industry by reason of dumping.<sup>44</sup> On the strength of Articles 1 and 18.1 of the Antidumping Agreement, which direct that antidumping measures can be applied only under the circumstances described in Article VI and are limited in accordance with the GATT 1994’s provisions, the panel expressed as its view that the transnational price discrimination targeted in the 1916 Act is subject to the disciplines of Article VI and the Antidumping Agreement.<sup>45</sup>

Moreover, the fact that the 1916 Act may be seen in U.S. law as an antitrust statute with an antitrust purpose does not cause the 1916 Act to fall outside Article VI’s scope, observed the panel, as long as the 1916 Act’s transnational price discrimination test is and has been understood in such a way as to meet Article VI’s definition of dumping.<sup>46</sup> In this connection, again recalling the need to take into account that the 1916 Act was over eighty years old, the panel went on to consider the U.S. claim that the nature of the 1916 Act as an antitrust statute outside Article VI’s scope is clear from the historical context, legislative history, and case law interpreting the 1916 Act.<sup>47</sup> Suffice to say this survey by the panel is quite thorough and lengthy.<sup>48</sup> In the end, the evidence from these supplementary sources reinforced, and did not detract from, the panel’s understanding of the 1916 Act’s price discrimination test on the basis of that statute’s text. Thus, the relevant historical context and legislative history confirmed for the panel that the practice addressed by the 1916 Act was construed at the time to be “dumping” as defined today<sup>49</sup> and that antidumping and antitrust laws dealing with predatory pricing both were part of the notion of “unfair competition”

43. Japan Report, *supra* note 12, para. 6.138. See also EC Report, *supra* note 11, para. 6.118.

44. EC Report, *supra* note 11, para. 6.114; Japan Report, *supra* note 12, para. 6.142.

45. EC Report, *supra* note 11, para. 6.115; Japan Report, *supra* note 12, para. 6.143.

46. EC Report, *supra* note 11, para. 6.117; Japan Report, *supra* note 12, para. 6.145.

47. EC Report, *supra* note 11, para. 6.119; Japan Report, *supra* note 12, paras. 6.149-6.150.

48. EC Report, *supra* note 11, paras. 6.120-6.162; Japan Report, *supra* note 12, paras. 6.151-6.191.

49. EC Report, *supra* note 11, para. 6.122; Japan Report, *supra* note 12, para. 6.154.

when the 1916 Act was passed into law.<sup>50</sup> In addition, from its overview of the relatively small body of pertinent U.S. case law, the panel (a) found no unambiguous authority from the U.S. Supreme Court that the 1916 Act was definitively an antitrust or antidumping instrument,<sup>51</sup> and (b) read the opinions of the lower federal courts to signify that those courts considered the 1916 Act's transnational price discrimination test to be "dumping" within the meaning of international and U.S. trade law.<sup>52</sup>

At this stage of its deliberations, therefore, the panel in each case had reached the following findings:

- (a) the 1916 Act's text incorporates a test for transnational price discrimination that falls within the definition of "dumping" in Article VI of the GATT 1994;
- (b) none of the 1916 Act's additional conditions or requirements causes the 1916 Act's test for transnational price discrimination to fall outside that definition;
- (c) there is no convincing evidence in the 1916 Act's legislative history to conclude otherwise;
- (d) U.S. federal courts' decisions have not interpreted the 1916 Act's test for transnational price discrimination in such a way that the test no longer meets Article VI's definition of dumping; and
- (e) the Antidumping Agreement's link and inseparability with Article VI implies as well the applicability of the Antidumping Agreement to the 1916 Act.<sup>53</sup>

### C. *The Panel's Finding of Mandatory Law*

Having determined that the 1916 Act falls within the scope of Article VI and the Antidumping Act, the panel in each case went on to weigh the U.S. argument that the 1916 Act is non-mandatory legislation, that is, that the 1916 Act has been and in the future can be interpreted by U.S. courts and applied by the U.S. Department of Justice in its discretion so as to be consistent with the U.S. obligations under the WTO.<sup>54</sup> In rejecting this contention, the panel referred to Article 18.4 of the Antidumping Agreement once more, quoting it in full:

Each Member shall take all necessary steps, of a general or particular character, to ensure, no later than the date of entry into force of the

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50. EC Report, *supra* note 11, para. 6.131; Japan Report, *supra* note 12, para. 6.159.

51. EC Report, *supra* note 11, paras. 6.135-6.139; Japan Report, *supra* note 12, paras. 6.163-6.167.

52. EC Report, *supra* note 11, paras. 6.140-6.146, 6.151; Japan Report, *supra* note 12, paras. 6.168-6.175.

53. EC Report, *supra* note 11, paras. 6.163-6.165; Japan Report, *supra* note 12, paras. 6.192-6.194.

54. EC Report, *supra* note 11, para. 6.82; Japan Report, *supra* note 12, para. 6.195.

WTO Agreement for it, the conformity of its laws, regulations and administrative practices with the provisions of this Agreement, as they may apply to the Member in question.<sup>55</sup>

Acknowledging that public international law generally recognizes the concept of “mandatory/non-mandatory legislation,” the panel in the Japan Report concluded that as a treaty provision Article 18.4 prevails over customary international law.<sup>56</sup> The panel in each case ruled that Article 18.4 requires the 1916 Act to be in conformity with the Antidumping Agreement as of its entry into force for the United States; that to interpret Article 18.4 differently would undermine that article’s obligations and be contrary to the general principle of effectiveness; and that the 1916 Act accordingly cannot be considered to be a “non-mandatory” law.<sup>57</sup>

#### D. *Applicability of Article VI and the Antidumping Agreement*

In drawing this portion of its report to a close, the panel in each case took care to underscore that its interpretation of the terms of Article VI and the Antidumping Agreement had been objective and did not dispute the fact that the U.S. courts and authorities in good faith may consider the 1916 Act to be a statute that addresses antitrust issues.<sup>58</sup> At the same time, in response to the U.S. warning that the panel’s interpretation was so broad as to risk making Article VI applicable to all antitrust laws, the panel in each case observed that it had acted consistently with its mandate of reviewing the 1916 Act’s conformity with the WTO Agreement’s provisions and that it had not been assigned the task of considering the general issue of the relationship between trade law and antitrust law.<sup>59</sup> Moreover, the panel thought the likelihood very limited that its findings with respect to Article VI’s transnational price discrimination would affect application of Member States’ antitrust laws, both because that discrimination is narrowly defined and does not include price discrimination within a given jurisdiction’s territory and because

55. EC Report, *supra* note 11, para. 6.168. See also Japan Report, *supra* note 12, para. 6.196.

56. Japan Report, *supra* note 12, para. 6.199 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 137 (June 27)).

57. EC Report, *supra* note 11, paras. 6.168-6.170; Japan Report, *supra* note 12, paras. 6.199-6.202.

58. EC Report, *supra* note 11, para. 6.172; Japan Report, *supra* note 12, para. 6.203.

59. EC Report, *supra* note 11, paras. 6.171-6.172; Japan Report, *supra* note 12, para. 6.205.

transnational price discrimination by itself is unlikely to be sanctionable under antitrust laws.<sup>60</sup>

### E. *The Panel's Finding of Violations*

The 1916 Act calls for damages, fines, or imprisonment as penalties for infractions of its terms.<sup>61</sup> Both the EC and Japan thus argued that the 1916 Act violates Article VI:2 of the GATT 1994, as confirmed by Article 18.1 of the Antidumping Agreement, on the ground that these articles authorize antidumping duties as the sole measure permitted in response to dumping.<sup>62</sup> In rebuttal, the United States advanced the view that there is no violation, because Article VI and the Antidumping Agreement govern just those laws and measures that seek to counteract injurious dumping by means of the imposition of antidumping duties and that Article VI:2's directive—that antidumping duties “may” be levied to offset or prevent dumping—is permissive and unqualified.<sup>63</sup>

With reference again to the interpretative rules of Article 31 of the Vienna Convention on the Law of Treaties,<sup>64</sup> the panel set about clarifying Article VI:2 of the GATT 1994 so as to ensure a harmonious meaning to both Article VI:2 and Article 18.1 of the Antidumping Agreement in resolving whether the 1916 Act violates these two articles by providing for sanctions other than antidumping duties.<sup>65</sup> As quoted by the panel, the first sentence of Article VI:2 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.”<sup>66</sup>

Article 18.1 of the Antidumping Agreement correspondingly states, “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.”<sup>67</sup>

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60. EC Report, *supra* note 11, paras. 6.173-6.176; Japan Report, *supra* note 12, paras. 6.206-6.209.

61. 15 U.S.C. § 72.

62. EC Report, *supra* note 11, paras. 6.183-6.184; Japan Report, *supra* note 12, para. 6.217.

63. EC Report, *supra* note 11, para. 6.185; Japan Report, *supra* note 12, paras. 6.212, 6.218.

64. See *supra* note 36 and accompanying text.

65. EC Report, *supra* note 11, paras. 6.185-6.186; Japan Report, *supra* note 12, paras. 6.214-6.216.

66. EC Report, *supra* note 11, para. 6.188; Japan Report, *supra* note 12, para. 6.220.

67. EC Report, *supra* note 11, para. 6.193; Japan Report, *supra* note 12, paras. 6.214, 6.225. Footnote 24 to Article 18.1 of the Antidumping Agreement states: “This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.” Japan Report, *supra* note 12, para. 6.225.

The panel in each case looked first to the ordinary meaning of Article VI:2's language, focusing on the use of "may levy" as making the *imposition* of antidumping duties facultative and limiting the amount of such duties in any event to the margin of dumping.<sup>68</sup> As construed by the panel, therefore, the word "may" allowed Member States a choice between levying an antidumping duty equal to or less than the dumping margin, but not between antidumping duties and other measures.<sup>69</sup> Had Article VI:2 been designed to allow other measures of the sort encompassed by the 1916 Act, the panel reasoned that "[i]t would have been logical to list the other possible sanctions, especially if those sanctions could be more severe than the imposition of offsetting duties."<sup>70</sup> The panel thus concluded that the ordinary meaning of Article VI:2's terms supports the view that antidumping duties are the only remedy allowed by Article VI of the GATT 1994.<sup>71</sup>

The panel next considered the context of Article VI:2, especially Article 18.1 of the Antidumping Agreement and its footnote 24.<sup>72</sup> According to the United States, footnote 24 envisions application of measures against dumping other than antidumping duties as long as those measures are consistent with the GATT 1994. In addition, in the U.S. judgment, if the measure is not regulated by the GATT 1994, as is the case with the 1916 Act, the measure is *a fortiori* in accord with the GATT 1994.<sup>73</sup> While noting that footnote 24 does not prevent Member States from addressing the causes or effects of dumping through other policy instruments allowed by the WTO Agreement or from adopting other measures compatible with the WTO Agreement, the panel dismissed the U.S. argument as being at odds with Article VI, inasmuch as Member States could then address "dumping" without having to respect Article VI or the Antidumping Agreement.<sup>74</sup>

Finally, the panel in each case explored whether the preparatory work leading to Article VI:2 of the GATT 1994 reinforces the view that Article VI:2 permits only antidumping duties to offset dumping. In particular, the panel cited a passage from a 1948 Report on Article

68. EC Report, *supra* note 11, para. 6.190; Japan Report, *supra* note 12, para. 6.222.

69. EC Report, *supra* note 11, para. 6.189; Japan Report, *supra* note 12, para. 6.221.

70. EC Report, *supra* note 11, para. 6.190 (footnote omitted); Japan Report, *supra* note 12, para. 6.222 (footnote omitted).

71. EC Report, *supra* note 11, para. 6.190; Japan Report, *supra* note 12, para. 6.222.

72. See *supra* note 67 and accompanying text.

73. EC Report, *supra* note 11, para. 6.198; Japan Report, *supra* note 12, para. 6.227.

74. EC Report, *supra* note 11, para. 6.199; Japan Report, *supra* note 12, para. 6.228.

VI by a Working Party, indicating that measures other than compensatory antidumping duties may not be applied to counteract dumping except as otherwise permitted by other provisions of the GATT.<sup>75</sup> Attempting to build on this legislative history, the United States urged that other measures can consequently be legally applied against dumping, such as raising unbound tariffs, tariff renegotiation, safeguard measures, or countervailing measures.<sup>76</sup> In response, the panel agreed these measures might be legally applied, but observed that the basis for their imposition would not objectively be “dumping” as defined by Article VI, but rather would be the causes or effects of the dumping. Thus, an increase of unbound tariffs, tariff renegotiation, or safeguard measures would apply on a most-favored-nation basis under Article I of the GATT 1994, clearly inappropriate responses unless all Member States were dumping.<sup>77</sup> Countervailing duties would likewise be unacceptable, as such duties can only be employed to counteract subsidies.<sup>78</sup>

Based upon its analysis of Article VI:2’s text, its context with reference particularly to Article 18.1 of the Antidumping Agreement, and the preparatory work underlying Article VI:2, therefore, the panel in each case concluded that Article VI:2 of the GATT 1994 contemplates that only antidumping duties may be applied to offset dumping as such and that by providing for fines, imprisonment, and treble damages for this purpose the 1916 Act violates Article VI:2.<sup>79</sup>

#### F. *Remainder of the Panel Reports*

As recounted above, the substantive core of the panel report in each case consists of the twin findings that (1) the 1916 Act falls within the scope of Article VI of the GATT 1994 and the Antidumping Agreement, and (2) the 1916 Act with its sanctions of fines, imprisonment, and treble damages violates the requirement of Article VI:2 of the GATT 1994 and Article 18.1 of the Antidumping Agreement that antidumping duties are the exclusive remedy for dumping. These matters were the principal ones raised and resolved by the panel in each case, but several others and their treatment by the panel are worth mentioning. The panel’s guideline at this juncture was whether additional findings would assist the Dispute Settlement Body in rendering “sufficiently precise recommendations

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75. EC Report, *supra* note 11, para. 6.201; Japan Report, *supra* note 12, para. 6.237.

76. EC Report, *supra* note 11, para. 6.202; Japan Report, *supra* note 12, para. 6.238.

77. *Id.*

78. *Id.*

79. EC Report, *supra* note 11, para. 6.204; Japan Report, *supra* note 12, para. 6.240.



and rulings” that would facilitate prompt compliance by the United States. To the extent it deemed addressing these further claims to be unnecessary, the panel exercised its right to judicial economy not to do so.<sup>80</sup>

Thus, for example, both the EC and Japan contended that the 1916 Act’s standard—that there be an intent to destroy or injure a U.S. industry or to prevent its establishment—was not compatible with the criterion to apply antidumping duties in Article VI:1 of the GATT 1994 and Article 3 of the Antidumping Agreement that dumping cause or threaten to cause material injury to a U.S. industry or threaten to retard its establishment.<sup>81</sup> Remarking that proving “intent” under the 1916 Act may be more difficult than proving actual injury under Article VI:1, and that the existence of “intent” may not always require or imply the existence of actual injury, actual threat of injury, or actual retardation,<sup>82</sup> the panel concluded that the 1916 Act with its provision for identification of “intent” is not compatible with the injury requirements of Article VI:1.<sup>83</sup> Given that Article 3 of the Antidumping Agreement addresses “material injury” in greater detail, the panel found it unnecessary to make specific findings under Article 3.<sup>84</sup>

Likewise, the panel considered and agreed with arguments by the EC and Japan that the 1916 Act violates a number of procedural and due process requirements contained in Articles 4 and 5 of the Antidumping Agreement.<sup>85</sup> More precisely, Articles 4 and 5 stipulate that an antidumping petition must be filed on behalf of, and be supported by, a minimum proportion of the domestic industry, while Article 5.5 directs that notice be given to the exporting country’s government before an antidumping proceeding is commenced. In contrast, the 1916 Act allows suit by “any person injured in his business or property” and includes no direction for such notice to the foreign government concerned.<sup>86</sup> The panel accordingly found the 1916 Act violative of Articles 4 and 5 of the Antidumping Agreement

80. EC Report, *supra* note 11, para. 6.207; Japan Report, *supra* note 12, para. 6.244.

81. EC Report, *supra* note 11, para. 6.178; Japan Report, *supra* note 12, para. 6.261.

82. EC Report, *supra* note 11, para. 6.180; Japan Report, *supra* note 12, para. 6.252.

83. EC Report, *supra* note 11, para. 6.181; Japan Report, *supra* note 12, para. 6.263.

84. EC Report, *supra* note 11, para. 6.211; Japan Report, *supra* note 12, para. 6.264.

85. EC Report, *supra* note 11, paras. 6.212, 6.215; Japan Report, *supra* note 12, para. 6.265.

86. EC Report, *supra* note 11, para. 6.213; Japan Report, *supra* note 12, para. 6.267.

in these respects<sup>87</sup> and, therefore, of Article 1 of the Antidumping Agreement as well, which sets forth that antidumping investigations are to be initiated and conducted in accordance with the Antidumping Agreement's provisions.<sup>88</sup>

Finally, after foregoing making findings and thereby exercising judicial economy as to alleged violations of Article III:4 of the GATT 1994 (on national treatment)<sup>89</sup> and of Article XI of the GATT 1994 (concerning impermissible prohibitions or restrictions on imports other than duties, taxes or other charges),<sup>90</sup> the panel in each case found that, by violating Articles VI:1 and VI:2 of the GATT 1994, the 1916 Act also violates Article XVI:4 of the Agreement Establishing the WTO.<sup>91</sup> Article XVI:4 states that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."<sup>92</sup>

Along much the same lines, by violating various articles of the Antidumping Agreement, including Articles 1, 4, 5, and 18, the panel in the Japan Report found that the 1916 Act violates Article 18.4 of the Antidumping Agreement.<sup>93</sup>

#### G. Nullification or Impairment and Recommendations By the Panel

On the strength of its findings regarding the violations attributable to the 1916 Act, and absent rebuttal by the United States, the panel concluded that the 1916 Act nullifies or impairs benefits accruing to the European Communities and Japan under the WTO Agreement.<sup>94</sup> The panel in each case consequently recommended in traditional fashion that the Dispute Settlement Body request that the United States bring the 1916 Act into conformity with its obligations under the WTO Agreement.<sup>95</sup> As noted earlier, however,<sup>96</sup> the panel in Japan's challenge also took the

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87. EC Report, *supra* note 11, paras. 6.213-6.216; Japan Report, *supra* note 12, paras. 6.267, 6.271.

88. EC Report, *supra* note 11, paras. 6.208, 6.217; Japan Report, *supra* note 12, para. 6.274.

89. EC Report, *supra* note 11, paras. 6.218-6.220; Japan Report, *supra* note 12, paras. 6.275-6.282.

90. Japan Report, *supra* note 12, paras. 6.283-6.291.

91. EC Report, *supra* note 11, para. 6.225; Japan Report, *supra* note 12, para. 6.298.

92. EC Report, *supra* note 11, para. 6.222; Japan Report, *supra* note 12, para. 6.294.

93. Japan Report, *supra* note 12, para. 6.298.

94. EC Report, *supra* note 11, para. 6.227; Japan Report, *supra* note 12, para. 6.299(g).

95. EC Report, *supra* note 11, para. 7.2; Japan Report, *supra* note 12, paras. 6.300-6.302.

96. See *supra* note 16 and accompanying text.

uncommon step of suggesting that repeal of the 1916 Act would be one way for the United States to accomplish this conformity.<sup>97</sup> The panel made this suggestion at Japan's request and after citing Article 19.1 of the DSU, which contemplates suggestions by a panel on ways for its recommendations to be implemented, and Article 3.7 of the DSU, which in its fourth sentence observes that withdrawal of measures found to be in violation of agreements under the WTO is the first objective of the dispute settlement mechanism if the parties cannot agree on a mutually acceptable solution otherwise.<sup>98</sup>

### III. THE APPELLATE BODY REPORT

Not surprisingly, the United States exercised its prerogative and appealed a number of legal issues from the panel's EC Report and Japan Report.<sup>99</sup> As described below, the Appellate Body upheld the panel in all respects.

#### A. *Jurisdiction*

The United States first renewed its contention that the panel did not have jurisdiction to review the conformity of the 1916 Act as such under the Antidumping Agreement and Article VI of the GATT 1994. In response to the EC's claim that the U.S. argument was untimely because not raised until the stage of the panel's interim review in the EC's case, the Appellate Body concurred that the interim review was not an appropriate stage for this objection to have been made by the United States, but felt this issue of jurisdiction was one that the panel rightly considered was of a nature that it could be addressed at any time. In the Appellate Body's words: "The vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings."<sup>100</sup>

With respect to the U.S. argument that Article 17.4 of the Antidumping Agreement, as interpreted by *Guatemala—Anti-*

97. Japan Report, *supra* note 12, para. 6.302.

98. *Id.* paras. 6.300-6.302.

99. The EC and Japan also appealed certain issues, the main ones being: (1) the panel's refusal to grant "enhanced" third-party rights to Japan in the EC's case and to the EC in Japan's case and (2) in the event the Appellate Body reversed the panel's substantive findings on the 1916 Act's violations of Article VI, whether the 1916 Act is inconsistent with Articles III:4 and XI of the GATT 1994. Appellate Body Report, *supra* note 13, para. 50(d)-(e). These issues are tangential to the thrust of the Appellate Body Report and, therefore, are not further discussed here.

100. *Id.* para. 54. The Appellate Body noted extensive authority in this connection for the widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative. *Id.* para. 54 & n.30.

*Dumping Investigation Regarding Portland Cement from Mexico*,<sup>101</sup> envisions claims of inconsistency only as to the three antidumping measures enumerated in Article 17.4—definitive antidumping duty, a price undertaking, or, in some circumstances, a provisional measure—the Appellate Body initially looked to the practice of panels under Article XXIII of the GATT 1947, whereby panels consistently found jurisdiction to deal with claims against legislation as such.<sup>102</sup> “In examining such claims, panels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations.”<sup>103</sup>

The Appellate Body next noted that, consistent with the affirmation in the DSU’s Article 3.1 of the principles for managing disputes under Articles XXII and XXIII of the GATT 1947, panels under the WTO’s DSU also have dealt with claims brought against Member States’ legislation as such, independently from the legislation’s application in a specific instance.<sup>104</sup>

Moving on to Article 17 of the Antidumping Agreement, the Appellate Body analogized that, in the same way that Article XXIII of the GATT 1994 allows challenges to legislation as such, so Article 17 should be similarly understood unless Article 17 expressly or implicitly directs to the contrary. Finding nothing in Article 17 or the rest of the Antidumping Agreement that expressly bars examination of legislation as such,<sup>105</sup> the Appellate Body then parsed Article 17 for any implicit restriction to this effect and found none.<sup>106</sup> As for *Guatemala Cement*, the Appellate Body recalled that Mexico had challenged Guatemala’s initiation of antidumping proceedings and its conduct of the investigation, but had done so without identifying any of the several measures listed as actionable in Article 17.4 of the Antidumping Agreement.<sup>107</sup> Under these circumstances, the Appellate Body explained, it had found simply that Mexico must identify one of Article 17.4’s measures in order to proceed with its challenge of Guatemala’s initiation and conduct of the antidumping investigation and had not precluded review of antidumping legislation as such.<sup>108</sup> Even as it recognized that Article 17.4

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101. WTO Appellate Body, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (Nov. 2, 1998), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) [hereinafter *Guatemala Cement*].

102. Appellate Body Report, *supra* note 13, para. 60.

103. *Id.*

104. *Id.* para. 61.

105. *Id.* para. 62.

106. *Id.* paras. 63-75.

107. *Id.* para. 71.

108. *Id.* para. 72.

balances a complaining Member State's right to seek redress with the risk that a responding Member State's antidumping investigation might otherwise be repeatedly disrupted by dispute settlement proceedings,<sup>109</sup> the Appellate Body reinforced that a Member State may challenge the consistency of any preceding action taken by an investigating authority in an antidumping investigation once one of Article 17.4's measures is identified in the request for establishment of a panel.<sup>110</sup>

Along with finding that Article 17.4 does not address or affect a Member State's right to bring a claim of inconsistency with the Antidumping Agreement against antidumping legislation as such,<sup>111</sup> the Appellate Body buttressed its affirmative finding of jurisdiction by pointing in turn to Articles 18.4 and 18.1 of the Antidumping Agreement. As summarized by the Appellate Body, Article 18.4 imposes an affirmative obligation on each Member State to bring its legislation into conformity with the Antidumping Agreement by the date of the WTO Agreement's entry into force for that Member State and nowhere excludes that obligation from the scope of matters that may be submitted for dispute settlement.<sup>112</sup> As for Article 18.1, the Appellate Body described its broad prohibition on specific actions against dumping unless such actions are in accordance with the GATT 1994 and the Antidumping Agreement. The Appellate Body found nothing in Article 18.1 or elsewhere in the Antidumping Agreement to suggest that the consistency of such actions may only be challenged when one of the three measures specified in Article 17.4 has been adopted.<sup>113</sup>

For these reasons, the Appellate Body confirmed the EC and Japan's right to bring dispute settlement claims of inconsistency with Article VI of the GATT 1994 and the Antidumping Agreement against the 1916 Act as such.

### B. *Mandatory and Discretionary Legislation*

In appealing the panel's conclusion that the 1916 Act is mandatory legislation, the United States reiterated its view that the 1916 Act is non-mandatory or discretionary legislation, and so not reviewable as such, because U.S. courts have interpreted in the past and could interpret in the future the 1916 Act in a manner consistent with the U.S. WTO obligations, and because the U.S. Department of Justice has discretion in determining whether to initiate criminal

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109. *Id.* para. 73 & n.38.

110. *Id.* para. 73 & n.39.

111. *Id.* para. 74.

112. *Id.* para. 78.

113. *Id.* para. 81.

proceedings under the 1916 Act. Citing *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*,<sup>114</sup> the Appellate Body recalled that discretion vested in the executive branch of government is the relevant discretion to distinguish between mandatory and discretionary legislation.<sup>115</sup>

Adhering to this yardstick, the Appellate Body concurred with the panel's decision that the 1916 Act is mandatory for a series of reasons:

- (a) With respect to civil actions under the 1916 Act, such actions are brought by private parties so that there is no relevant discretion accorded to the executive branch of the U.S. government in this area.<sup>116</sup>
- (b) With respect to criminal actions under the 1916 Act, the U.S. Department of Justice's discretion to prosecute or not is not of such a nature or such breadth as to transform the 1916 Act into discretionary legislation.<sup>117</sup>
- (c) In finding the U.S. Department of Justice's discretion in criminal cases does not mean that the 1916 Act is discretionary legislation, the Appellate Body rejected the U.S. argument that the panel had ruled that the mandatory/discretionary distinction is relevant only if the challenged legislation has never been applied.<sup>118</sup>
- (d) The Appellate Body also concluded that the panel had correctly articulated and applied the burden of proof in each case by finding that the European Communities and Japan had established a *prima facie* case that the 1916 Act on its face is inconsistent with Article VI of the GATT 1994 and the Antidumping Agreement and by then examining and deeming unpersuasive the U.S. arguments and evidence to rebut this *prima facie* case.<sup>119</sup>
- (e) The 1916 Act cannot be discretionary legislation based upon its interpretation by the United States' courts, because the mandatory/discretionary distinction relies upon the executive branch's discretion, not action by the judiciary.<sup>120</sup>

### C. *Applicability of Article VI of the GATT 1994 and the Antidumping Agreement to the 1916 Act*

As had the panel in each case, so the Appellate Body devoted considerable attention to the question whether the 1916 Act is within the scope of Article VI of the GATT 1994 and the Antidumping Agreement. In renewing its argument that the panel had erred as a

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114. Oct. 4, 1994, GATT B.I.S.D. (41st Supp.) at 131 (1997), 1994 WL 910938.

115. Appellate Body Report, *supra* note 13, para. 88.

116. *Id.* para. 90.

117. *Id.* para. 91.

118. *Id.* paras. 92-93.

119. *Id.* paras. 94-97.

120. *Id.* para. 100.

matter of law in making an affirmative finding in this regard, the United States emphasized that Article VI applies to a Member State's domestic legislation only when that law imposes antidumping duties and specifically targets dumping as defined in Article VI:1. By virtue of providing for imprisonment, fines, and treble damages (not antidumping duties) and of addressing predatory pricing (not dumping), the 1916 Act in the U.S. view falls outside Article VI and the Antidumping Agreement.<sup>121</sup>

In response, the Appellate Body framed the issue as depending on whether Article VI regulates all possible measures Member States can take against dumping or only the imposition of antidumping duties and neither prohibits nor governs other measures that Member States may take to counteract dumping.<sup>122</sup> After scrutinizing Article VI:2's wording that Member States "may levy" antidumping duties, the Appellate Body opined that this text by itself does not specify that only antidumping duties can be imposed to offset or prevent dumping.<sup>123</sup> The Appellate Body continued, however, Article VI:2—read in conjunction with the Antidumping Agreement's provisions—is properly understood as giving Member States a choice between imposing an antidumping duty or not and a choice between imposing an antidumping duty equal to or less than the margin of dumping. In this respect, the Appellate Body relied on Article 9 of the Antidumping Agreement and its language along these lines.<sup>124</sup> Moreover, the Appellate Body stressed, Article 18.1 of the Antidumping Agreement prohibits any "specific action against dumping" unless that action is in accordance with Article VI of the GATT 1994.<sup>125</sup>

The Appellate Body next turned to whether the 1916 Act provides for "specific action against dumping" and thus is covered by Article VI. Again noting the U.S. contention that the 1916 Act targets predatory pricing, the Appellate Body reviewed the relevant portions of the 1916 Act and concluded:

The constituent elements of "dumping" are built into the essential elements of civil and criminal liability under the 1916 Act. The wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of "dumping." It follows that the civil and criminal proceedings and penalties provided for in the 1916 Act are "specific action against dumping." We find, therefore, that Article VI of the GATT 1994 applies to the 1916 Act.<sup>126</sup>

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121. *Id.* para. 104.

122. *Id.* para. 109.

123. *Id.* para. 111.

124. *Id.* paras. 114-116.

125. *Id.* paras. 124-126.

126. *Id.* para. 130.

Furthermore, the 1916 Act's prerequisite of intent to destroy or injure an American industry was construed by the Appellate Body as not transforming the 1916 Act into a law that does not provide for "specific action against dumping."<sup>127</sup> For all these reasons, and agreeing with the panel on the inseparable relationship between Article VI of the GATT 1994 and the Antidumping Agreement, the Appellate Body found both to apply to the 1916 Act.<sup>128</sup>

#### D. *The Appellate Body's Conclusions*

Insofar as the panel found that the 1916 Act is inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and with various articles of the Antidumping Agreement, the United States argued before the Appellate Body that the panel had erred, but made this claim solely on the basis that the 1916 Act does not fall within the scope of application of Article VI and the Antidumping Agreement. Having rejected this underlying position by the United States, the Appellate Body upheld the panel's findings of these inconsistencies as well.<sup>129</sup>

Similarly, the United States urged that the panel's finding was incorrect that the 1916 Act is inconsistent with Article VI:2, because Article VI:2 regulates only the imposition of antidumping duties and not other measures to counter dumping. Recalling that Article VI:2 and the Antidumping Agreement limit the permissible responses to dumping to definitive antidumping duties, provisional measures, and price undertakings, the Appellate Body affirmed the panel's conclusion that the 1916 Act is inconsistent with Article VI:2 and the Antidumping Agreement by virtue of providing for "specific action against dumping" in the form of civil and criminal proceedings and penalties.<sup>130</sup>

#### E. *The Appellate Body's Recommendation*

Without specifying or suggesting how, the Appellate Body concluded by recommending that the Dispute Settlement Body request that the United States bring the 1916 Act into conformity with U.S. obligations under Article VI of the GATT 1994 and the Antidumping Agreement.<sup>131</sup>

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127. *Id.* para. 132.

128. *Id.* para. 133.

129. *Id.* paras. 134-135.

130. *Id.* paras. 136-138.

131. *Id.* para. 156.



## IV. CONCLUSION

On September 26, 2000, the Dispute Settlement Body adopted the Appellate Body Report and the EC and the Japan Reports as upheld by the Appellate Body.<sup>132</sup> Thereafter, on October 23, 2000, the United States informed the Dispute Settlement Body of its intention to implement the Dispute Settlement Body's recommendations and rulings, but stated it will require "a reasonable period of time" to do so and will consult with the European Communities and Japan. On November 17, 2000, both the European Communities and Japan requested arbitration under Article 21.3(c) of the DSU to determine "a reasonable period of time" under the circumstances.<sup>133</sup> These dispute settlement proceedings, thus, are yet to be completed.

From the Author's perspective, it seems that the United States has little leeway in carrying out its avowed intent to implement the Dispute Settlement Body's recommendations and rulings except by repealing the 1916 Act, as the panel in the Japan Report suggested. At one level, given that the 1916 Act has rarely been employed and never successfully so, and further in light of the ready availability and effectiveness of the antidumping statute—Title VII of the Tariff Act of 1930, repeal of the 1916 Act should not adversely affect the United States or its domestic industries that are experiencing the injurious effects of dumping.

On the other hand, as posited at the outset of this Commentary, the truly noteworthy aspect of these dispute settlements is the likely ultimate outcome—the striking down of a U.S. statute over eighty years old due to the deliberations of the WTO's dispute settlement process under public international law. That precedent could prove to be more problematic in the future if another U.S. law of more practical importance to the United States likewise comes under attack before the WTO. To the extent the United States follows through with repeal of the 1916 Act—as it has indicated—and another country's domestic law is found to violate the GATT 1994, the United States can legitimately point to this precedent as grounds for that other Member State respecting and acting on the Dispute Settlement Body's recommendations and rulings.

As a final observation, it can reasonably be said that the panel and Appellate Body acquitted themselves well. Their reports are

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132. World Trade Organization, *Overview of the State-of-Play of WTO Disputes*, pt. II, para. 12(a)-(b), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Jan. 20, 2001).

133. *Id.* pt. I, para. 37(a)-(b).

thorough and thoughtful and skillfully build on basic principles under GATT, WTO, and public international law to reach a solidly defensible result. While the United States appropriately did its utmost to achieve a victory in favor of maintaining the 1916 Act, the WTO's dispute settlement process as it operated here leaves the impression that the contentions and positions advanced by the United States were honestly and objectively considered by the panel and Appellate Body. This deliberate even-handedness should strengthen the legitimacy of the WTO's dispute settlement system and reinforce the faith of the Member States as a group that their decision to entrust so much jurisdiction to the WTO has been well-taken.

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