WORLD TRADE ORGANIZATION

WT/DS69/AB/R
13 July 1998

(98-2688)

Original: English

EUROPEAN COMMUNITIES – MEASURES AFFECTING THE IMPORTATION OF CERTAIN POULTRY PRODUCTS

AB-1998-3

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities - Measures Affecting the Importation of Certain Poultry Products

Brazil, *Appellant/Appellee*
European Communities, *Appellant/Appellee*

Thailand and the United States,
Third Participants

AB-1998-3

Present:

Bacchus, Presiding Member
El-Naggar, Member
Feliciano, Member

I. Introduction

1. Brazil and the European Communities appeal from certain issues of law and legal interpretations in the Panel Report, *European Communities - Measures Affecting the Importation of Certain Poultry Products*.[1] The Panel was established to consider a complaint by Brazil regarding the EC regime for the importation of certain frozen poultry meat products falling within Common Nomenclature ("CN") categories 0207 14 10, 0207 14 50 and 0207 14 70 (formerly CN categories 0207 41 10, 0207 41 41 and 0207 41 71), and the implementation by the European Communities of the tariff-rate quota in these products agreed in negotiations between Brazil and the European Communities.

2. The relevant factual aspects of this dispute are set out in the Panel Report, in particular, at paragraphs 8-12. On 19 June 1992, the CONTRACTING PARTIES authorized the European Communities to enter into negotiations with interested contracting parties under Article XXVIII of the GATT 1947, following adoption of the panel report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*[2] ("*EEC - Oilseeds*"). The European Communities entered into negotiations with Brazil, as well as nine other contracting parties. The negotiations with Brazil terminated in July 1993, and the parties signed Agreed Minutes on 31 January 1994. The bilateral agreement set out in these Agreed Minutes (the "Oilseeds Agreement") provided, *inter alia*, for a duty-free global annual tariff-rate quota of 15,500 tonnes for frozen poultry meat under CN categories 0207 41 10, 0207 41 41 and

[1]WT/DS69/R, 12 March 1998.

[2]Adopted 25 January 1990, BISD 37S/86; and DS28/R, 31 March 1992.

0207 41 71. The tariff-rate quota was opened as from 1 January 1994 by Council Regulation 774/94[3] ("Regulation 774/94") of 29 March 1994. Commission Regulation 1431/94[4] ("Regulation 1431/94") of 22 June 1994 sets out detailed rules for the application of Regulation 774/94, and stipulates, in Article 1, that all imports under the tariff-rate quota for the relevant poultry meat products are subject to the presentation of an import licence. There are no licensing requirements for out-of-quota imports of these products.

3. Schedule LXXX of the European Communities[5] ("Schedule LXXX") provides for a duty-free tariff-rate quota for up to 15,500 tonnes of frozen poultry meat in Part I - Most Favoured Nation Tariff, Section I - Agricultural Products, Section I - B - Tariff Quotas, with out-of-quota base duty rates of 1,600 ECU/tonne, 940 ECU/tonne and 1,575 ECU/tonne, respectively. The European Communities reserved the right in Schedule LXXX to introduce an additional duty on out-of-quota imports of the relevant poultry meat if the conditions for imposition of the "Special Safeguard" in Article 5 of the *Agreement on Agriculture* were satisfied. Council Regulation 2777/75[6] ("Regulation 2777/75") of 29 October 1975, as amended by Council Regulation 3290/94[7] ("Regulation 3290/94") of 22 December 1994, contains the general rule for the application of the additional safeguard duties in Article 5 of the *Agreement on Agriculture*. Article 5.3 of this regulation states:

> The import prices to be taken into consideration for imposing an additional import duty shall be determined on the basis of the cif import prices of the consignment in question.

Commission Regulation 1484/95[8] ("Regulation 1484/95") of 28 June 1995 contains the detailed rules pertaining to such special safeguard, and provides that, unless the imports of frozen poultry meat are unlikely to disturb the EC internal market, an additional duty will be levied if the import price falls below a trigger price set out in Annex II of the Regulation. The import price is either the "representative price" or, upon the request of the importer, the c.i.f. price, if this price is higher than the applicable representative price. The "representative price" is to be determined by taking into account: (i) "prices on third country markets"; (ii) "free-at-Community-frontier offer prices"; and (iii) "prices at the various stages of marketing in the Community for imported products".[9] If the c.i.f.

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[3]Official Journal No. L 91, 8 April 1994, p. 1.

[4]Official Journal No. L 156, 23 June 1994, p. 9.

[5]Schedule LXXX of the European Communities, *Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, 15 April 1994.

[6]Official Journal No. L 282, 1 November 1975, p. 77.

[7]Official Journal No. L 349, 31 December 1994, p. 105.

[8]Official Journal No. L 145, 29 June 1995, p. 47.

[9]Regulation 1484/95, Article 2.

price of the shipment is used, the importer must provide to the competent authorities the documents enumerated in Article 3 of Regulation 1484/95, that is: the purchasing contract (or any other equivalent document), the insurance contract, the invoice, the certificate of origin (where applicable), the transport contract, and, in the case of sea transport, the bill of lading.

4. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 12 March 1998. The Panel reached the following conclusions:

> 294. In light of our findings in Section B and C above, we conclude that Brazil has not demonstrated that the EC has failed to implement and administer the poultry TRQ in line with its obligations under the WTO agreements.
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> 295. In light of our findings in Section D above, we conclude that Brazil has not demonstrated that the EC has failed to implement the TRQ in accordance with Article XIII of GATT.
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> 296. In light of our findings in Section E above, we conclude that Brazil has not demonstrated that the EC has failed to implement the TRQ in accordance with Articles 1 and 3 of the Licensing Agreement, except on the point that the EC has failed to notify the necessary information regarding the poultry TRQ to the WTO Committee on Import Licensing under Article 1.4(a) of the Licensing Agreement.
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> 297. In light of our findings in Section F, G and H above, we conclude that Brazil has not demonstrated that the EC has failed to comply with the provisions of Articles X, II and III of GATT in respect of the implementation and administration of the poultry TRQ.
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> 298. In light of our findings in Section I above, we conclude that the EC has failed to comply with the provisions of Article 5.1(b) of the Agreement on Agriculture regarding the imports of the poultry products outside the TRQ.[10]

and made the following recommendation:

> We recommend that the Dispute Settlement Body request the EC to bring the measures found in this report to be inconsistent with the Licensing Agreement and the Agreement on Agriculture into conformity with its obligations under those agreements.[11]

5. On 29 April 1998, Brazil notified the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by

[10]Panel Report, paras. 294-298.

[11]Panel Report, para. 299.

the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a notice of appeal[12] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 11 May 1998, Brazil filed an appellant's submission.[13] On 14 May 1998, the European Communities filed its own appellant's submission.[14] On 25 May 1998, both the European Communities[15] and Brazil filed appellee's submissions.[16] On the same day, Thailand and the United States filed separate third participants' submissions.[17]

6. The oral hearing in the appeal was held on 9 June 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal. The participants and third participants also gave oral concluding statements. At the request of the Members of the Division, the participants and third participants submitted, on 12 June 1998, written post-hearing memoranda on particular issues relating to the appeal. The participants submitted their respective written replies to these post-hearing memoranda on 15 June 1998.

II. Arguments of the Participants and Third Participants

A. *Brazil - Appellant*

1. The Oilseeds Agreement

7. Brazil asserts that the Panel failed to apply the customary rules of interpretation of public international law properly to the Oilseeds Agreement, as required by Article 3.2 of the DSU. Brazil maintains that in limiting its examination of the Oilseeds Agreement to the "relevant parts" of the Oilseeds Agreement, the Panel failed to examine all of the terms and provisions of the Oilseeds

[12]WT/DS69/4, 29 April 1998.

[13]Pursuant to Rule 21(1) of the *Working Procedures*.

[14]Pursuant to Rule 23(1) of the *Working Procedures*.

[15]Pursuant to Rule 22 of the *Working Procedures*.

[16]Pursuant to Rule 23(3) of the *Working Procedures*.

[17]Pursuant to Rule 24 of the *Working Procedures*.

Agreement in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*[18] (the "*Vienna Convention*"), including, in particular, how many parties there were to the agreement, the structure of the agreement, the content of the different sections and the declared intention of the parties upon seeking authorization from the CONTRACTING PARTIES to negotiate.

8. With respect to the ordinary meaning to be given to all the terms of the Oilseeds Agreement, Brazil states that nothing in the text of the Oilseeds Agreement limits or diminishes the exclusive nature of that Agreement. Brazil contends that the Panel failed to interpret the Oilseeds Agreement in good faith, and instead interpreted Article XXVIII of the GATT without taking the Oilseeds Agreement appropriately into account. Brazil argues that the Panel examined the object and purpose of Article XXVIII of the GATT but not the object and purpose of the Oilseeds Agreement itself. According to Brazil, the Panel should have examined what was, in fact, agreed between the parties in the Oilseeds Agreement and, in particular, the reasons the parties had entered into that Agreement and also its compensatory nature. Therefore, in the Brazilian view, the proper analysis of the Oilseeds Agreement between Brazil and the European Communities required an examination of all the parts of that Agreement as well as the different bilateral oilseeds agreements that the European Communities had reached with different negotiating Members.

9. In the alternative, Brazil argues that the Panel erred in law in not examining the ordinary meaning of the "relevant parts" of the Oilseeds Agreement in the light of their context. Brazil stresses that the European Communities had specifically chosen to negotiate with Brazil separately from the other parties to be compensated so that variable solutions on compensation, rather than a common most-favoured-nation ("MFN") solution, could be reached.

2. Article XXVIII of the GATT

10. Brazil asserts that the Panel failed to apply to Article XXVIII of the GATT properly the customary rules of interpretation of public international law, as required by Article 3.2 of the DSU. According to Brazil, under the terms of Article 31 of the *Vienna Convention*, the Panel should have examined: what was agreed between the parties; whether what was agreed between the parties is legally possible within the terms of Article XXVIII of the GATT; and finally, if it found that the specific agreement was not compatible with other GATT provisions (Articles I and XIII), what the consequences of such incompatibility would be. Rather than adopting this step-by-step approach, the Panel only examined the question as to whether Articles I and XIII of the GATT 1994 apply to

[18]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 33; 8 International Legal Materials 679.

Article XXVIII tariff-rate quotas or whether Article XXVIII of the GATT can give rise to country-specific provisions.

11. In the view of Brazil, Article XXVIII of the GATT is a *lex specialis* providing for bilateral solutions within a multilateral framework and maintaining a balance between bilateral and multilateral rights and obligations. There is nothing in Article XXVIII of the GATT that prevents two contracting parties from making an agreement on a country-specific package of compensatory measures, although, at the same time, nothing requires that compensation must be country-specific. Brazil argues that Article XXVIII allows certain defined contracting parties to negotiate and agree. And it provides that other contracting parties have the right to ensure that such an agreement does not prejudice their own rights. In relation to the tariff-rate quota for frozen poultry meat, Brazil points out that no Member objected to the specific agreement reached between the principal negotiating parties. Therefore, all Members must be deemed to have agreed to the solution reached between Brazil and the European Communities.

12. In Brazil's view, Article XXVIII of the GATT can be an exception to the MFN rule contained in Article I of the GATT 1994 if the parties negotiating the agreement so choose and if the other contracting parties do not object. The European Communities and Brazil had agreed on a country-specific tariff-rate quota and did not provide that the MFN principle should apply to that tariff-rate quota. Brazil argues that the Panel erred in law in finding that an element in compensation for the withdrawal of an MFN concession must be MFN. According to Brazil, the opening of a country-specific tariff-rate quota for frozen poultry meat by the European Communities does not impact negatively on the trade interests of other Members. That quota is not therefore something to which the MFN principle necessarily applies.

3. Article XIII of the GATT 1994

13. Brazil claims that the Panel erred in finding that there was no evidence of an agreement between the European Communities and Brazil on the allocation of the tariff-rate quota to Brazil. The Panel based its finding on supplementary evidence, that is, certain letters from Brazil to the EC Commission, and failed to analyze the main supporting evidence of an agreement -- the Oilseeds Agreement itself. Brazil argues that, by not interpreting the Oilseeds Agreement at all, the Panel failed to examine all of the evidence before it.

14. According to Brazil, the Panel also erred in law in its analysis of the participation of non-Members in tariff-rate quotas allocated within the terms of Article XIII of the GATT 1994. Brazil states that the relevant issue is whether or not a non-Member can be unilaterally allowed to participate

in a compensatory tariff-rate quota, especially in a situation where there is considerable over-quota trade open to that non-Member. It is clear from the text of Article XIII of the GATT 1994, particularly Article XIII:2 and Article XIII:2(d), that the allocation of quota shares is always intended for Members. In footnote 140 of the Panel Report, the Panel reads paragraph 7.75 of the panel reports in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*[19] ("*EC - Bananas*") only partially. According to Brazil, when the panel in *EC - Bananas* quoted the phrase "all suppliers other than Members with a substantial interest in supplying the product", it referred exclusively to all suppliers that are Members with no substantial interest in supplying the product. The Panel appeared to be mandating the inclusion of non-Members, thereby expanding the wording of Article XIII of the GATT 1994, which merely limits the non-discrimination rule as between Members.

15. Brazil submits that the Panel involved itself in a fundamental contradiction on Article XIII of the GATT 1994. On the one hand, the Panel pointed out that the exclusion of non-Members would not be contrary to Article XIII:2 and that Members are free to choose; but, on the other hand, the Panel found that, if non-Members are excluded, the purposes of Article XIII are not achieved. Brazil notes that if the presence of non-Members is necessary for purposes of approximating the shares in the absence of the restriction, then non-Members need to be included in the allocation of the tariff-rate quota. They should be treated like Members. This constitutes a violation of the *WTO Agreement*, which is an international treaty laying down contractual obligations and not *erga omnes* obligations. According to Brazil, the only valid resolution of this contradiction is to interpret Article XIII of the GATT 1994 so as to prevent Members from allocating shares within the tariff-rate quota to non-Members. In Brazil's view, the origin and nature of the tariff-rate quota need to be considered, and the Panel erred in concluding that the compensatory nature of the tariff-rate quota opened under the terms of Article XXVIII of the GATT was not to be considered and that Article XIII of the GATT 1994 was simply a general provision.

4. Article X of the GATT 1994

16. Brazil alleges that the Panel erroneously assessed measures of general application under Article X of the GATT 1994. Brazil maintains that any measure of general application will always have to be applied to specific cases. Therefore, a panel cannot dismiss a claim of inconsistency with Article X of the GATT 1994 merely because the impact of the inconsistency is felt by individual traders in individual situations. The generally applicable regulations of the European Communities

[19]Adopted 25 September 1997, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, and WT/DS27/R/USA.

under review do not allow Brazilian traders to know whether the rules relating to in-quota or out-of-quota trade will be applicable to a particular shipment of frozen poultry meat. The object of Article X of the GATT 1994 is to ensure that traders can become familiar with the applicable trade rules. According to Brazil, mere publication of the rules is not sufficient to ensure familiarity and predictability. The rules must be drafted and administered in a reasonable way. According to Brazil, the Panel should have applied the principle of legal certainty to its examination of Article X of the GATT 1994 and its application to trade in frozen poultry meat.

17. Brazil submits that EC laws should allow traders to know which set of conditions is applicable (the in-quota or the out-of-quota system) in a particular case. There is a general need to draft clear general rules that will allow traders to distinguish between two systems that may be applicable in a given case. The Panel assumed that Brazil was arguing for transparency in each specific licence or shipment. The lack of clarity and transparency in the general rules and in their administration inevitably impact upon specific shipments and licences.

5. Agreement on Import Licensing Procedures

18. To Brazil, the *Agreement on Import Licensing Procedures* (the "*Licensing Agreement*") applies to both in-quota and out-of-quota trade in frozen poultry meat from Brazil to the European Communities, and, in Brazil's view, the Panel erred in interpreting Article 3.2 of the *Licensing Agreement* as applicable only to in-quota trade. Brazil argues that the Panel failed to give an objective statement of reasons for this particular conclusion, and that there is nothing in the text of the *Licensing Agreement* to justify the Panel's findings. In the view of Brazil, nothing in the text or context of Articles 1.2 and 3.2 of the *Licensing Agreement* limits exclusively to in-quota trade the requirement that licensing systems for tariff-rate quotas be "implemented ... with a view to preventing trade distortions".

19. The Panel, in examining whether there had been trade distortions in out-of-quota trade, dismissed the evidence submitted by Brazil on its falling market share. This evidence relates to Brazil's claim that the licensing system distorts total trade. According to Brazil, in holding that an increase in exports demonstrated that the decline in the percentage share in total trade was, first, not relevant and, second, not due to a violation of the *Licensing Agreement*, the Panel failed to address the real issue, which is, whether the fall in the market share was caused by the introduction of the licensing system. Brazil believes that it established a *prima facie* case of distortion of trade and that the burden of proof had shifted to the European Communities to show why the licensing system was not distorting trade. The Panel did not address this matter.

20. According to Brazil, the administration by the European Communities of the tariff-rate quota for frozen poultry meat does not comply with the requirements of fairness, equity and proportionality expressed in Article 1.2, and in the preamble, to the *Licensing Agreement*. Brazil argues that the European Communities allows speculation in licences and the proliferation of traders. Allowing speculation is unfair and distorts trade. It is also "disproportionate". The Panel failed to examine whether speculation was affecting trade relations between Brazilian exporters and EC importers with the subsequent reduction in Brazil's market share. Brazil maintains that the Panel should also have examined the changes to the licensing rules, licence entitlement based on export performance, and the issuance of licences in non-economic quantities in the light of the requirement not to distort trade. Allowing the volume covered by individual licences to fall to below 5.5 tonnes is "disproportionate". The Panel places an unusual emphasis on the fact that the tariff-rate quota licences were fully utilized. According to Brazil, there has been full utilization of the licences because an economic benefit accrues to the holder of the licence when the privilege to import is exercised. The licences can be fully utilized even if the rules on administering the licences are "disproportionate" and unreasonable.

21. Brazil maintains that the Panel incorrectly restricted Brazil's claims concerning transparency under the *Licensing Agreement* to an analysis of Article 3.5(a) of the *Licensing Agreement*. The administration of import licences in such a way that the exporter does not know what trade rules apply is, Brazil insists, a breach of the fundamental objective of the *Licensing Agreement*. Brazil made a comprehensive claim before the Panel relating to the violation of "the general principle of transparency" in the administration of the licensing procedures "as laid down in the Preamble and which underpin" the *Licensing Agreement*. The Panel did not address this claim.

6. Article 11 of the DSU

22. Brazil asserts also that the Panel did not fulfil the duties incumbent upon it under Article 11 of the DSU. Although Brazil acknowledges that Article 11 of the DSU should not be interpreted so as to limit the scope of any investigation a panel might wish to make or to limit what a panel considers will assist the DSB in making recommendations, Brazil maintains nonetheless that the wide discretion to examine issues of concern should not disguise a failure of a panel to fulfil the requirement to make an objective assessment of the matter before it. Nor, when a panel chooses to examine issues of principle, should it be allowed the discretion not to examine evidence of the practice of Members in relation to those principles.

23. Brazil also contends that the Panel did not address a series of arguments put forward by Brazil in relation to both GATT law and the practice of the Members: first, the similarities between Articles XXVIII and XXIV of the GATT that lead Brazil to question why the MFN principle in

Article I of the GATT 1994 must always apply in relation to Article XXVIII, but not necessarily so in relation to Article XXIV; second, the flexible nature of Article XXVIII of the GATT, which permits bilateral agreements and the opening of bilateral concessions subject to the review of all Members; and, third, the text of Article XXVIII of the GATT, which allows the establishment of country-specific tariff-rate quotas when other Members do not object.

24. The Panel failed in its obligation to the DSB to examine the practice of the Members. The Panel erred in law in considering that the practice of the Members does not show the possibility of departing from the MFN principle in the case of tariff-rate quotas resulting from Article XXVIII of the GATT. According to Brazil, Article XXVIII of the GATT, in and of itself, cannot be used by the Panel as an evidence to show that the Oilseeds Agreement signed between the European Communities and Brazil could not give rise to country-specific tariff-rate quotas.

25. Brazil submits that panels, and the Appellate Body, do not have the competence, within the terms of the DSU, to limit or change the clear terms of agreements made between two Members to which the other Members do not object. The MFN principle is not absolute; there are exceptions. If the Members have determined that the tariff-rate quota for frozen poultry meat is an exception, then a panel must respect that determination of the Members. If, on the other hand, a panel does find that an agreement is void, it must examine the consequences of such a void agreement. The Panel did not examine this matter.

B. *European Communities - Appellee*

1. The Oilseeds Agreement

26. In the view of the European Communities, the Panel reasonably and correctly performed its task of interpreting the Oilseeds Agreement in the proper manner, by applying the principles established in Article 31 of the *Vienna Convention*. First, the Panel identified the relevant part of the agreement in dispute. Second, when addressing the "ordinary meaning" of the relevant terms of the Oilseeds Agreement, the Panel analyzed the arguments of both parties to conclude that "[various arguments made by Brazil] … do not constitute conclusive evidence to the effect that the particular terms used in the Oilseeds Agreement must be read in the way claimed by Brazil". Third, the Panel also concluded that the context of the terms "global annual tariff quota" does not give any additional guidance for the purpose of determining a particular interpretation of the terms involved. Fourth, the Panel analyzed the object and purpose of the Oilseeds Agreement, which could not be assessed without determining the object and purpose of the procedure set out in Article XXVIII of the GATT.

According to the European Communities, such an analysis is necessary in particular to consider the inter-relationship between this provision and Article I of the GATT 1994. The conclusion of the Panel that there is no provision in the WTO Agreements which allows departure from the MFN principle in the case of tariff-rate quotas resulting from Article XXVIII negotiations removed any reasonable need to address the subordinate issue of the object and purpose of the specific procedure under Article XXVIII that was concluded with the Oilseeds Agreement.

2. Article XXVIII of the GATT

27. The European Communities maintains that the Panel findings on the interpretation of Article XXVIII of the GATT are correct, and that the arguments put forward by the Panel to demonstrate that Article XXVIII of the GATT does not waive Members' obligations with respect to the MFN clauses contained in Articles I and XIII of the GATT 1994 are extensively reasoned.

28. In the view of the European Communities, Article XXVIII is *lex generalis* insofar as it provides the normal procedural framework to be used by any Member in order legally to modify, change or withdraw, totally or partially, one of its concessions. Brazil is "wrong" to suggest that there is nothing in Article XXVIII of the GATT that prevents two contracting parties from agreeing on a country-specific package of compensatory measures. The European Communities argues that the terms of Article XXVIII:2, read in their context and in the light of its object and purpose, do not support Brazil's claims with respect to the Oilseeds Agreement. The agreement resulting from the Article XXVIII oilseeds negotiations and the poultry meat tariff concessions resulting from the *Marrakesh Agreement Establishing the World Trade Organization*[20] (the "*WTO Agreement*") had the same objective. The fact that the oilseeds negotiations and the Uruguay Round negotiations were initiated for partially different reasons cannot affect these conclusions. The negotiating history of Article XXVIII of the GATT confirms that Articles I and XIII of the GATT 1994 must be respected when achieving an agreement in the framework of compensatory adjustment negotiations. The fact that the Article XXVIII negotiating process occurs on a bilateral basis cannot change this.

3. Article XIII of the GATT 1994

29. The European Communities argues that Brazil's claim concerning the existence of an agreement between the European Communities and Brazil on the allocation of the tariff-rate quota for frozen poultry meat should be rejected. The Panel's conclusions, drawn from the examination of the letters sent by Brazil to the European Communities, are logical and fully reasoned and relate to

[20]Done at Marrakesh, 15 April 1994.

questions of fact. Thus, Brazil's complaints in this respect appear totally unjustified and cannot properly be the subject of this appeal. According to the European Communities, the fact that the European Communities did not answer these letters officially is further evidence of the lack of explicit (or even implicit) agreement with Brazil on this issue.

30. The European Communities states furthermore that the Panel correctly interpreted Article XIII:2(d) of the GATT 1994 and that Brazil's appeal of the Panel's finding that Article XIII does not oblige Members to include or exclude non-Members therefore should be rejected. The EC position that Article XIII of the GATT 1994 operates only as a positive obligation to provide MFN treatment to Members when allocating tariff-rate quota shares is based on both the terms of Article XIII:2 and on its objective. An allocation of a share of a tariff-rate quota has been considered to be an advantage by the Appellate Body in *EC - Bananas*[21] to such an extent that the basic principle of non-discrimination applies strictly when allocating shares of a tariff-rate quota, including for Members not having a substantial interest. Thus, by assigning a share of the tariff-rate quota to all substantially interested Members, including Brazil, the European Communities has provided Brazil with the best possible (and legally sound) situation in the trade of frozen poultry meat within the tariff-rate quota.

31. The European Communities insists that while there is a general obligation to treat on an MFN basis any Member with respect to advantages granted even to a non-Member, there is no provision in the *WTO Agreement* forbidding Members from providing market access to non-Members on an MFN basis. Moreover, Brazil's claim that the European Communities should exclude any non-Member supplying country from the allocation of the tariff-rate quota would inevitably entail an increase in its share of the tariff-rate quota. This is an "unjustified" request in the light of the chapeau of Article XIII:2 of the GATT 1994. Market access to the residual part of a tariff-rate quota is a matter that cannot harm in any manner the trade interests of Members having a substantial interest if their shares have been correctly allocated in accordance with the relevant provisions of Article XIII. According to the European Communities, this is the case for Brazil with respect to the allocation of the duty-free tariff-rate quota concerning frozen poultry meat, and therefore Brazil's position that Article XIII of the GATT 1994 is for the benefit of Members only is incorrect.

32. The European Communities maintains that the text of Article XIII:2(d) of the GATT 1994 is clear: a quota must be allocated among "supplying countries". However, the rights and obligations attached to the allocation between supplying countries having a substantial interest apply only to "contracting parties". Thus, only substantial suppliers who are Members can claim participation in an

[21]Brazil refers to Appellate Body Report, *EC - Bananas*, adopted 25 September 1997, WT/DS27/AB/R, paras. 161 and 162.

agreed distribution or can expect a share in case the importing Member proceeds to an allocation. According to the terms of Article XIII, the shares to be allocated to the substantial suppliers/Members can be calculated as "proportions … of the total quantity or value of imports of the products". The European Communities insists that it applied the provisions of Article XIII:2(d) to the tariff-rate quota for frozen poultry meat: "the allocation has been effected only with respect to Members having a substantial interest on the basis of proportions of imports into the EC during a previous representative period of three years". Non-Member participation has been limited to the "others" category.

4. Article X of the GATT 1994

33. The European Communities submits that the Panel's approach in interpreting "measures of general application" in Article X of the GATT 1994 was correct. Article X requires that the general terms and conditions of trade regulation be transparent so that operators are aware of the conditions applying to commerce. Application of Article X in the manner suggested by Brazil would be impossible to implement in practice and would require that Members manage completely the terms and conditions of trade. With respect to out-of-quota trade, the European Communities demonstrated, to the satisfaction of the Panel, as a matter of fact, that it has fully complied with the requirements of Article X. By arguing that the Panel mischaracterized its claim under Article X, Brazil is seeking to refine and re-organise its arguments. Brazil also raises an additional argument that the Panel erred in law by failing to apply the principle of legal certainty. According to the European Communities, the approach followed by Brazil is contrary to the provisions of Article 17.6 of the DSU, and therefore those of Brazil's submissions that amount to either a re-characterization of its arguments or to new arguments not submitted to the Panel should be dismissed as inadmissible.

5. Agreement on Import Licensing Procedures

34. The European Communities contends that the Panel correctly restricted the application of the *Licensing Agreement* to in-quota trade. This ruling is not only consistent with the text of the Agreement, but also it is the logical consequence of the Panel's ruling on Article X of the GATT 1994. Articles 1.2 and 3.2 of the *Licensing Agreement* make it clear that the trade restriction is clearly linked to the effects flowing from the restriction imposed.

35. The European Communities submits that Brazil has been unable to demonstrate any trade distorting effects of the administration of the tariff-rate quota for frozen poultry meat, on either in-quota or out-of-quota trade. Brazil's submissions concerning falling market share and burden of proof amount to a request to the Appellate Body not to correct an error of law by the Panel but rather to re-

investigate and re-assess the factual questions before the Panel. These submissions do not fall within the proper scope of the appellate process. Brazil seeks to advance before the Appellate Body "re-worked arguments" on transparency, equity and proportionality, thereby re-introducing its arguments on speculation and economic quantities that were considered and dismissed by the Panel. This constitutes an "abuse" by Brazil of the appellate process.

6. Article 11 of the DSU

36. The European Communities agrees with the Panel that Article XXVIII of the GATT does not waive Members' obligations with respect to the MFN clauses contained in Articles I and XIII of the GATT 1994. In the context of the tariff-rate quota for frozen poultry meat, the issue of the relations between Article XXIV and Article XXVIII was a "side-issue". Although paragraphs 4 and 5 of Article XXIV provide a legal basis for an exception to Article I of the GATT 1994, these relate to the actual creation of a customs union. The Oilseeds Agreement did not involve the creation of a customs union or a free-trade area. The Panel was therefore fully justified in not addressing that specific argument. According to the European Communities, Brazil confuses the legal nature of a particular tariff treatment granted through an Article XXVIII procedure, that is based on the MFN, with the economic effects of that particular tariff treatment. Article XXVIII is a procedural, rather than a substantive, provision and no Article XXVIII negotiation in which the European Communities was involved was concluded with a non-MFN agreement.

37. With respect to the practice of Members in Article XXVIII negotiations, the European Communities asserts that Brazil has not shown the existence of a "concordant, common and consistent" practice of non-MFN Article XXVIII agreements. Brazil's argument that Articles I and XIII do not necessarily apply to tariff-rate quotas opened as a result of compensation negotiations under Article XXVIII of the GATT, is not supported either by the text of the *WTO Agreement* or past GATT practice. The *WTO Agreement* entered into force after the conclusion of the Oilseeds Agreement. At the time of the negotiation of the Oilseeds Agreement, the practice of the GATT contracting parties, including panels, was squarely within the MFN interpretation of concessions. Moreover, as found by the Panel, the Oilseeds Agreement was incorporated into Schedule LXXX, whose poultry meat tariff concession is also undisputedly a MFN tariff commitment. Finally, the Oilseeds Agreement was "undoubtedly aimed at (partially) replacing MFN concessions in Oilseeds".

C. *European Communities - Appellant*

1. Relationship between Schedule LXXX and the Oilseeds Agreement

38. The European Communities is satisfied with the conclusion reached in the Panel Report on the relationship between the Oilseeds Agreement and Schedule LXXX, but submits that the Panel should have followed a different line of legal reasoning to reach that conclusion. According to the European Communities, the relationship between the bilateral Oilseeds Agreement and the later Schedule LXXX should be examined on the basis of Article 59.1, or, in the alternative, Article 30.3, of the *Vienna Convention*. The Panel did not draw the logical conclusions from its finding in paragraph 206 of the Panel Report that Articles 59.1 and 30.3 of the *Vienna Convention* are customary rules of interpretation of public international law. Rather than applying Article 3.2 of the DSU and the *Vienna Convention*, the Panel referred to the panel report in *EEC - Oilseeds*, which pre-dates the entry into force of the DSU and which is therefore "irrelevant" in this case because it was decided in the context of a non-violation case.

39. The undisputed evidence before the Panel showed that the results of the bilateral Oilseeds Agreement were incorporated into the final stages of the negotiations of Schedule LXXX and eventually agreed and ratified by all parties, including Brazil. This was a "conscious act" of the two parties in order to clarify their mutual obligations. In the meantime, the European Communities had autonomously put into force the tariff-rate quota as an MFN market access opportunity. The fact that the EC Schedule applicable at the time did not provide for any tariff treatment for frozen poultry meat other than variable levies should not be overlooked.

40. In the present case, the European Communities asserts that only one alternative is logically possible: either the Oilseeds Agreement and Schedule LXXX are identical in their content, or they are not. If they are identical, then the principle laid down in Article 59.1 of the *Vienna Convention* must be applicable because, in the specific context of the WTO, Brazil and the European Communities intended that the matter should be governed by the later treaty, which introduced the tariff-rate quota as a new element of tariff binding within the framework of the EC Schedule. If they are not identical, the earlier Oilseeds Agreement was changed by the later Schedule LXXX with the assent and the active participation of all parties, including Brazil. Thus, the rule established by Article 30.3 of the *Vienna Convention* must be applicable, and the Oilseeds Agreement can only be applied to the extent that its provisions are compatible with those of the later treaty, namely, Schedule LXXX. And, in the view of the European Communities, there cannot be any doubt that a new tariff-rate quota negotiated during the Uruguay Round was meant to be applied on an MFN basis.

2. Agreement on Agriculture

41. The European Communities contends that contrary to the legal interpretation applied by the majority of the Panel, the phrase "on the basis of the c.i.f. import price" in Article 5.1(b) of the *Agreement on Agriculture* refers to the cost of the product plus insurance and freight charges and does not include the duties payable.

42. Article 5.1(b) refers to the price at which imports "may enter" the customs territory. This wording confirms that the price in issue is that which is calculated at the moment a shipment arrives and before its entry on to the EC market, at which point taxes and duties become payable. The Panel incorrectly assumed that the words "the price at which imports of that product may enter the customs territory" and the words "market entry price" are equivalent. The phrase "on the basis of" in Article 5.1(b) means "founded on". The authors of the *Agreement on Agriculture* selected the c.i.f. price as the principal parameter for the application of the special safeguard. The Panel's statement in paragraph 278 of the Panel Report that "the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters" incorrectly presupposes that the c.i.f. price is always the basis for the calculation of the duties to be included in the notion of "market entry price". Duties upon importation of frozen poultry meat into the European Communities are not *ad valorem* but, rather, fixed duties that are calculated on the basis of the quantities imported and not on the basis of the c.i.f. price. The European Communities maintains that the Panel's "restrictive" reading of Article 5.1(b) does not take account of the proper context of that provision, in particular, footnote 2 to Article 5.1(b) and Article 5.5, and disregards the fact that the system applying the special safeguard clause is separate and parallel to the tariffication scheme applied under Article 4.2 of the *Agreement on Agriculture*.

43. Moreover, the European Communities states, the Panel disregarded the broader context of the border protection measures in the agricultural sector that existed before the Uruguay Round and their conversion into ordinary customs duties. The special safeguard provision exists to ensure that unknown or unpredictable factors that would cause c.i.f. prices of imports to drop below the level taken as a reference point during the Uruguay Round negotiations, could not fundamentally alter the internal market prices and the domestic price support system. This is in line with the results of tariffication as embodied in the schedules. It is for this reason that Articles 5.1 and 5.5 of the *Agreement on Agriculture* provide for calculation of the additional duty "on the basis of the c.i.f. price". If this basis is altered, then the entire result of the Uruguay Round is modified. The result of the majority of the Panel's interpretation is, as the dissenting member noted, that where a specific duty is payable and this is higher than the trigger price, the trigger price can never be exceeded. With

respect to "subsequent practice" in Article 31.3(b) of the *Vienna Convention*, the European Communities understands that the practice of other Members is not to include customs duties in the calculation under Article 5.1(b). A document used in the WTO technical assistance training courses confirms this approach.

44. Should the Appellate Body reverse the Panel's findings relating to Article 5.1(b) of the *Agreement on Agriculture*, the European Communities submits that the Appellate Body should dismiss Brazil's requests that issues relating to Articles 5.5 and 4.2 of that Agreement be taken up. These issues were not appealed in accordance with the rules on the scope of an appeal in Article 16.4 of the DSU and in Rules 20.2(d) and 21.2(b)(i) of the *Working Procedures.* For reasons of due process, consistency and fair treatment among all Members, the European Communities argues that the Appellate Body should not depart from the "strict" interpretation of these provisions adopted in *EC - Bananas*. In respect of the reason given by the Division in the course of the oral hearing, "i.e. that 'due process considerations' justified an additional exchange of written memoranda" between the participants, the European Communities wonders whether it would be compatible with the DSU to incorporate other due process considerations that are not included in the DSU, any other covered agreement, or the *Working Procedures.* Any specific procedures adopted pursuant to Rule 16.1 of the *Working Procedures* must be consistent with the DSU, the other covered agreements and the *Working Procedures* themselves.

45. According to the European Communities, in practice, there is no need for the Appellate Body to address in this case the theoretical issue raised by Brazil of whether the application by a panel of the principle of judicial economy would allow departure from the explicit provisions of Article 16.4 of the DSU and Rule 20 of the *Working Procedures.* The Panel made a finding in paragraph 286 with respect to Article 5 of the *Agreement on Agriculture* and Article X of the GATT 1994, that Brazil "had not specified the manner in which the EC has violated these provisions". Brazil did not appeal from this finding, and the European Communities cannot be required to suffer the consequences of an appellant's failure to define properly the scope of its appeal.

46. According to the European Communities, Brazil's claim under Article 4.2 of the *Agreement on Agriculture* was vague and was not supported by factual or legal arguments. The purpose of the appellate process is not to allow Members to correct or re-plead arguments that were barely sketched out in the panel procedure and which, with hindsight, may be expanded, refined or improved. Brazil should not be allowed to abuse the appellate procedure by invoking non-existent reasons of "due process" when Brazil did not properly make its case clear during the panel procedure. In any event, the Panel's findings on Articles 5.5 and 4.2 are not logically or legally linked with the issues

concerning the interpretation of Article 5.1(b) of the *Agreement on Agriculture*, and the Panel erred in creating a link among these provisions that is non-existent in fact and law.

47. In the view of the European Communities, a determination as to whether the representative price violates Articles 5.5 and 4.2 of the *Agreement on Agriculture* requires a finding of fact centered on the examination of EC legislation. Examination of EC legislation is not an interpretation of legislation as such: it is a judgment as to whether or not the European Communities, in applying its law, is acting in conformity with its WTO obligations. The Appellate Body cannot address issues of fact and is bound by the determinations of fact made during the panel procedure. Brazil itself admits that the Appellate Body would have to address issues of fact in order to decide these questions. The European Communities submits that certain assertions by Brazil relating to the document submitted by the European Communities to the Panel on 21 November 1997 misrepresent the reality of the panel procedure. The European Communities also states that Brazil breached the confidentiality requirements of the panel procedure.

48. According to the European Communities, Brazil acknowledges that the EC rules on the application of the special safeguard provision are in line with the provisions of Article 5 of the *Agreement on Agriculture*. Thus, Brazil has formally accepted that its complaint concerning Article 5.5 of the *Agreement on Agriculture* is unfounded in law and should be dismissed.

49. The European Communities observes further that the *Agreement on Agriculture* does not impose a pre-determined system of calculating the "c.i.f. price of the shipment expressed in terms of the domestic currency." Thus, the fact that a representative price system is not explicitly provided in the *Agreement on Agriculture* does not imply that the use of such a system automatically constitutes a violation of Article 5. The representative price is based on two main regulations. First, Regulation 3290/94, which implements the agreements concluded during the Uruguay Round in the agricultural sector, amends Regulation 2777/75. The revised version of Article 5.3 of Regulation 2777/75 lays down the general rule for the application of the special safeguard additional duties as provided for in Article 5 of the *Agreement on Agriculture*. Second, the detailed rules for the application of this provision are found in Regulation 1484/95. The European Communities states that Article 3 of that Regulation shows that "any importer is completely free to follow an approach based on a shipment by shipment basis if he so wishes", as indicated by Article 5 of the *Agreement on Agriculture*. The apparent limitation of this entitlement to situations in which the c.i.f. import price is higher than the applicable representative price is not in violation of the *Agreement on Agriculture*. It represents, in fact, a substantial benefit for the importer: if the c.i.f. price is lower than the representative price, then the additional duty to be paid is higher.

50. The European Communities states that the representative price, which is an average c.i.f. price, is determined at regular intervals in order to keep the system up-to-date. Availability of recourse to the different sources set out in Article 2.1 of Regulation 1484/95 is designed to ensure that the average c.i.f. price arrived at for a given country of origin "is truly representative". For the poultry products in question, the representative price is, in general, calculated on the basis of free-at-frontier offer prices transmitted by the EC member states, either from usual monthly import statistics or from *ad hoc* price recording of such date by importers. Thus, the European Communities is, in fact, using the free-at-frontier price. The representative price is a means of boosting trade by reducing bureaucracy and paperwork.

51. According to the European Communities, the representative price does not impose penalties on, or create deterrents for, the importer. According to Article 3.2 of Regulation 1484/95, the importer is given four months from the date of acceptance of the declaration of release for free circulation to provide the necessary proof that the c.i.f. import price is higher than the representative price. If no such proof is provided, then the security is withheld. This security amounts exactly to the additional duty calculated on the basis of the representative price plus interest as from the date of release of the goods into free circulation. The evidence requested of the operators in order to establish the c.i.f. price of a specific shipment consists of normal and customary commercial documents for the shipment of the products. The representative price is "more transparent" than the determination of the c.i.f. price on a shipment-by-shipment basis. It is a "more stable and less variable system" than the shipment-by-shipment approach explicitly mentioned in Article 5.5 of the *Agreement on Agriculture*. It provides operators with published c.i.f. prices that are regularly updated, but are applied only after they have been published. There is, according to the European Communities, no relation between the representative price and a variable levy.

D. *Brazil - Appellee*

1. Relationship between Schedule LXXX and the Oilseeds Agreement

52. Brazil argues that the Panel reached the correct conclusions on the applicability of Articles 59.1 and 30.3 of the *Vienna Convention*. Article 59 of the *Vienna Convention* is not applicable to the present situation because the Oilseeds Agreement was incorporated into the *WTO Agreement*, and therefore the intention was that the matter be governed by the *WTO Agreement*, in the light of the Oilseeds Agreement. The intention of the parties was to incorporate the Oilseeds Agreement into the *WTO Agreement*. This confirms the relevance of the Oilseeds Agreement in understanding Schedule LXXX. According to Brazil, this is a question of the continuation of a valid

agreement that was not terminated and was specifically incorporated into the later agreement intact and without amendment. For this reason, there was no provision in the Oilseeds Agreement relating to its termination, or denunciation or withdrawal. The Oilseeds Agreement remains a valid agreement between Brazil and the European Communities, is incorporated into the *WTO Agreement* and, therefore, remains the basis for the interpretation of the tariff-rate quota for frozen poultry meat.

53. Brazil states that the European Communities showed its intention to continue to be bound by the terms of the earlier Oilseeds Agreement by specifically incorporating the earlier agreement into the later *WTO Agreement*. The matter is therefore governed by the *WTO Agreement* as incorporating the Oilseeds Agreement, which is compatible with the *WTO Agreement*. Country-specific tariff-rate quotas are compatible with the *WTO Agreement* and with Members' Schedules, and Members provide for country-specific tariff-rate quotas in their Schedules.

54. According to Brazil, the European Communities misreads Article 59 of the *Vienna Convention* by limiting its application to only one element of the subsequent treaty, its Schedule, rather than referring to the *WTO Agreement* as a whole. Members intend that their relations should be governed by the *WTO Agreement* read in the light of earlier agreements reached between Members. The Oilseeds Agreement may be considered part of the GATT 1994, as a protocol or certification relating to tariff concessions within the meaning of paragraph 1(b)(i) of the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

55. Article 30.3 of the *Vienna Convention* is not applicable in this case because the country-specific aspects of the incorporated Oilseeds Agreement are fully compatible with the *WTO Agreement*. The incorporation of the Oilseeds Agreement into the *WTO Agreement* did not change the terms of the earlier agreement.

56. Brazil argues that if the tariff-rate quotas for frozen poultry meat in the Oilseeds Agreement and the *WTO Agreement* are identical, and if the Oilseeds Agreement was incorporated into Schedule LXXX, then, on the basis of Article 30.2 of the *Vienna Convention*, the tariff-rate quota in Schedule LXXX is the same as the tariff-rate quota in the Oilseeds Agreement and is therefore subject to the conditions set out in the Oilseeds Agreement. If the tariff-rate quotas in the Oilseeds Agreement and the *WTO Agreement* are not identical, and if the Schedule LXXX tariff-rate quota is a new tariff-rate quota negotiated within the terms of the Uruguay Round, then the European Communities would be in breach of its obligations under the Oilseeds Agreement, Article XXVIII of the GATT and Article 26 of the *Vienna Convention*.

57. According to Brazil, customary international law cautions against the application of one legal maxim for the interpretation of treaties to the exclusion of others. Acceptance of the EC arguments

on Articles 59 and 30.3 of the *Vienna Convention* would give undue weight to the legal maxim *lex posterior derogat prior* on the issue of the succession of treaties relating to the same subject-matter. To ignore the relevance of the Oilseeds Agreement would undermine the security and predictability in the multilateral trading system and the fundamental principle of legal certainty. The European Communities "did not perform its obligations to Brazil in good faith".

2. Agreement on Agriculture

58. In the view of Brazil, the Panel reached the correct conclusion on the interpretation of Article 5.1(b) of the *Agreement on Agriculture*. The special safeguard provision is an exception to the requirement set out in Article 4.2 of that Agreement. Contrary to the EC argument, the system applying the special safeguard clause is not separate and parallel to the tariffication process under Article 4.2. The provisions are linked. Special safeguards are dependent on the implementation of tariffication. The reduction in tariffs over time may, in certain circumstances, increase the need for the introduction of special safeguards, but this does not necessarily make the two processes a different set of rights and obligations.

59. According to Brazil, the "price at which a product may enter the customs territory" is the duty-paid price and this market entry price, while "determined on the basis of" the c.i.f. price, is not the c.i.f. price itself. Payment of any applicable customs duty is a *sine qua non* of customs clearance. Brazil agrees with the finding of the Panel that, for present purposes, the words "market entry price" and the "price at which a product may enter the customs territory" are equivalent. Article 5.1(b) requires that the c.i.f. price is the price from which the calculation of the market entry price begins, but the market entry price is not the same as, but is "based on", the c.i.f. price.

60. Brazil stresses that Members were free to fix an appropriate "reference price" (or trigger price) which was only, in general, to be based on the average c.i.f. unit value. Members had a certain discretion in fixing the reference price. The fact that some Members may now be in a situation where use of the special safeguard is unlikely in relation to a limited number of products because of the level of the reference price which they have set and the level of tariff they have negotiated, is not material to the proper interpretation of the text of Article 5.

61. Brazil asserts that if the Appellate Body reverses the findings of the Panel on Article 5.1(b) of the *Agreement on Agriculture*, then the question will remain whether or not the European Communities has complied with the other provisions of Article 5, in particular Article 5.5, or with Article 4.2, and that the Appellate Body must consider the proper procedure to be followed with regard to the finding of a panel on the basis of judicial economy. Because the Panel did not examine

the substance of the claims under Articles 5.5 or 4.2 of the *Agreement on Agriculture*, there were no issues of law to be appealed by Brazil. According to Brazil, the very act of appeal of a panel's finding must open the possibility for the appellee to address, not only the grounds of appeals raised by the appellant, but also those issues of law and of fact that become germane as a consequence of the examination of those grounds. This would be "in line with" the doctrine of due process, to consider otherwise would be to defeat the doctrine of judicial economy. Should the Appellate Body reverse the findings of the Panel on Article 5.1(b), Brazil considers that the Appellate Body should also address the question of the substantive issues raised by Brazil so as not to diminish Brazil's rights in relation to dispute settlement. Brazil considers that the best approach is the approach adopted in previous appeals, and that Rule 16 of the *Working Procedures* allows such an approach. The problem in this case only arises if a finding is cross-appealed (without the benefit of a notice of appeal) and if that finding is reversed.

62. Brazil maintains that nothing in Article 5 of the *Agreement on Agriculture* permits a Member to introduce a representative price system. According to Brazil, the representative price mechanism distorts the implementation by the European Communities of Article 5 and results in the application of additional duties in a manner incompatible with that Article. Even though Regulation 1484/95 gives importers of out-of-quota frozen poultry meat two options for establishing the c.i.f. price of any one shipment, the representative c.i.f. price nevertheless determines the conditions for the import of frozen poultry meat into the European Communities. This is so because, upon importation, the European Communities requires immediate payment of the additional duty calculated on the basis of the representative price. If the importer elects to establish the actual c.i.f. price, payment of a security of the same value as the additional duty is required. This security must be pre-paid, and it is forfeited unless the trader can comply with the proofs required under Article 3.1 of Regulation 1484/95.

63. According to Brazil, the information provided by the European Communities to the Panel on the use by traders of all origins of the option to prove the actual c.i.f. price was inadequate and lacked transparency. Because of the complexities of the system, the use of the representative price is the rule and not the exception. The European Communities did not provide information to the Panel on how precisely the representative price is calculated in practice. Although the representative price is supposed to be representative of an average c.i.f. price of all shipments from any one origin, there is no element in its calculation that refers to the value of the product at the EC frontier or to the value of the product on world markets. To comply with Article 5 of the *Agreement on Agriculture*, the European Communities is obliged to use the actual world price or free-at-frontier price. Brazil argues that as an exception to Article 4.2 of the *Agreement on Agriculture*, Article 5 must be construed narrowly. The representative price is not the c.i.f. price, nor is it representative of the c.i.f. price of any one shipment. Therefore, the representative price mechanism is not provided for, nor in

compliance with, Article 5 of the *Agreement on Agriculture*. Brazil did not have an opportunity to comment on the EC submission to the Panel of 21 November 1997 concerning the calculation by the European Communities of the representative price, other than in a letter responding to the EC protest that Brazil breached confidentiality with respect to these documents, and in the comments on the interim report.

64. Brazil contends that, because the additional duty or bond that is payable on the basis of the EC representative price varies regularly depending on the published representative price, it is equivalent to a variable levy. This form of border protection measure is prohibited under Article 4.2 of the *Agreement on Agriculture*. Additional duties under Article 5.1(b) should be allowed to rise and fall on the basis of the shipment-by-shipment c.i.f. price changes.

E. *Arguments by the Third Participants*

1. Thailand

65. Thailand is of the view that a Member is free to conclude any bilateral agreement with any country. However, if the agreement has any effect on the rights and obligations of Members, all the provisions of general application of the *WTO Agreement*, including Articles I, III and XIII of the GATT 1994, must apply. Thailand agrees with the Panel's findings in paragraphs 213, 216 and 218 of the Panel Report. Allocation of any tariff-rate quota is governed by, and must be consistent with, Article XIII:2(d) of the GATT 1994. Insofar as the allocation of tariff-rate quotas to Members is concerned, Thailand agrees with the Panel's finding in paragraph 232 of the Panel Report that "Article XIII is a general provision regarding the non-discriminatory administration of import restrictions applicable to any TRQs regardless of their origin."

66. Thailand disagrees with the Panel's conclusion in paragraph 262 of the Panel Report that the tariff-rate quota for frozen poultry meat is fully utilized. Because the import licensing regime of the European Communities is operating in such a way that exporters do not know whether the transactions involved are within or outside the tariff-rate quota, and thus cannot take that factor into account when making the transactions, Thailand maintains it cannot be said that the tariff-rate quota is fully utilized. Once a tariff-rate quota is allocated, it must be administered in a manner that enables Members to "utilize fully the share of any such total quantity or value which has been allotted" to them in accordance with Article XIII:2(d) of the GATT 1994. No conditions or formalities may be imposed that would prevent such full utilization. This is a substantive provision that Thailand understands to be applicable not only with respect to the total quantity or total value *per se*, but also

in respect of the full benefits derived from the tariff-rate quotas, including the full enjoyment of the in-quota tariff rate.

67. Thailand agrees with the Panel's finding in paragraph 278 of the Panel Report that the "ordinary meaning of the phrase 'the price at which imports may enter the customs territory of the member granting the concession' would include payment of applicable duties" and in paragraph 282 of the Panel Report that "the EC has not invoked the special safeguard provision with respect to poultry in accordance with Article 5.1(b)." Thailand, however, disagrees with the Panel's exercise of judicial economy concerning Article 5.5 of the *Agreement on Agriculture* and argues that the Panel should have examined the consistency of the representative price with Article 5.1(b). In Thailand's opinion, the representative price is not in conformity with Article 5.1(b), which requires that the market entry price must be calculated on the basis of the c.i.f. import price of the shipment concerned alone. To the extent that the representative price is used in place of the c.i.f. import price for comparison with the trigger price for the purpose of setting additional duties to be paid as special safeguard duties, it is also inconsistent with Article 5.5 of the *Agreement on Agriculture*, which requires that the comparison be made only between the c.i.f. import price and the trigger price. Because the representative price is calculated on the basis of an average of a variety of prices, including internal market prices that are not c.i.f. prices within the meaning of Article 5.1(b), the representative price is thus functioning in such a way as to stabilize the price of the product concerned in the same fashion as the former EC regime of variable import levies.

2. United States

68. The United States supports the conclusion of the Panel that Brazil is not entitled to an allocation of the entire in-quota quantity of the tariff-rate quota for frozen poultry meat. The United States maintains that Brazil has failed to demonstrate that the EC allocation of this tariff-rate quota is inconsistent with the obligations of the European Communities under Articles XIII and XXVIII of the GATT, or that Brazil is otherwise entitled to the entire in-quota quantity of this tariff-rate quota. Brazil is incorrect to argue that as no Member objected, all Members must be deemed to have agreed to the solution agreed between Brazil and the European Communities. According to the United States, Brazil misunderstands the purpose of a notice withdrawing concessions under Article XXVIII of the GATT. Failure to have recourse under Article XXVIII:3 of the GATT can hardly be perceived as "agreement" of all Members, since not all Members have a right to such recourse. Brazil also errs in claiming that the opening of a country-specific tariff-rate quota for frozen poultry meat by the European Communities does not give rise to a negative impact on the trade interests of other

Members. A country-specific tariff-rate quota increases a trade opportunity for one Member, which receives a benefit relative to other Members.

69. The United States believes that the Panel correctly found in paragraph 230 of the Panel Report that there is "nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from Members only", and, consequently, that it was consistent with Article XIII of the GATT 1994 for the European Communities to allow non-Members access to the tariff-rate quota. The obligations in Article XIII with respect to the treatment of Members when allocating a tariff-rate quota in no way imply that non-Members must be excluded from access to the in-quota quantity of a tariff-rate quota. The Panel correctly defined the issue before it as whether the European Communities is required to exclude non-Members from the basis of the calculation of tariff quota shares.

70. The United States supports the Panel's conclusion in paragraph 269 of the Panel Report that licences granted to a specific company or tariffs applied to a specific shipment would not be considered measures of "general application" within the scope of Article X of the GATT 1994. Moreover, the United States agrees with the EC view that Brazil's request to have each shipper informed of whether a shipment would be in-quota or out-of-quota could be impossible to implement in practice and is not required by Article X of the GATT 1994.

71. To the extent that the Panel's statement in paragraph 249 of the Panel Report that "[t]he Licensing Agreement, as applied to this particular case, only relates to in-quota trade" could be read to require that the "effects" referred to in Article 3.2 of the *Licensing Agreement* are limited to effects on in-quota imports, the United States supports the appeal of Brazil that the Panel's reasoning should be modified. The United States also supports Brazil's appeal with respect to the Panel's reliance on "full utilization" of the in-quota quantity as being dispositive of whether or not there is a breach of Article 3.2 of the *Licensing Agreement*. To the extent that the Panel's reasoning may be read to imply that full utilization of a quota allocation would preclude a finding of trade distortion, the United States supports the appeal of Brazil that the Panel's reasoning should be modified.

72. According to the United States, the Appellate Body should reject the EC appeal concerning the application of Articles 30.3 and 59.1 of the *Vienna Convention*. The approach advocated by the European Communities is based on the erroneous assumption that the agreement between the European Communities and Brazil -- whether reflected in the bilateral Oilseeds Agreement or in Schedule LXXX -- is dispositive in this case. According to the United States, it is not the bilateral agreement between the European Communities and Brazil which is at issue; rather, the question is whether the current allocation by the European Communities of its tariff-rate quota is in accordance

with its obligations under Articles XIII and XXVIII of the GATT. The Oilseeds Agreement is not a "covered agreement" under the DSU. The Panel correctly set forth the role of the Oilseeds Agreement in its analysis in paragraph 202 of the Panel Report. The Panel's conclusion that the provisions of the Oilseeds Agreement did not provide for Brazil to receive the entire amount of the tariff-rate quota for frozen poultry meat renders moot much of the EC argument on this point. Article XXVIII of the GATT could not justify a quota allocation inconsistent with Article XIII, even had that allocation been implemented in accordance with the terms of the Oilseeds Agreement.

73. With respect to Article 5.1(b) of the *Agreement on Agriculture*, the United States supports the position of the European Communities and believes that the Panel erred in interpreting the phrase "the price at which imports of that product may enter the customs territory of the Member granting the concession" to mean the price including the payment of applicable duties.

74. According to the United States, the *Working Procedures* do not appear to address the situation where a successful cross-appeal under Rule 23 would require that other issues raised in the panel proceeding be addressed by the Appellate Body in order to resolve the dispute. However, the United States notes that where a procedural question arises that is not covered by the *Working Procedures*, Rule 16.1 of the *Working Procedures* permits a Division to adopt an appropriate procedure for the purposes of a particular appeal. In this case, Brazil should not be denied relief to which it might otherwise be entitled simply because it did not appeal issues that only became relevant in light of the EC cross-appeal. However, the United States adds that for the purpose of making legal findings on Brazil's claims relating to additional duties, the Appellate Body should make legal findings based only on the Panel's factual findings or on facts submitted by the parties that were uncontested at the panel stage, and not on facts presented by a party for the first time on appeal.

75. The United States maintains that the EC representative price is inconsistent with Article 5.5 of the *Agreement on Agriculture*, as it appears to bear no relationship to the price of the individual shipment it is intended to represent. The United States agrees with Brazil that the burdens imposed by the European Communities, and its use of a penalty provision, create an effective deterrent to traders seeking to have additional duties calculated on a shipment-by-shipment basis. In the view of the United States, these facts undermine the EC claim that the use of a representative price is optional and help to explain the low rate at which traders are requesting shipment-by-shipment calculation of additional duties. With respect to Brazil's claim under Article 4.2 of the *Agreement on Agriculture*, the United States wishes to express caution as to whether the changes in the special safeguard duty as applied by the European Communities are such as to render it a "variable levy" within the meaning of that provision. By its nature, the amount of additional duties calculated under Article 5.5 could vary from shipment to shipment, so some variation must be permitted under the *Agreement on Agriculture*.

III. Issues Raised in this Appeal

76. The following legal issues were raised by the appellants in this appeal:

(a) Whether the Panel erred in its interpretation of the relationship between Schedule LXXX and the Oilseeds Agreement;

(b) Whether the Panel erred in finding that the tariff-rate quota for frozen poultry meat in Schedule LXXX was not exclusively for the benefit of Brazil and that no agreement existed between Brazil and the European Communities on the allocation of the tariff-rate quota within the meaning of Article XIII:2(d) of the GATT 1994;

(c) Whether a tariff-rate quota resulting from negotiations under Article XXVIII of the GATT 1947 must be administered in a non-discriminatory manner consistent with Article XIII of the GATT 1994;

(d) Whether the Panel erred in its interpretation of Article XIII of the GATT 1994 with respect to the rights and obligations of Members in relation to non-Members in the administration of tariff-rate quotas;

(e) Whether the Panel erred in its application of Article X of the GATT 1994, and, in particular, in its assessment of measures "of general application" in this case;

(f) Whether the Panel erred: in finding that the *Licensing Agreement* applies only to in-quota trade in this case; in finding that there was no trade distortion within the meaning of Articles 1.2 and 3.2 of the *Licensing Agreement*; and in not examining Brazil's claim concerning a general principle of transparency underlying the *Licensing Agreement*;

(g) Whether the Panel acted inconsistently with Article 11 of the DSU in not examining certain arguments made by Brazil relating to GATT/WTO law and practice; and

(h) Whether the Panel erred in finding that the "price at which imports of [a] product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned" in Article 5.1(b) of the *Agreement on Agriculture* is the c.i.f. price *plus* ordinary customs duties.

IV. Relationship between Schedule LXXX and the Oilseeds Agreement

77. With respect to the relationship between the Oilseeds Agreement and Schedule LXXX in this case, the Panel found, *inter alia*:

> ... in the present case, the Oilseeds Agreement was negotiated within the framework of Article XXVIII of GATT. Insofar as the content of the Oilseeds Agreement is incorporated into Schedule LXXX - a point not disputed by the parties - there is a close connection between the two.[22]

The Panel also stated:

> … the Oilseeds Agreement was concluded within the context of Article XXVIII negotiations. Under ordinary circumstances, the resulting modification of the EC tariff schedule would have been certified by the Director-General pursuant to the 1980 procedure for modification and rectification of schedules. However, as the conclusion of the Oilseeds Agreement coincided with the substantive conclusion of tariff negotiations in the Uruguay Round, this procedure was not strictly followed. The EC directly incorporated the substance of the Oilseeds Agreement into its then-current tariff schedule, effective 1 January 1994, and also into Schedule LXXX at the conclusion of the Uruguay Round negotiations. This procedural anomaly, in our view, does not affect the legal characterization of the Oilseeds Agreement as a bilateral agreement concluded within the context of Article XXVIII negotiations, as is evidenced by the fact that the negotiations leading to its conclusion were authorized by the CONTRACTING PARTIES.[23]

The Panel asserted that it would:

> … proceed to the examination of the Oilseeds Agreement to the extent relevant to the determination of the EC's obligations under the WTO agreements vis-à-vis Brazil.[24]

78. Although the European Communities is satisfied with the practical result of the Panel Report on this point, the European Communities argues that the Panel erred in its interpretation of the

[22]Panel Report, para. 201.

[23]Panel Report, para. 204.

[24]Panel Report, para. 202.

relationship between Schedule LXXX and the Oilseeds Agreement.[25] The Panel did not accept the argument of the European Communities that Schedule LXXX superseded and terminated the Oilseeds Agreement because the *WTO Agreement* was a later treaty relating to the same subject-matter in accordance with Article 59.1 of the *Vienna Convention*, or that the Oilseeds Agreement only applies to the extent compatible with Schedule LXXX in accordance with Article 30.3 of the *Vienna Convention*. The Panel stated:

> ... we cannot summarily dismiss the significance of the Oilseeds Agreement in the interpretation of Schedule LXXX by recourse to the public international law principles embodied in the Vienna Convention.[26]

79. In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case. Schedule LXXX is annexed to the *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994* (the "*Marrakesh Protocol*"), and is an integral part of the GATT 1994.[27] As such, it forms part of the multilateral obligations under the *WTO Agreement*. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC - Oilseeds*.[28] As such, the Oilseeds Agreement is not a "covered agreement" within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the *WTO Agreement*, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the *WTO Agreement*. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the *WTO Agreement*[29], the Oilseeds Agreement is not one of those legal instruments.

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[25]EC appellant's submission, para. 33.

[26]Panel Report, para. 207.

[27]Article II:7 of the GATT 1994.

[28]Adopted 25 January 1990, BISD 37S/86; and DS28/R, 31 March 1992.

[29]Those legal instruments are described in paragraph 1(b) of that incorporating language as including certain protocols and certifications relating to tariff concessions, certain protocols of accession, certain decisions on waivers granted under Article XXV of the GATT 1947, and "other decisions of the CONTRACTING PARTIES to GATT 1947".

80. Furthermore, the Oilseeds Agreement does not constitute part of the "decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947" by which the WTO "shall be guided" under Article XVI:1 of the *WTO Agreement*. These "decisions, procedures and customary practices" include only those taken or followed by the CONTRACTING PARTIES to the GATT 1947 acting *jointly*.

81. It is Schedule LXXX, rather than the Oilseeds Agreement, which contains the relevant obligations of the European Communities under the *WTO Agreement*. Therefore, it is Schedule LXXX, rather than the Oilseeds Agreement, which forms the legal basis for this dispute and which must be interpreted in accordance with "customary rules of interpretation of public international law" under Article 3.2 of the DSU.

82. In *European Communities - Customs Classification of Certain Computer Equipment*, we made the following general statement on the interpretation of concessions in a Member's Schedule:

> A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.[30]

83. We recognize that the Oilseeds Agreement was negotiated within the framework of Article XXVIII of the GATT 1947 with the authorization of the CONTRACTING PARTIES and that both parties agree that the substance of the Oilseeds Agreement was the basis for the 15,500 tonne tariff-rate quota for frozen poultry meat that became a concession of the European Communities in the Uruguay Round set forth in Schedule LXXX. Therefore, in our view, the Oilseeds Agreement may serve as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat.

84. The Panel accepts that the Oilseeds Agreement can be useful in interpreting the EC concession on frozen poultry meat in Schedule LXXX.[31] In paragraph 202, the Panel states "we proceed to the examination of the Oilseeds Agreement to the extent relevant to *the determination of the EC's obligations under the WTO agreements* vis-à-vis Brazil". (emphasis added) In paragraph 207, the Panel states, "we cannot summarily dismiss the significance of the Oilseeds

[30]Adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84.

[31]Panel Report, paras. 202 and 207.

Agreement *in the interpretation of Schedule LXXX* by recourse to the public international law principles embodied in the Vienna Convention". (emphasis added)

85. We find no reversible error in the Panel's treatment of the relationship between Schedule LXXX and the Oilseeds Agreement.

V. The Tariff-Rate Quota in Schedule LXXX

86. Three legal issues are raised with respect to the tariff-rate quota for frozen poultry meat in Schedule LXXX:

(a) Whether the tariff-rate quota of 15,500 tonnes for frozen poultry meat specified in Schedule LXXX is allocated exclusively for the benefit of Brazil, and whether an agreement existed between Brazil and the European Communities on the allocation of the tariff-rate quota within the meaning of Article XIII:2(d) of the GATT 1994;

(b) Whether a tariff-rate quota resulting from negotiations under Article XXVIII of the GATT 1947 must be administered in a non-discriminatory manner consistent with Article XIII of the GATT 1994; and

(c) Whether the trade of non-Members should be taken into account in calculating tariff-rate quota shares under Article XIII of the GATT 1994.

A. *The Exclusive or Non-exclusive Character of the Tariff-Rate Quota for Frozen Poultry Meat in Schedule LXXX*

87. With respect to the tariff-rate quota for frozen poultry meat of 15,500 tonnes specified in Schedule LXXX, the Panel found, *inter alia*:

> To sum up our findings in this section, we find no proof (either in the text or in the object and purpose of the Oilseeds Agreement) in support of the Brazilian claim that the poultry TRQ opened as the result of the Oilseeds Agreement was intended to be a country-specific tariff quota with Brazil being the sole beneficiary. In other words, we find that the European Communities is bound, on an MFN basis, by its tariff commitments for frozen poultry meat.[32]

[32]Panel Report, para. 218.

88. Brazil argues that the Panel erred in finding that the tariff-rate quota for frozen poultry meat was not allocated exclusively to Brazil, and in finding that there was no explicit agreement between Brazil and the European Communities to this effect within the meaning of Article XIII:2(d) of the GATT 1994.[33] Brazil contends further that the Panel erred in limiting its examination of the Oilseeds Agreement to the "relevant parts" of that Agreement, and in failing to examine *all* the provisions of the Oilseeds Agreement in accordance with Article 31 of the *Vienna Convention.*[34]

89. As we stated previously, it is Schedule LXXX, rather than the Oilseeds Agreement, that is the relevant WTO obligation in this dispute and that must therefore be interpreted in accordance with "customary rules of interpretation of public international law" under Article 3.2 of the DSU.

90. Part I (Most-Favoured-Nation-Tariff), Section I (Agricultural Products), Section I-B (Tariff Quotas) of Schedule LXXX provides a duty-free quota of 15,500 tonnes of frozen poultry meat falling within CN subheadings 0207 41 10, 0207 41 41 and 0207 41 71. There are no "other terms and conditions" specified relating to this tariff-rate quota in Schedule LXXX, and, in particular, there is no reference to the Oilseeds Agreement and no mention that the tariff-rate quota is exclusively reserved for exports from Brazil. The fact that the tariff-rate quota for frozen poultry meat appears in Part I under the heading "Most-Favoured-Nation Tariff" and that there are no other terms or conditions specified in Schedule LXXX concerning that concession would suggest, on the basis of the ordinary meaning of the terms, that the tariff-rate quota for frozen poultry meat was intended to be allocated on an MFN basis.

91. This view is confirmed by an examination of the relevant provisions of the Oilseeds Agreement as a supplementary means of interpretation of the concessions made by the European Communities in Schedule LXXX. A footnote in the Oilseeds Agreement states:

> Duty exemption shall be applicable for cuts falling within subheadings 0207.41.10, 0207.41.41 and 0207.41.71 within the limits of a *global annual tariff quota* of 15.500 tonnes to be granted by the competent Community authorities. (emphasis added)

92. The Oilseeds Agreement uses the term "global annual tariff quota" in describing the 15,500 tonnes. Although we agree with the Panel that this term is "non-legal", nevertheless, this is a term well-understood in GATT/WTO practice to mean a tariff-rate quota that is to be administered on a non-discriminatory basis pursuant to Article XIII of the GATT 1994. As early as the Havana

[33]Brazil's appellant's submission, paras. 80-84.

[34]Brazil's appellant's submission, paras. 17 and 21.

Conference in 1947, it was pointed out during discussions on the provision that later became Article XIII of the GATT that "*global quotas* not allocated among supplying countries might sometimes operate in a manner unduly favourable to those countries best able for any reason to take prompt advantage of the *global quotas* at the opening of the quota period".[35] (emphasis added) We also refer to the statement in *Panel on Newsprint*:

> In examining the EEC Regulation 3684/83, the Panel found that it did not in fact constitute a change in the administration or management of the tariff quota from a *global quota* system to a system of country shares, as had been asserted by the EC.[36] (emphasis added)

In both cases, the term "global quota" was used in contrast with quotas allocated on a country-specific basis. In the light of this, and in the absence of any persuasive evidence to the contrary, we cannot construe the term "global annual tariff quota" as used in the Oilseeds Agreement to mean a country-specific quota allocated exclusively to Brazil.[37]

93. We proceed next to an examination of Brazil's claim that the Panel erred in finding that there was no evidence of an agreement between Brazil and the European Communities on the allocation of the tariff-rate quota for frozen poultry meat within the meaning of Article XIII:2(d) of the GATT 1994. To conform to Article XIII:2(d), all other Members having a "substantial interest" in supplying the product concerned would have to agree. That is not the case here. As the European Communities did not seek an agreement with Thailand, the other contracting party having a substantial interest in the supply of frozen poultry meat to the European Communities at that time, the Oilseeds Agreement cannot be considered an agreement within the meaning of Article XIII:2(d) of the GATT 1994.

94. We understand Brazil to argue that the bilateral character of the Oilseeds Agreement implies, in itself, that the tariff-rate quota for frozen poultry meat is for Brazil's exclusive benefit and should not be extended to others who are not parties to that Agreement. The bilateral character of the Oilseeds Agreement does not, by itself, constitute evidence of a common intent that the tariff-rate quota was for the exclusive benefit of Brazil. We agree with the Panel that:

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[35]Reports of Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 91, para. 28, cited in GATT, *Analytical Index: Guide to GATT Law and Practice* (1995), Vol. I, p. 400.

[36]Adopted 20 November 1984, BISD 31S/114, para. 51.

[37]See Jackson, J., *World Trade and the Law of GATT* (Bobbs-Merrill, 1969), p. 232. See also, for example, the *Dictionary of Trade Policy Terms* (Centre for International Economic Studies, 1998), and the *Dictionary of International Trade* (World Trade Press, 1998).

> … most tariff concessions are negotiated bilaterally, but the results of the negotiations are extended on a multilateral basis. The fact that the tariff-rate quota for frozen poultry meat was opened as a result of bilateral negotiations between the EC and Brazil does not mean that the EC was obligated to accord the benefit exclusively to Brazil.[38]

95. Therefore, we uphold the Panel's finding in paragraph 218 of the Panel Report that there is no adequate proof to support Brazil's claim that the tariff-rate quota for frozen poultry meat set forth in Schedule LXXX was intended to be a country-specific tariff-rate quota with Brazil as the sole beneficiary. We also agree with the Panel that there is no evidence that an agreement, explicit or otherwise, existed between Brazil and the European Communities concerning the allocation of the tariff-rate quota for frozen poultry meat within the meaning of Article XIII:2(d) of the GATT 1994.[39]

B. *Article XIII of the GATT 1994*

96. The Panel found that:

> … there is no provision in the WTO agreements that allows departure from the MFN principle in the case of TRQs resulting from Article XXVIII negotiations. Nor is there any decision of the CONTRACTING PARTIES or of the Ministerial Conference/General Council, or any adopted panel or Appellate Body report that permits such departure.[40]

97. Brazil argues that the MFN principle in Articles I and XIII of the GATT 1994 does not necessarily apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the GATT.[41] According to Brazil, because the purpose of the Oilseeds Agreement was to compensate Brazil for the modification of EC concessions on oilseeds, Brazil is entitled to benefit exclusively from the modified concession. In Brazil's view, the European Communities failed to respect the balance between the withdrawal of a concession and the offering of compensation in another product.[42]

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[38]Panel Report, para. 216.

[39]Panel Report, para. 227.

[40]Panel Report, para. 213.

[41]Brazil's appellant's submission, para. 46.

[42]Brazil's appellant's submission, paras. 47-55.

98. In *United States - Restrictions on Imports of Sugar*[43], the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts *diminishing* obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC - Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994.[44] The ordinary meaning of the term "concessions" suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

> The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)

99. Therefore, the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Articles I and XIII of the GATT 1994.

100. Brazil argues that the Oilseeds Agreement was negotiated under Article XXVIII to compensate Brazil for the impairment of benefits from the oilseeds concession. According to Brazil, there is an element of specificity about compensation, which explains and justifies possible departure from the principle of non-discrimination.[45] In support of this interpretation, Brazil refers to compensation under Article XXIV:6 of the GATT. In Brazil's view, no distinction should be made, either in procedure or in intention, between compensation negotiated under Articles XXIV:6 and XXVIII of the GATT. In practice, Brazil maintains, there are examples of both country-specific and non-discriminatory tariff-rate quotas offered and implemented by the European Communities as compensation under Article XXIV:6 of the GATT. There is no reason, Brazil argues, why the same principle should not apply to compensation under Article XXVIII of the GATT.[46] We do not accept this argument. We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994. As the Panel observed, this interpretation is, furthermore,

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[43]Adopted 22 June 1989, BISD 36S/331, para. 5.2.

[44]Adopted 25 September 1997, WT/DS27/AB/R, para. 154.

[45]Brazil's appellant's submission, paras. 46 and 51.

[46]Brazil's appellant's submission, para. 59.

supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

> It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed "Modification of Schedules". It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.[47]

Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the GATT 1994.

101. We agree with the Panel that:

> If a preferential treatment of a particular trading partner not elsewhere justified is permitted under the pretext of "compensatory adjustment" under Article XXVIII:2, it would create a serious loophole in the multilateral trading system. Such a result would fundamentally alter the overall balance of concessions Article XXVIII is designed to achieve.[48]

102. For these reasons, we uphold the Panel's finding in paragraph 213 of the Panel Report that a tariff-rate quota which resulted from negotiations under Article XXVIII of the GATT 1947, and which was incorporated into a Member's Uruguay Round Schedule, must be administered in a non-discriminatory manner consistent with Article XIII of the GATT 1994.

C. *Treatment of Non-Members under Article XIII of the GATT 1994*

103. According to the Panel, there is nothing in Article XIII of the GATT 1994 that obligates Members to calculate tariff-rate quota shares on the basis of imports from Members only.[49] In the Panel's view, if the purpose of using past trade performance is to approximate the shares of Members in the absence of the restrictions, as required under the chapeau of Article XIII:2, exclusion of a non-

[47]EPCT/TAC/PV/18, p. 46; see Panel Report, para. 217.

[48]Panel Report, para. 215.

[49]Panel Report, para. 230.

Member, particularly if it is an efficient supplier, would not serve that purpose.[50] Accordingly, the Panel found:

> … the EC has not acted inconsistently with Article XIII of GATT by calculating Brazil's tariff quota share based on the total quantity of imports, including those from non-Members.[51]

104. Brazil submits that under Article XIII:2(d) of the GATT 1994 non-Members have no right to participate in a tariff-rate quota, and that a Member opening a tariff-rate quota has no right unilaterally to allow such participation.[52] In Brazil's view, the Panel has expanded the wording of Article XIII of the GATT 1994 by allowing the inclusion of non-Members in a tariff-rate quota.[53]

105. We note that the finding of the Panel on this point is limited to one issue, namely, whether trade of non-Members may be taken into account in the calculation of shares in a tariff-rate quota. This finding is narrower than the scope of Brazil's argument before the Panel, which was concerned with other issues related to the rights and obligations of Members in relation to non-Members under Article XIII, and particularly the participation of a non-Member in the "others" category of a tariff-rate quota. The Panel's finding is also narrower than the scope of Brazil's appeal, which is concerned with the rights and obligations of Members in relation to non-Members in the administration of tariff-rate quotas under Article XIII.

106. We agree with the Panel that the calculation of shares must be based on the total imports of the product in question -- whether those imports originate from Members or non-Members. Otherwise, it would not be possible to comply with the requirement in the chapeau of Article XIII:2 that:

> In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions … .

[50]Panel Report, para. 230.

[51]Panel Report, para. 233.

[52]Brazil's appellant's submission, para. 89.

[53]Brazil's appellant's submission, para. 95.

107. This leaves unanswered two issues that were raised by Brazil before the Panel and also in both Brazil's notice of appeal and Brazil's appellant's submission, namely, the *allocation* of tariff-rate quota shares to a non-Member, and the *participation of non-Members in the "others" category* of a tariff-rate quota. With respect to these two issues, we are mindful of our mandate under Article 17.6 of the DSU to limit appeals "to issues of law covered in the panel report and legal interpretations developed by the panel". Also, we are mindful of Article 17.13 of the DSU, which states, "The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." With these constraints in mind, we note that there is no finding by the Panel or legal interpretation developed by the Panel on either of these two issues. It is true that in footnote 140 of the Panel Report, the Panel states that paragraph 7.75 of the *EC - Bananas* panel reports and "particularly the use of the phrase 'all suppliers other than Members with a substantial interest in supplying the product' … indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted". We do not consider this comment made in a footnote by the Panel to be either a "legal interpretation developed by the panel" within the meaning of Article 17.6 of the DSU or a "legal finding" or "conclusion" that the Appellate Body may "uphold, modify or reverse" under Article 17.13 of the DSU. It is undisputed in this case that there is no *allocation* of a country-specific share in the tariff-rate quota to a non-Member. There is, therefore, no finding nor any "legal interpretation developed by the panel" that may be the subject of an appeal of which the Appellate Body may take cognizance.

108. Therefore, we uphold the finding of the Panel in paragraph 233 of the Panel Report that the European Communities has not acted inconsistently with Article XIII of the GATT 1994 by calculating Brazil's tariff-rate quota share based on the total quantity of imports, including those from non-Members.

VI. Article X of the GATT 1994

109. Article X of the GATT 1994 states, in relevant part:

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them ...
>
> ...
>
> 3. (*a*) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

110. With respect to Article X, the Panel found:

> ... that Article X is applicable only to laws, regulations, judicial decisions and administrative rulings "of general application" ... licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure "of general application". In the present case, the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT.
>
> In view of the fact that the EC has demonstrated that it has complied with the obligation of publication of the regulations under Article X regarding the licensing rules of general application, without further evidence and argument in support of Brazil's position regarding how Article X is violated, we dismiss Brazil's claim on this point.[54]

111. Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules "of general application".[55] It is clear to us that the EC rules pertaining to import licensing set out in Regulation 1431/94 are rules "of general application". The Panel found that with respect to these rules of general application, the European Communities had complied with its publication obligations under Article X.[56] Brazil does not appeal this finding.

112. Brazil, however, argues that the Panel erred in law in assessing measures of general application in Article X of the GATT 1994 and that the Panel also misinterpreted Brazil's submissions relating to Article X. According to Brazil, the generally applicable rules of the European Communities relating to imports of frozen poultry meat do not allow Brazilian traders to know whether a particular shipment will be subject to the rules governing in-quota trade or to rules relating to out-of-quota trade, and Brazil maintains that this is a violation of Article X.[57]

113. The approach to Article X of the GATT 1994 advocated by Brazil would require that a Member specify in advance the precise treatment to be accorded to each individual shipment of frozen poultry meat into the European Communities. Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure "of general application" within the meaning of Article X. The Panel cited the following passage from the panel report in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*:

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[54]Panel Report, paras. 269-270.

[55]Panel Report, para. 269.

[56]Panel Report, para. 270.

> The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application.[58]

We agree with the Panel that "conversely, licences issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application'"[59] within the meaning of Article X.

114. It is inherent in the nature of a tariff-rate quota that imports over the threshold quantity specified in the rules of general application will not benefit from the terms of the tariff-rate quota. Within the framework of the rules of general application that establish the terms of the tariff-rate quota for frozen poultry meat, the detailed arrangements concerning the importation of a particular shipment of frozen poultry into the European Communities are made primarily among private operators. These arrangements will determine whether a particular shipment falls within or outside the tariff-rate quota, and will consequently determine whether the rules relating to in-quota trade or those relating to out-of-quota trade will apply to a given shipment. These arrangements among private operators have been generally left to them by the government of the Member concerned. Article X of the GATT 1994 does not impose an obligation on Member governments to ensure that exporters are continuously notified by importers as to the treatment particular impending shipments will receive in relation to a tariff-rate quota.

115. Article X relates to the *publication* and *administration* of "laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures. In *EC - Bananas*, we stated:

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[57]Brazil's appellant's submission, paras. 105 and 114.

[58]Adopted 25 February 1997, WT/DS24/R, para. 7.65. In that case, we agreed with the panel's finding that the safeguard measure restraint imposed by the United States was "a measure of general application" within the contemplation of Article X:2 of the GATT 1994. See Appellate Body Report, *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 21.

[59]Panel Report, para. 269.

> The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[60]

Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994.[61] The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.

116. For these reasons, we uphold the Panel's finding in paragraph 269 of the Panel Report that "the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT".

VII. Agreement on Import Licensing Procedures

117. Three issues are raised by Brazil with respect to the *Licensing Agreement*:

(a) Whether the Panel erred in interpreting Articles 1.2 and 3.2 of the *Licensing Agreement* so as to restrict the scope of application of that Agreement, in this case, to in-quota trade;

(b) Whether the Panel erred in finding that there was no trade distortion in this case within the meaning of Articles 1.2 and 3.2 of the *Licensing Agreement*; and

(c) Whether the Panel erred in failing to examine the general claim made by Brazil concerning the violation of a principle of transparency set out in the preamble to, and underlying, the *Licensing Agreement*.

[60]Adopted 25 September 1997, WT/DS27/AB/R, para. 200.

[61]We note that the issue of the *comprehensibility* of the EC measure does not arise in this case.

118. Article 1.2 of the *Licensing Agreement* states:

> Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, *with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures*, taking into account the economic development purposes and financial and trade needs of developing country Members. (emphasis added)

Article 3.2 of the *Licensing Agreement* provides:

> Non-automatic licensing shall *not* have *trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction*. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure. (emphasis added)

119. With respect to the *Licensing Agreement*, the Panel found, in relevant part:

> In examining these claims, we first note that Brazil's reference to the percentage share relates to its total exports of poultry products to the EC market, the majority of which consists of over-quota (duty paid) trade. *The Licensing Agreement, as applied to this particular case, only relates to in-quota trade*. Second, the licences issued to imports from Brazil are *fully utilized*, which strongly suggests that *any trade-distortive effects of the operation of the licensing rules have been overcome by exporters*. Third, the total volume of poultry exports from Brazil has generally been increasing ... . Therefore, *we fail to understand the relevance of the decline in the percentage share in total trade to a violation of the Licensing Agreement*. Thus, based on the evidence presented by Brazil regarding its percentage share of the EC poultry market, *we do not find that the EC has acted inconsistently with Articles 1.2 and 3.2 of the Licensing Agreement.*[62] (emphasis added)

A. *Scope of Application*

120. Brazil maintains that there is nothing in the text or context of Articles 1.2 and 3.2 of the *Licensing Agreement* that limits to in-quota trade the requirement in Article 1.2 that licensing systems

[62]Panel Report, para. 249.

be implemented "with a view to preventing trade distortions" or the prohibition in Article 3.2 of additional trade-restrictive or trade-distortive effects.[63]

121. The preamble to the *Licensing Agreement* stresses that the Agreement aims at ensuring that import licensing procedures "are not utilized in a manner contrary to the principles and obligations of GATT 1994" and are "implemented in a transparent and predictable manner". Moreover, Articles 1.2 and 3.2 make it clear that the *Licensing Agreement* is also concerned, with, among other things, preventing trade distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the *Licensing Agreement* refers to *any* trade distortion that may be caused by the introduction or operation of licensing procedures, and is not necessarily limited to that part of trade to which the licensing procedures themselves apply. There may be situations where the operation of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to those procedures.

122. In the case before us, the licensing procedure established in Article 1 of Regulation 1431/94 applies, by its terms, only to in-quota trade in frozen poultry meat.[64] No licensing is required by Regulation 1431/94 for out-of-quota trade in frozen poultry meat. To the extent that the Panel intended merely to reflect the fairly obvious fact that this licensing procedure applies only to in-quota trade, we uphold the finding of the Panel that "[t]he Licensing Agreement, as applied to this particular case, only relates to in-quota trade".[65]

B. *Trade Distortion*

123. Brazil maintains that the Panel failed to address or examine properly certain evidence, including evidence concerning Brazil's falling share of the EC poultry market, and did not examine whether this falling market share was caused by the introduction of the EC licensing procedures for the tariff-rate quota for frozen poultry meat.[66]

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[63]Brazil's appellant's submission, para. 140.

[64]Article 1 of Regulation 1431/94 states: "All imports into the Community under [the tariff-rate quota] … shall be subject to the presentation of an import licence."

[65]Panel Report, para. 249.

[66]Brazil's appellant's submission, paras. 143-150.

124. The Panel stated that it "fail[ed] to understand the relevance of the decline in the percentage share in total trade to a violation of the Licensing Agreement."[67] The Panel then concluded that, "based on the evidence presented by Brazil regarding its percentage share of the EC poultry market, we do not find that the EC has acted inconsistently with Articles 1.2 and 3.2 of the Licensing Agreement."[68]

125. Under Regulation 1431/94, Brazil's share in the EC tariff-rate quota for frozen poultry meat is 7,100 tonnes out of the total tariff-rate quota of 15,500 tonnes.[69] This share is equal to approximately 45 per cent of the tariff-rate quota. This is the same as Brazil's percentage share of the total exports of frozen poultry meat to the European Communities during the reference period of the preceding three years. In addition, the Panel noted, licences issued by the European Communities for imports of frozen poultry meat from Brazil have been fully utilized.[70] This means that Brazil's percentage share in the tariff-rate quota has remained at the same level as Brazil's share in the total trade over the relevant period. Moreover, the absolute volume of exports of frozen poultry meat by Brazil in the total exports of this product to the European Communities has been rising since the imposition of the tariff-rate quota for frozen poultry meat.[71]

126. Brazil has not, in our view, clearly explained, either before the Panel or before us, how the licensing procedure *caused* the decline in market share. Brazil has not offered any persuasive evidence that its falling market share could, in this particular case -- with a constant percentage share of the tariff-rate quota, full utilization of the tariff-rate quota and a growing total volume of exports -- be viewed as constituting trade distortion attributable to the licensing procedure. In other words, Brazil has not proven a violation of the prohibition of trade distortion in Articles 1.2 and 3.2 of the *Licensing Agreement* by the European Communities.

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[67]Panel Report, para. 249.

[68]*Ibid.*

[69]Regulation 1431/94, Annex I.

[70]Panel Report, para. 249.

[71]Panel Report, para. 249 and Annex I.

127. Brazil argues that the Panel did not consider a number of other arguments in its examination of the existence of trade distortion: that licences have been apportioned in non-economic quantities; that there have been frequent changes to the licensing rules; that licence entitlement has been based on export performance; and that there has been speculation in licences.[72] These arguments, however, do not address the problem of establishing a causal relationship between imposition of the EC licensing procedure and the claimed trade distortion. Even if conceded *arguendo*, these arguments do not provide proof of the essential element of causation.

128. For these reasons, we uphold the finding of the Panel that Brazil has not established that the European Communities has acted inconsistently with either Article 1.2 or Article 3.2 of the *Licensing Agreement*.[73]

C. *Transparency*

129. Brazil's notice of appeal contained no reference to a general issue of transparency in relation to the *Licensing Agreement*. However, Brazil argued in its appellant's submission that the Panel erred in restricting Brazil's "comprehensive claim in relation to a violation of the general principle of transparency underlying the Licensing Agreement"[74] to an analysis of Article 3.5(a) of the *Licensing Agreement*. The contention of Brazil is that "the administration of import licenses in such a way that the exporter does not know what trade rules apply is a breach of the fundamental objective of the Licensing Agreement."[75]

130. Brazil argued before the Panel that "underlying the Licensing Agreement was the principle of transparency."[76] Brazil submitted, in particular, that the European Communities was obliged under either Article 3.5(a)(iii) or (iv) of the *Licensing Agreement* to provide complete and relevant information on the distribution of licences among supplying countries and statistics on volumes and values. According to Brazil, the European Communities failed to fulfil this obligation.[77] The Panel found that Brazil had not demonstrated that the European Communities had violated either

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[72]Brazil's appellant's submission, paras. 151-160. We note that these facts *were* considered by the Panel in the context of other alleged violations of the *Licensing Agreement*, but *not* in the context of trade distortion within the meaning of Articles 1.2 and 3.2 of the *Licensing Agreement*.

[73]Panel Report, para. 249.

[74]Brazil's appellant's submission, para. 161.

[75]Brazil's appellant's submission, para. 163.

[76]Panel Report, para. 105.

[77]Panel Report, para. 107.

Article 3.5(a)(iii) or (iv) of the *Licensing Agreement*.[78] In the light of the existence of express provisions in Article 3.5(a) of the *Licensing Agreement* relating to transparency on which the Panel did in fact make findings, we do not believe that the Panel erred by refraining from examining Brazil's "comprehensive" claim relating to a general principle of transparency purportedly underlying the *Licensing Agreement*.

VIII. Article 11 of the DSU

131. Article 11 of the DSU states in part:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

132. Brazil maintains that the Panel did not make "an objective assessment of the matter before it", as required by Article 11 of the DSU, because the Panel allegedly failed to consider a series of arguments put forward by Brazil relating to GATT/WTO law and practice. These arguments were: "first, the similarities between Article XXIV and XXVIII: second, the flexible nature of Article XXVIII that permits bilateral agreements and the opening of bilateral concessions subject to the review of all Members: [and] third, the text of Article XXVIII, which allows the possibility of country-specific solutions when other contracting parties do not object."[79]

133. An allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. In *EC Measures Concerning Meat and Meat Products* (*Hormones*), in relation to the requirement in Article 11 of the DSU that a panel "make an objective assessment of the facts of the case", we stated:

[78]Panel Report, para. 265.

[79]Brazil's appellant's submission, para. 58.

> Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. … The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an *egregious error that calls into question the good faith of a panel*. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[80] (emphasis added)

Subsequently, in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*[81], we found that the panel there had not committed an abuse of discretion amounting to a failure to render "an objective assessment of the matter before it", as mandated by Article 11.

134. The same is true here. The alleged failures imputed to the Panel by Brazil do not approach the level of gravity required for a claim under Article 11 of the DSU to prevail.

135. We note, furthermore, that Brazil's appeal under Article 11 of the DSU relates, in effect, to the judicial economy exercised by the Panel in its consideration of a number of arguments in support of the various claims that Brazil submitted to the Panel. Brazil argues that the Panel, in effect, abused its discretion in not addressing in the Panel Report a series of arguments Brazil made in relation to GATT/WTO law and practice. In *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we stated that nothing in Article 11 "or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party", and that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[82] Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is

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[80]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 133.

[81]Adopted 22 April 1998, WT/DS56/AB/R, paras. 81 and 86.

[82]Adopted 23 May 1997, WT/DS33/AB/R, pp. 18-19.

not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU.

136. For these reasons, we conclude that the Panel did not fail to make the "objective assessment of the matter before it" required by Article 11 of the DSU.

IX. Agreement on Agriculture

A. *Article 5.1(b)*

137. Article 5.1 of the *Agreement on Agriculture* provides, in relevant part, as follows:

> 1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below in connection with the importation of an agricultural product, in respect of which measures referred to in paragraph 2 of Article 4 of this Agreement have been converted into an ordinary customs duty and which is designated in its Schedule with the symbol "SSG" as being the subject of a concession in respect of which the provisions of this Article may be invoked, if:
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> …
>
> (b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price[2] for the product concerned.

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[2]The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

138. With respect to "the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned" in Article 5.1(b) of the *Agreement on Agriculture*, the Panel found that,

> … the ordinary meaning of the terms used in Article 5.1(b) would appear to support the interpretation advanced by Brazil, i.e. that the market entry price must include duties paid.[83]

and that,

> The object and purpose of Article 5.1(b) is to provide additional protection against significant decline in import prices during the implementation period of the Agreement on Agriculture after all agricultural products have been "tariffied" under Article 4.2. By its nature, it has to address a situation that has occurred after the tariffication process. If the market entry price is equated with the c.i.f. import price, and then compared with the trigger price calculated using the c.i.f. price only, it would disregard the effect of protection granted by high duties resulting from tariffication. Thus, although the drafting of Article 5.1(b) is not a model of clarity, in light of the object and purpose of that subparagraph, it would be appropriate to interpret the market entry price under Article 5.1(b) to include duties paid.[84]

139. On this basis, the majority of the Panel concluded that "the EC has not invoked the special safeguard provision with respect to the poultry products in question in accordance with Article 5.1(b)."[85]

140. In contrast, one member of the Panel was "of the view that Article 5 of the Agreement on Agriculture requires an importing Member to calculate the relevant import price within the meaning of Article 5.1(b) on the basis of the c.i.f. import price only." [86]

141. Brazil, as the exporting Member, endorses the Panel's finding that the relevant import price in Article 5.1(b) of the *Agreement on Agriculture* is the c.i.f. price *plus* ordinary customs duties. This is not surprising. This would limit the instances in which the European Communities could impose additional safeguard duties. In contrast, the European Communities, as the importing Member, is of the view that the relevant import price in Article 5.1(b) is the c.i.f. price *without* ordinary customs duties. This view increases the opportunities for an importing Member to impose additional safeguard duties.

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[83] Panel Report, para. 278.

[84] Panel Report, para. 281.

[85] Panel Report, para. 282.

[86] Panel Report, para. 292.

142. The legal issue raised in this appeal concerns the proper interpretation of the phrase, "the price at which imports of that product may enter the customs territory of the Member granting the concession, *as determined on the basis of the c.i.f. import price of the shipment concerned*" (emphasis added) in Article 5.1(b) of the *Agreement on Agriculture*. Specifically, the issue is whether the special safeguard mechanism in Article 5.1(b) is triggered when the c.i.f. price, or when the c.i.f. price *plus* ordinary customs duties, falls below the reference or trigger price.

143. The practical significance of this issue can be illustrated with the following hypothetical example. This dispute has no practical significance if both the c.i.f. import price and the c.i.f. import price plus customs duties fall above or below the trigger price. If both prices are above the trigger price, then additional duties cannot be imposed. And, if both prices fall below the trigger price, then additional duties may be imposed regardless of which definition of the relevant import price is adopted. However, the practical significance of this dispute becomes apparent whenever the trigger price falls between the other two prices, that is, when the trigger price is greater than the c.i.f. import price but smaller than the c.i.f. import price plus customs duties. To illustrate:

c.i.f. import price plus customs duties	=	1,200
trigger price	=	1,000
c.i.f. import price	=	800

In this example, if the relevant price is defined as the c.i.f. import price plus customs duties, additional duties may not be imposed since the relevant price is well above the trigger price. If, on the other hand, it is defined as the c.i.f. import price only (that is, without customs duties), additional duties may be imposed because the relevant price is below the trigger price. Thus, to adopt one definition, rather than another, will determine whether or not an importing Member may impose additional safeguard duties.

144. In examining this issue, we begin with the text of Article 5.1(b) which refers to: "the price at which imports of that product *may enter the customs territory* of the Member granting the concession …". (emphasis added) In interpreting this provision, the majority of the Panel uses the concept of "market entry price". However, this phrase is not found in the text of Article 5.1(b). Yet, the Panel states as follows:

> Thus, the ordinary meaning of the terms used in Article 5.1(b) would appear to support the interpretation advanced by Brazil, i.e. *that the market entry price must include duties paid.*[87] (emphasis added)

[87]Panel Report, para. 278.

Again, in paragraph 281 of the Panel Report, the Panel states that "If *the market entry price* is equated with the c.i.f. import price … ." (emphasis added) In fact, this section of the Panel Report is entitled: "*Market entry price* and the c.i.f. price". (emphasis added)

145. The relevant import price in Article 5.1(b) is described as "the price at which imports of that product *may enter the customs territory* of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned". It is noteworthy that the drafters of the *Agreement on Agriculture* chose to use as the relevant import price the entry price into the *customs territory*, rather than the entry price into the *domestic market*. This suggests that they had in mind the point of time *just before* the entry of the product concerned into the customs territory, and certainly before entry into the domestic market, of the importing Member. The ordinary meaning of these terms in Article 5.1(b) supports the view that the "price at which that product may enter the customs territory" of the importing Member should be construed to mean just that -- the price at which the product may enter the *customs territory*, not the price at which the product may enter the *domestic market* of the importing Member. And that price is a price that does not include customs duties and internal charges. It is upon entry of a product into the customs territory, but before the product enters the domestic market, that the obligation to pay customs duties and internal charges accrues.

146. Article 5.1(b) also states that the relevant import price is to be "as determined *on the basis of* the c.i.f. import price of the shipment concerned". (emphasis added) The Panel interprets this phrase to mean "that the market entry price is something that has to be constructed using the c.i.f. price as one of the parameters."[88] We disagree. In the light of our construction of the preceding phrase "the price at which imports of the product may enter the customs territory of the Member granting the concession", we conclude that the phrase "as determined *on the basis of* the c.i.f. import price of the shipment concerned" in Article 5.1(b) refers simply to the c.i.f. price without customs duties and taxes. There is no definition of the term "c.i.f. import price" in the *Agreement on Agriculture* or in any of the other covered agreements. However, in customary usage in international trade, the c.i.f. import price does not include any taxes, customs duties, or other charges that may be imposed on a product by a Member upon entry into its customs territory.[89] We think it significant also that ordinary

[88]Panel Report, para. 278.

[89]We note that the *Incoterms 1990* of the International Chamber of Commerce explains what the acronym "c.i.f." means "cost, insurance and freight", but does not give a definition of "c.i.f. import price". However, according to customary usage in international trade, c.i.f. import price, or simply c.i.f. price, is equal to the price of the product in the exporting country plus additional costs, insurance and freight to the importing country. This definition may also be inferred from paragraph 2 of the *Attachment to Annex 5 of the Agreement on Agriculture*.

customs duties are not mentioned as a component of the relevant import price in the text of Article 5.1(b). Article 5.1(b) does not state that the relevant import price is "the c.i.f. price plus ordinary customs duties". Accordingly, to read the inclusion of customs duties into the definition of the c.i.f. import price in Article 5.1(b) would require us to read words into the text of that provision that simply are not there.

147. This reading of the text of Article 5.1(b) is supported by our reading of the context of that provision in accordance with Article 31 of the *Vienna Convention*, which specifies that the ordinary meaning of the terms of a treaty should be interpreted in their context.

148. We look first to the rest of Article 5.1. In considering when additional special safeguard duties under Article 5.1(b) may be imposed, the relevant import price must be compared with a trigger price. According to Article 5.1(b), this trigger price is "equal to the average 1986 to 1988 reference price for the product concerned". Footnote 2 to Article 5.1(b) states:

> The reference price used to invoke the provisions of this subparagraph shall, in general, be the average c.i.f. unit value of the product concerned, or otherwise shall be an appropriate price in terms of the quality of the product and its stage of processing. It shall, following its initial use, be publicly specified and available to the extent necessary to allow other Members to assess the additional duty that may be levied.

149. Thus, the reference price with which the relevant price is compared under Article 5.1 does *not* include ordinary customs duties. It is simply the average c.i.f. import price of the product concerned during the reference period, 1986-1988. Given this definition of the reference price, it could not have been the intention of the drafters to compare a c.i.f. price exclusive of customs duties for the reference period with a c.i.f. price inclusive of such duties today.

150. Paragraph 5 of Article 5 is also part of the context of Article 5.1(b). This provision establishes a link between the amount of the additional duty to be imposed and the difference between the c.i.f. import price of the shipment and the trigger price. According to the schedule contained in paragraph 5, when the difference between the c.i.f. import price of the shipment and the trigger price is not greater than 10 per cent, no additional duty shall be imposed. When the difference is greater than 10 per cent, additional duties may be imposed. The amount of the additional safeguard duties increases as the difference in the two prices increases. We see no reference in paragraph 5 to "c.i.f. import price *plus* ordinary customs duties". The price used to determine when the special safeguard may be triggered and the price used to calculate the amount of the additional duties must be one and the same.

151. Certain anomalies would arise from the interpretation adopted by the majority of the Panel. One of these anomalies was cited in the opinion of the dissenting member of the Panel.[90] If tariffication of non-tariff barriers on a certain product took the form of specific duties that were greater than the trigger price, then an importing Member may never be able to invoke Article 5.1(b). The truth of this observation is evident from the fact that the c.i.f. import price plus customs duties may never fall below the trigger price. This consequence is not limited to the case of specific duties that exceed the trigger price. It could also occur in cases where tariffication takes the form of *ad valorem* duties. We know that tariffication has resulted in tariffs which are, in a large number of cases, very high. The probability is strong, therefore, that the *ad valorem* duties could exceed the percentage decrease in the c.i.f. import price by a substantial margin. In such cases, the decrease in the c.i.f. price would have to be very deep before the relevant import price would fall below the trigger price. Thus, the provisions of Article 5.1(b) would not be operational in many cases. It is doubtful that this was intended by the drafters of the "Special Safeguard Provisions".

152. Another anomaly that would arise from defining the relevant import price as the c.i.f. import price *plus* ordinary customs duties would be that the right of Members to invoke the provisions of Article 5.1(b) would depend on the level of tariffs resulting from tariffication. Faced with a certain decline in the c.i.f. price -- say, 20 per cent -- some Members would find themselves in a situation where they could not invoke the price safeguard; others would have the right to do so. The first category would comprise those Members with a relatively high level of tariffied duties; the second would be those with a relatively moderate level. Thus, the rights of Members would ultimately depend on the level of their tariffied duties. It is doubtful, too, that this was intended by the drafters of the "Special Safeguard Provisions".

153. For the foregoing reasons, we interpret the "price at which the product concerned may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price" in Article 5.1(b) as the c.i.f. import price not including ordinary customs duties. Accordingly, we reverse the finding of the Panel in paragraph 282 of the Panel Report.

B. *Article 5.5*

154. As noted above, the Panel found that the European Communities has acted inconsistently with Article 5.1(b) of the *Agreement on Agriculture*. In consequence, the Panel chose not to make a finding under Article 5.5 of the *Agreement on Agriculture*. The Panel stated:

[90]Panel Report, para. 291.

> We note that Brazil's argument on this point appears to address the issue of whether the EC has followed its own regulations concerning the operation of special safeguards. To the extent that Brazil's claim is directed to the appropriateness of the special safeguard mechanism within the EC, we are unable to find any violation of the WTO rules. Although Brazil refers to Article 5 of the Agreement on Agriculture and Article X:3 of GATT, it has not specified in what manner the EC has violated these provisions. In any event, since we have already found a violation of Article 5.1(b) by the EC, for the sake of judicial economy, we do not examine this claim any further.[91]

This paragraph of the Panel Report can only be interpreted to mean that the Panel did not make a finding on the consistency of the EC measure with Article 5.5. The Panel acted within its discretion in choosing to exercise judicial economy in this manner.[92]

155. Brazil did not include a claim relating to Article 5.5 of the *Agreement on Agriculture* in its notice of appeal. Nor did Brazil claim in its appellant's submission that the Panel erred in failing to make a finding relating to Article 5.5. The European Communities later filed an appellant's submission of its own appealing the Panel's finding on Article 5.1(b) of the *Agreement on Agriculture*. Brazil then argued in reply in its appellee's submission that if we reversed the Panel's finding on Article 5.1(b), it would then be necessary for us to address the issues arising under Articles 5.5 and 4.2 of the *Agreement on Agriculture*. Having decided to reverse the Panel's finding relating to Article 5.1(b), we turn now to these additional issues.

156. We are aware of the provisions of Article 17 of the DSU that state our jurisdiction and our mandate. Article 17.6 of the DSU provides: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Article 17.13 of the DSU states: "The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." In certain appeals, however, the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel. This occurred, for example, in the appeals in *United States - Standards for Reformulated and Conventional Gasoline*[93] and in *Canada - Certain Measures Concerning Periodicals*.[94] And, in this appeal, as we have reversed the Panel's finding on Article 5.1(b), we believe we should complete our analysis of the c.i.f. import price by making a finding with respect to the consistency of the EC regulation with Article 5.5, which was not addressed by the Panel for reasons of judicial economy.

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[91]Panel Report, para. 286.

[92]We refer to our decision in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 19.

[93]Adopted 20 May 1996, WT/DS2/AB/R, pp. 13-29.

[94]Adopted 30 July 1997, WT/DS31/AB/R, pp. 23-24.

157. Looking at Article 5 of the *Agreement on Agriculture* as a whole, it is clear that the provisions of Article 5.1(b) and Article 5.5 are closely linked. Together, these provisions establish the precise conditions for imposing additional duties under the price-triggered special safeguards mechanism that is established by Article 5. Article 5.1(b) determines when the price-triggered special safeguard mechanism may be activated so that additional duties may be imposed. Article 5.5 determines the method by which such additional duties will be calculated.

158. Article 5.5 of the *Agreement on Agriculture* reads:

> The additional duty imposed under subparagraph 1(b) *shall* be set according to the following schedule:
>
> (a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that subparagraph is less than or equal to 10 per cent of the trigger price, no additional duty shall be imposed;
>
> (b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 per cent but less than or equal to 40 per cent of the trigger price, the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent;
>
> (c) if the difference is greater than 40 per cent but less than or equal to 60 per cent of the trigger price, the additional duty shall equal 50 per cent of the amount by which the difference exceeds 40 per cent, plus the additional duty allowed under (b);
>
> (d) if the difference is greater than 60 per cent but less than or equal to 75 per cent, the additional duty shall equal 70 per cent of the amount by which the difference exceeds 60 per cent of the trigger price, plus the additional duties allowed under (b) and (c);
>
> (e) if the difference is greater than 75 per cent of the trigger price, the additional duty shall equal 90 per cent of the amount by which the difference exceeds 75 per cent, plus the additional duties allowed under (b), (c) and (d). (emphasis added)

159. The legal issue raised with respect to Article 5.5 is whether it is permissible for the importing Member to offer the importer a choice between the use of the c.i.f. price of the shipment as provided in Article 5.5, and another method of calculation which departs from this principle. In this case, the alternative method consists of the "representative price" provided in Regulation 1484/95.

160. Regulation 2777/75, the Council regulation, contains the general rule for the application of the additional "special safeguard" duties provided for in Article 5 of the *Agreement on Agriculture*. Article 5.3 of Regulation 2777/75 states:

> The import prices to be taken into consideration for imposing an additional import duty shall be determined on the basis of the cif import prices of the consignment in question.

161. However, what is really at issue here is Regulation 1484/95, the Commission regulation, which sets forth in detail the EC system for calculating the additional duties on shipments of frozen poultry meat to be imposed as a "special safeguard" over and above the ordinary customs duties. Regulation 1484/95 provides for two methods of calculating these additional duties.

162. The first method is explained in Article 3.1 of Regulation 1484/95, which provides: "At the request of the importer the additional duty may be established on the basis of the cif import price of the consignment in question, if this price is higher than the applicable representative price … ." According to Article 3.1, "the application of the cif price of the consignment in question for establishing the additional duty is subject to the presentation by the interested party to the competent authorities of the importing Member State of at least the following proofs: the purchasing contract, or any other equivalent document, the insurance contract, the invoice, the certificate of origin (where applicable), the transport contract, and, in the case of sea transport, the bill of lading".[95] An importer requesting that this method be followed must lodge a security "equal to the amount of the additional duty which he would have paid if the calculation of the additional duty had been made on the basis of the representative price applicable to the product in question"[96], for the goods to be released immediately for free circulation within the European Communities.

163. The second method is explained in Article 3.3 of Regulation 1484/95, which provides that in the absence of a request by the importer to calculate the additional duties on the basis of the c.i.f. import price of the consignment in question, "the import price of the consignment in question to be taken into consideration for imposing an additional duty shall be the representative price referred to in Article 2(1)" of the regulation. According to Article 2.1 of Regulation 1484/95, the EC Commission determines at regular intervals the "representative prices" of frozen poultry meat, "taking into account in particular: the prices on third country markets, free-at-Community frontier offer prices, and prices at the various stages of marketing in the Community for imported products."

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[95]Regulation 1484/95, Article 3.1.

[96]Regulation 1484/95, Article 3.2.

164. To determine whether the two methods specified in the EC measure are consistent with the obligations of the European Communities under Article 5.5 of the *Agreement on Agriculture*, we must turn first to an examination of the text of Article 5.5. The chapeau of Article 5.5 states: "The additional duty imposed under subparagraph 1(b) *shall* be set according to the following schedule … ". (emphasis added) According to the schedule in Article 5.5, the additional safeguard duty is calculated as a certain percentage of the difference between the c.i.f. import price and the trigger price. This percentage increases with the increases in that difference.

165. In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is "shall", not "may". There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties. Likewise, Article 5.5 clearly identifies the *c.i.f. import price of the shipment* as the sole element to be compared with the trigger price in the calculation of the additional duties. Article 5.5 stipulates that the amount of additional duties "*shall* be set" on the basis of the comparison of *the c.i.f. import price of the shipment* concerned with the trigger price. Thus, the ordinary meaning of the *c.i.f. import price of the shipment* is precisely that: the c.i.f. import price *of the shipment*. Unlike the trigger price with which it is compared, the c.i.f. import price is not described in the text of Article 5 of the *Agreement on Agriculture* as an average price during a certain period of time. It is simply *the c.i.f. import price of the shipment*, that is, the actual price of an actual shipment. There is no authority in the text of Article 5.5 for a Member to use any alternative to the c.i.f. import price, shipment-by-shipment, in the calculation of the additional duties imposed under this special safeguard mechanism.

166. The context of Article 5.5 supports this conclusion. The context of Article 5.5 includes both Article 5.1(b) and Article 4.2 of the *Agreement on Agriculture*. As noted previously, Articles 5.1(b) and 5.5 are inextricably linked. We have already concluded that the relevant import price in Article 5.1(b) is the c.i.f. import price of the shipment. Under Article 5.1(b), this price must be compared to the trigger price to determine whether the special safeguard mechanism is activated. Both the import price and the trigger price mentioned in Article 5.1(b) are also the very same import price and trigger price, respectively, that are mentioned in Article 5.5. If the relevant import price that is compared to the trigger price to determine whether the safeguard mechanism in Article 5.1(b) is activated is *the c.i.f. import price of the shipment*, then logic dictates that *the c.i.f. import price of the shipment* that is used to set the amount of those additional duties under Article 5.5 cannot be anything else.

167. We note that the safeguard mechanism in Article 5 of the *Agreement on Agriculture* is described as "special". The reason for this description is that it is a unique mechanism compared with safeguard provisions in Article XIX of the GATT 1994, the *Agreement on Safeguards*, and in Article 6 of the *Agreement on Textiles and Clothing*. It is not conditional upon a test of injury as it is the case with other safeguard provisions; it can be automatically activated when there is a certain surge in the volume of imports (Article 5.1(a)) or a certain drop in the price of the product (Article 5.1(b)). For this reason, it should not be invoked except in accordance with, and within the confines of, the strict requirements of Article 5. One of these requirements is that the relevant import price to be compared with the trigger price for the purpose of establishing the amount of the additional duties under Article 5.5 must be the *c.i.f. import price of the shipment*. To read the text of Article 5.5 as permitting the use of any price other than the c.i.f. import price, shipment-by-shipment, would not be consistent with the *special* character of this provision.

168. Therefore, neither the text nor the context of Article 5.5 of the *Agreement on Agriculture* permits us to conclude that the additional duties imposed under the special safeguard mechanism in Article 5 of the *Agreement on Agriculture* may be established by any method other than a comparison of the *c.i.f. price of the shipment* with the trigger price.

169. With this conclusion in mind, we turn again to the two methods employed in the EC measure. With respect to the first method, it will be recalled that Article 3.1 of Regulation 1484/95 permits the additional duties to be calculated, at the request of the importer, on the basis of "the c.i.f. price of the consignment" in question. To the extent that this method uses the c.i.f. price of the shipment to calculate the amount of the additional duties, it is consistent with Article 5.5 of the *Agreement on Agriculture*. We note, however, that this method is only available at the request of the importer and also is only available if the price established by this method is higher than the applicable representative price. Otherwise, the alternative method, which does not use the c.i.f. price of the shipment, is used. This means that the actual c.i.f. price of the consignment is not used in all cases. To this extent, this method is not consistent with Article 5.5 of the *Agreement on Agriculture*.

170. With respect to the second method, it will be recalled that Article 3.3 of Regulation 1484/95 provides for the calculation of additional duties by reference to the "representative price". As pointed out previously, the basic characteristic of the "representative price" is that it is an average of three elements over a certain period of time. The "representative price" may be more advantageous for exporters of frozen poultry meat to the European Communities, "a useful and transparent tool for importers to reduce bureaucracy",[97] conducive to the avoidance of fraud or other irregularities in the

[97]EC post-hearing reply memorandum, para. 16.

pricing of imports of frozen poultry meat,[98] "a means of boosting trade by dramatically reducing bureaucracy and paperwork",[99] and a method that the importer is "completely free" to choose.[100] We offer no views on any of these possible justifications for, or consequences of, the EC "representative price". We need not do so. For, whatever the "representative price" may or may not be, it is clear on the face of the regulation that the "representative price" is *not* calculated on a shipment-by-shipment basis and, therefore, it is not the c.i.f. price *of the shipment* concerned. Article 3.1 of Regulation 1484/95 states that: "At the request of the importer the additional duty may be established on the basis of the cif import price of the consignment in question, *if this price is higher than the applicable representative price* … ." (emphasis added) If the representative price can be lower or higher than the c.i.f. price of the shipment concerned, then it obviously will not always be the same as the c.i.f. price o*f the shipment*. For this reason, and because we hold that calculation of the additional "special safeguard" duties on the basis of the c.i.f. price *of the shipment* is mandatory, we conclude that the use of the "representative price" is inconsistent with Article 5.5 of the *Agreement on Agriculture.*

171. To the extent that Regulation 1484/95 allows for the calculation of the additional duties under Article 5 of the *Agreement on Agriculture* on a basis other than the c.i.f. price *of the shipment* concerned, it is inconsistent with the obligations of the European Communities under Article 5.5 of the *Agreement on Agriculture*. Therefore, the "representative price" method in Regulation 1484/95 is not consistent with Article 5.5 of the *Agreement on Agriculture*. Having made this determination, it is not necessary for us to proceed to examine whether the EC measure is consistent with Article 4.2 of the *Agreement on Agriculture*.

X. Findings and Conclusions

172. For the reasons set out in this Report, the Appellate Body:

(a) finds no reversible error in the interpretation by the Panel of the relationship between Schedule LXXX and the Oilseeds Agreement;

[98]EC post-hearing reply memorandum, para. 15.

[99]EC post-hearing reply memorandum, para. 11.

[100]EC post-hearing reply memorandum, para. 11.

(b) upholds the Panel's findings that the European Communities is bound, on a non-discriminatory basis, by its tariff commitments for frozen poultry meat, and that no agreement existed between Brazil and the European Communities on the allocation of the tariff-rate quota for frozen poultry meat within the meaning of Article XIII:2(d) of the GATT 1994;

(c) upholds the Panel's finding that a tariff rate-quota resulting from negotiations under Article XXVIII of the GATT 1947 must be administered in a non-discriminatory manner consistent with Article XIII of the GATT 1994;

(d) upholds the Panel's finding that the European Communities has not acted inconsistently with Article XIII of the GATT 1994 in calculating Brazil's tariff-rate quota share based on the total quantity of imports, including those from non-Members;

(e) upholds the Panel's finding relating to Article X of the GATT 1994;

(f) upholds the Panel's findings relating to Articles 1.2 and 3.2 of the *Licensing Agreement*;

(g) concludes that the Panel did not act inconsistently with Article 11 of the DSU in not examining certain arguments made by Brazil relating to GATT/WTO law and practice;

(h) reverses the finding of the Panel that the European Communities has acted inconsistently with Article 5.1(b) of the *Agreement on Agriculture* by invoking the safeguard mechanism when the c.i.f. import price, not including ordinary customs duties, falls below the trigger price; and

(i) concludes that the representative price used in certain cases by the European Communities in calculating the additional safeguard duties is inconsistent with Article 5.5 of the *Agreement on Agriculture*.

173. The Appellate Body *recommends* that the DSB request that the European Communities bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture* and the *Licensing Agreement* into conformity with its obligations under those agreements.

Signed in the original at Geneva this 1st day of July 1998 by:

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James Bacchus

Presiding Member

_____ _____

Said El-Naggar
Member

Florentino Feliciano
Member