I. INTRODUCTION

1.1 On 4 June 1998, the European Communities requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 (hereinafter the "GATT 1994") and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter the "Anti-Dumping Agreement")

regarding failure on the part of the United States to repeal Title VIII of the US Revenue Act of 1916, also known as the US Antidumping Act of 1916 (hereinafter the "1916 Act").[1]

1.2 Consultations were held in Geneva on 29 July 1998, but did not lead to a mutually satisfactory resolution of the matter.

1.3 On 11 November 1998, the European Communities requested the Dispute Settlement Body (hereinafter the "DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17 of the Anti-Dumping Agreement.[2] The European Communities claimed that the 1916 Act was inconsistent with Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "Agreement Establishing the WTO" - the Marrakesh Agreement Establishing the World Trade Organization including its annexes being referred to as the "WTO Agreement"); Articles VI:1 and VI:2 of the GATT 1994; and Articles 1, 2.1, 2.2, 3, 4 and 5 of the Anti-Dumping Agreement.[3] In the alternative, the European Communities claimed that the 1916 Act was in breach of Article III:4 of the GATT 1994.

1.4 On 1 February 1999, the DSB established a panel pursuant to the request made by the European Communities, in accordance with Article 6 of the DSU. In document WT/DS136/3, the Secretariat reported that the parties had agreed that the panel would have the standard terms of reference. The terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS136/2, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 Document WT/DS136/3 also reported that, on 1 April 1999, the Panel was constituted as follows:

Chairman: Mr. Johann Human

Members: Mr. Dimitrij Grčar

Professor Eugeniusz Piontek

1.6 India, Japan and Mexico reserved their rights to participate in the Panel proceedings as third parties. All of them presented arguments to the Panel.

1.7 The Panel met with the parties on 13 - 14 July 1999 as well as 14 - 15 September 1999. It met with third parties on 14 July 1999. The Panel issued its interim report to the parties on 20 December 1999. The Panel issued its final report to the parties on 14 February 2000.

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1 See WT/DS136/1.

2 See WT/DS/136/2.

3 The provisions listed by the European Communities in WT/DS/136/2 as being infringed by the 1916 Act are, in the view of the European Communities, not necessarily the only violations of the mentioned Agreements. See WT/DS/136/2.

II. FACTUAL ASPECTS

A. Description of the US 1916 Act

2.1 The 1916 Act at issue in the present dispute was enacted by the US Congress under the heading of "Unfair Competition" in Title VIII of the Revenue Act of 1916.[4] It provides as follows:

> "It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.
>
> Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.
>
> Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefor in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.
>
> The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder."[5]

2.2 Thus, the business activity which the 1916 Act prohibits is a form of international price discrimination, which has two basic components:

(a) An importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the country of the foreign producer.

(b) The importer must have undertaken this price discrimination "commonly and systematically."

[4] Act of 8 September 1916. The Revenue Act of 1916 can be found at 39 Stat. 756 (1916).
[5] 15 U.S.C. § 72.

2.3 It is a condition for criminal or civil liability under the 1916 Act that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."

2.4 Another characteristic of the 1916 Act is that it provides for a private right of action in federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.

2.5 The 1916 Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade".[6]

B. Description of Other Relevant US Acts

1. Antidumping Act of 1921 and Tariff Act of 1930

2.6 In 1921, the United States enacted the "Antidumping Act of 1921."[7] It empowered the Secretary of the Treasury to impose duties on dumped goods without regard to the dumper's intent. Whereas the Antidumping Act of 1921 was later repealed, it is on this Act that the United States' Tariff Act of 1930, as amended (hereinafter the "Tariff Act of 1930"),[8] is built. The Tariff Act of 1930 is implemented through proceedings governed by regulations promulgated by the US Department of Commerce[9] and the US International Trade Commission[10].

2.7 The 1921 Antidumping Act was, and the 1930 Tariff Act, as amended, is, codified in Title 19 of the United States Code, entitled "Customs Duties".

2.8 The United States has notified Title VII of the Tariff Act of 1930, as amended, and its implementing regulations to the WTO's Committee on Anti-Dumping Practices in accordance with Articles 18.4 and 18.5 of the Anti-Dumping Agreement.

2. Robinson-Patman Act

2.9 Section 2 of the Clayton Act, as amended by the Robinson-Patman Act in 1936, provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States […] and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to

6 See 15 U.S.C. §§ 71-74.
7 The Antidumping Act of 1921 was codified at 19 U.S.C. §§ 160-71 (repealed).
8 The Tariff Act of 1930 is codified at 19 U.S.C. §§ 1671 et seq.
9 See 19 C.F.R. Part 351.
10 See 19 C.F.R. Part 200.

> injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."[11]

2.10 Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, applies the same principles to the conduct of a buyer, by making it unlawful for a buyer "knowingly to induce or receive discrimination in price" prohibited by other parts of the Act.[12] A violation of this provision is subject to criminal penalties and also is actionable in a private right of action, where treble damages and injunctive relief are available.

2.11 To establish price discrimination in an action under the Robinson-Patman Act, there first must be evidence of two actual sales at different prices, with both sales occurring in US commerce.[13] Thus, the Robinson-Patman Act does not apply to cross-border price discrimination.[14] In addition, a successful price discrimination claim requires a showing of an anti-competitive effect. Case law has established that, if the claim is directed at so-called "primary line injury," meaning injury to the price discriminator's rivals, which corresponds to the situation addressed by the 1916 Act, the requisite anti-competitive effect can be demonstrated through a showing of (i) pricing below an appropriate measure of cost and (ii) the likelihood that the predator will recoup its losses in the future.[15]

2.12 The Robinson-Patman Act is codified in Title 15 of the United States Code, entitled "Commerce and Trade."[16]

C. Instances of Application of the US 1916 Act

2.13 The 1916 Act has been invoked infrequently. Before the 1970s, there was only one reported 1916 Act court case, *H. Wagner and Adler Co. v. Mali*[17].[18]

2.14 In line with the infrequent invocation of the 1916 Act, there is a limited number of judicial interpretations of its specific provisions.[19] In this regard, it should be

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[11] 15 U.S.C. 13(a).

[12] See 15 U.S.C. 13(f).

[13] See *International Telephone & Telegraph Corp. et al.*, 104 F.T.C. 280, 417, citing E. Kinter, *A Robinson-Patman Primer*, 3rd ed. (1979), p. 35.

[14] In answering a question of the Panel regarding, *inter alia*, whether the Robinson-Patman Act applies to imported products, the United States notes, however, that imported goods that have become a part of domestic commerce may be subject to the Robinson-Patman Act.

[15] See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (hereinafter "*Brooke Group*").

[16] Also located in Title 15 are the Sherman Act (15 U.S.C. §§ 1-7, to be found at 26 Stat. 209 (1890)), the Clayton Act (15 U.S.C. §§ 12-27, to be found at 38 Stat. 730 (1914)) and the Federal Trade Commission Act (15 U.S.C. §§ 41-58, to be found at 38 Stat. 717 (1914)).

[17] F.2d 666 (2d Cir. 1935).

[18] In response to a question of the Panel regarding whether the 1916 Act was applied before the 1970s, the United States confirmed its understanding that there was only one reported 1916 Act case before the 1970s. The United States also notes, however, that not all filed cases lead to reported decisions.

[19] Those interpretations can be found in the following - final or interlocutory - court decisions: *H. Wagner and Adler Co. v. Mali*, *Op. Cit.*; *In re Japanese Electronic Products Antitrust Litigation*, 388 F.Supp. 565 (Judicial Panel on Multidistrict Litigation, 1975) (hereinafter "*In re Japanese*

noted that, under the US legal system, the judicial branch of the government is the final authority regarding the meaning of federal laws, such as statutes passed by the legislative branch, i.e. the US Congress. It should also be noted, however, that no claims under the 1916 Act have ever been reviewed by the US Supreme Court, which is the highest federal court in the United States.[20] All court decisions so far have been rendered by US circuit courts of appeals or US district courts.[21]

2.15 All of the court decisions addressing the meaning of the 1916 Act and its various provisions to date also have involved private civil complaints rather than criminal prosecutions. Yet no complainant in a civil suit has so far recovered treble damages and the cost of the suit. However, in one recent civil case involving a 1916 Act claim, *Wheeling-Pittsburgh*[22], some defendants have elected to settle rather than proceed to trial.

2.16 The US Department of Justice, the agency responsible for prosecuting criminal violations of the 1916 Act, has never successfully prosecuted a criminal case under the 1916 Act.[23] Accordingly, no criminal sanctions have ever been imposed pursuant to the 1916 Act.

Electronic Products I"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd*., 402 F.Supp. 244 (E.D. Pa. 1975) (hereinafter "*Zenith I*"); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd*., 402 F.Supp. 251 (E.D. Pa. 1975) (hereinafter "*Zenith II*"); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Schwimmer v. Sony Corp. of America*, 471 F. Supp. 793 (E.D.N.Y. 1979); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41 (2nd Cir. 1980); *Jewel Foliage Co. v. Uniflora Overseas Florida*, 497 F. Supp. 513 (M.D. Fla. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd*., 494 F.Supp. 1190 (E.D. Pa. 1980) (hereinafter "*Zenith III*"); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 723 F.2d 319 (3d Cir. 1983) (hereinafter "*In re Japanese Electronic Products II*"); *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013 (9th Cir. 1985); *Isra Fruit Ltd. v. Agrexco Agr. Export Co*., 631 F. Supp. 984 (S.D.N.Y. 1986); *In re Japanese Electronic Products Antitrust Litigation (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.)*, 807 F.2d 44 (3d Cir. 1986) (hereinafter "*In re Japanese Electronic Products III*") *Helmac Products Corp. v. Roth (Plastics) Corp*., 814 F. Supp. 560 (E.D. Mich. 1992) (hereinafter "*Helmac I*"); *Helmac Products Corp. v. Roth (Plastics) Corp*., 814 F.Supp. 581 (E.D. Mich. 1993) (hereinafter "*Helmac II*"); *Geneva Steel Company v. Ranger Steel Supply Corp*., 980 F.Supp. 1209 (D. Utah 1997) (hereinafter "*Geneva Steel*"); *Wheeling-Pittsburgh Steel Corporation v. Mitsui Co*., 35 F.Supp.2d. 597 (S.D. Ohio 1999) (hereinafter "*Wheeling-Pittsburgh*").

[20] The only reported case in which the US Supreme Court has considered the 1916 Act was *United States v. Cooper Corp*., 312 U.S. 600 (1941), although the issue in that case was whether the United States is a "person" within the meaning of Section 7 of the US Sherman Act entitled to sue for treble damages thereunder.

[21] In the United States, the federal judicial branch is established on three levels. Generally, the lowest level is the trial court level, consisting of the various US district courts. At least one district court can be found in each of the 50 States. The next level consists of the US circuit courts of appeals, which are intermediate appellate courts responsible for reviewing district court decisions. There are 12 federal court circuits. At the highest level of the federal court system is the US Supreme Court, which, at its discretion, hears appeals from decisions of the circuit courts.

[22] The case is still pending while the remaining litigants conduct discovery.

[23] In response to a question of the Panel regarding the number of cases considered for prosecution by the US Department of Justice, the United States notes that, so far as it can determine, the US Department of Justice has never prosecuted nor seriously considered prosecuting a criminal case under the 1916 Act. In *Zenith III*, *Op. Cit*., p. 1212, the following is stated regarding enforcement of the 1916 Act's criminal provisions until the early 1970s:

III. CLAIMS AND MAIN ARGUMENTS

A. Requests Dealt with by the Panel in the Course of the Proceedings

1. Preliminary Objection by the United States and Request for a Ruling by the Panel

3.1 As a preliminary matter, the **United States** considers[24] that the European Communities claims for the first time in its first written submission that the 1916 Act also violates Articles 1 and 18.1 of the Anti-Dumping Agreement because these provisions make anti-dumping duties the exclusive remedy for dumping. The relevant WTO dispute settlement provisions - Articles 6.2 and 7 of the DSU and Articles 17.4 and 17.5 of the Anti-Dumping Agreement - preclude the Panel from considering these two claims because they were not included in the European Communities' request for the establishment of a panel.[25]

3.2 The United States notes that Article 7 of the DSU provides that the Panel's mandate is to examine the "matter" described in the panel request.[26] The Appellate Body has definitively described the "matter" which is properly before a panel to examine. In *Guatemala - Cement*, it explained that the complaining Member must, in its panel request,

> "identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly. [...] The "matter referred to the DSB", therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[27]

> "Apparently there have been four attempts to enforce the criminal provisions of the Act, but none of them has been successful and none has given rise to a reported judicial decision. Marks, *United States Antidumping Laws - A* Government *Overview* 43 Antitrust L.J. 580, 581 (1974)."

24 See the US First Written Submission, dated 3 June 1999, p.2.

25 The United States refers to WT/DS136/3.

26 The United States notes that Article 1.2 of the DSU explains that its rules and procedures govern a dispute subject to any special or additional rules and procedures contained in the covered agreements. The same Article provides that, to the extent that there is a "difference" between the rules and procedures of the DSU and the special or additional rules and procedures set forth in a covered agreement, the special or additional rules and procedures in the covered agreement "shall prevail." However, as established in the Appellate Body Report on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, paras. 65-66 (hereinafter "Appellate Body Report on *Guatemala - Cement*"), if there is no "difference," the rules and procedures of the DSU *apply together with* the special or additional rules and procedures of the covered agreement. The Appellate Body expressly held that there is no "difference" between Articles 6.2 and 7 of the DSU, and Articles 17.4 and 17.5 of the Antidumping Agreement. *Ibid*., paras. 67-68. Accordingly, Articles 6.2 and 7 of the DSU apply together with Articles 17.4 and 17.5 of the Antidumping Agreement when the claims at issue are being made under the Antidumping Agreement. When applied together, these Articles permit a panel to consider only the "matter" set forth in the complaining Member's panel request where, as here, the terms of reference are exclusively defined by reference to the panel request. *Ibid*., paras. 70-72.

27 Appellate Body Report, *Guatemala - Cement*, *supra*, footnote 26, para. 72 (emphasis in original).

3.3 According to the United States, the Appellate Body has also settled that the complaining Member may set out the "legal basis for the complaint" - its "claims" - in a summary fashion and that the minimum requirement is simply for the complaining Member to list provisions of a WTO agreement[28].[29] Vague references to unidentified "other" provisions, however, do not satisfy the standards of Article 6.2 of the DSU.[30] If a particular "legal basis of the complaint" - a "claim" - is not set forth in the panel request, it is not properly before the panel. Likewise, Article 6.2 is not satisfied by only identifying the claims in the complaining Member's first written submission. In *European Communities - Bananas*, the Appellate Body explained that a deficiency in a panel request cannot be cured by the complaining Member's first submission:

> "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party […] to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[31]

3.4 The United States contends that, under these standards, the European Communities' panel request in the present dispute is insufficient to place claims that the 1916 Act violated Articles 1 and 18.1 of the Anti-Dumping Agreement before the Panel. The European Communities, in its panel request, characterised the 1916 Act as an anti-dumping statute and claimed that the 1916 Act was inconsistent with Article VI:2 of the GATT 1994, which, according to the European Communities, "specif[ies] that anti-dumping duties are the only possible remedy to dumping whereas the 1916 Act is having recourse to treble damages and fines and/or imprisonment."[32] The European Communities at no point claimed - in its panel request or even in its request for consultations - that the 1916 Act was similarly inconsistent with any provision of the Anti-Dumping Agreement or, in particular, with Article 1 or Article 18.1 of the Anti-Dumping Agreement.[33]

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[28] The term "WTO agreement(s)" is used hereinafter to refer to the various agreements contained in Annex 1 and 2 of the WTO Agreement.

[29] The United States refers to the Appellate Body Report on *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, paras. 88-91 (hereinafter "Appellate Body Report on *India - Patents*"); Report of the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141 (hereinafter "Appellate Body Report on *European Communities - Bananas*").

[30] The United States refers to the Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, adopted 25 September 1997, DSR 1997:II, 943, paras. 7.29-7.30 (hereinafter "Panel Report on *European Communities - Bananas*").

[31] Appellate Body Report, *European Communities - Bananas*, *supra*, footnote 29, para. 143 (emphasis in original).

[32] WT/DS136/1.

[33] The United States notes that the European Communities did reference Article 1 of the Anti-dumping Agreement but only with regard to a separate claim that Article 1 requires "the carrying out

3.5 The United States submits that until receipt of the European Communities' first written submission, the United States had no notice that the European Communities was asserting claims under Articles 1 and 18.1 of the Anti-Dumping Agreement. The Appellate Body has explained that a defective panel request cannot be cured by a later submission or statement. Accordingly, the European Communities' claims under Articles 1 and 18.1 of the Anti-Dumping Agreement are not properly before the Panel.

3.6 The United States therefore requests that the Panel rule that the claims are not before it and are eliminated from the instant proceeding. The United States requests that the Panel rule expeditiously and, if possible, by the time of its first meeting.

3.7 In response to a question of the Panel regarding its position *vis-à-vis* the US request, the **European Communities** states[34] that the United States requests the Panel to exclude claims that the European Communities has not made. The relevant EC claims are that by providing for a remedy other than duties against dumping the 1916 Act violates Article XVI:4 of the Agreement Establishing the WTO and Article VI:2 of the GATT 1994. The European Communities makes no separate claims that this feature of the 1916 Act violates Article 1 and 18.1 of the Anti-Dumping Agreement. These provisions were merely mentioned as arguments in support of the European Communities' claims. Accordingly, the US request for a preliminary ruling can be dismissed as being without object.

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

2. Request by Japan for Enhanced Third Party Rights

3.9 **Japan**, which is a third party in the present case and has requested the establishment of another panel in respect of the 1916 Act,[35] requests to be granted enhanced third party rights.[36] In particular, Japan requests to receive all the necessary documents, including submissions and written versions of statements by the parties, and that it be granted permission to attend all the meetings of the second substantive meeting of the Panel.[37]

3.10 In reply to a request by the Panel for the views of the parties, the **European Communities** states that it is happy to support the request of Japan, provided that the

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of an investigation (which has to respect a set of procedural rules) prior to the imposition of any duty." Never did the European Communities identify Article 1 of the Antidumping Agreement as the basis for a claim that antidumping duties are the sole remedy for dumping. The United States also refers to the Panel Report on *European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, adopted on 5 July 1995, ADP/137, paras. 442-447 for the proposition that if there is more than one legal basis for alleging a breach of the same provision of an agreement, a separate and distinct claim is required.

[34] See the European Communities' letter to the Chairman of the Panel, dated 6 July 1999.

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

[36] As stated in Japan's letter to the Chairman of the Panel, dated 2 September 1999.

[37] Japan made its request for enhanced third party rights after the first substantive meeting of the Panel.

European Communities' similar request in the case initiated by Japan in respect of the 1916 Act (WT/DS162) is also accepted by the Panel.

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

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

3.13 The United States argues, moreover, that, as individual complaining parties, Japan and the European Communities have more than adequate opportunity to present their views and respond to the arguments of the United States. In *EC Measures Concerning Meat and Meat Products (Hormones)*[38], the panel allowed expanded third party rights because the panel had stated that it intended to conduct concurrent deliberations in those cases meaning that its deliberations were going to be based upon the arguments and presentations in both cases, including presentations by experts made jointly to both panels. The panel proceeded with this approach despite the fact that the United States had expressed its unequivocal concern with the panel's "concurrent deliberations" approach. Thus, because the panel was going to consider arguments made in one case in the course of deciding another case, the United States requested and was allowed enhanced third party rights. Otherwise, without an opportunity for the United States to respond, the panel would have been considering what would have been, in effect, *ex parte* submissions.

3.14 The United States notes that, in the present case, the Panel has not stated that it intends to conduct concurrent deliberations, and for the reasons expressed in the *European Communities - Hormones* proceeding, the United States would not support concurrent deliberations. Accordingly, the European Communities will not be denied an opportunity to respond to arguments of the United States that will be considered by the Panel in making its decision in the case initiated by the European Communities. The same holds true for Japan in its case. The apparent purpose for the request for expanded third party rights is to provide the third parties with an opportunity to make an additional submission in their own panel process. There is no provision in the DSU for such additional submissions.

3.15 The position taken by the Panel in the course of the proceedings *vis-à-vis* Japan's request is reflected in section VI.B.2 of this report.

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[38] Panel Report on *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA, WT/DS48/R/CAN, adopted 13 February 1998, DSR 1998:III, 699 (hereinafter Panel Report on "*European Communities - Hormones*").