THE DISPUTE OVER THE INDONESIAN NATIONAL CAR PROGRAM

CASE B

Part I

Consultations and Negotiations

Bilateral Consultations

By early June of 1996, the dispute over the Indonesian National Car Program had moved to the level of government-to-government discussions. The bilateral consultations between Indonesia and each of the three complaining governments—Japan, the United States and the European Union—lasted through the summer, fall and winter of 1996–97 and well into the spring of 1997. By the fall of 1996, the Japanese and the US governments and the European Commission had all decided to begin WTO dispute settlement proceedings by requesting consultations in accordance with the terms of the DSU. These consultations proceeded concurrently with the bilateral consultations. All three complaining parties were ready to reach a negotiated settlement and delayed requesting a WTO dispute settlement panel when the mandatory 60-day minimum consultation period expired. On the other hand, all three countries considered the issue important enough that they were prepared to have it raised at the highest levels of their governments. When by May 1997 WTO consultation and the bilateral negotiations had not resolved the matters, the trade agencies in the Japanese and US governments and the EU Commission, one-by-one, announced that they would request the formation of a WTO dispute settlement panel.

The Japanese Approach -- Japanese officials initially sent conflicting signals regarding the National Car Program, as noted in Part I. From June of 1996 to June of 1997, Japanese officials attempted to resolve the national car problem through bilateral talks while at the same time slowly moving toward a WTO dispute settlement panel. In late July of 1996 Japanese trade officials in MITI still expressed the hope that Indonesia would not actually import "national cars" from South Korea. One MITI official noted that Indonesia had not yet approved a shipment of national cars from Korea. The MITI officials said: "We are cool-headedly dealing with national car project separately," and stressed that Japan was talking a careful stance so that other aspects of Japan's bilateral relations with Indonesia would not be affected. He even said, "We don't want to cause any speculation that Japan is reducing ODA (development aid) or yen loans because of this problem."[1] After meeting with President Soeharto and Trade Minister Tunky Ariwibowo on September 13, Japanese Trade Minister Shunpei Tsukahara said that Japan would continue to hold bilateral talks even if it decided to take action within the WTO. He also noted that Japan must verify that the TPN cars had actually cleared customs duty-free before making a definitive decision about the WTO case.[2]

[1] "Indonesia 'National Car': Brazil Case Separate" Dow Jones News Service, 7/31/96.
[2] "Japan-Indonesia Talks on Cars will Go on, Even with WTO Case" Asian Wall Street Journal, 9/16/1996.

In November and December of 1996 Japan and Indonesia held WTO consultations pursuant to the procedures in the WTO Dispute Settlement Understanding. After the second round Japanese officials said that "We did not see any new proposals today from the Indonesian side to resolve the matter."

Japan could have requested the formation of a dispute settlement panel following the failure of the consultations in December, but waited until April 17. Even at this point, Japanese officials were sending mixed signals. The Japanese Foreign Minister Yukihito Ikeda said in early May that: "We are willing to take up the issue in a discussion again in a bid to maintain our harmonious relations in many fields with Indonesia."[3] The Japanese auto industry also much preferred a negotiated settlement to a confrontational WTO proceeding. In January, the industry sought to get Indonesia to provide the same tax breaks provided to TPN and again in February indicated its readiness for a deal.

The EU Approach -- The EU Commission also held a series of consultations. In October, Commissioner for External Affairs Sir Leon Brittan blasted Indonesia's national car policy when he said, "It is something of a paradox that with import tariffs as high as 125 percent, the Indonesian government still feels that it needs discriminatory measures to protect its industry."[4] The EU did not always speak with one voice. The French Economic and Finance Minister, Jean Arthuis, speaking in Jakarta in July of 1996, said that Indonesia's desire to have a national car policy was reasonable as it is a country in transition. He also expressed France's wish to participate in the development of the Indonesian car industry. The European industry, like its Japanese and US counterparts, was looking for a negotiated settlement.

The US Approach -- After the announcement of the revised National Car Program in early June 1996, a USTR official protested that the program violated the national treatment principle of the WTO and demand consultations. These meetings took place in Manila the week of June 3, but according to Indonesian officials they only resulted in the clarification of positions.[5] Another round of meetings was held in early July. During the remainder of 1996 the United States and Indonesia engaged in a series of bilateral meetings in an effort to negotiate a deal that would be acceptable to the US auto industry. These negotiations took place both at the level of the Assistant US Trade Representative for Asia or his deputy on the U.S. side and the Director General of the Indonesian Ministry of Trade and Industry. Since the US negotiators also preferred to settle the case, at each stage in the dispute settlement process, they would only proceed to the next stage at the last moment when they knew that there was no chance of a new deal.

The US automakers had a smaller stake in the Indonesian market than their Japanese and European counterparts, but the United States probably waged the most visible campaign of the three countries in an effort to resolve the dispute. On October 1, in the context of the announcement of the annual Super 301 report on the Clinton Administration's trade

[3] ANTARA, May 9, 1997.
[4] Dow Jones Newswires, October 3, 1996.
[5] Time, June 10, 1996 page 40.

expansion priorities, the USTR announced that she was initiating a regular Section 301 investigation of Indonesia's national car policy. The Super 301 report stressed that:

> [T]he Clinton Administration has adopted a strategic enforcement strategy — aimed not only at challenging existing barriers but also at preventing the future adoption of similar barriers around the world. Successful challenges to such measures will establish beneficial precedents not only for the United States, but for all WTO members.
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> Application of the Administration's strategic enforcement strategy is particularly appropriate in the automotive sector, where trade-related investment measures affect U.S. exports in many countries. Manufacturing of autos and auto parts is a key industry for the United States and access to foreign markets is important for its future growth. The U.S. auto industry has made enormous strides in competitiveness and productivity. As a result of USTR's monitoring of compliance with WTO agreements, the USTR has identified practices that are inhibiting U.S. exports of autos and auto parts and the creation of the jobs associated with those exports. In many cases such practices appear to be inconsistent with WTO rules, including those under the WTO Agreement on Trade-Related Investment Measures (TRIMs).[6]

The 1996 Super 301 report also announced the initiation of three other Section 301 investigations, of which two involved auto trade measures: (1) Brazil -- --reduced duties on assembled auto imports and other benefits if manufacturers export a certain amount, and (2) Australia -- subsidies on the export of leather seat covers. The Australian investigation was launched in response to a petition filed by US manufacturers of leather auto seats covers. In all four cases the USTR announced that, as the practices under investigations were covered by WTO agreements, she would initiate or continue WTO dispute settlement proceedings.

The United States did not put as much pressure on Indonesia as it could have. The year before the United States had threatened to identify Korea as a "priority foreign country" under the Super 301 statute if it did not agree to take steps to modify practices considered to be barriers to US auto exports. In 1997, the United States actually did name Korea as a "priority foreign country" because of its failure to comply with the 1995 auto trade agreement.

Having announced the Section 301 investigation of the National Car Program, the United States resumed bilateral consultations with Indonesia as the WTO consultations got underway. In mid-October a US trade official noted that President Clinton planned to raise the car issue during bilateral meetings at the APEC summit in November. The official added: "It's one of the bigger bilateral issues at this point."[7]

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[6] See report "Identification of Trade Expansion Priorities (Super 301) Pursuant to Executive order 12901" released October 1, 1996.

[7] "See You in Court" by Niger Holloway, et el in Far Eastern Economic Review, p. 96, 10/17/96.

Indonesian Strategy -- During the extended WTO consultations between Indonesia and the US, Japan and the EU, Tungky and State Secretary Moerdiono continued to imply in public that even if Japan, the EU and the US were to go to the WTO, it would still take until 1999 before a ruling would be brought against Indonesia and that by then, the National Car should be successfully launched.[8] Tunkgy also assured the public that government "as facilitator, will provide whatever assistance they [TPN] needed, either in construction, licensing or other aspects of the industry." On the eve of WTO consultation in October of 1996, Tunkgy reassured his countrymen that WTO consultations were normal in trade disputes, "so there is no need for us to get fidgety".[9]

After Japan announced on April 17, 1997 its intention to request the formation of a WTO dispute settlement panel, President Soeharto reacted angrily and called for a halt to the bilateral negotiations. The resort to the WTO apparently hurt Indonesian national pride. Even after Japan announced its decisions, Indonesian officials still hoped to keep the National Car Program. One commentator predicted that the United States and EU would not follow Japan's lead. The commentator also observed "Japan's intention to take the case to the WTO panel is not a final decision." Considering Indonesia's strong reaction to its move, Japan may rethink the decision. [10]

May was a relatively quiet month as Japan waited for Indonesian assembly elections to take place before pressing its case further.[11] Some Indonesian leaders remained confident that even if Indonesia lost in the WTO, it would have until 1999 to get the National Car Program successfully launched. At the same time, others in the government were beginning to organize a team to defend Indonesia.[12] Further, at least one Indonesian trade expert at a Jakarta think tank warned that Indonesia's practices were inconsistent with the TRIMs Agreement and that the new WTO dispute settlement system was much more effective than its predecessor in getting offending parties to change practices inconsistent with the WTO. He noted "thus far all members involved in dispute cases have adhered to panel decisions despite loopholes in national law that would allow them to ignore the decision", but this was Indonesia's first experience with the WTO dispute settlement system.[13] The same commentator also warned that a panel might well rule against Indonesia on the merits and that Indonesia's negotiating room had been narrowed by having the matter go to the WTO.[14]

In early June of 1997, Indonesia appeared to be on the verge of reaching a negotiated settlement with Japan, the EU and the United States. Indonesian business leaders

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[8] Jakarta Post 4/23/97.
[9] ANTARA, 10/07/1996 "Three Envoys to Represent Indonesia for Consultation on National Car Policy at WTO."
[10] Economist A. Tony Prasetiantono of Yogyakarta's Gadjah Mada University quoted in Jakarta Post on 4/23/1997.
[11] "Tokyo Waits to Press on Jakarta Car Project until after Elections: The Asian Wall Street Journal, 5/22/97.
[12] ANTARA, The Indonesian National News Agency May 9, 1997.
[13] "Indonesia's WTO Test Drive" by Mari Pangestu, Director of Center for Strategic and International Studies, in Asian Wall Street Journal, 5/13/97.
[14] Mari E. Pangestu of the Center for International Studies in Jakarta, as quoted in Jakarta Post.

attempted to generate support for a negotiated deal by sending in early June a team to Japan to lobby the influential Japanese Keidanren to oppose continuation of the WTO case.[15] Indonesia was reportedly ready to offer to eliminate the import duty on car parts and the luxury tax on cars with engines larger than 3000ccs or on cars assembled in Indonesia.[16] Tungky reported that Indonesian negotiating teams were being dispatched to the three countries and that Indonesia would negotiate the seven demands made by the United States.[17] However, negotiations were complicated because every decision had to be cleared by President Soeharto. All of Soeharto's public statements indicated that he was determined not to surrender the special preferences given the national car and his son.

In the end the parties could not negotiate a deal as President Soeharto was apparently not willing to eliminate the discriminatory preferences given to the National Car, the concession demanded by the foreign car companies. By June 19, 1997 Tungky was much less forthcoming and, after reporting to President Soeharto, commented, "We should be careful because the local car industry has already achieved some progress." He added that lower car import taxes and duties could affect car production costs.
Dates for the various WTO consultations and requests for a panel are set forth in the following table:

WTO Consultations with Indonesia

Summary Table

Date	Consulting Country	Action
June–Sept. 1996	Japan, United States	Held informal bi-lateral consultations with Indonesia
Oct. 3, 1996	EU	Requests consultations pursuant to WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") procedures with respect to certain measures affecting the automobile industry
Oct. 4, 1996	Japan	Requests consultations pursuant to DSU procedures regarding certain measures affecting the automotive industry of Indonesia.
Nov. 4 & 5, 1996	Japan	Consultations held in Geneva
Oct. 8, 1996	United States	Requests consultations pursuant to DSU procedures regarding certain measures affecting trade and investment in the motor vehicle sector.
Nov. 4, 1996	EU	Consultations in Geneva
Nov. 29, 1996	Japan	Request additional consultations regarding the National Car Programme pursuant to DSU procedures.

[15] "Indonesian Chamber to Lobby Japan's Keidanren on Car Policy" Asia Pulse, 06/09/1997.
[16] "Indonesia Offers Tax Relief on 3000cc Car Imports" Asia Pulse 5/20/97.
[17] "Jakarta to Negotiate Seven U.S. demands on Car Policy" Asian Pulse 6/10/97.

Dec. 3, 1996	Japan	Second round of consultations. No mutually agreed solution reached.
Dec. 5, 1996	EU	Consultations in Geneva
Apr. 17, 1997	Japan	Requests establishment of a panel to examine the consistency of various measures under the National Car Programme with Articles I:1, III:2, III:4, X:1 and X:3(a) of GATT 1994, Article 2 of the TRIMs Agreement, and Articles 3.1(b) and 28.2 of the SCM Agreement.
May 12, 1997	EU	Requests establishment of a panel to examine the consistency of the measures identified with Articles I:1, III:2 and III:4 of GATT 1994, and Article 2 of the TRIMs Agreement. The European Communities also requested the panel to examine its complaint that the measures identified constitute "specific subsidies" within the meaning of Articles 1 and 2 of the SCM Agreement which cause "serious prejudice" to the Community's interest in the sense of Article 6 of that Agreement.
June 12, 1997	United States	Requests the establishment of a panel to examine the consistency of the measures identified with Articles I:1, III:2, III:4 and III:7 of GATT 1994, Articles 3, 20, and 65 of the TRIMs Agreement, Article 28.2 of the SCM Agreement, and Article 2 of the TRIMs Agreement. The United States also requested the panel to examine its complaint that the measures identified constitute "specific subsidies" within the meaning of Articles 1 and 2 of the SCM Agreement which cause "serious prejudice" to the United States' interest in the sense of Article 6 and 27 of that Agreement.
June 12 – July 1997	Japan & EU	DSB establishes a panel and agrees, as provided for in Article 9 of the DSU in respect of multiple complainants, that the Panel established on 12 June 1997 to examine the complaints by Japan and the European Communities would also examine the United States' complaint. Terms of reference of the Panel are the following: "To examine, in the light of the relevant provisions of the covered agreements cited by Japan, by the European Communities, and by the United States in the matter referred to the DSB by Japan, the European Communities and the United States and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."
July 30, 1997	United States	DSB agreed to request for establishment of a panel.

Part II

The WTO Panel Proceedings

With the collapse of the bilateral talks in June of 1997, the WTO proceedings continued almost as if on autopilot. While the consultation phase had continued much longer than the minimum time required by the DSU rules, the Panel proceeding itself adhered more closely to the guidelines set forth in the DSU. The Panel met with the parties on December 3 and 4, 1997 and January 13 through 15 of 1998. Nevertheless, because Japan, the EU and the United States requested the 60-day period for information gathering (provided under Annex V of the SCM Agreement), the panel proceeding was delayed by four months and took longer than the 6 months normally anticipated by the DSU for panel proceedings.

Procedural Issues

The parties raised a number of procedural issues at the Panel's first and second meetings, including the following:

Participation of Private Sector Lawyers: The United States objected to the presence in the Indonesian delegation of two American private lawyers. The United States argued that the private lawyers might not be bound by the same disciplinary rules regarding keeping the proceedings confidential as a member of the government. The United States also argued that including private lawyers could undermine the intergovernmental nature of the proceeding.

Indonesia argued that it had a sovereign right to determine the composition of is delegation. This sovereign right, Indonesia claimed, is based on the customary international law principle of the sovereign equality of states. Indonesia also cited a WTO Appellate Body ruling in another case that nothing in the Marrakesh Agreement Establishing the World Trade Organization, the DSU, or the Working Procedures, or in customary international law or the prevailing practice of international tribunals, prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings.

Indonesia noted that the right to determine the composition of delegations in dispute settlement proceedings is particularly important for developing countries since they do not have at their disposal specially trained and highly experienced WTO legal experts.

Loan to TPN: Indonesia also objected to a request of the United States that the Panel examine a $690 million loan. The loan was made on August 11, 1997, to TPN by a consortium of four Indonesian government-owned banks. The United States contended that the loan was made at the direction of the Government of Indonesia and, as a government-directed loan, violated paragraph 4 of GATT Article III and Article 2 of the TRIMs agreement. The United States also claimed that the loan constituted a specific

subsidy that caused serious prejudice to its interests. Indonesia argued that the loan was not cited in the US June 12, 1997, requests for a panel and was not covered in the terms of reference of the Panel.[18] Indonesia noted that Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) states that "[t]he request for the establishment of a panel ... shall identify the specific measures at issue." Indonesia also contended that, as the loan came after the formation of the Panel, it was not covered in the terms of reference of the Panel.

The United States in reply argued that the loan was covered by the terms of the reference for the Panel since it considered the loan subsidy to be a component of the National Car Program. The United States contended that, because the Panel will have to make findings as to whether or not the $690 million government-directed loan is merely one aspect of a single measure — the National Car Program, the Panel should not prejudge the outcome of this issue by making a ruling on a preliminary objection. The United States further contended the standard practice is to defer such rulings until the final panel report.

Significance of terminated measures: In the context of its effort to cope with the Asian Financial Crisis, Indonesia concluded an agreement with the International Monetary Fund for standby financing in the fall of 1997. In order to get the financing, Indonesia committed to the IMF to implement a program over the next three years to address the

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[18] The panel request of the United States (WT/DS59/6 dated June 12, 1997) stated that the following measures were at issue in the case:

The Measures at issue in this request include:

- the grant of import duty relief to parts and components used in the assembly of motor vehicles in Indonesia based on the finished vehicles, and under some circumstances the finished parts and components, meeting certain local content requirements;

- the effective reduction or elimination of the luxury sales tax on vehicles in Indonesia based on the finished vehicles meeting certain local content requirements;

- the exemption of import duties for parts and components used for the assembly of "national motor vehicles" assembled in Indonesia and meeting certain local content obligations;

- the effective exemption from the luxury sales tax on "national motor vehicles" assembled in Indonesia and meeting certain local content obligations;

- the grant of "national motor vehicle" tariff and luxury sales tax benefits to a single company that imports such vehicles from Korea; and

- defining "national motor vehicles" as including only those motor vehicles bearing unique Indonesian trademarks owned by Indonesian nationals.

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The panel had standard WTO terms of reference which were as follows: "To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS55/6-WT/DS64/4, by the European Communities in document WT/DS54/6, and by the United States in document WT/DS59/6, the matter referred to the DSB by Japan, the European Communities and the United States in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

fundamental causes of its current financial difficulties. In its letter of commitment dated October 31, 1997, Indonesia stated that:

> The government aims to promote greater transparency in policy making and competition to support an ongoing restructuring of the economy that is necessary to promote growth. To this end, the government intends to speed up its structural reform program through further trade and investment reform, and deregulation and privatization…
>
> …The government has a comprehensive program, which it introduced in 1995, to reduce most tariffs from 0–40 percent to 0–10 percent by 2003. Over the program period, any remaining quantitative import restrictions, other than those that may be justified for health, safety, environment and security reasons, and other non-tariff barriers that protect domestic production, will be phased out. Consistent with Indonesia's commitment to the WTO, the local content program for motor vehicles, which gives preferential tariff rates to vehicle manufacturers using a high percentage of local parts, will be phased out by 2000. With respect to the National Car project, the Government of Indonesia will implement ahead of schedule the ruling of the WTO dispute panel.[19]

On January 21, 1998, after the Panel had heard from the parties, but before it had begun its report, Indonesia revoked the Presidential Decree No 42/1996 of June 4, 1996 and thereby terminated the authority for the import duty and tax exemption provided in the National Car Program. In addition, on February 25, 1998, Indonesia notified the WTO Subsidies Committee that, as of January 21, 1998, it had terminated all subsidies previously granted under the National Car Program. On March 2, 1998, Indonesia notified the Panel and requested it to terminate the dispute settlement proceeding, at least as it relates to the 1996 National Car Program measures. Indonesia cited a prior GATT case where a panel had refused to grant a party's request for compensation because the measure had been withdrawn prior to the panel's decision.

Japan opposed Indonesia's request on the grounds that it still did not believe that a mutually satisfactory solution had been achieved. Unless such a mutually satisfactory solution is obtained between the parties, Japan contended, a panel is obliged to submit its findings to the DSB as described in Article 12:7 of the DSU.[20] Japan and the EU noted that it was still not clear if all of the National Car Program measures had been terminated. For instance, Presidential Instruction No. 2/1996 had not been revoked but merely declared "obsolete" by Presidential Decree Number 20/1998. Japan claimed that the usual practice of GATT/WTO panels was to rule on measures effective at the time the panel's terms of reference were fixed, even if such measures were withdrawn before the panel rendered its

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[19] Letter to IMF Managing Director Michael Camdessus, IMF website, http://www.imf.org/external/np/loi/103197.HTM.

[20] Article 12.7 of the DSU provides in part: "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. …"

ruling. In support of its position, Japan cited Article 3.2 of the DSU, which provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." If a panel should not rule on this kind of occasion, Japan argued a WTO Member might easily evade the WTO reviews. The EU and United States presented arguments along similar lines.

Substantive Arguments of the Parties[21]

Summary Table
Principal Indonesian Measures and Alleged WTO Violations

Measure	WTO Provisions Alleged to Be Violated by Complainants
1993 Program (Incentives System)	
1. Duty on imported auto parts, subparts and components reduced as domestic content of finished vehicles and parts moves from 20% to 60%.	(a) National treatment provision of GATT Article III:4 and (b) Article 2 of TRIMs Agreement
2. Luxury tax on finished autos reduced if domestic content of motor vehicles is above 60 percent.	National treatment provision of first sentence of GATT Article III:2
February, 1996 National Car Program	
3. Duty eliminated on parts and equipment used in the assembly or manufacture of a "national motor vehicles" (i.e., vehicles made by Indonesian owned firm with a domestic content of at least 20% by the end of the first year, 40% by the end of the second year and 60% by the end of the third year.	(a) National treatment provisions of Article III:4 and (b) Article 2 of TRIMs and MFN provision in Article 1:1 of GATT (c) Specific subsidies which have caused serious prejudice within meaning of Article 5(c) of SCM
4. Luxury tax eliminated on "national cars" and (after June, 1996) also eliminated on passenger cars of less than 1600cc with domestic content over 60%.	(a) Article III:2 of GATT (b) Specific subsidies which have caused serious prejudice within meaning of Article 5(c) of SCM
June 1996 National Car Program	
5. Imported National cars made by KIA in Korea (i.e., overseas) by Indonesia workers which fulfill the local content stipulated by MITI (as modified by counter purchase provisions) receive same duty elimination benefits as national cars made in Indonesia.	(a) MFN requirement in GATT Article I.1 as well as (b) GATT Article III:4 and (c) Article of TRIMs 2 (d) Specific subsidies which have caused serious prejudice within meaning of Article 5(c) of SCM
6. Vehicles in 5 also receive exemption	(a) MFN requirement in GATT Article I:1

[21] This section will only discuss some of the principal claims of the complainants; for reasons of space and the need to keep the number of issues manageable for purposes of this case study, a number of issues are not discussed.

from luxury tax.	as well as (b)Article III:2 (c) Specific subsidies which have caused serious prejudice within meaning of Article 5(c) of SCM

The complaining parties in their presentations to the Panel focused: first, on the alleged violations of the national treatment provisions of GATT Article III; second, on the alleged WTO TRIMs Agreement violations; third, on the alleged violation of MFN provisions of paragraph 1 of GATT Article I, and finally, on the alleged violations of the SCM Agreement.

In particular, the EU and the United States claimed that the local content requirements in the 1993 Incentives Program—which provided reduced duties and luxury taxes on imported parts and components if a manufacturer produced finished parts and vehicles whose domestic content exceeded a fixed percentage—violated GATT Article III paragraphs 2 and 4, and Article 2 of the TRIMs Agreement. Japan did not file a complaint against the 1993 program.

Japan, the EU and the United States all claimed that the domestic content requirements of the February and June 1996 National Car programs violated GATT Article I, GATT Article III, paragraphs 2 and 4, and Article 2 of the TRIMs agreement. The EU and United States also claimed that the National Car Program caused serious prejudice within the meaning of Article 5(c) of the SCM Agreement.

GATT Article III:2 National Treatment

Japan, the EU and the United States all claimed that the luxury tax exemptions of the National Car Program provided under the 1996 National Car program and the 1993 program (EU and US only) violated the first sentence of paragraph 2 of Article III. The 1993 incentives program, after the 1995 and 1996 amendments, exempted from the luxury tax domestically manufactured sedans and stations wagons of less than 1,600 cc with a local content of more than 60 percent. Passenger cars 1600cc and higher and passenger cars with less than 60% local contents were subject to a 35 percent luxury tax. The February 1996 program exempted National Cars assembled in Indonesia by Pioneer companies as defined in the regulations and the June 1996 program exempted imported National Cars manufactured by Kia in Korea.

Based on an earlier opinion of the WTO Appellate Body, the complainants proposed that the relevant criteria for finding a violation of the first sentence were set forth in the following sentence:

> The words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are 'like' and, second, whether the taxes applied to the imported products are 'in excess of those applied to the like domestic products.

The complainants argued that the luxury tax was an internal tax, not an import charge. They noted that the luxury tax is applied on the sale of all cars whether produced abroad or in Indonesia and it is not just applied "on" or "in connection" with importation of motor vehicles.

Second, the complainants noted that while the WTO Appellate Body had set forth criteria for determining likeness for the purposes of Article III, paragraph 2, first sentence[22], it was unnecessary to discuss the criteria. The Indonesian measures required that, even if a car were identical with an Indonesian National Car, it would still be treated differently if it were manufactured abroad and imported. Nevertheless, the complainants argued that the following categories of products could be considered like products for purposes of Article III, paragraph 2, first sentence:

> Imported sedans of less than 1,600 cc and Indonesian made sedans of less than 1,600cc, including those with a local content of 60 percent or more;
>
> Imported motor vehicles and National Cars assembled in Indonesia by Pioneer companies, and
>
> Imported parts, components and raw materials for the assembly of motor vehicles and Indonesian made parts, components and raw materials, including those incorporated into imported National Cars.

The complainants said that imported motor vehicles are taxed "in excess of" domestic like products because they are always subject to the Sales Tax on Luxury Goods at a rate of 35 percent for sedans, whereas like domestic products can benefit from the exemption if their domestic content is more than 60 percent. The complainants noted further that it did not matter if a domestic car with a domestic content of less than 60% were subject to the same luxury tax as like imported cars As long as some imported cars were treated less favorably than some like domestic cars, there is a violation.

Indonesia did not offer a specific defense to the claims, but instead relied on its general defense.

GATT Article III:4

The complainants argued that the customs and tax benefits accorded to National Cars by the February and June 1996 programs violated GATT Article III, paragraph 4. In

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[22] A determination of 'like products' for the purpose of Article III:2, first sentence, must be construed narrowly, on a cases-by-case basis, by examining relevant factors including:

i. the product's end-uses in a given market,
ii. consumers' tastes and habits and
iii. the product's properties, nature and quality.

addition, the EU and the United Sates argued that customs and tax benefits of the 1993 Incentives program also violated GATT Article III:4.

The parties said that in order to establish a violation of paragraph 4, the Panel would need to answer the following questions:

> first, whether the measures at issue are "laws, regulations or requirements";
>
> second, whether they "affect the internal use" of parts and components for the assembly of motor vehicles;
>
> third, whether imported parts and components are "like" domestic parts and components; and
>
> fourth, whether the measures afford "less favourable treatment" to imported parts and components.

The complainants said that the measures were clearly laws and regulations since they are set forth in Presidential instructions, government regulations and decrees. The measures also affect "the internal use" of parts and components because they "modify adversely the conditions of competitions between domestic and imported parts and components by giving to Indonesian car manufacturers tax and tariff incentives for using local parts and components instead of like imported parts and components. Use of imported parts and components would not give Indonesian car manufacturers the same benefits as use of local ones would and therefore imported parts and components are treated less favorably. The complainants noted that the panel in the FIRA cases had come to a similar conclusion.

The TRIMs Agreement

The complainants argued that the rules of the TRIMs agreement apply to the National Car Program since the program contains "investment measures related to trade" within the meaning of Article 1 of the TRIMs Agreement.

The complainants argued first that the word "measure" is interpreted broadly and means any measure by a Member whether in the form of law, regulation, rule, procedure, decision, or administrative action.

Second, the National Car Program is an "investment measure". Government Regulation No. 36/1996 states that the National Car program was established "with a view to supporting the development of the automotive industry".[23] One of the implementing regulations is entitled "Investment Provisions for Realization of the National Automobile Industry". The complainants also noted that at a meeting of the WTO Committee on Trade-Related Investment Measures in 1996, Indonesia had said that the National Car Program was to encourage car companies to increase their local content and thereby

[23] Para 6.2–6.3, page 145 of Panel report.

result in a rapid growth of investment.[24] The measures in the National Car Program were trade-related because they encouraged the use of domestic parts and components over imported ones.

The complainants also noted that the Illustrative List in the Annex to the TRIMS Agreement specifically includes local content requirements as TRIMs that are inconsistent with Article III:4 of GATT 1994. Since the customs and luxury tax exemptions in the National Car Program are Indonesia measures that are contingent on compliance with local content requirements, they clearly constitute TRIMs as set forth in the illustrative list.

The complainants further noted that while the TRIMs Agreement provides for notification and transition arrangements for developing countries, Indonesia did not take advantage of those arrangements. Indonesia failed to notify within 90 days of the entry into force of the WTO Agreements (i.e., March 31, 1995) the portions of the 1993 program that provided tariff incentives. Its notification of May 23, 1995 did not cover the luxury tax incentives in the 1993 program and the notification was subsequently withdrawn.

Indonesia, in opposition to the three complainants, argued that since the measures did not violate Article III, they did not violate the TRIMs Agreement. As stated earlier, Indonesia contended that GATT Article III and the SCM agreements are mutually exclusive. The measures are covered by the SCM agreement, not Article III, and thus could not be found to violate it. Indonesia said that the TRIMs Agreement did not impose any new rights and obligations on Members and only elaborated on the FIRA Panel's decision regarding the coverage of Article III. Therefore, if a measure does not violate Article III or Article XI, it cannot be said to violate the TRIMs Agreement.

Indonesia also argued that the domestic content measures were not investment measures, but subsidies. The only regulation that mentions "investment" is a minor one regarding the role of the Chairman of the Investment Coordination Board (BKPM) to look over the national car industry; it is not one of the principal regulations that give instructions to the Minister of Trade & Industry and the Minister of Finance.

Indonesia's General Defense to Article III and TRIMs Agreement Claims

Indonesia claimed as a general defense to all of the Article III and TRIMs claims brought against it that the measures in question were subsidies. Therefore, the only WTO provisions applicable are those regarding subsidies in GATT 1994 Article XVI and the SCM Agreement. Indonesia argued that the provisions of GATT Articles III and I

[24] In the minutes of the Meeting Held on 30 September and 1 November 1996, the representative of Indonesia said:

> [T]he National Car Programme was intended to bring about major structural changes in the Indonesian automotive sector so that it could develop into a world standard industry… . These policies were expected to encourage car companies to increase their local content, resulting in a rapid growth of investment in the automotive component industry.

conflict with the SCM Agreement and that the conflict should be resolved by applying only the latter agreement. Further, Indonesia argued that if GATT Article III is not applicable, then the TRIMs Agreement is not applicable.

In particular, Indonesia showed that the local content measures were subsidies as defined in the SCM Agreement. Indonesia then invoked the international law concept of "*lex specialis*" to argue that the SCM agreement dealt specifically with subsidies while Article III of GATT was more general and therefore the SCM provision should prevail since the two agreements were in conflict.

The complainants disputed Indonesia's contention that the SCM and GATT provisions were in conflict, but rather said that they were complementary. A measure could be both a subsidy that is permitted by the SCM Agreement and measure that is inconsistent with Article III because it denies national treatment. Since there was no conflict, the *lex specialis* argument was wrong. To accept Indonesia's argument would mean that the SCM Agreement would make GATT Article III redundant.

GATT Article I Most Favored Nation Treatment

Japan, the EU and the United States claimed that the National Car Program violated GATT Article I, paragraph 1 because the customs and tax provisions resulted in some auto and parts imports being treated less favorably than others. The complainants argued that the test should be whether the customs duty and luxury tax exemptions confer an advantage of the type covered by Article I:1 to imports of automotive parts and components from Korea but not to imports of like products from other WTO members.

In particular, the following elements of the National Car Program were considered to violate Article I, paragraph 1: (1) the exemption from custom duties on imports of parts and components used in the assembly of National Cars in Indonesia; (2) the exemption from the luxury tax for National Cars assembled in Indonesia; (3) the exemption from the luxury tax (sales tax on luxury goods) for imported National Cars, and (4) the exemption from customs duties on imports of National Cars (June 1996 program).

The complainants said that the February 1996 National Car Program resulted in unfairly favorable trading terms for Korea. The exemption of National Cars produced in Korea from luxury tax meant that the imported parts and components used in them were being treated more favorably than parts and components used in other cars.

Indonesia contended that neither the February 1996 nor the June 1996 program granted advantages to automobiles or parts originating in one country that were not granted to like products originating in other countries. The national car producer, TPN, had the freedom to determine the source of technology, components and parts. The National Car Program did not compel TPN to purchase parts and cars from Korea. In GATT cases concerning violations of Article I, the government was compelled to favor products from one country over products from another.

In rebuttal of Indonesia's contention that the National Car Program did not violate Article I, Japan, the EU and United States argued that the Indonesia government knew that TPN had a relationship with Kia and that KIA auto, parts and components would be imported under the program. In fact, the document authorizing the importation of built-up cars under the June 1996 program, Decree No. 140/MPP/6/1996, expressly authorized only the importation of the TIMOR Sedan/S515.

Part III

Epilogue

Conclusions of WTO Dispute Settlement Panel

The Panel issued its report on July 2, 1998. Since no party appealed the findings of the Panel, the WTO Dispute Settlement Body (the "DSB") adopted the Panel Report on July 23, 1998. The report is formally titled "*Indonesia – Certain Measures Affecting the Automobile Industry*". This section summarizes the principal findings of the Panel with respect to the issues discussed above as well as the findings and reasoning of the Panel with respect to the SCM claims raised by the complaining parties.

Procedural Issues -- In regards to whether the private American lawyers could be included in the Indonesian delegation, the Panel ruled that:

> We conclude that it is for the Government of Indonesia to nominate the members of its delegation to meetings of this Panel, and we find no provision in the WTO Agreement or the DSU, including the standard rules of procedures included therein, which prevents a WTO member from determining the composition of its delegation to WTO panel meetings.[25]

The Panel also stressed that "all members of parties' delegations -- whether or not they are government employees-- are present as representatives of their governments, and as such are subject to the provisions of the DSU … In particular, parties are required to treat as confidential all submissions to the Panel ..."[26]

The Panel also rejected one of the key claims of the United States—that the Panel's terms of reference covered the $690 million August 11, 1997 loan to TPN. A consortium of four Indonesian government-owned banks made the loan and the United States claimed that the loan violated GATT Article III and the TRIMs Agreement and was subject to the serious prejudice provisions of the SCM Agreement. The Panel noted that the United States clearly identified in its June 12, 1997 panel request the measures to be considered. These measures did not include the $690 million loan. The Panel therefore upheld Indonesia's request that it not consider any claims relating to $690 million loan.

[25] Panel report, para. 14.1
[26] Panel report, para. 14.1.

Substantive Issues -- The Panel flatly rejected Indonesia's general defense in saying that based on numerous panel rulings in the past GATT and WTO cases, "Article III and the SCM Agreement have generally different coverage and do not impose the same type of obligations."[27] The Panel later added "We consider rather that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement."[28]

The Panel had to determine whether to examine the Indonesia domestic content measures in light of the TRIMs Agreement or in light of GATT Article III. Because the TRIMs Agreement was more specific than GATT Article III, the Panel decided to consider first the applicability of its provisions to the domestic content measures.

TRIMs Agreement

With respect to the TRIMs Agreement, the Panel found that the legislation introducing the National Car measures clearly stated they were intended to promote the development of a domestic motor vehicle industry in Indonesia. The Panel quickly concluded that the domestic content measures where "trade-related" because they "by definition, always favour the use of domestic products over imported products, and therefore affect trade".[29]

The Panel then found that the domestic content measures were covered by item 1(a) in the illustrative list of Trims in the ANNEX to the TRIMs Agreement. As noted earlier, paragraph 1 of the Annex applies to measures which requires a person to comply in order to receive an advantage that are inconsistent with the national treatment provisions of GATT Article III:4, Sub-paragraph (a) applies to such measures which require the purchase or use by an enterprise of products of domestic origin. The Panel said:

> We note that all the various decrees and regulations implementing the Indonesian car programmes operate in the same manner. They provide for tax advantages on finished motor vehicles using a certain percentage value of local content and additional customs duty advantages on imports of parts and components to be used in the finished motor vehicles using a certain percentage of local content. We also note that under the June 1996 car programme, the local content envisaged in the February 1996 car programme could be performed through an undertaking by the foreign producer of National Cars to counter-purchase Indonesian parts and components.[30]

The Panel concluded that "compliance with the provisions for the purchase and use of particular products of domestic origin is necessary to obtain the tax and customs duty benefits on these car programmes, as referred to in Item 1(a) of the Illustrative List of

[27] Panel report, para. 14.36.
[28] Panel report, para. 14.56
[29] Panel report, para. 14.82.
[30] Panel report, para 14.85.

TRIMs."[31] In order for a domestic content measure to constitute a violation of Article 2, it must provide an "advantage". In this case, the Panel noted that the tax and tariff benefits provided by the Indonesian domestic content measures did constitute advantages and that they therefore did violate Article 2. The Panel noted that the TRIMs Agreement did permit certain justifications in Articles 3, 4 and 5. Indonesia had not, however, invoked any the general exceptions provided for in GATT, 1994 permitted by Article 3 of the TRIMs Agreement (i.e., exceptions for measures to protect regarding health and safety, public morals or national security). In addition, Indonesia had not invoked the exemptions permitted by Article 4 of TRIMs for developing countries to promote infant industries or protect the balance of payments. Lastly, Indonesia had not invoked the transitional period provided for in Article 5 that allows developing countries to maintain any TRIMs notified by March 31, 1995 that existed 180 days prior to January 1, 1995.

GATT Article III:2 National Treatment –Internal Taxes

In order to violate the first sentence of Article III, paragraph 2, the Panel said that Indonesia would have to tax an imported product higher than a like domestic product. The Panel first noted, "Indonesia does not dispute that pursuant to the 1993 and 1996 car programs imported motor vehicles are taxed in excess of the domestic product."[32] Under the 1996 program National Cars are completely exempt from sales tax, and under the 1993 program domestic cars below 1600cc with greater than 60% local content are exempt while imported or domestic sedans with 60% or less local content pay a sales tax of 35%. The Panel went through a detailed analysis to show that some imported models of Japanese and European cars were like the National Car, Timor. The Panel therefore concluded that the tax provisions of the 1993 and 1996 Indonesian car programs violated the first sentence of Article III: 2.[33]

The Panel decided that it did not have to address the claim that the Indonesian measures violated Article III, paragraph 4, regarding national treatment with respect to internal regulations, since the actions Indonesia would have to take to comply with the TRIMs Agreement would also bring it into compliance with Article III:4.[34]

GATT Article I:1 Most Favored Nation Treatment

With respect to the claims that the Indonesian car programs violated the most favored nation of GATT Article 1, paragraph 1, the Panel said that there must be an advantage of the type covered by Article which is not accorded unconditionally to all "like products" of all WTO members. The Panel first found that the customs and tax benefits of the February and June 1996 car programs were advantages of the type covered by Article I. Article 1 explicitly refers to customs duties and all matters referred to in paragraphs 2 and

[31] Panel report, para 14.88.
[32] Panel report, para. 14.107
[33] Panel report, para. 14.114.
[34] Article III, paragraph 4 requires that foreign products not be treated less favorable than domestic products with respect to internal regulations. In deciding that it did not have to address paragraph 4 the panel invoked the well-recognized concept in WTO jurisprudence of "judicial economy" which permits panels not to address issues if their ruling on other issues in the case will resolve the matter.

4 of Article III and the tax benefits were already found to be covered by Article III:2. The Panel next found that, on the basis of its analysis with respect to GATT Article III, for the purpose of Article I National Cars and their parts and components imported into Indonesia from Korea were to be considered "like" products other similar motor vehicles and parts and components imported from other WTO Members.

The Panel noted that the customs and tax benefits of the June 1996 National Car Program were conditioned on whether PT TPN had made a private contractual arrangement with an exporting company to produce National Cars. The customs benefits of the February 1996 program were conditioned on parts and components being used in the assembly of National Cars in Indonesia and on finished cars and components meeting certain local content targets. Since the foregoing conditions were not related to the imported parts, components and vehicles themselves, the Panel considered that the tax and customs advantages of June the 1996 car program and the customs advantages of the February 1996 program were not unconditional and were inconsistent with the provisions of Article I of GATT.

SCM Agreement

The Panel next addressed the EC and US claims regarding the SCM Agreement. The EC and United States claimed that the tariff and luxury sales tax exemptions provided through the National Car Program caused "serious prejudice" to their interests within the meaning of Article 5 of the SCM agreement. The EU and United States further claimed that they could bring a serious prejudice claim again Indonesia even though it was a developing country because the subsidies displaced or impeded imports of like products in the Indonesian market and caused significant price undercutting. Such subsidies fall within the provisions of Article 5 of the SCM Agreement and can be the subject of a serious prejudice claim. Japan did not raise claims under the SCM Agreement.

Existence of Subsidies: Indonesia did not disagree with the claim that the tariff and tax exemptions in the National Car Program as elaborated in February 1996 and expanded in June 1996 represented specific subsidies. Indonesia, the United States, and the EU agreed that the above measures represented government revenue forgone as defined in Article 1.1(a)(i)(ii) of the SCM Agreement and that the measures conferred a benefit on PT TPN within the meaning of Article 1.1(b) of the SCM Agreement. The three parties also considered that because the measures are contingent upon the use of domestic over imported parts, they are deemed to be specific subsidies within the terms of Article 2 of the SCM Agreement. The Panel concluded that the measures in question were specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.[35]

Serious prejudice: In light of the general agreement on the specificity of the subsidies, the key question for the Panel was whether a serious prejudice complaint may be brought against Indonesia in view of its status as a developing country and the special and differential measures provisions in Article 27. Again the EU, the US and Indonesia all

[35] Panel report, para. 14.155.

agreed that Indonesia was a developing country and qualified for the benefits under Article 27.

The Panel therefore had only to address the question whether the subsidies provided by Indonesia to PT TPN fell within the scope of the subsidies covered by the provisions of Article 6.1 (a). If the subsidies were covered by Article 6.1(a), then Article 27.8 did not preclude the EU and US from bringing a complaint that the subsidies were causing serious prejudice to their interests and demonstrating by positive evidence that they caused serious prejudice.

Presumption of serious prejudice: In its serious prejudice inquiry, the Panel examined whether the subsidies fell within any of the categories of subsidies listed in Article 6.1. The Panel noted that the EU submitted calculations showing that the *ad valorem* subsidization of Timors assembled in Indonesia ranged from 40 to 61 percent and that of Timors imported from Korea ranged from 156 to 460 percent. The US also submitted calculations showing high rates of subsidization. Indonesia provided calculations which showed a much lower rate of subsidization, but still higher than the five percent threshold provided in Article 6.1(a) for triggering the presumption of serious prejudice. The Panel concluded that it did not have to resolve which calculations were correct, since all were well above the 5 percent threshold. Furthermore, the Panel noted that because Indonesia exempted Timors from the 35 per cent luxury sales tax, the rate of subsidization was clearly in excess of 5 percent.

Normally, a defending party would have to demonstrate that none of the effects listed in Article 6.3 had taken place in order to defeat the presumption that subsidies covered by Article 6.1(a) were causing serious prejudice. However, since Indonesia was a developing country, the Panel concluded that the EU and US would have to show by positive evidence that one of the effects listed in Article 6.3 had occurred.

The EU and US both argued that the Indonesian subsidies displaced or impeded their auto exports into the Indonesia market (effect identified in 6.3(a)) and also undercut the price of their autos in the Indonesian market (effect identified in 6.3(c)). The key issue in making these determinations was which EU and US autos are like products to the Timor.

Like Product: The parties presented a variety of views as to which of their cars should be considered "like products" to the Timor and what should be the basis for making such a determination. The Panel based its determination on the definition provided in the SCM Agreement:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[36]

[36] Paragraph 14.170 of Panel Report, page 370.

In short, cars which have "characteristics closely resembling" those of the Timor are like the Timor. The Panel found this task particular challenging and observed that "[w]e are aware that there are innumerable differences among passenger car and that the identification of appropriate dividing lines between them may not be a simple task." [37]

The Panel ultimately decided that a reasonable way "to approach the 'like product' issue is to look at the manner in which the automotive industry itself analyzed market segmentation".[38] The Panel relied heavily on the market segmentation approach taken by the DRI Global Automotive Group as expressed in particular in DRI's *Asian Automotive Industry Forecast Report of June 1997.* Using the DRI approach as its foundation, the Panel first identified a category of autos that could be considered "like products". The Panel then independently examined a number of Indonesia's arguments regarding which cars should be considered "like products". They concluded that the Opel Optima, the Ford Escort and the Peugot 306 were like products of the Timor.

Cars considered like products of the Timor were generally imported to Indonesia in unassembled form (i.e., as completely knocked down (CKD) kits). The Panel had to decide if a car imported in unassembled form could be considered a like product to a completed Timor. Because the EU and US shipped to Indonesia "virtually completed CKD kits that were effectively 'cars in a box'", the Panel concluded they could properly be considered to have the characteristics closely resembling those of a completed car.[39]

Claim based on products being produced in another country: In response to questions from the Panel, the US acknowledged that cars deemed like products to the Timor would have been manufactured in Europe by US companies that intended to sell them in Indonesia (i.e., General Motors' Optima and the Ford Escort). In light of this admission, the Panel investigated whether a country could claim that it had suffered serious prejudice under the SCM Agreement with respect to a product that did not originate in its borders, but was the product of one of its companies. The Panel concluded that a WTO Member couldn't bring a complaint of adverse affects from subsidization and serious prejudice merely because its companies had been harmed where no products of the Member are involved. Neither Article XVI of the GATT nor the relevant articles of the SCM Agreement suggest that the nationality of the producers of a product is relevant to establishing serious prejudice—only the origin of the products is relevant.[40]

The Panel further concluded that a Member couldn't bring a claim alleging that another Member had suffered serious prejudice. The dispute settlement procedures in Article 7 of the SCM Agreement may only be invoked by a Member that believes it has itself suffered serious prejudice from subsidization.[41]

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[37] Paragraph 14.176 of Panel Report, page 372.
[38] Paragraph 14.181 of Panel Report, page 374.
[39] Panel report, para. 14.197, page 380.
[40] Panel report, para. 14.201, page 381.
[41] Panel report, para. 14.202-203, pages 381-382.

Displacement or impedance of imports of EU or US products into the Indonesian market: The Panel observed market share data in Indonesia for the US and EU vehicles considered like products of the Timor. Indeed, the EU cars had suffered a substantial decline relative to the subsidized Timor following the Timor's introduction.[42] However, as the volume of EU sales did not change significantly while the overall market expanded, the Panel felt that a loss of market share did not constitute the positive evidence required by the SCM Agreement. Further, the Panel also examined the actual sales data, which was much more inconclusive since it was incomplete and in many cases insufficient to be statistically significant. The Panel concluded that the fall in EC market share was "not decisive evidence of displacement or impedance, as the data lent some credence to the Indonesian view that the introduction of the subsidized Timor created much of the market growth".[43]

The Panel also considered evidence offered by the EU and US that their auto manufacturers would have introduced new models and had higher sales if the subsidization of the Timor did not exist. The Panel was very dissatisfied with the evidence, which consisted primarily of newspaper reports and statements of the auto companies regarding their intentions. The Panel felt that such evidence did not constitute the positive evidence required by the SCM Agreement to demonstrate serious prejudice within the meaning of Article 6.3(a).[44]

Existence of significant price undercutting or price suppression as a result of subsidization: The Panel then examined the sales price data of European cars determined to be like products of the Timor. The Panel took into account the standards set forth in paragraph 6.5 of the SCM Agreement, regarding sales at the same level of trade and at comparable times, and took due account of any other factors affecting price comparability. The Panel found that the Timor enjoyed a 27.5-million ruppiah advantage over the lowest price Peugot 306 and 23.25-million ruppiah price advantage over the lowest price Opel Optima. In other words the Timor sold for only 57 percent as much as the Peugot 306 and 60 percent as much as the Open Optima.[45]

The Panel sought to consider differences in accessories and engine sizes and other factors that might affect the price consumers pay for cars. While the Panel was dissatisfied with some of the data presented, it felt that the price difference was great, and was clearly caused by the subsidization. There was sufficient evidence that price undercutting had occurred.[46] The Panel further concluded that the degree price was sufficiently large to satisfy the requirement in Article 6.3(c), that the price undercutting be "significant".[47] The Panel noted that Indonesia had effectively conceded during the panel proceeding that the tariff and tax subsidies under the National Car Program were responsible for the

[42] Panel report, para. 14.214, page385.
[43] Panel report, para. 14.222, page 388.
[44] Panel report, paras. 14.235-236.
[45] Panel report, para. 14.243.
[46] Panel report, para. 14.253.
[47] Panel report, para. 14.254.

significant level of price undercutting. The Panel therefore concluded that these subsidies were causing serious prejudice to the interests of the European Communities.

Summation of finding: With respect to the 1993 Program, the Panel found that the local content requirements linked to certain sales tax benefits and customs duty benefits violated the provisions of Article 2 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*") and that the sales tax discrimination aspects violated Article III:2 of the GATT 1994. With respect to the 1996 National Car Program, the Panel found, *inter alia*, that Indonesia had acted inconsistently with Article 2 of the *TRIMs Agreement* and Articles I and III:2 of the GATT 1994, and that the European Communities had demonstrated that Indonesia had caused serious prejudice to the interests of the European Communities within Article 5(c) of the *Agreement on Subsidies and Countervailing Measures*. As is the norm when measures are found to be inconsistent with WTO Agreements, the Panel at the conclusion of its report recommended "that the Dispute Settlement Body request Indonesia to bring its measures into conformity with its obligations under the WTO Agreement". This became the request of the DSB once the panel report was adopted.

Implementation Issues and Arbitrator's Ruling

Following adoption of the report, Indonesia entered into negotiations with the complaining parties for the reasonable period of time to bring its measures into compliance with the Panel's finding. Indonesia contended, and the complaining parties did not disagree, that the measures taken on January 21, 1998 to repeal the February 1996 National Car Program constituted "appropriate implementation of the recommendations and rulings of the DSB" concerning the 1996 program.

In order to bring the 1993 incentive program into compliance with the Panel's ruling, Indonesia wanted 15 months from the date of adoption of the panel report—6 months for adoption of domestic regulations and 9 months for a transaction period. The EU pushed for six months, the time required to complete the domestic rulemaking. In the end the arbiter ruled:

> Indonesia is not only a developing country; it is a developing country that is currently in a dire economic and financial situation. Indonesia itself states that its economy is "near collapse". In these very particular circumstances, I consider it appropriate to give full weight to matters affecting the interests of Indonesia as a developing country pursuant to the provisions of Article 21.2 of the DSU. I, therefore, conclude that an additional period of six months over and above the six-month period required for the completion of Indonesia's domestic rule-making process constitutes a reasonable period of time for implementation of the recommendations and rulings of the DSB in this case.

The National Car Program Today

In a document distributed to the DSP on July 15, 1999,[48] Indonesia stated that:

> [O]n 24 June 1999 the GOI [i.e., Government of Indonesia]has issued a new policy package on automotive industry (the 1999 Automotive Policy) comprising Government Regulation No. 59/1999, Decrees of the Minister for Industry and Trade No. 275/1999 and No. 276/1999 and Decree of the Minister for Finance No. 344/1999. In accordance with the decision of the DSB adopted on 23 July 1998, the new policy has removed all WTO-inconsistent elements of the 1993 car program, i.e.:
>
> (a) by abolishing the policy regarding the determination of local content levels of domestically made motor vehicles or components as stipulated by the Minister of Industry Decree No. 114/M/SK/6/1993 of 9 June 1993;
>
> (b) the sales tax discrimination aspects of the 1993 car policy in favour of domestic motor vehicles incorporating a certain value of domestic program;
>
> (c) the local content requirements which are linked to (1) sales tax benefit on finished motor vehicles incorporating a certain percentage value of domestic products and (ii) custom duty benefits for imported parts and components used in finished motor vehicles incorporating a certain percentage value of domestic products.
>
> The 1999 Automotive Policy, which is mainly based on non-discriminatory and WTO-consistent tariff and tax measures, will be effective before the expiry of the reasonable period of time for implementation.
>
> By the entry into force of the 1999 Automotive Policy, Indonesia considers it has now fully implemented the recommendations and rulings of the DSB in the dispute regarding "Indonesia - Measures Affecting the Automotive Industry" adopted by the DSB on 23 July 1998.

[48] See WTO document: Status Report by Indonesia WT/DS54/17/Add.1, WT/DS55/16/Add.1, WT/DS59/15/Add.1, WT/DS64/14/Add.1 of 15 July 1999