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INTERNATIONAL TRADE LAW

COURSE MATERIALS

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1. Agreement Establishing the World Trade Organization

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

The *Parties* to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system,

Agree as follows:

Article I

Establishment of the Organization

The World Trade Organization (hereinafter referred to as "the WTO") is hereby established.

Article II

Scope of the WTO

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is legally distinct from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").

Article III

Functions of the WTO

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.

2. The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter referred to as the "Dispute Settlement Understanding" or "DSU") in Annex 2 to this Agreement.

4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the "TPRM") provided for in Annex 3 to this Agreement.

5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

Article IV

Structure of the WTO

1. There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.

2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

5. There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

6. The Council for Trade in Goods, the Council for Trade in Services and the Council for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall establish their respective rules of procedure subject to the approval of their respective Councils.

7. The Ministerial Conference shall establish a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration, which shall carry out the functions assigned to them by this Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements in favour of the least-developed country Members and report to the General Council for appropriate action. Membership in these Committees shall be open to representatives of all Members.

8. The bodies provided for under the Plurilateral Trade Agreements shall carry out the functions assigned to them under those Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

Article V

Relations with Other Organizations

1. The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO.

2. The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.

Article VI

The Secretariat

1. There shall be a Secretariat of the WTO (hereinafter referred to as “the Secretariat”) headed by a Director-General.

2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General.

3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.

4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the WTO shall respect the international character of the responsibilities of the Director-General and of the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.

Article VII

Budget and Contributions

1. The Director-General shall present to the Committee on Budget, Finance and Administration the annual budget estimate and financial statement of the WTO. The Committee on Budget, Finance and Administration shall review the annual budget estimate and the financial statement presented by the Director-General and make recommendations thereon to the General Council. The annual budget estimate shall be subject to approval by the General Council.

2. The Committee on Budget, Finance and Administration shall propose to the General Council financial regulations which shall include provisions setting out:

(a) the scale of contributions apportioning the expenses of the WTO among its Members; and

(b) the measures to be taken in respect of Members in arrears.

The financial regulations shall be based, as far as practicable, on the regulations and practices of GATT 1947.

3. The General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the Members of the WTO.

4. Each Member shall promptly contribute to the WTO its share in the expenses of the WTO in accordance with the financial regulations adopted by the General Council.

Article VIII

Status of the WTO

1. The WTO shall have legal personality, and shall be accorded by each of its Members such legal capacity as may be necessary for the exercise of its functions.

2. The WTO shall be accorded by each of its Members such privileges and immunities as are necessary for the exercise of its functions.

3. The officials of the WTO and the representatives of the Members shall similarly be accorded by each of its Members such privileges and immunities as are necessary for the independent exercise of their functions in connection with the WTO.

4. The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947.

5. The WTO may conclude a headquarters agreement.

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.[1] Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States[2] which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.[3]

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths[4] of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths4 of the Members.

[1] The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[2] The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

[3] Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

[4] A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

Article X

Amendments

1. Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.

2. Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:

Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS.

3. Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not

accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

4. Amendments to provisions of this Agreement or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members.

5. Except as provided in paragraph 2 above, amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference. Amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members.

6. Notwithstanding the other provisions of this Article, amendments to the Agreement on TRIPS meeting the requirements of paragraph 2 of Article 71 thereof may be adopted by the Ministerial Conference without further formal acceptance process.

7. Any Member accepting an amendment to this Agreement or to a Multilateral Trade Agreement in Annex 1 shall deposit an instrument of acceptance with the Director-General of the WTO within the period of acceptance specified by the Ministerial Conference.

8. Any Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference.

9. The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.

10. Amendments to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XI

Original Membership

1. The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.

2. The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

Article XII

Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XIII

Non-Application of Multilateral Trade Agreements between Particular Members

1. This Agreement and the Multilateral Trade Agreements in Annexes 1 and 2 shall not apply as between any Member and any other Member if either of the Members, at the time either becomes a Member, does not consent to such application.

2. Paragraph 1 may be invoked between original Members of the WTO which were contracting parties to GATT 1947 only where Article XXXV of that Agreement had been invoked earlier and was effective as between those contracting parties at the time of entry into force for them of this Agreement.

3. Paragraph 1 shall apply between a Member and another Member which has acceded under Article XII only if the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

4. The Ministerial Conference may review the operation of this Article in particular cases at the request of any Member and make appropriate recommendations.

5. Non-application of a Plurilateral Trade Agreement between parties to that Agreement shall be governed by the provisions of that Agreement.

Article XIV

Acceptance, Entry into Force and Deposit

1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay

Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

3. Until the entry into force of this Agreement, the text of this Agreement and the Multilateral Trade Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. The Director-General shall promptly furnish a certified true copy of this Agreement and the Multilateral Trade Agreements, and a notification of each acceptance thereof, to each government and the European Communities having accepted this Agreement. This Agreement and the Multilateral Trade Agreements, and any amendments thereto, shall, upon the entry into force of this Agreement, be deposited with the Director-General of the WTO.

4. The acceptance and entry into force of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement. Such Agreements shall be deposited with the Director-General to the CONTRACTING PARTIES to GATT 1947. Upon the entry into force of this Agreement, such Agreements shall be deposited with the Director-General of the WTO.

Article XV

Withdrawal

1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the WTO.

2. Withdrawal from a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

2. To the extent practicable, the Secretariat of GATT 1947 shall become the Secretariat of the WTO, and the Director-General to the CONTRACTING PARTIES to GATT 1947, until such time as the Ministerial Conference has appointed a Director-General in accordance with paragraph 2 of Article VI of this Agreement, shall serve as Director-General of the WTO.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

5. No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements. Reservations in respect of a provision of a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

6. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Marrakesh this fifteenth day of April one thousand nine hundred and ninety-four, in a single copy, in the English, French and Spanish languages, each text being authentic.

Explanatory Notes:

The terms "country" or "countries" as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

LIST OF ANNEXES

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

General Agreement on Tariffs and Trade 1994
Agreement on Agriculture
Agreement on the Application of Sanitary and Phytosanitary Measures
Agreement on Textiles and Clothing
Agreement on Technical Barriers to Trade
Agreement on Trade-Related Investment Measures
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Agreement on Preshipment Inspection
Agreement on Rules of Origin
Agreement on Import Licensing Procedures
Agreement on Subsidies and Countervailing Measures
Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX 2

Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 3

Trade Policy Review Mechanism

ANNEX 4

Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

2. Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 2

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Members hereby *agree* as follows:

Article 1

Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the "DSB"), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

Article 2

Administration

1. The Dispute Settlement Body is hereby established to administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under a covered agreement which is a Plurilateral Trade Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Plurilateral Trade Agreement. Where the DSB administers the dispute settlement provisions of a Plurilateral Trade Agreement, only those Members that are parties to that Agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2. The DSB shall inform the relevant WTO Councils and Committees of any developments in disputes related to provisions of the respective covered agreements.

3. The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

4. Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus.[1]

Article 3

General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered

[1] The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.

agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.[2]

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.

Article 4

Consultations

1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

[2] This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

2. Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.[3]

3. If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4. All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings.

7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

8. In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel.

9. In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible.

10. During consultations Members should give special attention to the particular problems and interests of developing country Members.

11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[4],

[3] Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

[4] The corresponding consultation provisions in the covered agreements are listed hereunder: Agreement on Agriculture, Article 19; Agreement on the Application of Sanitary and Phytosanitary Measures, paragraph 1 of Article 11; Agreement on Textiles and Clothing, paragraph 4 of Article 8; Agreement on Technical Barriers to Trade, paragraph 1 of Article 14; Agreement on Trade-Related Investment Measures, Article 8; Agreement on Implementation of Article VI of GATT 1994, paragraph 2 of Article 17; Agreement

such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements.

Article 5

Good Offices, Conciliation and Mediation

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.

4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

Article 6

Establishment of Panels

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on Implementation of Article VII of GATT 1994, paragraph 2 of Article 19; Agreement on Preshipment Inspection, Article 7; Agreement on Rules of Origin, Article 7; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Article 30; Agreement on Safeguards, Article 14; Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 64.1; and any corresponding consultation provisions in Plurilateral Trade Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.[5]

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

Article 7

Terms of Reference of Panels

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

Article 8

Composition of Panels

1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

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[5] If the complaining party so requests, a meeting of the DSB shall be convened for this purpose within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.

[6] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all member countries of the customs unions or common markets.

4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Article 9

Procedures for Multiple Complainants

1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

2. The single panel shall organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel.

3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

Article 10

Third Parties

1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel.

4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible.

Article 11

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 12

Panel Procedures

1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.

2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

3. After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 9 of Article 4, if relevant.

4. In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

5. Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

6. Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 3 and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time-period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

7. 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. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

8. In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.

9. When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

10. In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 7 and 8 of Article 4. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraph 1 of Article 20 and paragraph 4 of Article 21 are not affected by any action pursuant to this paragraph.

11. Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements

which have been raised by the developing country Member in the course of the dispute settlement procedures.

12. The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

Article 13

Right to Seek Information

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

Article 14

Confidentiality

1. Panel deliberations shall be confidential.

2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

3. Opinions expressed in the panel report by individual panelists shall be anonymous.

Article 15

Interim Review Stage

1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further

meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

3. The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time-period set out in paragraph 8 of Article 12.

Article 16

Adoption of Panel Reports

1. In order to provide sufficient time for the Members to consider panel reports, the reports shall not be considered for adoption by the DSB until 20 days after the date they have been circulated to the Members.

2. Members having objections to a panel report shall give written reasons to explain their objections for circulation at least 10 days prior to the DSB meeting at which the panel report will be considered.

3. The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[7] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

Article 17

Appellate Review

Standing Appellate Body

1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.

3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They

[7] If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 1 and 4 of Article 16 to be met, a meeting of the DSB shall be held for this purpose.

shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days.

6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

7. The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

8. The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

10. The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

11. Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

12. The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding.

13. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Body Reports

14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report

within 30 days following its circulation to the Members.[8] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

Article 18

Communications with the Panel or Appellate Body

1. There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Article 19

Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[9] bring the measure into conformity with that agreement.[10] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 20

Time-frame for DSB Decisions

Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, to extend the time for providing its report, the additional time taken shall be added to the above periods.

Article 21

[8] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[9] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[10] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

Surveillance of Implementation of Recommendations and Rulings

1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

3. At a DSB meeting held within 30 days[11] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[12] In such arbitration, a guideline for the arbitrator[13] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting

[11] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[12] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[13] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

7. If the matter is one which has been raised by a developing country Member, the DSB shall consider what further action it might take which would be appropriate to the circumstances.

8. If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

Article 22

Compensation and the Suspension of Concessions

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

(d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

(e) if that party decides to request authorization to suspend concessions or other obligations pursuant to subparagraphs (b) or (c), it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to subparagraph (b), the relevant sectoral bodies;

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[14]

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

(g) for purposes of this paragraph, "agreement" means:

(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[15] appointed by the Director-General and shall be completed within 60

[14] The list in document MTN.GNS/W/120 identifies eleven sectors.

[15] The expression"arbitrator" shall be interpreted as referring either to an individual or a group.

days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator[16] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[17]

Article 23

Strengthening of the Multilateral System

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in

[16] The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

[17] Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;

(b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

Article 24

Special Procedures Involving Least-Developed Country Members

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

2. In dispute settlement cases involving a least-developed country Member, where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which either deems appropriate.

Article 25

Arbitration

1. Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.

4. Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement;

(b) where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment;

(c) notwithstanding the provisions of Article 21, the arbitration provided for in paragraph 3 of Article 21, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute;

(d) notwithstanding the provisions of paragraph 1 of Article 22, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

2. *Complaints of the Type Described in Paragraph 1(c) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(c) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of paragraphs 1(a) and 1(b) of Article XXIII of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been circulated to the Members. The dispute settlement rules and procedures contained in the Decision of 12 April 1989 (BISD 36S/61-67) shall apply to consideration for adoption, and surveillance and implementation of recommendations and rulings. The following shall also apply:

(a) the complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph;

(b) in cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall circulate a report to the DSB addressing any such matters and a separate report on matters falling under this paragraph.

Article 27

Responsibilities of the Secretariat

1. The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

2. While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the WTO technical cooperation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

3. The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods
Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

(C) Plurilateral Trade Agreements

Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Agreement
International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES
CONTAINED IN THE COVERED AGREEMENTS

Agreement Rules and Procedures	
Agreement on the Application of Sanitary and Phytosanitary Measures	11.2
Agreement on Textiles and Clothing	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 through 8.12
Agreement on Technical Barriers to Trade	14.2 through 14.4, Annex 2
Agreement on Implementation of Article VI of GATT 1994	17.4 through 17.7
Agreement on Implementation of Article VII of GATT 1994	19.3 through 19.5, Annex II.2(f), 3, 9, 21
Agreement on Subsidies and Countervailing Measures	4.2 through 4.12, 6.6, 7.2 through 7.10, 8.5, footnote 35, 24.4, 27.7, Annex V
General Agreement on Trade in Services	XXII:3, XXIII:3
Annex on Financial Services	4
Annex on Air Transport Services	4
Decision on Certain Dispute Settlement Procedures for the GATS	1 through 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in the Plurilateral Trade Agreements as determined by the competent bodies of each agreement and as notified to the DSB.

APPENDIX 3

WORKING PROCEDURES

l. In its proceedings the panel shall follow the relevant provisions of this Understanding. In addition, the following working procedures shall apply.

2. The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it shall be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute

submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Article 10 shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, shall be made available to the other party or parties.

11. Any additional procedures specific to the panel.

12. Proposed timetable for panel work:

(a) Receipt of first written submissions of the parties:

(1) complaining Party: _____ 3-6 weeks
(2) Party complained against: _____ 2-3 weeks

(b) Date, time and place of first substantive meeting with the parties; third party session: _____ 1-2 weeks

(c) Receipt of written rebuttals of the parties: _____ 2-3 weeks

(d) Date, time and place of second substantive meeting with the parties: _____ 1-2 weeks

(e) Issuance of descriptive part of the report to the parties:_____ 2-4 weeks

(f) Receipt of comments by the parties on the descriptive part of the report: _____ 2 weeks

(g)	Issuance of the interim report, including the findings and conclusions, to the parties:_____	2-4 weeks	
(h)	Deadline for party to request review of part(s) of report:	_____	1 week
(i)	Period of review by panel, including possible additional meeting with parties:	_____	2 weeks
(j)	Issuance of final report to parties to dispute:	_____	2 weeks
(k)	Circulation of the final report to the Members:	_____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the parties shall be scheduled if required.

APPENDIX 4

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of paragraph 2 of Article 13.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall

also be issued to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.

3. The General Agreement on Tariffs and Trade (GATT 1947)

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

PART I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5[1], of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Article II

Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be

[1] The authentic text erroneously reads "subparagraph 5 (a)".

exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(*c*) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the

CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

PART II

*Article III**

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting

party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Article IV

Special Provisions relating to Cinematograph Films

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

(*a*) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilized, over a specified period of not less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;

(*b*) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;

(*c*) Notwithstanding the provisions of subparagraph (*b*) of this Article, any contracting party may maintain screen quotas conforming to the requirements of subparagraph (*a*) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; *Provided* that no such minimum proportion of screen time shall be increased above the level in effect on April 10, 1947;

(*d*) Screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

Article V

Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a

requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (*a*) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(*b*) The CONTRACTING PARTIES may waive the requirement of subparagraph (*a*) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (*a*) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(*c*) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (*b*) of this paragraph without the prior approval of the CONTRACTING PARTIES; *Provided* that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(*a*) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(*b*) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Article VII

Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they

shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (*a*) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.*

(*b*) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.*

(*c*) When the actual value is not ascertainable in accordance with subparagraph (*b*) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (*a*) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(*b*) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(*c*) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the Contracting Parties, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

(*d*) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory

on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

Article VIII

*Fees and Formalities connected with Importation and Exportation**

1. (*a*) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(*b*) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (*a*).

(*c*) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

(*a*) consular transactions, such as consular invoices and certificates;

(*b*) quantitative restrictions;

(*c*) licensing;

(*d*) exchange control;

(*e*) statistical services;

(*f*) documents, documentation and certification;

(*g*) analysis and inspection; and

(*h*) quarantine, sanitation and fumigation.

Article IX

Marks of Origin

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The contracting parties shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation. Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

Article X

Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary

to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(*b*) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(*c*) The provisions of subparagraph (*b*) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

Article XI*

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

(*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;

(*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (*c*) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned.

Article XII*

Restrictions to Safeguard the Balance of Payments

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.

2. (*a*) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:

(i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves; or

(ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

(*b*) Contracting parties applying restrictions under sub-paragraph (*a*) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that subparagraph.

3. (*a*) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognize that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.

(*b*) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.

(*c*) Contracting parties applying restrictions under this Article undertake:

(i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;*

(ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

(iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.

(*d*) The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (*a*) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.

4. (*a*) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(*b*) On a date to be determined by them,* the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in subparagraph (*a*) of this paragraph with the CONTRACTING PARTIES annually.

(*c*) (i) If, in the course of consultations with a contracting party under subparagraph (*a*) or (*b*) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*d*) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*e*) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.*

(*f*) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organization, to remove the underlying causes of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

*Article XIII**

Non-discriminatory Administration of Quantitative Restrictions

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

(*a*) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (*b*) of this Article;

(*b*) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

(*c*) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (*d*) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;

(*d*) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (*a*) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(*b*) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any

change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

(*c*) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

4. With regard to restrictions applied in accordance with paragraph 2 (*d*) of this Article or under paragraph 2 (*c*) of Article XI, the selection of a representative period for any product and the appraisal of any special factors* affecting the trade in the product shall be made initially by the contracting party applying the restriction; *Provided* that such contracting party shall, upon the request of any other contracting party having a substantial interest in supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

Article XIV*

Exceptions to the Rule of Non-discrimination

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of

Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.

4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.

5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:

(*a*) having equivalent effect to exchange restrictions authorized under Section 3 (*b*) of Article VII of the Articles of Agreement of the International Monetary Fund, or

(*b*) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

Article XV

Exchange Arrangements

1. The CONTRACTING PARTIES shall seek co-operation with the International Monetary Fund to the end that the CONTRACTING PARTIES and the Fund may pursue a co-ordinated policy with regard to exchange questions within the jurisdiction of the Fund and questions of quantitative restrictions and other trade measures within the jurisdiction of the CONTRACTING PARTIES.

2. In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES. The CONTRACTING PARTIES in reaching their final decision in cases involving the criteria set forth in paragraph 2 (*a*) of Article XII or in paragraph 9 of Article XVIII, shall accept the determination of the Fund as to what constitutes a serious decline in the contracting party's monetary reserves, a very low level of its monetary reserves or a reasonable rate of increase in its monetary reserves, and as to the financial aspects of other matters covered in consultation in such cases.

3. The CONTRACTING PARTIES shall seek agreement with the Fund regarding procedures for consultation under paragraph 2 of this Article.

4. Contracting parties shall not, by exchange action, frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.

5. If the CONTRACTING PARTIES consider, at any time, that exchange restrictions on payments and transfers in connection with imports are being applied by a contracting party in a manner inconsistent with the exceptions provided for in this Agreement for quantitative restrictions, they shall report thereon to the Fund.

6. Any contracting party which is not a member of the Fund shall, within a time to be determined by the CONTRACTING PARTIES after consultation with the Fund, become a member of the Fund, or, failing that, enter into a special exchange agreement with the CONTRACTING PARTIES. A contracting party which ceases to be a member of the Fund shall forthwith enter into a special exchange agreement with the CONTRACTING PARTIES. Any special exchange agreement entered into by a contracting party under this paragraph shall thereupon become part of its obligations under this Agreement.

7. (*a*) A special exchange agreement between a contracting party and the CONTRACTING PARTIES under paragraph 6 of this Article shall provide to the satisfaction of the CONTRACTING PARTIES that the objectives of this Agreement will not be frustrated as a result of action in exchange matters by the contracting party in question.

(*b*) The terms of any such agreement shall not impose obligations on the contracting party in exchange matters generally more restrictive than those imposed by the Articles of Agreement of the International Monetary Fund on members of the Fund.

8. A contracting party which is not a member of the Fund shall furnish such information within the general scope of section 5 of Article VIII of the Articles of Agreement of the International Monetary Fund as the CONTRACTING PARTIES may require in order to carry out their functions under this Agreement.

9. Nothing in this Agreement shall preclude:

(*a*) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES, or

(*b*) the use by a contracting party of restrictions or controls in imports or exports, the sole effect of which, additional to the effects permitted under Articles XI, XII, XIII and XIV, is to make effective such exchange controls or exchange restrictions.

Article XVI*

Subsidies

Section A - Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined

that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B - Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidization beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidization seriously prejudicial to the trade or interests of contracting parties.

Article XVII

State Trading Enterprises

1.* (*a*) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

(*b*) The provisions of subparagraph (*a*) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

(*c*) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (*a*) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (*a*) and (*b*) of this paragraph.

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (*a*) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.*

4. (*a*) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (*a*) of this Article.

(*b*) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

(*c*) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (*a*), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(*d*) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

Article XVIII*

Governmental Assistance to Economic Development

1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living* and are in the early stages of development.*

2. The contracting parties recognize further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified in so far as they facilitate the attainment of the objectives of this Agreement. They agree, therefore, that those contracting parties should enjoy additional facilities to enable them (*a*) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry* and

(*b*) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their programmes of economic development.

3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries* with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

4. (*a*) Consequently, a contracting party, the economy of which can only support low standards of living* and is in the early stages of development,* shall be free to deviate temporarily from the provisions of the other Articles of this Agreement, as provided in Sections A, B and C of this Article.

(*b*) A contracting party, the economy of which is in the process of development, but which does not come within the scope of subparagraph (*a*) above, may submit applications to the CONTRACTING PARTIES under Section D of this Article.

5. The contracting parties recognize that the export earnings of contracting parties, the economies of which are of the type described in paragraph 4 (*a*) and (*b*) above and which depend on exports of a small number of primary commodities, may be seriously reduced by a decline in the sale of such commodities. Accordingly, when the exports of primary commodities by such a contracting party are seriously affected by measures taken by another contracting party, it may have resort to the consultation provisions of Article XXII of this Agreement.

6. The CONTRACTING PARTIES shall review annually all measures applied pursuant to the provisions of Sections C and D of this Article.

Section A

7. (*a*) If a contracting party coming within the scope of paragraph 4 (*a*) of this Article considers it desirable, in order to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.

(*b*) If agreement is not reached within sixty days after the notification provided for in subparagraph (*a*) above, the contracting party which proposes to modify or withdraw the concession may refer the matter to the CONTRACTING PARTIES which shall promptly examine it. If they find that the contracting party which proposes to modify or withdraw the concession has made every effort to reach an agreement and that the compensatory adjustment offered by it is adequate, that contracting party shall be free to modify or withdraw the concession

if, at the same time, it gives effect to the compensatory adjustment. If the CONTRACTING PARTIES do not find that the compensation offered by a contracting party proposing to modify or withdraw the concession is adequate, but find that it has made every reasonable effort to offer adequate compensation, that contracting party shall be free to proceed with such modification or withdrawal. If such action is taken, any other contracting party referred to in subparagraph (*a*) above shall be free to modify or withdraw substantially equivalent concessions initially negotiated with the contracting party which has taken the action.*

Section B

8. The contracting parties recognize that contracting parties coming within the scope of paragraph 4 (*a*) of this Article tend, when they are in rapid process of development, to experience balance of payments difficulties arising mainly from efforts to expand their internal markets as well as from the instability in their terms of trade.

9. In order to safeguard its external financial position and to ensure a level of reserves adequate for the implementation of its programme of economic development, a contracting party coming within the scope of paragraph 4 (*a*) of this Article may, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary:

(*a*) to forestall the threat of, or to stop, a serious decline in its monetary reserves, or

(*b*) in the case of a contracting party with inadequate monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of the contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

10. In applying these restrictions, the contracting party may determine their incidence on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential in the light of its policy of economic development; *Provided* that the restrictions are so applied as to avoid unnecessary damage to the commercial or economic interests of any other contracting party and not to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and *Provided* further that the restrictions are not so applied as to prevent the importation of commercial samples or to prevent compliance with patent, trade mark, copyright or similar procedures.

11. In carrying out its domestic policies, the contracting party concerned shall pay due regard to the need for restoring equilibrium in its balance of payments on a sound and lasting basis and to the desirability of assuring an economic employment of productive resources. It shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance; *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.*

12. (*a*) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Section, shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.

(*b*) On a date to be determined by them* the CONTRACTING PARTIES shall review all restrictions still applied under this Section on that date. Beginning two years after that date, contracting parties applying restrictions under this Section shall enter into consultations of the type provided for in subparagraph (*a*) above with the CONTRACTING PARTIES at intervals of approximately, but not less than, two years according to a programme to be drawn up each year by the CONTRACTING PARTIES; *Provided* that no consultation under this subparagraph shall take place within two years after the conclusion of a consultation of a general nature under any other provision of this paragraph.

(*c*) (i) If, in the course of consultations with a contracting party under subparagraph (*a*) or (*b*) of this paragraph, the CONTRACTING PARTIES find that the restrictions are not consistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.

(ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within a specified period. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*d*) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Section to enter into consultations with them at the request of any contracting party which can establish a *prima facie* case that the restrictions are inconsistent with the provisions of this Section or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

(*e*) If a contracting party against which action has been taken in accordance with the last sentence of subparagraph (*c*) (ii) or (*d*) of this paragraph, finds that the release of obligations authorized by the CONTRACTING PARTIES adversely affects the operation of its programme and policy of economic development, it shall be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[2] to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect on the sixtieth day following the day on which the notice is received by him.

(*f*) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to the factors referred to in paragraph 2 of this Article. Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.

Section C

13. If a contracting party coming within the scope of paragraph 4 (*a*) of this Article finds that governmental assistance is required to promote the establishment of a particular industry* with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.*

14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CONTRACTING PARTIES in accordance with provisions of paragraph 18; *Provided* that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.*

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them,* that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

16. If it is requested by the CONTRACTING PARTIES to do so, *the contracting party concerned shall consult with them as to the purpose of the proposed measure, as to alternative measures which may be available under this Agreement, and as to the possible effect of the measure proposed on the commercial and economic interests of other contracting parties. If, as a result of such consultation, the CONTRACTING PARTIES agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective outlined in paragraph 13 of this Article, and concur* in the proposed measure, the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to apply that measure.

[2] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES.

18. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the contracting party concerned shall enter into consultations with any other contracting party with which the concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. The CONTRACTING PARTIES shall concur* in the measure if they agree that there is no measure consistent with the other provisions of this Agreement which is practicable in order to achieve the objective set forth in paragraph 13 of this Article, and if they are satisfied:

(*a*) that agreement has been reached with such other contracting parties as a result of the consultations referred to above, or

(*b*) if no such agreement has been reached within sixty days after the notification provided for in paragraph 14 has been received by the CONTRACTING PARTIES, that the contracting party having recourse to this Section has made all reasonable efforts to reach an agreement and that the interests of other contracting parties are adequately safeguarded.*

The contracting party having recourse to this Section shall thereupon be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure.

19. If a proposed measure of the type described in paragraph 13 of this Article concerns an industry the establishment of which has in the initial period been facilitated by incidental protection afforded by restrictions imposed by the contracting party concerned for balance of payments purposes under the relevant provisions of this Agreement, that contracting party may resort to the provisions and procedures of this Section; *Provided* that it shall not apply the proposed measure without the concurrence* of the CONTRACTING PARTIES.*

20. Nothing in the preceding paragraphs of this Section shall authorize any deviation from the provisions of Articles I, II and XIII of this Agreement. The provisos to paragraph 10 of this Article shall also be applicable to any restriction under this Section.

21. At any time while a measure is being applied under paragraph 17 of this Article any contracting party substantially affected by it may suspend the application to the trade of the contracting party having recourse to this Section of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove;* *Provided* that sixty days' notice of such suspension is given to the CONTRACTING PARTIES not later than six months after the measure has been introduced or changed substantially to the detriment of the contracting party affected. Any such contracting party shall afford adequate opportunity for consultation in accordance with the provisions of Article XXII of this Agreement.

Section D

22. A contracting party coming within the scope of subparagraph 4 (*b*) of this Article desiring, in the interest of the development of its economy, to introduce a measure of the type described in paragraph 13 of this Article in respect of the establishment of a particular industry* may apply to the CONTRACTING PARTIES for approval of such measure. The CONTRACTING PARTIES shall promptly consult with such contracting party and shall, in making their decision, be guided by the considerations set out in paragraph 16. If the CONTRACTING PARTIES concur* in the proposed measure the contracting party concerned shall be released from its obligations under the relevant provisions of the other Articles of this Agreement to the extent necessary to permit it to apply the measure. If the proposed measure affects a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, the provisions of paragraph 18 shall apply.*

23. Any measure applied under this Section shall comply with the provisions of paragraph 20 of this Article.

Article XIX

Emergency Action on Imports of Particular Products

1. (*a*) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (*a*) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (*a*) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall,

nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (*b*) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(*b*) Notwithstanding the provisions of subparagraph (*a*) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

(*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

Article XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

(*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(*c*) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (*c*) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary[3] to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

[3] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

PART III

Article XXIV

Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

(*a*) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

(*b*) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:

(*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(*b*) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in

each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

(*c*) any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of subparagraph 5 (*a*), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (*a*) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (*a*), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(*c*) Any substantial change in the plan or schedule referred to in paragraph 5 (*c*) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(*b*) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

Article XXV

Joint Action by the Contracting Parties

1. Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES.

2. The Secretary-General of the United Nations is requested to convene the first meeting of the CONTRACTING PARTIES, which shall take place not later than March 1, 1948.

3. Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.

4. Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast.

5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this

Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph[4].

Article XXVI

Acceptance, Entry into Force and Registration

1. The date of this Agreement shall be 30 October 1947.

2. This Agreement shall be open for acceptance by any contracting party which, on 1 March 1955, was a contracting party or was negotiating with a view to accession to this Agreement.

3. This Agreement, done in a single English original and a single French original, both texts authentic, shall be deposited with the Secretary-General of the United Nations, who shall furnish certified copies thereof to all interested governments.

4. Each government accepting this Agreement shall deposit an instrument of acceptance with the Executive Secretary[5] to the Contracting Parties, who will inform all interested governments of the date of deposit of each instrument of acceptance and of the day on which this Agreement enters into force under paragraph 6 of this Article.

5. (*a*) Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary[5] to the CONTRACTING PARTIES at the time of its own acceptance.

(*b*) Any government, which has so notified the Executive Secretary[5] under the exceptions in subparagraph (*a*) of this paragraph, may at any time give notice to the Executive Secretary[5] that its acceptance shall be effective in respect of any separate customs territory or territories so excepted and such notice shall take effect on the thirtieth day following the day on which it is received by the Executive Secretary.[5]

(*c*) If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.

[4] The authentic text erroneously reads "sub-paragraph".

[5] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

6. This Agreement shall enter into force, as among the governments which have accepted it, on the thirtieth day following the day on which instruments of acceptance have been deposited with Executive Secretary[6] to the Contracting Parties on behalf of governments named in Annex H, the territories of which account for 85 per centum of the total external trade of the territories of such governments, computed in accordance with the applicable column of percentages set forth therein. The instrument of acceptance of each other government shall take effect on the thirtieth day following the day on which such instrument has been deposited.

7. The United Nations is authorized to effect registration of this Agreement as soon as it enters into force.

Article XXVII

Withholding or Withdrawal of Concessions

Any contracting party shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such contracting party determines that it was initially negotiated with a government which has not become, or has ceased to be, a contracting party. A contracting party taking such action shall notify the CONTRACTING PARTIES and, upon request, consult with contracting parties which have a substantial interest in the product concerned.

*Article XXVIII**

Modification of Schedules

1. On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period* that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest* in such concession, modify or withdraw a concession* included in the appropriate schedule annexed to this Agreement.

2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the contracting parties concerned shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations.

3. (*a*) If agreement between the contracting parties primarily concerned cannot be reached before 1 January 1958 or before the expiration of a period envisaged in paragraph 1 of this Article, the contracting party which proposes to modify or withdraw the concession shall, nevertheless, be free to do so and if such action is taken any contracting party with which such concession was initially negotiated, any contracting party determined under paragraph 1 to have a

[6] By the Decision of 23 March 1965, the CONTRACTING PARTIES changed the title of the head of the GATT secretariat from "Executive Secretary" to "Director-General".

principal supplying interest and any contracting party determined under paragraph 1 to have a substantial interest shall then be free not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

(*b*) If agreement between the contracting parties primarily concerned is reached but any other contracting party determined under paragraph 1 of this Article to have a substantial interest is not satisfied, such other contracting party shall be free, not later than six months after action under such agreement is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with the applicant contracting party.

4. The CONTRACTING PARTIES may, at any time, in special circumstances, authorize* a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement subject to the following procedures and conditions:

(*a*) Such negotiations* and any related consultations shall be conducted in accordance with the provisions of paragraph 1 and 2 of this Article.

(*b*) If agreement between the contracting parties primarily concerned is reached in the negotiations, the provisions of paragraph 3 (*b*) of this Article shall apply.

(*c*) If agreement between the contracting parties primarily concerned is not reached within a period of sixty days* after negotiations have been authorized, or within such longer period as the CONTRACTING PARTIES may have prescribed, the applicant contracting party may refer the matter to the CONTRACTING PARTIES.

(*d*) Upon such reference, the CONTRACTING PARTIES shall promptly examine the matter and submit their views to the contracting parties primarily concerned with the aim of achieving a settlement. If a settlement is reached, the provisions of paragraph 3 (*b*) shall apply as if agreement between the contracting parties primarily concerned had been reached. If no settlement is reached between the contracting parties primarily concerned, the applicant contracting party shall be free to modify or withdraw the concession, unless the CONTRACTING PARTIES determine that the applicant contracting party has unreasonably failed to offer adequate compensation.* If such action is taken, any contracting party with which the concession was initially negotiated, any contracting party determined under paragraph 4 (*a*) to have a principal supplying interest and any contracting party determined under paragraph 4 (*a*) to have a substantial interest, shall be free, not later than six months after such action is taken, to modify or withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the CONTRACTING PARTIES, substantially equivalent concessions initially negotiated with applicant contracting party.

5. Before 1 January 1958 and before the end of any period envisaged in paragraph 1 a contracting party may elect by notifying the CONTRACTING PARTIES to reserve the right, for the duration of the next period, to modify the appropriate Schedule in accordance with the procedures of paragraph 1 to 3. If a contracting party so elects, other contracting parties shall

have the right, during the same period, to modify or withdraw, in accordance with the same procedures, concessions initially negotiated with that contracting party.

Article XXVIII bis

Tariff Negotiations

1. The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time.

2. (*a*) Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels. The binding against increase of low duties or of duty-free treatment shall, in principle, be recognized as a concession equivalent in value to the reduction of high duties.

(*b*) The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another.

3. Negotiations shall be conducted on a basis which affords adequate opportunity to take into account:

(*a*) the needs of individual contracting parties and individual industries;

(*b*) the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development and the special needs of these countries to maintain tariffs for revenue purposes; and

(*c*) all other relevant circumstances, including the fiscal,* developmental, strategic and other needs of the contracting parties concerned.

Article XXIX

The Relation of this Agreement to the Havana Charter

1. The contracting parties undertake to observe to the fullest extent of their executive authority the general principles of Chapters I to VI inclusive and of Chapter IX of the Havana Charter pending their acceptance of it in accordance with their constitutional procedures.*

2. Part II of this Agreement shall be suspended on the day on which the Havana Charter enters into force.

3. If by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.

4. If at any time the Havana Charter should cease to be in force, the CONTRACTING PARTIES shall meet as soon as practicable thereafter to agree whether this Agreement shall be supplemented, amended or maintained. Pending such agreement, Part II of this Agreement shall again enter into force; *Provided* that the provisions of Part II other than Article XXIII shall be replaced, *mutatis mutandis*, in the form in which they then appeared in the Havana Charter; and *Provided* further that no contracting party shall be bound by any provisions which did not bind it at the time when the Havana Charter ceased to be in force.

5. If any contracting party has not accepted the Havana Charter by the date upon which it enters into force, the CONTRACTING PARTIES shall confer to agree whether, and if so in what way, this Agreement in so far as it affects relations between such contracting party and other contracting parties, shall be supplemented or amended. Pending such agreement the provisions of Part II of this Agreement shall, notwithstanding the provisions of paragraph 2 of this Article, continue to apply as between such contracting party and other contracting parties.

6. Contracting parties which are Members of the International Trade Organization shall not invoke the provisions of this Agreement so as to prevent the operation of any provision of the Havana Charter. The application of the principle underlying this paragraph to any contracting party which is not a Member of the International Trade Organization shall be the subject of an agreement pursuant to paragraph 5 of this Article.

Article XXX

Amendments

1. Except where provision for modification is made elsewhere in this Agreement, amendments to the provisions of Part I of this Agreement or the provisions of Article XXIX or of this Article shall become effective upon acceptance by all the contracting parties, and other amendments to this Agreement shall become effective, in respect of those contracting parties which accept them, upon acceptance by two-thirds of the contracting parties and thereafter for each other contracting party upon acceptance by it.

2. Any contracting party accepting an amendment to this Agreement shall deposit an instrument of acceptance with the Secretary-General of the United Nations within such period as the CONTRACTING PARTIES may specify. The CONTRACTING PARTIES may decide that any amendment made effective under this Article is of such a nature that any contracting party which has not accepted it within a period specified by the CONTRACTING PARTIES shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES.

Article XXXI

Withdrawal

Without prejudice to the provisions of paragraph 12 of Article XVIII, of Article XXIII or of paragraph 2 of Article XXX, any contracting party may withdraw from this Agreement, or may separately withdraw on behalf of any of the separate customs territories for which it has

international responsibility and which at the time possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement. The withdrawal shall take effect upon the expiration of six months from the day on which written notice of withdrawal is received by the Secretary-General of the United Nations.

Article XXXII

Contracting Parties

1. The contracting parties to this Agreement shall be understood to mean those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.

2. At any time after the entry into force of this Agreement pursuant to paragraph 6 of Article XXVI, those contracting parties which have accepted this Agreement pursuant to paragraph 4 of Article XXVI may decide that any contracting party which has not so accepted it shall cease to be a contracting party.

Article XXXIII

Accession

A government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING PARTIES under this paragraph shall be taken by a two-thirds majority.

Article XXXIV

Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

Article XXXV

Non-application of the Agreement between Particular Contracting Parties

1. This Agreement, or alternatively Article II of this Agreement, shall not apply as between any contracting party and any other contracting party if:

(*a*) the two contracting parties have not entered into tariff negotiations with each other, and

(*b*) either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

2. The CONTRACTING PARTIES may review the operation of this Article in particular cases at the request of any contracting party and make appropriate recommendations.

PART IV*

TRADE AND DEVELOPMENT

Article XXXVI

Principles and Objectives

1.* The contracting parties,

(*a*) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;

(*b*) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

(*c*) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;

(*d*) recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;

(*e*) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures - and measures in conformity with such rules and procedures - as are consistent with the objectives set forth in this Article;

(*f*) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,* there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain

stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-developed contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible - that is, except when compelling reasons, which may include legal reasons, make it impossible - give effect to the following provisions:

(*a*) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;*

(*b*) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

(*c*) (i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

2. (*a*) Whenever it is considered that effect is not being given to any of the provisions of subparagraph (*a*), (*b*) or (*c*) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(b) (i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of subparagraph (*a*), (*b*) or (*c*) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of subparagraph (*a),* (*b*) or (*c*) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

(*a*) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

(*b*) give active consideration to the adoption of other measures* designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;

(*c*) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in

so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraph 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

Article XXXVIII

Joint Action

1. The contracting parties shall collaborate jointly, with the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.

2. In particular, the CONTRACTING PARTIES shall:

(*a*) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

(*b*) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

(*c*) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connection, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

(*d*) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;

(*e*) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations, through technical and commercial standards affecting production, transportation and marketing, and through export promotion

by the establishment of facilities for the increased flow of trade information and the development of market research; and

(*f*) establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provision of this Part.

ANNEX A

LIST OF TERRITORIES REFERRED TO IN
PARAGRAPH 2 (a) OF ARTICLE I

United Kingdom of Great Britain and Northern Ireland

Dependent territories of the United Kingdom of Great Britain and Northern Ireland

Canada

Commonwealth of Australia

Dependent territories of the Commonwealth of Australia

New Zealand

Dependent territories of New Zealand

Union of South Africa including South West Africa

Ireland

India (as on April 10, 1947)

Newfoundland

Southern Rhodesia

Burma

Ceylon

Certain of the territories listed above have two or more preferential rates in force for certain products. Any such territory may, by agreement with the other contracting parties which are principal suppliers of such products at the most-favoured-nation rate, substitute for such preferential rates a single preferential rate which shall not on the whole be less favourable to suppliers at the most-favoured-nation rate than the preferences in force prior to such substitution.

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on April 10, 1947 exclusively between two or more of the territories listed in this Annex or to replace the preferential quantitative arrangements described in the following paragraph, shall not be deemed to constitute an increase in a margin of tariff preference.

The preferential arrangements referred to in paragraph 5 (*b*) of Article XIV are those existing in the United Kingdom on 10 April 1947, under contractual agreements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork and bacon. It is the intention, without

prejudice to any action taken under subparagraph (*h*)[7] of Article XX, that these arrangements shall be eliminated or replaced by tariff preferences, and that negotiations to this end shall take place as soon as practicable among the countries substantially concerned or involved.

The film hire tax in force in New Zealand on 10 April 1947, shall, for the purposes of this Agreement, be treated as a customs duty under Article I. The renters' film quota in force in New Zealand on April 10, 1947, shall, for the purposes of this Agreement, be treated as a screen quota under Article IV.

The Dominions of India and Pakistan have not been mentioned separately in the above list since they had not come into existence as such on the base date of April 10, 1947.

[7] The authentic text erroneously reads "part I (*h*)".

ANNEX B

LIST OF TERRITORIES OF THE FRENCH UNION REFERRED TO IN PARAGRAPH 2 (*b*) OF ARTICLE I

France

French Equatorial Africa (Treaty Basin of the Congo[8] and other territories)

French West Africa

Cameroons under French Trusteeship[8]

French Somali Coast and Dependencies

French Establishments in Oceania

French Establishments in the Condominium of the New Hebrides[8]

Indo-China

Madagascar and Dependencies

Morocco (French zone)[8]

New Caledonia and Dependencies

Saint-Pierre and Miquelon

Togo under French Trusteeship[8]

Tunisia

[8] For imports into Metropolitan France and Territories of the French Union.

ANNEX C

LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (*b*) OF ARTICLE I AS RESPECTS THE CUSTOMS UNION OF BELGIUM, LUXEMBURG AND THE NETHERLANDS

The Economic Union of Belgium and Luxemburg

Belgian Congo

Ruanda Urundi

Netherlands

New Guinea

Surinam

Netherlands Antilles

Republic of Indonesia

For imports into the territories constituting the Customs Union only.

ANNEX D

LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (*b*) OF ARTICLE I AS RESPECTS THE UNITED STATES OF AMERICA

United States of America (customs territory)

Dependent territories of the United States of America

Republic of the Philippines

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on 10 April, 1947, exclusively between two or more of the territories listed in this Annex shall not be deemed to constitute an increase in a margin of tariff preference.

ANNEX E

LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN CHILE AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (*d*) OF ARTICLE I

Preferences in force exclusively between Chile on the one hand, and

1. Argentina

2. Bolivia

3. Peru

on the other hand.

ANNEX F

LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN LEBANON AND SYRIA AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (*d*) OF ARTICLE I

Preferences in force exclusively between the Lebano-Syrian Customs Union, on the one hand, and

1. Palestine

2. Transjordan

on the other hand.

ANNEX G

DATES ESTABLISHING MAXIMUM MARGINS OF PREFERENCE REFERRED TO IN PARAGRAPH 4[9] OF ARTICLE I

Australia …….October 15, 1946

Canada ……..…..….July 1, 1939

France ……..…January 1, 1939

Lebano-Syrian Customs Union……...November 30, 1938

Union of South Africa……...…..July 1, 1938

Southern Rhodesia …….....May 1, 1941

[9] The authentic text erroneously reads "Paragraph 3".

ANNEX H

PERCENTAGE SHARES OF TOTAL EXTERNAL TRADE TO BE USED FOR THE PURPOSE OF MAKING THE DETERMINATION REFERRED TO IN ARTICLE XXVI

(BASED ON THE AVERAGE OF 1949-1953)

If, prior to the accession of the Government of Japan to the General Agreement, the present Agreement has been accepted by contracting parties the external trade of which under Column I accounts for the percentage of such trade specified in paragraph 6 of Article XXVI, column I shall be applicable for the purposes of that paragraph. If the present Agreement has not been so accepted prior to the accession of the Government of Japan, column II shall be applicable for the purposes of that paragraph.

	Column I (Contracting parties on 1 March 1955)	Column II (Contracting parties on 1 March 1955 and Japan)
Australia	3.1	3.0
Austria	0.9	0.8
Belgium-Luxemburg	4.3	4.2
Brazil	2.5	2.4
Burma	0.3	0.3
Canada	6.7	6.5
Ceylon	0.5	0.5
Chile	0.6	0.6
Cuba	1.1	1.1
Czechoslovakia	1.4	1.4
Denmark	1.4	1.4
Dominican Republic	0.1	0.1
Finland	1.0	1.0
France	8.7	8.5
Germany, Federal Republic of	5.3	5.2
Greece	0.4	0.4
Haiti	0.1	0.1
India	2.4	2.4
Indonesia	1.3	1.3
Italy	2.9	2.8
Netherlands, Kingdom of the	4.7	4.6
New Zealand	1.0	1.0
Nicaragua	0.1	0.1
Norway	1.1	1.1
Pakistan	0.9	0.8
Peru	0.4	0.4
Rhodesia and Nyasaland	0.6	0.6
Sweden	2.5	2.4
Turkey	0.6	0.6
Union of South Africa	1.8	1.8
United Kingdom	20.3	19.8
United States of America	20.6	20.1
Uruguay	0.4	0.4
Japan	-	2.3
	100.0	100.0

Note: These percentages have been computed taking into account the trade of all territories in respect of which the General Agreement on Tariffs and Trade is applied.

ANNEX I

NOTES AND SUPPLEMENTARY PROVISIONS

Ad Article I

Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 *(b)* of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.[10]

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

(1) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favoured-nation rate;

(2) If the most-favoured-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 per cent *ad valorem*;

(3) If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

(i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and

(ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

[10] This Protocol entered into force on 14 December 1948.

Ad Article II

Paragraph 2 (a)

The cross-reference, in paragraph 2 (*a*) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.[11]

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

[11] This Protocol entered into force on 14 December 1948.

Paragraph 5

Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

Ad Article V

Paragraph 5

With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.

Ad Article VI

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

2. It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

Ad Article VII

Paragraph 1

The expression "or other charges" is not to be regarded as including internal taxes or equivalent charges imposed on or in connection with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of "actual value" and plus any abnormal discount or other reduction from the ordinary competitive price.

2. It would be in conformity with Article VII, paragraph 2 *(b)*, for a contracting party to construe the phrase "in the ordinary course of trade ... under fully competitive conditions", as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.

3. The standard of "fully competitive conditions" permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.

4. The wording of subparagraphs *(a)* and *(b)* permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

Ad Article VIII

1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 *(a)* of Article XV fully safeguard its position.

2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.

Ad Articles XI, XII, XIII, XIV and XVIII

Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

Ad Article XI

Paragraph 2 (c)

The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last subparagraph

The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

Ad Article XII

The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.

Paragraph 3 (c)*(i)*

Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 4 (b)

It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this subparagraph at the time envisaged, they may determine a later date; *Provided* that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.

Paragraph 4 (e)

It is agreed that paragraph 4 *(e)* does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.

Ad Article XIII

Paragraph 2 (d)

No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to "special factors" in connection with the last subparagraph of paragraph 2 of Article XI.

Ad Article XIV

Paragraph 1

The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.

Paragraph 2

One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.

Ad Article XV

Paragraph 4

The word "frustrate" is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article. Thus, a contracting party which, as part of its exchange control operated in accordance with the Articles of Agreement of the International Monetary Fund, requires payment to be received for its exports in its own currency or in the currency of one or more members of the International Monetary Fund will not thereby be deemed to contravene Article XI or Article XIII. Another example would be that of a contracting party which specifies on an import licence the country from which the goods may be imported, for the purpose not of introducing any additional element of discrimination in its import licensing system but of enforcing permissible exchange controls.

Ad Article XVI

The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Section B

1. Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.

2. For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

Paragraph 3

1. The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.

2. A system for the stabilization of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:

(a) the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and

(b) the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.

Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.

Paragraph 4

The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.

Ad Article XVII

Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of subparagraphs *(a)* and *(b)*.

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

Paragraph 1 (a)

Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources

but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".

Paragraph 1 (b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

Paragraph 2

The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.

Paragraph 3

Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)

Paragraph 4 (b)

The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.

Ad Article XVIII

The CONTRACTING PARTIES and the contracting parties concerned shall preserve the utmost secrecy in respect of matters arising under this Article.

Paragraphs 1 and 4

1. When they consider whether the economy of a contracting party "can only support low standards of living", the CONTRACTING PARTIES shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party.

2. The phrase "in the early stages of development" is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.

Paragraphs 2, 3, 7, 13 and 22

The reference to the establishment of particular industries shall apply not only to the establishment of a new industry, but also to the establishment of a new branch of production in an existing industry and to the substantial transformation of an existing industry, and to the substantial expansion of an existing industry supplying a relatively small proportion of the

domestic demand. It shall also cover the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters.

Paragraph 7 (b)

A modification or withdrawal, pursuant to paragraph 7 *(b)*, by a contracting party, other than the applicant contracting party, referred to in paragraph 7 *(a)*, shall be made within six months of the day on which the action is taken by the applicant contracting party, and shall become effective on the thirtieth day following the day on which such modification or withdrawal has been notified to the CONTRACTING PARTIES.

Paragraph 11

The second sentence in paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal would thereupon produce conditions justifying the intensification or institution, respectively, of restrictions under paragraph 9 of Article XVIII.

Paragraph 12 (b)

The date referred to in paragraph 12 *(b)* shall be the date determined by the CONTRACTING PARTIES in accordance with the provisions of paragraph 4 *(b)* of Article XII of this Agreement.

Paragraphs 13 and 14

It is recognized that, before deciding on the introduction of a measure and notifying the CONTRACTING PARTIES in accordance with paragraph 14, a contracting party may need a reasonable period of time to assess the competitive position of the industry concerned.

Paragraphs 15 and 16

It is understood that the CONTRACTING PARTIES shall invite a contracting party proposing to apply a measure under Section C to consult with them pursuant to paragraph 16 if they are requested to do so by a contracting party the trade of which would be appreciably affected by the measure in question.

Paragraphs 16, 18, 19 and 22

1. It is understood that the CONTRACTING PARTIES may concur in a proposed measure subject to specific conditions or limitations. If the measure as applied does not conform to the terms of the concurrence it will to that extent be deemed a measure in which the CONTRACTING PARTIES have not concurred. In cases in which the CONTRACTING PARTIES have concurred in a measure for a specified period, the contracting party concerned, if it finds that the maintenance of the measure for a further period of time is required to achieve the objective for which the measure was originally taken, may apply to the CONTRACTING PARTIES for an extension of that period in accordance with the provisions and procedures of Section C or D, as the case may be.

2. It is expected that the CONTRACTING PARTIES will, as a rule, refrain from concurring in a measure which is likely to cause serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.

Paragraph 18 and 22

The phrase "that the interests of other contracting parties are adequately safeguarded" is meant to provide latitude sufficient to permit consideration in each case of the most appropriate method of safeguarding those interests. The appropriate method may, for instance, take the form of an additional concession to be applied by the contracting party having recourse to Section C or D during such time as the deviation from the other Articles of the Agreement would remain in force or of the temporary suspension by any other contracting party referred to in paragraph 18 of a concession substantially equivalent to the impairment due to the introduction of the measure in question. Such contracting party would have the right to safeguard its interests through such a temporary suspension of a concession; *Provided* that this right will not be exercised when, in the case of a measure imposed by a contracting party coming within the scope of paragraph 4 *(a)*, the CONTRACTING PARTIES have determined that the extent of the compensatory concession proposed was adequate.

Paragraph 19

The provisions of paragraph 19 are intended to cover the cases where an industry has been in existence beyond the "reasonable period of time" referred to in the note to paragraphs 13 and 14, and should not be so construed as to deprive a contracting party coming within the scope of paragraph 4 *(a)* of Article XVIII, of its right to resort to the other provisions of Section C, including paragraph 17, with regard to a newly established industry even though it has benefited from incidental protection afforded by balance of payments import restrictions.

Paragraph 21

Any measure taken pursuant to the provisions of paragraph 21 shall be withdrawn forthwith if the action taken in accordance with paragraph 17 is withdrawn or if the CONTRACTING PARTIES concur in the measure proposed after the expiration of the ninety-day time limit specified in paragraph 17.

Ad Article XX

Subparagraph (h)

The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.

Ad Article XXIV

Paragraph 9

It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and

any higher duty that would be payable if the product were being imported directly into its territory.

Paragraph 11

Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.

Ad Article XXVIII

The CONTRACTING PARTIES and each contracting party concerned should arrange to conduct the negotiations and consultations with the greatest possible secrecy in order to avoid premature disclosure of details of prospective tariff changes. The CONTRACTING PARTIES shall be informed immediately of all changes in national tariffs resulting from recourse to this Article.

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the first day following the expiration of such other period and, unless the CONTRACTING PARTIES have again specified another period, subsequent periods will be three-year periods following the expiration of such specified period.

2. The provision that on 1 January 1958, and on other days determined pursuant to paragraph 1, a contracting party "may ... modify or withdraw a concession" means that on such day, and on the first day after the end of each period, the legal obligation of such contracting party under Article II is altered; it does not mean that the changes in its customs tariff should necessarily be made effective on that day. If a tariff change resulting from negotiations undertaken pursuant to this Article is delayed, the entry into force of any compensatory concessions may be similarly delayed.

3. Not earlier than six months, nor later than three months, prior to 1 January 1958, or to the termination date of any subsequent period, a contracting party wishing to modify or withdraw any concession embodied in the appropriate Schedule, should notify the CONTRACTING PARTIES to this effect. The CONTRACTING PARTIES shall then determine the contracting party or contracting parties with which the negotiations or consultations referred to in paragraph 1 shall take place. Any contracting party so determined shall participate in such negotiations or consultations with the applicant contracting party with the aim of reaching agreement before the end of the period. Any extension of the assured life of the Schedules shall relate to the Schedules as modified after such negotiations, in accordance with paragraphs 1, 2, and 3 of Article XXVIII. If the CONTRACTING PARTIES are arranging for multilateral tariff negotiations to take place within the period of six months before 1 January 1958, or before any other day determined pursuant to paragraph 1, they shall include in the arrangements for such negotiations suitable procedures for carrying out the negotiations referred to in this paragraph.

4. The object of providing for the participation in the negotiation of any contracting party with a principle supplying interest, in addition to any contracting party with which the concession was originally negotiated, is to ensure that a contracting party with a larger share in the trade

affected by the concession than a contracting party with which the concession was originally negotiated shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement. On the other hand, it is not intended that the scope of the negotiations should be such as to make negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application of this Article in the future to concessions which result from negotiations thereunder. Accordingly, the CONTRACTING PARTIES should only determine that a contracting party has a principal supplying interest if that contracting party has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated or would, in the judgement of the CONTRACTING PARTIES, have had such a share in the absence of discriminatory quantitative restrictions maintained by the applicant contracting party. It would therefore not be appropriate for the CONTRACTING PARTIES to determine that more than one contracting party, or in those exceptional cases where there is near equality more than two contracting parties, had a principal supplying interest.

5. Notwithstanding the definition of a principal supplying interest in note 4 to paragraph 1, the CONTRACTING PARTIES may exceptionally determine that a contracting party has a principal supplying interest if the concession in question affects trade which constitutes a major part of the total exports of such contracting party.

6. It is not intended that provision for participation in the negotiations of any contracting party with a principal supplying interest, and for consultation with any contracting party having a substantial interest in the concession which the applicant contracting party is seeking to modify or withdraw, should have the effect that it should have to pay compensation or suffer retaliation greater than the withdrawal or modification sought, judged in the light of the conditions of trade at the time of the proposed withdrawal or modification, making allowance for any discriminatory quantitative restrictions maintained by the applicant contracting party.

7. The expression "substantial interest" is not capable of a precise definition and accordingly may present difficulties for the CONTRACTING PARTIES. It is, however, intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonably be expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession.

Paragraph 4

1. Any request for authorization to enter into negotiations shall be accompanied by all relevant statistical and other data. A decision on such request shall be made within thirty days of its submission.

2. It is recognized that to permit certain contracting parties, depending in large measure on a relatively small number of primary commodities and relying on the tariff as an important aid for furthering diversification of their economies or as an important source of revenue, normally to negotiate for the modification or withdrawal of concessions only under paragraph 1 of Article XXVIII, might cause them at such time to make modifications or withdrawals which in the long run would prove unnecessary. To avoid such a situation the CONTRACTING PARTIES shall authorize any such contracting party, under paragraph 4, to enter into negotiations unless they consider this would result in, or contribute substantially towards, such an increase in tariff levels as to threaten the stability of the Schedules to this Agreement or lead to undue disturbance of international trade.

3. It is expected that negotiations authorized under paragraph 4 for modification or withdrawal of a single item, or a very small group of items, could normally be brought to a conclusion in sixty days. It is recognized, however, that such a period will be inadequate for cases involving negotiations for the modification or withdrawal of a larger number of items and in such cases, therefore, it would be appropriate for the CONTRACTING PARTIES to prescribe a longer period.

4. The determination referred to in paragraph 4 *(d)* shall be made by the CONTRACTING PARTIES within thirty days of the submission of the matter to them unless the applicant contracting party agrees to a longer period.

5. In determining under paragraph 4 *(d)* whether an applicant contracting party has unreasonably failed to offer adequate compensation, it is understood that the CONTRACTING PARTIES will take due account of the special position of a contracting party which has bound a high proportion of its tariffs at very low rates of duty and to this extent has less scope than other contracting parties to make compensatory adjustment.

Ad Article XXVIII bis

Paragraph 3

It is understood that the reference to fiscal needs would include the revenues aspect of duties and particularly duties imposed primarily for revenue purpose, or duties imposed on products which can be substituted for products subject to revenue duties to prevent the avoidance of such duties.

Ad Article XXIX

Paragraph 1

Chapters VII and VIII of the Havana Charter have been excluded from paragraph 1 because they generally deal with the organization, functions and procedures of the International Trade Organization.

Ad Part IV

The words "developed contracting parties" and the words "less-developed contracting parties" as used in Part IV are to be understood to refer to developed and less-developed countries which are parties to the General Agreement on Tariffs and Trade.

Ad Article XXXVI

Paragraph 1

This Article is based upon the objectives set forth in Article I as it will be amended by Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX when that Protocol enters into force.[12]

[12] This Protocol was abandoned on 1 January 1968.

Paragraph 4

The term "primary products" includes agricultural products, *vide* paragraph 2 of the note *ad* Article XVI, Section B.

Paragraph 5

A diversification programme would generally include the intensification of activities for the processing of primary products and the development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities.

Paragraph 8

It is understood that the phrase "do not expect reciprocity" means, in accordance with the objectives set forth in this Article, that the less-developed contracting parties should not be expected, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs, taking into consideration past trade developments.

This paragraph would apply in the event of action under Section A of Article XVIII, Article XXVIII, Article XXVIII *bis* (Article XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective[13]), Article XXXIII, or any other procedure under this Agreement.

Ad Article XXXVII

Paragraph 1 (a)

This paragraph would apply in the event of negotiations for reduction or elimination of tariffs or other restrictive regulations of commerce under Articles XXVIII, XXVIII *bis* (XXIX after the amendment set forth in Section A of paragraph 1 of the Protocol Amending Part I and Articles XXIX and XXX shall have become effective[13]), and Article XXXIII, as well as in connection with other action to effect such reduction or elimination which contracting parties may be able to undertake.

Paragraph 3 (b)

The other measures referred to in this paragraph might include steps to promote domestic structural changes, to encourage the consumption of particular products, or to introduce measures of trade promotion.

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[13] This Protocol was abandoned on 1 January 1968.

4. Agreement on the Application of Sanitary and Phytosanitary Measures

AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)[1];

Hereby agree as follows:

Article 1

General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.

2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

[1] In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

3. The annexes are an integral part of this Agreement.

4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Article 2

Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.

2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

Article 3

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[2]

[2] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.

5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Article 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Article 4

Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

Article 5

Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.

4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]

7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Article 6

Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as

[3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Article 7

Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Article 8

Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Article 9

Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, *inter alia*, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.

2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

Article 10

Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.

4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

Article 11

Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

Article 12

Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.

3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosanitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.

4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations. For this purpose, the Committee should, in conjunction with the relevant international organizations, establish a list of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as conditions for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough to provide the appropriate level of sanitary or phytosanitary protection. If a Member revises its position, following its indication of the use of a standard, guideline or recommendation as a condition for import, it should provide an explanation for its change and so inform the Secretariat as well as the relevant international organizations, unless such notification and explanation is given according to the procedures of Annex B.

5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.

6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.

7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, *inter alia*, to the experience gained in its implementation.

Article 13

Implementation

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

Article 14

Final Provisions

The least-developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.

ANNEX A

DEFINITIONS[4]

1. *Sanitary or phytosanitary measure* - Any measure applied:

   (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

   (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

   (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

   (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

2. *Harmonization* - The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.

3. *International standards, guidelines and recommendations*

   (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and

[4] For the purpose of these definitions, "animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.

pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;

(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and

(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

4. *Risk assessment* - The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5. *Appropriate level of sanitary or phytosanitary protection* - The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6. *Pest- or disease-free area* - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.

NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area - whether within part of a country or in a geographic region which includes parts of or all of several countries -in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7. *Area of low pest or disease prevalence* - An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

ANNEX B

TRANSPARENCY OF SANITARY AND PHYTOSANITARY REGULATIONS

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations[5] which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.

2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:

(a) any sanitary or phytosanitary regulations adopted or proposed within its territory;

(b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;

(c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;

(d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.

4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals[6] of the Member concerned.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

[5] Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.

[6] When "nationals" are referred to in this Agreement, the term shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.

8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.

9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:

(a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or

(b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

ANNEX C

CONTROL, INSPECTION AND APPROVAL PROCEDURES[7]

[7] Control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification.

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:

(a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;

(b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

(c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;

(d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;

(e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;

(f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;

(g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;

(h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and

(i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.

2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.

3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.

5. Agreement on Technical Barriers to Trade

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

Article 1

General Provisions

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 3

Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

Article 4

Preparation, Adoption and Application of Standards

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance

of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;

5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;

5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;

5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;

5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;

5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;

5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;

5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.

5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, *inter alia*, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.

5.5 With a view to harmonizing conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of guides and recommendations for conformity assessment procedures.

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;

5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 6

Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:

6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;

6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

Article 7

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.

7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

Article 8

Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

INFORMATION AND ASSISTANCE

Article 10

Information About Technical Regulations, Standards and Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and

10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral

arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals[1] of the Member concerned or of any other Member.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

Article 11

[1] "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to

discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.

13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

Article 14

Consultation and Dispute Settlement

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

FINAL PROVISIONS

Article 15

Final Provisions

Reservations

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.

15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia,* to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. *Technical regulation*

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. *Standard*

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. *Conformity assessment procedures*

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Explanatory note

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. *International body or system*

Body or system whose membership is open to the relevant bodies of at least all Members.

5. *Regional body or system*

Body or system whose membership is open to the relevant bodies of only some of the Members.

6. *Central government body*

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

Explanatory note:

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. *Local government body*

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. *Non-governmental body*

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

ANNEX 2

TECHNICAL EXPERT GROUPS

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

ANNEX 3

CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS

General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

SUBSTANTIVE PROVISIONS

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

6. Agreement on Subsidies and Countervailing Measures

AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Members hereby *agree* as follows:

PART I: GENERAL PROVISIONS

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [1];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

[1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

Article 2

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

PART II: PROHIBITED SUBSIDIES

Article 3

Prohibition

[2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days[6] of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts[7] (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

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[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

[6] Any time-periods mentioned in this Article may be extended by mutual agreement.

[7] As established in Article 24.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[8]

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate[9] countermeasures, unless the DSB decides by consensus to reject the request.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.[10]

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

PART III: ACTIONABLE SUBSIDIES

Article 5

Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

(a) injury to the domestic industry of another Member[11];

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994[12];

[8] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[9] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[10] This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

[11] The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

(c) serious prejudice to the interests of another Member.[13]

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 6

Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

(a) the total ad valorem subsidization[14] of a product exceeding 5 per cent[15];

(b) subsidies to cover operating losses sustained by an industry;

(c) subsidies to cover operating losses sustained by an enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.[16]

6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;

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[12] The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[13] The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

[14] The total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV.

[15] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

[16] Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

(d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative shares of the market" shall include any of the following situations: *(a)* there is an increase in the market share of the subsidized product; *(b)* the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; *(c)* the market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.

6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall, subject to the provisions of paragraph 3 of Annex V, make available to the parties to a dispute arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7, all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.

6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist[18] during the relevant period:

(a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;

(b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;

(c) natural disasters, strikes, transport disruptions or other *force majeure* substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

(d) existence of arrangements limiting exports from the complaining Member;

(e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, *inter alia*, a situation where firms in the

[17] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

[18] The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

complaining Member have been autonomously reallocating exports of this product to new markets);

(f) failure to conform to standards and other regulatory requirements in the importing country.

6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V.

6.9 This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

Article 7

Remedies

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to *(a)* the existence and nature of the subsidy in question, and *(b)* the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice[19] caused to the interests of the Member requesting consultations.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

7.4 If consultations do not result in a mutually agreed solution within 60 days[20], any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel's terms of reference.

7.6 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB[21] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

[19] In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

[20] Any time-periods mentioned in this Article may be extended by mutual agreement.

[21] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.[22]

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.

PART IV: NON-ACTIONABLE SUBSIDIES

Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable[23]:

(a) subsidies which are not specific within the meaning of Article 2;

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:[24] ,[25] ,[26]

[22] If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

[23] It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

[24] Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

[25] Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible

the assistance covers[27] not more than 75 per cent of the costs of industrial research[28] or 50 per cent of the costs of pre-competitive development activity[29], [30]; and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [31] and non-specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

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modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

[26] The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

[27] The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

[28] The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

[29] The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

[30] In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

[31] A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria[32], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities[33] to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one-time non-recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

(iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and

(v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the

[32] "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

[33] The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.[34]

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

Article 9

Consultations and Authorized Remedies

9.1 If, in the course of implementation of a programme referred to in paragraph 2 of Article 8, notwithstanding the fact that the programme is consistent with the criteria laid down in that paragraph, a Member has reasons to believe that this programme has resulted in serious adverse effects to the domestic industry of that Member, such as to cause damage which would be difficult to repair, such Member may request consultations with the Member granting or maintaining the subsidy.

9.2 Upon request for consultations under paragraph 1, the Member granting or maintaining the subsidy programme in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

9.3 If no mutually acceptable solution has been reached in consultations under paragraph 2 within 60 days of the request for such consultations, the requesting Member may refer the matter to the Committee.

9.4 Where a matter is referred to the Committee, the Committee shall immediately review the facts involved and the evidence of the effects referred to in paragraph 1. If the Committee determines that such effects exist, it may recommend to the subsidizing Member to modify this programme in such a way as to remove these effects. The Committee shall present its conclusions within 120 days from the date when the matter is referred to it under paragraph 3. In the event the recommendation is not followed within six months, the Committee shall authorize the requesting Member to take appropriate countermeasures commensurate with the nature and degree of the effects determined to exist.

[34] It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

PART V: COUNTERVAILING MEASURES

Article 10

Application of Article VI of GATT 1994[35]

Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated[37] and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

Article 11

Initiation and Subsequent Investigation

11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and *(c)* a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

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[35] The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

[36] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

[37] The term "initiated" as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

(ii) a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) evidence with regard to the existence, amount and nature of the subsidy in question;

(iv) evidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[38] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[39] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation.

11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.

11.7 The evidence of both subsidy and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.

11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of

[38] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[39] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* , or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.

11.10 An investigation shall not hinder the procedures of customs clearance.

11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 12

Evidence

12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.

12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters[41] and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.

12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases,

[40] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[41] It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.[42]

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

12.4.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[43]

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if *(a)* the firm so agrees and *(b)* the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

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[42] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

[43] Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

12.9 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and

(ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidization, injury and causality.

12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 13

Consultations

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.[44]

13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such

[44] It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

investigation access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.

Article 14

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 15

Determination of Injury[45]

15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the subsidized imports and

[45] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

the effect of the subsidized imports on prices in the domestic market for like products[46] and *(b)* the consequent impact of these imports on the domestic producers of such products.

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

15.5 It must be demonstrated that the subsidized imports are, through the effects[47] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

15.6 The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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[46] 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.

[47] As set forth in paragraphs 2 and 4.

15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as:

(i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;

(iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur.

15.8 With respect to cases where injury is threatened by subsidized imports, the application of countervailing measures shall be considered and decided with special care.

Article 16

Definition of Domestic Industry

16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers.

16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any

[48] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to the producers of all or almost all of the production within such market.

16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if *(a)* the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and *(b)* such duties cannot be levied only on products of specific producers which supply the area in question.

16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.

16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

Article 17

Provisional Measures

17.1 Provisional measures may be applied only if:

(a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;

(b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports; and

(c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.

17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

Article 18

Undertakings

18.1 Proceedings may[49] be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

(a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidization and injury caused by such subsidization and, in case of undertakings from exporters, have obtained the consent of the exporting Member.

18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

18.4 If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of

[49] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of undertakings, except as provided in paragraph 4.

such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Article 19

Imposition and Collection of Countervailing Duties

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Article 20

Retroactivity

20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.

20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures,

[50] For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

[51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

20.6 In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Article 21

Duration and Review of Countervailing Duties and Undertakings

21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to

continuation or recurrence of subsidization and injury.[52] The duty may remain in force pending the outcome of such a review.

21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

Article 22

Public Notice and Explanation of Determinations

22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

22.2 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report[53], adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) a description of the subsidy practice or practices to be investigated;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested Members and interested parties should be directed; and

(vi) the time-limits allowed to interested Members and interested parties for making their views known.

22.3 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 18, of the termination of such an undertaking, and of the termination of a definitive countervailing duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

22.4 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary

[52] When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

[53] Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

determinations on the existence of a subsidy and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers or, when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the amount of subsidy established and the basis on which the existence of a subsidy has been determined;

(iv) considerations relevant to the injury determination as set out in Article 15;

(v) the main reasons leading to the determination.

22.5 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of an undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of an undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

22.6 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 18 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

Article 23

Judicial Review

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

PART VI: INSTITUTIONS

Article 24

Committee on Subsidies and Countervailing Measures and Subsidiary Bodies

24.1 There is hereby established a Committee on Subsidies and Countervailing Measures composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

24.2 The Committee may set up subsidiary bodies as appropriate.

24.3 The Committee shall establish a Permanent Group of Experts composed of five independent persons, highly qualified in the fields of subsidies and trade relations. The experts will be elected by the Committee and one of them will be replaced every year. The PGE may be requested to assist a panel, as provided for in paragraph 5 of Article 4. The Committee may also seek an advisory opinion on the existence and nature of any subsidy.

24.4 The PGE may be consulted by any Member and may give advisory opinions on the nature of any subsidy proposed to be introduced or currently maintained by that Member. Such advisory opinions will be confidential and may not be invoked in proceedings under Article 7.

24.5 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved.

PART VII: NOTIFICATION AND SURVEILLANCE

Article 25

Notifications

25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.

25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.

25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies[54], Members shall ensure that their notifications contain the following information:

(i) form of a subsidy (i.e. grant, loan, tax concession, etc.);

(ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);

[54] The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193-194.

(iii) policy objective and/or purpose of a subsidy;

(iv) duration of a subsidy and/or any other time-limits attached to it;

(v) statistical data permitting an assessment of the trade effects of a subsidy.

25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.

25.5 If subsidies are granted to specific products or sectors, the notifications should be organized by product or sector.

25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

25.7 Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.

25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.

25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.

25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

25.12 Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and *(b)* its domestic procedures governing the initiation and conduct of such investigations.

Article 26

Surveillance

26.1 The Committee shall examine new and full notifications submitted under paragraph 1 of Article XVI of GATT 1994 and paragraph 1 of Article 25 of this Agreement at special sessions held

every third year. Notifications submitted in the intervening years (updating notifications) shall be examined at each regular meeting of the Committee.

26.2 The Committee shall examine reports submitted under paragraph 11 of Article 25 at each regular meeting of the Committee.

PART VIII: DEVELOPING COUNTRY MEMBERS

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two

[55] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

27.7 The provisions of Article 4 shall not apply to a developing country Member in the case of export subsidies which are in conformity with the provisions of paragraphs 2 through 5. The relevant provisions in such a case shall be those of Article 7.

27.8 There shall be no presumption in terms of paragraph 1 of Article 6 that a subsidy granted by a developing country Member results in serious prejudice, as defined in this Agreement. Such serious prejudice, where applicable under the terms of paragraph 9, shall be demonstrated by positive evidence, in accordance with the provisions of paragraphs 3 through 8 of Article 6.

27.9 Regarding actionable subsidies granted or maintained by a developing country Member other than those referred to in paragraph 1 of Article 6, action may not be authorized or taken under Article 7 unless nullification or impairment of tariff concessions or other obligations under GATT 1994 is found to exist as a result of such a subsidy, in such a way as to displace or impede imports of a like product of another Member into the market of the subsidizing developing country Member or unless injury to a domestic industry in the market of an importing Member occurs.

27.10 Any countervailing duty investigation of a product originating in a developing country Member shall be terminated as soon as the authorities concerned determine that:

(a) the overall level of subsidies granted upon the product in question does not exceed 2 per cent of its value calculated on a per unit basis; or

(b) the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member.

27.11 For those developing country Members within the scope of paragraph 2(b) which have eliminated export subsidies prior to the expiry of the period of eight years from the date of entry into force of the WTO Agreement, and for those developing country Members referred to in Annex VII, the number in paragraph 10(a) shall be 3 per cent rather than 2 per cent. This provision shall apply from the date that the elimination of export subsidies is notified to the Committee, and for so long as export subsidies are not granted by the notifying developing country Member. This provision shall expire eight years from the date of entry into force of the WTO Agreement.

27.12 The provisions of paragraphs 10 and 11 shall govern any determination of *de minimis* under paragraph 3 of Article 15.

27.13 The provisions of Part III shall not apply to direct forgiveness of debts, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatization programme of a developing country Member, provided that both such programme and the subsidies involved are granted for a limited period and notified to the Committee and that the programme results in eventual privatization of the enterprise concerned.

27.14 The Committee shall, upon request by an interested Member, undertake a review of a specific export subsidy practice of a developing country Member to examine whether the practice is in conformity with its development needs.

27.15 The Committee shall, upon request by an interested developing country Member, undertake a review of a specific countervailing measure to examine whether it is consistent with the provisions of paragraphs 10 and 11 as applicable to the developing country Member in question.

PART IX: TRANSITIONAL ARRANGEMENTS

Article 28

Existing Programmes

28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:

(a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and

(b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

Article 29

Transformation into a Market Economy

29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy may apply programmes and measures necessary for such a transformation.

29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. In such a case, Article 4 shall not apply. In addition during the same period:

(a) Subsidy programmes falling within the scope of paragraph 1(d) of Article 6 shall not be actionable under Article 7;

(b) With respect to other actionable subsidies, the provisions of paragraph 9 of Article 27 shall apply.

29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.

29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time-frame by the Committee if such departures are deemed necessary for the process of transformation.

PART X: DISPUTE SETTLEMENT

Article 30

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

PART XI: FINAL PROVISIONS

Article 31

Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

Article 32

Other Final Provisions

32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]

32.2 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.

32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws,

[56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.

32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

32.7 The Committee shall review annually the implementation and operation of this Agreement, taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews.

32.8 The Annexes to this Agreement constitute an integral part thereof.

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available[57] on world markets to their exporters.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes[58] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

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[57] The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

[58] For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

[59] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes58 in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes58 on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).[60] This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

(i) The remission or drawback of import charges58 in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original

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this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

[60] Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

ANNEX II

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS[61]

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

[61] Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.

4. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

5. The investigating authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

ANNEX III

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not

exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEX IV

CALCULATION OF THE TOTAL AD VALOREM SUBSIDIZATION (PARAGRAPH 1(A) OF ARTICLE 6)[62]

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.

2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's[63] sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.[64]

3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.

[62] An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

[63] The recipient firm is a firm in the territory of the subsidizing Member.

[64] In the case of tax-related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax-related measure was earned.

4. Where the recipient firm is in a start-up situation, serious prejudice shall be deemed to exist if the overall rate of subsidization exceeds 15 per cent of the total funds invested. For purposes of this paragraph, a start-up period will not extend beyond the first year of production.[65]

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.

6. In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.

7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization.

8. Subsidies which are non-actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

ANNEX V

PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE

1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyze the adverse effects caused by the subsidized product.[66] This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.[67]

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which

[65] Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

[66] In cases where the existence of serious prejudice has to be demonstrated.

[67] The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

have already been gathered by relevant statistical services but which have not yet been published, customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

ANNEX VI

PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the government of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

[68] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

7. General Agreement on Trade in Services

ANNEX 1B

GENERAL AGREEMENT ON TRADE IN SERVICES

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GENERAL AGREEMENT ON TRADE IN SERVICES

Members,

Recognizing the growing importance of trade in services for the growth and development of the world economy;

Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives;

Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;

Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness;

Taking particular account of the serious difficulty of the least-developed countries in view of their special economic situation and their development, trade and financial needs;

Hereby *agree* as follows:

PART I

SCOPE AND DEFINITION

Article I

Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.

2. For the purposes of this Agreement, trade in services is defined as the supply of a service:

(a) from the territory of one Member into the territory of any other Member;

(b) in the territory of one Member to the service consumer of any other Member;

(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;

(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

3. For the purposes of this Agreement:

(a) "measures by Members" means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

(c) "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

PART II

GENERAL OBLIGATIONS AND DISCIPLINES

Article II

Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Article III

Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III bis

Disclosure of Confidential Information

Nothing in this Agreement shall require any Member to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.

Article IV

Increasing Participation of Developing Countries

1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:

(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, *inter alia* through access to technology on a commercial basis;

(b) the improvement of their access to distribution channels and information networks; and

(c) the liberalization of market access in sectors and modes of supply of export interest to them.

2. Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning:

(a) commercial and technical aspects of the supply of services;

(b) registration, recognition and obtaining of professional qualifications; and

(c) the availability of services technology.

3. Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

Article V

Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage[1], and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1,

[1] This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

Article V bis

Labour Markets Integration Agreements

This Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration[2] of the labour markets between or among the parties to such an agreement, provided that such an agreement:

[2] Typically, such integration provides citizens of the parties concerned with a right of free entry to the employment markets of the parties and includes measures concerning conditions of pay, other conditions of employment and social benefits.

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

Article VI

Domestic Regulation

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

(b) The provisions of subparagraph (a) shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application.

4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:

(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

(b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[3] applied by that Member.

6. In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.

Article VII

Recognition

1. For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

2. A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.

3. A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

4. Each Member shall:

(a) within 12 months from the date on which the WTO Agreement takes effect for it, inform the Council for Trade in Services of its existing recognition measures and state whether such measures are based on agreements or arrangements of the type referred to in paragraph 1;

(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.

[3] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

5. Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

Article VIII

Monopolies and Exclusive Service Suppliers

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (*a*) authorizes or establishes a small number of service suppliers and (*b*) substantially prevents competition among those suppliers in its territory.

Article IX

Business Practices

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

Article X

Emergency Safeguard Measures

1. There shall be multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination. The results of such negotiations shall enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement.

2. In the period before the entry into effect of the results of the negotiations referred to in paragraph 1, any Member may, notwithstanding the provisions of paragraph 1 of Article XXI, notify the Council on Trade in Services of its intention to modify or withdraw a specific commitment after a period of one year from the date on which the commitment enters into force; provided that the Member shows cause to the Council that the modification or withdrawal cannot await the lapse of the three-year period provided for in paragraph 1 of Article XXI.

3. The provisions of paragraph 2 shall cease to apply three years after the date of entry into force of the WTO Agreement.

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Article XII

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.

2. The restrictions referred to in paragraph 1:

(a) shall not discriminate among Members;

(b) shall be consistent with the Articles of Agreement of the International Monetary Fund;

(c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;

(d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;

(e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures[4] for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:

(i) the nature and extent of the balance-of-payments and the external financial difficulties;

(ii) the external economic and trading environment of the consulting Member;

(iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

Article XIII

Government Procurement

[4] It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

1. Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.

2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

Article XIV

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;[5]

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[6] imposition or collection of direct taxes in respect of services or service suppliers of other Members;

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[5] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[6] Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or

(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or

(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or

(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or

(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or

(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Article XIV bis

Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

Article XV

Subsidies

1. Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects.[7] The negotiations shall also address the appropriateness of countervailing procedures. Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of Members, particularly developing country Members, for flexibility in this area. For the purpose of such negotiations, Members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

[7] A future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted.

2. Any Member which considers that it is adversely affected by a subsidy of another Member may request consultations with that Member on such matters. Such requests shall be accorded sympathetic consideration.

PART III

SPECIFIC COMMITMENTS

Article XVI

Market Access

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[8]

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[9]

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

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[8] If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

[9] Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

Article XVII

National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Article XVIII

Additional Commitments

Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

PART IV

PROGRESSIVE LIBERALIZATION

Article XIX

Negotiation of Specific Commitments

1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access. This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations.

2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their

[10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.

3. For each round, negotiating guidelines and procedures shall be established. For the purposes of establishing such guidelines, the Council for Trade in Services shall carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV. Negotiating guidelines shall establish modalities for the treatment of liberalization undertaken autonomously by Members since previous negotiations, as well as for the special treatment for least-developed country Members under the provisions of paragraph 3 of Article IV.

4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.

Article XX

Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Article XXI

Modification of Schedules

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.

(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.

2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.

(b) Compensatory adjustments shall be made on a most-favoured-nation basis.

3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.

(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.

4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.

(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.

5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.

PART V

INSTITUTIONAL PROVISIONS

Article XXII

Consultation

1. Each Member shall accord sympathetic consideration to, and shall afford adequate opportunity for, consultation regarding such representations as may be made by any other Member with respect to any matter affecting the operation of this Agreement. The Dispute Settlement Understanding (DSU) shall apply to such consultations.

2. The Council for Trade in Services or the Dispute Settlement Body (DSB) may, at the request of a Member, consult with any Member or Members in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

3. A Member may not invoke Article XVII, either under this Article or Article XXIII, with respect to a measure of another Member that falls within the scope of an international agreement between them relating to the avoidance of double taxation. In case of disagreement between Members as to whether a measure falls within the scope of such an agreement between them, it shall be open to either Member to bring this matter before the Council for Trade in Services.[11] The Council shall refer the matter to arbitration. The decision of the arbitrator shall be final and binding on the Members.

Article XXIII

Dispute Settlement and Enforcement

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.

2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the DSU. If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply.

Article XXIV

Council for Trade in Services

1. The Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives. The Council may establish such subsidiary bodies as it considers appropriate for the effective discharge of its functions.

2. The Council and, unless the Council decides otherwise, its subsidiary bodies shall be open to participation by representatives of all Members.

3. The Chairman of the Council shall be elected by the Members.

Article XXV

Technical Cooperation

[11] With respect to agreements on the avoidance of double taxation which exist on the date of entry into force of the WTO Agreement, such a matter may be brought before the Council for Trade in Services only with the consent of both parties to such an agreement.

1. Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV.

2. Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.

Article XXVI

Relationship with Other International Organizations

The General Council shall make appropriate arrangements for consultation and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services.

PART VI

FINAL PROVISIONS

Article XXVII

Denial of Benefits

A Member may deny the benefits of this Agreement:

(a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(b) in the case of the supply of a maritime transport service, if it establishes that the service is supplied:

(i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and

(ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement;

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement.

Article XXVIII

Definitions

For the purpose of this Agreement:

(a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(b) "supply of a service" includes the production, distribution, marketing, sale and delivery of a service;

(c) "measures by Members affecting trade in services" include measures in respect of

(i) the purchase, payment or use of a service;

(ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;

(iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member;

(d) "commercial presence" means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Member for the purpose of supplying a service;

(e) "sector" of a service means,

(i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Member's Schedule,

(ii) otherwise, the whole of that service sector, including all of its subsectors;

(f) "service of another Member" means a service which is supplied,

(i) from or in the territory of that other Member, or in the case of maritime transport, by a vessel registered under the laws of that other Member, or by a person of that other Member which supplies the service through the operation of a vessel and/or its use in whole or in part; or

(ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Member;

(g) "service supplier" means any person that supplies a service;[12]

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service;

(i) "service consumer" means any person that receives or uses a service;

[12] Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

(j) "person" means either a natural person or a juridical person;

(k) "natural person of another Member" means a natural person who resides in the territory of that other Member or any other Member, and who under the law of that other Member:

(i) is a national of that other Member; or

(ii) has the right of permanent residence in that other Member, in the case of a Member which:

1. does not have nationals; or

2. accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified in its acceptance of or accession to the WTO Agreement, provided that no Member is obligated to accord to such permanent residents treatment more favourable than would be accorded by that other Member to such permanent residents. Such notification shall include the assurance to assume, with respect to those permanent residents, in accordance with its laws and regulations, the same responsibilities that other Member bears with respect to its nationals;

(l) "juridical person" means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(m) "juridical person of another Member" means a juridical person which is either:

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i);

(n) a juridical person is:

(i) "owned" by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) "controlled" by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(o) "direct taxes" comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

Article XXIX

Annexes

The Annexes to this Agreement are an integral part of this Agreement.

ANNEX ON ARTICLE II EXEMPTIONS

Scope

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.

2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

Review

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.

4. The Council for Trade in Services in a review shall:

(a) examine whether the conditions which created the need for the exemption still prevail; and

(b) determine the date of any further review.

Termination

5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.

6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.

7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.

Lists of Article II Exemptions

[The agreed lists of exemptions under paragraph 2 of Article II will be annexed here in the treaty copy of the WTO Agreement.]

ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[13]

ANNEX ON AIR TRANSPORT SERVICES

1. This Annex applies to measures affecting trade in air transport services, whether scheduled or non-scheduled, and ancillary services. It is confirmed that any specific commitment or obligation assumed under this Agreement shall not reduce or affect a Member's obligations under bilateral or multilateral agreements that are in effect on the date of entry into force of the WTO Agreement.

2. The Agreement, including its dispute settlement procedures, shall not apply to measures affecting:

(a) traffic rights, however granted; or

(b) services directly related to the exercise of traffic rights,

except as provided in paragraph 3 of this Annex.

3. The Agreement shall apply to measures affecting:

(a) aircraft repair and maintenance services;

[13] The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

(b) the selling and marketing of air transport services;

(c) computer reservation system (CRS) services.

4. The dispute settlement procedures of the Agreement may be invoked only where obligations or specific commitments have been assumed by the concerned Members and where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

5. The Council for Trade in Services shall review periodically, and at least every five years, developments in the air transport sector and the operation of this Annex with a view to considering the possible further application of the Agreement in this sector.

6. Definitions:

(a) "Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

(b) "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.

(c) "Computer reservation system (CRS) services" mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

(d) "Traffic rights" mean the right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.

ANNEX ON FINANCIAL SERVICES

1. *Scope and Definition*

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, "services supplied in the exercise of governmental authority" means the following:

(i) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;

(ii) activities forming part of a statutory system of social security or public retirement plans; and

(iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b)(ii) or (b)(iii) of this paragraph to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, "services" shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. *Domestic Regulation*

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

3. *Recognition*

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. *Dispute Settlement*

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. *Definitions*

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

(i) Direct insurance (including co-insurance):

(A) life
(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

Banking and other financial services (excluding insurance)

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(A) money market instruments (including cheques, bills, certificates of deposits);
(B) foreign exchange;
(C) derivative products including, but not limited to, futures and options;
(D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
(E) transferable securities;
(F) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term "financial service supplier" does not include a public entity.

(c) "Public entity" means:

(i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or

(ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

SECOND ANNEX ON FINANCIAL SERVICES

1. Notwithstanding Article II of the Agreement and paragraphs 1 and 2 of the Annex on Article II Exemptions, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, list in that Annex measures relating to financial services which are inconsistent with paragraph 1 of Article II of the Agreement.

2. Notwithstanding Article XXI of the Agreement, a Member may, during a period of 60 days beginning four months after the date of entry into force of the WTO Agreement, improve, modify or withdraw all or part of the specific commitments on financial services inscribed in its Schedule.

3. The Council for Trade in Services shall establish any procedures necessary for the application of paragraphs 1 and 2.

ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

(a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member's Schedule.

3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.

ANNEX ON TELECOMMUNICATIONS

1. *Objectives*

Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities, the Members have agreed to the following Annex with the objective of elaborating upon the provisions of the Agreement with respect to measures affecting access to and use of public telecommunications transport networks and services. Accordingly, this Annex provides notes and supplementary provisions to the Agreement.

2. *Scope*

(a) This Annex shall apply to all measures of a Member that affect access to and use of public telecommunications transport networks and services.[14]

(b) This Annex shall not apply to measures affecting the cable or broadcast distribution of radio or television programming.

(c) Nothing in this Annex shall be construed:

(i) to require a Member to authorize a service supplier of any other Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, other than as provided for in its Schedule; or

(ii) to require a Member (or to require a Member to oblige service suppliers under its jurisdiction) to establish, construct, acquire, lease, operate or supply telecommunications transport networks or services not offered to the public generally.

3. *Definitions*

For the purposes of this Annex:

(a) "Telecommunications" means the transmission and reception of signals by any electromagnetic means.

(b) "Public telecommunications transport service" means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally.

[14] This paragraph is understood to mean that each Member shall ensure that the obligations of this Annex are applied with respect to suppliers of public telecommunications transport networks and services by whatever measures are necessary.

Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

(c) "Public telecommunications transport network" means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points.

(d) "Intra-corporate communications" means telecommunications through which a company communicates within the company or with or among its subsidiaries, branches and, subject to a Member's domestic laws and regulations, affiliates. For these purposes, "subsidiaries", "branches" and, where applicable, "affiliates" shall be as defined by each Member. "Intra-corporate communications" in this Annex excludes commercial or non-commercial services that are supplied to companies that are not related subsidiaries, branches or affiliates, or that are offered to customers or potential customers.

(e) Any reference to a paragraph or subparagraph of this Annex includes all subdivisions thereof.

4. *Transparency*

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. *Access to and use of Public Telecommunications Transport Networks and Services*

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, *inter alia*, through paragraphs (b) through (f).[15]

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

[15] The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in

international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

6. *Technical Cooperation*

(a) Members recognize that an efficient, advanced telecommunications infrastructure in countries, particularly developing countries, is essential to the expansion of their trade in services. To this end, Members endorse and encourage the participation, to the fullest extent practicable, of developed and developing countries and their suppliers of public telecommunications transport networks and services and other entities in the development programmes of international and regional organizations, including the International Telecommunication Union, the United Nations Development Programme, and the International Bank for Reconstruction and Development.

(b) Members shall encourage and support telecommunications cooperation among developing countries at the international, regional and sub-regional levels.

(c) In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.

(d) Members shall give special consideration to opportunities for the least-developed countries to encourage foreign suppliers of telecommunications services to assist in the transfer of technology, training and other activities that support the development of their telecommunications infrastructure and expansion of their telecommunications services trade.

7. *Relation to International Organizations and Agreements*

(a) Members recognize the importance of international standards for global compatibility and inter-operability of telecommunication networks and services and undertake to promote such standards through the work of relevant international bodies, including the International Telecommunication Union and the International Organization for Standardization.

(b) Members recognize the role played by intergovernmental and non-governmental organizations and agreements in ensuring the efficient operation of domestic and global telecommunications services, in particular the International Telecommunication Union. Members shall make appropriate arrangements, where relevant, for consultation with such organizations on matters arising from the implementation of this Annex.

ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for basic telecommunications only on:

(a) the implementation date to be determined under paragraph 5 of the Ministerial Decision on Negotiations on Basic Telecommunications; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Basic Telecommunications provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on basic telecommunications which is inscribed in a Member's Schedule.

WORLD TRADE ORGANIZATION
APPELLATE BODY

Japan - Taxes on Alcoholic Beverages	AB-1996-2
Japan, Appellant/Appellee United States, Appellant/Appellee	Present:
Canada, Appellee European Communities, Appellee	Lacarte-Muró, Presiding Member Bacchus, Member El-Naggar, Member

A. Introduction

Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report, *Japan - Taxes on Alcoholic Beverages*[1] (the "Panel Report"). That Panel (the "Panel") was established to consider complaints by the European Communities, Canada and the United States against Japan relating to the Japanese Liquor Tax Law (Shuzeiho), Law No. 6 of 1953 as amended (the "Liquor Tax Law").[2]

The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 11 July 1996. It contains the following conclusions:

> (i)Shochu and vodka are like products and Japan, by taxing the latter in excess of the former, is in violation of its obligation under Article III:2, first sentence, of the General Agreement on Tariffs and Trade 1994.
>
> (ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under

[1]WT/DS8/R, WT/DS10/R, WT/DS11/R.

[2]Norway originally reserved its right as a third party to the dispute but subsequently informed the Panel that it was withdrawing its request to participate as a third party.

> Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.[3]

The Panel made the following recommendations:

> 7.2 The Panel recommends that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.[4]

On 8 August 1996, Japan notified the Dispute Settlement Body[5] of the WTO of its decision to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*") and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[6] On 19 August 1996, Japan filed an appellant's submission.[7] On 23 August 1996, the United States filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. The European Communities, Canada and the United States submitted appellees' submissions pursuant to Rule 22 of the *Working Procedures*, on 2 September 1996. That same day, Japan submitted an appellee's submission pursuant to Rule 23(3) of the *Working Procedures*.

The oral hearing contemplated by Rule 27 of the *Working Procedures* was held on 9 September 1996. The participants presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal (the "Division"). The participants answered most of these questions orally at the hearing. They answered some in writing.[8] The Division gave each participant an opportunity to respond to the written post-hearing memoranda of the other participants.[9]

B. Arguments of Participants

1. Japan

[3]Panel Report, para. 7.1.

[4]Panel Report, para. 7.2.

[5]WT/DS8/9, WT/DS10/9, WT/DS11/6.

[6]WT/AB/WP/1.

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

[8]Pursuant to Rule 28(1) of the *Working Procedures*.

[9]Pursuant to Rule 28(2) of the *Working Procedures*.

Japan appeals from the Panel's findings and conclusions, as well as from certain of the legal interpretations developed by the Panel. Japan argues that the Panel erred in its interpretation of Article III:2, first and second sentences of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), which is an integral part of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").[10] According to Japan, with respect to both the first and second sentences of Article III:2, the Panel erred in: (1) disregarding the need to determine whether the Liquor Tax Law has the aim of affording protection to domestic production; (2) ignoring whether there is "linkage" between the origin of products and the tax treatment they incur and, in this respect, not comparing the tax treatment of domestic products as a whole and foreign products as a whole; and (3) not giving proper weight to the tax/price ratio as a yardstick to compare the tax burdens.

With respect to the first sentence of Article III:2, Japan argues that the Panel erred by virtually ignoring Article III:1, particularly the phrase "so as to afford protection to domestic production", as part of the context of Article III:2. Japan maintains also that the title of Article III forms part of the context of Article III:2, and that the object and purpose of the GATT 1994 and the *WTO Agreement* as a whole must also be taken into account in interpreting Article III:2. Japan argues that the interpretation of Article III:2, first sentence, in the light of these considerations, requires an examination of both the aim and the effect of the measure in question. Japan also alleges that the Panel erred in placing excessive emphasis on tariff classification in finding that shochu and vodka are "like products" within the meaning of Article III:2, first sentence, arguing that the relevant tariff bindings indicate that these products are not "like".

With respect to the second sentence of Article III:2, Japan asserts that the Panel erred by failing to interpret correctly the principle of Article III:1, in particular, the language "so as to afford protection to domestic production", erroneously placing excessive emphasis on the phrase "not similarly taxed" in the Interpretative Note *Ad* Article III:2. Japan claims further that the Panel erred by failing to examine the issue of *de minimis* differences in the light of the principle of "so as to afford protection to domestic production"; the Panel examined the issue of *de minimis* differences only by comparing taxes in terms of taxation per kilolitre of product and taxation per degree of alcohol.

With respect to the points of appeal raised by the United States in its appellant's submission, Japan responds that the arguments advanced by the United States are not based on a correct understanding of the Japanese liquor tax system. Japan argues that the Liquor Tax Law has the legitimate policy purpose of ensuring neutrality and equity, particularly horizontal equity, and that it has neither the aim nor the effect of protecting domestic production. Japan asserts that it is not correct

[10]Done at Marrakesh, Morocco, 15 April 1994 and entered into effect on 1 January 1995.

to conclude that all distilled liquors are "like products" under Article III:2, first sentence, or to conclude that the Liquor Tax Law is inconsistent with Article III:2 because it imposes a tax on imported distilled liquors in excess of the tax on like domestic products.

2. United States

The United States supports the Panel's overall conclusions, but appeals nonetheless. The United States alleges several errors in the findings of the Panel and the legal interpretations developed by the Panel in reaching its conclusions in the Panel Report. The United States maintains that the Panel erred in its interpretation of Article III:2, first and second sentences, principally as a result of an erroneous understanding of the relationship between Article III:2 and Article III:1. The United States contends that the Panel disregarded Article III:1, which the United States sees as an integral part of the context that must be considered in interpreting Article III:2, and Article III generally. The United States asserts that Article III:1 sets out the object and purpose of Article III and must therefore be considered in any interpretation of the text of Article III:2. The United States argues that the Panel did not look beyond the text of Article III:2 in interpreting Article III:2 and thereby fell into error.

More specifically, with respect to the first sentence of Article III:2, the United States submits that the Panel erred in finding that "likeness" can be determined purely on the basis of physical characteristics, consumer uses and tariff classification without considering also the context and purpose of Article III, as set out in Article III:1, and without considering, in particular, whether regulatory distinctions are made, in the language of Article III:1, "so as to afford protection to domestic production". The United States concludes that the Panel erred in its interpretation of Article III:2, first sentence in: failing to interpret Article III:2, first sentence, in the light of Article III:1, consistently with the analysis in *United States - Measures Affecting Alcoholic and Malt Beverages* ("*Malt Beverages*");[11] not finding that all distilled spirits constitute "like products" under Article III:2, first sentence; and drawing a connection between national treatment obligations and tariff bindings.

With respect to the second sentence of Article III:2 and the *Ad* Article thereto, the United States argues that the Panel erred with respect to the *Ad* Article to the second sentence in its interpretation of the term "directly competitive or substitutable products" by not considering whether a tax distinction is applied "in a manner contrary to the principles set forth in paragraph 1 of [Article III]", that is, "so as to afford protection to domestic production". The United States also claims that the Panel erred by using cross-price elasticity as the "decisive criterion" for whether products are "directly competitive or substitutable".

[11]Panel Report adopted on 19 June 1992, BISD 39S/206.

The United States contends as well that the Panel erred in not addressing the full scope of the products subject to the dispute and that there is inconsistency between the Panel's conclusions in paragraph 7.1(ii) of the Panel Report and in paragraphs 6.32-6.33 of the Panel Report. The United States further submits that the Panel erred in incorrectly assessing the relationship between Article III:2 and Article III:4 by stating that the product coverage of the two provisions is not identical.

Finally, the United States claims that the Panel erred in incorrectly characterizing adopted panel reports as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[12] According to the United States, adopted panel reports serve only to clarify, for the purposes of the particular dispute, the application of the rights and obligations of the parties to that dispute to the precise set of circumstances at that time. The *decision* to adopt a panel report constitutes a "decision" within the meaning of paragraph 1(b)(iv) of the language incorporating the GATT 1994 into the *WTO Agreement*, however, the adopted panel report as such does not constitute a "decision" in this sense.

With respect to the claims of error raised in Japan's appellant's submission, the United States responds that: the national treatment provisions in Article III of GATT 1994 can apply to origin-neutral measures; Japan's taxation under the Liquor Tax Law does have the aim and effect of affording protection to domestic production; and the tax/price ratios cited by Japan are not the appropriate basis for evaluating the consistency of taxation under the Liquor Tax Law with Article III:2.

3. European Communities

The European Communities support the Panel's conclusions, and largely agree with the legal interpretations of Article III:2, first and second sentences, employed by the Panel. With respect to Article III:2, first sentence, the European Communities submit that the Panel's reasons for adopting the interpretation in the Panel Report, and thus for rejecting a specific test of "aims and effects", are sound and "in accordance with customary rules of interpretation of public international law", as contemplated by Article 3.2 of the *DSU*.[13] The European Communities contend that the Panel made it clear that the essential criterion for a "like product" determination is similarity of physical

[12]23 May 1969, 1155 *U.N.T.S.* 331; 8 *International Legal Materials* 679.

[13]Article 3.2 of the *DSU* states in pertinent part:

> …The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

characteristics and that tariff nomenclatures may be relevant for a determination of "likeness" because they constitute an objective classification of products according to their physical characteristics. The European Communities maintain that the Panel's decision to identify only vodka and shochu as "like products" for purposes of Article III:2 cannot be regarded as arbitrary or insufficiently motivated. Although not entirely satisfied with the Panel's conclusions on the range of products found to be "like" under Article III:2, first sentence, the European Communities claim that those conclusions primarily involve the assessment of facts and, therefore, are not reviewable by the Appellate Body, which is limited to the consideration of issues of law under Article 17.6 of the *DSU*.[14]

With respect to Article III:2, second sentence, the European Communities argue that the Panel did not rule that cross-price elasticity is the decisive criterion for a determination that two products are directly competitive or substitutable, but rather ruled that such elasticity is only one of the criteria to be considered. The European Communities view the Panel's findings on the issue of the tax/price ratios as factual; however, if the Appellate Body nevertheless considers it necessary to rule on this issue, the European Communities argue that tax/price ratios are not the most appropriate yardstick for comparing tax burdens imposed by a system of specific taxes. The European Communities submit further that the Panel was correct in ignoring the linkage between differences in taxation and the origin of products. The European Communities assert that Japan's argument that the Liquor Tax Law is not applied "so as to afford protection to domestic production" of shochu because shochu is also produced in other countries and, therefore, is not an "inherently domestic product" rests on two wrong propositions: first, that "domestic production" of shochu is not "protected" if the same tax treatment is accorded to foreign shochu; and, second, that the mere fact that shochu is produced in third countries is sufficient to conclude that foreign shochu may benefit from the lower tax as much as domestic shochu and, consequently, that protection is not afforded only to domestic production. The European Communities further contend that the United States is incorrect to attribute to the Panel the statement that the product coverage of Article III:2 and Article III:4 is not equivalent.

With respect to the status of adopted panel reports, the European Communities conclude that the Panel's characterization of them as "subsequent practice in a specific case" is intrinsically contradictory, since the essence of subsequent practice is that it consists of a large number of legally relevant events and pronouncements. The European Communities' view is that one adopted panel report "would merely constitute part of a wall of the house that constitutes subsequent practice". The European Communities, therefore, ask the Appellate Body to modify the Panel's legal terminology on

[14]Article 17.6 of the *DSU* states:

> An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

this issue. The European Communities further consider that the *decision* to adopt a panel report constitutes a "decision" within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*, however an adopted panel report is not itself a "decision" in this sense.

4. Canada

Canada confined its submissions and arguments on appeal to Article III:2, second sentence. Canada supports the Panel's legal interpretations of Article III:2, second sentence, as well as the conclusion of the Panel that the Liquor Tax Law is inconsistent with Article III:2, second sentence. Canada claims that the Panel properly found that the phrase "so as to afford protection" in Article III:1 does not require a consideration of both the aim and effect of a measure to determine whether that measure affords protection to domestic production. Canada argues further that: first, the Panel Report did not create a *per se* test in Article III:2, second sentence, and did not equate the reference to "so as to afford protection to domestic production" with a determination that directly competitive or substitutable products are "not similarly taxed"; second, the Panel had sufficient evidence before it to conclude that differential tax treatment under the Liquor Tax Law favours domestic shochu production; third, the Panel Report considered in detail the issue of the tax/price ratios and assigned them their proper weight in assessing the tax burden on the products in dispute; and, finally, the Panel interpreted the phrase "directly competitive or substitutable" properly and did not identify "cross-price elasticity" as *the* decisive criterion for assessment of whether products are directly competitive or substitutable.

With regard to the status of adopted panel reports, Canada argues that decisions to adopt panel reports under GATT 1947 constitute "decisions" under Article 1(b)(iv) of the GATT 1994.

C. Issues Raised in the Appeal

The appellants, Japan and the United States, have raised the following issues in this appeal:

1. Japan

(a) whether the Panel erred in failing to interpret Article III:2, first and second sentences, in the light of Article III:1;

(b)whether the Panel erred in rejecting an "aim-and-effect" test in establishing whether the Liquor Tax Law is applied "so as to afford protection to domestic production";

(c)whether the Panel erred in failing to examine the effect of affording protection to domestic production from the perspective of the linkage between the origin of products and their treatment under the Liquor Tax Law;

(d)whether the Panel failed to give proper weight to tax/price ratios as a yardstick for comparing tax burdens under Article III:2, first and second sentences;

(e)whether the Panel erred in interpreting and applying Article III:2, second sentence, by equating the language "not similarly taxed" in *Ad* Article III:2, second sentence, with "so as to afford protection" in Article III:1; and

(f)whether the Panel erred in placing excessive emphasis on tariff classification as a criterion for determining "like products".

2. United States

(a)whether the Panel erred in failing to interpret Article III:2, first and second sentences, in the light of Article III:1;

(b)whether the Panel erred in failing to find that all distilled spirits are "like products";

(c)whether the Panel erred in drawing a connection between national treatment obligations and tariff bindings;

(d)whether the Panel erred in interpreting and applying Article III:2, second sentence, by equating the language "not similarly taxed" in *Ad* Article III:2, second sentence, with "so as to afford protection" in Article III:1;

(e)whether the Panel erred in its conclusions on "directly competitive or substitutable products" by examining cross-price elasticity as "the decisive criterion";

(f) whether the Panel erred in failing to maintain consistency between the conclusions in paragraph 7.1(ii) of the Panel Report on "directly competitive or substitutable products" and the conclusions in paragraphs 6.32-6.33 of the Panel Report, and whether the Panel erred in failing to address the full scope of products subject of this dispute;

(g) whether the Panel erred in finding that the coverage of Article III:2 and Article III:4 are not equivalent; and

(h) whether the Panel erred in its characterization of panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body as "subsequent practice in a specific case by virtue of the decision to adopt them".

D. Treaty Interpretation

Article 3.2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other "covered agreements" of the *WTO Agreement* "in accordance with customary rules of interpretation of public international law". Following this mandate, in *United States - Standards for Reformulated and Conventional Gasoline*,[15] we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention*. We stressed there that this general rule of interpretation "has attained the status of a rule of customary or general international law".[16] There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status.[17]

Article 31, as a whole, and Article 32 are each highly pertinent to the present appeal. They provide as follows:

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[15] Adopted 20 May 1996, WT/DS2/9.

[16] *Ibid.*, at p. 17.

[17] See *e.g.*: Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours p.1 at 42; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, (1994), I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, *Judgment*, (1995), I.C.J.Reports, p. 6 at 18; *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night* (1932), P.C.I.J., Series A/B, No. 50, p. 365 at 380; cf. the *Serbian and Brazilian Loans Cases* (1929), P.C.I.J., Series A, Nos. 20-21, p. 5 at 30; *Constitution of the Maritime Safety Committee of the IMCO* (1960), I.C.J. Reports, p. 150 at 161; *Air Transport Services Agreement Arbitration* (*United States of America v. France*) (1963), International Law Reports, 38, p. 182 at 235-43.

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty".[18] The provisions of the treaty are to be given their ordinary meaning in their context.[19] The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.[20] A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*).[21] In *United States - Standards for Reformulated and Conventional Gasoline*, we noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[22]

E. Status of Adopted Panel Reports

In this case, the Panel concluded that,

> …panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted panel reports constitute subsequent practice. Such reports are an integral part of GATT 1994, since they constitute "other decisions of the CONTRACTING PARTIES to GATT 1947".[23]

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[18]*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Judgment*, (1994) I.C.J. Reports, p. 6 at 20; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, *Judgment*, (1995) I.C.J.Reports, p. 6 at 18.

[19]See, *e.g., Competence of the General Assembly for the Admission of a State to the United Nations* (*Second Admissions Case*) (1950), I.C.J. Reports, p. 4 at 8, in which the International Court of Justice stated: "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning and in the context in which they occur".

[20]That is, the treaty's "object and purpose" is to be referred to in determining the meaning of the "terms of the treaty" and not as an independent basis for interpretation: Harris, Cases and Materials on International Law (4th ed., 1991) p. 770; Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours p. 1 at 44; Sinclair, *The Vienna Convention and the Law of Treaties* (2nd ed, 1984), p. 130. See *e.g.* Oppenheims' International Law (9th ed., Jennings and Watts, eds., 1992) Vol. I, p.1273; *Competence of the ILO to Regulate the Personal Work of the Employer* (1926), P.C.I.J., Series B, No. 13, p. 6 at 18; *International Status of South West Africa* (1962), I.C.J. Reports, p. 128 at 336; *Re Competence of Conciliation Commission* (1955), 22 International Law Reports, p. 867 at 871.

[21]See also (1966) Yearbook of the International Law Commission, Vol. II, p. 219: "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

[22]*United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted 20 May 1996, p. 23.

[23]Panel Report, para. 6.10.

Article 31(3)(b) of the *Vienna Convention* states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be "taken into account together with the context" in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[24] An isolated act is generally not sufficient to establish subsequent practice;[25] it is a sequence of acts establishing the agreement of the parties that is relevant.[26]

Although GATT 1947[27] panel reports were adopted by decisions of the CONTRACTING PARTIES[28], a decision to adopt a panel report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that panel report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.[29]

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members". The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

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[24]Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), p. 137; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 Recueil des Cours p. 1 at 48.

[25]Sinclair, *supra*., footnote 24, p. 137.

[26](1966) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra*., footnote 24, p. 138.

[27]By GATT 1947, we refer throughout to the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified.

[28]By CONTRACTING PARTIES, we refer throughout to the CONTRACTING PARTIES of GATT 1947.

[29]*European Economic Community - Restrictions on Imports of Dessert Apples*, BISD 36S/93, para. 12.1.

Historically, the decisions to adopt panel reports under Article XXIII of the GATT 1947 were different from joint action by the CONTRACTING PARTIES under Article XXV of the GATT 1947. Today, their nature continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This is clear from a reading of Article 3.9 of the *DSU*, which states:

> The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.[30] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

For these reasons, we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" as the phrase "subsequent practice" is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel's conclusion in the same paragraph of the Panel Report that adopted panel reports in themselves constitute "other decisions of the CONTRACTING PARTIES to GATT 1947" for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

[30]It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.

However, we agree with the Panel's conclusion in that same paragraph of the Panel Report that *unadopted* panel reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members".[31] Likewise, we agree that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant".[32]

F. Interpretation of Article III

The *WTO Agreement* is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.

One of those commitments is Article III of the GATT 1994, which is entitled "National Treatment on Internal Taxation and Regulation". For the purpose of this appeal, the relevant parts of Article III read as follows:

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

[31]Panel Report, para. 6.10.

[32]*Ibid.*

Ad Article III

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'".[33] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[34] "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given".[35] Moreover, it is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.[36] Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although the protection of negotiated tariff concessions is certainly one purpose of Article III,[37] the statement in Paragraph 6.13 of the Panel Report that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II" should not be overemphasized. The sheltering scope of Article III is not limited to products that are

[33] *United States - Section 337 of the Tariff Act of 1930,* BISD 36S/345, para. 5.10.

[34] *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b).

[35] *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.

[36] *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9.

[37] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b); *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD 39S/27, para. 5.30.

the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II.[38] This is confirmed by the negotiating history of Article III.[39]

G. Article III:1

The terms of Article III must be given their ordinary meaning -- in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which "contains general principles", and Article III:2, which "provides for specific obligations regarding internal taxes and internal charges".[40]

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[38]*Brazilian Internal Taxes*, BISD II/181, para. 4; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *EEC - Regulation on Imports of Parts and Components*, BISD 37S/132, para. 5.4.

[39]At the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, held in 1947, delegates in the Tariff Agreement Committee addressed the issue of whether to include the national treatment clause from the draft Charter for an International Trade Organization ("ITO Charter") in the GATT 1947. One delegate noted:

> This Article in the Charter had two purposes, as I understand it. The first purpose was to protect the items in the Schedule or any other Schedule concluded as a result of any subsequent negotiations and agreements - that is, to ensure that a country offering a tariff concession could not nullify that tariff concession by imposing an internal tax on the commodity, which had an equivalent effect. If that were the sole purpose and content of this Article, there could really be no objection to its inclusion in the General Agreement. But the Article in the Charter had an additional purpose. That purpose was to prevent the use of internal taxes as a system of protection. It was part of a series of Articles designed to concentrate national protective measures into the forms permitted under the Charter, i.e. subsidies and tariffs, and since we have taken over this Article from the Charter, we are, by including the Article, doing two things: so far as the countries become parties to the Agreement, we are, first of all, ensuring that the tariff concessions they grant one another cannot be nullified by the imposition of corresponding internal taxes; but we are also ensuring that those countries which become parties to the Agreement undertake not to use internal taxes as a system of protection.

This view is reinforced by the following statement of another delegate:

> … [Article III] is necessary to protect not only scheduled items in the Agreement, but, indeed, all items for all our exports and the exports of any country. If that is not done, then every item which does not appear in the Schedule would have to be reconsidered and possibly tariff negotiations re-opened if Article III were changed to permit any action on these non-scheduled items.

See EPCT/TAC/PV.10, pp. 3 and 33.

[40]Panel Report, para. 6.12.

Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.

H. Article III:2

1. First Sentence

Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection". This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, 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. If the imported and domestic products are "like products", and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.[41]

[41]In accordance with Article 3.8 of the *DSU*, such a violation is *prima facie* presumed to nullify or impair benefits under Article XXIII of the GATT 1994. Article 3.8 reads as follows:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947.[42] Moreover, it is consistent with the object and purpose of Article III:2, which the panel in the predecessor to this case dealing with an earlier version of the Liquor Tax Law, *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*1987 Japan - Alcohol*"), rightly stated as "promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products".[43]

(a) *"Like Products"*

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.[44]

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[42]See *Brazilian Internal Taxes*, BISD II/181, para. 14; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(d); *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.1; *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R, adopted on 4 October 1994.

[43]*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para 5.5(c).

[44]We note the argument on appeal that the Panel suggested in paragraph 6.20 of the Panel Report that the product coverage of Article III:2 is not identical to the coverage of Article III:4. That is not what the Panel said. The Panel said the following:

If the coverage of Article III:2 is identical to that of Article III:4, a different interpretation of the term "like product" would be called for in the two paragraphs. Otherwise, if the term "like product" were to be interpreted in an identical way in both instances, the scope of the two paragraphs would be different. (emphasis added)

This was merely a hypothetical statement.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are "like" on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting "like or similar products" generally in the various provisions of the GATT 1947:

> … the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[45]

This approach was followed in almost all adopted panel reports after *Border Tax Adjustments*.[46] This approach should be helpful in identifying on a case-by-case basis the range of "like products" that fall within the narrow limits of Article III:2, first sentence in the GATT 1994. Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of "like products" in Article III:2, first sentence is meant to be as opposed to the range of "like" products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*. In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their best judgement in determining whether in fact products are "like". This will always involve an unavoidable element of individual, discretionary judgement. We do not agree with the Panel's observation in paragraph 6.22 of the Panel Report that distinguishing between "like products" and "directly competitive or substitutable products" under Article III:2 is "an arbitrary decision". Rather, we think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.

No one approach to exercising judgement will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like". The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO*

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[45]Report of the Working Party on *Border Tax Adjustments*, BISD 18S/97, para. 18.

[46]*The Australian Subsidy on Ammonium Sulphate*, BISD II/188; *EEC - Measures on Animal Feed Proteins*, BISD 25S/49; *Spain - Tariff Treatment of Unroasted Coffee*, BISD 28S/102; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136. Also see *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted on 20 May 1996.

Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.

The Panel determined in this case that shochu and vodka are "like products" for the purposes of Article III:2, first sentence. We note that the determination of whether vodka is a "like product" to shochu under Article III:2, first sentence, or a "directly competitive or substitutable product" to shochu under Article III:2, second sentence, does not materially affect the outcome of this case.

A uniform tariff classification of products can be relevant in determining what are "like products". If sufficiently detailed, tariff classification can be a helpful sign of product similarity. Tariff classification has been used as a criterion for determining "like products" in several previous adopted panel reports.[47] For example, in the *1987 Japan - Alcohol* Panel Report, the panel examined certain wines and alcoholic

[47]*EEC - Measures on Animal Feed Proteins*, BISD 25S/49; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83; *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/9, adopted on 20 May 1996.

beverages on a "product-by-product basis" by applying the criteria listed in the Working Party Report on *Border Tax Adjustments*,

> … as well as others recognized in previous GATT practice (see BISD 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan.[48]

Uniform classification in tariff nomenclatures based on the Harmonized System (the "HS") was recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products. However, there is a major difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product "likeness". Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the *WTO Agreement*. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products.[49] This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance as to the identification of "like products". Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product "likeness" under Article III:2.[50]

With these modifications to the legal reasoning in the Panel Report, we affirm the legal conclusions and the findings of the Panel with respect to "like products" in all other respects.

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[48] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.6.

[49] For example, Jamaica has bound tariffs on the majority of non-agricultural products at 50%. Trinidad and Tobago have bound tariffs on the majority of products falling within HS Chapters 25-97 at 50%. Peru has bound all non-agricultural products at 30%, and Costa Rica, El Salvador, Guatemala, Morocco, Paraguay, Uruguay and Venezuela have broad uniform bindings on non-agricultural products, with a few listed exceptions.

[50] We believe, therefore, that statements relating to any relationship between tariff bindings and "likeness" must be made cautiously. For example, the Panel stated in paragraph 6.21 of the Panel Report that "… with respect to two products subject to the same tariff binding and therefore to the same maximum border tax, there is no justification, outside of those mentioned in GATT rules, to tax them in a differentiated way through internal taxation". This is incorrect.

(b) *"In Excess Of"*

The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are "in excess of" those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of "excess" is too much. "The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard."[51] We agree with the Panel's legal reasoning and with its conclusions on this aspect of the interpretation and application of Article III:2, first sentence.

2. Second Sentence

Article III:1 informs Article III:2, second sentence, through specific reference. Article III:2, second sentence, contains a general prohibition against "internal taxes or other internal charges" applied to "imported or domestic products in a manner contrary to the principles set forth in paragraph 1". As mentioned before, Article III:1 states that internal taxes and other internal charges "should not be applied to imported or domestic products so as to afford protection to domestic production". Again, *Ad* Article III:2 states as follows:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

[51] *United States - Measures Affecting Alcoholic and Malt Beverages*, BISD 39S/206, para 5.6; see also *Brazilian Internal Taxes*, BISD II/181, para. 16; *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.8.

Article III:2, second sentence, and the accompanying *Ad* Article have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time.[52] The *Ad* Article does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the *Ad* Article must be read together in order to give them their proper meaning.

Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

(1)the imported products and the domestic products *are "directly competitive or substitutable products" which are in competition with each other*;
(2)the directly competitive or substitutable imported and domestic products *are "not similarly taxed*"; and
(3)the dissimilar taxation of the directly competitive or substitutable imported domestic products *is "applied … so as to afford protection to domestic production*".

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.

[52]The negotiating history of Article III:2 confirms that the second sentence and the *Ad* Article were added during the Havana Conference, along with other provisions and interpretative notes concerning Article 18 of the draft ITO Charter. When introducing these amendments to delegates, the relevant Sub-Committee reported that: "The new form of the Article makes clearer than did the Geneva text the intention that internal taxes on goods should not be used as a means of protection. The details have been relegated to interpretative notes so that it would be easier for Members to ascertain the precise scope of their obligations under the Article." E/CONF.2/C.3/59, page 8. Article 18 of the draft ITO Charter subsequently became Article III of the GATT pursuant to the Protocol Modifying Part II and Article XXVI, which entered into force on 14 December 1948.

(a) *"Directly Competitive or Substitutable Products"*

If imported and domestic products are not "like products" for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of "directly competitive or substitutable products" that fall within the domain of Article III:2, second sentence. How much broader that category of "directly competitive or substitutable products" may be in any given case is a matter for the panel to determine based on all the relevant facts in that case. As with "like products" under the first sentence, the determination of the appropriate range of "directly competitive or substitutable products" under the second sentence must be made on a case-by-case basis.

In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the "market place".[53] This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable".

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is "*the* decisive criterion"[54] for determining whether products are "directly competitive or substitutable". The Panel stated the following:

> In the Panel's view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.[55]

We agree. And, we find the Panel's legal analysis of whether the products are "directly competitive or substitutable products" in paragraphs 6.28-6.32 of the Panel Report to be correct.

We note that the Panel's conclusions on "like products" and on "directly competitive or substitutable products" contained in paragraphs 7.1(i) and (ii), respectively, of the Panel Report fail to

[53]Panel Report, para. 6.22.

[54]United States Appellant's Submission, dated 23 August 1996, para. 98, p.63. (emphasis added)

[55]Panel Report, para 6.22.

address the full range of alcoholic beverages included in the Panel's Terms of Reference.[56] More specifically, the Panel's conclusions in paragraph 7.1(ii) on "directly competitive or substitutable products" relate only to "shochu, whisky, brandy, rum, gin, genever, and liqueurs," which is narrower than the range of products referred to the Dispute Settlement Body by one of the complainants, the United States, which included in its request for the establishment of a panel "all other distilled spirits and liqueurs falling within HS heading 2208". We consider this failure to incorporate into its conclusions all the products referred to in the Terms of Reference, consistent with the matters referred to the DSB in WT/DS8/5, WT/DS10/5 and WT/DS11/2, to be an error of law by the Panel.

(b) *"Not Similarly Taxed"*

To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase "not similarly taxed" in the *Ad* Article to the second sentence must not be construed so as to mean the same thing as the phrase "in excess of" in the first sentence. On its face, the phrase "in excess of" in the first sentence means *any* amount of tax on imported products "in excess of" the tax on domestic "like products". The phrase "not similarly taxed" in the *Ad* Article to the second sentence must therefore mean something else. It requires a different standard, just as "directly competitive or substitutable products" requires a different standard as compared to "like products" for these same interpretive purposes.

Reinforcing this conclusion is the need to give due meaning to the distinction between "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad* Article to the second sentence. If "in excess of" in the first sentence and "not similarly taxed" in the *Ad* Article to the second sentence were construed to mean one and the same thing, then "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad* Article to the second sentence would also mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.

To interpret "in excess of" and "not similarly taxed" identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be "in excess of" the tax on domestic "like

[56]The Panel's Terms of Reference cite the matters referred to the Dispute Settlement Body by the European Communities, Canada and the United States in WT/DS8/5, WT/DS10/5 and WT/DS11/2, respectively. In WT/DS8/5, the European Communities referred the Dispute Settlement Body to Japan's taxation of shochu, "spirits", "whisky/brandy" and "liqueurs". In WT/DS10/5, Canada referred the Dispute Settlement Body to Japan's taxation of shochu and products falling "within HS 2208.30 ('whiskies'), HS 2208.40 ('rum and tafia'), HS 2208.90 ('other' including fruit brandies, vodka, ouzo, korn, cream liqueurs and 'classic' liqueurs.)" In WT/DS11/2, the United States referred the Dispute Settlement Body to Japan's taxation of shochu and "all other distilled spirits and liqueurs falling within HS heading 2208".

products" but may not be so much as to compel a conclusion that "directly competitive or substitutable" imported and domestic products are "not similarly taxed" for the purposes of the *Ad* Article to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic "directly competitive or substitutable products" but may nevertheless not be enough to justify a conclusion that such products are "not similarly taxed" for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed "not similarly taxed" in any given case.[57] And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be "not similarly taxed", the tax burden on imported products must be heavier than on "directly competitive or substitutable" domestic products, and that burden must be more than *de minimis* in any given case.

In this case, the Panel applied the correct legal reasoning in determining whether "directly competitive or substitutable" imported and domestic products were "not similarly taxed". However, the Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied "so as to afford protection". Again, these are separate issues that must be addressed individually. If "directly competitive or substitutable products" are *not* "not similarly taxed", then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied "so as to afford protection". But if such products are "not similarly taxed", a further inquiry must necessarily be made.

(c) *"So As To Afford Protection"*

This third inquiry under Article III:2, second sentence, must determine whether "directly competitive or substitutable products" are "not similarly taxed" in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "*applied* to imported or domestic products so as to afford protection to domestic production".[58] This is an issue of how the measure in question is *applied*.

[57]Panel Report, para. 6.33.

[58]Emphasis added.

In the *1987 Japan- Alcohol* case, the panel subsumed its discussion of the issue of "not similarly taxed" within its examination of the separate issue of "so as to afford protection":

> … whereas under the first sentence of Article III:2 the tax on the imported product and the tax on the like domestic product had to be equal in effect, Article III:1 and 2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner "so as to afford protection to domestic production". The Panel was of the view that also small tax differences could influence the competitive relationship between directly competing distilled liquors, but the existence of protective taxation could be established only in the light of the particular circumstances of each case and there could be a *de minimis* level below which a tax difference ceased to have the protective effect prohibited by Article III:2, second sentence.[59]

To detect whether the taxation was protective, the panel in the 1987 case examined a number of factors that it concluded were "sufficient evidence of fiscal distortions of the competitive relationship between imported distilled liquors and domestic shochu affording protection to the domestic production of shochu". These factors included the considerably lower specific tax rates on shochu than on imported directly competitive or substitutable products; the imposition of high *ad valorem* taxes on imported alcoholic beverages and the absence of *ad valorem* taxes on shochu; the fact that shochu was almost exclusively produced in Japan and that the lower taxation of shochu did "afford protection to domestic production"; and the mutual substitutability of these distilled liquors.[60] The panel in the 1987 case concluded that "the application of considerably lower internal taxes by Japan on shochu than on other directly competitive or substitutable distilled liquors had trade-distorting effects affording protection to domestic production of shochu contrary to Article III:1 and 2, second sentence".[61]

As in that case, we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe

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[59]*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,* BISD 34S/83, para. 5.11.

[60]*Ibid*.

[61]*Ibid.*

it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

In this respect, we note and agree with the panel's acknowledgment in the *1987 Japan - Alcohol* Report:

> … that Article III:2 does not prescribe the use of any specific method or system of taxation. … there could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could also be compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what mattered was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products.[62]

We have reviewed the Panel's reasoning in this case as well as its conclusions on the issue of "so as to afford protection" in paragraphs 6.33 - 6.35 of the Panel Report. We find cause for thorough examination. The Panel began in paragraph 6.33 by describing its approach as follows:

> … if directly competitive or substitutable products are not "similarly taxed", and if it were found that the tax favours domestic products, then protection would be afforded to such products, and Article III:2, second sentence, is violated.

This statement of the reasoning required under Article III:2, second sentence is correct.

However, the Panel went on to note:

[62] *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,* BISD 34S/83, para. 5.9(c).

… for it to conclude that dissimilar taxation afforded protection, it would be sufficient for it to find that the dissimilarity in taxation is not *de minimis*. … the Panel took the view that "similarly taxed" is the appropriate benchmark in order to determine whether a violation of Article III:2, second sentence, has occurred as opposed to "in excess of" that constitutes the appropriate benchmark to determine whether a violation of Article III:2, first sentence, has occurred.[63]

In paragraph 6.34, the Panel added:

(i) The benchmark in Article III:2, second sentence, is whether internal taxes operate "so as to afford protection to domestic production", a term which has been further interpreted in the Interpretative Note ad Article III:2, paragraph 2, to mean dissimilar taxation of domestic and foreign directly competitive or substitutable products.

And, furthermore, in its conclusions, in paragraph 7.1(ii), the Panel concluded that:

(ii) Shochu, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.

Thus, having stated the correct legal approach to apply with respect to Article III:2, second sentence, the Panel then equated dissimilar taxation above a *de minimis* level with the separate and distinct requirement of demonstrating that the tax measure "affords protection to domestic production". As previously stated, a finding that "directly competitive or substitutable products" are "not similarly taxed" is necessary to find a violation of Article III:2, second sentence. Yet this is not enough. The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied "so as to afford protection". In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied "so as to afford protection". In any case, the three issues that must be addressed in determining whether there is such a violation must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful, objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine "the existence of protective taxation".[64] Although the Panel blurred its legal reasoning in this respect, nevertheless we conclude that it reasoned correctly that in this case, the Liquor Tax Law is not in compliance with Article III:2. As the Panel did, we note that:

[63]Panel Report, para 6.33.

[64]*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.11.

> …the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced shochu to penetrate the Japanese market and, on the other, it does not guarantee equality of competitive conditions between shochu and the rest of 'white' and 'brown' spirits. Thus, through a combination of high import duties and differentiated internal taxes, Japan manages to "isolate" domestically produced shochu from foreign competition, be it foreign produced shochu or any other of the mentioned white and brown spirits.[65]

Our interpretation of Article III is faithful to the "customary rules of interpretation of public international law".[66] WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.[67]

I. Conclusions and Recommendations

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

(a) the Panel erred in law in its conclusion that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them";

(b) the Panel erred in law in failing to take into account Article III:1 in interpreting Article III:2, first and second sentences;

(c) the Panel erred in law in limiting its conclusions in paragraph 7.1(ii) on "directly competitive or substitutable products" to "shochu, whisky, brandy, rum, gin, genever, and liqueurs", which is not consistent with the Panel's Terms of Reference; and

(d) the Panel erred in law in failing to examine "so as to afford protection" in Article III:1 as a separate inquiry from "not similarly taxed" in the *Ad* Article to Article III:2, second sentence.

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[65] Panel Report, para. 6.35.

[66] Article 3.2 of the *DSU*.

[67] *Ibid*.

With the modifications to the Panel's legal findings and conclusions set out in this report, the Appellate Body affirms the Panel's conclusions that shochu and vodka are like products and that Japan, by taxing imported products in excess of like domestic products, is in violation of its obligations under Article III:2, first sentence, of the General Agreement on Tariffs and Trade 1994. Moreover, the Appellate Body concludes that shochu and other distilled spirits and liqueurs listed in HS 2208, except for vodka, are "directly competitive or substitutable products", and that Japan, in the application of the Liquor Tax Law, does not similarly tax imported and directly competitive or substitutable domestic products and affords protection to domestic production in violation of Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.

The Appellate Body *recommends* that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.

Signed in the original at Geneva this 25th day of September 1996 by:

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Julio Lacarte-Muró
Presiding Member

_____ _____

James Bacchus Said El-Naggar
Member Member

WORLD TRADE ORGANIZATION
APPELLATE BODY

Korea – Taxes on Alcoholic Beverages

Korea, *Appellant*
European Communities, *Appellee*
United States, *Appellee*

Mexico, *Third Participant*

AB-1998-7

Present:

Matsushita, Presiding Member
Ehlermann, Member
Feliciano, Member

I. Introduction

1. This is an appeal by Korea from certain issues of law and legal interpretation developed in the Panel Report, *Korea – Taxes on Alcoholic Beverages*.[1] That Panel was established[2] by the Dispute Settlement Body (the "DSB") to examine the consistency of two Korean tax laws: the Korean Liquor Tax Law of 1949 and the Korean Education Tax Law of 1982, both as amended (the "measures"), with Article III:2 of the GATT 1994. The Liquor Tax Law imposes an *ad valorem* tax on all distilled spirits. The rate of that tax depends on which of the eleven fiscal categories a particular alcoholic beverage falls within. The Education Tax Law imposes a surtax on the sale of most distilled spirits, the rate of the surtax being a percentage of the liquor tax rate applied to the spirit in question. A detailed description of the operation of these two taxes is to be found at paragraphs 2.1 to 2.23 of the Panel Report.

2. The Panel considered claims made by the European Communities and the United States that the contested measures are inconsistent with Article III:2 of the GATT 1994 because they accord preferential tax treatment to soju, a traditional Korean alcoholic beverage, as compared with certain imported "western-style" alcoholic beverages. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 17 September 1998. The Panel "reached the conclusion

[1]WT/DS75/R, WT/DS84/R, 17 September 1998.

[2]The Panel was established 16 October 1997 with standard terms of reference (see WT/DS75/7, WT/DS84/5, 10 December 1997) that were based on requests for the establishment of a panel made by the European Communities (WT/DS75/6, 15 September 1997) and the United States (WT/DS84/4, 15 September 1997).

that soju (diluted and distilled), whiskies, brandies, cognac, rum, gin, tequila, liqueurs and admixtures are directly competitive or substitutable products."[3] The Panel also concluded that "Korea has taxed the imported products in a dissimilar manner and the tax differential is more than *de minimis*" and that "the dissimilar taxation is applied in a manner so as to afford protection to domestic production."[4] The Panel made the following recommendation:

> We recommend that the Dispute Settlement Body request Korea to bring the Liquor Tax Law and the Education Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.[5]

3. On 20 October 1998, Korea notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 30 October 1998, Korea filed its appellant's submission.[6] On 16 November 1998, the European Communities and the United States filed their respective appellees' submissions[7] and Mexico filed a third participant's submission.[8] The oral hearing, provided for in Rule 27 of the *Working Procedures*, was held on 24 November 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

[3]Panel Report, para. 11.1.

[4]*Ibid*.

[5]Panel Report, para. 11.2.

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

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

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

II. Arguments of the Participants and the Third Participant

A. *Korea – Appellant*

1. "Directly Competitive or Substitutable Products"

4. Korea contends that the Panel misinterpreted and misapplied the term "directly competitive or substitutable product", especially the word "directly" which, in Korea's view, is at the heart of the term at issue. At some level all products are competitive, in that they compete for the consumer's limited budget, and it is therefore "directly" which gives meaning to the legal text and prevents Article III:2 from becoming an "unbridled instrument of tax harmonization and deregulation".

(a) Potential Competition

5. Korea claims that the alleged evidence of "potential" competition was essential to the Panel's finding of a directly competitive or substitutable relationship between the products at issue.[9] However, Article III:2 does not speak of "potential" competition. Accordingly, it is at least ambiguous whether "potential" competition is embraced by the second sentence of Article III:2 of the GATT 1994. Given that ambiguity, Article 19.2 of the DSU and the principles of predictability and *in dubio mitius* should have been respected by the Panel.

6. In Korea's view, the term "directly competitive or substitutable" is not meant to exclude products that do not compete directly or are not substitutable because of the contested measure itself. The absence of a competitive relationship on the market concerned should be taken as a powerful counter-indication that the products involved are not "directly competitive or substitutable". The Panel, however, has read Article III:2 as covering both products that "are either directly competitive now or *can reasonably be expected to become* directly competitive in the *near future*."[10] (emphasis added) In so doing, the Panel relieved the complainants of the need to prove that the lack of actual competition is caused by the contested measure, and opened the door to speculation about how the market could evolve in the future, irrespective of the measure in question. Korea warns against speculation about what consumers might (or might not) do, as opposed to looking at what they actually do. The Panel repeatedly excused the complainants' failure to produce evidence about actual competition by saying that preferences in the Korean market might have been *frozen* by government

[9]Panel Report, para. 10.97.

[10]Panel Report, para. 10.48. Korea also refers to paras. 10.40 and 10.73 of the Panel Report.

measures.[11] However, Korea points out that, at the time this case was argued, its market had been open for eight years.

7. Korea contends that the "potential" standard is impermissibly broad and speculative, and the wording and the purpose of Article III:2 do not permit this interpretation. There is nothing wrong with requiring complainants to wait until, if ever, their case becomes "ripe" and products actually compete directly. What if a Member has been forced to change its tax law because products might compete and then, in fact, they do not? Should that Member return to the panel to request permission to restore its tax system?

(b) Expectations, the "Trade Effects" Test and the "Nature" of Competition

8. Korea notes the considerable emphasis the Panel placed on "expectations" of an "equal competitive relationship" between imported and domestic products.[12] However, Korea argues that these "expectations" exist only for those products which are "like" or "directly competitive or substitutable". If products are not currently directly competitive or substitutable, there can be no relevant expectations with respect to them.

9. The Panel erroneously considered that to "focus on the quantitative extent of competition instead of the nature of it, could result in a type of trade effects test being written into Article III cases."[13] This is a misunderstanding of the "trade effects" test. While past cases held that a lack of "trade effects" is not a defence to an Article III:2 violation, in those cases the products involved had *already been shown* to be "like" or "directly competitive or substitutable".

10. Korea observes that the Panel referred to the "nature" of competition many times in its findings, making statements such as: "the question is not of the degree of competitive overlap, but its nature."[14] By examining the *nature* of competition, the Panel added a vague and subjective criterion which is not present in Article III:2, and dispensed with the complainants' obligation to show *direct* competitiveness or substitutability and also with the need to look at actual markets.

[11]See, for example, Panel Report, para. 10.94.

[12]Panel Report, para. 10.48.

[13]Panel Report, para. 10.42.

[14]Panel Report, para. 10.44. Korea also refers to Panel Report, paras. 10.42, 10.44 and 10.66 in this respect.

(c) Evidence From Other Markets

11. The Panel stated that it could "look at other markets and make a judgement as to whether the same patterns could prevail in the case at hand."[15] In Korea's view, this amounts to little more than guesswork and constitutes an impermissible broadening of the scope of Article III:2. The Panel also disregarded the fact that consumer responsiveness to different products "may vary from country to country".[16] Moreover, there was no basis for the Panel to assume that the Korean and Japanese markets were, or were becoming, the same. Korea further contends that, even if evidence from other markets were relevant, the Panel should not have limited itself to looking at only one other country's market. To ensure a balanced view, evidence from more than one other market ought to have been reviewed.

12. Korea submits that all of the above misinterpretations of Article III:2 constitute a violation of provisions of the DSU and general principles of law, namely, the principle that neither panels nor the Appellate Body can add to or diminish the rights and obligations provided in the covered agreements (Article 19.2 of the DSU), the principle of predictability, and the principle of *in dubio mitius*.

(d) Grouping of the Products

13. Korea stresses the importance of the methodology used to compare domestic and imported products under Article III:2. It considers that the Panel committed a major legal error in wrongly defining the comparison it had to undertake. The Panel grouped together products that are not physically identical; are produced in different ways by different manufacturers using different raw materials; taste differently; are used differently; are marketed and sold differently at considerably different prices and are subject to different tax rates in Korea. The Panel also failed to carry out a separate analysis for diluted and distilled soju.[17] Korea urges that the Panel erred in conducting its analysis on the basis of an agglomeration of the characteristics of two such different products. To extend conclusions that are primarily based on diluted soju to distilled soju is unacceptable logic. Further, by treating diluted soju and distilled soju together, the Panel overlooked the relevance of the considerable price differential between diluted soju and whisky.

[15]Panel Report, para. 10.46.

[16]Panel Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, para. 6.28.

[17]Panel Report, para. 10.54.

14. Korea points out that the Panel decided to treat all the imported distilled spirits as one group.[18] In Korea's view, the Panel's decision to group all these beverages together was, in effect, a decision (or at least a presumption) that they are directly competitive or substitutable everywhere, without considering whether that was true in the Korean market. By grouping all the imported beverages together, the Panel made it impossible to appreciate the differences between the imported products. The Panel could not, for example, conclude that in Korea diluted soju was directly competitive or substitutable for vodka, but not whisky.

15. Korea acknowledges that when the Panel considered the product characteristics, it examined the products in the group one by one. But the Panel dismissed as insignificant, differences between the products regarding such characteristics as colour, taste and price. In so doing, the Panel "trivialized" actual consumer perceptions which are at the heart of the "directly competitive or substitutable" standard. The erroneous approach adopted by the Panel makes it impossible to determine what the outcome of the case would have been if the Panel had not erred at the outset.

2. "So As to Afford Protection"

16. According to Korea, the Panel erred in finding that the Korean taxes had a protective effect mainly on the basis of an analysis of the structure of the law itself. The Panel ignored Korea's explanation for the structure of the law.[19] The Panel also made too much of the fact that there is virtually no imported soju, overlooking the fact that there has simply been a lack of interest abroad in the manufacture of these typically Korean products. More importantly, the Panel did not follow the Appellate Body's ruling in *Japan – Alcoholic Beverages*, to the effect that, even though the tax differential may, in some cases, show that the tax is applied "so as to afford protection", "in other cases, there may be other factors that will be *just as relevant or more relevant* to demonstrating that the dissimilar taxation was applied 'so as to afford protection'." [20] (emphasis added)

17. Korea reiterates the argument it made before the Panel that, in view of the large, intrinsic pre-tax price-differences between diluted soju and the imported products at issue, the tax differential cannot be said to have the effect of "afford[ing] protection" to diluted soju. Where the price-difference between two products is so significant, the additional difference created by the variation in

[18]Panel Report, para. 10.60.

[19]Korea's explanation of the structure of its tax regime is set out at paras. 5.172 to 5.181 of the Panel Report. In its arguments before the Appellate Body, Korea placed particular emphasis on the arguments summarized at para. 5.176 of the Panel Report.

[20]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 30.

tax can have no protective effect. Korea also maintains that demand for distilled soju is specific and static, and that it would not be affected a great deal by altering the price, especially not to the degree at issue in this case. Korea, therefore, claims that the tax differential does not "afford protection" to distilled soju, contrary to the conclusion reached by the Panel.

3. Application of Article III:2 of the GATT 1994

18. Korea submits that the Panel erred in several ways when assessing the evidence. While Korea recognizes that appellate review is limited to questions of law, it considers that, in reviewing a panel's interpretation and application of Article III:2, second sentence, the Appellate Body cannot avoid considering the factual underpinnings of the panel's assessment. In this case, the Panel drew conclusions which the evidence before it did not support. Errors of this type were decisive in the adjudication of the dispute in favour of the complainants, and thus constitute reversible legal errors.

19. The Panel also erred in applying different standards of proof to the evidence. The Panel was far more exacting when looking at evidence submitted by Korea than when considering evidence brought by the complainants. The Panel, in effect, applied a "double standard of proof".[21] The Panel also misapplied the requirements on the burden of proof which follow from the Appellate Body Report in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts & Blouses*").[22]

20. Despite evidence to the contrary provided by Korea, the Panel relied upon the notion that consumer preferences in the Korean market might have been frozen by the measures at issue. By so doing, the Panel unfairly put Korea in the position of having to prove a negative -- that the lack of competition was not due to the contested measures -- rather than requiring the complainants to prove positively that consumer preferences in Korea had been frozen.

[21]Korea's appellant's submission, para. 85.

[22]Adopted 23 May 1997, WT/DS33/AB/R, WT/DS33/R, p. 14.

(a) Product Characteristics

21. Korea notes that the Panel found that "[a]ll the products … have the essential feature of being distilled alcoholic beverages."[23] In essence, the Panel considered this sufficient to raise a presumption that all distilled alcoholic beverages are "directly competitive or substitutable". Korea disagrees that such a generic statement could give rise to a presumption of this type. The Panel erred in dismissing the importance of flavour in a case concerning beverages. The flavour of products is one of the consumer's primary considerations when choosing a beverage and distinctions between flavours are, therefore, not "minor"[24] from the consumer's perspective.

22. The Panel's focus on the fact that all the alcoholic beverages at issue are produced by distillation means that certain industrial products (e.g., paint thinner) or medicinal products (e.g., rubbing alcohol) would also be in a directly competitive or substitutable relationship with the beverages in question. Similarity in raw materials and the methods of production are, therefore, meaningless in defining a directly competitive or substitutable relationship between products.

23. That the Panel applied a "double standard of proof" is shown by its rejection, on the one hand, of Korea's example of bottled and tap water, which Korea believes demonstrated that close physical similarity is not always probative evidence of a directly competitive or substitutable relationship. On the other hand, the Panel relied on the United States' example of branded and generic aspirin to show that physical similarity was highly significant. Moreover, the Panel dismissed Korea's bottled and tap water example, in part, because it refered to "different products in different countries".[25] Yet, in another part of its Report, the Panel said that evidence from "other countries" was relevant.[26]

(b) End-Uses

24. Before the Panel, Korea showed that, in Korea, the overwhelming end-use of diluted soju is consumption during meals whereas western-style drinks are hardly ever consumed with meals. The Panel, however, found that this distinction did not suffice to prevent the products from being considered as directly competitive or substitutable.[27] Korea believes the Panel erred, both as to the application of Article III:2 and as to requirements of the burden of proof, in accepting that all the beverages at issue were drunk for the same purposes, *inter alia*, socialization and relaxation. In

[23]Panel Report, para. 10.67.

[24]*Ibid*.

[25]Panel Report, para. 9.23.

[26]Panel Report, para. 10.45.

[27]Panel Report, para. 10.76.

reaching this finding, the Panel drew upon three sources: (a) trends and anecdotal evidence; (b) marketing strategies; and, (c) the presence of admixtures.

25. The Panel placed emphasis on "trends and changes in consumption patterns" [28] which it said were demonstrated in the Nielsen Study and the Dodwell Study. However, neither of these studies nor the Trendscope Study contains evidence of trends. They show, instead, a "snapshot" of the market at a particular moment in time; they do not show changes over time. The Panel erred in considering that these studies contained evidence of trends, and the Panel's statements amount to mischaracterization of the evidence presented. Moreover, the Panel erred in speculating that those trends were "likely to continue",[29] without pointing to any supporting evidence.

26. Korea argues that the Nielsen Study was used "selectively" by the Panel. For example, even if it showed some overlap in beverages available in Japanese and western-style restaurants, it also showed that in the large majority of outlets there was no overlap. Thus, the overlap shown in the Nielsen Study is very limited and, in light of contrary evidence, cannot be considered as conclusive proof of the similarity of end-uses between the drinks at issue. In other words, the overall consumption pattern sufficiently rebuts any presumption of common end-uses raised by the minor overlap indicated by the Nielsen Study. The same is true of the figures given in the Nielsen Study for home-consumption of alcoholic beverages with meals. Even if 5.8 per cent of respondents stated that they drink whisky with their meals, that still leaves 94.2 per cent who do not. This evidence supports Korea's argument regarding the "meal" end-use of particular alcoholic beverages. Instead, it was turned around to become evidence of "overlap" in end-use. The speculation engaged in by the Panel was made worse by the Panel's consideration of trends on the Japanese market.

27. The Panel's treatment of Korean companies' marketing strategies discloses again a "double standard of proof ". Where the Panel considered that marketing strategies supported a finding that the products were "like" or "directly competitive or substitutable", they became important evidence [30], whereas the Panel dismissed evidence from marketing strategies that it considered did not support such a finding.[31]

28. The Panel also erred when assessing the evidence submitted concerning admixtures. Korea argued that diluted soju and distilled soju are consumed "straight" in Korea (unlike some of the

[28]Panel Report, para. 10.48.

[29]Panel Report, para. 10.76.

[30]Panel Report, para. 10.79.

[31]Panel Report, paras. 10.65 and 10.66.

imported beverages at issue in this case), a fact borne out in its market study.[32] That soju cocktails are different from diluted soju and distilled soju is reflected in Korea's tax law. Korea maintains that the presence of diluted soju in admixtures cannot support a finding of similarity with other drinks which are drunk in a mixed form, just as the existence of Bailey's[33] is not proof that whisky is often drunk mixed. Like Bailey's and whisky, diluted soju, distilled soju and admixtures are different drinks and are treated as such under the Liquor Tax Law. The Panel wrongfully rejected Korea's point which rebutted the evidence on admixtures.

(c) Channels of Distribution

29. While recognizing that channels of distribution are revealing for a market structure, the Panel wrongly dismissed Korea's distinctions regarding on-premise consumption, and thereby erred in its assessment of the evidence.

30. The essence of Korea's argument was that most of the volume of diluted soju and of western-style drinks was sold and consumed in different types of outlets. This was borne out by the Nielsen Study which clearly shows that, except in the case of Japanese restaurants and café/western-style restaurants, there was no overlap for on-premise consumption. Before the Panel, the United States responded to this by noting that that their embassy personnel knew of nine "traditional Korean-style restaurants" in Seoul serving both whisky and soju. Korea argues that the Panel should not have dismissed Korea's evidence about differences in places of consumption on the basis of evidence concerning nine restaurants, provided by the United States' embassy personnel.

31. The Panel also applied "double standards" to the evidence Korea and the complainants supplied on this issue. While Korea presented a market survey covering 320 restaurants that showed that there are different channels of distribution for the drinks in dispute, the Panel accepted the anecdotal evidence produced by the United States about only nine Korean restaurants.

[32]See in particular Panel Report, paras. 5.268 and 5.273.

[33]Panel Report, para. 7.11. Bailey's Irish Cream is an alcoholic beverage which is a mixture of whisky and cream.

(d) Prices

32. Korea considers that the large, undisputed price differences between diluted soju and the imported beverages are key elements of evidence, and that the larger the price difference between two products, the less influence a change in the price of one will have on the demand for the other. In the present case, there is no price overlap between diluted soju, including its premium version, and any of the western-style drinks.

33. Korea believes that the only evidence on consumer responsiveness to changes in prices which was submitted by the complainants was the Dodwell Study. But Korea raised "fundamental objections" about the Dodwell Study before the Panel, and the Study is so flawed that it should have been rejected. The Panel erred in failing to recognize the weaknesses in the Study. Korea notes that the Panel considered the Dodwell Study "helpful evidence" [34] sufficient to raise a presumption of a directly competitive or substitutable relationship, and rejected the "hard evidence" Korea had submitted in rebuttal. The Panel, therefore, wrongly allocated the burden of proof and also applied a "double standard" since it was lenient with the complainants' evidence, but strict with Korea's rebuttal evidence.

34. Korea contends that the evidence of the large price differences between diluted soju and most of the imported beverages is sufficient to rebut the complainants' claims about the existence of a directly competitive or substitutable relationship between the imported and domestic beverages. However, the Panel essentially disregarded the evidence and did not address Korea's argument that the absolute price differences were so great that behavioural changes were unlikely.

35. When stating that premium diluted soju was a "fast growing category" [35], the Panel neglected Korea's evidence. Korea had emphasized during the second meeting with the Panel that premium soju production was declining, apparently as a result of Korean consumers' unwillingness to pay more for an up-market version of diluted soju.

36. According to the Panel, cognac is a directly competitive or substitutable product for standard diluted soju even though, before any tax is applied, the products differ in price by a factor of 20.[36] Admittedly, for some of the western-style beverages, the price differential from soju is smaller, and even negative (e.g. distilled soju as compared to standard whisky). However, the Panel did not

[34]Panel Report, para. 10.92.

[35]Panel Report, para. 10.94.

[36]This factor is based on the prices of the Dodwell Study. However, the Panel mentions an even higher price difference: a factor of 24 (Panel Report, footnote 408).

distinguish between types of product and concluded broadly that "the price differences [were] not so large as to refute the other evidence".[37] Korea believes that in the case of consumer products, to say that an actual price difference of a factor of 10 or 20 is insufficient to refute hypothetical evidence on competition, such as the Dodwell Study, flies in the face of common sense and shows that the Panel wrongly applied Article III:2.

(e) Treatment of Tequila

37. Korea observes that, although virtually no evidence on tequila was submitted by either the complainants or the third party, the Panel found that Korea had violated Article III:2 with respect to this beverage. The United States identified tequila as one of the products covered by the measures at issue, and tequila was included in the Dodwell Study presented by the European Communities. Mexico also made certain descriptive comments concerning the physical characteristics, tariff classification and patterns of consumption of tequila and mescal. The Panel included tequila in its examination because evidence was presented with respect to it[38], although it excluded mescal which "was mentioned without positive evidence" being provided.[39] The only additional elements concerning tequila were statements made by the complainants that tequila is drunk with spicy food in Mexico, that tequila is becoming popular in Japan[40] and that tequila was included in the Dodwell Study. Korea considers the evidence on tequila to be insufficient to give rise to a presumption of a directly competitive or substitutable relationship with soju.

38. The Panel made no attempt to analyze what the Dodwell Study actually said. The Dodwell Study shows that consumers responded inconsistently to a possible price change for tequila. In fact, it even appears from the Dodwell Study that demand for tequila may not change if its price were lowered. The Panel, nonetheless, concluded that there was evidence that consumers were sensitive to relative price changes of soju and tequila.

[37]Panel Report, para. 10.94.

[38]Panel Report, para. 10.58.

[39]*Ibid.*

[40]Panel Report, paras. 5.72 and 6.182.

4. Article 11 of the DSU

39. Korea submits that, contrary to Article 11 of the DSU, the Panel failed to apply the standard of review appropriate to an Article III:2 dispute. Korea maintains that, in this case, the Panel simply did not have sufficient evidence to enable it to conduct an "objective assessment" and, instead, relied on speculation. The Panel also failed to accord due deference to Korea's description of its own market. Korea believes that, when faced with conflicting descriptions of a foreign market, a panel should be very careful in making assertions about what this market is like and should certainly not engage in speculation about its possible future development. Where there was disagreement between the parties about the Korean market, the Panel should have accepted Korea's description, unless the complainants brought compelling evidence to the contrary.

40. Despite its "strong misgivings" about the Panel Report, Korea states that it does not assert that the Panel acted in bad faith. However, Korea believes that the matters it has raised under Article 11 of the DSU are, nonetheless, serious enough to merit reversal of the Panel's conclusions.

5. Article 12.7 of the DSU

41. Finally, Korea claims that the Panel failed to fulfil its obligation under Article 12.7 of the DSU. Korea considers much of the Panel's reasoning to be obscure, making it very difficult to determine the evidence the Panel relied upon in reaching its conclusions and the weight it gave to different evidence and arguments. In addition, the Panel Report is also "unacceptably vague". The Panel relies upon open-ended concepts, such as "potential" competition in the "near term", "potential" end-uses and the "nature" of competition, to support its conclusions which can be stretched to cover any outcome. Furthermore, certain evidence, such as the Sofres Study, was simply ignored without the Panel giving reasons therefor. The inadequate reasoning, in Korea's view, also prevented the Panel from making an objective assessment under Article 11 of the DSU.

B. *European Communities - Appellee*

1. "Directly Competitive or Substitutable Products"

42. The European Communities submits that Korea's appeal is grounded on the erroneous premise that the term "directly competitive or substitutable" must be interpreted "strictly". That proposition finds no support in the GATT, in its drafting history or in previous panel reports. As noted by the Panel, the drafting history of Article III:2 suggests that the drafters had in mind a rather broad notion of "directly competitive or substitutable" products, that could include apples and oranges.[41] Furthermore, the Korean argument that Article III:2, second sentence, must be interpreted "strictly" is equally applicable to virtually any GATT provision.

(a) Potential Competition

43. The European Communities believes that the Panel's finding that there is "present direct competition" between the imported beverages and soju[42] would be sufficient to conclude that those products are "directly competitive or substitutable". The additional finding of "a strong potentially direct competitive relationship" provides further support for that conclusion but is not indispensable.

44. In any event, the Panel's analysis of the evidence of "potential" competition is consistent with the wording of Article III:2, its object and purpose, as well as previous Appellate Body and panel reports. Korea relies on the fact that neither Article III:2 nor the *Ad* Article mention "potential" competition. But nor do they mention "actual" competition. In the European Communities' view, potential competition *is* "competition", both in the ordinary economic sense and within the meaning of the *Ad* Article. The use in the *Ad* Article of the words "competitive" (rather than "competing") and "substitutable" (instead of "substitute") is a further indication that the drafters envisaged the application of Article III:2 in the case of both "actual" and "potential" competition. The French and Spanish texts also support this view.

45. To the European Communities, the relevance of potential competition flows directly from the fact that Article III does not protect export volumes but expectations of an equal competitive relationship. The prohibition against protective taxation applies even if there are *no* imports of "directly competitive and substitutable" products. Korea's insistence on the existence of actual competition is, therefore, inconsistent with the proper interpretation of Article III:2. Korea's "but for"

[41]See Panel Report, para. 10.38.

[42]Panel Report, para. 10.98.

test is an admission that potential competition is relevant in some circumstances, but that test is too restrictive and finds no support in Article III:2, second sentence.

(b) Evidence From Other Markets

46. A determination of whether two products are "directly competitive or substitutable" must be made on a case-by-case basis and in respect of the market of the Member applying the contested tax measures. Nevertheless, other markets may provide a strong indication of the nature of the competitive relationship between the products in the market at issue. This may be particularly true in cases where there is either very little or no actual competition on the market at issue. In the present case, the Panel made very limited use of evidence drawn from third country markets. The Panel looked at evidence from the Japanese market to corroborate findings made concerning the Korean market. Although the Panel could have looked at other markets in addition to the Japanese market, that was not necessary.

47. The European Communities contends that Korea's interpretation of Article III:2 diminishes the rights of Members. Furthermore, the principle *in dubio mitius* is a supplementary method of interpretation that applies only where there is a genuine ambiguity. That is not the case here. Finally, the Panel's interpretation promotes "predictability".

(c) Grouping of the Products

48. The European Communities views the Panel's decision on how to group the products as a methodological one made for analytical purposes only. It does not involve any interpretation of Article III:2 and does not, therefore, raise any "question of law" which could form the subject of an appeal, unless the Panel failed to make an "objective assessment" of the facts.

49. Contrary to Korea's assertions, the Panel did not find that distilled soju and diluted soju were directly substitutable and competitive products. The Panel held that if diluted soju were found to be directly competitive or substitutable with imported spirits, it would follow necessarily that distilled soju, which is more similar to imported spirits, would also be directly competitive or substitutable with those spirits.[43] Korea has not challenged the premise underlying the Panel's reasoning.

[43]Panel Report, para. 10.54.

50. The European Communities contends that, in deciding to consider together all imported beverages, the Panel did not anticipate the outcome of the case nor did it find that the imported products were directly competitive or substitutable *inter se*. Korea has not shown that applying a different analytical approach would have led to a different result. There is no significant difference between Korea's strict product-by-product approach and the Panel's method. In practice, the Panel switched to a product-by-product approach whenever there were differences between the imported spirits in respect of a particular criterion.

2. "So As To Afford Protection"

51. According to the European Communities, the Panel's finding that Korea's measures are applied "so as to afford protection to domestic production", is based on three factors: the sheer magnitude of the tax differential, the lack of rationality of the product categorization, and the fact that there were virtually no imports.[44] There is no indication in the Panel Report that the Panel considered the second of these three factors to be particularly important.

52. Korea has not explained why it was necessary to add a series of exceptions to the definition of soju which resulted in the most important categories of imported spirits being placed in a much higher tax bracket than soju. The reasons why there are no imports of soju are irrelevant. What matters is that, in practice, imports of soju are and always have been negligible.

53. The European Communities considers the Korean argument that the measures do not appreciably change the competitive opportunities of the imported products to be factually wrong. In any event, comparing pre-tax price-differences is not sufficient to take account of all possible price distortions caused by the measures.[45] Furthermore, prices may be affected by extraneous factors, such as fluctuations in exchange rates.[46]

54. The European Communities argues that the "so as to afford protection" requirement is concerned exclusively with *whether* the contested measures protect domestic production and not with *how much* protection is afforded. If two products are directly competitive or substitutable, then any tax differential which is more than *de minimis* may affect the competitive relationship between the

[44]Panel Report, paras. 10.101 and 10.102.

[45]See Panel Report, para. 10.94 and footnote 410.

[46]*Ibid.*

products and, as a result, "protect" the less taxed product. The only remaining issue is whether protecting the less taxed product favours "domestic production".

3. Application of Article III:2 of the GATT 1994

55. The European Communities asserts that Korea's claims under this heading do not raise any "question of law", but only factual issues which, in principle, are not subject to appellate review. These claims can only be considered by the Appellate Body under Article 11 of the DSU. However, an appellant invoking this ground of appeal must show that the Panel abused its discretion in a manner which attains a "certain level of gravity".[47] The European Communities contends that the Panel did not make the errors Korea alleges. However, even if Korea could demonstrate that the Panel committed those errors, they would not come close to constituting "egregious errors that call into question the good faith of the Panel".[48]

(a) Product Characteristics

56. According to the European Communities, Korea's argument that flavour is one of the consumer's primary considerations when choosing a beverage is flawed. If two products are nearly identical, the consumer's choice between them will necessarily turn on very minor differences. For instance, the only reason for choosing a green necktie instead of a red necktie is the colour. Yet, colour remains a relatively minor feature of neckties and differences in colour do not prevent neckties from being "directly competitive and substitutable".

57. Korea also considers that the Panel erred in relying on the "commonality of raw materials" and the similarity of manufacturing processes as a decisive criterion. In the European Communities' view, Korea improperly characterizes the Panel's reasoning. The Panel stated in unequivocal terms that "commonality of raw materials" is a relevant factor, but not a dispositive one. Nor did the Panel consider that the similarity of manufacturing processes is, in and of itself, decisive.

58. The European Communities does not accept that Korea's tap and bottled water example is comparable with that of generic and branded aspirin. Generic aspirin and branded aspirin are

[47]European Communities' appellee's submission, para. 68, citing Appellate Body Reports in *European Communities – Measures Affecting the Importation of Certain Poultry Products* ("*European Communities – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998 and *EC Measures Concerning Meat and Meat Products* (*Hormones*) ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

[48]*European Communities – Hormones*, *supra*, footnote 47.

identical or nearly identical products, even if they are marketed differently. Tap water and bottled water have the same appearance, but it may be highly questionable whether they have close physical characteristics.

(b) End-Uses

59. The European Communities argues that the Nielsen Study refutes Korea's assertions on consumption patterns of soju and western-style spirits. It showed that some consumers drank whisky with their meals and that soju is not always drunk with meals. The Trendscope survey confirmed that western-style spirits are sometimes consumed with meals. The Panel did not base its conclusion that soju and western-style spirits have similar end-uses on the Nielsen Study's finding that 6 per cent of consumers drank whisky with their meals. Rather, the Panel rejected the relevance of the narrow distinction between consumption with meals and without meals, and also between consumption with "snacks" or with "meals".[49]

60. The European Communities disagrees with Korea that there is a contradiction in the Panel's treatment of marketing strategies. Although the Panel stated that marketing strategies can be used to create primarily perceptual distinctions between products, it also stated that marketing strategies can be useful tools for analysis if they highlight fundamental product distinctions or similarities.[50] The Panel thereafter relied on marketing strategies that highlight underlying product similarities.[51]

61. The European Communities recalls that the complainants adduced evidence before the Panel that certain pre-mixed drinks contained soju, thereby refuting Korea's claim that soju is always drunk straight. Whether pre-mixes are considered as soju or as liqueurs for tax purposes is altogether irrelevant. Pre-mixed "gin and tonic", "whisky and cola" or "piña colada" would not be classified as whisky, gin or rum. Yet, their very existence constitutes irrefutable evidence that some consumers like to drink those spirits mixed with non-alcoholic beverages.

[49]Panel Report, para. 10.76.

[50]Panel Report, para. 10.65.

[51]Panel Report, para. 10.79.

(c) Channels of Distribution

62. The Panel relied on the "anecdotal" evidence provided by the United States embassy staff to show that Korea was drawing distinctions which were too fine. The Panel's reasoning, in the European Communities' view, was that the only relevant distinction was between off-premise consumption (i.e. consumption at home or at friends' places) and on-premise consumption (i.e. consumption at public places such as restaurants and bars).[52] Korea does not challenge the Panel's finding that both soju and western-style spirits are currently sold in a similar manner for off-premise consumption. Nor has Korea disputed that off-premise consumption represents a substantial share of total consumption. Further, if western-style spirits were taxed similarly to soju, more people would drink them in inexpensive public places than at present.

(d) Prices

63. The European Communities notes that Korea does not challenge the Panel's view that consumer responsiveness to changes in relative prices is, in principle, more relevant than a comparison of absolute prices when assessing whether products are directly competitive or substitutable. Korea argues that premium soju "only represents 5 per cent of the market". To put things in perspective, the European Communities recalls that the total sales volume of premium diluted soju exceeds the combined sales volume of all imported spirits.

64. Korea also claims that the Panel "wilfully neglected"[53] Korea's evidence when it observed that premium diluted soju was a "fast growing category"[54] of product. The Panel, however, responded to Korea's arguments during the interim review, stating that, although sales had slowed, that was true for all higher priced products and was a consequence of the financial crisis. In any event, Korea did not submit evidence to show that sales of premium diluted soju had decreased.

65. Korea's arguments concerning the Dodwell Study seek, purely and simply, a *de novo* examination by the Appellate Body of facts already determined by the Panel. Korea's critique of the Dodwell Study's methodology was refuted point-by-point by the European Communities in its submissions to the Panel, and the European Communities does not consider it necessary to repeat those arguments on appeal.

[52]Panel Report, para. 10.86.

[53]Korea's appellant's submission, para. 155.

[54]Panel Report, para. 10.94.

66. The European Communities underlines that the authors of the Sofres Report, who also prepared the Dodwell Study, assumed that all spirits were part of the same market. Although overlooked by Korea, this Report also states that imported beverages are increasingly preferred by Koreans. The passages Korea relies on have been quoted out of context.

(e) Treatment of Tequila

67. The Panel's finding that tequila and soju are "directly competitive or substitutable" products was based on the similarity of their physical characteristics and end-uses.[55] In addition, the Panel relied upon the Dodwell study.

4. Article 11 of the DSU

68. In respect of Korea's assertion that the Panel failed to accord due deference to Korea's description of the Korean market, the European Communities states that the "deferential" standard of review advocated by Korea finds no support in either the DSU or the GATT 1994. As stated by the Appellate Body[56], the appropriate standard of review for the application of the GATT 1994 and of all other covered agreements (with the sole exception of the *Agreement on the Implementation of Article VI of GATT 1994*) is contained in Article 11 of the DSU. A different standard of review would alter a "finely drawn balance".[57]

5. Article 12.7 of the DSU

69. This ground of appeal does not raise any issue that has not been addressed already.

[55]Panel Report, para. 10.58.

[56]*European Communities – Hormones*, *supra*, footnote 47, para. 114.

[57]*European Communities – Hormones*, *supra*, footnote 47, para. 115.

C. *United States - Appellee*

1. "Directly Competitive or Substitutable Products"

70. The United States observes that many of Korea's complaints in this case relate to questions of fact. Each allegation must be examined to determine whether it concerns a legal question that may be the subject of appellate review.

(a) Potential Competition

71. According to the United States, the Panel followed the Appellate Body's guidance in *Japan - Alcoholic Beverages* that the breadth of the category of "directly competitive or substitutable" products "is a matter for the panel to determine based on all the relevant facts", and that product comparisons "involve an unavoidable element of individual, discretionary judgment." [58]

72. The United States considers that the concepts of "potential" and "actual" competition are redundancies. Competition may be shown by many means, including through a demonstration that current substitution is occurring or through the inherent degree of substitutability evidenced by the products' similar physical characteristics and basic end-uses.

73. Contrary to Korea's claims, the United States observes that the Panel did not rely exclusively, or even mostly, on evidence of potential competition. The Panel's reference to "significant potential competition" [59] does not detract from the fact that it concluded that there was evidence of "present direct competition". [60]

74. In any event, the Panel was correct to consider evidence of potential competition in concluding that the imported products and the domestic products were "directly competitive or substitutable". Korea's argument to the contrary finds no support in the ordinary meaning of the relevant GATT 1994 provisions, taken in their context and read in light of their object and purpose, nor is it consistent with past panel and Appellate Body reports.

[58]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 20, pp. 25 and 21.

[59]Panel Report, para. 10.97.

[60]Panel Report, para 10.98. The United States also refers to Panel Report, paras. 10.71 – 10.73, 10.79, 10.82, 10.83, 10.86 and 10.95, all of which refer to aspects of current competition between the products.

75. According to the United States, the purpose of the provisions at issue is to prohibit protective taxation. The word "substitutable" clearly shows that Article III:2, second sentence, applies in the case of "potential substitution" (i.e. where products are *able* to be substituted). The French and Spanish texts of the provision support this reading. Likewise, the ordinary economic sense of the word "competition" is not limited to actual instances of observed substitution. The phrase "competition was involved"[61] must be read as referring to situations where competition -- both current and potential -- is present.

76. Article III:2 protects "expectations" and Members' "potentialities" as exporters. The Panel was, therefore, correct to reject Korea's argument for a quantification of current substitution. A complete absence of imports is not a defence in the case of a violation of Article III and a particular degree of current market penetration of imports should not, therefore, be required.

77. The Panel was also correct, the United States believes, to consider that evidence from other markets could be "relevant, albeit of less relative evidentiary weight" than evidence from the market actually at issue.[62] Indeed, evidence from another market may be highly probative, whereas evidence from the market at issue may be unreliable because of protection. Although the Panel could have considered more than one other market, it may have felt it most relevant and useful to consider the Japanese market, given its history of restrictions and the structure of its tax laws which appear similar to those of the Korean market. The United States also notes that the Panel's decision to consider other markets is consistent with broader GATT practice.[63]

78. The United States views Korea's arguments concerning Article 19.2 of the DSU, the principle of *in dubio mitius* and the so-called principle of "predictability" as aids to the interpretation of Article III rather than as independent claims. In any event, the United States argues that it is Korea's interpretation which would violate Article 19.2 of the DSU and the principle of predictability. Furthermore, the principle *in dubio mitius* only applies in case of ambiguity, and there is none here.

(b) Grouping of the Products

79. The United States contends that the Panel properly examined extensive evidence concerning the categorization of products, including physical characteristics, end-uses, channels of distribution

[61]*Ad* Article III:2, second sentence.

[62]Panel Report, para. 10.78.

[63]The United States refers, in particular, to *Panel on Poultry*, GATT Doc. L/2088, unadopted report issued 21 November 1963, para. 10, and *Japan - Restrictions on Imports of Certain Agricultural Products*, BISD 35S/163, adopted 22 March 1988, para. 5.1.3.7.

and points of sale, and prices. The Panel's determinations with regard to the "grouping" of products was an analytical methodology that was not used to "prejudge the substantive discussion". Moreover, the Panel also analyzed the competitive relationship between individual categories of imported and domestic products. Thus, the use of the "analytical tool" had no practical repercussions on the outcome of the case.

80. Korea's objections to the Panel's decision to "combine" diluted and distilled soju for the purposes of the comparison with imported spirits amount to a disagreement with the Panel's finding that the two types of soju are similar. Pursuant to Article 17.6 of the DSU, such issues cannot, however, form the subject of an appeal.

2. "So As To Afford Protection"

81. The Panel analyzed the protectionist character of the measures in a manner consistent with the guidance given by the Appellate Body in *Japan – Alcoholic Beverages*. The three factors relied upon by the Panel were: the size of the tax differentials, the structure of the Liquor Tax Law and its application. The United States observes that Korea's explanation of the structure of the tax provides no objective reason to tax the domestic and imported products at issue so differently, given the very minor physical differences between them. The fact that detailed product definitions, corresponding to the western beverages, were introduced over time shows a specific intent to apply different fiscal treatment to soju and imports as the imports entered the Korean market. The fact that there was no imported soju shows only that the design of the law can be safely equated with protection of domestic production.

82. To the United States, Korea's argument that the large price differences between diluted soju and the imported products prevented the tax measures from affording protection is specious. First, the magnitude of the tax differentials itself can be sufficient to conclude that there is a protective effect. Second, the Panel had already made a factual finding that, despite the large price differentials, the products were directly competitive or substitutable. Third, since the tax differentials exceeded *de minimis* levels, there is no factual or legal basis to argue that the measures are *incapable* of affording protection.

3. Application of Article III:2 of the GATT 1994

83. According to the United States, Korea's request to have the Appellate Body review the "misapplication of the facts" and Korea's arguments under various articles of the DSU and

international law principles amount, in essence, to an attempt to relitigate the facts. To the extent that Korea has raised any legal claims, for instance, specific violations of Article 11 and 12.7 of the DSU, these are without basis and would, if accepted, undermine Article 17.6 of the DSU.

84. Korea alleges that the Panel refused to recognize that the complainants did not satisfy the burden of proof requirements. According to the United States, these arguments amount to an objection to the Panel's weighing of the evidence.

4. Article 11 of the DSU

85. In short, to establish that the Panel has failed to discharge its duties under Article 11 of the DSU, Korea must show that the Panel committed an error so egregious that it calls into question the "good faith" of the Panel. This is a high standard and appropriately so. As Korea concedes, its allegations concerning the facts do not call into question the Panel's good faith. Therefore, none of Korea's allegations meet the requisite standard for a violation of Article 11 of the DSU.

86. Nevertheless, Korea asks the Appellate Body to look beyond instances of bad faith. In particular, Korea asks the Appellate Body to lower the present standard by introducing new criteria for the term "objective assessment". The Appellate Body should reject these proposals as they would require it to undertake a *de novo* factual review, thereby contradicting Article 17.6 of the DSU.

87. Korea's criticisms of the Dodwell Study and the Sofres Report basically find fault with the credibility and weight given to a piece of evidence, which the Appellate Body has confirmed is "part and parcel of the fact finding process".[64] Although the Panel does not explicitly mention the Sofres Report in its findings, the Panel is clearly aware of that Report. It is mentioned in the Panel Report and is quoted extensively in Korea's oral arguments.[65]

88. Korea's allegations concerning the application of a "double standard" of proof relate largely to the Panel's appreciation of the evidence before it. Korea's argument that the Panel did not have enough evidence to enable it to conduct an objective assessment is, essentially, an objection to the sufficiency of the evidence before the Panel. This is, again, a criticism of the weight and credibility of the facts.

[64]*European Communities – Hormones*, *supra*, footnote 47, para. 132.

[65]See, for example, Panel Report, paras. 6.121 and 6.125.

89. While the United States agrees that a country's description of its own market and culture should be respected, there is no basis in the DSU for Korea's claim that, in the event of a disagreement about the Korean market, the Panel should accept Korea's descriptions unless the complainants submit compelling evidence to the contrary. Moreover, this is a standard never before contemplated in any panel or Appellate Body report.

5. Article 12.7 of the DSU

90. The term "basic rationale" is not defined in the DSU. Under Article 31(1) of the *Vienna Convention on the Law of Treaties*[66], the text of a provision is to be given its "ordinary meaning". Dictionary definitions emphasize the minimal nature of the explanation required by Article 12.7 of the DSU.[67]

91. Given the ordinary meaning of these terms, the United States sees no basis for Korea's allegation that the Panel failed to provide a sufficient explanation of its findings. A panel need not give a detailed and exhaustive statement of its reasons for every factual determination it makes. It need only provide the fundamental reasoning behind each factual and legal finding or recommendation, thereby making it possible for the Appellate Body to exercise its review and ensuring that Members understand the manner in which the panel applied the provision in question. The Panel has more than satisfied this threshold, examining each legal element in great detail and listing the factual elements it considered important.

[66]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969), 8 International Legal Materials, 679.

[67]Webster's Dictionary defines the word "basic" as "of, relating to, or forming the base or essence; fundamental; constituting or serving as the basis or starting-point", and "rationale" as "an explanation of controlling principles of opinion, belief, practice, or phenomena; an underlying reason; basis". The Concise Oxford Dictionary defines "basic" as "forming or serving as a base; fundamental; simplest or lowest in level," and "rationale" as "the fundamental reason or logical basis of anything; a reasoned exposition; a statement of reason".

D. *Arguments of the Third Participant – Mexico*

1. "Directly Competitive or Substitutable Products"

(a) Potential Competition

92. Mexico contends that Korea overlooks that the Panel made an express ruling concerning "direct competition" [68] and applied all of the criteria established by the panel, and endorsed by the Appellate Body, in *Japan – Alcoholic Beverages*. These criteria are: physical characteristics, common end-uses, tariff classifications and the market-place.

93. Mexico also considers that Korea's assertions regarding the "potential competition" criterion are contradictory. Korea sometimes accepts, through the "but for" test, that potential competition may be a necessary element in analysis under Article III:2, while at other times it objects to that criterion.

94. In Mexico's view, Korea places considerable emphasis on the irrelevancy and danger of speculating on the possible future evolution of a market. It is difficult to believe that Korea really thinks that the complainants and the third party in this dispute have any interest in such speculation or that they would invest considerable resources merely to obtain a hypothetical, advisory opinion. Mexico seeks only to be able to export tequila to Korea without having to face a discriminatory tax regime.

(b) Evidence From Other Markets

95. According to Mexico, the Panel analyzed evidence from the Japanese market because the Korean market "still has substantial tax differentials"[69], and, in those circumstances, the Japanese market was relevant. The Panel did not evade its obligation to examine the Korean market since that market was also analyzed.

[68]Panel Report, paras 10.95, 10.97 and 10.98.

[69]Panel Report, para. 10.45.

(c) Grouping of the Products

96. Mexico is of the view that Korea has misunderstood the Panel's intention in proceeding primarily with an examination of the relationship between diluted soju and the imported beverages. The Panel simply based its examination on diluted soju and, when it detected a relevant difference between the two types of soju, highlighted that difference.

97. The Panel did not improperly group the imported beverages nor did it ignore differences between them. The Panel based its comparison on the characteristics common to all of them and, in any event, also noted relevant distinctions between the beverages where appropriate.

2. "So As to Afford Protection"

98. Mexico contends that Korea's arguments under this heading are wrong because the Panel mentioned not only the difference in tax burden between the domestic beverages and the imported beverages, but also noted that the structure of the Liquor Tax Law itself was discriminatory.

3. Application of Article III:2 of the GATT 1994

99. Mexico considers that, since this is a dispute concerning alleged failure to comply with obligations in the GATT 1994, Korea's measures are presumed to nullify or impair benefits accruing under that Agreement and, consequently, under Article 3.8 of the DSU, the burden of refuting the allegations is incumbent upon Korea and not on the appellees or the third party. Contrary to Korea's assertions, the complaining parties and Mexico submitted several pieces of evidence, including: evidence on the physical similarities of the spirits; evidence on the tariff classification of tequila and soju; and evidence from the market-place, in the form of the Dodwell Study, which also covered the relationship between tequila and soju.

100. Mexico agrees with the Panel's rejection of Korea's arguments that the appropriate end-use to be considered in this case was consumption of the beverages with or without meals. As regards admixtures, Mexico considers that the existence of soju cocktails is evidence that soju is not only drunk straight, but is also drunk mixed.

101. Korea argues that it has greater authority than the Panel to analyze its own market. In Mexico's view, this claim is not only difficult to defend, but is also contradictory. If the Koreans have

a special authority not possessed by others, why did Korea entrust analysis of the Korean market to non-Korean companies, such as A.C. Nielsen?

III. Issues Raised In This Appeal

102. This appeal raises the following issues:

(a) whether the Panel erred in its interpretation and application of the term "directly competitive or substitutable product" which appears in the *Ad* Article to Article III:2, second sentence, of the GATT 1994;

(b) whether the Panel erred in its interpretation and application of the term "so as to afford protection", which is incorporated into Article III:2, second sentence, by specific reference to the "principles set forth in paragraph 1" of Article III of the GATT 1994;

(c) whether the Panel erred in its application of the rules on the allocation of the burden of proof;

(d) whether the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU; and

(e) whether the Panel failed to set out the basic rationale behind its findings and recommendations as required by Article 12.7 of the DSU.

IV. Interpretation and Application of Article III:2, second sentence, of the GATT 1994

103. The first issue that we have to address is whether the Panel erred in interpreting Article III:2, second sentence, of the GATT 1994.

104. Article III:2 provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. [70]

105. The meaning of the second sentence of Article III:2 is clarified by paragraph 2 of *Ad* Article III, which reads:

> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

106. Article III:1 provides:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

107. In our Report in *Japan - Alcoholic Beverages*, we stated that three separate issues must be addressed when assessing the consistency of an internal tax measure with Article III:2, second sentence, of the GATT 1994. These three issues are whether:

[70]The provisions of Article III:2, second sentence, of the GATT 1994 include paragraph 2 of *Ad* Article III and, by specific incorporation, the term "so as to afford protection" which appears in paragraph 1 of Article III.

> (1) the imported products and the domestic products *are* "*directly competitive or substitutable products*" *which are in competition with each other*;
>
> (2) the directly competitive or substitutable imported and domestic products *are* "*not similarly taxed*"; and
>
> (3) the dissimilar taxation of the directly competitive or substitutable imported and domestic products *is* "*applied … so as to afford protection to domestic production*".[71]

A. "*Directly Competitive or Substitutable Products*"

108. The Panel concluded its examination of the first issue arising under Article III:2, second sentence, as follows:

> We are of the view that there is sufficient unrebutted evidence in this case to show present direct competition between the products. Furthermore, we are of the view that the complainants also have shown a strong potentially direct competitive relationship. Thus, on balance, we find that the evidence concerning physical characteristics, end-uses, channels of distribution and pricing, leads us to conclude that the imported and domestic products are directly competitive or substitutable. [72]

109. According to the Panel, the "key question" with respect to the first issue arising under Article III:2, second sentence, "is whether the products are **directly** competitive or substitutable." [73] (emphasis in the original) The Panel stated that "an assessment of whether there is a direct competitive relationship between two products or groups of products requires evidence that consumers consider or could consider the two products or groups of products as alternative ways of satisfying a particular need or taste." [74] The determination of whether domestic and imported products are directly competitive or substitutable "requires evidence of the direct competitive relationship between the products, including, in this case, comparisons of their physical characteristics, end-uses, channels of distribution and prices." [75] The Panel reasoned, furthermore, that the "focus should not be exclusively on the quantitative extent of the competitive overlap, but on the methodological basis on

[71]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 20, p. 24.

[72]The "products" referred to by the Panel are diluted soju, distilled soju, whiskies, brandies, cognac, rum, gin, vodka, tequila, liqueurs and admixtures. Panel Report, para. 10.98.

[73]Panel Report, para. 10.39.

[74]Panel Report, para. 10.40.

[75]Panel Report, para. 10.43.

which a panel should assess the competitive relationship."[76] "[Q]uantitative analyses, while helpful, should not be considered necessary."[77] Similarly, "quantitative studies of cross-price elasticity are relevant, but not exclusive or even decisive in nature."[78] A determination of the precise extent of the competitive overlap can be complicated by the fact that protectionist government policies can distort the competitive relationship between products, causing the quantitative extent of the competitive relationship to be understated.[79] The Panel cautioned that "a focus on the quantitative extent of competition instead of the nature of it, could result in a type of trade effects test being written into Article III cases."[80]

110. The Panel noted that assessment of competition has a temporal dimension.[81] It considered that panels should look at "evidence of trends and changes in consumption patterns and make an assessment as to whether such trends and patterns lead to the conclusion that the products in question are either directly competitive now or can reasonably be expected to become directly competitive in the near future."[82] The Panel stated:

> … We will not attempt to speculate on what could happen in the distant future, but we will consider evidence pertaining to what could reasonably be expected to occur in the near term based on the evidence presented. How much weight to be accorded such evidence must be decided on a case-by-case basis in light of the market structure and other factors including the quality of the evidence and the extent of the inference required. … Obviously, evidence as to what would happen now is more probative in nature than what would happen in the future, but most evidence cannot be so conveniently parsed. If one is dealing with products that are experience based consumer items, then trends are particularly important and it would be unrealistic and, indeed, analytically unhelpful to attempt to separate every piece of evidence and disregard that which discusses implications for market structure in the near future.[83]

[76]Panel Report, para. 10.39.

[77]Panel Report, para. 10.42.

[78]Panel Report, para. 10.44.

[79]Panel Report, para. 10.42.

[80]*Ibid*.

[81]Panel Report, para. 10.47.

[82]Panel Report, para. 10.48.

[83]Panel Report, para. 10.50.

111. According to Korea, the Panel misinterpreted the term "directly competitive or substitutable product" by, *inter alia*, "relying on 'potential' competition, comparing the Korean market to the Japanese market and undertaking the wrong product comparisons." [84]

1. Potential Competition

112. Korea argues that the Panel took an unacceptably broad and speculative approach to the role of potential competition, which is not permitted by the wording, context and object and purpose of Article III:2, second sentence.[85] Korea agrees that this provision is not intended to exclude products that are not directly competitive or substitutable because of the contested measure itself. However, the Panel's overly broad approach has opened the door to speculation about how the market could evolve in the future, irrespective of the tax measure in question.[86]

113. Contrary to Korea's assertions, the Panel has not relied on potential competition in order to overcome the absence today of a "directly competitive or substitutable" relationship between the domestic and imported products on the basis that such a relationship might develop in the future. The Panel concluded that "there is sufficient unrebutted evidence in this case to show *present* direct competition between the products".[87] (emphasis added) This legal finding is not a speculative one concerning the future, but is based firmly in the present. The reference to "a strong potentially direct competitive relationship" does no more than buttress the Panel's finding of "present direct competition".[88]

114. The term "directly competitive or substitutable" describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that the essence of that relationship is that the products are in competition. This much is clear both from the word "competitive" which means "characterized by competition" [89], and from the word "substitutable" which means "able to be substituted".[90] The context of the competitive relationship is

[84]Korea's appellant's submission, para. 22.

[85]Korea's appellant's submission, paras. 26 and 31.

[86]Korea's appellant's submission, para. 28.

[87]Panel Report, para. 10.98. Likewise, the Panel also stated that "the evidence overall supports a finding that the imported and domestic products at issue *are* directly competitive or substitutable" (para. 10.95). (emphasis added)

[88]Panel Report, para. 10.98.

[89]Lesley Brown (ed.), *The New Shorter Oxford English Dictionary*, Vol. I, p. 459 (Clarendon Press, 1993).

[90]Lesley Brown (ed.), *op. cit.*, Vol. II, p. 3125.

necessarily the marketplace since this is the forum where consumers choose between different products. Competition in the market place is a dynamic, evolving process. Accordingly, the wording of the term "directly competitive or substitutable" implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word "substitutable" indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another.

115. Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable[91] or if they offer, as the Panel noted, "alternative ways of satisfying a particular need or taste".[92] Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand.

116. The words "competitive or substitutable" are qualified in the *Ad* Article by the term "directly". In the context of Article III:2, second sentence, the word "directly" suggests a degree of proximity in the competitive relationship between the domestic and the imported products. The word "directly" does not, however, prevent a panel from considering both latent and extant demand.

117. Our reading of the ordinary meaning of the term "directly competitive or substitutable" is supported by its context as well as its object and purpose. As part of the context, we note that the *Ad* Article provides that the second sentence of Article III:2 is applicable "only in cases where competition *was* involved". (emphasis added) According to Korea, the use of the past indicative "was" prevents a panel taking account of "potential" competition. However, in our view, the use of the word "was" does not have any necessary significance in defining the temporal scope of the analysis to be carried out. The *Ad* Article describes the circumstances in which a hypothetical tax "*would* be considered to be inconsistent with the provisions of the second sentence". (emphasis added) The first part of the clause is cast in the conditional mood ("would") and the use of the past indicative simply follows from the use of the word "would". It does not place any limitations on the temporal dimension of the word "competition".

118. The first sentence of Article III:2 also forms part of the context of the term. "Like" products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all "directly competitive or substitutable"

[91]Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997.

[92]Panel Report, para. 10.40.

products are "like".[93] The notion of like products must be construed narrowly[94] but the category of directly competitive or substitutable products is broader.[95] While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[96]

119. The context of Article III:2, second sentence, also includes Article III:1 of the GATT 1994. As we stated in our Report in *Japan - Alcoholic Beverages*, Article III:1 informs Article III:2 through specific reference.[97] Article III:1 sets forth the principle "that internal taxes … should not be applied to imported or domestic products so as to afford protection to domestic production." It is in the light of this principle, which embodies the object and purpose of the whole of Article III, that the term "directly competitive and substitutable" must be read. As we said in *Japan – Alcoholic Beverages*:

> The broad and fundamental purpose of Article III is to *avoid protectionism* in the application of internal tax and regulatory measures. … Toward this end, Article III obliges Members of the WTO to *provide equality of competitive conditions* for imported products in relation to domestic products. … Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III *protects expectations* not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products. [98] (emphasis added).

120. In view of the objectives of avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationships, we decline to take a static view of the term "directly competitive or substitutable." The object and purpose of Article III

[93]Panel Report, *Japan - Alcoholic Beverages*, *supra*, footnote 16, para. 6.22, approved by the Appellate Body at p. 23 of its Report.

[94]Appellate Body Report, *Japan - Alcoholic Beverages*, *supra*, footnote 20, p. 20, and *Canada - Periodicals*, *supra*, footnote 91, p. 21.

[95]Appellate Body Report, *Japan - Alcoholic Beverages*, *supra*, footnote 20, p. 25.

[96]*Canada - Periodicals*, *supra*, footnote 91, p. 28.

[97]Appellate Body Report, *Japan - Alcoholic Beverages*, *supra*, footnote 20, p. 23.

[98]*Ibid*, p. 16, with references to earlier Panel Reports.

confirms that the scope of the term "directly competitive or substitutable" cannot be limited to situations where consumers *already* regard products as alternatives. If reliance could be placed only on current instances of substitution, the object and purpose of Article III:2 could be defeated by the protective taxation that the provision aims to prohibit. Past panels have, in fact, acknowledged that consumer behaviour might be influenced, in particular, by protectionist internal taxation. Citing the panel in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*1987 Japan – Alcohol*")[99], the panel in *Japan – Alcoholic Beverages* observed that "a tax system that discriminates against imports has the consequence of creating and even freezing preferences for domestic goods."[100] The panel in *Japan – Alcoholic Beverages* also stated that "consumer surveys in a country with … a [protective] tax system would likely understate the degree of *potential* competitiveness between substitutable products".[101] (emphasis added) Accordingly, in some cases, it may be highly relevant to examine latent demand.

121. We observe that studies of cross-price elasticity, which in our Report in *Japan – Alcoholic Beverages* were regarded as one means of examining a market[102], involve an assessment of latent demand. Such studies attempt to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the relative tax burdens on domestic and imported products.

122. Korea itself recognizes that potential demand may be taken into account in determining whether products are "directly competitive or substitutable". Before the Panel, Korea acknowledged that this term is not intended to exclude products that are not directly competitive or substitutable because of ("but for") the contested measure itself. At the oral hearing before us, Korea accepted that this "but for" test would permit account to be taken "not only [of] the direct price increasing effect of a tax differential but also [of] other elements that could show an impairment of competitive opportunities because of the tax differential, that distribution costs had been higher, etc." [103]

123. We note, however, that actual consumer demand may be influenced by measures other than internal taxation. Thus, demand may be influenced by, *inter alia*, earlier protectionist taxation,

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[99] *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 November 1987, BISD 34S/83. The panel in *Japan – Alcoholic Beverages*, *supra*, footnote 16, cited para. 5.9 of this panel report.

[100] Panel Report, *Japan – Alcoholic Beverages*, *supra*, footnote 16, para. 6.28. This passage was expressly approved by the Appellate Body in its Report in this case (p. 25).

[101] *Ibid*.

[102] Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 20, p. 25.

[103] Response by Korea to questions at the oral hearing.

previous import prohibitions or quantitative restrictions. Latent demand can be a particular problem in the case of "experience goods", such as food and beverages, which consumers tend to purchase because they are familiar with them and with which consumers experiment only reluctantly.[104]

124. We, therefore, conclude that the term "directly competitive or substitutable" does not prevent a panel from taking account of evidence of latent consumer demand as one of a range of factors to be considered when assessing the competitive relationship between imported and domestic products under Article III:2, second sentence, of the GATT 1994. In this case, the Panel committed no error of law in buttressing its finding of "present direct competition" by referring to a "strong potentially direct competitive relationship".[105]

2. Expectations

125. In the course of its reasoning on potential competition, the Panel referred to the "settled law that competitive expectations and opportunities are protected"[106] and noted our statement in *Japan - Alcoholic Beverages* that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products".[107]

126. Korea takes the view that "expectations" exist only for products which are already "like" or "directly competitive or substitutable" and that it was improper for the Panel to consider that there could be expectations regarding products that are not currently "directly competitive or substitutable", but which might become so in the near future.[108]

127. As we have said, the object and purpose of Article III is the maintenance of equality of competitive conditions for imported and domestic products.[109] It is, therefore, not only legitimate, but even necessary, to take account of this purpose in interpreting the term "directly competitive or substitutable product".[110]

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[104]Panel Report, paras. 10.44, 10.50 and 10.73.

[105]Panel Report, para. 10.98.

[106]Panel Report, para. 10.48.

[107]*Supra*, footnote 20, p. 16, with references to earlier panel reports.

[108]Korea's appellant's submission, para. 33, citing, in part, the Panel Report, para. 10.48.

[109]*Supra*, para. 119.

[110]Moreover, as we noted earlier, the Panel concluded that there was evidence of "*present* direct competition" between the imported and domestic products. (Panel Report, para. 10.98, emphasis added)

3. "Trade Effects" Test

128. The Panel expressed concern that "a focus on the quantitative extent of competition instead of the nature of it, could result in a type of trade effects test being written into Article III cases." [111]

129. Korea complains that this is a misunderstanding of the "trade effects" test.[112] In our view, when the Panel referred to a "type of trade effects test", it was simply expressing its scepticism about the consequences of placing undue emphasis on quantitative analyses of the competitive relationship between products. This is clear from the sentence immediately following the sentence containing the reference to a "type of trade effects test":

> That is, if a certain *degree* of competition must be shown, it is similar to showing that a certain *amount* of damage was done to that competitive relationship by the tax policies in question.[113] (emphasis in the original)

130. Thus, the Panel stated that if a particular degree of competition had to be shown in quantitative terms, that would be similar to requiring proof that a tax measure has a particular impact on trade. It considered such an approach akin to a "type of trade effects test".

131. We do not consider the Panel's reasoning on this point to be flawed. [114]

[111]Panel Report, para. 10.42.

[112]*Supra*, para. 9.

[113]Panel Report, para. 10.42.

[114]We note, moreover, that the Panel cites correctly the "trade effects" test in para. 10.42 of the Report, the very paragraph in which it refers to a "type of trade effects test".

4. Nature of Competition

132. The Panel makes numerous references to the "nature of competition".[115] Korea considers that, through the use of the term "nature of competition", the Panel has inserted a "vague and subjective element" which is not found in Article III:2, second sentence.[116] Korea argues that this reference to the "nature of competition", therefore, amounts to another failure properly to interpret the term "directly competitive or substitutable".

133. We believe that the Panel uses the term "*nature* of competition" as a synonym for *quality* of competition, as opposed to *quantity* of competition. The Panel considered that in analyzing whether products are "directly competitive or substitutable", the focus should be on the *nature* of competition and not on its *quantity*:

> … the question is not of the degree of competitive overlap, but its *nature*. *Is there a competitive relationship and is it direct*? …[117]
> (emphasis added)

134. In taking issue with the use of the term "nature of competition", Korea, in effect, objects to the Panel's sceptical attitude to quantification of the competitive relationship between imported and domestic products. For the reasons set above, we share the Panel's reluctance to rely unduly on quantitative analyses of the competitive relationship.[118] In our view, an approach that focused solely on the quantitative overlap of competition would, in essence, make cross-price elasticity *the* decisive criterion in determining whether products are "directly competitive or substitutable". We do not, therefore, consider that the Panel's use of the term "nature of competition" is questionable.

5. Evidence from the Japanese Market

135. The Panel considered that, in assessing whether products are directly competitive or substitutable, it was appropriate to look at "the nature of competition in other countries".[119] It stated:

[115]See Panel Report, paras. 10.42, 10.45, 10.66, 10.76, 10.78 and 10.92.

[116]Korea's appellant's submission, paras. 37 and 38.

[117]Panel Report, para. 10.44.

[118]*Supra*, para. 120.

[119]Panel Report, para. 10.45.

> [A]s we are looking at the nature of competition in a market that previously was relatively closed and still has substantial tax differentials, such evidence of competitive relationships in other markets is relevant. … We do not need, in this case, to give substantial weight to conditions in markets outside Korea, but such factors are relevant… . To completely ignore such evidence from other markets would require complete reliance on current market information which may be unreliable, due to its tendency to understate the competitive relationship, because of the very actions being challenged. Indeed, the result could be that the most restrictive and discriminatory government policies would be safe from challenge under Article III due to the lack of domestic market data.[120]

136. According to Korea, the Panel's approach constitutes an impermissible broadening of the scope of Article III:2, second sentence. Moreover, Korea believes that if evidence from other markets were to be admitted, more than one other market ought to be reviewed. In this case, as there was "considerable evidence available as to what is taking place within the Korean market"[121], Korea considers that there was no reason to rely on evidence drawn from another market when making conclusions about the Korean market.

137. It is, of course, true that the "directly competitive or substitutable" relationship must be present in the market at issue[122], in this case, the Korean market. It is also true that consumer responsiveness to products may vary from country to country.[123] This does not, however, preclude consideration of consumer behaviour in a country other than the one at issue. It seems to us that evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition. Clearly, not every other market will be relevant to the market at issue. But if another market displays characteristics similar to the market at issue, then evidence of consumer demand in that other market may have some relevance to the market at issue. This, however, can only be determined on a case-by-case basis, taking account of all relevant facts.

138. In the present case, the Panel did not err in referring to the Japanese market in its reasoning.

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[120]Panel Report, paras. 10.45 and 10.46.

[121]Panel Report, para. 10.46.

[122]Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 20, p. 25, and *Canada - Periodicals*, *supra*, footnote 91, p. 25.

[123]Panel Report, *Japan – Alcoholic Beverages*, *supra*, footnote 16, para. 6.28, with reference to Working Party Report on "Border Tax Adjustments", L/3464, adopted 2 December 1970, BISD 18S/97, p. 102, para. 18, approved by the Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 20, p. 25.

6. Grouping of the Products

139. Before embarking on its assessment of whether the imported and domestic products at issue are directly competitive or substitutable, the Panel considered how it would carry out that assessment. It stated:

> … With respect to the domestic product, soju, there are two primary categories identified. There is distilled soju and diluted soju.
>
> …
>
> … If we find that diluted soju is directly competitive with and substitutable for the imported products, it will follow that this is also the case for distilled soju because distilled soju is intermediary between the imported products and diluted soju. Indeed, distilled soju is, on the one hand, more similar to the imported products than diluted soju and is, on the other hand, more similar to diluted soju than are the imported products. [124]

With respect to the imported products, the Panel said:

> … We … do not accept the Korean argument that we are required to make an item by item comparison between each imported product and both types of soju. Relying on product categories is appropriate in many cases. … The question becomes where to draw the boundaries between categories, rather than whether it is appropriate to utilize categories for *analytical* purposes. … [W]e find that, on balance, all of the imported products specifically identified by the complainants have sufficient common characteristics, end-uses and channels of distribution and prices to be considered together.[*] (emphasis added)[125]
>
> ---
>
> [*]This decision does not prejudge the substantive discussion; rather we are merely identifying an *analytical* tool. It is possible that during the course of a dispute, evidence will show that an *analytical* approach should be revised. … (emphasis added)

140. Korea argues that the Panel erred in failing to examine distilled soju and diluted soju separately and also in examining all of the imported products together. Korea's argument is based, in large part, on allegedly significant differences between the products that the Panel grouped together. Korea is concerned that by considering the products together, the Panel overlooked important

[124]Panel Report, paras. 10.51 and 10.54.

[125]Panel Report, paras 10.59 and 10.60.

differences between them. Korea believes that, in so doing, the Panel was able to conclude that all the products at issue were directly competitive or substitutable, whereas had the imported products been examined individually, this result would not have been possible.

141. We consider that Korea's argument raises two distinct questions. The first question is whether the Panel erred in its "analytical approach". The second is whether, on the facts of this case, the Panel was entitled to group the products in the manner that it did. Since the second question involves a review of the way in which the Panel assessed the evidence, we address it in our analysis of procedural issues.

142. The Panel describes "grouping" as an "analytical tool". It appears to us, however, that whatever else the Panel may have seen in this "analytical tool", it used this "tool" as a practical device to minimize repetition when examining the competitive relationship between a large number of differing products. Some grouping is almost always necessary in cases arising under Article III:2, second sentence, since generic categories commonly include products with *some* variation in composition, quality, function and price, and thus commonly give rise to sub-categories.[126] From a slightly different perspective, we note that "grouping" of products involves at least a preliminary characterization by the treaty interpreter that certain products are sufficiently similar as to, for instance, composition, quality, function and price, to warrant treating them as a group for convenience in analysis. But, the use of such "analytical tools" does not relieve a panel of its duty to make an objective assessment of whether the components of a group of imported products are directly competitive or substitutable with the domestic products. We share Korea's concern that, in certain circumstances, such "grouping" of products *might* result in individual product characteristics being ignored, and that, in turn, *might* affect the outcome of a case. However, as we will see below, the Panel avoided that pitfall in this case.

143. Whether, and to what extent, products can be grouped is a matter to be decided on a case-by-case basis. In this case, the Panel decided to group the imported products at issue on the basis that:

> … on balance, all of the imported products specifically identified by the complainants have sufficient common characteristics, end-uses and channels of distribution and prices… .[127]

[126]The Panel mentions the product category of "whiskies" which include several subcategories of types of whisky such as Scotch (premium and standard), Irish, Bourbon, Rye, Canadian, etc., all of which differ. Panel Report, para. 10.59.

[127]Panel Report, para. 10.60.

144. As the Panel explained in the footnote attached to this passage [128], the Panel's subsequent analysis of the physical characteristics, end-uses, channels of distribution and prices of the imported products confirmed the correctness of its decision to group the products for analytical purposes. Furthermore, where appropriate, the Panel did take account of individual product characteristics.[129] It, therefore, seems to us that the Panel's grouping of imported products, complemented where appropriate by individual product examination, produced the same outcome that individual examination of each imported product would have produced.[130] We, therefore, conclude that the Panel did not err in considering the imported beverages together.

145. With respect to diluted soju and distilled soju, the Panel did not "group" these products as such. Rather, it concentrated on diluted soju in assessing the competitive relationship between the domestic and imported beverages. The Panel considered that distilled soju was an "intermediary" product, with respect to physical characteristics, end-uses and prices, between diluted soju and the imported products. On that assumption, it reasoned, *a fortiori*, taking the view that if diluted soju was shown to be competitive with the imported products, the intermediate product, distilled soju, would also necessarily be "directly competitive or substitutable" with them.[131] We do not consider the Panel's reasoning on this point to be objectionable.

B. *"So As To Afford Protection"*

146. We now address whether the Panel erred in its application of the term "so as to afford protection", which is incorporated into Article III:2, second sentence, by specific reference to paragraph 1 of Article III.

147. With regard to this third element of Article III:2, second sentence, the Panel stated:

[128]Panel Report, footnote 375. See also Panel Report, footnotes 382 and 399.

[129]See Panel Report, paras. 10.67, 10.71, 10.72, 10.85 and 10.94 and footnotes 385, 386, 387 and 408.

[130]We note that the panels in *1987 Japan – Alcohol* and in *Japan – Alcoholic Beverage*, followed the same approach. This approach was implicitly approved in our Report on *Japan – Alcoholic Beverages*.

[131]Panel Report, 10.54.

> The Appellate Body in the *Japan Alcoholic Beverages* case stated that the focus of this portion of the inquiry should be on the objective factors underlying the tax measure in question including its design, architecture and the revealing structure. In that case, the Panel and the Appellate Body found that the very magnitude of the dissimilar taxation supported a finding that it was applied so as to afford protection. In the present case, the Korean tax law also has very large differences in levels of taxation, large enough, in our view, also to support such a finding.
>
> In addition to the very large levels of tax differentials, we also note that the structures of the Liquor Tax Law and the Education Tax Law are consistent with this finding. The structure of the Liquor Tax Law itself is discriminatory. It is based on a very broad generic definition which is defined as soju and then there are specific exceptions corresponding very closely to one or more characteristics of imported beverages that are used to identify products which receive higher tax rates. There is virtually no imported soju so the beneficiaries of this structure are almost exclusively domestic producers.[*] Thus, in our view, the design, architecture and structure of the Korean alcoholic beverages tax laws (including the Education Tax as it is applied in a differential manner to imported and domestic products) afford protection to domestic production. … [132]
>
> [*]The only domestic product which falls into a higher category that corresponds to one type of imported beverage is distilled soju which represents less than one percent of Korean production.

148. According to Korea, the Panel committed several errors in applying the third element of Article III:2, second sentence. It ignored Korea's explanations for the structure of the tax. It made "much" of the virtual absence of imported soju. It did not observe the Appellate Body's guidance in *Japan – Alcoholic Beverages*, that, even though the tax differential may prove that a tax is applied "so as to afford protection", "in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied 'so as to afford protection'." [133]

149. In our Report in *Japan – Alcoholic Beverages*, we said that examination of whether a tax regime affords protection to domestic production "is an issue of how the measure in question is *applied*", and that such an examination "requires a comprehensive and objective analysis" [134]:

[132]Panel Report, paras. 10.101 and 10.102.

[133]*Supra*, footnote 20, p. 30.

[134]*Supra*, footnote 20, p. 28.

> … it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.
>
> Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such protective application … . Most often, there will be other factors to be considered as well.[135]

150. The Panel followed this approach. In finding that the Korean measures afford protection to domestic production, the Panel relied, first, on the fact that "the Korean tax law … has very large differences in levels of taxation."[136] Although it considered that the magnitude of the tax differences was sufficiently large to support a finding that the contested measures afforded protection to domestic production, the Panel also considered the structure and design of the measures.[137] In addition, the Panel found that, in practice, "[t]here is virtually no imported soju so the beneficiaries of this structure are almost exclusively domestic producers".[138] In other words, the tax operates in such a way that the lower tax brackets cover almost exclusively domestic production, whereas the higher tax brackets embrace almost exclusively imported products. In such circumstances, the reasons given by Korea as to *why* the tax is structured in a particular way do not call into question the conclusion that the measures are applied "so as to afford protection to domestic production". Likewise, the reason why there is very little imported soju in Korea does not change the pattern of application of the contested measures.

151. Korea claims that the Panel erred in failing to find that the "intrinsic" pre-tax price difference between diluted soju and the imported alcoholic beverages was so large that "the additional difference created by the variation in tax can have no [protective] effect".[139] According to Korea, the Panel "should have inquired whether the tax is capable of affecting reasonable expectations about the

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[135]*Supra*, footnote 20, p. 29.

[136]Panel Report, para. 10.101. In para. 10.100, the Panel set out the tax differentials: "the total tax on diluted soju is 38.5 percent; on distilled soju and liqueurs it is 55 percent; on vodka, gin, rum, tequila and admixtures it is 104 percent; on whisky, brandy and cognac it is 130 percent".

[137]Panel Report, para. 10.101.

[138]Panel Report, para. 10.102. We note that we considered a similar finding by the panel in *Japan – Alcoholic Beverages*, *supra*, footnote 16, p. 31, to be relevant for the establishment of the third element of Article III:2, second sentence.

[139]Korea's appellant's submission, para. 75.

competitive relationship between the products." [140] Korea also argued that "the demand for a product like distilled soju is specific and static and that it would be difficult to affect it a great deal in either direction by altering the price." [141]

152. In making these arguments, Korea seems to be revisiting the question whether the products can be treated as directly competitive or substitutable. As regards diluted soju, Korea seems to be saying, in effect, that the large pre-tax price difference is such that consumers do not treat the products as substitutable, and that consumers' decisions whether to buy the imported products will not, therefore, be affected by the higher tax burden imposed on these imports. Similarly, as regards distilled soju, Korea is arguing that there is no cross-elasticity of demand between distilled soju and the imported beverages. However, Korea overlooks the fact that the two products have already been found to be directly competitive or substitutable.[142] Its arguments are, therefore, misplaced at this stage of the analysis and do not cast doubt on the Panel's finding that the contested measures afford protection to domestic production.

153. Korea also seems to be insisting that a finding that a measure affords protection must be supported by proof that the tax difference has some identifiable trade effect. But, as we have said above, Article III is not concerned with trade volumes.[143] It is, therefore, not incumbent on a complaining party to prove that tax measures are capable of producing any particular trade effect.

154. We believe, and so hold, that the Panel did not err in its application of the term "so as to afford protection", which is incorporated into Article III:2, second sentence, by specific reference to paragraph 1 of Article III.

[140]Korea's appellant's submission, para. 76.

[141]Korea's appellant's submission, para. 79.

[142]The significant price differential between the products was taken into account in determining whether the products are, in fact, directly competitive or substitutable (Panel Report, para. 10.94).

[143]*Supra*, para. 119.

C. *Allocation of the Burden of Proof*

155. Korea argues that the Panel misapplied the burden of proof and that it applied a "double standard" when assessing the evidence. We note that although the Panel did not actually articulate the rules on allocation of the burden of proof, it made specific reference to passages of our Report in *United States – Shirts and Blouses* where we enunciated these rules.[144]

156. It is clear from paragraphs 10.57, 10.58 and 10.82 of the Panel Report that the Panel properly understood and applied the rules on allocation of the burden of proof. [145] First, the Panel insisted that it could make findings under Article III:2, second sentence, only with respect to products for which a *prima facie* case had been made out on the basis of evidence presented.[146] Second, it declined to establish a presumption concerning all alcoholic beverages within HS 2208.[147] Such a presumption would be inconsistent with the rules on the burden of proof because it would prematurely shift the burden of proof to the defending party. The Panel, therefore, did not consider alleged violations of Article III:2, second sentence, concerning products for which evidence was not presented.[148] Thus, the Panel examined tequila because evidence was presented for it, but did not examine mescal and certain other alcoholic beverages included in HS 2208 for which no evidence was presented. Third, contrary to Korea's assertions, the Panel did consider the evidence presented by Korea in rebuttal[149], but concluded that there was "sufficient *unrebutted* evidence" for it to make findings of inconsistency.[150] (emphasis added)

157. It is, therefore, clear that the Panel did not err in its application of the rules on allocation of the burden of proof.

[144]Panel Report, footnote 374.

[145]In paragraphs 10.57 and 10.58 of its Report, the Panel considered whether it was entitled to make findings with respect to products, including tequila, mescal and certain other alcoholic beverages, for which "virtually no evidence" had been provided. In para. 10.82, the Panel assessed whether the complainants had satisfied the burden of proof with respect to end-uses.

[146]Panel Report, para. 10.57. See also Panel Report, para. 10.82, where the Panel considered that, with respect to end-uses, "the complainants submitted adequate evidence … to establish this portion of their case".

[147]Panel Report, para. 10.57. HS 2208 is the category in Section IV, Chapter 22 of the Harmonised System of Customs Classification that applies to "Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80% vol; spirits, liqueurs and other spiritous beverages".

[148]Panel Report, paras. 10.57 and 10.58.

[149]See, for example, Panel Report, paras. 10.71, 10.82 and 10.85.

[150]Panel Report, para. 10.98.

158. We note, finally, that many of Korea's arguments concerning the burden of proof are, in reality, arguments about whether the Panel made an objective assessment of the matter before it. This is considered in the next section.

D. *Article 11 of the DSU*

159. Korea claims that the Panel failed to make an objective assessment of the matter before it and failed to apply the appropriate standard of review under Article 11 of the DSU. Korea contends that the Panel did not have sufficient evidence before it to enable it to conduct an objective assessment of the matter, and that, as regards the evidence that was, in fact, before it, the Panel made a series of "manifest and/or egregious errors of assessment". [151]

160. In *European Communities - Hormones*, we stated:

> Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel. … Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts. The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review.[152]

161. The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies. Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies, methods of production, taste, colour, places of consumption, consumption with "meals" or with "snacks", and prices.

[151]Korea's appellant's submission, para. 84.

[152]*Supra*, footnote 47, para. 132.

162. A panel's discretion as trier of facts is not, of course, unlimited. That discretion is always subject to, and is circumscribed by, among other things, the panel's duty to render an objective assessment of the matter before it. In *European Communities - Hormones*, we dealt with allegations that the panel had "disregarded", "distorted" and "misrepresented" the evidence before it. We held that these allegations amounted to charges that the panel had violated its duty under Article 11 of the DSU, allegations which, at the end of the day, we found to be unsubstantiated:

> ... Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. ... The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[153]

163. We have scrutinized with great care Korea's allegations that the Panel acted in breach of its duty under Article 11 of the DSU, especially Korea's contentions that the Panel applied a "double standard" in assessing the evidence before it: one standard, relaxed and permissive, for the complainants, and another, very strict and demanding, for the defending party, Korea. In our view, notwithstanding Korea's express disclaimer that it is not challenging the good faith of the Panel, an allegation of a "double standard" of proof in relation to the facts is equivalent to an allegation of failure to render an "objective assessment of the matter" under Article 11 of the DSU. In *European Communities – Poultry*, we observed:

[153] *Supra*, footnote 47, para. 133.

> An allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 of the DSU is a *very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. ...*[154] (emphasis added)

164. We are bound to conclude that Korea has not succeeded in showing that the Panel has committed any egregious errors that can be characterized as a failure to make an objective assessment of the matter before it. Korea's arguments, when read together with the Panel Report and the record of the Panel proceedings, do not disclose that the Panel has distorted, misrepresented or disregarded evidence, or has applied a "double standard" of proof in this case. It is not an error, let alone an egregious error, for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it.

165. In light of the above, we do not believe that the Panel has failed to make an objective assessment of the matter before it within the meaning of Article 11 of the DSU.

E. *Article 12.7 of the DSU*

166. Korea claims that the Panel has failed to fulfil its obligation under Article 12.7 of the DSU to set out the basic rationale behind its findings and recommendations. Korea maintains that "much" of the Panel Report contains contradictions and that it is vague.[155]

167. Article 12.7 of the DSU reads, in relevant 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. *In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.* … (emphasis added)

168. In this case, we do not consider it either necessary, or desirable, to attempt to define the scope of the obligation provided for in Article 12.7 of the DSU. It suffices to state that the Panel has set out a detailed and thorough rationale for its findings and recommendations in this case. The Panel went to some length to take account of competing considerations and to explain why, nonetheless, it made

[154]*Supra*, footnote 47, para. 133. This passage was cited in our Report in *Australia – Measures Affecting Importation of Salmon*, adopted 6 November 1998, WT/DS18/AB/R, para. 265.

[155]Korea's appellant's submission, para. 172.

the findings and recommendations it did. The rationale set out by the Panel may not be one that Korea agrees with, but it is certainly more than adequate, on any view, to satisfy the requirements of Article 12.7 of the DSU. We, therefore, conclude that the Panel did not fail to set out the basic rationale for its findings and recommendations as required by Article 12.7 of the DSU.

V. Findings and Conclusions

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

(a) upholds the Panel's interpretation and application of the term "directly competitive or substitutable product" which appears in the *Ad* Article to Article III:2, second sentence, of the GATT 1994;

(b) upholds the Panel's interpretation and application of the term "so as to afford protection", which is incorporated into Article III:2, second sentence, by specific reference to the "principles set forth in paragraph 1" of Article III of the GATT 1994;

(c) upholds the Panel's application of the rules on the allocation of the burden of proof;

(d) concludes that the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU; and

(e) concludes that the Panel did not fail to set out the basic rationale behind its findings and recommendations as required by Article 12.7 of the DSU.

170. The Appellate Body *recommends* that the Dispute Settlement Body request Korea to bring the Liquor Tax Law and the Education Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.

Signed in the original at Geneva this 16th day of December 1998 by:

_____

Mitsuo Matsushita
Presiding Member

_____ _____

Claus-Dieter Ehlermann
Member

Florentino Feliciano
Member

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Import Prohibition of Certain Shrimp and Shrimp Products

United States, *Appellant*
India, Malaysia, Pakistan, Thailand, *Appellees*

Australia, Ecuador, the European Communities, Hong Kong, China, Mexico and Nigeria, *Third Participants*

AB-1998-4

Present:

Feliciano, Presiding Member
Bacchus, Member
Lacarte-Muró, Member

I. Introduction : Statement of the Appeal

1. This is an appeal by the United States from certain issues of law and legal interpretations in the Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*.[1] Following a joint request for consultations by India, Malaysia, Pakistan and Thailand on 8 October 1996[2], Malaysia and Thailand requested in a communication dated 9 January 1997[3], and Pakistan asked in a communication dated 30 January 1997[4], that the Dispute Settlement Body (the "DSB") establish a panel to examine their complaint regarding a prohibition imposed by the United States on the importation of certain shrimp and shrimp products by Section 609 of Public Law 101-162[5] ("Section 609") and associated regulations and judicial rulings. On 25 February 1997, the DSB established two panels in accordance with these requests and agreed that these panels would be consolidated into a single Panel, pursuant to Article 9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), with standard terms of reference.[6] On

[1]WT/DS58/R, 15 May 1998.

[2]WT/DS58/1, 14 October 1996.

[3]WT/DS58/6, 10 January 1997.

[4]WT/DS58/7, 7 February 1997.

[5]16 United States Code (U.S.C.) §1537.

[6]WT/DSB/M/29, 26 March 1997.

10 April 1997, the DSB established another panel with standard terms of reference in accordance with a request made by India in a communication dated 25 February 1997[7], and agreed that this third panel, too, would be merged into the earlier Panel established on 25 February 1997.[8] The Report rendered by the consolidated Panel was circulated to the Members of the World Trade Organization (the "WTO") on 15 May 1998.

2. The relevant factual and regulatory aspects of this dispute are set out in the Panel Report, in particular at paragraphs 2.1-2.16. Here, we outline the United States measure at stake before the Panel and in these appellate proceedings. The United States issued regulations in 1987 pursuant to the Endangered Species Act of 1973[9] requiring all United States shrimp trawl vessels to use approved Turtle Excluder Devices ("TEDs") or tow-time restrictions in specified areas where there was a significant mortality of sea turtles in shrimp harvesting.[10] These regulations, which became fully effective in 1990, were modified so as to require the use of approved TEDs at all times and in all areas where there is a likelihood that shrimp trawling will interact with sea turtles, with certain limited exceptions.

3. Section 609 was enacted on 21 November 1989. Section 609(a) calls upon the United States Secretary of State, in consultation with the Secretary of Commerce, *inter alia*, to "initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations for the protection and conservation of … sea turtles" and to "initiate negotiations as soon as possible with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles; … ." Section 609(b)(1) imposed, not later than 1 May 1991, an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles. Section 609(b)(2) provides that the import ban on shrimp will not apply to harvesting nations that are certified. Two kinds of annual certifications are required for harvesting nations, details of which were further elaborated in regulatory guidelines in 1991, 1993

[7]WT/DS58/8, 4 March 1997.

[8]WT/DSB/M/31, 12 May 1997.

[9]Public Law 93-205, 16 U.S.C. 1531 *et. seq*.

[10]52 Fed. Reg. 24244, 29 June 1987 (the "1987 Regulations"). Five species of sea turtles fell under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*).

and 1996[11]: First, certification shall be granted to countries with a fishing environment which does not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting.[12] According to the 1996 Guidelines, the Department of State "shall certify any harvesting nation meeting the following criteria without the need for action on the part of the government of the harvesting nation: (a) Any harvesting nation without any of the relevant species of sea turtles occurring in waters subject to its jurisdiction; (b) Any harvesting nation that harvests shrimp exclusively by means that do not pose a threat to sea turtles, *e.g.*, any nation that harvests shrimp exclusively by artisanal means; or (c) Any nation whose commercial shrimp trawling operations take place exclusively in waters subject to its jurisdiction in which sea turtles do not occur."[13]

4. Second, certification shall be granted to harvesting nations that provide documentary evidence of the adoption of a regulatory program governing the incidental taking of sea turtles in the course of shrimp trawling that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of United States vessels.[14] According to the 1996 Guidelines, the Department of State assesses the regulatory program of the harvesting nation and certification shall be made if the program includes: (i) the required use of TEDs that are "comparable in effectiveness to those used in the United States. Any exceptions to this requirement must be comparable to those of the United States program … "; and (ii) "a credible enforcement effort that includes monitoring for compliance and appropriate sanctions."[15] The regulatory program may be in the form of regulations, or may, in certain circumstances, take the form of a voluntary arrangement between industry and government.[16] Other measures that the harvesting nation undertakes for the protection of sea turtles will also be taken into account in making the comparability determination.[17] The average incidental take rate "will be deemed comparable if the harvesting nation requires the use of TEDs in a manner comparable to that of the U.S. program … ."[18]

5. The 1996 Guidelines provide that all shrimp imported into the United States must be accompanied by a Shrimp Exporter's Declaration form attesting that the shrimp was harvested either

[11]Hereinafter referred to as the "1991 Guidelines" (56 Federal Register 1051, 10 January 1991), the "1993 Guidelines" (58 Federal Register 9015, 18 February 1993) and the "1996 Guidelines" (61 Federal Register 17342, 19 April 1996), respectively.

[12]Section 609(b)(2)(C).

[13]1996 Guidelines, p. 17343.

[14]Section 609(b)(2)(A) and (B).

[15]1996 Guidelines, p. 17344.

[16]*Ibid*.

[17]*Ibid*.

[18]*Ibid*.

in the waters of a nation currently certified under Section 609 or "under conditions that do not adversely affect sea turtles", that is: (a) "Shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days in ponds prior to being harvested"; (b) "Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States"; (c) "Shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program … , would not require TEDs"; and (d) "Species of shrimp, such as the pandalid species, harvested in areas where sea turtles do not occur."[19] On 8 October 1996, the United States Court of International Trade ruled that the 1996 Guidelines were in violation of Section 609 in allowing the import of shrimp from non-certified countries if accompanied by a Shrimp Exporter's Declaration form attesting that they were caught with commercial fishing technology that did not adversely affect sea turtles.[20] A 25 November 1996 ruling of the United States Court of International Trade clarified that shrimp harvested by manual methods which did not harm sea turtles could still be imported from non-certified countries.[21] On 4 June 1998, the United States Court of Appeals for the Federal Circuit vacated the decisions of the United States Court of International Trade of 8 October and 25 November 1996.[22] In practice, however, exemption from the import ban for TED-caught shrimp from non-certified countries remained unavailable while this dispute was before the Panel and before us.[23]

6. The 1991 Guidelines limited the geographical scope of the import ban imposed by Section 609 to countries in the wider Caribbean/western Atlantic region[24], and granted these countries a three-year phase-in period. The 1993 Guidelines maintained this geographical limitation. On 29 December 1995, the United States Court of International Trade held that the 1991 and 1993 Guidelines violated Section 609 by limiting its geographical scope to shrimp harvested in the wider Caribbean/western Atlantic region, and directed the Department of State to extend the ban worldwide not later than 1 May 1996.[25] On 10 April 1996, the United States Court of International Trade refused a subsequent request by the Department of State to postpone the 1 May 1996 deadline.[26] On

[19]1996 Guidelines, p. 17343.

[20]*Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).

[21]*Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).

[22]1998 U.S. App. Lexis 11789.

[23]Response by the United States to questioning at the oral hearing.

[24]Specifically, Mexico, Belize, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Trinidad and Tobago, Guyana, Suriname, French Guyana and Brazil.

[25]*Earth Island Institute v. Warren Christopher*, 913 Fed. Supp. 559 (CIT 1995).

[26]*Earth Island Institute v. Warren Christopher*, 922 Fed. Supp. 616 (CIT 1996).

19 April 1996, the United States issued the 1996 Guidelines, extending Section 609 to shrimp harvested in *all* foreign countries effective 1 May 1996.

7. In the Panel Report, the Panel reached the following conclusions:

> In the light of the findings above, we conclude that the import ban on shrimp and shrimp products as applied by the United States on the basis of Section 609 of Public Law 101-162 is not consistent with Article XI:1 of GATT 1994, and cannot be justified under Article XX of GATT 1994.[27]

and made this recommendation:

> The Panel *recommends* that the Dispute Settlement Body request the United States to bring this measure into conformity with its obligations under the WTO Agreement.[28]

8. On 13 July 1998, the United States notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a notice of appeal[29] with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review*. On 23 July 1998, the United States filed an appellant's submission.[30] On 7 August 1998, India, Pakistan and Thailand ("Joint Appellees") filed a joint appellees' submission and Malaysia filed a separate appellee's submission.[31] On the same day, Australia, Ecuador, the European Communities, Hong Kong, China, and Nigeria each filed separate third participants' submissions.[32] At the invitation of the Appellate Body, the United States, India, Pakistan, Thailand and Malaysia filed additional submissions on certain issues arising under Article XX(b) and Article XX(g) of the GATT 1994 on 17 August 1998. The oral hearing in the appeal was held on 19-20 August 1998. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

[27]Panel Report, para. 8.1.

[28]Panel Report, para. 8.2.

[29]WT/DS58/11, 13 July 1998.

[30]Pursuant to Rule 21(1) of the *Working Procedures for Appellate Review*.

[31]Pursuant to Rule 22(1) of the *Working Procedures for Appellate Review*.

[32]Pursuant to Rule 24 of the *Working Procedures for Appellate Review*.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the United States – Appellant*

1. Non-requested Information from Non-governmental Organizations

9. The United States claims that the Panel erred in finding that it could not accept non-requested submissions from non-governmental organizations. According to the United States, there is nothing in the DSU that prohibits panels from considering information just because the information was unsolicited. The language of Article 13.2 of the DSU is broadly drafted to provide a panel with discretion in choosing its sources of information. When a non-governmental organization makes a submission to a panel, Article 13.2 of the DSU authorizes the panel to "seek" such information. To find otherwise would unnecessarily limit the discretion that the DSU affords panels in choosing the sources of information to consider.

2. Article XX of the GATT 1994

10. In the view of the United States, the Panel erred in finding that Section 609 was outside the scope of Article XX. The United States stresses that under the Panel's factual findings and undisputed facts on the record, Section 609 is within the scope of the Article XX chapeau and Article XX(g) and, in the alternative, Article XX(b), of the GATT 1994. The Panel was also incorrect in finding that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". The Panel interprets the chapeau of Article XX as requiring panels to determine whether a measure constitutes a "threat to the multilateral trading system". This interpretation of Article XX has no basis in the text of the GATT 1994, has never been adopted by any previous panel or Appellate Body Report, and would impermissibly diminish the rights that WTO Members reserved under Article XX.

11. The United States contends that the Panel's findings are not based on the ordinary meaning and context of the term "unjustifiable discrimination". That term raises the issue of whether a particular discrimination is "justifiable". During the Panel proceeding, the United States presented the rationale of Section 609 for restricting imports of shrimp from some countries and not from others: sea turtles are threatened with extinction worldwide; most nations, including the appellees, recognize the importance of conserving sea turtles; and shrimp trawling without the use of TEDs contributes greatly to the endangerment of sea turtles. In these circumstances, it is reasonable and justifiable for Section 609 to differentiate between countries whose shrimp industries operate without TEDs, and

thereby endanger sea turtles, and those countries whose shrimp industries do employ TEDs in the course of harvesting shrimp.

12. The Panel, the United States believes, did not address the rationale of the United States for differentiating between shrimp harvesting countries. Rather, the Panel asked a different question: would the United States measure and similar measures taken by other countries "undermine the multilateral trading system"? The distinction between "unjustifiable discrimination" -- the actual term used in the GATT 1994 -- and the Panel's "threat to the multilateral trading system" test is crucial, in the view of the United States, and is posed sharply in paragraph 7.61 of the Panel Report, where the Panel states: "even though the situation of turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system ... ." An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the *Marrakesh Agreement Establishing the World Trade Organization*[33] (the "*WTO Agreement*") acknowledges that the rules of trade should be "in accordance with the objective of sustainable development", and should seek to "protect and preserve the environment". Moreover, Article XX neither defines nor mentions the "multilateral trading system", nor conditions a Member's right to adopt a trade-restricting measure on the basis of hypothetical effects on that system.

13. In adopting its "threat to the multilateral trading system" analysis, the Panel fails to apply the ordinary meaning of the text: whether a justification can be presented for applying a measure in a manner which constitutes discrimination. Instead, the Panel expands the ordinary meaning of the text to encompass a much broader and more subjective inquiry. As a result, the Panel would add an entirely new obligation under Article XX of the GATT 1994: namely that Members may not adopt measures that would result in certain effects on the trading system. Under the ordinary meaning of the text, there is sufficient justification for an environmental conservation measure if a conservation purpose justifies a difference in treatment between Members. Further inquiry into effects on the trading system is uncalled for and incorrect.

14. In the view of the United States, the Panel also fails to take account of the context of the term "unjustifiable discrimination". The language of the Article XX chapeau indicates that the chapeau was intended to prevent the abusive application of the exceptions for protectionist or other discriminatory aims. This is consistent with the approach of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*[34] ("*United States – Gasoline"*) and with the

[33]Done at Marrakesh, 15 April 1994.

[34]Adopted 20 May 1996, WT/DS2/AB/R.

preparatory work of the GATT 1947. In context, an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.

15. In the context of the GATT/WTO dispute settlement system, measures within the scope of Article XX can be expected to result in reduced market access or discriminatory treatment. To interpret the prohibition of "unjustifiable discrimination" in the Article XX chapeau as excluding measures which result in "reduced market access" or "discriminatory treatment" would, in effect, erase Article XX from the GATT 1994. The Panel's "threat to the multilateral trading system" analysis erroneously confuses the question of whether a measure reduces market access with the further and separate question arising under the chapeau as to whether that measure is nevertheless "justifiable" under one of the general exceptions in Article XX. The proper inquiry under the Article XX chapeau is whether a non-protectionist rationale, such as a rationale based on the policy goal of the applicable Article XX exception, could justify any discrimination resulting from the measure. Here, any "discrimination" resulting from the measure is based on, and in support of, the goal of sea turtle conservation.

16. The United States also argues that the Panel incorrectly applies the object and purpose of the *WTO Agreement* in interpreting Article XX of the GATT 1994. It is legal error to jump from the observation that the GATT 1994 is a trade agreement to the conclusion that trade concerns must prevail over all other concerns in all situations arising under GATT rules. The very language of Article XX indicates that the state interests protected in that article are, in a sense, "pre-eminent" to the GATT's goals of promoting market access.

17. Furthermore, the Panel failed to recognize that most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes. This is certainly true of the *WTO Agreement*. Thus, while the first clause of the preamble to the *WTO Agreement* calls for the expansion of trade in goods and services, this same clause also recognizes that international trade and economic relations under the *WTO Agreement* should allow for "optimal use of the world's resources in accordance with the objective of sustainable development", and should seek "to protect and preserve the environment". The Panel in effect took a one-sided view of the object and purpose of the *WTO Agreement* when it fashioned a new test not found in the text of the Agreement.

18. The additional bases, the United States continues, invoked by the Panel to support its "threat to the multilateral trading system" analysis -- i.e. the protection of expectations of Members as to the competitive relationship between their products and the products of other Members; the application

of the international law principle according to which international agreements must be applied in good faith; and the *Belgian Family Allowances*[35] panel report -- are without merit.

19. The United States submits that Section 609 does not threaten the multilateral trading system. The Panel did not find Section 609 to be an *actual* threat to the multilateral trading system. Rather, the Panel found that if other countries in other circumstances were to adopt the same type of measure here adopted by the United States *potentially* a threat to the system might arise. The United States urges that in engaging in hypothetical speculations regarding the effects of other measures which might be adopted in differing situations, while ignoring the compelling circumstances of this case, the Panel violated the Appellate Body's prescription in *United States - Gasoline*[36] that Article XX must be applied on a "case-by-case basis", with careful scrutiny of the specific facts of the case at hand. The Panel's "threat to the multilateral trading system" analysis adds a new obligation under Article XX of the GATT 1994 and is inconsistent with the proper role of the Panel under the DSU, in particular Articles 3.2 and 19.2 thereof.

20. To the United States, Section 609 reasonably differentiates between countries on the basis of the risk posed to endangered sea turtles by their shrimp trawling industries. Considering the aim of the Article XX chapeau to prevent abuse of the Article XX exceptions, an evaluation of whether a measure constitutes "unjustifiable discrimination where the same conditions prevail" should take account of whether the differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries on a basis "legitimately connected" with the policy of an Article XX exception, rather than for protectionist reasons, that measure does not amount to an abuse of the applicable Article XX exception.

21. The contention of the United States is that its measure does not treat differently those countries whose shrimp trawling industries pose similar risks to sea turtles. Only nations with shrimp trawling industries that harvest shrimp in waters where there is a likelihood of intercepting sea turtles, and that employ mechanical equipment which harms sea turtles, are subject to the import restrictions. The Panel properly recognized that certain naturally-occurring conditions relating to sea turtle conservation (namely, whether sea turtles and shrimp occur concurrently in a Member's waters) and at least certain conditions relating to how shrimp are caught (namely, whether shrimp nets are retrieved mechanically or by hand) are relevant factors in applying the Article XX chapeau. However, the Panel found that another condition relating to how shrimp are caught -- namely, whether a country requires its shrimp fishermen to use TEDs -- did not provide a basis under the chapeau for

[35]Adopted 7 November 1952, BISD 1S/59.

[36]Adopted 20 May 1996, WT/DS2/AB/R.

treating countries differently. Differing treatment based on whether a country had adopted a TEDs requirement was, in the Panel's view, "unjustifiable".

22. The United States believes that the analysis employed by the Appellate Body in *United States - Gasoline*[37] leads to the conclusion that Section 609 does not constitute "unjustifiable discrimination". Section 609 is applied narrowly and fairly. The United States does not apply sea turtle conservation rules differently to United States and foreign shrimp fishermen. Moreover, the United States has taken steps to assist foreign shrimp fishermen in adopting conservation measures and has undertaken efforts to transfer TED technology to governments and industries in other countries, including the appellees. In addition, Section 609 is limited in coverage and focuses on sea turtle conservation.

23. During the Panel proceeding, the United States presented "compelling evidence", reaffirmed by five independent experts, that Section 609 was a *bona fide* conservation measure under Article XX, imbued with the purpose of conserving a species facing the threat of extinction. To uphold the findings of the Panel would impermissibly change the basic terms of the bargain agreed to by WTO Members in agreeing to the GATT 1994. Further, to condone the Panel's adoption of a vague and subjective "threat to the multilateral trading system" test would fundamentally alter the intended role of panels under the DSU, and could call into question the legitimacy of the WTO dispute settlement process.

24. The United States states that neither it nor the appellees have appealed the decisions of the Panel to address first the Article XX chapeau and not to reach the issues regarding Article XX(b) and Article XX(g). Because the Panel made no findings regarding the applicability of Article XX(b) and XX(g), there are no findings in respect thereof that could even be the subject of appeal. Accordingly, issues regarding the applicability of Article XX(b) and Article XX(g) are not initially presented to the Appellate Body. However, the United States concurs with Joint Appellees that the Appellate Body may address Article XX(b) or Article XX(g) if it finds that Section 609 meets the criteria of the Article XX chapeau. In that case, the United States asserts that Article XX(g) should be applied first as it is the "most pertinent" of the Article XX exceptions, and that issues relating to Article XX(b) need be reached only if Article XX(g) were found to be inapplicable. The United States incorporates by reference and briefly summarizes the submissions that it made to the Panel regarding Article XX(b) and Article XX(g).

[37]Adopted 20 May 1996, WT/DS2/AB/R.

25. The essential claim of the United States is that Section 609 meets each element required under Article XX(g). Sea turtles are important natural resources. They are also an exhaustible natural resource since all species of sea turtles, including those found in the appellees' waters, face the danger of extinction. All species of sea turtles have been included in Appendix I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna[38] (the "CITES") since 1975, and other international agreements also recognize the endangered status of sea turtles.[39] In paragraph 7.58 of the Panel Report, the Panel noted: "The endangered nature of the species of sea turtles mentioned in [CITES] Annex I as well as the need to protect them are consequently not contested by the parties to the dispute."

26. The United States maintains Section 609 "relates to" the conservation of sea turtles. A "substantial relationship" exists between Section 609 and the conservation of sea turtles. Shrimp trawl nets are a major cause of human-induced sea turtle deaths, and TEDs are highly effective in preventing such mortality. The Panel noted that "TEDs, when properly installed and used and adapted to the local area, would be an effective tool for the preservation of sea turtles."[40] By encouraging the use of TEDs, Section 609 promotes sea turtle conservation.

27. The United States contends that Section 609 is also "made effective in conjunction with restrictions on domestic production or consumption" within the meaning of Article XX(g). The United States requires its shrimp trawl vessels that operate in waters where there is a likelihood of intercepting sea turtles to use TEDs at all times, and Section 609 applies comparable standards to imported shrimp. Section 609 is also "even-handed": it allows any nation to be certified -- and thus avoid any restriction on shrimp exports to the United States -- if it meets criteria for sea turtle conservation in the course of shrimp harvesting that are comparable to criteria applicable in the United States. With respect to nations whose shrimp trawl vessels operate in waters where there is a likelihood of intercepting sea turtles, Section 609 provides for certification where those nations adopt TEDs-use requirements comparable to those in effect in the United States.

28. The United States submits, moreover, that Section 609 is a measure "necessary to protect human, animal or plant life or health" within the meaning of Article XX(b). Section 609 is intended

[38]Done at Washington, 3 March 1973, 993 U.N.T.S. 243, 12 International Legal Materials 1085.

[39]The United States states that all species of sea turtle except the flatback are listed in Appendices I and II of the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 15; and in Appendix II of the Protocol concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 29 March 1983, T.I.A.S. No. 11085.

[40]The United States refers to Panel Report, para. 7.60, footnote 674.

to protect and conserve the life and health of sea turtles, by requiring that shrimp imported into the United States shall not have been harvested in a manner harmful to sea turtles. Section 609 is "necessary" in two different senses. First, efforts to reduce sea turtle mortality are "necessary" because all species of sea turtles are threatened with extinction. Second, Section 609 relating to the use of TEDs is "necessary" because other measures to protect sea turtles are not sufficient to allow sea turtles to move back from the brink of extinction.

B. *India, Pakistan and Thailand – Joint Appellees*

1. Non-requested Information from Non-governmental Organizations

29. Joint Appellees submit that the Panel's ruling rejecting non-requested information is correct and should be upheld. According to Joint Appellees, the United States misinterprets Article 13 of the DSU in arguing that nothing in the DSU prohibits panels from considering information merely because the information was unsolicited. The Panel correctly noted that, "pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel."[41] It is evident from Article 13 that Members have chosen to establish a formalized system for the collection of information, which gives a panel discretion to determine the information it needs to resolve a dispute. Panels have no obligation to consider unsolicited information, and the United States is wrong to argue that they do.

30. According to Joint Appellees, when a panel does seek information from an individual or body within a Member's jurisdiction, that panel has an obligation to inform the authorities of that Member. This demonstrates that a panel retains control over the information sought, and also that the panel is required to keep the Members informed of its activities. The process accepted by the Members necessarily implies three steps: a panel's decision to seek technical advice; the notification to a Member that such advice is being sought within its jurisdiction; and the consideration of the requested advice. In the view of Joint Appellees, the interpretation offered by the United States would eliminate the first two of these three steps, thereby depriving a panel of its right to decide whether it needs supplemental information, and what type of information it should seek; as well as depriving Members of their right to know that information is being sought from within their jurisdiction.

[41]Joint Appellees refer to Panel Report, para. 7.8.

31. Joint Appellees point to Appendix 3 of the DSU, which sets out Working Procedures for panels, and especially paragraphs 4 and 6 thereof, which limit the right to present panels with written submissions to parties and third parties. Thus, Joint Appellees argue, Members that are not parties or third parties cannot avail themselves of the right to present written submissions. It would be unreasonable, in the view of Joint Appellees, to interpret the DSU as granting the right to submit an unsolicited written submission to a non-Member, when many Members do not enjoy a similar right.

32. Joint Appellees maintain that, if carried to its logical conclusion, the appellant's argument could result in panels being deluged with unsolicited information from around the world. Such information might be strongly biased, if nationals from Members involved in a dispute could provide unsolicited information. They argue that this would not improve the dispute settlement mechanism, and would only increase the administrative tasks of the already overburdened Secretariat.

33. Joint Appellees argue as well that parties to a panel proceeding might feel obliged to respond to all unsolicited submissions -- just in case one of the unsolicited submissions catches the attention of a panel member. Due process requires that a party know what submissions a panel intends to consider, and that all parties be given an opportunity to respond to all submissions. Finally, because Article 12.6 of the DSU requires that second written submissions of the parties be submitted simultaneously, if a party is permitted to append *amicus curiae* briefs to its second submission, other parties can be deprived of their right to respond and be heard.

2. Article XX of the GATT 1994

34. Joint Appellees maintain that the Panel's ruling on the chapeau of Article XX is correct and should be upheld by the Appellate Body. They underline that the appellant does not appeal either the Panel's conclusion that Section 609 violated Article XI:1 of the GATT 1994, or the Panel's decision to address the chapeau of Article XX before addressing sub-paragraph (b) or (g) of that Article. Nor does the United States dispute that it bears the burden of proving that its measure is within Article XX. The United States takes issue with the Panel's alleged application of the chapeau to protect against a "threat to the multilateral trading system", submitting that the Panel developed a new chapeau "interpretation", "analysis" or "test" to invalidate Section 609, thus impermissibly diminishing the rights of WTO Members. According to Joint Appellees, the appellant's argument is baseless and results from a mischaracterization of the Panel's decision. The Panel did not invent a new "interpretation", "analysis" or "test", nor did it simply interpret "unjustifiable" to mean "a threat to the multilateral trading system". Instead, the Panel rendered a well-reasoned decision fully

supported by the *WTO Agreement*, past GATT/WTO practice, and the accepted rules of interpretation set forth in the Vienna Convention on the Law of Treaties[42] (the "Vienna Convention").

35. Joint Appellees argue that the flaw in Section 609, and in the appellant's argument, is the appellant's failure to accept that conditioning access to markets for a given product upon the adoption of certain policies by exporting Members, can violate the *WTO Agreement*. A Member must seek multilateral solutions to trade-related environmental problems. The threat to the multilateral trade system cited by the Panel is unrelated to the appellant's support for TEDs or turtle conservation. The threat is much simpler: the United States has abused Article XX by unilaterally developing a trade policy, and unilaterally imposing this policy through a trade embargo, as opposed to proceeding down the multilateral path. The multilateral trade system is based on multilateral cooperation. If every WTO Member were free to pursue its own trade policy solutions to what it perceives to be environmental concerns, the multilateral trade system would cease to exist. By preventing the abuse of Article XX, the chapeau protects against threats to the multilateral trading system. The prevention of abuse and the prevention of threats to the multilateral trading system are therefore inextricably linked to the object, purpose and goals of Article XX of the GATT 1994.

36. Joint Appellees submit that on the basis of its interpretation of the term "unjustifiable" in the chapeau and in light of the object and purpose of Article XX of the GATT 1994 and the object and purpose of the *WTO Agreement*, the Panel concluded that the chapeau of Article XX permits Members to derogate from GATT provisions, but prohibits derogations which would constitute abuse of the exceptions contained in Article XX, thereby undermining the WTO multilateral trading system. According to Joint Appellees, what the appellant claims to be a new "test" for justifiability is nothing more than a restatement of the principle that the chapeau's object and purpose is to prevent the abuse of the Article XX exceptions, specifying more clearly what may result from such abuse. In the light of recent and past GATT/WTO practice, in particular the panel report in *United States – Restrictions on Imports of Tuna*[43], the Panel correctly interpreted the chapeau, identifying its object and purpose as the prevention of abuse of the Article XX exceptions, and associating the prevention of such abuse with the preservation of the multilateral trading system.

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

[43]Unadopted, DS29/R, 16 June 1994, para 5.26.

37. In the view of Joint Appellees, the Panel's decision mirrors the Appellate Body's reasoning in *United States – Gasoline*[44] and is therefore correct. The Appellate Body made three pronouncements in *United States – Gasoline* that influenced the Panel's ruling: first, that the chapeau, by its express terms, addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which the measure is applied[45]; second, that it is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of abuse of the exceptions of Article XX[46]; and, third, that the Appellate Body cautioned against the application of Article XX exceptions so as to "frustrate or defeat" legal obligations of the holder of rights under the GATT 1994.[47]

38. Joint Appellees state that, in examining Section 609, the Panel paid particular attention to the manner in which the embargo is applied, and the Panel noted that the appellant conditioned market access on the adoption by exporting Members of conservation policies comparable to its own. The Panel also found that the United States did not enter into negotiations before it imposed its import ban. The Panel concluded that Section 609 abused Article XX and posed a threat to the multilateral trading system. The Panel equated the prevention of the abuse of Article XX with the avoidance of measures that would "frustrate or defeat the purposes and objects of the General Agreement and the WTO Agreement or its legal obligations under the substantive rules of GATT by abusing the exception contained in Article XX."[48] The Panel buttressed its conclusion by referring to the related principles of good faith and *pacta sunt servanda*, and by citing the *Belgian Family Allowances*[49] panel report.

39. Should the Appellate Body decide to reverse the Panel's findings with respect to the chapeau of Article XX, Joint Appellees request that the Appellate Body rule that Section 609 is "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" in violation of the chapeau of Article XX. Consistently with its decision in *United States - Gasoline*[50], the Appellate Body should examine the manner in which Section 609 has been applied, and decide whether an

[44]Adopted 20 May 1996, WT/DS2/AB/R.

[45]*United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, page 22.

[46]*Ibid*.

[47]*Ibid*.

[48]Joint Appellees refer to Panel Report, para 7.40.

[49]Adopted 7 November 1952, BISD 1S/59.

[50]Adopted 20 May 1996, WT/DS2/AB/R.

Article XX exception is being abused so as to frustrate or defeat the substantive rights of the appellees under the GATT 1994.

40. Joint Appellees submit that, even leaving aside the "threat to the multilateral trading system" language of the Panel, there is "compelling evidence" in the record that the appellant abused Article XX and its exceptions. Joint Appellees maintain that this abuse takes several forms, each instance "grave", and, by itself, adequate to support a finding that Section 609 has been applied in an abusive manner so as to frustrate the substantive rights of the appellees under the *WTO Agreement*.

41. First, Section 609 was applied without a serious attempt to reach a cooperative multilateral solution with Joint Appellees. The importance of multilateralism should be clear to the United States because it is an integral provision of Section 609, has been emphasised at numerous GATT and WTO meetings, is reflected in Article 23.1 of the DSU and in Principle 12 of the Rio Declaration on Environment and Development[51], and was underscored by the Appellate Body in *United States - Gasoline*.[52] The chapeau violation that the United States committed in *United States - Gasoline* is, Joint Appellees believe, the same violation committed by the United States in this dispute.

42. Second, the United States discriminated impermissibly among exporting countries, and between exporting countries and the United States in, *inter alia*, the following ways: (a) "[t]he Panel found that the Appellant negotiated an agreement to protect and conserve sea turtles with some WTO Members, but did not propose the negotiation of such an agreement with the … Appellees until after having concluded its negotiations with the other Members. The Panel also found that Section 609 was already in effect against the Appellees by the time such negotiations were proposed"; (b) "[p]hase-in periods for the use of TEDs differed depending on the countries involved. 'Initially affected countries' had a three year phase-in period, while 'newly affected nations' were given four months or less to change shrimp harvesting practices"; and (c) Section 609 "discriminates between products based on non-product-related processes and production methods."

43. Third, Joint Appellees contend that the appellant's argument misconstrues key portions of the chapeau and of the Panel Report. The appellant's starting-point is that the Panel's findings are not based on the ordinary meaning of the phrase "unjustifiable discrimination" in the context in which it appears. The appellant also suggests that the only object and purpose of the chapeau is the prevention of "indirect protection". This interpretation is contradicted by recent WTO practice. The Appellate

[51]UN Doc. A/CONF. 151/5/Rev.1, 13 June 1992, 31 International Legal Materials 874.

[52]Adopted 20 May 1996, WT/DS2/AB/R, pp. 27-28.

Body Report in *United States - Gasoline*[53] stands for the proposition that "unjustifiable discrimination" has a meaning larger than "indirect protection". The appellant, in effect, suggests that justifiability should be determined by reference to the specific Article XX exception invoked. If discrimination were to be justified merely on the basis of the policy goals of the particular exception invoked, all trade measures that meet the requirements of an Article XX exception would, *ipso facto*, satisfy the requirements of the chapeau. The chapeau would be rendered meaningless -- in violation of the commonly accepted rule of treaty interpretation which requires that meaning and effect be given to all treaty terms. The principles enunciated in the Appellate Body Report in *United States - Gasoline* would also become null.

44. Joint Appellees argue that both the Appellate Body in *United States – Gasoline*[54] and the Panel in the present case, recognized that the Article XX chapeau must be interpreted in light of the object and purpose of the *WTO Agreement*. This does not mean re-incorporating substantive GATT provisions into the analysis through the chapeau; it means instead examining a proposed Article XX derogation from the perspective of the broader policy goals of the *WTO Agreement*. The Panel identified two such goals: endeavouring to find cooperative solutions to trade problems; and preventing the risk that a multiplicity of conflicting trade requirements, each justified by reference to Article XX, could emerge. Section 609 jeopardizes both goals and poses a threat to the multilateral trading system.

45. Should the Appellate Body decide to reverse the Panel's legal findings with respect to the chapeau of Article XX and rule that Section 609 meets the requirements of the chapeau, Joint Appellees request that the Appellate Body make legal findings on Article XX(b) and Article XX(g) of the GATT 1994. They incorporate by reference their submissions to the Panel with respect to the interpretation of Article XX(b) and Article XX(g), while noting at the same time that there are persuasive reasons for following the interpretative approach adopted by the Panel in examining the chapeau first. Not only does the concept of judicial economy favour such an analysis, but also none of the participants has questioned the Panel's interpretative approach in their submissions (although, Joint Appellees note, one third participant, Australia, did comment with disapproval on this approach).

[53]Adopted 20 May 1996, WT/DS2/AB/R.

[54]*Ibid*.

C. *Malaysia - Appellee*

1. Non-requested Information from Non-governmental Organizations

46. Malaysia submits that the Panel ruled correctly on this issue and that its ruling should be upheld as there is nothing in the DSU that *permits* the admission of unsolicited briefs from non-governmental organizations. Malaysia does not agree with the United States that there is nothing in the DSU *prohibiting* panels from considering information just because the information was offered unsolicited. Under Article 13 of the DSU, the prerequisite for invocation of that provision is that a panel must "seek" information. In the view of Malaysia, the Panel correctly noted that the initiative to seek information and to select the source of information rests with the Panel. The Panel could not consider unsolicited information. In the alternative, should the Appellate Body accept the United States argument that panels may accept *amicus curia* briefs, it must be left to the complete discretion of panel members whether or not to read them. A panel's decision not to read the briefs cannot constitute a procedural mistake and cannot influence the outcome of a panel report.

2. Article XX of the GATT 1994

47. Malaysia maintains that the Panel's decision concerning Article XX of the GATT 1994 represents a balanced view of the requirements of the provisions of the *WTO Agreement*, rules of treaty interpretation and GATT practice. The appellant misconceives the Panel's findings: the Panel did not in any way allude to the supremacy of trade concerns over non-trade concerns, and did not fail to recognize that most treaties have no single, undiluted object and purpose but a variety of different objects and purposes. The Panel in fact alluded to the first, second and third paragraphs of the preamble to the *WTO Agreement*, which make reference to different objects and purposes. Moreover, in Malaysia's view, the appellant misapplies the principle in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*[55] to the facts of this case, and misconstrues the Panel's application of the *Belgian Family Allowances*[56] panel report.

48. To Malaysia, the Panel's "threat to the multilateral trading system" analysis does not constitute a new test, but is in fact a restatement of the approach taken by the Panel that Members are not allowed to resort to measures that would undermine the multilateral trading system and thus abuse the exceptions contained in Article XX. The Panel itself states that its findings are the result of the

[55]Adopted 16 January 1998, WT/DS50/AB/R.

[56]Adopted 7 November 1952, BISD 1S/59.

application of the interpretative methods required by Article 3.2 of the DSU and that its process of interpretation does not add to Members' obligations in contravention of Article 3.2 of the DSU.

49. It was also noted by Malaysia that the Panel found on the facts that the import ban is applied even on TED-caught shrimp, as long as the country has not been certified; certification is only granted if comprehensive requirements regarding the use of TEDs by fishing vessels are applied by the exporting country concerned or if shrimp trawling operations of the exporting country take place exclusively in waters in which sea turtles do not occur. On the basis of these findings, the Panel concluded that the United States measure constitutes unjustifiable discrimination between countries where the same conditions prevail.

50. Malaysia believes that the Panel relied in large measure on the Appellate Body Report in *United States – Gasoline*.[57] Although the requirement of use of TEDs is applied to both United States and foreign shrimp trawlers, Malaysia contends that Section 609 violates the chapeau prohibition of "unjustifiable discrimination between countries where the same conditions prevail": not all species of sea turtles covered by Section 609 and found in Malaysia and the United States are alike -- Kemp's ridley and loggerhead turtles, which occur in the United States, are absent or occur only in negligible numbers in Malaysian waters; the habitats of these turtles do not coincide with areas of shrimp trawling operations in Malaysia; certain countries which have been exempted from TED requirements are harvesting sea turtles commercially and exploiting the eggs; and the time given to countries to comply with the requirements of Section 609 varied.

51. In response to the appellant's statement that it has taken steps to assist foreign shrimp fishermen in adopting turtle conservation measures, Malaysia states that there has been no transfer of TEDs technology to the government and industries in Malaysia, apart from participation by Malaysia in one regional workshop.

52. Malaysia's submissions on legal issues arising under Article XX(b) and Article XX(g) have been addressed by the Panel, at paragraphs 3.213, 3.218-3.221, 3.231, 3.233, 3.236, 3.240, 3.247, 3.257, 3.266, 3.271-3.275, 3.286-3.288 and 3.293 of the Panel Report.

[57]Adopted 20 May 1996, WT/DS2/AB/R.

D. *Arguments of Third Participants*

1. Australia

53. Australia states that with respect to unsolicited submissions to the Panel by non-governmental organizations, the United States appears to suggest that the Panel's legal interpretation of the provisions of the DSU would limit the discretion the DSU affords to panels in choosing the sources of information they should consider. However, in the view of Australia, nothing in the Panel Report suggests that the Panel saw any legal obstacles to its requesting information from the non-governmental sources, if it had so wished. The decision of the Panel not to seek such information would appear to reflect the exercise of its discretion as provided by the DSU, and was not the result of any perceived legal obstacles. Australia notes that the United States has not claimed that the Panel's exercise of its discretion in this matter was inappropriate or involved an error in law.

54. Australia believes that the Panel correctly found that Section 609 constitutes "unjustifiable discrimination between countries where the same conditions prevail". However, Australia supports the appeal by the United States of the Panel's finding that Section 609 "is not within the scope of measures permitted under the chapeau of Article XX." Australia submits that the Appellate Body should complete the analysis under Article XX and find that the United States has not demonstrated that its measure is in conformity with Article XX, including the provisions of the chapeau. Australia's concerns are that the United States has sought to impose a unilaterally determined conservation measure through restrictions on trade, and has not explored the scope for working cooperatively with other countries to identify internationally shared concerns about sea turtle conservation issues and consider ways to address these concerns. Therefore, the United States has imposed Section 609 in a manner that constitutes unjustifiable discrimination between countries where the same conditions prevail and also a disguised restriction on international trade.

55. Australia agrees with the United States that the Panel failed to interpret the terms of the chapeau of Article XX requiring that measures not be applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in accordance with customary rules of interpretation of public international law, in particular, with its ordinary meaning and in context.

56. In Australia's view, the Panel's decision to examine first whether Section 609 met the requirements of the chapeau before considering whether it met the requirements of any of the paragraphs of Article XX may not necessarily have been an error in law, but contributed to the Panel's errors in its examination of Section 609 under Article XX. Australia argues that it is preferable to

begin examination of the legal issues raised by Article XX by considering the policy objective of the measure, and the connection between the policy objective and the measure, before turning to the chapeau. This approach would enable the examination of all aspects of the case that may be relevant in determining whether a particular measure meets the requirements of the chapeau. There is nothing in the wording of Article XX, read in its context and in the light of the object and purposes of the GATT 1994 and the *WTO Agreement*, to suggest that it is intended to exclude particular classes or types of measures from its coverage. The Panel erred in law in conducting this generalized inquiry. By its terms, Article XX would seem capable of application only on a case-by-case basis.

57. Article XX contains a series of tests designed to ensure that its provisions cannot be abused. There must be a presumption that a measure which meets the requirements of Article XX will not "undermine the WTO multilateral trading system." According to Australia, there is no textual basis for interpreting "unjustifiable discrimination" in such a broad manner that it becomes an independent test of this issue. Under the Panel's interpretation, the chapeau of Article XX could serve to nullify the effects of the paragraphs of that Article, rather than acting as a safeguard against their abuse.

58. Australia agrees with the United States that the Panel's interpretation of "unjustifiable discrimination" is based on an incorrect interpretation and application of the object and purpose of the *WTO Agreement* in construing the GATT 1994. The Panel has projected a view of the relationship between the objectives of the WTO multilateral trading system and environmental considerations which is at odds with the Ministerial Decision on Trade and Environment.[58]

59. At the same time, to Australia, the alternative interpretation of "unjustifiable discrimination" put forward by the United States -- i.e. that discrimination is not "unjustifiable" where the policy goal of the Article XX exemption being applied provides a rationale for the justification -- is in error. This interpretation would weaken the important safeguard represented by the chapeau of Article XX of avoiding the abuse or illegitimate use of the Article XX exceptions. This interpretation confuses the tests applied under the two tiers of Article XX, fails to give effect to all the terms of the treaty and is not based on the ordinary meaning of "unjustifiable discrimination" in its context and in the light of the object and purpose of the *WTO Agreement* and the GATT 1994.

60. Australia maintains that Section 609 is applied by the United States in a manner constituting an unjustifiable discrimination and a disguised restriction on international trade. Australia observes that the only justification the United States appears to offer for Section 609 is that it is required to

[58]Adopted by Ministers at the Meeting of the Trade Negotiations Committee at Marrakesh, 14 April 1994.

enforce a unilaterally determined conservation measure. However, Australia argues that the United States has not demonstrated that it has adequately explored means of addressing its concerns about shrimp harvesting practices and turtle conservation in other countries through cooperation with the governments concerned.

61. It is the view of Australia that Section 609 does not reasonably and properly differentiate between countries based on the risks posed to sea turtles in the exporting country's shrimp fishery. The Panel focused on exports of wild shrimp, and it is misleading to suggest that the Panel drew conclusions about whether the same conditions prevailed in certain other circumstances with respect to shrimp not subject to the import prohibition. Furthermore, the United States has provided no evidence that it took into account the views of other countries about sea turtle conservation issues within their jurisdictions, or their respective national programs, in making its determination of "countries where the same conditions prevail". In particular, the United States has provided no evidence that it considered the possibility that other Members may have had sea turtle conservation programs in place which differed from that of the United States but which were comparable and appropriate for their circumstances. Australia argues that the United States refused to certify Australia under Section 609 even though Australia's sea turtle conservation regime "extends well beyond protecting turtles from shrimping nets and … includes cooperative programs with the shrimp industry to limit turtle bycatch."

62. In Australia's view, the legal obligations of the United States under the chapeau of Article XX required the United States to explore adequately means of mitigating the discriminatory and trade restrictive application of its measure. In particular, given the transboundary and global character of the environmental concern involved in this dispute, the United States should have consulted with affected Members to see whether the discrimination imposed by the measure in dispute could have been avoided, whether the restrictions on trade were required, whether alternative approaches were available, and whether the incidence of any trade measures could have been reduced.

2. Ecuador

63. Ecuador endorses the Panel's finding that Section 609 is inconsistent with Article XI:1 of the GATT 1994 and cannot be justified under Article XX of the GATT 1994. Ecuador is participating as a third party in this case in order to defend basic principles, such as the principle reaffirming that relations among states should be established on the basis of international law -- since it is unacceptable that one state impose its domestic policy objectives upon other states -- as well as the observance of more specific principles and aspects set forth in the agreements governing the

multilateral trading system. These include non-discrimination in national treatment, the protection of the environment and the implementation of environmental policy.

64. According to Ecuador, this dispute does not concern the desirability of implementing some kind of conservation policy, to which Ecuador attaches the utmost importance, but rather the manner in which such a policy should be implemented. It is unacceptable that internal legislation is applied in an arbitrary manner, creating a high degree of uncertainty, and consequently prejudice, in a sector that is central to Ecuador's national economy. Ecuador endorses the Panel's view that Members are free to establish their own environmental policies in a manner consistent with their WTO obligations.

3. European Communities

65. With respect to unsolicited submissions to a panel by non-governmental organizations, the European Communities asserts that Article 13 of the DSU clearly gives a panel the "pro-active discretion" to "seek" certain information that the panel believes may be relevant to the case at hand. In addition, non-governmental organizations are free to publish their views so that their opinion is heard by the general public, which could include the parties to a dispute, the WTO Secretariat or the members of a panel. However, the European Communities "wonders whether the text of the DSU could be interpreted so widely" as to give non-governmental organizations the right to file submissions directly to a panel.

66. The European Communities contends that Article 13 of the DSU "does not oblige panels to 'accept' non-requested information which was not 'sought' for the purposes of a dispute settlement procedure." Panels should therefore reject submissions from non-governmental organizations when the panel itself had not requested such submissions. However, in the view of the European Communities, if a panel were interested in the information contained in an *amicus curiae* brief from a non-governmental organization, it would have the right to request and receive (to "seek") exactly the same information as had first been sent to it in an unsolicited manner. The European Communities agrees with the Panel that a Member, party to a dispute, is free to put forward as part of its own submission, a submission of a non-governmental organization that it considers relevant. The European Communities notes that its comments are based on the current language of Article 13 of the DSU.

67. The European Communities states further that the issues at stake in this dispute concern principles to which it attaches great importance, such as respect for the environment and the functioning of the multilateral trading system. The European Communities is bound by the text of the

Treaty Establishing the European Community[59] to ensure a harmonious and balanced development of economic activities with respect for the environment. The principle of sustainable development, also laid down in the first paragraph of the preamble to the *WTO Agreement*, as well as the precautionary principle, play an important role in the implementation of all EC policies. The EC position is mirrored in public international law by statements of the International Court of Justice, stressing the significance of respect for the environment.[60]

68. The European Communities is convinced that international cooperation is the most effective means to address global and transboundary environmental problems, rather than unilateral measures which may be less environmentally effective and more trade disruptive. Economic performance and environmental performance are not necessarily incompatible. The European Communities asserts that "[w]hile countries have the sovereign right to design and implement their own environmental policies through the measures they consider appropriate to protect their domestic environment -- including the life and health of humans, animals and plants -- all countries have a responsibility to contribute to the solution of international environmental problems." Thus, the European Communities considers that, "in general, the most effective means to attain the shared objectives relating to the conservation of global resources is by proceeding through the process of international co-operation."

69. To the European Communities, the approach to Article XX developed by previous panels and followed by the Appellate Body in *United States - Gasoline*[61] -- that is, first examining whether a measure falls under one of the exceptions set out in paragraphs (a) to (j) of Article XX and, then, making an inquiry under the chapeau -- makes logical sense and could reasonably have been applied by the Panel in this case.

70. The European Communities agrees with the United States that it would be wrong for trade concerns to prevail over all other concerns in all situations under WTO rules. Article XX should not be construed so that trade concerns always prevail over the non-trade concerns reflected in that Article, including environmental concerns and those related to health and other legitimate policy objectives. It is up to panels and the Appellate Body to judge each case on its own merits, taking into account Members' rights and obligations.

[59]Done at Rome, 25 March 1957, as amended.

[60]The European Communities refers to: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996), I.C.J Rep. pp. 241-242, para. 29; *Case Concerning the Gabcikovo-Nagymoros Project*, (1998) 37 International Legal Materials 162, para. 140.

[61]Adopted 20 May 1996, WT/DS2/AB/R.

71. The European Communities also agrees with the United States that the adoption of the Panel's "test" -- namely, whether a measure is of a type that would threaten the security and predictability of the multilateral trading system -- would make trade concerns paramount to all other concerns and is thus inconsistent with the object and purpose of the *WTO Agreement*.

72. In the view of the European Communities, certain species, in particular migratory species, may require application of protective measures beyond usual territorial boundaries. Sea turtles should be considered a globally shared environmental resource because they are included in Annex I of CITES and are a species protected under the Convention on the Conservation of Migratory Species of Wild Animals.[62] The appropriate way for Members concerned with the preservation of globally shared environmental resources to ensure such preservation is through internationally agreed solutions. Measures taken pursuant to such multilateral agreements would in general be allowed under the chapeau of Article XX.

73. However, the European Communities would not want to exclude the possibility, as a last resort, for a WTO Member, on its own, to take a "reasonable" measure with the aim of protecting and preserving a particular global environmental resource. However, such a measure would only be justified under exceptional circumstances and if consistent with general principles of public international law on "prescriptive jurisdiction". The Member would have to demonstrate that its environmentally protective measure was "reasonable", that is, no more trade restrictive than required to protect the globally shared environmental resource. Such a measure should be directly connected to the environmental objective and not go beyond what was required to limit the environmental damage. Finally, in such a case, the Member should have made genuine efforts to enter into cooperative environmental agreements with other Members. This is consistent with Principle 12 of the Rio Declaration on Environment and Development.

74. Given the Panel's factual finding that the United States did not enter into negotiations with the appellees before it imposed the import ban, the European Communities concludes that the United States has not demonstrated that a negotiated solution in respect of measures to protect sea turtles could not be found.

4. Hong Kong, China

75. Hong Kong, China states that it would be a "serious misunderstanding of the role of the WTO" if the multilateral trading system were viewed as impervious to environmental concerns. The

[62]Done at Bonn, 23 June 1979, 19 International Legal Materials 15.

WTO system does not, and should not, impede the adoption of non-arbitrary and justifiable measures to protect the environment. Hong Kong, China fully shares the Panel's concern that the chapeau of Article XX should not be interpreted in a way that will threaten the security and predictability of trade relations under the *WTO Agreement*. With reference to the Appellate Body Report in *United States – Gasoline*[63], Hong Kong, China contends that an examination under the chapeau should focus on the manner in which the measure is applied, and answer the key question of whether the manner of application constitutes an abuse of the exceptions. Questions pertaining to the policy objective of the measure concerned should be set aside in examining the consistency of a measure with the chapeau.

76. Hong Kong, China argues that in line with the views of the Appellate Body in *United States – Gasoline*[64], Article XX should not be read to establish an unqualified deviation from the GATT principle of non-discrimination. Taken together, the three elements of the chapeau of Article XX impose an obligation not to discriminate based on the origin of the product. With respect to "non-discrimination", the standard of obligation imposed by the chapeau is different from that imposed by Articles I and III of the GATT 1994, which is based on a strict interpretation of the concept of "like products". The chapeau of Article XX requires governments that intervene in order to achieve one of the objectives laid down in the sub-paragraphs of Article XX to ensure that the competitive conditions resulting from their intervention do not *de jure* or *de facto* favour their domestic products, nor the products of a certain specific origin. There should be no ambiguity about the exact content of the level of protection and the competitive conditions established as a result of government intervention. In the view of Hong Kong, China, a legal finding of inconsistency of a measure with the chapeau of Article XX is predicated on a factual finding that a particular measure does not respect the principle of non-discrimination. If this requirement is satisfied, a panel then can proceed to examine whether the requirements laid down in a sub-paragraph of Article XX have been satisfied as well.

77. Hong Kong, China contends that Section 609 violates the chapeau of Article XX to the extent that, after the October 1996 ruling of the United States Court of International Trade, shrimp caught by fishermen in uncertified countries are subject to the import ban even if they were caught with nets that are equipped with TEDs. The resulting competitive conditions show that Section 609 does not meet the requirement of no arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In addition, the 1993 Guidelines removed the possibility available to foreign producers to use any form of fishing other than TEDs in shrimp harvesting to avoid the incidental taking of sea turtles. This would be consistent with the Article XX chapeau only if the use of TEDs is

[63]Adopted 20 May 1996, WT/DS2/AB/R, page 22.

[64]*Ibid*.

proven to be the sole means by which the stated objective can be achieved. Otherwise, it must be acknowledged that other means may exist whose effectiveness can be demonstrated to be comparable to TEDs, and the United States must give the same treatment to shrimp harvested with measures that exporters could demonstrate are comparable in effectiveness to TEDs. Failure to do so renders Section 609 a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail. If the Appellate Body finds it necessary to examine the measure in question under sub-paragraphs (b) and (g) of Article XX, Hong Kong, China invites the Appellate Body to consider its arguments submitted to the Panel and reflected in the Panel Report, in particular, at paragraphs 4.44 and 4.45.

5. Nigeria

78. Nigeria confirms its views expressed in paragraph 4.53 of the Panel Report and requests the Appellate Body to uphold the Panel's decision. Nigeria shares the concern about the conservation and protection of sea turtles but, however, objects to the methods and measures for doing so. Nigeria's position is defined by paragraphs 169 and 171 of the Report (1996) of the Committee on Trade and Environment.[65]

[65]Nigeria refers to WT/CTE/1, 12 November 1996. Paragraph 169 of the Report states: "WTO Member governments are committed not to introduce WTO-inconsistent or protectionist trade restrictions or countervailing measures in an attempt to offset any real or perceived adverse domestic economic or competitiveness effects of applying environmental policies; not only would this undermine the open, equitable and non-discriminatory nature of the multilateral trading system, it would also prove counterproductive to meeting environmental objectives and promoting sustainable development. Equally, and bearing in mind the fact that governments have the right to establish their national environmental standards in accordance with their respective environmental and developmental conditions, needs and priorities, WTO Members note that it would be inappropriate for them to relax their existing national environmental standards or their enforcement in order to promote their trade. The CTE notes the statement in the 1995 Report on Trade and Environment to the OECD Council at Ministerial Level that there has been no evidence of a systematic relationship between existing environmental policies and competitiveness impacts, nor of countries deliberately resorting to low environmental standards to gain competitive advantages. The CTE welcomes similar policy statements made in other inter-governmental fora."

Paragraph 171 of the Report states: "The CTE notes that governments have endorsed in the results of the 1992 U.N. Conference on Environment and Development their commitment to Principle 12 of the *Rio Declaration* that "Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global problems should, as far as possible, be based on an international consensus." There is a clear complementarity between this approach and the work of the WTO in seeking cooperative multilateral solutions to trade concerns. The CTE endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both."

III. Procedural Matters and Rulings

A. *Admissibility of the Briefs by Non-governmental Organizations Appended to the United States Appellant's Submission*

79. The United States attached to its appellant's submission, filed on 23 July 1998, three Exhibits, containing comments by, or "*amicus curiae* briefs" submitted by, the following three groups of non-governmental organizations[66]: 1. the Earth Island Institute; the Humane Society of the United States; and the Sierra Club; 2. the Center for International Environmental Law ("CIEL"); the Centre for Marine Conservation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia; and 3. the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development. On 3 August 1998, CIEL *et al*. submitted a slightly revised version of their brief.

80. In their joint appellees' submission, filed on 7 August 1998, Joint Appellees object to these briefs appended to the appellant's submission, and request that the Appellate Body not consider these briefs. Joint Appellees argue that the appellant's submission, including its three Exhibits, is not in conformity with the stipulation in Article 17.6 of the DSU that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel", nor with Rule 21(2) of the *Working Procedures for Appellate Review*. They ask the Appellate Body to reject as irrelevant the factual assertions made in certain paragraphs of the appellant's submission, as well as the factual information presented in the Exhibits. In their view, because of the incorporation of unauthorized material through the attachment of the Exhibits, the appellant's submission could no longer be considered a "precise statement" as required by Rule 21(2) of the *Working Procedures for Appellate Review*. Rather, a number of the factual and legal assertions contained in the Exhibits go beyond the position taken by the appellant, resulting in confusion concerning the exact nature and linkage between the appeal and the three Exhibits.

81. Joint Appellees state further that the submission of Exhibits that present the views of non-governmental organizations, as opposed to the views of the appellant Member, is not contemplated in, or authorized by, the DSU or the *Working Procedures for Appellate Review*. Such submissions were

[66]In respect of these Exhibits, the United States stated the following: "Encouraging the use of TEDs in order to promote sea turtle conservation is a matter of great importance to a number of nongovernmental environmental organizations. Three groups of these organizations – each with specialized expertise in conservation of sea turtles and other endangered species – have prepared submissions reflecting their respective independent views with respect to the use of TEDs and other issues. The United States is submitting these materials to the Appellate Body for its information attached hereto as U.S. Appellant Exhibits 1-3." United States appellant's submission, para. 2, footnote 1.

not in conformity with Article 17.4 of the DSU, nor with Rule 28(1) of the *Working Procedures for Appellate Review*, which vests the discretion to request additional submissions with the Appellate Body. According to Joint Appellees, the decision of the appellant to attach the Exhibits to its submission gives rise both to contradictions and internal inconsistencies, and raises serious procedural and systemic problems. Joint Appellees maintain that by virtue of their incorporation into the appellant's submission, these pleadings are no longer "*amicus curiae* briefs", but instead have become a portion of the appellant's submission, and thus have also become what would appear to be the official United States position.

82. In its appellee's submission, also filed on 7 August 1998, Malaysia similarly urges the Appellate Body to rule that the three Exhibits appended to the United States appellant's submission are inadmissible in this appeal. Malaysia refers to its argument before the Panel that briefs from non-governmental organizations do not fall within Article 13 of the DSU. In addition, according to Malaysia, admission of the Exhibits would not be consonant with Article 17.6 of the DSU, or with Rule 21(2) of the *Working Procedures for Appellate Review*, as the United States appellant's submission and Exhibit 2 contain statements of facts. Moreover, Article 17.4 of the DSU only grants the right to make written and oral submissions to third parties. Articles 11 and 17.12 of the DSU are significant and serve to safeguard the admissibility of evidence before the Appellate Body. In the alternative, in the event the Appellate Body ruled that Exhibits 1-3 of the appellant's submission should be admitted, Malaysia submits rebuttals to each of the Exhibits.

83. On 11 August 1998, we issued a ruling on this preliminary procedural matter addressed to the participants and third participants, as follows:

> We have decided to accept for consideration, insofar as they may be pertinent, the legal arguments made by the various non-governmental organizations in the three briefs attached as exhibits to the appellant's submission of the United States, as well as the revised version of the brief by the Center for International Environmental Law *et al.*, which was submitted to us on 3 August 1998. The reasons for our ruling will be given in the Appellate Body Report.

84. In the same ruling, we addressed the following questions to the appellant, the United States:

> to what extent do you agree with or adopt any one or more of the legal arguments set out in the three briefs prepared by the non-governmental organizations and appended as exhibits to your appellant's submission? In particular, do you adopt the legal arguments stated therein relating to paragraphs (b) and (g) and the chapeau of Article XX of the GATT 1994?

85. We asked the United States to respond in writing to these questions by 13 August 1998, and offered an opportunity to the appellees and the third participants to respond, by 17 August 1998, to the answer filed by the United States concerning which aspects of these briefs it accepted and endorsed as part of its appeal as well as to the legal arguments made in the briefs by the non-governmental organizations. We noted at the time that Malaysia had already done the latter in Exhibits 1 through 3 attached to its appellee's submission.

86. On 13 August 1998, the United States replied as follows:

> The main U.S. submission reflects the views of the United States on the legal issues in this appeal. As explained in our appellant's submission, the three submissions prepared by non-governmental organizations reflect the independent views of those organizations …. These non-governmental organizations have a great interest, and specialized expertise, in sea turtle conservation and related matters. It is appropriate therefore that the Appellate Body be informed of those organizations' views. The United States is not adopting these views as separate matters to which the Appellate Body must respond.
>
> The United States agrees with the legal arguments in the submissions of the non-governmental organizations to the extent those arguments concur with the U.S. arguments set out in our main submission … .

87. On 17 August 1998, Joint Appellees filed a joint response, and Malaysia filed a separate one, to the matters raised in the reply of the United States, as well as in the Exhibits. Without prejudice to their view that the receipt and consideration by the Appellate Body of the briefs of non-governmental organizations attached to the appellant's submission is not authorized by the DSU or the *Working Procedures for Appellate Review*, Joint Appellees responded to certain legal arguments made in the briefs. Malaysia incorporated by reference its rebuttals to the briefs contained in its appellee's submission of 7 August 1998, and made certain additional comments in respect of each of the briefs. Also, on 17 August 1998, Hong Kong, China and Mexico filed statements in respect of the same matters. Hong Kong, China stated that the reply by the United States was unclear and that it was not possible, at that stage, to comment further on the legal arguments. For its part, Mexico stated that if the Appellate Body were to make use of arguments which are outside the terms of Article 17.6 of the DSU and which are not clearly and explicitly attributable to a Member that is a party to the dispute, the Appellate Body would exceed its powers under the DSU.

88. The admissibility of the briefs by certain non-governmental organizations which have been appended to the appellant's submission of the United States is a legal question raised by the appellees. This is a legal issue which does not relate to a finding of law made, or a legal interpretation developed, by the Panel in the Panel Report. For this reason, it has seemed appropriate to us to deal

with this issue separately from the issues raised by the appellant and addressed in the succeeding portions of this Appellate Body Report.

89. We consider that the attaching of a brief or other material to the submission of either appellant or appellee, no matter how or where such material may have originated, renders that material at least *prima facie* an integral part of that participant's submission. On the one hand, it is of course for a participant in an appeal to determine for itself what to include in its submission. On the other hand, a participant filing a submission is properly regarded as assuming responsibility for the contents of that submission, including any annexes or other attachments.

90. In the present appeal, the United States has made it clear that its views "on the legal issues in this appeal" are found in "the main U.S. submission." The United States has confirmed its agreement with the legal arguments in the attached submissions of the non-governmental organizations, to the extent that those arguments "concur with the U.S. arguments set out in [its] main submission."

91. We admit, therefore, the briefs attached to the appellant's submission of the United States as part of that appellant's submission. At the same time, considering that the United States has itself accepted the briefs in a tentative and qualified manner only, we focus in the succeeding sections below on the legal arguments in the main U.S. appellant's submission.

B. Sufficiency of the Notice of Appeal

92. In their joint appellee's submission, filed on 7 August 1998, Joint Appellees contend that the notice of appeal by the United States is defective in form and that the action is, therefore, not properly before the Appellate Body. They contend that the appellant's notice of appeal is both vague and cursory, and is, accordingly, not in compliance with the procedural requirements set forth in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. It is also not a proper "submission" filed "within the required time periods" pursuant to Rule 29 of the *Working Procedures for Appellate Review*. As a result, it is argued, the United States' appeal should be dismissed by the Appellate Body on this ground alone. The appellant's notice of appeal does not identify any legal errors in a manner sufficient for the appellees to develop a defence, and this, in the appellees' view, made it impossible for them to discern the issues that were going to be the subject of the appeal until the appellant filed its written submission 10 days later. This reduced the time available for all appellees to draft their responsive submissions from 25 days to 15 days.

93. According to Joint Appellees, vague notices of appeal should not be tolerated for at least two reasons. First, considerations of fundamental fairness and good faith mandate that the appellant should not be permitted to gain a tactical advantage through its failure to fulfil the requirements of the *Working Procedures for Appellate Review*. Second, carefully considered and well-drafted submissions benefit the decision-making process of the Appellate Body.

94. The United States in turn submits that the notice of appeal provided just the type of "*brief* statement of the nature of the appeal, including the allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel" (emphasis in the original) called for in Rule 20(2)(d) of the *Working Procedures for Appellate Review*. First, the notice of appeal explained that the United States was appealing from the findings on issues of law and related legal interpretations leading to the panel's conclusion that the United States measure was outside the scope of the Article XX chapeau. Second, the notice of appeal stated that the United States was appealing the Panel's procedural finding that the Panel lacked discretion to accept materials received from non-governmental sources. The appellees did not explain what additional information they believed should have been included in the notice of appeal. Furthermore, according to the United States, the appellees' allegation of prejudice was unfounded. The appellees well knew the basic argument that the United States would present to support its claim of legal error. Indeed, the appellees themselves had pointed out that the United States appeal rests solely on one leg, that is, that the Panel created a "threat to the multilateral trading system" test, and that the United States already raised this same issue at the interim review stage. In short, the appeal did not result in any unfair surprise to the appellees.

95. Rule 20(2) of the *Working Procedures for Appellate Review* provides, in relevant part:

> (2) A Notice of Appeal shall include the following information:
>
> …
>
> (d) a *brief statement of the nature of the appeal, including the allegations of errors* in the issues of law covered in the panel report and legal interpretations developed by the panel.(emphasis added)

The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being

appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.

96. In this instance, the notice of appeal does communicate the decision by the United States to appeal certain legal issues covered and certain legal interpretations developed in the Panel Report. The notice then refers to the two allegedly erroneous findings of the Panel being appealed from -- the finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX; and the finding that accepting non-requested information from non-governmental sources is incompatible with the DSU. The notice did not cite the numbered paragraphs of the Panel Report containing the above findings, but Joint Appellees do not assert that that is necessary. The references in the notice of appeal to these two findings of the Panel are terse[67], but there is no mistaking which findings or interpretations of the Panel the Appellate Body is asked to review. We accordingly hold that the notice of appeal by the United States meets the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*, and deny the request of Joint Appellees to dismiss the entire appeal summarily on the sole ground of insufficiency of the notice of appeal.

97. It remains only to recall that the right of a party to appeal from legal findings and legal interpretations reached by a panel in a dispute settlement proceeding is an important new right established in the DSU resulting from the Uruguay Round. We believe that the provisions of Rule 20(2) and other Rules of the *Working Procedures for Appellate Review* are most appropriately read so as to give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation. It is scarcely necessary to add that an appellee is, of course, always entitled to its full measure of due process. In the present appeal, perhaps the best indication that that full measure of due process was not in any degree impaired by the notice of appeal filed by the United States, is the developed and substantial nature of the appellees' submissions.

[67]The interpretation of the Panel concerning non-requested information, and its finding on the inconsistency of Section 609 with Article XX of the GATT 1994, are themselves cast in fairly terse language; Panel Report, paras. 7.8, fourth sentence, 7.49 and 7.62.

IV. Issues Raised in This Appeal

98. The issues raised in this appeal by the appellant, the United States, are the following:

(a) whether the Panel erred in finding that accepting non-requested information from non-governmental sources would be incompatible with the provisions of the DSU as currently applied; and

(b) whether the Panel erred in finding that the measure at issue constitutes unjustifiable discrimination between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX of the GATT 1994.

V. Panel Proceedings and Non-requested Information

99. In the course of the proceedings before the Panel, on 28 July 1997, the Panel received a brief from the Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL"). Both are non-governmental organizations. On 16 September 1997, the Panel received another brief, this time from the World Wide Fund for Nature. The Panel acknowledged receipt of the two briefs, which the non-governmental organizations also sent directly to the parties to this dispute. The complaining parties -- India, Malaysia, Pakistan and Thailand -- requested the Panel not to consider the contents of the briefs in dealing with the dispute. In contrast, the United States urged the Panel to avail itself of any relevant information in the two briefs, as well as in any other similar communications.[68] The Panel disposed of this matter in the following manner:

[68]Panel Report, para. 3.129

> *We had not requested such information* as was contained in the above-mentioned documents. We note that, pursuant to Article 13 of the DSU, the initiative to seek information and to select the source of information rests with the Panel. In any other situations, only parties and third parties are allowed to submit information directly to the Panel. *Accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied. We therefore informed the parties that we did not intend to take these documents into consideration*. We observed, moreover, that it was usual practice for parties to put forward whatever documents they considered relevant to support their case and that, *if any party in the present dispute wanted to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so. If this were the case, the other parties would have two weeks to respond to the additional material*. We noted that the United States availed themselves of this opportunity by designating Section III of the document submitted by the Center for Marine Conservation and the Center for International Environmental Law as an annex to its second submission to the Panel.[69](emphasis added)

100. We note that the Panel did two things. First, the Panel declared a legal interpretation of certain provisions of the DSU: i.e., that accepting non-requested information from non-governmental sources would be "incompatible with the provisions of the DSU as currently applied." Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties, in such case, two additional weeks to respond to the additional material. The United States appeals from this legal interpretation of the Panel.

101. It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel.[70] Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those

[69]Panel Report, para. 7.8.

[70]See Articles 4, 6, 9 and 10 of the DSU.

submissions considered by, a panel.[71] Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the DSU.

102. Article 13 of the DSU reads as follows:

> *Article 13*
>
> *Right to Seek Information*
>
> 1. *Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate*. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. *A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate*. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. *Panels may seek information from any relevant source* and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.(emphasis added)

103. In *EC Measures Affecting Meat and Meat Products (Hormones)*, we observed that Article 13 of the DSU[72] "enable[s] panels to seek information and advice as they deem appropriate in a particular case."[73] Also, in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that:

[71]Articles 10 and 12, and Appendix 3 of the DSU. We note that Article 17.4 of the DSU limits the right to appeal a panel report to parties to a dispute, and permits third parties which have notified the DSB of their substantial interest in the matter to make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

[72]As well as Article 11.2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

[73]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147.

> Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. *This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.* We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." *Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.*
>
> …
>
> In this case, we find that the *Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF.*[74] (emphasis added)

104. The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

105. It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. Article 12.2 goes on to direct that "[p]anel procedures should provide *sufficient flexibility* so as to *ensure high-quality panel reports* while *not unduly delaying the panel process.*"(emphasis added)

[74]Adopted 22 April 1998, WT/DS56/AB/R, paras. 84-86.

106. The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements … .*" (emphasis added)

107. Against this context of broad authority vested in panels by the DSU, and given the object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without "unduly delaying the panel process", it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between "requested" and "non-requested" information vanishes.

108. In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*. The fact that a panel may *motu proprio* have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.

109. Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. In the present case, the Panel did not reject the information outright. The Panel suggested instead, that, if any of the parties wanted "to put forward these documents, or parts of them, as part of their own submissions to

the Panel, they were free to do so." [75] In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word "seek" in Article 13.1 of the DSU. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

110. We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU. At the same time, we consider that the Panel acted within the scope of its authority under Articles 12 and 13 of the DSU in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.

VI. Appraising Section 609 Under Article XX of the GATT 1994

111. We turn to the second issue raised by the appellant, the United States, which is whether the Panel erred in finding that the measure at issue[76] constitutes unjustifiable discrimination between countries where the same conditions prevail and, thus, is not within the scope of measures permitted under Article XX of the GATT 1994.

A. *The Panel's Findings and Interpretative Analysis*

112. The Panel's findings, from which the United States appeals, and the gist of its supporting reasoning, are set forth below *in extenso*:

[75]Panel Report, para. 7.8.

[76]The United States measure at issue is referred to in this Report as "Section 609" or "the measure". By these terms, we mean Section 609 and the 1996 Guidelines.

> … [W]e are of the opinion that the *chapeau* [of] *Article XX*, interpreted within its context and in the light of the object and purpose of GATT and of the WTO Agreement, *only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilateral trading system*, thus also abusing the exceptions contained in Article XX. Such undermining and abuse would occur when a Member jeopardizes the operation of the WTO Agreement in such a way that guaranteed market access and nondiscriminatory treatment within a multilateral framework would no longer be possible. … We are of the view that a *type of measure adopted by a Member* which, on its own, may appear to have a relatively minor impact on the multilateral trading system, *may* nonetheless *raise a serious threat to that system if similar measures are adopted by the same or other Members*. Thus, by allowing such type of measures even though their individual impact may not appear to be such as to threaten the multilateral trading system, one would affect the security and predictability of the multilateral trading system. We consequently find that when considering a measure under Article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure*, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system.[77]
>
> In our view, if an interpretation of the chapeau of Article XX were to be followed which would allow a Member *to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Members of certain policies, including conservation policies*, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened. This follows because, if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. … Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.[78]

[77]Panel Report, para. 7.44.

[78]Panel Report, para. 7.45.

> … Section 609, as applied, is a measure conditioning access to the US market for a given product on the adoption by exporting Members of conservation policies that the United States considers to be comparable to its own in terms of regulatory programmes and incidental taking.[79]
>
> … it appears to us that, in light of the context of the term "unjustifiable" and the object and purpose of the WTO Agreement, *the US measure at issue constitutes unjustifiable discrimination* between countries where the same conditions prevail and thus is not within the scope of measures permitted under Article XX.[80]
>
> …
>
> We therefore find that *the US measure* at issue is *not within the scope of measures permitted under the chapeau of Article XX*.[81](emphasis added)

113. Article XX of the GATT 1994 reads, in its relevant parts:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …
>
> (*b*) necessary to protect human, animal or plant life or health;
>
> …
>
> (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

114. The Panel did not follow all of the steps of applying the "customary rules of interpretation of public international law" as required by Article 3.2 of the DSU. As we have emphasized numerous

[79]Panel Report, para. 7.48.

[80]Panel Report, para. 7.49.

[81]Panel Report, para. 7.62.

times[82], these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[83]

115. In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX. The Panel disregarded the fact that the introductory clauses of Article XX speak of the "manner" in which measures sought to be justified are "applied". In *United States - Gasoline*, we pointed out that the chapeau of Article XX "by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied*."[84](emphasis added) The Panel did not inquire specifically into how the *application* of Section 609 constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." What the Panel did, in purporting to examine the consistency of the measure with the chapeau of Article XX, was to focus repeatedly on the *design of the measure itself.* For instance, the Panel stressed that it was addressing "a particular situation where a Member has taken unilateral measures which, *by their nature*, could put the multilateral trading system at risk." [85](emphasis added)

116. The general design of a measure, as distinguished from its application, is, however, to be examined in the course of determining whether that measure falls within one or another of the paragraphs of Article XX following the chapeau. The Panel failed to scrutinize the *immediate*

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[82]See, for example, the Appellate Body Reports in: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17; *Japan - Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, paras. 45-46; *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 13 February 1998, WT/DS56/AB/R, para. 47; and *European Communities - Customs Classification of Certain Computer Equipment*, adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 85.

[83]I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), pp. 130-131.

[84]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[85]Panel Report, para. 7.60. The Panel also stated, in paras. 7.33-7.34 of the Panel Report:

> … Pursuant to the chapeau of Article XX, a measure may discriminate, but not in an 'arbitrary' or 'unjustifiable' manner.
>
> We therefore move to consider *whether the US measure* conditioning market access on the adoption of certain conservation policies by the exporting Member *could be considered as* '*unjustifiable*' *discrimination* … .(emphasis added)

context of the chapeau: i.e., paragraphs (a) to (j) of Article XX. Moreover, the Panel did not look into the object and purpose of the *chapeau of Article XX*. Rather, the Panel looked into the object and purpose of the *whole of the GATT 1994 and the WTO Agreement*, which object and purpose it described in an overly broad manner. Thus, the Panel arrived at the very broad formulation that measures which "undermine the WTO multilateral trading system"[86] must be regarded as "not within the scope of measures permitted under the chapeau of Article XX."[87] Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the chapeau of Article XX. In *United States - Gasoline*, we stated that it is "important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of *'abuse of the exceptions of* [*Article XX*]'."[88](emphasis added) The Panel did not attempt to inquire into how the measure at stake was being *applied in such a manner* as to constitute *abuse or misuse of a given kind of exception.*

117. The above flaws in the Panel's analysis and findings flow almost naturally from the fact that the Panel disregarded the sequence of steps essential for carrying out such an analysis. The Panel defined its approach as first "determin[ing] whether the measure at issue satisfies the conditions contained in the chapeau."[89] If the Panel found that to be the case, it said that it "shall then examine whether the US measure is covered by the terms of Article XX(b) or (g)." [90] The Panel attempted to justify its interpretative approach in the following manner:

> As mentioned by the Appellate Body in its report in the *Gasoline* case, in order for the justification of Article XX to be extended to a given measure, it must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clause of Article XX. We note that panels have in the past considered the specific paragraphs of Article XX before reviewing the applicability of the conditions contained in the chapeau. However, *as the conditions contained in the introductory provision apply to any of the paragraphs of Article XX, it seems equally appropriate to analyse first the introductory provision of Article XX*.[91](emphasis added)
>
> …

[86]See, for example, Panel Report, para. 7.44.

[87]Panel Report, para. 7.62.

[88]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[89]Panel Report, para. 7.29.

[90]*Ibid*.

[91]Panel Report, para. 7.28.

118. In *United States - Gasoline*, we enunciated the appropriate method for applying Article XX of the GATT 1994:

> In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions -- paragraphs (a) to (j) -- listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. *The analysis is*, in other words, *two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX*.[92](emphasis added)

119. The sequence of steps indicated above in the analysis of a claim of justification under Article XX reflects, not inadvertence or random choice, but rather the fundamental structure and logic of Article XX. The Panel appears to suggest, albeit indirectly, that following the indicated sequence of steps, or the inverse thereof, does not make any difference. To the Panel, reversing the sequence set out in *United States - Gasoline* "seems equally appropriate."[93] We do not agree.

120. The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exception threatened with abuse. The standards established in the chapeau are, moreover, necessarily broad in scope and reach: the prohibition of the *application* of a measure "in a manner which would constitute a means of *arbitrary* or *unjustifiable discrimination* between countries where the same conditions prevail" or "a *disguised restriction* on international trade."(emphasis added) When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

121. The consequences of the interpretative approach adopted by the Panel are apparent in its findings. The Panel formulated a broad standard and a test for appraising measures sought to be justified under the chapeau; it is a standard or a test that finds no basis either in the text of the chapeau or in that of either of the two specific exceptions claimed by the United States. The Panel, in effect, constructed an *a priori* test that purports to define a category of measures which, *ratione*

[92]Adopted 20 May 1996, WT/DS2/AB/R, p. 22.

[93]Panel Report, para 7.28.

materiae, fall outside the justifying protection of Article XX's chapeau.[94] In the present case, the Panel found that the United States measure at stake fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States. It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.

122. We hold that the findings of the Panel quoted in paragraph 112 above, and the interpretative analysis embodied therein, constitute error in legal interpretation and accordingly reverse them.

123. Having reversed the Panel's legal conclusion that the United States measure at issue "is not within the scope of measures permitted under the chapeau of Article XX" [95], we believe that it is our duty and our responsibility to complete the legal analysis in this case in order to determine whether Section 609 qualifies for justification under Article XX. In doing this, we are fully aware of our jurisdiction and mandate under Article 17 of the DSU. We have found ourselves in similar situations on a number of occasions. Most recently, in *European Communities - Measures Affecting the Importation of Certain Poultry Products*, we stated:

> In certain appeals, … the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel.[96]

In that case, having reversed the panel's finding on Article 5.1(b) of the *Agreement on Agriculture*, we completed the legal analysis by making a finding on the consistency of the measure at issue with Article 5.5 of the *Agreement on Agriculture.* Similarly, in *Canada - Certain Measures Concerning*

[94]See, for example, Panel Report, para. 7.50.

[95]Panel Report, para. 7.62.

[96]Adopted 23 July 1998, WT/DS69/AB/R, para. 156.

Periodicals[97], having reversed the panel's findings on the issue of "like products" under the first sentence of Article III:2 of the GATT 1994, we examined the consistency of the measure with the second sentence of Article III:2. And, in *United States – Gasoline* [98], having reversed the panel's findings on the first part of Article XX(g) of the GATT 1994, we completed the analysis of the terms of Article XX(g), and then examined the application of the measure at issue in that case under the chapeau of Article XX.

124. As in those previous cases, we believe it is our responsibility here to examine the claim by the United States for justification of Section 609 under Article XX in order properly to resolve this dispute between the parties. We do this, in part, recognizing that Article 3.7 of the DSU emphasizes that: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Fortunately, in the present case, as in the mentioned previous cases, we believe that the facts on the record of the panel proceedings permit us to undertake the completion of the analysis required to resolve this dispute.

B. *Article XX(g): Provisional Justification of Section 609*

125. In claiming justification for its measure, the United States primarily invokes Article XX(g). Justification under Article XX(b) is claimed only in the alternative; that is, the United States suggests that we should look at Article XX(b) only if we find that Section 609 does not fall within the ambit of Article XX(g).[99] We proceed, therefore, to the first tier of the analysis of Section 609 and to our consideration of whether it may be characterized as provisionally justified under the terms of Article XX(g).

126. Paragraph (g) of Article XX covers measures:

> relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

1. "Exhaustible Natural Resources"

127. We begin with the threshold question of whether Section 609 is a measure concerned with the conservation of "exhaustible natural resources" within the meaning of Article XX(g). The Panel, of

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

[98] Adopted 20 May 1996, WT/DS2/AB/R, pp. 19 ff.

[99] Additional submission of the United States, dated 17 August, 1998, para. 5.

course, with its "chapeau-down" approach, did not make a finding on whether the sea turtles that Section 609 is designed to conserve constitute "exhaustible natural resources" for purposes of Article XX(g). In the proceedings before the Panel, however, the parties to the dispute argued this issue vigorously and extensively. India, Pakistan and Thailand contended that a "reasonable interpretation" of the term "exhaustible" is that the term refers to "finite resources such as minerals, rather than biological or renewable resources."[100] In their view, such finite resources were exhaustible "because there was a limited supply which could and would be depleted unit for unit as the resources were consumed."[101] Moreover, they argued, if "all" natural resources were considered to be exhaustible, the term "exhaustible" would become superfluous.[102] They also referred to the drafting history of Article XX(g), and, in particular, to the mention of minerals, such as manganese, in the context of arguments made by some delegations that "export restrictions" should be permitted for the preservation of scarce natural resources.[103] For its part, Malaysia added that sea turtles, being living creatures, could only be considered under Article XX(b), since Article XX(g) was meant for "nonliving exhaustible natural resources".[104] It followed, according to Malaysia, that the United States cannot invoke both the Article XX(b) and the Article XX(g) exceptions simultaneously.[105]

128. We are not convinced by these arguments. Textually, Article XX(g) is *not* limited to the conservation of "mineral" or "non-living" natural resources. The complainants' principal argument is rooted in the notion that "living" natural resources are "renewable" and therefore cannot be "exhaustible" natural resources. We do not believe that "exhaustible" natural resources and "renewable" natural resources are mutually exclusive. One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, "renewable", are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities. Living resources are just as "finite" as petroleum, iron ore and other non-living resources.[106]

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[100]Panel Report, para. 3.237.

[101]*Ibid*.

[102]*Ibid*.

[103]Panel Report, para 3.238. India, Pakistan and Thailand referred, *inter alia*, to E/PC/T/C.II/QR/PV/5, 18 November 1946, p. 79.

[104]Panel Report, para. 3.240.

[105]*Ibid.*

[106]We note, for example, that the World Commission on Environment and Development stated: "The planet's species are under stress. There is growing scientific consensus that species are disappearing at rates never before witnessed on the planet … ." World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 13.

129. The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the *WTO Agreement* -- which informs not only the GATT 1994, but also the other covered agreements -- explicitly acknowledges "the objective of *sustainable development*[107]":

> The *Parties* to this Agreement,
>
> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand*, and *expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the *objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so* in a manner consistent with their respective needs and concerns at different levels of economic development, …[108](emphasis added)

130. From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".[109] It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the

[107]This concept has been generally accepted as integrating economic and social development and environmental protection See e.g., G. Handl, "Sustainable Development: General Rules versus Specific Obligations", in *Sustainable Development and International Law* (ed. W. Lang, 1995), p. 35; World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), p. 43.

[108]Preamble of the *WTO Agreement*.

[109]See *Namibia (Legal Consequences) Advisory Opinion* (1971) I.C.J. Rep., p. 31. The International Court of Justice stated that where concepts embodied in a treaty are "by definition, evolutionary", their "interpretation cannot remain unaffected by the subsequent development of law … . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." See also *Aegean Sea Continental Shelf Case*, (1978) I.C.J. Rep., p. 3; Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), p. 1282 and E. Jimenez de Arechaga, "International Law in the Past Third of a Century", (1978-I) 159 *Recueil des Cours* 1, p. 49.

Sea[110] ("UNCLOS"), in defining the jurisdictional rights of coastal states in their exclusive economic zones, provides:

> *Article 56*
> *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*
>
> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the *natural resources, whether living or non-living,* of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, …(emphasis added)

The UNCLOS also repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity[111] uses the concept of "biological resources". Agenda 21[112] speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources". In addition, the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, recites:

> Conscious that an important element of development lies in the conservation and management of *living natural resources* and that migratory species constitute a significant part of these resources; …[113](emphasis added)

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[110]Done at Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122; 21 International Legal Materials 1261. We note that India, Malaysia and Pakistan have ratified the UNCLOS. Thailand has signed, but not ratified the Convention, and the United States has not signed the Convention. In the oral hearing, the United States stated: "… we have not ratified this Convention although, with respect to fisheries law, for the most part we do believe that UNCLOS reflects international customary law." Also see, for example, W. Burke, *The New International Law of Fisheries* (Clarendon Press, 1994), p. 40:

> [the] coastal state sovereign rights over fisheries in a 200-mile zone are now considered part of customary international law. The evidence of state practice supporting this derives not only from the large number of coastal states claiming an EEZ [exclusive economic zone] in which such rights are advanced, but also from the fact that many of those states not claiming an EEZ assert rights not appreciably different than those in an EEZ. The provision for sovereign rights of the coastal state in [Article 56.1(a) of] the 1982 Convention is also a part of this evidence, but has particular weight because of the uniformity of state practice outside the Convention.

[111]Done at Rio de Janeiro, 5 June 1992, UNEP/Bio.Div./N7-INC5/4; 31 International Legal Materials 818. We note that India, Malaysia and Pakistan have ratified the Convention on Biological Diversity, and that Thailand and the United States have signed but not ratified the Convention.

[112]Adopted by the United Nations Conference on Environment and Development, 14 June 1992, UN Doc. A/CONF. 151/26/Rev.1. See, for example, para. 17.70, ff.

[113]Final Act of the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn, 23 June 1979, 19 International Legal Materials 11, p. 15. We note that India and Pakistan have ratified the Convention on the Conservation of Migratory Species of Wild Animals, but that Malaysia, Thailand and the United States are not parties to the Convention.

131. Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. [114] Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g).[115] We hold that, in line with the principle of effectiveness in treaty interpretation[116], measures to conserve exhaustible natural resources, whether *living* or *non-living*, may fall within Article XX(g).

132. We turn next to the issue of whether the living natural resources sought to be conserved by the measure are "exhaustible" under Article XX(g). That this element is present in respect of the five species of sea turtles here involved appears to be conceded by all the participants and third participants in this case. The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes "all species *threatened with extinction* which are or may be affected by trade."[117](emphasis added)

133. Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said:

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[114]Furthermore, the drafting history does not demonstrate an intent on the part of the framers of the GATT 1947 *to exclude* "living" natural resources from the scope of application of Article XX(g).

[115]*United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91, para. 4.9; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, adopted 22 March 1988, BISD 35S/98, para. 4.4.

[116]See the following Appellate Body Reports: *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; and *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, adopted 25 February 1997, WT/DS24/AB/R, p. 16. See also Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's, 1992), pp. 1280-1281; M.S. McDougal, H.D. Lasswell and J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven/Martinus Nijhoff, 1994), p. 184; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 118; D. Carreau, *Droit International* (Editions A. Pedone, 1994), para. 369; P. Daillier and A. Pellet, *Droit International Public*, 5th ed. (L.G.D.J., 1994), para. 172; L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público* (Tipografica Editora Argentina, 1985), pp. 109-110 and M. Diez de Velasco, *Instituciones de Derecho Internacional Público*, 11th ed. (Tecnos, 1997), p. 169.

[117]CITES, Article II.1.

> … Information brought to the attention of the Panel, including documented statements from the experts, tends to *confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea*. …[118](emphasis added)

The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.[119] Of course, it is not claimed that *all* populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).

134. For all the foregoing reasons, we find that the sea turtles here involved constitute "exhaustible natural resources" for purposes of Article XX(g) of the GATT 1994.

2. "Relating to the Conservation of [Exhaustible Natural Resources]"

135. Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources. It is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants and third participants in this appeal, indeed, by the vast majority of the nations of the world.[120] None of the parties to this dispute question the genuineness of the commitment of the others to that policy.[121]

136. In *United States - Gasoline*, we inquired into the relationship between the baseline establishment rules of the United States Environmental Protection Agency (the "EPA") and the

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[118]Panel Report, para. 7.53.

[119]See Panel Report, para. 2.6. The 1987 Regulations, 52 Fed. Reg. 24244, 29 June 1987, identified five species of sea turtles as occurring within the areas concerned and thus falling under the regulations: loggerhead (*Caretta caretta*), Kemp's ridley (*Lepidochelys kempi*), green (*Chelonia mydas*), leatherback (*Dermochelys coriacea*) and hawksbill (*Eretmochelys imbricata*). Section 609 refers to "those species of sea turtles the conservation of which is the subject of regulations promulgated by the Secretary of Commerce on 29 June, 1987."

[120]There are currently 144 states parties to CITES.

[121]We note that all of the participants in this appeal are parties to CITES.

conservation of natural resources for the purposes of Article XX(g). There, we answered in the affirmative the question posed before the panel of whether the baseline establishment rules were "primarily aimed at" the conservation of clean air.[122] We held that:

> … The baseline establishment rules whether individual or statutory, were designed to permit scrutiny and monitoring of the level of compliance of refiners, importers and blenders with the "non-degradation" requirements. Without baselines of some kind, such scrutiny would not be possible and the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated. … We consider that, given that substantial relationship, the baseline establishment rules cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air in the United States for the purposes of Article XX(g).[123]

The substantial relationship we found there between the EPA baseline establishment rules and the conservation of clean air in the United States was a close and genuine relationship of ends and means.

137. In the present case, we must examine the relationship between the general structure and design of the measure here at stake, Section 609, and the policy goal it purports to serve, that is, the conservation of sea turtles.

138. Section 609(b)(1) imposes an import ban on shrimp that have been harvested with commercial fishing technology which may adversely affect sea turtles. This provision is designed to influence countries to adopt national regulatory programs requiring the use of TEDs by their shrimp fishermen. In this connection, it is important to note that the general structure and design of Section 609 *cum* implementing guidelines is fairly narrowly focused. There are two basic exemptions from the import ban, both of which relate clearly and directly to the policy goal of conserving sea turtles. First, Section 609, as elaborated in the 1996 Guidelines, excludes from the import ban shrimp harvested "under conditions that do not adversely affect sea turtles". Thus, the measure, by its terms, excludes from the import ban: aquaculture shrimp; shrimp species (such as *pandalid* shrimp) harvested in water areas where sea turtles do not normally occur; and shrimp harvested exclusively by artisanal methods, even from non-certified countries.[124] The harvesting of such shrimp clearly does not affect sea turtles. Second, under Section 609(b)(2), the measure exempts from the import ban shrimp caught in waters subject to the jurisdiction of certified countries.

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[122]Adopted 20 May 1996, WT/DS2/AB/R, p. 19.

[123]*Ibid*.

[124]See the 1996 Guidelines, p. 17343.

139. There are two types of certification for countries under Section 609(b)(2). First, under Section 609(b)(2)(C), a country may be certified as having a fishing environment that does not pose a threat of incidental taking of sea turtles in the course of commercial shrimp trawl harvesting. There is no risk, or only a negligible risk, that sea turtles will be harmed by shrimp trawling in such an environment.

140. The second type of certification is provided by Section 609(b)(2)(A) and (B). Under these provisions, as further elaborated in the 1996 Guidelines, a country wishing to export shrimp to the United States is required to adopt a regulatory program that is comparable to that of the United States program and to have a rate of incidental take of sea turtles that is comparable to the average rate of United States' vessels. This is, essentially, a requirement that a country adopt a regulatory program requiring the use of TEDs by commercial shrimp trawling vessels in areas where there is a likelihood of intercepting sea turtles.[125] This requirement is, in our view, directly connected with the policy of conservation of sea turtles. It is undisputed among the participants, and recognized by the experts consulted by the Panel[126], that the harvesting of shrimp by commercial shrimp trawling vessels with mechanical retrieval devices in waters where shrimp and sea turtles coincide is a significant cause of sea turtle mortality. Moreover, the Panel did "not question … the fact generally acknowledged by the experts that TEDs, when properly installed and adapted to the local area, would be an effective tool for the preservation of sea turtles."[127]

141. In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake[128], it appears to us that Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States - Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States.

[125]See the 1996 Guidelines, p. 17343.

[126]For example, Panel Report, paras. 5.91-5.118.

[127]Panel Report, para. 7.60, footnote 674.

[128]We focus on the *application* of the measure below, in Section VI.C of this Report.

142. In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

3. "If Such Measures are Made Effective in conjunction with Restrictions on Domestic Production or Consumption"

143. In *United States – Gasoline*, we held that the above-captioned clause of Article XX(g),

> … is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.[129]

In this case, we need to examine whether the restrictions imposed by Section 609 with respect to imported shrimp are also imposed in respect of shrimp caught by United States shrimp trawl vessels.

144. We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting of imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls.[130] These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles" [131], with certain limited exceptions.[132] Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions.[133] The United States government currently relies on monetary sanctions and civil penalties for enforcement.[134] The government has the ability to seize

[129]Adopted 20 May 1996, WT/DS2/AB/R, pp. 20-21.

[130]52 Fed. Reg. 24244, 29 June 1987.

[131]See the 1996 Guidelines, p. 17343.

[132]According to the 1996 Guidelines, p. 17343, the exceptions are: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Service determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs.

[133]Endangered Species Act, Section 11.

[134]Statement by the United States at the oral hearing.

shrimp catch from trawl vessels fishing in United States waters and has done so in cases of egregious violations.[135] We believe that, in principle, Section 609 is an even-handed measure.

145. Accordingly, we hold that Section 609 is a measure made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).

C. *The Introductory Clauses of Article XX: Characterizing Section 609 under the Chapeau's Standards*

146. As noted earlier, the United States invokes Article XX(b) only if and to the extent that we hold that Section 609 falls outside the scope of Article XX(g). Having found that Section 609 does come within the terms of Article XX(g), it is not, therefore, necessary to analyze the measure in terms of Article XX(b).

147. Although provisionally justified under Article XX(g), Section 609, if it is ultimately to be justified as an exception under Article XX, must also satisfy the requirements of the introductory clauses -- the "chapeau" -- of Article XX, that is,

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are *not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or *a disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (emphasis added)

We turn, hence, to the task of appraising Section 609, and specifically the manner in which it is applied under the chapeau of Article XX; that is, to the second part of the two-tier analysis required under Article XX.

1. General Considerations

148. We begin by noting one of the principal arguments made by the United States in its appellant's submission. The United States argues:

[135]Statement by the United States at the oral hearing.

> In context, *an alleged "discrimination between countries where the same conditions prevail" is not "unjustifiable" where the policy goal of the Article XX exception being applied provides a rationale for the justification.* If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection.[136]
>
> …
>
> [A]n evaluation of whether a measure constitutes "unjustifiable discrimination [between countries] where the same conditions prevail" should take account of *whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception*, rather than for protectionist reasons, *the measure does not amount to an abuse of the applicable Article XX exception*.[137] (emphasis added)

149. We believe this argument must be rejected. The policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX. The legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure, are examined under Article XX(g), and the treaty interpreter may then and there declare the measure inconsistent with Article XX(g). If the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX. On the other hand, it does not follow from the fact that a measure falls within the terms of Article XX(g) that that measure also will necessarily comply with the requirements of the chapeau. To accept the argument of the United States would be to disregard the standards established by the chapeau.

150. We commence the second tier of our analysis with an examination of the ordinary meaning of the words of the chapeau. The precise language of the chapeau requires that a measure not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade." There are three standards contained in the chapeau: first, arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination between countries where the same conditions prevail; and third, a disguised restriction on international trade. In order for a measure to

[136]United States appellant's submission, para. 28.

[137]United States appellant's submission, para. 53.

be applied in a manner which would constitute "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", three elements must exist. First, the application of the measure must result in *discrimination*. As we stated in *United States – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994, such as Articles I, III or XI.[138] Second, the discrimination must be *arbitrary* or *unjustifiable* in character. We will examine this element of *arbitrariness* or *unjustifiability* in detail below. Third, this discrimination must occur *between countries where the same conditions prevail*. In *United States – Gasoline*, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned.[139] Thus, the standards embodied in the language of the chapeau are not only different from the requirements of Article XX(g); they are also different from the standard used in determining that Section 609 is violative of the substantive rules of Article XI:1 of the GATT 1994.

151. In *United States – Gasoline*, we stated that "the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [Article XX]'."[140] We went on to say that:

> … The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the *General Agreement*. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.[141]

152. At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement*, which strengthened the multilateral trading system by establishing an international organization, *inter alia*, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round.[142] In recognition of the importance of continuity with the previous GATT system, negotiators used the

[138]In *United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 23, we stated: "The provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred."

[139]*Ibid*., pp. 23-24.

[140]*Ibid*., p. 22.

[141]*Ibid*.

[142]*WTO Agreement*, Article III:1.

preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of "full use of the resources of the world" set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

> … while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, …[143]

153. We note once more[144] that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.[145]

154. We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the "CTE"). In their Decision on Trade and Environment, Ministers expressed their intentions, in part, as follows:

> … *Considering* that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other, …[146]

[143]Preamble of the *WTO Agreement*, first paragraph.

[144]*Supra*, para. 129.

[145]*Supra*, para. 131.

[146]Preamble of the Decision on Trade and Environment.

In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development [147], Agenda 21[148], and "its follow-up in the GATT, as reflected in the statement of the Council of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992 … ."[149] We further note that this Decision also set out the following terms of reference for the CTE:

> (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
>
> (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
>
> - the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
>
> - the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
>
> - surveillance of trade measures used for environmental purposes, of trade-related aspects of environmental measures which have significant trade affects, and of effective implementation of the multilateral disciplines governing those measures.[150]

155. With these instructions, the General Council of the WTO established the CTE in 1995, and the CTE began its important work. Pending any specific recommendations by the CTE to WTO Members on the issues raised in its terms of reference, and in the absence up to now of any agreed amendments or modifications to the substantive provisions of the GATT 1994 and the *WTO Agreement* generally, we must fulfill our responsibility in this specific case, which is to interpret

[147]We note that Principle 3 of the Rio Declaration on Environment and Development states: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Principle 4 of the Rio Declaration on Environment and Development states that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[148]Agenda 21 is replete with references to the shared view that economic development and the preservation and protection should be mutually supportive. For example, paragraph 2.3(b) of Agenda 21 states: "The international economy should provide a supportive international climate for achieving environment and development goals by … [m]aking trade and environment mutually supportive … ." Similarly, paragraph 2.9(d) states that an "objective" of governments should be: "To promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive."

[149]Preamble of the Decision on Trade and Environment.

[150]Decision on Trade and Environment.

the existing language of the chapeau of Article XX by examining its ordinary meaning, in light of its context and object and purpose in order to determine whether the United States measure at issue qualifies for justification under Article XX. It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the *WTO Agreement*, which, we have said, gives colour, texture and shading to the rights and obligations of Members under the *WTO Agreement*, generally, and under the GATT 1994, in particular.

156. Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences.

157. In our view, the language of the chapeau makes clear that each of the exceptions in paragraphs (a) to (j) of Article XX is a *limited and conditional* exception from the substantive obligations contained in the other provisions of the GATT 1994, that is to say, the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau.[151] This interpretation of the chapeau is confirmed by its negotiating

[151]This view is consistent with the approach taken by the panel in *United States – Section 337 of the United States Tariff Act of 1930*, which stated:

> Article XX is entitled "General Exceptions" and … the central phrase in the introductory clause reads: "nothing in this Agreement shall be construed to prevent the adoption or enforcement … of measures…". Article XX(d) thus provides *a limited and conditional exception from obligations under other provisions*.[151] (emphasis added) Adopted 7 November 1989, BISD 365/345, para. 5.9.

history.[152] The language initially proposed by the United States in 1946 for the chapeau of what would later become Article XX was unqualified and unconditional.[153] Several proposals were made during the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in 1946 suggesting modifications.[154] In November 1946, the United Kingdom proposed that "in order to prevent abuse of the exceptions of Article 32 [which would subsequently become Article XX]", the chapeau of this provision should be qualified.[155] This proposal was generally accepted, subject to later review of its precise wording. Thus, the negotiating history of Article XX confirms that the paragraphs of Article XX set forth *limited and conditional* exceptions from the obligations of the substantive provisions of the GATT. Any measure, to qualify finally for exception, must also satisfy the requirements of the chapeau. This is a fundamental part of the balance of rights and obligations struck by the original framers of the GATT 1947.

158. The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be

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[152]Article 32 of the Vienna Convention permits recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Here, we refer to the negotiating history of Article XX to confirm the interpretation of the chapeau we have reached from applying Article 31 of the Vienna Convention.

[153]The chapeau of Article 32 of the United States Draft Charter for an International Trade Organization, which formed the basis for discussions at the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in late 1946, read, in relevant part:

> Nothing in Chapter IV of this Charter shall be construed to prevent the adoption or enforcement by any member of measures: …

[154]For example, the Netherlands, Belgium and Luxembourg stated that the exceptions should be qualified in some way:

> Indirect protection is an undesirable and dangerous phenomenon. … Many times, the stipulations to 'protect animal or plant life or health' are misused for indirect protection. It is recommended to insert a clause which prohibits expressly to direct such measures that they constitute an indirect protection or, in general, to use these measures to attain results, which are irreconsiliable [*sic*] with the aim of chapters IV, V and VI. E/PC/T/C.II/32, 30 October 1946

[155]The United Kingdom's proposed text for the chapeau read:

> The undertaking in Chapter IV of this Charter relating to import and export restrictions shall not be construed to prevent the adoption or enforcement by any member of measures for the following purposes, provided that they are not applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. E/PC/T/C.II/50, pp. 7 and 9; E/PC/T/C.II/54/Rev.1, 28 November 1946, p. 36.

exercised bona fide, that is to say, reasonably."[156] An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting. Having said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.[157]

159. The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

160. With these general considerations in mind, we address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or "a disguised restriction on international trade". We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g). We note, preliminarily, that the application of a measure may be characterized as amounting to an abuse or misuse of an exception of Article XX not only when the detailed operating provisions of the measure prescribe the arbitrary or unjustifiable activity, but also where a measure, otherwise fair and just on its face, is actually applied in an

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[156]B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates:

> … A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e*., in furtherance of the interests which the right is intended to protect). It should at the same time be *fair and equitable as between the parties* and not one which is calculated to procure for one of them an unfair advantage in the light of the obligation assumed. A reasonable exercise of the right is regarded as compatible with the obligation. But the exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. …(emphasis added)

Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed, Vol. I (Longman's, 1992), pp. 407-410, *Border and Transborder Armed Actions Case*, (1988) I.C.J. Rep. 105; *Rights of Nationals of the United States in Morocco Case*, (1952) I.C.J. Rep. 176; *Anglo-Norwegian Fisheries Case*, (1951) I.C.J. Rep. 142.

[157]Vienna Convention, Article 31(3)(c).

arbitrary or unjustifiable manner. The standards of the chapeau, in our view, project both substantive and procedural requirements.

2. "Unjustifiable Discrimination"

161. We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail". Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers. As enacted by the Congress of the United States, the *statutory* provisions of Section 609(b)(2)(A) and (B) do not, in themselves, *require* that other WTO Members adopt *essentially the same* policies and enforcement practices as the United States. Viewed alone, the statute appears to permit a degree of discretion or flexibility in how the standards for determining comparability might be applied, in practice, to other countries.[158] However, any flexibility that may have been intended by Congress when it enacted the statutory provision has been effectively eliminated in the implementation of that policy through the 1996 Guidelines promulgated by the Department of State and through the practice of the administrators in making certification determinations.

162. According to the 1996 Guidelines, certification "shall be made" under Section 609(b)(2)(A) and (B) if an exporting country's program includes a requirement that all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles use, at all times, TEDs comparable in effectiveness to those used in the United States.[159] Under these Guidelines, any exceptions to the requirement of the use of TEDs must be comparable to those of the United States

[158]Pursuant to Section 609(b)(2), a harvesting nation may be certified, and thus exempted from the import ban, if:

> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting…

[159]1996 Guidelines, p. 17344.

program.[160] Furthermore, the harvesting country must have in place a "credible enforcement effort".[161] The language in the 1996 Guidelines is mandatory: certification "shall be made" if these conditions are fulfilled. However, we understand that these rules are also applied in an *exclusive* manner. That is, the 1996 Guidelines specify the *only* way that a harvesting country's regulatory program can be deemed "comparable" to the United States' program, and, therefore, they define the *only* way that a harvesting nation can be certified under Section 609(b)(2)(A) and (B). Although the 1996 Guidelines state that, in making a comparability determination, the Department of State "shall also take into account other measures the harvesting nation undertakes to protect sea turtles"[162], in practice, the competent government officials only look to see whether there is a regulatory program requiring the use of TEDs or one that comes within one of the extremely limited exceptions available to United States shrimp trawl vessels.[163]

163. The actual *application* of the measure, through the implementation of the 1996 Guidelines and the regulatory practice of administrators, *requires* other WTO Members to adopt a regulatory program that is not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels. Thus, the effect of the application of Section 609 is to establish a rigid and unbending standard by which United States officials determine whether or not countries will be certified, thus granting or refusing other countries the right to export shrimp to the United States. Other specific policies and measures that an exporting country may have adopted for the protection and conservation of sea turtles are not taken into account, in practice, by the administrators making the comparability determination.[164]

164. We understand that the United States also applies a uniform standard throughout its territory, regardless of the particular conditions existing in certain parts of the country. The United States requires the use of approved TEDs at all times by domestic, commercial shrimp trawl vessels operating in waters where there is any likelihood that they may interact with sea turtles, regardless of the actual incidence of sea turtles in those waters, the species of those sea turtles, or other differences or disparities that may exist in different parts of the United States. It may be quite acceptable for a

[160]As already noted, these exceptions are extremely limited and currently include only: vessels equipped exclusively with certain special types of gear; vessels whose nets are retrieved exclusively by manual rather than mechanical means; and, in exceptional circumstances, where the National Marine Fisheries Services determines that the use of TEDs would be impracticable because of special environmental conditions, vessels are permitted to restrict tow-times instead of using TEDs. See the 1996 Guidelines, p. 17343. In the oral hearing, the United States informed us that the exception for restricted tow-times is no longer available.

[161]1996 Guidelines, p. 17344.

[162]*Ibid*.

[163]Statements by the United States at the oral hearing.

[164]Statement by the United States at the oral hearing.

government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.

165. Furthermore, when this dispute was before the Panel and before us, the United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States if those shrimp originated in waters of countries not certified under Section 609. In other words, *shrimp caught using methods identical to those employed in the United States* have been excluded from the United States market solely because they have been caught in waters of *countries that have not been certified by the United States*. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.

166. Another aspect of the application of Section 609 that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members. The relevant factual finding of the Panel reads:

> … However, *we have no evidence that the United States actually undertook negotiations on an agreement on sea turtle conservation techniques which would have included the complainants before the imposition of the import ban as a result of the CIT judgement.* From the replies of the parties to our question on this subject, in particular that of the United States, we understand that the United States did not propose the negotiation of an agreement to any of the complainants until after the conclusion of negotiations on the Inter-American Convention for the Protection and Conservation of Sea Turtles, in September 1996, i.e. well after the deadline for the imposition of the import ban of 1 May 1996. Even then, it seems that the efforts made merely consisted of an exchange of documents. We therefore conclude that, in spite of the possibility offered by its legislation, the United States did not enter into negotiations before it imposed the import ban. As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.[165](emphasis added)

167. *A propos* this failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy, which produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted, a number of points must be made. First, the Congress of the United States expressly recognized the importance of securing international agreements for the protection and conservation of the sea turtle species in enacting this law. Section 609(a) *directs* the Secretary of State to:

> (1) *initiate negotiations as soon as possible for the development of bilateral or multilateral agreements with other nations* for the protection and conservation of such species of sea turtles;
> (2) *initiate negotiations as soon as possible* with all foreign governments which are engaged in, or which have persons or companies engaged in, commercial fishing operations which, as determined by the Secretary of Commerce, may affect adversely such species of sea turtles, *for the purpose of entering into bilateral and multilateral treaties with such countries to protect such species of sea turtles*;
> (3) *encourage such other agreements* to promote the purposes of this section *with other nations* for the protection of specific ocean and land regions which are of special significance to the health and stability of such species of sea turtles;
> (4) *initiate the amendment of any existing international treaty* for the protection and conservation of such species of sea turtles to which the United States is a party *in order to make such treaty consistent with the purposes and policies of this section*; and

[165]Panel Report, para. 7.56.

> (5) provide to the Congress by not later than one year after the date of enactment of this section: …
>
> > (C) a full report on:
> > > (i) the results of his efforts under this section; …
>
> (emphasis added)

Apart from the negotiation of the Inter-American Convention for the Protection and Conservation of Sea Turtles[166] (the "Inter-American Convention") which concluded in 1996, the record before the Panel does not indicate any serious, substantial efforts to carry out these express directions of Congress.[167]

168. Second, the protection and conservation of highly migratory species of sea turtles, that is, the very policy objective of the measure, demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations. The need for, and the appropriateness of, such efforts have been recognized in the WTO itself as well as in a significant number of other international instruments and declarations. As stated earlier, the Decision on Trade and Environment, which provided for the establishment of the CTE and set out its terms of reference, refers to both the Rio Declaration on Environment and Development and Agenda 21.[168] Of particular relevance is Principle 12 of the Rio Declaration on Environment and Development, which states, in part:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*(emphasis added)

In almost identical language, paragraph 2.22(i) of Agenda 21 provides:

> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: …
>
> (i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. *Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus.*(emphasis added)

[166]First written submission of the United States to the Panel, Exhibit AA.

[167]Panel Report, para. 7.56.

[168]See Decision on Trade and Environment, preamble and para. 2(b). See *Supra*, para. 154.

Moreover, we note that Article 5 of the Convention on Biological Diversity states:

> … each contracting party shall, as far as possible and as appropriate, cooperate with other contracting parties directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

The Convention on the Conservation of Migratory Species of Wild Animals, which classifies the relevant species of sea turtles in its Annex I as "Endangered Migratory Species", states:

> The contracting parties [are] convinced that conservation and effective management of migratory species of wild animals requires the concerted action of all States within the national boundaries of which such species spend any part of their life cycle.

Furthermore, we note that WTO Members in the Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference, endorsed and supported:

> … *multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature*. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue *shared goals*, and in the development of a mutually supportive relationship between them, *due respect must be afforded to both*. [169] (emphasis added)

169. Third, the United States did negotiate and conclude one regional international agreement for the protection and conservation of sea turtles: The Inter-American Convention. This Convention was opened for signature on 1 December 1996 and has been signed by five countries[170], in addition to the United States, and four of these countries are currently certified under Section 609.[171] This Convention has not yet been ratified by any of its signatories. The Inter-American Convention provides that each party shall take "appropriate and necessary measures" for the protection,

[169]Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)/2, 26 November 1996.

[170]Brazil, Costa Rica, Mexico, Nicaragua and Venezuela.

[171]As of 1 January 1998, Brazil was among those countries certified as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the United States' program. See Panel Report, para. 2.16. However, according to information provided by the United States at the oral hearing, Brazil is not currently certified under Section 609.

conservation and recovery of sea turtle populations and their habitats within such party's land territory and in maritime areas with respect to which it exercises sovereign rights or jurisdiction.[172] Such measures include, notably,

> [t]he reduction, to the greatest extent practicable, of the incidental capture, retention, harm or mortality of sea turtles in the course of fishing activities, through the appropriate regulation of such activities, as well as the development, improvement and use of appropriate gear, devices or techniques, including the use of turtle excluder devices (TEDs) pursuant to the provisions of Annex III [of the Convention].[173]

Article XV of the Inter-American Convention also provides, in part:

> Article XV
> Trade Measures
>
> 1. *In implementing this Convention, the Parties shall act in accordance with the provisions of the Agreement establishing the World Trade Organization* (WTO), as adopted at Marrakesh in 1994, including its annexes.
>
> 2. In particular, and *with respect to the subject-matter of this Convention, the Parties shall act in accordance with the provisions of* the Agreement on Technical Barriers to Trade contained in Annex 1 of the WTO Agreement, as well as *Article XI of the General Agreement on Tariffs and Trade of 1994*. …(emphasis added)

170. The juxtaposition of (a) the *consensual* undertakings to put in place regulations providing for, *inter alia*, use of TEDs *jointly determined* to be suitable for a particular party's maritime areas, with (b) the reaffirmation of the parties' obligations under the *WTO Agreement*, including the *Agreement on Technical Barriers to Trade* and Article XI of the GATT 1994, suggests that the parties to the Inter-American Convention together marked out the equilibrium line to which we referred earlier. The Inter-American Convention demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles. Moreover, the Inter-American Convention emphasizes the continuing validity and significance of Article XI of the GATT 1994, and of the obligations of the *WTO Agreement* generally, in maintaining the balance of rights and obligations under the *WTO Agreement* among the signatories of that Convention.

[172]Inter-American Convention, Article IV.1.

[173]Inter-American Convention, Article IV.2(h).

171. The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles[174] before imposing the import ban.

172. Clearly, the United States negotiated seriously with some, but not with other Members (including the appellees), that export shrimp to the United States. The effect is plainly discriminatory and, in our view, unjustifiable. The unjustifiable nature of this discrimination emerges clearly when we consider the cumulative effects of the failure of the United States to pursue negotiations for establishing consensual means of protection and conservation of the living marine resources here involved, notwithstanding the explicit statutory direction in Section 609 itself to initiate negotiations as soon as possible for the development of bilateral and multilateral agreements.[175] The principal consequence of this failure may be seen in the resulting unilateralism evident in the application of Section 609. As we have emphasized earlier, the policies relating to the necessity for use of particular kinds of TEDs in various maritime areas, and the operating details of these policies, are all shaped by the Department of State, without the participation of the exporting Members. The system and processes of certification are established and administered by the United States agencies alone. The decision-making involved in the grant, denial or withdrawal of certification to the exporting Members, is, accordingly, also unilateral. The unilateral character of the application of Section 609 heightens the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability.

173. The application of Section 609, through the implementing guidelines together with administrative practice, also resulted in other differential treatment among various countries desiring certification. Under the 1991 and 1993 Guidelines, to be certifiable, fourteen countries in the wider

[174]While the United States is a party to CITES, it did not make any attempt to raise the issue of sea turtle mortality due to shrimp trawling in the CITES Standing Committee as a subject requiring concerted action by states. In this context, we note that the United States, for example, has not signed the Convention on the Conservation of Migratory Species of Wild Animals or UNCLOS, and has not ratified the Convention on Biological Diversity.

[175]Section 609(a).

Caribbean/western Atlantic region had to commit themselves to require the use of TEDs on all commercial shrimp trawling vessels by 1 May 1994. These fourteen countries had a "phase-in" period of three years during which their respective shrimp trawling sectors could adjust to the requirement of the use of TEDs. With respect to all other countries exporting shrimp to the United States (including the appellees, India, Malaysia, Pakistan and Thailand), on 29 December 1995, the United States Court of International Trade directed the Department of State to apply the import ban on a world-wide basis not later than 1 May 1996.[176] On 19 April 1996, the 1996 Guidelines were issued by the Department of State bringing shrimp harvested in *all* foreign countries within the scope of Section 609, effective 1 May 1996. Thus, all countries that were not among the fourteen in the wider Caribbean/western Atlantic region had only four months to implement the requirement of compulsory use of TEDs. We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all other Members of the WTO and of the general community of states, bears responsibility for acts of all its departments of government, including its judiciary.[177]

174. The length of the "phase-in" period is not inconsequential for exporting countries desiring certification. That period relates directly to the onerousness of the burdens of complying with the requisites of certification and the practical feasibility of locating and developing alternative export markets for shrimp. The shorter that period, the heavier the burdens of compliance, particularly where an applicant has a large number of trawler vessels, and the greater the difficulties of re-orienting the harvesting country's shrimp exports. The shorter that period, in net effect, the heavier the influence of the import ban. The United States sought to explain the marked difference between "phase-in" periods granted to the fourteen wider Caribbean/western Atlantic countries and those allowed the rest of the shrimp exporting countries. The United States asserted that the longer time-period was justified by the then undeveloped character of TED technology, while the shorter period was later made possible by the improvements in that technology. This explanation is less than persuasive, for it does not address the administrative and financial costs and the difficulties of governments in putting together and enacting the necessary regulatory programs and "credible

[176]*Earth Island Institute* v. *Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

[177]See *United States - Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 28. Also see, for example, Jennings and Watts (eds.), *Oppenheim's International Law*, 9th ed., Vol. I (Longman's 1992), p. 545; and I. Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press, 1990), p. 450.

enforcement effort", and in implementing the compulsory use of TEDs on hundreds, if not thousands, of shrimp trawl vessels.[178]

175. Differing treatment of different countries desiring certification is also observable in the differences in the levels of effort made by the United States in transferring the required TED technology to specific countries. Far greater efforts to transfer that technology successfully were made to certain exporting countries -- basically the fourteen wider Caribbean/western Atlantic countries cited earlier -- than to other exporting countries, including the appellees.[179] The level of these efforts is probably related to the length of the "phase-in" periods granted -- the longer the "phase-in" period, the higher the possible level of efforts at technology transfer. Because compliance with the requirements of certification realistically assumes successful TED technology transfer, low or merely nominal efforts at achieving that transfer will, in all probability, result in fewer countries being able to satisfy the certification requirements under Section 609, within the very limited "phase-in" periods allowed them.

176. When the foregoing differences in the means of application of Section 609 to various shrimp exporting countries are considered in their cumulative effect, we find, and so hold, that those differences in treatment constitute "unjustifiable discrimination" between exporting countries desiring certification in order to gain access to the United States shrimp market within the meaning of the chapeau of Article XX.

3. "Arbitrary Discrimination"

177. We next consider whether Section 609 has been applied in a manner constituting "arbitrary discrimination between countries where the same conditions prevail". We have already observed that Section 609, in its application, imposes a single, rigid and unbending requirement that countries applying for certification under Section 609(b)(2)(A) and (B) adopt a comprehensive regulatory program that is essentially the same as the United States' program, without inquiring into the appropriateness of that program for the conditions prevailing in the exporting countries.[180] Furthermore, there is little or no flexibility in how officials make the determination for certification

[178]For example, at the oral hearing, India stated that its "number of mechanized nets is estimated at about 47,000. Most of these are mechanized vessels … ."

[179]Response by the United States to questioning by the Panel; statements by the United States at the oral hearing.

[180]*Supra*, paras. 161-164.

pursuant to these provisions.[181] In our view, this rigidity and inflexibility also constitute "arbitrary discrimination" within the meaning of the chapeau.

178. Moreover, the description of the administration of Section 609 provided by the United States in the course of these proceedings highlights certain problematic aspects of the certification processes applied under Section 609(b). With respect to the first type of certification, under Section 609(b)(2)(A) and (B), the 1996 Guidelines set out certain elements of the procedures for acquiring certification, including the requirement to submit documentary evidence of the regulatory program adopted by the applicant country. This certification process also generally includes a visit by United States officials to the applicant country.[182]

179. With respect to certifications under Section 609(b)(2)(C), the 1996 Guidelines state that the Department of State "shall certify" any harvesting nation under Section 609(b)(2)(C) if it meets the criteria in the 1996 Guidelines "without the need for action on the part of the government of the harvesting nation … ."[183] Nevertheless, the United States informed us that, in all cases where a country has not previously been certified under Section 609, it waits for an application to be made before making a determination on certification.[184] In the case of certifications under Section 609(b)(2)(C), there appear to be certain opportunities for the submission of written evidence, such as scientific documentation, in the course of the certification process.[185]

180. However, with respect to neither type of certification under Section 609(b)(2) is there a transparent, predictable certification process that is followed by the competent United States government officials. The certification processes under Section 609 consist principally of administrative *ex parte* inquiry or verification by staff of the Office of Marine Conservation in the Department of State with staff of the United States National Marine Fisheries Service.[186] With respect to both types of certification, there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or to deny certification is made. Moreover, no formal written, reasoned decision,

[181]In the oral hearing, the United States stated that "as a policy matter, the United States government believes that all governments should require the use of turtle excluder devices on all shrimp trawler boats that operate in areas where there is a likelihood of intercepting sea turtles" and that "when it comes to shrimp trawling, we know of only one way of effectively protecting sea turtles, and that is through TEDs."

[182]Statement by the United States at the oral hearing.

[183]1996 Guidelines, p. 17343.

[184]Statement by the United States at the oral hearing.

[185]Statement by the United States at the oral hearing.

[186]Statement by the United States at the oral hearing.

whether of acceptance or rejection, is rendered on applications for either type of certification, whether under Section 609(b)(2)(A) and (B) or under Section 609(b)(2)(C).[187] Countries which are granted certification are included in a list of approved applications published in the Federal Register; however, they are not notified specifically. Countries whose applications are denied [188] also do not receive notice of such denial (other than by omission from the list of approved applications) or of the reasons for the denial.[189] No procedure for review of, or appeal from, a denial of an application is provided.[190]

181. The certification processes followed by the United States thus appear to be singularly informal and casual, and to be conducted in a manner such that these processes could result in the negation of rights of Members. There appears to be no way that exporting Members can be certain whether the terms of Section 609, in particular, the 1996 Guidelines, are being applied in a fair and just manner by the appropriate governmental agencies of the United States. It appears to us that, effectively, exporting Members applying for certification whose applications are rejected are denied basic fairness and due process, and are discriminated against, *vis-à-vis* those Members which are granted certification.

182. The provisions of Article X:3[191] of the GATT 1994 bear upon this matter. In our view, Section 609 falls within the "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1. Inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure which purports to be an exception to the treaty obligations of the Member imposing the measure and which effectively results in a suspension *pro hac vice* of the treaty rights of other Members.

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[187]Statement by the United States at the oral hearing.

[188]We were advised at the oral hearing by the United States that these include: Australia, Pakistan and Tunisia.

[189]Statement by the United States at the oral hearing.

[190]Statement by the United States at the oral hearing.

[191]Article X:3 states, in part:

> (a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
> (b) Each Member shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters … .

183. It is also clear to us that Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and *ex parte* nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.

184. We find, accordingly, that the United States measure is applied in a manner which amounts to a means not just of "unjustifiable discrimination", but also of "arbitrary discrimination" between countries where the same conditions prevail, contrary to the requirements of the chapeau of Article XX. The measure, therefore, is not entitled to the justifying protection of Article XX of the GATT 1994. Having made this finding, it is not necessary for us to examine also whether the United States measure is applied in a manner that constitutes a "disguised restriction on international trade" under the chapeau of Article XX.

185. In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we *have* decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on

international trade. As we emphasized in *United States – Gasoline*, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the *WTO Agreement*.[192]

VII. Findings and Conclusions

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

(a) reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU;

(b) reverses the Panel's finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and

(c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994.

188. The Appellate Body *recommends* that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

[192]Adopted 20 May 1996, WT/DS2/AB/R, p. 30.

Signed in the original at Geneva this 8th day of October 1998 by:

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries

European Communities, *Appellant*
India, *Appellee*

Bolivia, *Third Participant*
Brazil, *Third Participant*
Colombia, *Third Participant*
Costa Rica, *Third Participant*
Cuba, *Third Participant*
Ecuador, *Third Participant*
El Salvador, *Third Participant*
Guatemala, *Third Participant*
Honduras, *Third Participant*
Mauritius, *Third Participant*
Nicaragua, *Third Participant*
Pakistan, *Third Participant*
Panama, *Third Participant*
Paraguay, *Third Participant*
Peru, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

AB-2004-1

Present:

Abi-Saab, Presiding Member
Baptista, Member
Sacerdoti, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (the "Panel Report").[1] The Panel was established to consider a complaint by India against the European Communities regarding the conditions under which the European Communities accords tariff preferences to developing countries pursuant to Council Regulation (EC) No. 2501/2001 of 10 December 2001 "applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004" (the "Regulation").[2]

[1]WT/DS246/R, 1 December 2003.

[2]*Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1 (Exhibit India-6 submitted by India to the Panel).

2. The Regulation provides for five preferential tariff "arrangements"[3], namely:

(a) general arrangements described in Article 7 of the Regulation (the "General Arrangements");

(b) special incentive arrangements for the protection of labour rights;

(c) special incentive arrangements for the protection of the environment;

(d) special arrangements for least-developed countries; and

(e) special arrangements to combat drug production and trafficking (the "Drug Arrangements").[4]

3. All the countries listed in Annex I to the Regulation are eligible to receive tariff preferences under the General Arrangements[5], which provide, broadly, for suspension of Common Customs Tariff duties on products listed as "non-sensitive" and for reduction of Common Customs Tariff *ad valorem* duties on products listed as "sensitive".[6] The General Arrangements are described in further detail in paragraphs 2.4 and 2.5 of the Panel Report. The four other arrangements in the Regulation provide tariff preferences *in addition* to those granted under the General Arrangements.[7] However, only some of the country beneficiaries of the General Arrangements are also beneficiaries of the other arrangements. Specifically, preferences under the special incentive arrangements for the protection of labour rights and the special incentive arrangements for the protection of the environment are restricted to those countries that "are determined by the European Communities to comply with certain labour [or] environmental policy standards"[8], respectively. Preferences under the special arrangements for least-developed countries are restricted to certain specified countries.[9] Finally, preferences under the Drug Arrangements are provided only to 12 predetermined countries, namely Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela.[10]

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[3]Regulation, Art. 1.2.

[4]*Ibid*.

[5]Panel Report, para. 2.4.

[6]Regulation, Arts. 7.1-7.2.

[7]*Ibid.*, Arts. 8-10. For example, these tariff preferences include further reductions in the duties imposed on certain "sensitive" products.

[8]Panel Report, para. 2.3. See Regulation, Arts. 14 and 21, and Annex I (Columns E and G).

[9]Regulation, Annex I (Column H).

[10]*Ibid.* (Column I); Panel Report, paras. 2.3 and 2.7.

4. India is a beneficiary of the General Arrangements but not of the Drug Arrangements, or of any of the other arrangements established by the Regulation. In its request for the establishment of a panel, India challenged the Drug Arrangements as well as the special incentive arrangements for the protection of labour rights and the environment.[11] However, in a subsequent meeting with the Director-General regarding the composition of the Panel—and later in writing to the European Communities—India indicated its decision to limit its complaint to the Drug Arrangements, while reserving its right to bring additional complaints regarding the two "special incentive arrangements".[12] Accordingly, this dispute concerns only the Drug Arrangements.

5. The Panel summarized the effect of the Drug Arrangements as follows:

> The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted *duty-free* access to the European Communities' market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*. [13] (original italics)

6. India requested the Panel to find that "the Drug Arrangements set out in Article 10" [14] of the Regulation are inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and are not justified by the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause").[15] In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 1 December 2003, the Panel concluded that:

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[11]Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2.

[12]Panel Report, para. 1.5.

[13]*Ibid*., para. 2.8. See also, *ibid.*, para. 2.7.

[14]*Ibid*., para. 3.1 (referring to India's first written submission to the Panel, para. 67).

[15]GATT Document L/4903, 28 November 1979, BISD 26S/203 (attached as Annex 2 to this Report).

> (a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
>
> (b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
>
> (c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause; [and]
>
> (d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[.][16]

The Panel also concluded that the European Communities had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994".[17] Finally, the Panel concluded, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that "because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994."[18]

7. On 8 January 2004, the European Communities notified the Dispute Settlement Body of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal[19] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[20] On 19 January 2004, the European Communities filed its appellant's submission.[21] On 30 January 2004, Pakistan notified its intention to appear at the oral hearing as a third participant.[22] On 2 February 2004, India filed its appellee's submission.[23] On the same day, Costa Rica, Panama, Paraguay, and the United States each filed a third participant's submission, and Bolivia, Colombia, Ecuador, Peru, and Venezuela filed a joint third participant's submission as the Andean Community.[24] Also on 2 February 2004, Brazil notified its intention to make a statement at the oral

[16]Panel Report, para. 8.1(a)-(d).

[17]*Ibid.*, para. 8.1(e).

[18]*Ibid.*, para. 8.1(f).

[19]Notification of an appeal by the European Communities, WT/DS246/7, 8 January 2004 (attached as Annex 1 to this Report).

[20]WT/AB/WP/7, 1 May 2003.

[21]Pursuant to Rule 21 of the *Working Procedures*.

[22]Pursuant to Rule 24(2) of the *Working Procedures*.

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

[24]Pursuant to Rule 24(1) of the *Working Procedures*.

hearing as a third participant, and Mauritius notified its intention to appear at the oral hearing as a third participant.[25] Finally, on 2 February 2004, El Salvador, Guatemala, Honduras, and Nicaragua jointly notified their intention to make a statement at the oral hearing as third participants.[26] On 4 February 2004, Cuba notified its intention to appear at the oral hearing as a third participant.[27] By letter dated 16 February 2004, Pakistan submitted a request to make a statement at the oral hearing.[28] No participant objected to Pakistan's request, which was authorized by the Division hearing the appeal on 18 February 2004.[29]

8. The oral hearing in this appeal was held on 19 February 2004. The participants and third participants presented oral arguments (with the exception of Cuba and Mauritius) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

9. The European Communities argues that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and in assigning to the European Communities the burden of justifying the Drug Arrangements under the Enabling Clause. Furthermore, the European Communities submits, the Panel erred in finding that Article I:1 applies to measures covered by the Enabling Clause. The European Communities requests the Appellate Body to reverse the Panel's consequent finding that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 and, because India made no claim with respect to the Enabling Clause, to refrain from assessing the Drug Arrangements under the Enabling Clause.

10. According to the European Communities, the Panel's main reason for deciding that the Enabling Clause is an exception to Article I:1 was that the Enabling Clause does not provide "positive

[25]Pursuant to Rule 24(2) of the *Working Procedures*.

[26]*Ibid*.

[27]Pursuant to Rule 24(4) of the *Working Procedures*.

[28]*Ibid*.

[29]Pursuant to Rule 27(3)(c) of the *Working Procedures*. The Director of the Appellate Body Secretariat advised Pakistan and the other participants in the appeal of the Division's decision by letter dated 18 February 2004.

rules establishing obligations in themselves".[30] In the European Communities' view, however, the fact that developed countries are not legally obliged to implement schemes pursuant to the Generalized System of Preferences ("GSP") does not mean that the Enabling Clause does not impose positive obligations, or that it is an exception to Article I:1. The European Communities argues that the Panel's reasoning suggests that, if a WTO provision applies only when a WTO Member takes a particular step that it is not obliged to take, that provision cannot create a positive obligation and must be an exception. According to the European Communities, this test is not consistent with Appellate Body decisions and "would lead to manifestly absurd results".[31] For example, the European Communities contends, this test would mean that the following provisions do not impose positive rules establishing obligations in themselves, despite contrary reasoning in previous Appellate Body decisions: Article 27.4 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); Article 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"); Article 2.4 of the *Agreement on Technical Barriers to Trade*; and Article 6 of the *Agreement on Textiles and Clothing*.[32] According to the European Communities, Articles VI and XIX of the GATT 1994 would also be rendered exceptions under the Panel's reasoning, contrary to well-established GATT and WTO panel practice.

11. The European Communities suggests that the Panel should have begun its analysis by examining the ordinary meaning of the word "notwithstanding" in the Enabling Clause. This ordinary meaning, in the view of the European Communities, does not compel the Panel's finding that the Enabling Clause is an "exception" to Article I:1. This is apparent from the dissenting opinion in the Panel Report and the Panel's own recognition that the definition of "notwithstanding" is not dispositive of this question. Therefore, the European Communities argues, in accordance with the basic rules of treaty interpretation in Article 31 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[33], the Panel should have proceeded to examine the relevant "content"[34], context, and object and purpose of the Enabling Clause in order to identify the relationship between

[30]European Communities' appellant's submission, para. 32 (quoting Panel Report, para. 7.35, itself quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, at 337).

[31]*Ibid.*, para. 34.

[32]*Ibid.*, para. 35 (referring to Appellate Body Report, *Brazil – Aircraft*, paras. 134-141; Appellate Body Report, *EC – Hormones*, paras. 97-104; Appellate Body Report, *EC – Sardines*, para. 275; and Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-17, DSR 1997:I, at 333-338).

[33]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[34]European Communities' appellant's submission, paras. 18 and 39, and heading 2.5.1.

the Enabling Clause and Article I:1. Instead, the European Communities observes, the Panel simply "assumed" [35] that the Enabling Clause is an exception to Article I:1.

12. Turning to the content and context of the Enabling Clause, the European Communities submits that the Enabling Clause provides a comprehensive set of rules that positively regulate the substantive content of GSP schemes, to the exclusion of the rules in Article I:1 of the GATT 1994. Specifically, the European Communities emphasizes that the words "generalized, non-reciprocal and non discriminatory" in footnote 3 of the Enabling Clause are distinct from and are intended to replace the most-favoured-nation ("MFN") obligation in Article I:1. The European Communities also argues that, according to the Panel's own reasoning, footnote 3 should be interpreted in the context of the Agreed Conclusions of the Special Committee on Preferences of the United Nations Conference on Trade and Development (the "Agreed Conclusions")[36] and the submissions by developed countries to that committee. As such, the detailed obligations created by paragraph 2(a), footnote 3, and paragraph 3(c) of the Enabling Clause go far beyond "mere 'anti-abuse' safeguards".[37] The European Communities contends that the Enabling Clause is unlike the chapeau of Article XX of the GATT 1994, which neither regulates the substantive content of measures adopted by Members, nor replaces the substantive rules from which Article XX derogates.

13. The European Communities relies in support of its argument on the position of the Enabling Clause within the GATT 1994 and the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). Thus, the European Communities contends that if paragraph 2(a) of the Enabling Clause were an exception to Article I:1, it would typically be found in Article I, or immediately after that Article. This is not the case, however. The Enabling Clause is a separate decision complementing Part IV of the GATT 1994, which is entitled "Trade and Development". In the view of the European Communities, Part IV of the GATT 1994 and the Enabling Clause cannot be "mere 'exception[s]'" to the GATT 1994.[38] Rather, the European Communities argues, they constitute a "special regime" for developing countries to address inequalities among the WTO Membership.[39]

14. The European Communities submits that its understanding of the relationship between Article I:1 and the Enabling Clause is supported by the object and purpose of the Enabling Clause, in

[35]European Communities' appellant's submission, para. 31.

[36]Attached as Annex D-4 to the Panel Report.

[37]European Communities' appellant's submission, para. 48.

[38]*Ibid.*, para. 51.

[39]*Ibid.*

accordance with the rules of treaty interpretation. The European Communities emphasizes that the Enabling Clause is "the most concrete, comprehensive and important application"[40] of the principle of special and differential treatment. In the view of the European Communities, special and differential treatment is "the most basic principle of the international law of development"[41], and it constitutes *lex specialis* that applies to the exclusion of more general WTO rules on the same subject matter. In concluding that the Enabling Clause is an "exception" to Article I:1, the Panel chose to "disregard"[42] this principle. Moreover, the European Communities argues, characterizing special and differential treatment as an "exception" suggests that this principle "is *discriminatory* against the developed country Members".[43] In fact, special and differential treatment is designed to achieve effective equality among Members. Therefore, the European Communities contends that the Panel's reasoning undermines the principle of special and differential treatment and challenges its "legitimacy".[44] The European Communities also asserts that the Panel was "oblivious"[45] to certain elements of the drafting history of the Enabling Clause, which indicate that the Contracting Parties intended to strengthen the legal status of GSP schemes in the GATT by replacing the Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")[46] with the Enabling Clause.

15. The European Communities further contends that special and differential treatment is critical to achieving one of the fundamental objectives of the *WTO Agreement*, as identified in its Preamble: ensuring that developing countries "secure a share in the growth in international trade commensurate with the needs of their economic development".[47] Therefore, according to the European Communities, the object and purpose of the Enabling Clause clearly distinguish it from exceptions such as those found in Article XX(a) and (b) of the GATT 1994, which generally allow Members to adopt "legitimate policy objectives"[48] that are *separate and distinct* from the objectives of the *WTO Agreement*. In the European Communities' view, the Appellate Body decision in *Brazil – Aircraft* confirms that the fact that a provision confers special and differential treatment is highly relevant in determining whether that provision constitutes an exception.

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[40]European Communities' appellant's submission, para. 20.

[41]*Ibid.*, para. 21.

[42]*Ibid.*, para. 23.

[43]*Ibid.*, para. 26. (original italics)

[44]*Ibid.*

[45]*Ibid.*, para. 25.

[46]GATT Document L/3545, 25 June 1971, BISD 18S/24 (attached as Annex D-2 to the Panel Report).

[47]European Communities' appellant's submission, para. 20 (quoting *WTO Agreement*, Preamble, second recital).

[48]*Ibid.*, para. 52.

16. The European Communities notes the Panel's suggestion that absurd results would flow from characterizing the Enabling Clause as excluding the application of Article I:1 because it "would mean that GSP imports from different developing countries could be subject to different taxation levels in the importing country's domestic market."[49] According to the European Communities, the Panel confuses *tariff measures* covered by paragraph 2(a) with the *imported products* to which such measures apply. Finding that the Enabling Clause excludes the application of Article I:1 would mean only that Article I:1 does not apply to a *tariff measure* falling within paragraph 2(a) of the Enabling Clause. It would not mean, as the Panel suggested, that Article I:1 does not apply with respect to *imported products* covered by such a *tariff measure.*

17. The European Communities submits that, as a result of the Panel's erroneous findings that the Enabling Clause is an "exception" to Article I:1 and that the Enabling Clause does not prevent the continued application of Article I:1, the Panel found that the European Communities bears the burden of justifying the Drug Arrangements under the Enabling Clause. According to the European Communities, the Enabling Clause imposes "positive obligations"[50] and is not an exception. As such, it is India that must, in the first instance, claim that the Drug Arrangements are inconsistent with the Enabling Clause and thereby bear the burden of demonstrating that inconsistency. According to the European Communities, India made no claim under the Enabling Clause. Consequently, the European Communities requests the Appellate Body to reverse the Panel's finding that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 and to refrain from examining the consistency of the Drug Arrangements with the Enabling Clause.

2. Whether the Drug Arrangements are Justified Under the Enabling Clause

18. The European Communities makes a "subsidiary" appeal, which would arise only if the Appellate Body were to find that the Enabling Clause is an exception to Article I:1 of the GATT 1994, or that India made a valid claim under the Enabling Clause. Specifically, the European Communities claims "subsidiarily"[51] that the Panel erred in finding that the Drug Arrangements are not "justified"[52] under paragraph 2(a) of the Enabling Clause and, therefore, requests the Appellate Body to reverse this finding.

19. According to the European Communities, this finding of the Panel was based on two erroneous legal interpretations. The first alleged error relates to the Panel's interpretation of the term

[49]European Communities' appellant's submission, para. 56 (quoting Panel Report, para. 7.46).

[50]*Ibid.*, para. 39.

[51]*Ibid.*, para. 67.

[52]*Ibid.* (quoting Panel Report, para. 7.177).

"non-discriminatory" in footnote 3 of the Enabling Clause as requiring GSP schemes to provide "identical" preferences to "all" developing countries without differentiation, except with regard to *a priori* import limitations as permissible safeguard measures. The second error alleged by the European Communities concerns the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause as meaning *all* developing countries, except with regard to *a priori* limitations.

20. The European Communities asserts that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries.[53] Even assuming such obligations existed, the European Communities maintains, the Panel failed to take into account the context of footnote 3 and the object and purpose of the Enabling Clause. Properly interpreted, the European Communities argues, the word "non-discriminatory" allows a preference-granting country to accord differential tariff treatment in its GSP scheme to developing countries that have different development needs according to "objective criteria", provided that tariff differentiation is an "adequate" response to these differences.[54]

21. The European Communities emphasizes that the immediate context for interpreting the term "non-discriminatory" in footnote 3 includes the terms "generalized" and "non-reciprocal" in that same footnote. These three terms express "distinct requirement[s]"[55], according to the European Communities, and they must be interpreted so that each is compatible with the other two, without being rendered redundant.

22. According to the European Communities, the ordinary meaning of the word "generalized" and the negotiating history indicate that GSP schemes are not required to cover *all* developing countries. The word "generalized" in footnote 3 was intended to distinguish these preferences from "special" preferences, which were granted to selected developing countries for political, historical, or geographical reasons. The European Communities maintains that consultations in the United Nations Conference on Trade and Development ("UNCTAD") led to a compromise in the Agreed Conclusions such that developed countries would, "in general"[56], recognize as beneficiaries those countries that

[53]European Communities' response to questioning at the oral hearing.

[54]European Communities' appellant's submission, para. 4.

[55]*Ibid.*, para. 80.

[56]*Ibid.*, para. 87.

considered themselves as developing countries, although a developed country might decide to exclude a country *ab initio* on grounds it considered "compelling".[57]

23. In contrast to the term "generalized", the European Communities argues, the word "non-discriminatory" relates to whether developed countries may grant different preferences to individual developing countries that have already been recognized as beneficiaries of a GSP scheme. The European Communities submits that the Panel's interpretation of "non-discriminatory", as requiring that identical preferences be granted to *all* developing countries, would render redundant the term "generalized".

24. Referring to the term "non-reciprocal" in footnote 3, the European Communities argues that reciprocity, in connection with inter-state relations, generally refers to an exchange of identical or similar benefits. In contrast to the word "unconditionally" found in Article I:1 of the GATT 1994, the European Communities argues, the word "non-reciprocal" was not intended to prevent developed countries from attaching all types of conditions to preferences granted under GSP schemes. Rather, in the European Communities' view, the word "non-reciprocal" only prohibits developed countries from imposing conditions of *reciprocity*. The European Communities contends that the Panel's interpretation of "non-discriminatory" precludes the imposition of *any* conditions on the granting of preferences, thereby rendering redundant the word "non-reciprocal" in footnote 3. In addition, the European Communities claims, the Panel's interpretation equates *conditional* preferences with *discriminatory* preferences. In fact, according to the European Communities, a preference is not rendered discriminatory by virtue of a condition being attached to it if the condition applies equally to, and is capable of being fulfilled by, all GSP beneficiaries "that are in the same situation".[58]

25. The European Communities maintains that its interpretation of "non-discriminatory" in footnote 3 does not render redundant paragraph 2(d) of the Enabling Clause, as the Panel suggested. In the view of the European Communities, the scope of paragraph 2(a) differs from that of paragraph 2(d) in three respects. First, paragraph 2(a) applies to preferences granted by *developed* countries, whereas paragraph 2(d) includes preferences granted by *any* WTO Member. Secondly, paragraph 2(a) relates only to preferences under GSP schemes, whereas paragraph 2(d) relates to any measures imposed in favour of developing countries. Thirdly, paragraph 2(a) applies only to tariff measures, whereas paragraph 2(d) applies to any kind of "special treatment".[59] In addressing only the

[57]European Communities' appellant's submission, paras. 85 and 87.

[58]*Ibid*., para. 120.

[59]*Ibid*., para. 122 (quoting Enabling Clause, para. 2(d) (attached as Annex 2 to this Report)).

last of these differences, the European Communities argues, the Panel's reasoning was "manifestly flawed".[60]

26. The European Communities points out that the Panel found that paragraph 3(c) of the Enabling Clause allows developed countries to differentiate in their GSP schemes in only two ways, namely, in connection with least-developed countries and in the implementation of *a priori* limitations. According to the European Communities, the Panel arrived at this interpretation despite the absence of any such restriction in the text of paragraph 3(c) and despite the Panel's acceptance of the European Communities' argument that the "needs" described in paragraph 3(c) extend to individual or common needs of particular categories of developing countries. In fact, the European Communities argues, paragraph 3(c) lends contextual support to the European Communities' interpretation of the word "non-discriminatory" in footnote 3. The European Communities claims that the objective described in paragraph 3(c) is best achieved by allowing developed countries to design their GSP schemes so as to take into account the development needs of certain categories of developing countries.

27. The European Communities argues that the Panel's contrary interpretation of paragraph 3(c) stems from the Panel's concern that developed countries might abuse their discretion by distinguishing arbitrarily between developing countries. In the view of the European Communities, such policy concerns cannot replace the text of paragraph 3(c). Furthermore, the European Communities submits that this concern is unwarranted because the European Communities' interpretation of "non-discriminatory" would not allow a preference-granting country to distinguish between developing countries on the basis of political, historical, or geographical ties. Rather, a distinction would be allowed only if it: (i) pursued an "objective which is legitimate in the light of the objectives of the Enabling Clause" and the principle of special and differential treatment; and (ii) represented a "reasonable" and "proportionate" means of achieving that objective.[61] In order to assess whether these criteria are met, panels need to analyze the relevant facts.

28. The European Communities contends that, because of the Panel's erroneous legal interpretations, the Panel made insufficient factual findings in order for the Appellate Body to complete the legal analysis regarding the consistency of the Drug Arrangements with footnote 3. Nevertheless, should the Appellate Body decide to complete this analysis, the European Communities requests the Appellate Body to find that the Drug Arrangements are consistent with the term "non-discriminatory" in footnote 3 and, therefore, with paragraph 2(a) of the Enabling Clause.

[60]European Communities' appellant's submission, para. 125.

[61]*Ibid.*, para. 135.

29. The European Communities contends that, although tariff preferences may not be an "adequate" or "appropriate" response to other development problems, drug production and trafficking form major economic activities in the relevant countries, which activities cannot be eliminated without the provision of "alternative licit activities".[62] Therefore, the European Communities claims that tariff preferences are an appropriate response to the drug problem, as recognized by the Members of the WTO—through the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act[63]—and the United Nations—through other instruments. Furthermore, the European Communities argues that the Drug Arrangements are non-discriminatory because the drug problem affects individual developing countries in different ways, and because beneficiaries under the Drug Arrangements are designated according to the impact of the drug problem in those countries.

30. The European Communities distinguishes the "object and purpose" of the Enabling Clause from that of Article I:1 of the GATT 1994. Article I:1 focuses on providing equal conditions of competition for imports of like products from WTO Members, whereas the Enabling Clause embodies special and differential treatment for developing countries and, therefore, aims to provide unequal competitive opportunities to respond to the needs of such countries. The European Communities claims that, in the light of the objectives associated with special and differential treatment, providing additional preferences to countries with particular development needs is not discriminatory in the context of the Enabling Clause. However, the Panel failed to take into account these objectives. The European Communities contends that the Panel should have interpreted the objectives described in the Preamble to the *WTO Agreement* in a harmonious manner, instead of assuming that the objective of eliminating discrimination prevails over the objective of ensuring that developing countries secure a share of international trade commensurate with their development needs.

31. The European Communities contends that the Panel relied selectively and incorrectly on certain UNCTAD texts to support its findings. According to the European Communities, some of these documents do not assist in interpreting footnote 3 of the Enabling Clause.[64] In several cases, this is because they relate not to the issue of non-discrimination, but to the exclusion of certain

[62]European Communities' appellant's submission, paras. 144-145.

[63]*Ibid.*, para. 148 (referring to Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385; renewed 14 October 1996, WT/L/184).

[64]*Ibid.*, paras. 159-160 (referring to Resolution 21(II) of the Second Session of UNCTAD, entitled "Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries" (attached as Annex D-3 to the Panel Report) ("Resolution 21(II)")) and paras. 182-183 (referring to the Recommendation contained in Annex A.II.1 to the Final Act and Report adopted at the First Session of UNCTAD on 15 June 1964, at p. 26).

developing countries *ab initio* from GSP schemes.[65] The European Communities contends that several other documents that the Panel relied on contain merely "expectations"[66] or "aim[s]"[67] of particular parties, rather than agreed statements of "legally binding" obligations.[68] Finally, the European Communities argues, the Agreed Conclusions do not purport to be an exhaustive regulation of GSP schemes. Therefore, in the European Communities' view, the allowance under the Agreed Conclusions for differentiation in favour of least-developed countries does not mean that the Agreed Conclusions prohibit all other forms of differentiation between developing countries.

32. The European Communities submits that the practice by developed countries of seeking waivers in order to provide more favourable treatment to a limited number of developing countries—as highlighted by the Panel—does not mean that such treatment may not otherwise be provided. According to the European Communities, the waivers mentioned by the Panel all relate to the restriction of preferences *ab initio* to particular countries in a particular region. The European Communities further points out that, in seeking these waivers, the preference-granting countries did not claim that the preferences were restricted to developing countries with development needs of a specific kind.

33. The European Communities contends that the Panel's interpretation of the term "developing countries" in paragraph 2(a) of the Enabling Clause is erroneous because it is entirely dependent on the Panel's erroneous interpretation of the word "non-discriminatory". In the European Communities' view, as the word "non-discriminatory" in footnote 3 of the Enabling Clause allows Members to differentiate between developing countries with different development needs, it follows for the same reasons that paragraph 2(a) does not require Members to grant the same preferences to *all* developing countries.

34. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Drug Arrangements are inconsistent with paragraph 2(a) of the Enabling Clause and, in particular, with footnote 3 thereof.

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[65]European Communities' appellant's submission, paras. 162-163 (referring to the Charter of Algiers, TD/38, adopted at the Ministerial Meeting of the Group of 77 on 24 October 1967 ("Charter of Algiers")) and paras. 179-181 (referring to General Principle Eight contained in the Final Act and Report adopted at the First Session of UNCTAD on 15 June 1964, at p. 20 (Exhibit EC-20 submitted by the European Communities to the Panel) ("General Principle Eight")).

[66]*Ibid.*, para. 162 (referring to Charter of Algiers).

[67]*Ibid.*, para. 165 (referring to the Report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, TD/56, 29 January 1968 ("OECD Special Report")).

[68]*Ibid.*, para. 180 (referring to General Principle Eight).

B. *Arguments of India – Appellee*

1. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

35. India argues that the Panel correctly found that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and requests the Appellate Body to uphold this finding. In addition, India submits that it made a claim against the Drug Arrangements under the Enabling Clause and that, therefore, the Appellate Body should examine the consistency of the Drug Arrangements under the Enabling Clause, even if it finds that the Enabling Clause is not an exception to Article I:1.

36. India contends that the Panel's test as to what is an "exception" is consistent with previous Appellate Body decisions. According to India, the Appellate Body drew an important distinction in *US – Wool Shirts and Blouses* between "positive rules establishing obligations in themselves" and "exceptions" to those obligations.[69] India states that an exception is an "affirmative defence"[70] and, accordingly, panels examine the consistency of a challenged measure with an exception only if the Member complained against invokes the exception to justify its measure. This leaves the Member with the choice of which exceptions to invoke and prevents exceptions being turned into rules. In other words, in India's view, a Member needs to comply with a provision that is an exception only when the Member invokes that exception to justify an inconsistency with another provision.

37. Applying this reasoning to the present dispute, India characterizes paragraph 2(a) of the Enabling Clause as an "exception" to Article I:1, because it grants developed-country Members a "conditional right"[71] to provide tariff preferences to developing-country Members under the conditions contained in paragraphs 2(a) and 3 of the Enabling Clause. India submits that these paragraphs impose conditions only on Members who invoke the Enabling Clause as a defence, whereas Article I:1 imposes obligations regardless of the defence invoked.

38. India argues, with reference to the *Vienna Convention*, that "subsequent practice"[72] supports its interpretation. First, India maintains that all waivers for preferential tariff treatment for products from developing countries have permitted derogations from Article I without mentioning the Enabling

[69]India's appellee's submission, para. 36 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, at 337).

[70]*Ibid.*, para. 36.

[71]*Ibid.*, para. 39.

[72]*Ibid.*, para. 42 (referring to *Vienna Convention*, Art. 31.3(b)).

Clause. Indeed, according to India, the fact that the European Communities requested a waiver[73] from its obligations *under Article I:1* in respect of the Drug Arrangements cannot be reconciled with the European Communities' position that the Enabling Clause excludes the application of Article I:1. Secondly, India refers to two GATT panels that examined, first, the consistency of a challenged measure under Article I:1, before proceeding to consider whether the measure was authorized under the Enabling Clause. India regards this as evidence of the "common understanding" of the Contracting Parties to the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947") regarding the relationship between Article I:1 and the Enabling Clause.[74]

39. India disputes the European Communities' contention that the Enabling Clause is not an exception to Article I:1 because the Enabling Clause constitutes *lex specialis*. India argues, with reference to a study by the International Law Commission and certain Appellate Body decisions[75], that the "maxim *lex specialis derogat legi generali*"[76] means not that a special rule necessarily excludes the application of a related general rule, but that the two rules apply cumulatively, and the special rule prevails over the general rule only to the extent of any conflict between the two rules. Thus, India maintains, developing-country Members have not waived their rights under Article I:1, which applies "cumulatively" with the Enabling Clause, except to the extent that these provisions are in conflict with each other.[77]

40. India also contests the European Communities' reliance on the Appellate Body decisions in *Brazil – Aircraft* and *EC – Hormones*. India states that these appeals related to Article 27.2(a) of the *SCM Agreement* and Article 3.1 of the *SPS Agreement*, both of which provisions explicitly exclude other provisions. India argues that, in contrast, the Enabling Clause does not clearly exclude the application of Article I:1 of the GATT 1994. In India's view, this supports India's contention that Article I:1 and the Enabling Clause apply "concurrently".[78]

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[73]Council for Trade in Goods, Request for a WTO Waiver, "New EC Special Tariff Arrangements to Combat Drug Production and Trafficking", G/C/W/328, 24 October 2001 (Exhibit India-2(b) submitted by India to the Panel).

[74]India's appellee's submission, para. 43 (referring to GATT Panel Report, *US – Customs User Fee*, 1988, BISD 35S/245, at 289-290; and GATT Panel Report, *US – MFN Footwear*, 1992, BISD 39S/128, at 153).

[75]*Ibid.*, paras. 76-80 (referring to International Law Commission, *Study Group on Fragmentation: Koskenniemi*, p. 5, <http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf>; Appellate Body Report, *Argentina – Footwear (EC)*, para. 89; and Appellate Body Report, *Guatemala – Cement I*, para. 65).

[76]*Ibid.*, para. 76.

[77]*Ibid.*, heading II.C.1.

[78]*Ibid.*, para. 51.

41. India claims that, even if the Appellate Body were to find that the Enabling Clause is not an exception to Article I:1, the Appellate Body should assess the consistency of the Drug Arrangements with the Enabling Clause because India did make a claim under the Enabling Clause. The European Communities' argument to the contrary, according to India, is "factually baseless".[79] India highlights that it originally requested the establishment of a panel "to examine whether [the Drug Arrangements] are consistent with Article I:1 … *and ... the Enabling Clause*".[80] In addition, India maintains that, in its first and second written submissions to the Panel, it requested the Panel to find that the Drug Arrangements "*are not justified [by] the Enabling Clause*".[81] Moreover, India states that the European Communities acknowledged in its first written submission to the Panel that the Enabling Clause forms part of India's claim[82], and that the Panel confirmed India's inclusion of this claim in paragraph 7.61 of the Panel Report.

42. India submits that it does not follow from India's characterization of the Enabling Clause as an "exception"—which was a "procedural argument" regarding the allocation of the burden of proof—that India made no "substantive" claims under the Enabling Clause.[83] India maintains that, in response to questioning by the Panel, it "merely stated that the Enabling Clause is not a *material element* of India's *claim under Article I:1 of the GATT*."[84] Furthermore, India reiterated its request for the Panel to examine the consistency of the Drug Arrangements with the Enabling Clause at the second substantive meeting of the Panel and at the interim review stage. In addition, India maintains that the Panel would have had "competence"[85] to assess the Drug Arrangements under the Enabling Clause even if the Panel had found that the Enabling Clause is not an exception to Article I:1.[86] In India's view, requiring India to resubmit its claims under the Enabling Clause to a new panel would be contrary to the "fundamental principle of good faith"[87] and the objectives of the dispute settlement

[79]India's appellee's submission, para. 52.

[80]*Ibid.*, para. 54 (quoting request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2). (italics added by India in its appellee's submission)

[81]*Ibid.*, para. 56 (quoting India's first written submission to the Panel, para. 67; and India's second written submission to the Panel, para. 164). (italics added by India in its appellee's submission)

[82]*Ibid.*, para. 58 (referring to European Communities' first written submission to the Panel, paras. 57, 141, and 206).

[83]*Ibid.*, para. 70.

[84]*Ibid.*, para. 64. (original italics)

[85]*Ibid.*, heading II.B.3.

[86]*Ibid.*, paras. 70-71 (referring to Panel Report, *US – Wool Shirts and Blouses*; Appellate Body Report, *EC – Hormones*, footnote 71 to para. 109 and footnote 180 to para. 197; and DSU, Arts. 7.2 and 11).

[87]*Ibid.*, para. 72 (referring to Appellate Body Report, *US – FSC*, para. 166).

system.[88] India asserts that the question of which party bears the burden of proof "does not affect the outcome of this dispute".[89]

43. Finally, India emphasizes that the European Communities has not yet obtained a waiver from its obligations under Article I:1 with respect to the Drug Arrangements and that only the WTO Members can provide such a waiver.

44. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the Enabling Clause is an exception to Article I:1 of the GATT 1994.

2. Whether the Drug Arrangements are Justified Under the Enabling Clause

45. India requests the Appellate Body to uphold the Panel's finding that the Drug Arrangements are not justified under the Enabling Clause. In particular, India maintains that paragraph 2(a) of the Enabling Clause does not authorize the European Communities to differentiate between developing-country Members that are beneficiaries under the European Communities' GSP scheme.

46. At the outset, India submits that the present dispute focuses not on the European Communities' initial selection of particular developing countries as beneficiaries under its GSP scheme, but on the European Communities' treatment of developing countries already identified as beneficiaries under that scheme. Therefore, according to India, the Appellate Body is not required to examine legal issues arising from the initial selection of beneficiaries under the Enabling Clause. Rather, India urges the Appellate Body to find that the term "developing countries" in footnote 3 of the Enabling Clause includes at least those countries that are beneficiaries under a given GSP scheme, and that the words "products originating in developing countries" in paragraph 2(a) refer to products originating in any of those beneficiary countries.

47. India argues that its interpretation is reinforced by the nature of the MFN principle embodied in Article I:1 as "a fundamental norm of the rules-based multilateral trading system of the WTO".[90] India points to Appellate Body decisions as support for its view that "derogations" from Article I:1 exist only where provided for explicitly.[91] India emphasizes that paragraph 2(a) of the Enabling Clause does *not* specifically state that developing countries waive their rights to MFN treatment. Moreover, the object and purpose of the Enabling Clause, as well as its drafting history, indicate that

[88]India's appellee's submission, para. 74 (referring to DSU, Arts. 3.3-3.4 and 3.7).

[89]*Ibid.*, para. 73.

[90]*Ibid.*, para. 1.

[91]*Ibid.*, paras. 93-94 (referring to Appellate Body Report, *Canada – Autos*, para. 84; and Appellate Body Report, *EC – Bananas III*, paras. 190-191).

the developing countries did not agree to relinquish their MFN rights as between themselves in agreeing to paragraph 2(a) of the Enabling Clause.

48. India contends that the Drug Arrangements are not "non discriminatory preferences beneficial to the developing countries" within the meaning of footnote 3 of the Enabling Clause. First, India relies on dictionary definitions to ascertain that the ordinary meaning of "non-discriminatory preferences" in footnote 3 is "preferential tariff treatment that is applied equally".[92] Secondly, India finds "contextual guidance"[93] on the meaning of "non-discriminatory" in Articles I, XIII, and XVII of the GATT 1994. According to India, these provisions confirm that "non-discrimination" refers to the provision of "equal competitive opportunities" in relation to non-tariff measures and of "formally equal[] treatment" in relation to tariff measures.[94] In addition, in India's submission, the inclusion of the word "unjustifiable" before the word "discrimination" in the chapeau of Article XX of the GATT 1994 demonstrates that a Member's reasons for distinguishing between products of different origin are not relevant to whether such distinction constitutes discrimination.

49. Turning to the words "generalized" and "non-reciprocal" in footnote 3, India argues that the word "generalized" refers to the countries that should be included *ab initio* as beneficiaries under a GSP scheme, whereas the word "non-discriminatory" refers to the treatment of products originating in beneficiary countries. Even if "generalized" meant that all developing countries must be included *ab initio* as beneficiaries, in India's view, the "additional requirement"[95] imposed by the word "non-discriminatory" would still be relevant in addressing the separate question of how products from beneficiary countries should be treated. India contests the European Communities' argument that the Panel's interpretation of "non-discriminatory" renders redundant the word "non-reciprocal" in footnote 3. India suggests that reciprocity is a "principle of trade negotiations"[96], whereas "non-discriminatory" addresses the implementation of the results of such negotiations. India argues that Part IV of the GATT 1994 (entitled "Trade and Development") was added to the original GATT provisions because it is possible to comply with the principle of non-discrimination while insisting on non-reciprocity in negotiations.

[92]India's appellee's submission, para. 106.

[93]*Ibid.*, para. 115.

[94]*Ibid.*, paras. 118 and 120 (referring to Appellate Body Report, *EC – Bananas III*, paras. 190-191). (See also, *ibid.*, paras. 170 and 180)

[95]*Ibid.*, para. 148.

[96]*Ibid.*, para. 153.

50. India contends that paragraph 2(a) of the Enabling Clause and Article I:1 of the GATT 1994 must be interpreted in a harmonious manner so as to give effect to both provisions.[97] With this in mind, India submits that the Enabling Clause should be interpreted to authorize only those deviations from the MFN principle that are necessary in order for GSP schemes to operate. Thus, the Enabling Clause authorizes developed-country Members to exclude other developed countries from their GSP schemes, because Members could not grant any tariff preferences under these schemes if such exclusion was not authorized. However, in India's view, the Enabling Clause does not authorize tariff preferences that differentiate between developing countries, as tariff preferences under GSP schemes can be and are granted to developing countries without differentiation of this kind. According to India, a contrary interpretation would be inconsistent with the need to interpret paragraph 2(a) and Article I:1 so as to avoid conflict between the two provisions.

51. India derives support for its interpretation from several provisions of the Enabling Clause. In particular, India reads paragraphs 2(a) and 2(d) together as identifying three categories of countries: the developed countries, the developing countries, and the least-developed countries. In India's view, under the Enabling Clause, the developed countries "relinquished" their MFN rights in respect of preferential tariff treatment in favour of developing and least-developed countries, whereas the developing countries "relinquished" their MFN rights only in respect of preferential treatment in favour of least-developed countries.[98] However, India sees nothing in the text of the Enabling Clause to indicate that developing countries have similarly relinquished their MFN rights in relation to preferential treatment accorded by developed countries to other developing countries. India suggests that the European Communities itself recognized this fact prior to this dispute.[99] India maintains that paragraph 2(d) was specifically inserted to allow differentiation of a kind that was not previously allowed under the 1971 Waiver Decision. India argues that the European Communities' current interpretation of "non-discriminatory" in footnote 3 would render paragraph 2(d) redundant, contrary to the "principle of effectiveness in treaty interpretation".[100]

52. The opening words of paragraph 3(c) demonstrate, according to India, that paragraph 3(c) of the Enabling Clause does not provide for derogations from obligations imposed under paragraph 2(a), (b), or (d). Further, unlike paragraphs 5 and 6, paragraph 3(c) does not refer to

[97]India's appellee's submission, para. 83 (referring to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; and International Court of Justice, Preliminary Objections, *Right of Passage over Indian Territory (Portugal v. India)*, 1957, ICJ Reports, p. 142).

[98]*Ibid.*, paras. 3 and 5.

[99]*Ibid.*, para. 6 (referring to "User's Guide to the European Union's Scheme of Generalised Tariff Preferences" (February 2003) (Exhibit India-1 submitted by India to the Panel)).

[100]*Ibid.*, para. 132 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, at 21).

"individual" or "particular" needs of developing countries. India argues that this shows that the "needs" intended by the drafters under paragraph 3(c) are the needs of "developing countries as a whole".[101]

53. India draws support for its reading of paragraph 2(a) from the object and purpose of the Enabling Clause. According to India, the purpose includes: facilitating "mutually acceptable arrangements"[102] that were "unanimous[ly] agree[d]"[103] in UNCTAD; replacing "special preferences"[104] granted only to some developing countries with generalized preferences that do not differentiate between developing countries; and, promoting the trade of developing countries without raising barriers to or creating undue difficulties for the trade of other Members, as confirmed in paragraph 3(a). India points to several UNCTAD texts to confirm these purposes[105], arguing that the European Communities offers no such support for its contrary views. India regards differentiation between developing countries under a GSP scheme as inconsistent with paragraph 3(a) because it creates difficulties for the trade of other developing countries by "divert[ing] competitive opportunities"[106] from one country to another. In addition, India contends that linking GSP benefits to "the situation or policies"[107] of beneficiaries reduces the certainty and value of such benefits.

54. India contends that the European Communities' interpretation of paragraph 3(c) would mean that developed countries "would have *the obligation*"[108] to differentiate between developing countries according to their individual needs. This would have the "absurd consequence"[109] that a measure eliminating tariffs on products from *all* least-developed countries, without differentiating between those countries would be open to challenge under paragraph 3(c). Moreover, India argues that it would result not only in the European Communities' scheme, but in all GSP schemes being inconsistent with the Enabling Clause because they do not differentiate between developing countries based on their *individual* development needs. India also maintains that the European Communities' suggestion that its interpretation would best fulfil the objectives of paragraph 3(c) is inconsistent with

[101]India's appellee's submission, para. 124.

[102]*Ibid.*, paras. 95 and 190.

[103]*Ibid.*, para. 165.

[104]*Ibid.*, paras. 147 and 190.

[105]*Ibid.*, paras. 158-184 (referring to Agreed Conclusions; Resolution 21(II); Resolution 24(II) of the Second Session of UNCTAD; Charter of Algiers, paras. (a) and (d); and OECD Special Report, part II).

[106]*Ibid.*, para. 192.

[107]*Ibid.*, para. 21.

[108]*Ibid.*, para. 14. (original italics)

[109]*Ibid.*, para. 15.

the rule that treaty interpretation should be based on the text and not on policy considerations that are not reflected in the text.

55. For these reasons, India requests the Appellate Body to uphold the Panel's finding that the Drug Arrangements are not justified under the Enabling Clause.

C. *Arguments of the Third Participants*

1. Andean Community

56. The governments of Bolivia, Colombia, Ecuador, Peru, and Venezuela (jointly, the "Andean Community") submit that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994 and in finding that Article I:1 applies concurrently with the Enabling Clause. The Andean Community also contends that, contrary to the Panel's finding, the Drug Arrangements are consistent with the Enabling Clause. Accordingly, the Andean Community supports the European Communities' contention that the Drug Arrangements are "fully WTO-compatible".[110]

57. The Andean Community argues that the Enabling Clause establishes "a self-standing regime"[111], meaning that Article I:1 of the GATT 1994 does not apply to GSP schemes.[112] According to the Andean Community, the ordinary meaning of the word "notwithstanding" in paragraph 1 of the Enabling Clause confirms this interpretation, as do the context, and object and purpose of the Enabling Clause. In addition, the "history, ... practice and ... current role"[113] of the Enabling Clause indicate that GSP schemes provide the "most concrete and relevant form"[114] of special and differential treatment. This supports the concept of the Enabling Clause as a self-standing regime. According to the Andean Community, because measures falling within the Enabling Clause are to be judged solely under the Enabling Clause, India was required to make a claim under the Enabling Clause. As India did not do so, the Andean Community maintains, India's claim should be dismissed.

58. The Andean Community submits further that, even if the Enabling Clause is an exception to Article I:1, this characterization is not determinative of which party bears the burden of proof. The Andean Community asserts that the Panel erred in assigning the burden. According to the Andean

[110]Andean Community's third participant's submission, para. 97.

[111]See, for example, *ibid.*, paras. 8, 12, and 27.

[112]*Ibid.*, para. 9 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 139).

[113]*Ibid.*, para. 13.

[114]*Ibid.*, para. 21.

Community, under the Panel's allocation of the burden of proof, every GSP scheme would be open to challenge, with the burden falling on each preference-granting country to establish the consistency of its GSP scheme with the Enabling Clause. The Andean Community claims that the assigning of the burden of proof is "a fundamental initial decision upon which every further consideration is based", such that the Appellate Body "should reverse on this element alone".[115]

59. Regarding the consistency of the Drug Arrangements with the Enabling Clause, the Andean Community submits, first, that the Panel did not properly interpret the historical texts serving as context and preparatory work for the Enabling Clause. The Andean Community emphasizes the "aspirational tone"[116] of these texts and argues that the Panel "mischaracterize[d]"[117] certain texts as binding or reflecting "unanimous agreement".[118] Secondly, turning to the interpretation of the term "non-discriminatory" in the Enabling Clause, the Andean Community contends that the Panel wrongly equated this concept with MFN treatment. The Andean Community further alleges that the Panel's allowance for *a priori* limitations under the Enabling Clause is contrary to the Panel's own interpretation of "non-discriminatory".

60. In the view of the Andean Community, "a prohibition of discrimination is a command not to treat equal situations differently, or different situations equally"[119] and, accordingly, the word "non-discriminatory" in the Enabling Clause does not require that identical treatment be granted to all developing countries. The Andean Community suggests that differentiating between developing countries—taking into account their objectively different situations—does not constitute discrimination. The Andean Community argues that the "production and trafficking of illicit drugs have far-reaching, unparalleled and unquantifiable implications for the economic and social development"[120] of affected developing countries. By providing preferential access for "alternative products"[121] and, thereby, seeking to reduce the importance of drugs as an economic activity, the European Communities responds to these countries' specific needs. The Andean Community asserts that this response is consistent with the requirements of the Enabling Clause.

[115]Andean Community's third participant's submission, para. 41.

[116]*Ibid.*, para. 50.

[117]*Ibid.*, para. 56. (original underlining)

[118]*Ibid.*, para. 55.

[119]*Ibid.*, para. 64.

[120]*Ibid.*, para. 78.

[121]*Ibid.*, para. 87.

2. Costa Rica

61. Costa Rica submits that the Panel erred in finding that the Drug Arrangements are not justified under the Enabling Clause. Costa Rica asserts that the Panel based this finding on erroneous interpretations of the terms "non-discriminatory" and "developing countries" contained in footnote 3 and paragraph 2(a), respectively, of the Enabling Clause. Accordingly, Costa Rica supports the European Communities' request that the Appellate Body reverse this finding.

62. Costa Rica contends that, instead of relying on the ordinary meaning of these terms of the Enabling Clause in context, the Panel relied on other instruments that "cannot be properly considered context for the interpretation of the Enabling Clause".[122] Costa Rica maintains that this led to the Panel's incorrect finding that "non-discriminatory" treatment under footnote 3 of the Enabling Clause is synonymous with identical or unconditional treatment. Costa Rica asserts that had the Panel interpreted the Enabling Clause in accordance with Article 31 of the *Vienna Convention*—in the light of the object and purpose of the Enabling Clause and the 1971 Waiver Decision—it would have found that "the 'non-discriminatory' standard prohibits developed countries from according tariff preferences that make an unjust or prejudicial distinction between different categories of developing countries."[123]

63. In addition, according to Costa Rica, the Panel erred in concluding that the term "developing countries" in paragraph 2(a) of the Enabling Class means *all* developing countries. In Costa Rica's view, in interpreting this term, the Panel relied on its incorrect interpretation of the term "non-discriminatory" and failed to examine paragraph 1 of the Enabling Clause as relevant context. Moreover, Costa Rica is of the opinion that it is not appropriate to consider the *travaux préparatoires* as a supplementary means of interpretation under Article 32 of the *Vienna Convention* in interpreting paragraph 2(a). However, even if this were appropriate, the drafting history of the 1971 Waiver Decision confirms that the term "developing countries" means less than all developing countries.

3. Panama

64. Panama submits that the Panel erred in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994. Panama maintains that the Enabling Clause is "*per se* an autonomous rule"[124] that permits the granting of more favourable treatment to developing countries. Panama also contests the Panel's finding that the Drug Arrangements are incompatible with the Enabling Clause.

[122]Costa Rica's third participant's submission, para. 6.

[123]*Ibid.*, para. 15.

[124]Panama's third participant's submission, para. 4.

In particular, Panama argues that the Panel erred in interpreting the term "non-discriminatory" in footnote 3 of the Enabling Clause as requiring preference-granting countries to accord identical treatment to all developing countries. Panama therefore states that it is "completely in agreement with the arguments by the European Communities".[125]

65. Panama is of the view that, if the Enabling Clause were an exception to Article I of the GATT 1994, it would be included as a waiver decision in the GATT 1994.[126] Because the Enabling Clause is not so included, Panama contends, it is an "independent" and "special" rule governing the differential and more favourable treatment accorded to developing countries under the schemes set out in paragraph 2 of the Enabling Clause.[127] Panama submits that "the Enabling Clause creates a standalone mechanism that is linked to the general principle contained in GATT Article I:1" [128] and, as such, constitutes an "autonomous right" [129] of WTO Members.

66. Panama argues that the Enabling Clause is not an affirmative defence but, rather, "excludes the application of ... Article I:1".[130] As such, Panama claims, it was up to India to claim that the Drug Arrangements do not fall within the scope of paragraph 2(a) of the Enabling Clause and are inconsistent with paragraph 3(c) thereof. Because India did not do so, Panama argues, the Appellate Body should refrain from assessing the consistency of the Drug Arrangements with the Enabling Clause.

67. According to Panama, "non-discrimination" does not mean equal treatment. Panama submits that the fact that the Drug Arrangements are not extended to all developing countries does not mean that they discriminate between developing countries. In addition, Panama maintains that the obligation imposed in paragraph 3(c) of the Enabling Clause must be interpreted in order to allow some flexibility for preference-granting countries to provide preferential treatment that "effectively help[s] 'generalized' needs".[131] In this respect, Panama claims, the Drug Arrangements satisfy the "requirement" in paragraph 3(c) because they respond to "specific growth needs".[132]

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[125]Panama's third participant's submission, para. 1.

[126]Paragraph 1(b)(iii) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

[127]Panama's third participant's submission, paras. 5-6.

[128]*Ibid.*, para. 10.

[129]*Ibid.*, para. 8.

[130]*Ibid.*, para. 17.

[131]*Ibid.*, para. 23.

[132]*Ibid.*, para. 13.

4. Paraguay

68. Paraguay contends that the Panel was correct in finding that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994. In addition, Paraguay agrees with the Panel's interpretation of paragraph 2(a) of the Enabling Clause and the Panel's consequent finding that the Drug Arrangements are not justified by the Enabling Clause. Accordingly, Paraguay supports India's request that the Appellate Body uphold these findings.

69. According to Paraguay, where a Member's measure differentiates between other Members in a manner inconsistent with Article I:1 and does not fall within any specific exceptions such as the Enabling Clause or Article XX of the GATT 1994, the only way for that Member to impose its measure in accordance with its WTO obligations is to seek a waiver under Article IX of the *WTO Agreement*. Paraguay maintains that the Drug Arrangements are inconsistent with Article I:1 and that the European Communities has received no such waiver in respect of them.

70. Paraguay contests the European Communities' characterization of the Enabling Clause as a "different, parallel legal regime".[133] Paraguay maintains that Article I:1 forms the "primary basis" for WTO trade and that exceptions to Article I:1 must be founded on "properly established legal rules".[134] In Paraguay's view, the Enabling Clause is an exception to Article I:1 and is a part of the GATT 1994, and the GSP recognized in the Enabling Clause is "a permanent mechanism of the rules-based multilateral trading system".[135]

71. Paraguay emphasizes that developing countries did not renounce their right to MFN treatment under Article I:1 of the GATT 1994 in agreeing to the Enabling Clause. According to Paraguay, the Enabling Clause was adopted to replace the "special preferences"[136] provided by developed countries to certain developing countries, with a generalized system under which all developing countries would benefit. Paraguay argues that the only distinction that the WTO draws within the category of developing countries is in recognizing the category of least-developed countries, as explicitly stated in paragraph 2(d) of the Enabling Clause. As such, in Paraguay's view, the "condition"[137] of non-discrimination in footnote 3 means that benefits granted to some developing countries must be granted

[133]Paraguay's third participant's submission, para. 13.

[134]*Ibid.*, para. 12.

[135]*Ibid.*, para. 11.

[136]*Ibid.*, para. 14.

[137]*Ibid.*, para. 27.

to all such countries. Therefore, Paraguay submits that tariff preferences pursuant to the Enabling Clause must apply to all developing countries.

5. United States

72. The United States contends that the Panel misconceived the relationship between the Enabling Clause and Article I:1 of the GATT 1994. The United States also submits that the Panel erred in concluding that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires preference-granting countries to accord "identical" treatment to all beneficiaries and that, consequently, paragraph 2(a) covers only identical preferences extended to *all* developing countries. Accordingly, the United States supports the European Communities' request that the Appellate Body reverse the Panel's legal interpretation of the terms "non-discriminatory" in footnote 3 and "developing countries" in paragraph 2(a) and, consequently, reverse the Panel's finding that the Enabling Clause is an "exception" to Article I:1.

73. Beginning with the relationship between Article I:1 and the Enabling Clause, the United States claims that the Panel failed to consider the entire text of the Enabling Clause and the context and object and purpose of the Enabling Clause and of the GATT 1994. The United States argues that the Panel "misconstru[ed]" the statement of the Appellate Body in *US – Wool Shirts and Blouses* and applied this statement "as a mechanical 'test' " without due regard to the term "notwithstanding" in the Enabling Clause.[138] The United States observes that the Panel examined the ordinary meaning of "notwithstanding" in paragraph 1 of the Enabling Clause only after the Panel had concluded that the Enabling Clause is an "exception". In addition, in the view of the United States, the reasoning underlying the Panel's conclusion that the Enabling Clause is an exception "would result in ... inconsistencies and absurd results"[139] because several WTO obligations apply only if a Member chooses to take the action addressed in the relevant provision.

74. The United States submits that the Enabling Clause is part of the overall balance of rights and obligations in the covered agreements and, as such, is a "separate provision authorizing the types of treatment provided therein", "in spite of" the MFN obligation in Article I:1.[140] In other words, the United States maintains that, contrary to the finding of the Panel, the Enabling Clause *is* a "positive rule establishing obligations in itself".[141] The United States emphasizes that several aspects of the Enabling Clause are unrelated to Article I:1 and that the Enabling Clause is incorporated into the

[138]United States' third participant's submission, paras. 2-3.

[139]*Ibid.*, para. 5.

[140]*Ibid.*, paras. 3 and 10.

[141]*Ibid.*, para. 4.

GATT 1994. The United States also argues that, unlike Article XX of the GATT 1994, the Enabling Clause "*encourages*"[142] developed-country Members to grant preferences to developing-country Members. In the view of the United States, "[p]lacing the burden on developed countries to defend actions they take to benefit developing countries ... would create a *disincentive* for developed countries" to take such action.[143]

75. Turning to footnote 3 of the Enabling Clause, the United States contests the Panel's "assum[ption]"[144] that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries. In the view of the United States, "[t]his footnote is simply a cross-reference to where the Generalized System of Preferences is described."[145] Because the Panel began its analysis "from a false premise", the United States suggests that the Panel's finding as to footnote 3 "should be rejected on that basis alone".[146] In any case, the United States contends, the Panel erroneously arrived at a "one size fits all"[147] obligation to grant "identical" tariff preferences to "all" developing countries. Furthermore, according to the United States, the fact that the Panel understood the Enabling Clause to allow *a priori* limitations demonstrates that the term "non-discriminatory" does not preclude *all* conditions. The United States asserts that the Panel focused not on the text, but on a policy concern—the prevention of "abuse"[148] by preference-granting countries. In the United States' view, the Panel's focus on this policy concern is inconsistent with Article 3.2 of the DSU and led to an incorrect interpretation of "non-discriminatory".

76. With respect to paragraph 3(c) of the Enabling Clause, the United States argues that the Panel wrongly interpreted this provision as imposing an obligation not to provide differentiated GSP benefits. In doing so, the United States submits, the Panel failed to recognize that the term "generalized" in footnote 3 ensures that the responses of preference-granting countries to the needs of developing countries do not result in tariff advantages accorded primarily to select countries.

77. Finally, the United States contends that the Panel's interpretation of "developing countries" in paragraph 2(a) as referring to *all* developing countries is "completely dependent"[149] on its erroneous interpretation of "non-discriminatory". Moreover, the United States argues, the Enabling Clause

[142]United States' third participant's submission, para. 8. (original italics)

[143]*Ibid.*, para. 9. (original italics)

[144]*Ibid.*, para. 11.

[145]*Ibid.*

[146]*Ibid.*

[147]*Ibid.*, para. 22.

[148]*Ibid.*, para. 20 (quoting Panel Report, para. 7.158).

[149]*Ibid.*, para. 23.

refers only to "developing countries" or "the developing countries", and not to "*all* developing countries".[150]

III. Issues Raised in This Appeal

78. The following issues are raised in this appeal:

(a) Whether the Panel erred in concluding that the "special arrangements to combat drug production and trafficking" (the "Drug Arrangements"), which are part of Council Regulation (EC) No. 2501/2001 (the "Regulation")[151], are inconsistent with Article I:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")[152], based on the Panel's findings that:

(i) the Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries (the "Enabling Clause")[153] is an "exception" [154] to Article I:1 of the GATT 1994;

(ii) the Enabling Clause "does not exclude the applicability" [155] of Article I:1 of the GATT 1994; and

(iii) the European Communities bears the burden of invoking the Enabling Clause and proving that the Drug Arrangements are consistent with that Clause [156]; and

(b) Whether the Panel erred in concluding that the European Communities failed to prove that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause [157], based on the Panel's findings that:

[150]United States' third participant's submission, para. 24. (original italics)

[151]Council Regulation (EC) No. 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, *Official Journal of the European Communities*, L Series, No. 346 (31 December 2001), p. 1 (Exhibit India-6 submitted by India to the Panel).

[152]Panel Report, paras. 7.60 and 8.1(b).

[153]GATT Document L/4903, 28 November 1979, BISD 26S/203 (attached as Annex 2 to this Report).

[154]Panel Report, para. 7.53.

[155]*Ibid*.

[156]*Ibid*.

[157]*Ibid*., para. 8.1(d).

(i) the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause requires that, pursuant to schemes under the Generalized System of Preferences ("GSP"), "identical tariff preferences"[158] be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations; and

(ii) the term "developing countries" in paragraph 2(a) of the Enabling Clause means "all"[159] developing countries, except as regards the implementation of *a priori* limitations.

IV. The Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause

79. We begin our analysis of the European Communities' appeal by examining its claim that the Panel improperly characterized the relationship between Article I:1 of the GATT 1994 and the Enabling Clause, and thus improperly allocated the burden of proof in this dispute.

A. *The Panel's Analysis and the Arguments on Appeal*

80. The Panel observed that the participants disagree on whether the Enabling Clause constitutes a "positive rule setting out obligations", or an "exception" authorizing derogation from one or more such positive rules.[160] Based on its understanding of the Appellate Body's decision in *US – Wool Shirts and Blouses*, the Panel determined that the Enabling Clause, in and of itself, does not establish legal obligations but, instead, contains requirements that are "only subsidiary obligations, dependent on the decision of the Member to take [particular] measures".[161] The Panel further concluded that the legal function of the Enabling Clause is to permit Members to derogate from Article I:1 "so as to enable developed countries, *inter alia*, to provide GSP to developing countries".[162] As a result, the Panel found that the Enabling Clause is "in the nature of an exception" to Article I:1.[163]

81. The Panel noted that the GATT 1994 includes several provisions in the nature of exceptions that serve to justify a measure's inconsistency with Article I:1, including Articles XX, XXI, and XXIV, and the Enabling Clause. According to the Panel, these exceptions reflect "legitimate

[158]Panel Report, para. 7.161.

[159]*Ibid.*, para. 7.176.

[160]*Ibid.*, para. 7.32.

[161]*Ibid.*, para. 7.37.

[162]*Ibid.*, para. 7.38.

[163]*Ibid.*, para. 7.39.

objectives" that may be pursued by Members.[164] The Panel reasoned that, because a complaining party may not be able to discern the objectives of a given measure, particularly as they may not be apparent from the text of the measure itself, it is "sufficient" for a complaining party to demonstrate an inconsistency with Article I:1, without also establishing "violations" of any of the possible exception provisions.[165]

82. With respect to the present dispute, the Panel found that India could make its case against the European Communities solely by establishing the inconsistency of the Drug Arrangements with Article I:1.[166] Having done so, according to the Panel, it would then be incumbent upon the European Communities to invoke the Enabling Clause as a defence and to demonstrate the consistency of the Drug Arrangements with the requirements contained in that Clause.[167]

83. The Panel also examined whether Article I:1 applies to a measure covered by the Enabling Clause. It looked first to the ordinary meaning of the term "notwithstanding", as used in paragraph 1 of the Enabling Clause, and concluded on that basis that the Enabling Clause takes precedence over Article I "to the extent of conflict between the two provisions".[168] Nevertheless, the Panel declined to assume the exclusion of the applicability of a "basic GATT obligation" such as Article I:1 in the absence of a textual indication of Members' intent to that effect.[169] Thus, it also referred to World Trade Organization ("WTO") jurisprudence relating to other exception provisions, and concluded that the relationship between these exceptions and the obligations from which derogation is permitted is "one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, [the exception] prevails".[170] Accordingly, the Panel concluded, on the basis of both the ordinary meaning of the text of the provision and WTO case law, that Article I:1 applies to measures covered by the Enabling Clause and that the Enabling Clause prevails over Article I:1 "to the extent of the conflict between [them]".[171]

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[164]Panel Report, para. 7.40.

[165]*Ibid.*

[166]*Ibid.*

[167]*Ibid.*, para. 7.42.

[168]*Ibid.*, para. 7.44. Paragraph 1 of the Enabling Clause provides:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. (footnote omitted)

[169]Panel Report, para. 7.44.

[170]*Ibid.*, para. 7.45.

[171]*Ibid.*

84. Finally, the Panel referred to the European Communities' reliance on the Appellate Body's decisions in *Brazil – Aircraft* and *EC – Hormones* and distinguished those cases from the present dispute. The Panel stated that the relationship between the provisions at issue in those cases was "different" from the relationship it had found between Article I:1 and the Enabling Clause.[172] In particular, the Panel determined that, in the two earlier disputes, one provision "clearly exclude[d]" the application of the other.[173] In contrast, the Panel had already found that the Enabling Clause does not exclude the applicability of Article I:1. In these circumstances, the Panel suggested that the Enabling Clause constitutes an "affirmative defence", in relation to which the responding party bears the burden of proof if that party invokes the Enabling Clause to justify its challenged measure.[174]

85. On appeal, the European Communities challenges the Panel's finding that the Enabling Clause is an "exception"[175] to Article I:1 of the GATT 1994 and that, therefore, the European Communities must invoke the Enabling Clause as an "affirmative defence"[176] to India's claim that the Drug Arrangements are inconsistent with Article I:1. The European Communities submits that the Enabling Clause is part of a "special regime for developing countries"[177], which "encourages"[178], *inter alia*, the granting of tariff preferences by developed-country Members to developing countries. As a result, the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and applies to the *exclusion* thereof, rather than as an exception thereto.[179] The European Communities argues, therefore, that India is required to bring a claim under the Enabling Clause if it considers that the European Communities' GSP scheme has nullified or impaired India's rights.[180] The European Communities requests us to refrain from examining the consistency of the Drug Arrangements with the requirements of the Enabling Clause because, according to the European Communities and as

[172]Panel Report, paras. 7.48-7.50.

[173]*Ibid*., para. 7.48. (See also, *ibid*., paras. 7.47-7.50) The Panel was referring to Articles 3.1(a) and 27.2(b) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), as interpreted in Appellate Body Report, *Brazil – Aircraft*, and Articles 3.1 and 3.3 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), as interpreted in Appellate Body Report, *EC – Hormones*.

[174]Panel Report, para. 7.49.

[175]*Ibid*., para. 7.39.

[176]*Ibid*., para. 7.42.

[177]European Communities' appellant's submission, para. 51.

[178]*Ibid.*, para. 53.

[179]*Ibid.*, para. 22.

[180]*Ibid.*, para. 15(2).

allegedly acknowledged by India before the Panel, India did not bring a claim under the Enabling Clause.[181]

86. India, by contrast, supports the Panel's understanding of the relationship between Article I:1 and the Enabling Clause. India argues that paragraph 2(a) of the Enabling Clause qualifies as an "exception" because the conditions therein must be complied with only by Members adopting a measure pursuant to the authorization granted by that provision. This differs from the most-favoured nation ("MFN") obligation in Article I:1.[182] Moreover, according to India, we are not precluded from addressing the consistency of the Drug Arrangements with the Enabling Clause because, contrary to the assertion of the European Communities, India did make a claim under that Clause before the Panel.[183] India submits that denying the Panel the "competence" [184] to evaluate this claim, even if the Enabling Clause is not regarded as an exception, would be inconsistent with the objectives of WTO dispute settlement, "namely to secure a 'prompt' and 'positive solution to a dispute', and 'achieve a satisfactory settlement of the matter' in accordance with rights and obligations under the covered agreements." [185] According to India, this is particularly so because the European Communities had been on notice throughout the Panel proceedings of India's position that the Drug Arrangements are not justified by the Enabling Clause.[186]

B. *Relevance of the Relationship Between Article I:1 of the GATT 1994 and the Enabling Clause for the Allocation of the Burden of Proof*

87. We begin our analysis of the relationship between Article I:1 of the GATT 1994 and the Enabling Clause, and the attendant implications for the allocation of the burden of proof in this dispute, by recalling the observation of the Appellate Body in *US – Wool Shirts and Blouses*:

> [I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[187]

[181]European Communities' appellant's submission, paras. 3, 13(2), and 66.

[182]India's appellee's submission, paras. 36 and 39.

[183]*Ibid.*, paras. 54-57.

[184]*Ibid.*, para. 71 and heading II.B.3.

[185]*Ibid.*, para. 74 (quoting DSU, Arts. 3.3, 3.4, and 3.7). (footnotes omitted)

[186]*Ibid.*, para. 73.

[187]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, at 335.

It is thus for the *complaining* party to raise a claim with respect to a particular obligation and to *prove* that the responding party is acting inconsistently with that obligation. It is for the *responding* party, if it so chooses, to raise a defence in response to an allegation of inconsistency and to *prove* that its challenged measure satisfies the conditions of that defence. Therefore, the question before us is whether India must raise a "claim" and prove that the Drug Arrangements are inconsistent with the Enabling Clause, or whether the European Communities must raise and prove, in "defence", that the Drug Arrangements are consistent with the Enabling Clause, in order to justify the alleged inconsistency of the Drug Arrangements with Article I:1.[188]

88. We recall that the Appellate Body has addressed the allocation of the burden of proof in similar situations. In cases where one provision permits, in certain circumstances, behaviour that would otherwise be inconsistent with an obligation in another provision, and one of the two provisions refers to the other provision, the Appellate Body has found that the complaining party bears the burden of establishing that a challenged measure is inconsistent with the provision permitting particular behaviour *only* where one of the provisions suggests that the obligation is not applicable to the said measure.[189] Otherwise, the permissive provision has been characterized as an exception, or defence, and the onus of invoking it and proving the consistency of the measure with its requirements has been placed on the responding party.[190] However, this distinction may not always be evident or readily applicable.

C. *Characterization of the Enabling Clause*

1. Text of Article I:1 and the Enabling Clause

89. In considering whether the Enabling Clause is an exception to Article I:1 of the GATT 1994, we look, first, to the text of the provisions at issue. Article I:1, which embodies the MFN principle, provides:

[188]We are not concerned here with the situation where a complaining party brings a challenge solely under the provisions of the Enabling Clause, that is, without also claiming an inconsistency with Article I of the GATT 1994.

[189]See Appellate Body Report, *EC – Hormones*, para. 104; Appellate Body Report, *Brazil – Aircraft*, paras. 139-141; and Appellate Body Report, *EC – Sardines*, para. 275.

[190]See Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 131-133; and Appellate Body Report, *US – Wool Shirts and Blouses*, p.16, DSR 1997:I, at 337.

Article I

General Most-Favoured-Nation Treatment

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article I:1 plainly imposes upon WTO Members the obligation to treat "like products ... equally, irrespective of their origin".[191]

90. We turn now to the Enabling Clause, which has become an integral part of the GATT 1994.[192] Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. (footnote omitted)

The ordinary meaning of the term "notwithstanding" is, as the Panel noted[193], "[i]n spite of, without regard to or prevention by".[194] By using the word "notwithstanding", paragraph 1 of the Enabling

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[191]Appellate Body Report, *EC – Bananas III*, para. 190.

[192]In response to questioning at the oral hearing, the participants and third participants agreed that the Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*. That provision stipulates that:

> 1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
>
> ...
>
> (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
>
> ...
>
> (iv) other decisions of the CONTRACTING PARTIES to GATT 1947[.]

[193]See Panel Report, para. 7.44.

[194]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 1948.

Clause permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally".[195] Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1.

2. Object and Purpose of the *WTO Agreement* and the Enabling Clause

91. The European Communities' contention that the Enabling Clause is *not* in the nature of an exception appears to be founded on the European Communities' understanding of the object and purpose of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and the Enabling Clause. We, too, look to the object and purpose of the *WTO Agreement* and the Enabling Clause to clarify whether the Enabling Clause was intended to operate as an exception to Article I:1.

92. The Preamble to the *WTO Agreement* provides that Members recognize:

> ... that there is need for *positive efforts* designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development[.][196] (emphasis added)

The Waiver Decision on the Generalized System of Preferences (the "1971 Waiver Decision")[197], which provided the initial authorization under the GATT for developed countries' GSP schemes and is explicitly referred to in footnote 3 of the Enabling Clause[198], offers relevant guidance in discerning the object and purpose of the Enabling Clause. In the Preamble to the 1971 Waiver Decision, the Contracting Parties recognized:

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[195]GATT 1994, Art. I:1.

[196]Second recital. We note that Article XXXVI:3 of the GATT 1994 similarly provides:

> There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

[197]GATT Document L/3545, 25 June 1971, BISD 18S/24 (attached as Annex D-2 to the Panel Report).

[198]Footnote 3 of the Enabling Clause states:

> As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

> ... that a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development;
>
> [and recognized] further that individual and joint action is essential to further the development of the economies of developing countries[.][199]

We understand, therefore, that the Enabling Clause is among the "positive efforts" called for in the Preamble to the *WTO Agreement* to be taken by developed-country Members to enhance the "economic development" of developing-country Members.[200]

93. According to the European Communities, the Enabling Clause, as the "most concrete, comprehensive and important application of the principle of Special and Differential Treatment", serves "to achieve one of the fundamental objectives of the WTO Agreement".[201] In the view of the European Communities, provisions that are exceptions permit Members to adopt measures to pursue objectives that are "not ... among the WTO Agreement's own objectives"[202]; the Enabling Clause thus does not fall under the category of exceptions. Pointing to this alleged difference between the role of measures falling under the Enabling Clause and that of measures falling under exception provisions such as Article XX, the European Communities contends that the *WTO Agreement* does not "merely tolerate" measures under the Enabling Clause, but rather "encourages" developed-country Members to adopt such measures.[203] According to the European Communities, to require preference-granting countries to invoke the Enabling Clause in order to justify or defend their GSP schemes cannot be reconciled with the intention of WTO Members to encourage these schemes.

94. We note, however, as did the Panel[204], that WTO objectives may well be pursued through measures taken under provisions characterized as exceptions. The Preamble to the *WTO Agreement* identifies certain objectives that may be pursued by Members through measures that would have to be

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[199]First and second recitals. Similarly, Article XXXVI:1(d) of the GATT 1994 provides:

> [I]ndividual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries[.]

[200]We discuss further the role of the Enabling Clause in the context of the covered agreements, *infra*, paras. 106-109.

[201]European Communities' appellant's submission, para. 20.

[202]*Ibid.*, para. 52.

[203]*Ibid.*, para. 53.

[204]See Panel Report, para. 7.52.

justified under the "General Exceptions" of Article XX. For instance, one such objective is reflected in the recognition by Members that the expansion of trade must be accompanied by:

> ... the optimal use of the world's resources in accordance with the objective of sustainable development, [with Members] seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[.][205]

95. As the Appellate Body observed in *US – Shrimp*, WTO Members retained Article XX(g) from the *General Agreement on Tariffs and Trade 1947* (the "GATT 1947") without alteration after the conclusion of the Uruguay Round, being "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy".[206] Article XX(g) of the GATT 1994 permits Members, subject to certain conditions, to take measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". It is well-established that Article XX(g) is an *exception* in relation to which the responding party bears the burden of proof.[207] Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the *WTO Agreement*, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defence to otherwise WTO-inconsistent measures. Likewise, characterizing the Enabling Clause as an exception, in our view, does not undermine the importance of the Enabling Clause within the overall framework of the covered agreements and as a "positive effort" to enhance economic development of developing-country Members. Nor does it "discourag[e]"[208] developed countries from adopting measures in favour of developing countries under the Enabling Clause.

96. The European Communities acknowledges that requiring Members to pursue environmental measures through Article XX(g), an exception provision, may be logical because "the WTO Agreement is not an environmental agreement and ... it contains no positive regulation of environmental matters."[209] Because the *WTO Agreement* "regulate[s] positively the use of trade

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[205]*WTO Agreement*, Preamble, first recital.

[206]Appellate Body Report, *US – Shrimp*, para. 129.

[207]*Ibid.*, para. 157; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 15-16, DSR 1997:I, at 337 (referring to GATT Panel Report, *Canada – FIRA*, para. 5.20; GATT Panel Report, *US – Section 337*, para. 5.27; GATT Panel Report, *US – Malt Beverages*, paras. 5.43 and 5.52; and Panel Report, *US – Gasoline*, para. 6.20).

[208]United States' third participant's submission, para. 9.

[209]European Communities' appellant's submission, para. 54.

measures"[210], however, and the Enabling Clause "promotes" the use of trade measures to further the development of developing countries, the European Communities argues that Members should not be required to prove the consistency of their measures with the Enabling Clause.

97. We do not consider it relevant, for the purposes of determining whether a provision is or is not in the nature of an exception, that the provision governs "trade measures" rather than measures of a primarily "non-trade" nature. Indeed, in a previous appeal, the Appellate Body found that the proviso to Article XVIII:11 of the GATT 1994—a provision authorizing quantitative restrictions when taken in response to balance-of-payments difficulties—is a defence to be invoked by the responding party.[211] The fact that a provision regulates the use of "trade measures", therefore, does not compel a finding that it is for the complaining party to establish inconsistency with that provision, rather than for the defending party to rely on it as a defence.

98. In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment". The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the "customary rules of interpretation of public international law", as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[212] Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception

[210]European Communities' appellant's submission, para. 54.

[211]Appellate Body Report, *India – Quantitative Restrictions*, paras. 134-136. We also note that GATT panels determined Article XI:2(c) of the GATT 1947 to constitute an "exception", even though that provision addresses "trade measures", namely quantitative restrictions. (See GATT Panel Report, *Japan – Agricultural Products I*, para. 5.1.3.7; GATT Panel Report, *EEC – Dessert Apples*, para. 12.3; and GATT Panel Report, *Canada – Ice Cream and Yoghurt*, para. 59)

[212]In this regard, we recall the Appellate Body's statement in *EC – Hormones* that:

> ... merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.

(Appellate Body Report, para. 104)

detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO.

99. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994.

100. We examine now the European Communities' appeal regarding the Panel's finding that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994.[213] The European Communities argues that the Enabling Clause exists "side-by-side and on an equal level" with Article I:1, and thus applies to the exclusion of that provision.[214] In our view, the European Communities misconstrues the relationship between the two provisions.

101. It is well settled that the MFN principle embodied in Article I:1 is a "cornerstone of the GATT" and "one of the pillars of the WTO trading system" [215], which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Members are entitled to adopt measures providing "differential and more favourable treatment" under the Enabling Clause. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. In our view, this is so because the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.

[213]Panel Report, para. 7.53.

[214]European Communities' appellant's submission, para. 22.

[215]Appellate Body Report, *Canada – Autos*, para. 69. See also, Appellate Body Report, *US – Section 211 Appropriations Act*, para. 297, which reads:

> Like the national treatment obligation, the obligation to provide most-favoured-nation treatment has long been one of the cornerstones of the world trading system. For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods.

102. In other words, the Enabling Clause "does not exclude the applicability"[216] of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated[217]), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination—or *application* rather than *applicability*—it is clear that only one provision applies at a time. This is what the Panel itself found when, after stating that "as an exception provision, the Enabling Clause applies concurrently with Article I:1", it added "and *takes precedence* to the extent of the conflict between the two provisions."[218]

103. It is with this understanding, therefore, that we *uphold* the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994.

D. *Burden of Proof*

104. We now examine the implications of the relationship between Article I:1 of the GATT 1994 and the Enabling Clause for the allocation of the burden of proof in this dispute. As a general rule, the burden of proof for an "exception" falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party "assert[ing] the affirmative of a particular ... defence".[219] From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.

105. We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*[220], it is not the responsibility of the European Communities to provide us with the

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[216]Panel Report, para. 7.53.

[217]*Ibid*., para. 7.45.

[218]*Ibid*. (emphasis added)

[219]Appellate Body Report, p. 14, DSR 1997:I, at 335. (See also, Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report, *India – Quantitative Restrictions*, para. 136)

[220]The principle of *jura novit curia* has been articulated by the International Court of Justice as follows:

> It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

(International Court of Justice, Merits, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports, p. 14, para. 29 (quoting International Court of Justice, Merits, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, 1974 ICJ Reports, p. 9, para. 17))

legal interpretation to be given to a particular provision in the Enabling Clause[221]; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause.

1. Responsibility for Raising the Enabling Clause

106. With respect to the legal responsibility for *raising* a defence as an issue in a dispute settlement proceeding, however, we regard the particular circumstances of this case as dictating a special approach, given the fundamental role of the Enabling Clause in the WTO system as well as its contents. The Enabling Clause authorizes developed-country Members to grant enhanced market access to products from developing countries beyond that granted to products from developed countries. Enhanced market access is intended to provide developing countries with increasing returns from their growing exports, which returns are critical for those countries' economic development. The Enabling Clause thus plays a vital role in promoting trade as a means of stimulating economic growth and development. In this respect, the Enabling Clause is not a typical "exception", or "defence", in the style of Article XX of the GATT 1994, or of other exception provisions identified by the Appellate Body in previous cases.

107. A brief review of the history of the Enabling Clause confirms its special status in the covered agreements. When the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to "rais[e] standards of living".[222] However, this objective was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions. In 1965, the Contracting Parties added Articles XXXVI, XXXVII, and XXXVIII to form Part IV of the GATT 1947, entitled "Trade and Development".[223] Article XXXVI expressly recognized the "need for positive efforts" and "individual and joint action" so that developing countries would be able to share in the growth in international trade and further their economic development.[224] Some of these "positive efforts" resulted in the Agreed Conclusions

[221]Compare Appellate Body Report, *EC – Hormones*, para. 156, which states:

> [N]othing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.

[222]GATT 1947, Preamble, first recital.

[223]*Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, BISD 13S/2 (1965).

[224]GATT 1947, Arts. XXXVI:3 and XXXVI:1(d).

of the United Nations Conference on Trade and Development ("UNCTAD") Special Committee on Preferences (the "Agreed Conclusions")[225], which recognized that preferential tariff treatment accorded under a generalized scheme of preferences was key for developing countries "*(a)* to increase their export earnings; *(b)* to promote their industrialization; and *(c)* to accelerate their rates of economic growth."[226] The Agreed Conclusions also made clear that the achievement of these objectives through the adoption of preferences by developed countries required a GATT waiver, in particular, with respect to the MFN obligation in Article I:1.[227] Accordingly, the Contracting Parties adopted the 1971 Waiver Decision in order to waive the obligations of Article I of the GATT 1947 and thereby authorize the granting of tariff preferences to developing countries for a period of ten years.[228]

108. In 1979, the Enabling Clause expanded the authorization provided by the 1971 Waiver Decision to cover additional preferential measures and made the authorization a permanent feature of the GATT. In his report at the conclusion of the Tokyo Round of negotiations, the then-Director General observed:

> The Enabling Clause meets a fundamental concern of developing countries by introducing differential and more favourable treatment as an integral part of the GATT system, no longer requiring waivers from the GATT. It also provides the perspective against which the participation of developing countries in the trading system may be seen.[229]

Members reaffirmed the significance of the Enabling Clause in 1994 with the incorporation of the Enabling Clause into the GATT 1994.[230] The relationship between trade and development, and in particular the role of the Enabling Clause, remain prominent on the agenda of the WTO, as recognized by the Doha Ministerial Conference in 2001.[231]

109. We thus understand that, between the entry into force of the GATT and the adoption of the Enabling Clause, the Contracting Parties determined that the MFN obligation failed to secure

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[225]Attached as Annex D-4 to the Panel Report.

[226]Agreed Conclusions, para. I.2 (Panel Report, p. D-8).

[227]*Ibid.*, paras. IX.1 and IX.2(*c*) (Panel Report, pp. D-13–D-14).

[228]1971 Waiver Decision, para. (*a*) (Panel Report, p. D-4).

[229]European Communities' appellant's submission, para. 25 (quoting Report by the Director-General of GATT, in GATT, *The Tokyo Round of Multilateral Trade Negotiations* (1979), Vol. I, p. 99).

[230]Para. 1(b)(iv) of the language of Annex 1A to the *WTO Agreement* incorporating the GATT 1994 into the *WTO Agreement*.

[231]Ministerial Decision of 14 November 2001, *Implementation-related Issues and Concerns*, WT/MIN(01)/17, paras. 12.1-12.2.

adequate market access for developing countries so as to stimulate their economic development. Overcoming this required recognition by the multilateral trading system that certain obligations, applied to all Contracting Parties, could impede rather than facilitate the objective of ensuring that developing countries secure a share in the growth of world trade. This recognition came through an authorization for GSP schemes in the 1971 Waiver Decision and then in the broader authorization for preferential treatment for developing countries in the Enabling Clause.[232]

110. In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, "notwithstanding" the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an "advantage" to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the "legal basis of the complaint sufficient to present the problem clearly".[233] In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.[234]

111. Furthermore, the history and objective of the Enabling Clause lead us to agree with the European Communities[235] that Members are *encouraged* to deviate from Article I in the pursuit of "differential and more favourable treatment" for developing countries. This deviation, however, is encouraged only to the extent that it complies with the series of requirements set out in the Enabling

[232]We recognize that an exemption for developing countries from certain GATT obligations also resulted from the 1954-1955 Review Session, where the Contracting Parties amended the GATT by adding Article XVIII for the benefit of developing countries facing balance-of-payments difficulties or seeking to nurture an infant industry. (See Reports Relating to the Review of the Agreement: Quantitative Restrictions, GATT Document L/332/Rev.1 and Addenda, adopted 2, 4 and 5 March 1955, BISD, 3S/170, paras. 3, 35-36, 44, and 52)

[233]DSU, Art. 6.2. See also, Appellate Body Report, *Korea – Dairy*, paras. 120, 124, and 127.

[234]*Infra*, paras. 116-117.

[235]European Communities' appellant's submission, para. 53.

Clause, requirements that we find to be more extensive than more typical defences such as those found in Article XX.

112. Paragraph 2 of the Enabling Clause identifies the four types of measures to which the authorization of paragraph 1 applies:

> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]
>
> (*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;
>
> (*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another
>
> (*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

Measures that a Member claims are exempt from a finding of inconsistency with Article I by virtue of the Enabling Clause must fit within these sub-paragraphs, of which the most relevant for this case is paragraph 2(a), which provides for GSP schemes. As we discuss in greater detail *infra* [236], this provision requires the preferential treatment to be "in accordance with" the GSP and further defines this obligation through each of the terms "generalized, non-reciprocal and non discriminatory". Paragraphs 2(b)-(d) impose different obligations to be satisfied by a Member taking a measure pursuant to those provisions. Paragraph 3 identifies three conditions that must also be satisfied by *any* measure under the Enabling Clause. Paragraph 4 sets forth procedural conditions for the introduction, modification, or withdrawal of a preferential measure for developing countries.

[236] *Infra*, paras. 142-174.

Paragraphs 5 through 9 include obligations that are not necessarily related to measures providing "differential and more favourable treatment".[237]

113. In the light of the extensive requirements set forth in the Enabling Clause, we are of the view that, when a complaining party considers that a preference scheme of another Member does not meet one or more of those requirements, the specific provisions of the Enabling Clause with which the scheme allegedly falls afoul, form critical components of the "legal basis of the complaint"[238] and, therefore, of the "matter" in dispute.[239] Accordingly, a complaining party cannot, in good faith, ignore those provisions and must, in its request for the establishment of a panel, identify them and thereby "notif[y] the parties and third parties of the nature of [its] case".[240] For the failure of such a complaining party to raise the relevant provisions of the Enabling Clause would place an unwarranted burden on the responding party. This due process consideration applies equally to the elaboration of a complaining party's case in its written submissions, which must "explicitly" articulate a claim so that the panel and all parties to a dispute "understand that a specific claim has been made, [are] aware of its dimensions, and have an adequate opportunity to address and respond to it".[241]

114. Exposing preference schemes to open-ended challenges would be inconsistent, in our view, with the intention of Members, as reflected in the Enabling Clause, to "encourage"[242] the adoption of preferential treatment for developing countries and to provide a practical means of doing so within the legal framework of the covered agreements. Accordingly, although a responding party must defend the consistency of its preference scheme with the conditions of the Enabling Clause and must prove such consistency, a *complaining* party has to define the parameters within which the *responding* party must make that defence.

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[237]See Enabling Clause (attached as Annex 2 to this Report).

[238]DSU, Art. 6.2, which provides:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

[239]Appellate Body Report, *US – Carbon Steel*, para. 125 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76).

[240]*Ibid.*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, at 186; and Appellate Body Report, *EC – Bananas III*, para. 142).

[241]Appellate Body Report, *Chile – Price Band System*, para. 164.

[242]European Communities' appellant's submission, para. 53.

115. The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above[243], remains on the responding party invoking the Enabling Clause as a defence.

116. We observe, moreover, that the measure challenged in this dispute is unmistakably a preferential tariff scheme, granted by a developed-country Member in favour of developing countries, and proclaiming to be in accordance with the GSP. The Drug Arrangements are found in Council Regulation (EC) No. 2501/2001, the title of which indicates the Regulation to be "applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004". The first recital in the Preamble to the Regulation provides:

> Since 1971, the Community has granted trade preferences to developing countries, in the framework of its scheme of generalised tariff preferences.

In its original proposal for the Regulation, the European Commission explained:

> In 1994, the Commission adopted some guidelines on the *role of the GSP* for the ten-year period 1995 to 2004. A new regulation is required in order to implement *those guidelines* for the remainder of the period, i.e. the years 2002 to 2004. This memorandum is meant to explain the proposal for that new regulation.[244] (footnote omitted; emphasis added)

In its amended proposal, adding Pakistan to the list of beneficiaries under the Drug Arrangements, the European Commission further stated:

> Since the *GSP drug regime* was extended to the countries of the Andean Community and to those of the Central American Common Market, it provided an important incentive to allow for the substitution of illicit crops, enhance exports in order to create jobs not linked to drug production and trafficking and foster diversification.

[243] *Supra*, para. 105.

[244] Explanatory Memorandum to the Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, para. 1 (attached to Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), at p. 3) (Exhibit India-7 submitted by India to the Panel).

> The problems which Pakistan is facing today, are similar. The *GSP drug regime* is therefore likely to stabilise its economic and social structures and thus consolidate the institutions that uphold the rule of law.[245] (emphasis added)

117. It is therefore clear, on the face of the Regulation and from official, publicly-available explanatory documentation, that the Drug Arrangements challenged by India in this dispute are part of a preferential tariff scheme implemented by the European Communities pursuant to the authorization in paragraph 2(a) of the Enabling Clause. As such, India would have been well aware that the Drug Arrangements must comply with the requirements of the Enabling Clause, and that the European Communities was likely to invoke the Enabling Clause in response to a challenge of inconsistency with Article I:1. Indeed, India admitted as much before the Panel.[246] India also must have believed that at least certain of those requirements were not being met and that, as a consequence, the inconsistency of the Drug Arrangements with Article I could not be justified. Accordingly, India, as the complaining party, should reasonably have articulated its claims of inconsistency with specific provisions of the Enabling Clause at the outset of this dispute as part of its responsibility to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute".[247]

118. In sum, although the burden of *justifying* the Drug Arrangements under the Enabling Clause falls on the European Communities, India was required to do more than simply allege inconsistency with Article I. India's claim of inconsistency with Article I with respect to the measure challenged here is inextricably linked with its argument that the Drug Arrangements do not satisfy the conditions in the Enabling Clause and that, therefore, they cannot be justified as a derogation from Article I. In the light of the above considerations, we are of the view that India was required to (i) identify, in its

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[245]Explanatory Memorandum to the Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), p. 2, fourth and fifth recitals (Exhibit India-7 submitted by India to the Panel).

[246]See, for example, India's first written submission to the Panel, para. 44, which states: "[S]ince the Drug Arrangements are part of the EC's GSP scheme, it may reasonably be assumed that the EC will invoke the Enabling Clause as a defence."

[247]DSU, Art. 3.10. See also, Appellate Body Report, *US – FSC*, para. 166, which reads:

> Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. (footnote omitted)

request for the establishment of a panel, which obligations in the Enabling Clause the Drug Arrangements are alleged to have contravened, and (ii) make written submissions in support of this allegation. The requirement to make such an argument, however, does not mean that India must prove inconsistency with a provision of the Enabling Clause, because the ultimate burden of establishing the consistency of the Drug Arrangements with the Enabling Clause lies with the European Communities.[248]

2. Whether India Raised the Enabling Clause Before the Panel

119. We turn now to examine whether, in fact, India fulfilled these requirements and thereby sufficiently identified the scope of its claim before the Panel. In its request for consultations, India claimed that the Drug Arrangements and the special incentive arrangements for the protection of labour rights and the environment "nullify or impair the benefits accruing to India under the most-favoured-nation provisions of Article I:1 of the GATT 1994 and paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause."[249] In its request for the establishment of a panel, India asked that a panel examine whether the aforementioned arrangements of the European Communities' GSP scheme "are consistent with Article I:1 of the GATT 1994 and the requirements set out in paragraphs 2(a), 3(a) and 3(c) of the Enabling Clause".[250] The Panel's terms of reference, therefore, included India's allegations that certain aspects of the European Communities' GSP scheme were not "consistent" with, or did not "meet the requirements set out in", paragraphs 2(a), 3(a), and 3(c) of the Enabling Clause.[251]

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[248]Compare Appellate Body Report, *US – Certain EC Products*, para. 114, which states:

> On the basis of our review of the European Communities' submissions and statements to the Panel, we conclude that the European Communities *did not specifically claim* before the Panel that, by adopting the 3 March Measure, the United States acted inconsistently with Article 23.2(a) of the DSU. As the European Communities did not make a specific claim of inconsistency with Article 23.2(a), it *did not adduce any evidence or arguments* to demonstrate that the United States made a "determination as to the effect that a violation has occurred" in breach of Article 23.2(a) of the DSU. And, as the European Communities did not adduce any evidence or arguments in support of a claim of violation of Article 23.2(a) of the DSU, the European Communities could not have established, and *did not establish, a prima facie case* of violation of Article 23.2(a) of the DSU. (footnotes omitted; emphasis added)

[249]Request for consultations by India, WT/DS246/1, 12 March 2002, p. 1.

[250]Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2. In addition to the Drug Arrangements and the special incentives for the protection of labour rights and the environment, India also challenged the WTO-consistency of "any implementing rules and regulations, ... any amendments to any of the foregoing, and ... their application". (*Ibid.*)

[251]Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, pp. 1-2. The Panel's terms of reference incorporated these allegations by reference to document WT/DS246/4. (Constitution of the panel established at the request of India, WT/DS246/5, 6 March 2003, para. 2)

120. In its written submissions before the Panel, India clearly invoked paragraph 2(a) of the Enabling Clause as the basis for its allegation that the Drug Arrangements are not "justified" by the Enabling Clause.[252] For example, in its first written submission before the Panel, India stated:

> The tariff preferences under the Drug Arrangements are beneficial to some developing countries and detrimental to others and consequently do not comply with paragraph 2(a) of the Enabling Clause.[253]

121. India's second written submission before the Panel included a sub-heading entitled, "The EC has failed to demonstrate that under the Drug Arrangements it accords tariff treatment that is 'non-discriminatory' within the meaning of paragraph 2(a) of the Enabling Clause".[254] Under this sub-heading, India argued:

> [P]aragraph 2(a) of the Enabling Clause was meant to ensure that benefits under the GSP are extended to *all* developing countries, as opposed to some developing countries. Paragraph 2(a) of the Enabling Clause does not envisage selectivity. Instead, it requires that preferential tariff treatment is accorded to all developing countries.[255] (original italics)

India further argued that, even if the European Communities' interpretation of paragraph 2(a) were correct, the Drug Arrangements would not be "non-discriminatory", as required by footnote 3 to paragraph 2(a).[256]

122. We find that India acted in good faith, in its written submissions before the Panel, explaining why, in its view, the Drug Arrangements fail to meet certain requirements of the Enabling Clause, namely, those present in paragraph 2(a). Such an explanation, in our view, was sufficient to place the European Communities on notice as to the reasons underlying India's allegation that the Drug Arrangements are not justified by the relevant provision of the Enabling Clause. With such notice,

[252]India's first written submission to the Panel, heading IV.C. and para. 67; India's second written submission to the Panel, heading III.B. and para. 164. By the time of its first written submission to the Panel, India had indicated to the European Communities and to the Panel that this dispute was limited to the WTO-consistency of the Drug Arrangements, but that India reserved its right to challenge the special incentives for the protection of labour rights and the environment in a future dispute settlement proceeding. (See *supra*, para. 4; and Panel Report, para. 1.5) Both participants confirmed, in response to questioning at the oral hearing, that the measure at issue in this dispute was limited to the Drug Arrangements.

[253]India's first written submission to the Panel, para. 62.

[254]India's second written submission to the Panel, heading III.B.3.

[255]*Ibid.*, para. 95.

[256]*Ibid.*, paras. 119-128.

the European Communities could be expected to defend its challenged measure under the Enabling Clause, in relation to which the European Communities ultimately bears the burden of justification.

123. In allocating the burden of proof, therefore, we conclude that India was required to raise the Enabling Clause in making its claim of inconsistency with Article I:1. Once India had identified, in its panel request and through argumentation in its written submissions, the relevant obligations of the Enabling Clause that it claims were not satisfied by the Drug Arrangements, the European Communities was then required to prove that the Drug Arrangements met those obligations, having chosen to rely on the Enabling Clause as a defence.

124. Finally, we observe that the European Communities' appeal of the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994 is "based on" the European Communities' claim that the Panel erroneously found that (i) the Enabling Clause is an "exception" to Article I:1; (ii) the Enabling Clause "does not exclude the applicability" of Article I:1; and (iii) the European Communities had the burden of proving the consistency of the Drug Arrangements with that Clause.[257] As we have not reversed any of these findings of the Panel[258], we do not need to review further and we *do not rule* on the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994.[259]

125. For these reasons, we *modify* the Panel's finding, in paragraph 7.53 of the Panel Report, that "the European Communities bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements under that provision." We *find* that it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, but that the

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[257]In its Notice of Appeal, the European Communities' reference to Article I:1 was limited to its decision to:

> ... seek[] review of the Panel's legal conclusion that [the Drug Arrangements] are inconsistent with Article I:1 ... This conclusion is based on the following erroneous legal findings:
>
> - that the Enabling Clause is an "exception" to Article I:1 of the GATT;
> - that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;
> - that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

(Notification of an appeal by the European Communities, WT/DS246/7, 8 January 2004, p.1 (attached as Annex 1 to this Report))

[258]*Supra*, paras. 99, 103, and 123.

[259]Panel Report, paras. 7.60 and 8.1(b). The European Communities confirmed, in response to questioning at the oral hearing, that it is not appealing the Panel's conclusion, in paragraph 7.60 of the Panel Report, that the tariff advantages under the Drug Arrangements are inconsistent with Article I:1 because they are not accorded "unconditionally" to the like products originating in all other WTO Members.

European Communities bore the burden of *proving* that the Drug Arrangements satisfy the conditions of the Enabling Clause, in order to justify those Arrangements under that Clause. We *find*, further, that India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel. We turn now to examine whether the European Communities met its burden of justifying the Drug Arrangements under that provision.

V. Whether the Drug Arrangements are Justified Under the Enabling Clause

126. The European Communities "appeals subsidiarily" the Panel's finding that the Drug Arrangements are not justified under paragraph 2(a), should we "conclude that the Enabling Clause is an exception to GATT Article I:1, or that India made a valid claim under the Enabling Clause".[260] Having found that the Enabling Clause is in the nature of an exception to Article I:1 of the GATT 1994, we proceed to examine the European Communities' appeal as it relates to paragraph 2(a) of the Enabling Clause.

127. The European Communities challenges three of the Panel's findings, namely that:

(a) "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations" [261];

(b) "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries" [262]; and, ultimately, that

(c) the European Communities failed "to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".[263]

[260]European Communities' appellant's submission, para. 67.

[261]Panel Report, paras. 7.161 and 7.176.

[262]*Ibid.*, para. 7.174. (original italics; footnote omitted)

[263]*Ibid.*, para. 8.1(d).

128. Before addressing these specific issues, we will identify the precise scope of the appeal before us. In doing so, we note that both the European Communities and India agree that, in addressing paragraph 2(a) of the Enabling Clause, the Panel implicitly made findings on issues that were not before it. Thus, India submits that "[t]he issue before the Panel was not whether the EC could exclude from its GSP scheme countries claiming developing country status."[264] In India's view, that issue did not arise "because India and all the countries enjoying tariff preferences under the Drug Arrangements are beneficiaries under the EC's GSP scheme."[265] Also not before the Panel, according to India, was "whether the EC's mechanisms for the graduation of developing countries meet the requirements of the Enabling Clause."[266] India emphasizes that it "did not submit any claims on these issues to the Panel because they are not relevant to the resolution of this dispute."[267] In other words, according to India, the legal issues raised in this dispute "relate exclusively"[268] to the treatment of those countries that a preference-granting country has included in its GSP scheme as beneficiaries. The European Communities echoes India's concern that the Panel read obligations into the Enabling Clause "in respect of issues which had not been raised by any of the parties and which [the Panel] did not have to address in order to resolve the dispute".[269]

129. Against this background, we understand India's claim before the Panel to have been limited to the consistency of the Drug Arrangements with the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause.[270] In particular, India's challenge to the Drug Arrangements is based on its submission that the term "non-discriminatory" prevents preference-granting countries from according preferential tariff treatment to any beneficiary of their GSP schemes without granting identical preferential tariff treatment to all other beneficiaries. Therefore, in this Report, we do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.

[264]India's appellee's submission, para. 101.

[265]*Ibid.*

[266]India's opening statement at the oral hearing. By "graduation", we understand India to refer to the withdrawal of preferential tariff treatment with respect to specific products or designated developing countries on grounds of the degree of their development.

[267]India's opening statement at the oral hearing.

[268]India's appellee's submission, para. 103.

[269]European Communities' appellant's submission, para. 7.

[270]See *supra*, paras. 120-122.

130. We note, moreover, that the European Communities has *not* appealed the Panel's interpretation of paragraph 3(c) of the Enabling Clause.[271] Instead, the European Communities has invoked that provision solely as "contextual support" for its interpretation of "non-discriminatory" in footnote 3.[272] We also note that the Panel made no findings in this case as to whether the Drug Arrangements are inconsistent with paragraph 3(a) or 3(c) of the Enabling Clause. Our mandate, pursuant to Article 17.6 of the DSU, is limited to "issues of law covered in the panel report and legal interpretations developed by the panel". Therefore, in this appeal, we are not required to, and we shall not address, the issue of whether the Drug Arrangements are consistent with paragraphs 3(a) and 3(c) of the Enabling Clause. This does not prevent us, of course, from examining those paragraphs as context for our interpretation of "non-discriminatory" in footnote 3.

131. With these considerations in mind, we turn to address the meaning of the term "non-discriminatory" in footnote 3. In doing so, we consider it useful to begin our analysis by setting out briefly the relevant findings of the Panel.

A. *Panel Findings*

132. The Panel stated at the outset that "[t]he main issue disputed by the parties is whether the Drug Arrangements are consistent with paragraph 2(a) of the Enabling Clause, particularly the requirement of 'non-discriminatory' in footnote 3 to this subparagraph."[273] Paragraph 2(a) reads:

> 2. The provisions of paragraph 1 apply to the following:
>
> (*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]
>
> [3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24). (footnote 2 omitted)

[271]The European Communities refers to the Panel's finding, in paragraph 7.99 of the Panel Report, that paragraph 3(c) requires preference-granting countries to "provide product coverage and tariff cuts at levels in general no less than those offered and accepted in the Agreed Conclusions." The European Communities explains that "[s]ince this issue was not raised by India and is not directly relevant to the issues in dispute, ... the EC has not deemed [it necessary] to appeal it." (European Communities' appellant's submission, footnote 40 to para. 47)

[272]European Communities' appellant's submission, para. 126.

[273]Panel Report, para. 7.65.

133. The Panel went on to examine, not the language of those provisions, but the meaning of paragraph 3(c) of the Enabling Clause, which reads:

> 3. Any differential and more favourable treatment provided under this clause:
>
> ...
>
> (*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

The Panel explained that "[i]t is only possible to give a full meaning to paragraph 2(a) and footnote 3 after determining whether paragraph 3(c) allows differentiation among developing countries in 'respond[ing] positively to the development, financial and trade needs of developing countries'."[274]

134. Having found that the text of paragraph 3(c) "does not reveal whether the 'needs of developing countries' refers to the needs of *all* developing countries or to the needs of *individual* developing countries"[275], the Panel proceeded to examine "the drafting history in UNCTAD ... to identify the intention of the drafters on issues relating to the GSP arrangements."[276] The Panel concluded that paragraph 3(c) allows for differentiation among beneficiaries for the purposes of granting preferential treatment to least-developed countries and setting *a priori* import limitations for products originating in particularly competitive developing countries. The Panel asserted that "[n]o other differentiation among developing countries is permitted by paragraph 3(c)."[277]

135. Having made these findings based on its review of what it considered the "context" and "preparatory work"[278] of paragraph 3(c) of the Enabling Clause, the Panel turned to examine paragraph 2(a) and footnote 3 thereto. The Panel observed that the word "discriminate ... can have either a *neutral* meaning of making a distinction or a *negative* meaning carrying the connotation of a distinction that is unjust or prejudicial."[279] In order to determine the appropriate meaning of the

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[274]Panel Report, para. 7.65 (quoting Enabling Clause, para. 3(c) (attached as Annex 2 to this Report)). In a footnote, the Panel explained further that "[t]he European Communities argue[d] that 'if the term "non-discriminatory" was interpreted as prohibiting any difference in treatment between developing countries, developed countries would be effectively precluded from responding positively to those needs, thus rendering [to] a nullity the requirement set forth in paragraph 3(c)'." (*Ibid.*, footnote 291 to para. 7.65 (quoting European Communities' first written submission to the Panel, para. 71))

[275]*Ibid.*, para. 7.78. (original italics)

[276]*Ibid.*, para. 7.80.

[277]*Ibid.*, para. 7.116.

[278]*Ibid.*, para. 7.88.

[279]*Ibid.*, para. 7.126. (original italics)

term "non-discriminatory" as used in footnote 3, the Panel turned to the context of that term. According to the Panel, this context includes paragraphs 2(a), 2(d), and 3(c) of the Enabling Clause, with the "most relevant elements of context" being Resolution 21(II) of the Second Session of UNCTAD ("Resolution 21(II)")[280] and the Agreed Conclusions.[281] Based on its review of these documents, the Panel found that:

> … the clear intention of the negotiators was to provide GSP equally to all developing countries and to eliminate all differentiation in preferential treatment to developing countries, with the exception of the implementation of a priori limitations in GSP schemes.[282]

136. The Panel concluded:

> … that the requirement of non-discrimination, as a general principle formally set out in Resolution 21(II) and later carried over into the 1971 Waiver Decision and then into the Enabling Clause, obliges preference-giving countries to provide the GSP benefits to *all* developing countries without differentiation, except for the implementation of a priori limitations in GSP schemes.[283] (original italics)

137. The Panel found further support for its conclusion in its previous analysis of paragraph 3(c)[284] and in paragraph 2(d) of the Enabling Clause, which provides:

> 2. The provisions of paragraph 1 apply to the following:
>
> ...
>
> (*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries. (footnote omitted)

The Panel stated that the term "non-discriminatory" cannot be interpreted "to permit preferential treatment to less than all developing countries without an explicit authorization".[285] According to the Panel, "[s]uch explicit authorization is only provided for the benefit of the least-developed countries

[280]Resolution 21(II) of the Second Session of UNCTAD, entitled "Expansion and Diversification of Exports of Manufactures and Semi-Manufactures of Developing Countries" (attached as Annex D-3 to the Panel Report).

[281]Panel Report, para. 7.128.

[282]*Ibid.*, para. 7.144.

[283]*Ibid.*

[284]*Ibid.*, paras. 7.148-7.149.

[285]*Ibid.*, para. 7.151.

in paragraph 2(d) of the Enabling Clause and for the implementation of a priori limitations, as set out in the Agreed Conclusions."[286]

138. Turning to the "object and purpose" of the Enabling Clause, the Panel considered that "the objective of promoting the trade of developing countries and that of promoting trade liberalization generally"[287] are relevant for the interpretation of the term "non-discriminatory". The Panel determined, however, that the latter "contributes more to guiding the interpretation of 'non-discriminatory', given its function of preventing abuse in providing GSP."[288]

139. The Panel found further support for its interpretation in an examination of the "overall practice" of preference-granting countries[289], which, according to the Panel, "suggests that there was a common understanding of 'equal' treatment to all developing countries except for a priori measures, and that it was on this basis that the 1971 Waiver Decision was adopted."[290]

140. Based on its analysis described above, the Panel found that:

> ... the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations.[291] (emphasis added)

141. Regarding the measure at issue in this dispute, the Panel found that:

> ... the European Communities' Drug Arrangements, as a GSP scheme, do not provide identical tariff preferences to *all* developing countries and that the differentiation is neither for the purpose of special treatment to the least-developed countries, nor in the context of the implementation of a priori measures. Such differentiation is inconsistent with paragraph 2(a), particularly the term "non-discriminatory" in footnote 3[.][292] (original italics)

Consequently, the Panel also found that "the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".[293]

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[286]Panel Report, para. 7.151.

[287]*Ibid.*, para. 7.158.

[288]*Ibid.*

[289]*Ibid.*, para. 7.159.

[290]*Ibid.*

[291]*Ibid.*, para. 7.161.

[292]*Ibid.*, para. 7.177.

[293]*Ibid.*, para. 8.1(d).

B. *Interpretation of the Term "Non-Discriminatory" in Footnote 3 to Paragraph 2(a) of the Enabling Clause*

142. We proceed to interpret the term "non-discriminatory" as it appears in footnote 3 to paragraph 2(a) of the Enabling Clause.

143. We recall first that the Enabling Clause has become a part of the GATT 1994.[294] Paragraph 1 of the Enabling Clause authorizes WTO Members to provide "differential and more favourable treatment to developing countries, without according such treatment to other WTO Members". As explained above, such differential treatment is permitted "notwithstanding" the provisions of Article I of the GATT 1994. Paragraph 2(a) and footnote 3 thereto clarify that paragraph 1 applies to "[p]referential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences"[295], "[a]s described in the [1971 Waiver Decision], relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries'".[296]

144. The Preamble to the 1971 Waiver Decision in turn refers to "preferential tariff treatment" in the following terms:

> *Recalling* that at the Second UNCTAD, unanimous agreement was reached in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries;
>
> *Considering* that mutually acceptable arrangements have been drawn up in the UNCTAD concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential tariff treatment in the markets of developed countries for products originating in developing countries[.][297] (original italics; underlining added)

145. Paragraph 2(a) of the Enabling Clause provides, therefore, that, to be justified under that provision, preferential tariff treatment must be "in accordance" with the GSP "as described" in the *Preamble* to the 1971 Waiver Decision. "Accordance" being defined in the dictionary as

[294]See *supra*, footnote 192.

[295]Enabling Clause, para. 2(a) (attached as Annex 2 to this Report).

[296]*Ibid.*, footnote 3 to para. 2(a).

[297]1971 Waiver Decision, third and fourth recitals.

"conformity"[298], only preferential tariff treatment that is in conformity with the description "generalized, non-reciprocal and non-discriminatory" treatment can be justified under paragraph 2(a).

146. In the light of the above, we do not agree with European Communities' assertion[299] that the Panel's interpretation of the word "non-discriminatory" in footnote 3 of the Enabling Clause is erroneous because the phrase "generalized, non-reciprocal and non discriminatory" in footnote 3 merely refers to the description of the GSP in the 1971 Waiver Decision and, of itself, does not impose any legal obligation on preference-granting countries. Nor do we agree with the United States that the Panel erred in "assum[ing]" that the term "non-discriminatory" in footnote 3 imposes obligations on preference-granting countries, and that, instead, footnote 3 "is simply a cross-reference to where the Generalized System of Preferences is described."[300]

147. We find support for our interpretation in the French version of paragraph 2(a) of the Enabling Clause, requiring that the tariff preferences be accorded "*conformément au Système généralisé de préférences*". The term "in accordance" is thus "*conformément*" in the French version. In addition, the phrase "[a]s described in [the 1971 Waiver Decision]" in footnote 3 is stated as "*[t]el qu'il est défini dans la décision des PARTIES CONTRACTANTES en date du 25 juin 1971*". Similarly, the Spanish version uses the terms "*conformidad*" and "*[t]al como lo define la Decisión de las PARTES CONTRATANTES de 25 de junio de 1971*". In our view, the stronger, more obligatory language in both the French and Spanish texts—that is, using "as defined in" rather than "as described in"—lends support to our view that only preferential tariff treatment that is "generalized, non-reciprocal and non-discriminatory" is covered under paragraph 2(a) of the Enabling Clause.[301]

148. Having found that the qualification of the GSP as "generalized, non-reciprocal and non discriminatory" imposes obligations that must be fulfilled for preferential tariff treatment to be justified under paragraph 2(a), we turn to address the Panel's finding that:

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[298]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 15.

[299]European Communities' response to questioning at the oral hearing.

[300]United States' third participant's submission, para. 11.

[301]We further note the existence of a 1999 WTO waiver allowing *developing* countries to grant special preferences to *least-developed* countries. (Waiver Decision on Preferential Tariff Treatment for Least-Developed Countries, WT/L/304, 15 June 1999 (the "1999 LDC Waiver")) That waiver applies only to "preferential tariff treatment ... provided on a generalized, non-reciprocal and non-discriminatory basis". (*Ibid*., para. 2) As such, for tariff preferences to be justified thereunder, there is a *requirement* that the treatment be accorded on a "generalized, non-reciprocal and non-discriminatory *basis*." (emphasis added) We see no reason why *developed* countries would be permitted to provide preferential tariff treatment to developing countries under the Enabling Clause other than on a "non-discriminatory basis", when there is clearly a requirement for *developing* countries to provide such treatment to least-developed countries on a "non-discriminatory basis" under the 1999 LDC Waiver.

> ... the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations.[302] (emphasis added)

149. The European Communities maintains that "'non-discrimination' is not synonymous with formally equal treatment"[303] and that "[t]reating differently situations which are objectively different is not discriminatory."[304] The European Communities asserts that "[t]he objective of the Enabling Clause is different from that of Article I:1 of the GATT."[305] In its view, the latter is concerned with "providing equal conditions of competition for imports of like products originating in all Members", whereas "the Enabling Clause is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries."[306] The European Communities derives contextual support from paragraph 3(c), which states that the treatment provided under the Enabling Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." The European Communities concludes that the term "non-discriminatory" in footnote 3 "does not prevent the preference-giving countries from differentiating between developing countries which have different development needs, where tariff differentiation constitutes an adequate response to such differences."[307]

150. India, in contrast, asserts that "non-discrimination in respect of tariff measures refers to formally equal[] treatment"[308] and that paragraph 2(a) of the Enabling Clause requires that "preferential tariff treatment [be] applied equally" among developing countries.[309] In support of its argument, India submits that an interpretation of paragraph 2(a) of the Enabling Clause that authorizes developed countries to provide "discriminatory tariff treatment *in favour of the developing countries* but not *between the developing countries* gives full effect to both Article I of the GATT and paragraph 2(a) of the Enabling Clause and minimises the conflict between them."[310] India emphasizes that, by consenting to the adoption of the Enabling Clause, developing countries did not

[302]Panel Report, para. 7.161.

[303]European Communities' appellant's submission, para. 71.

[304]*Ibid.*

[305]*Ibid.*, para. 152.

[306]*Ibid.*

[307]*Ibid.*, para. 188.

[308]India's appellee's submission, para. 120.

[309]*Ibid.*, para. 106.

[310]*Ibid.*, para. 92. (original italics)

"relinquish[] their MFN rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them."[311]

151. We examine now the ordinary meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause. As we observed, footnote 3 requires that GSP schemes under the Enabling Clause be "generalized, non-reciprocal and non discriminatory". Before the Panel, the participants offered competing definitions of the word "discriminate". India suggested that this word means "'to make or constitute a difference in or between; distinguish' and 'to make a distinction in the treatment of different categories of peoples or things'."[312] The European Communities, however, understood this word to mean "'to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc.'"[313]

152. Both definitions can be considered as reflecting ordinary meanings of the term "discriminate"[314] and essentially exhaust the relevant ordinary meanings. The principal distinction between these definitions, as the Panel noted, is that India's conveys a "*neutral* meaning of making a distinction", whereas the European Communities' conveys a "*negative* meaning carrying the connotation of a distinction that is unjust or prejudicial."[315] Accordingly, the ordinary meanings of "discriminate" point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term "non-discriminatory", on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

153. Nevertheless, at this stage of our analysis, we are able to discern some of the content of the "non-discrimination" obligation based on the ordinary meanings of that term. Whether the drawing of

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[311]India's appellee's submission, para. 104.

[312]Panel Report, para. 7.126 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689).

[313]*Ibid.* (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 689). (italics added by the Panel)

[314]See *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 697.

[315]Panel Report, para. 7.126. (original italics)

distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of "discriminate" converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have "similar development needs".[316] Although the European Communities acknowledges that differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the Enabling Clause, it submits that there is no inconsistency in differentiating between GSP beneficiaries with "different development needs".[317] Thus, based on the ordinary meanings of "discriminate", India and the European Communities effectively appear to agree that, pursuant to the term "non-discriminatory" in footnote 3, similarly-situated GSP beneficiaries should not be treated differently.[318] The participants disagree only as to the basis for determining whether beneficiaries are similarly-situated.

154. Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of "non-discriminatory", however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries.

155. We continue our interpretive analysis by turning to the immediate context of the term "non-discriminatory". We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being "non-discriminatory", tariff preferences provided under GSP schemes must be "generalized".

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[316]European Communities' appellant's submission, para. 175. (See also, *ibid*., para. 186)

[317]*Ibid.*, para. 188.

[318]We note that the contrasting definitions proffered by the participants, as well as the convergence of those definitions on the fact that similarly-situated entities should not be treated differently, find reflection in the use of the term "discrimination" in general international law. In this respect, we note, as an example, the definitions of "discrimination" provided by the European Communities, in footnotes 56 and 57 of its appellant's submission:

> [56]... Mere differences of treatment do not necessarily constitute discrimination … discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way.

(quoting R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (Longman, 1992), Vol. I, p. 378)

> [57]... Discrimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right, or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made.

(quoting E.W. Vierdag, *The Concept of Discrimination in International Law*, (Martinus Nijhoff, 1973), p. 61)

According to the ordinary meaning of that term, tariff preferences provided under GSP schemes must be "generalized" in the sense that they "apply more generally; [or] become extended in application".[319] However, this ordinary meaning alone may not reflect the entire significance of the word "generalized" in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel's finding that, by requiring tariff preferences under the GSP to be "generalized", developed and developing countries together sought to eliminate existing "special" preferences that were granted only to certain designated developing countries.[320] Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences[321] that were, in general, based on historical and political ties between developed countries and their former colonies.

156. It does not necessarily follow, however, that "non-discriminatory" should be interpreted to require that preference-granting countries provide "identical" tariff preferences under GSP schemes to "all" developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily "result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries".[322] To us, this conclusion is unwarranted. We observe that the term "generalized" requires that the GSP schemes of preference-granting countries remain generally applicable.[323] Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below[324], provisions such as paragraphs 3(a) and 3(c)

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[319]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1082.

[320]Panel Report, paras. 7.135-7.137. The Panel also observed that statements by developed and developing countries indicated the aim of providing GSP schemes with a broad scope, encompassing the granting of preferences by *all* developed countries to *all* developing countries. (*Ibid.*, paras. 7.131-7.132)

[321]See also European Communities' appellant's submission, para. 175.

[322]Panel Report, para. 7.102.

[323]The European Communities argues in this respect that the GATT Contracting Parties and the WTO Members have granted a number of waivers, as mentioned in the Panel Report, for tariff preferences that are "confined *ab initio* and permanently to a limited number of developing countries located in a certain geographical region". (European Communities' appellant's submission, paras. 184-185 (referring to Panel Report, para. 7.160)) See also, Panel Report, footnote 31 to para. 4.32 (referring to Waiver Decision on the Caribbean Basin Economic Recovery Act, GATT Document L/5779, 15 February 1985, BISD 31S/20, renewed 15 November 1995, WT/L/104; Waiver Decision on CARIBCAN, GATT Document L/6102, 28 November 1986, BISD 33S/97, renewed 14 October 1996, WT/L/185; Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385, renewed 14 October 1996, WT/L/184; Waiver Decision on The Fourth ACP-EEC Convention of Lomé, GATT Document L/7604, 9 December 1994, BISD 41S/26, renewed 14 October 1996, WT/L/186; and Waiver Decision on European Communities – The ACP-EC Partnership Agreement, WT/MIN (01)/15), 14 November 2001.

[324]*Infra*, paras. 157-168.

of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries.

157. As further context for the term "non-discriminatory" in footnote 3, we turn next to paragraph 3(c) of the Enabling Clause, which specifies that "differential and more favourable treatment" provided under the Enabling Clause:

> ... shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

158. At the outset, we note that the use of the word "shall" in paragraph 3(c) suggests that paragraph 3(c) sets out an obligation for developed-country Members in providing preferential treatment under a GSP scheme to "respond positively" to the "needs of developing countries".[325] Having said this, we turn to consider whether the "development, financial and trade needs of developing countries" to which preference-granting countries are required to respond when granting preferences must be understood to cover the "needs" of developing countries *collectively*.

159. The Panel found that "the only appropriate way [under paragraph 3(c) of the Enabling Clause] of responding to the differing development needs of developing countries is for preference-giving countries to ensure that their [GSP] schemes have sufficient breadth of product coverage and depth of tariff cuts to respond positively to those differing needs."[326] In reaching this conclusion, the Panel appears to have placed a great deal of significance on the fact that paragraph 3(c) does not refer to needs of "*individual*" developing countries.[327] The Panel thus understood that paragraph 3(c) does not permit the granting of preferential tariff treatment exclusively to a sub-category of developing countries on the basis of needs that are common to or shared by only those developing countries. We see no basis for such a conclusion in the text of paragraph 3(c). Paragraph 3(c) refers generally to "the development, financial and trade needs of developing countries". The absence of an explicit requirement in the text of paragraph 3(c)[328] to respond to the needs of "all" developing countries, or to

[325]We note that the European Communities agreed before the Panel that paragraph 3(c) of the Enabling Clause sets forth a "requirement". (European Communities' first written submission to the Panel, paras. 71 and 149)

[326]Panel Report, para. 7.149. (See also, *ibid*., paras. 7.95-7.97 and 7.105)

[327]*Ibid.*, para. 7.78.

[328]The United States refers to Article 3.2 of the DSU to support its argument that "panels are barred from reading legal obligations into the Enabling Clause that are not found in the text." (United States' third participant's submission, para. 13)

the needs of "each and every"[329] developing country, suggests to us that, in fact, that provision imposes no such obligation.[330]

160. Furthermore, as we understand it, the participants in this case agree that developing countries may have "development, financial and trade needs" that are subject to change and that certain development needs may be common to only a certain number of developing countries.[331] We see no reason to disagree. Indeed, paragraph 3(c) contemplates that "differential and more favourable treatment"[332] accorded by developed to developing countries may need to be "modified" in order to "respond positively" to the needs of developing countries. Paragraph 7 of the Enabling Clause supports this view by recording the expectation of "less-developed contracting parties" that their capacity to make contributions or concessions under the GATT will "improve with the progressive development of their economies and improvement in their trade situation". Moreover, the very purpose of the special and differential treatment permitted under the Enabling Clause is to foster economic development of developing countries. It is simply unrealistic to assume that such development will be in lockstep for all developing countries at once, now and for the future.

161. In addition, the Preamble to the *WTO Agreement*, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[333] The word "commensurate" in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the *WTO Agreement* further recognizes

[329]Panel Report, para. 7.105. (italics omitted)

[330]In this respect, we agree with the European Communities that paragraph 3(c) should "be interpreted in a manner which, while preserving its relevance, is both workable for developed countries and consistent with the requirements that the preferences be *non-discriminatory*." (European Communities' appellant's submission, para. 138 (original italics))

[331]The European Communities emphasized before the Panel that the "development, financial and trade needs of developing countries" referred to in paragraph 3(c) of the Enabling Clause "[o]bviously ... may vary between different categories of developing countries, as well as over time." (European Communities' first written submission to the Panel, para. 71) That "needs of developing countries" may change over time was also acknowledged by India in response to our questioning at the oral hearing. In addition, we understand India not to disagree that developing countries may have different individual needs, given that it argues that paragraph 3(c) should be interpreted as requiring "GSP schemes [to] respond to the needs of developing countries as a whole and not their individual needs." (India's appellee's submission, para. 124)

[332]Enabling Clause, para. 1 (attached as Annex 2 to this Report).

[333]*WTO Agreement*, Preamble, second recital.

that Members' "respective needs and concerns at different levels of economic development"[334] may vary according to the different stages of development of different Members.

162. In sum, we read paragraph 3(c) as authorizing preference-granting countries to "respond positively" to "needs" that are *not* necessarily common or shared by all developing countries. Responding to the "needs of developing countries" may thus entail treating different developing-country beneficiaries differently.

163. However, paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to "development, financial and trade needs". In our view, a "need" cannot be characterized as one of the specified "needs of developing countries" in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a "development, financial [or] trade need" must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard.[335]

164. Secondly, paragraph 3(c) mandates that the response provided to the needs of developing countries be "positive". "Positive" is defined as "consisting in or characterized by constructive action or attitudes".[336] This suggests that the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will "respond positively" to the "needs of developing countries" suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant "development, financial [or] trade need". In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the "positive" manner suggested, in "respon[se]" to a

[334]*WTO Agreement*, Preamble, first recital.

[335]The European Communities argues that tariff preferences are an appropriate response to the drug problem. In support of its argument, the European Communities refers to the Preamble to the *Agreement on Agriculture* and the waiver for the United States' Andean Trade Preference Act. In addition, the European Communities finds support in several international conventions and resolutions that have recognized drug production and drug trafficking as entailing particular problems for developing countries. (See Panel Report, paras. 4.71-4.74; and European Communities' appellant's submission, paras. 144-149)

[336]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2293.

widely-recognized "development, financial [or] trade need", can such action satisfy the requirements of paragraph 3(c).

165. Accordingly, we are of the view that, by requiring developed countries to "respond positively" to the "needs of developing countries", which are varied and not homogeneous, paragraph 3(c) indicates that a GSP scheme may be "non-discriminatory" even if "identical" tariff treatment is not accorded to "all" GSP beneficiaries. Moreover, paragraph 3(c) suggests that tariff preferences under GSP schemes may be "non-discriminatory" when the relevant tariff preferences are addressed to a particular "development, financial [or] trade need" and are made available to all beneficiaries that share that need.

166. India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 *vis-à-vis* other developing countries[337], and we make no such presumption. In fact, we note that the Enabling Clause *specifically* allows developed countries to provide differential and more favourable treatment to developing countries "notwithstanding" the provisions of Article I.[338] With this in mind, and given that paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary *vis-à-vis* other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause.

167. Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any "differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties." This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another.[339] Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries[340], and paragraph 3(c) even contemplates such differentiation under certain circumstances[341], paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.

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[337]India's appellee's submission, para. 94.

[338]Compare para. 1 of the Enabling Clause ("Notwithstanding the provisions of Article I") with para. (a) of the 1971 Waiver Decision ("the provisions of Article I shall be waived ... to the extent necessary").

[339]We note in this respect that the language contained in paragraph 3(a) of the Enabling Clause is reflected in waivers referred to in *supra*, footnote 323.

[340]*Supra*, paras. 153-154.

[341]*Supra*, paras. 162-165.

168. Having examined the context of paragraph 2(a), we turn next to examine the object and purpose of the *WTO Agreement*. We note first that paragraph 7 of the Enabling Clause provides that "[t]he concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the [GATT 1994] should promote the basic objectives of the [GATT 1994], including those embodied in the Preamble". As we have observed, the Preamble to the *WTO Agreement* provides that there is "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development".[342] Similarly, the Preamble to the 1971 Waiver Decision provides that "a principal aim of the CONTRACTING PARTIES is promotion of the trade and export earnings of developing countries for the furtherance of their economic development".[343] These objectives are also reflected in paragraph 3(c) of the Enabling Clause, which states that the treatment provided under the Enabling Clause "shall ... be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries".

169. Although enhanced market access will contribute to responding to the needs of developing countries *collectively*, we have also recognized that the needs of developing countries may vary over time. We are of the view that the objective of improving developing countries' "share in the growth in international trade", and their "trade and export earnings", can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of "non-discriminatory" that does not require the granting of "identical tariff preferences"[344] allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be "generalized" and "non-reciprocal". We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause.

170. The Panel took the view, however, that the objective of "elimination of discriminatory treatment in international commerce"[345], found in the Preamble to the GATT 1994, "contributes more

[342]*WTO Agreement*, Preamble, second recital.

[343]1971 Waiver Decision, Preamble, first recital.

[344]Panel Report, para. 7.161.

[345]*Ibid*., para. 7.157 (quoting GATT 1994, Preamble, second recital).

to guiding the interpretation of 'non-discriminatory'"[346] than does the objective of ensuring that developing countries "secure ... a share in the growth in international trade commensurate with their development needs."[347] We fail to see on what basis the Panel drew this conclusion.

171. We next examine the relevance of paragraph 2(d) of the Enabling Clause[348] for the interpretation of "non-discriminatory" in footnote 3. The Panel characterized paragraph 2(d) as an "exception" to paragraph 2(a)[349] and relied on paragraph 2(d) to support its view that paragraph 2(a) requires "formally identical treatment".[350] In the Panel's view, if developed-country Members were entitled under paragraph 2(a) to differentiate between developing-country Members, then they would have been entitled under that paragraph alone to differentiate between developing and least-developed countries. Accordingly, "there would have been no need to include paragraph 2(d) in the Enabling Clause."[351]

172. We do not agree with the Panel that paragraph 2(d) is an "exception" to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-developed countries form an identifiable sub-category of developing countries with "special economic difficulties and ... particular development, financial and trade needs".[352] When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have already found[353], footnote 3 imposes a requirement that such preferences be "non-discriminatory". In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not "discriminate" against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to

[346]Panel Report, paras. 7.157-7.158.

[347]*Ibid.*, para. 7.155 (referring to *WTO Agreement*, Preamble, second recital).

[348]Paragraph 2(d) deals with special treatment of least-developed countries "in the context of any general or specific measures in favour of developing countries".

[349]Panel Report, para. 7.147.

[350]*Ibid.*, para. 7.145.

[351]*Ibid.*, para. 7.145.

[352]Enabling Clause, para. 6 (attached as Annex 2 to this Report). Similarly, paragraph 8 of the Enabling Clause refers to the "special economic situation and [the] development, financial and trade needs" of least-developed countries.

[353]*Supra*, paras. 145-148.

least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is "non-discriminatory". This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term "non-discriminatory" does not require the granting of "identical tariff preferences" [354] to all GSP beneficiaries.

173. Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the *WTO Agreement* and the Enabling Clause, we conclude that the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.

174. For all of these reasons, we *reverse* the Panel's finding, in paragraphs 7.161 and 7.176 of the Panel Report, that "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations." [355]

C. *The Words "Developing Countries" in Paragraph 2(a) of the Enabling Clause*

175. In addition to the Panel's interpretation of the term "non-discriminatory" in footnote 3 of the Enabling Clause, the European Communities appeals the Panel's finding that "the term 'developing countries' in paragraph 2(a) should be interpreted to mean *all* developing countries, [except as regards] *a priori* limitations".[356] The Panel's interpretation of paragraph 2(a) is premised on its findings that (i) footnote 3 permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purpose of *a priori* limitations [357], and (ii) paragraph 3(c) permits the granting of different tariff preferences to different GSP beneficiaries *only* for the purposes of

[354]Panel Report, para. 7.161.

[355]Given our interpretation, which permits differentiation among GSP beneficiaries, it is not necessary for us to rule on whether *a priori* limitations are permitted under the Enabling Clause. (See also, *supra*, paras. 128-129)

[356]Panel Report, para. 7.174. (original italics) See also, European Communities' appellant's submission, para. 67.

[357]Panel Report, para. 7.170.

a priori limitations and preferential treatment in favour of least-developed countries.[358] We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term "developing countries" in paragraph 2(a) should not be read to mean "all" developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries.

176. Accordingly, we also *reverse* the Panel's finding, in paragraph 7.174 of the Panel Report, that "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries."

D. *Consistency of the Drug Arrangements with the Enabling Clause*

177. We turn next to examine the consistency of the Drug Arrangements with the Enabling Clause.

178. We recall that, with respect to the Enabling Clause, the only challenge by India before the Panel related to paragraph 2(a) and, in particular, footnote 3 thereto.[359] In response, the European Communities argued that it found contextual support for its interpretation of paragraph 2(a) in the requirement, contained in paragraph 3(c), to respond positively to the needs of developing countries.[360] In rejecting the European Communities' interpretation of paragraph 2(a), the Panel did not determine whether the Drug Arrangements satisfy the conditions set out in paragraph 3(c), but, rather, limited its discussion of paragraph 3(c) to the relevance of that provision as context for its interpretation of paragraph 2(a). Thus, the Panel made a finding of inconsistency only with respect to paragraph 2(a) of the Enabling Clause.[361] The European Communities appeals this finding of inconsistency with paragraph 2(a).

179. Although paragraph 3(c) informs the interpretation of the term "non-discriminatory" in footnote 3 to paragraph 2(a), as detailed above[362], paragraph 3(c) imposes requirements that are

[358]Panel Report, para. 7.171.

[359]*Supra*, paras. 120-122.

[360]See Panel Report, para. 7.123; European Communities' first written submission to the Panel, paras. 70-71 and 149; and European Communities' second written submission to the Panel, paras. 48-52.

[361]Panel Report, para. 8.1(d).

[362]*Supra*, paras. 157-162.

separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized "development, financial and trade needs" of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this "positive response" would not, as such, fail to comply with the "non-discriminatory" requirement in footnote 3 of the Enabling Clause [363], even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members.[364] With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause [365], we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to "respond positively to the development, financial and trade needs of developing countries" or with the obligation contained in paragraph 3(a) not to "raise barriers" or "create undue difficulties" for the trade of other Members.

180. We found above that the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause does not prohibit the granting of different tariffs to products originating in different sub-categories of GSP beneficiaries, but that identical tariff treatment must be available to all GSP beneficiaries with the "development, financial [or] trade need" to which the differential treatment is intended to respond.[366] The need alleged to be addressed by the European Communities' differential tariff treatment is the problem of illicit drug production and trafficking in certain GSP beneficiaries. In the context of this case, therefore, the Drug Arrangements may be found consistent with the "non-discriminatory" requirement in footnote 3 only if the European Communities proves, at a minimum, that the preferences granted under the Drug Arrangements are available to all GSP beneficiaries that are similarly affected by the drug problem.[367] We do not believe this to be the case.

[363] *Supra*, para. 165.

[364] *Supra*, para. 167.

[365] See *supra*, para. 134.

[366] *Supra*, para. 165.

[367] According to the European Communities, "the Drug Arrangements are *non-discriminatory* because the designation of the beneficiary countries is based only and exclusively on their development needs. All the developing countries that are similarly affected by the drug problem have been included in the Drug Arrangements". (European Communities' appellant's submission, para. 186 (original italics))

181. By their very terms, the Drug Arrangements are limited to the 12 developing countries designated as beneficiaries in Annex I to the Regulation.[368] Specifically, Article 10.1 of the Regulation states:

> Common Customs Tariff *ad valorem* duties on [covered products] which originate in a country that according to Column I of Annex I benefits from [the Drug Arrangements] shall be entirely suspended.

182. Articles 10 and 25 of the Regulation, which relate specifically to the Drug Arrangements, provide no mechanism under which additional beneficiaries may be added to the list of beneficiaries under the Drug Arrangements as designated in Annex I. Nor does any of the other Articles of the Regulation point to the existence of such a mechanism with respect to the Drug Arrangements. Moreover, the European Communities acknowledged the absence of such a mechanism in response to our questioning at the oral hearing. This contrasts with the position under the "special incentive arrangements for the protection of labour rights" and the "special incentive arrangements for the protection of the environment", which are described in Article 8 of the Regulation. The Regulation includes detailed provisions setting out the procedure and substantive criteria that apply to a request by a beneficiary under the general arrangements described in Article 7 of the Regulation (the "General Arrangements") to become a beneficiary under either of those special incentive arrangements.[369]

183. What is more, the Drug Arrangements themselves do *not* set out any clear prerequisites—or "objective criteria"[370]—that, if met, would allow for other developing countries "that are similarly affected by the drug problem"[371] to be *included* as beneficiaries under the Drug Arrangements.[372] Indeed, the European Commission's own Explanatory Memorandum notes that "the benefits of the drug regime ... are given without *any* prerequisite."[373] Similarly, the Regulation offers no criteria

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[368]The 12 designated beneficiary countries are: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela. (Regulation, Annex I (Column I))

[369]Regulation, Title III.

[370]European Communities' appellant's submission, paras. 4 and 139.

[371]*Ibid.*, para. 186.

[372]In response to Question 4 posed by India at the First Panel Meeting, the European Communities confirmed that the Regulation does not set out objective criteria for designating beneficiary countries under the Drug Arrangements. The European Communities stated:

> The criteria are not set out in the GSP Regulation. They are not contained in a public document.

(Panel Report, p. B-69, para. 5)

[373]Explanatory Memorandum to the Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, para. 35 (emphasis added) (attached to Amended Proposal for a Council Regulation applying a scheme of generalised tariff preferences for the period 1 January 2002 to 31 December 2004, 2001/0131 (ACC), at p. 3) (Exhibit India-7 submitted by India to the Panel).

according to which a beneficiary could be *removed* specifically from the Drug Arrangements on the basis that it is no longer "similarly affected by the drug problem". Indeed, Article 25.3 expressly states that the evaluation of the effects of the Drug Arrangements described in Articles 25.1(b) and 25.2 "will be without prejudice to the continuation of the [Drug Arrangements] until 2004, and their possible extension thereafter." This implies that, even if the European Commission found that the Drug Arrangements were having no effect whatsoever on a beneficiary's "efforts in combating drug production and trafficking"[374], or that a beneficiary was no longer suffering from the drug problem, beneficiary status would continue.[375] Therefore, even if the Regulation allowed for the list of beneficiaries under the Drug Arrangements to be modified, the Regulation itself gives no indication as to how the beneficiaries under the Drug Arrangements were chosen or what kind of considerations would or could be used to determine the effect of the "drug problem" on a particular country. In addition, we note that the Regulation does not, for instance, provide any indication as to how the European Communities would assess whether the Drug Arrangements provide an "adequate and proportionate response"[376] to the needs of developing countries suffering from the drug problem.

184. It is true that a country may be removed as a beneficiary under Annex I, either altogether or in respect of certain product sectors, for reasons that are not specific to the Drug Arrangements. Thus, Article 3 of the Regulation provides for the removal of a country from Annex I (and hence, from the General Arrangements and any other arrangements under which it is a beneficiary) if particular circumstances are met indicating that the country has reached a certain level of development. Article 12 provides for the removal of a country as a beneficiary under the General Arrangements and the Drug Arrangements with respect to a product sector where the country's level of development and competition has reached a certain threshold with respect to that sector. Neither Article 3 nor Article 12 appears to relate in any way to the degree to which the country is suffering from the "drug problem". Finally, Title V to the Regulation contains certain "Temporary Withdrawal and Safeguard Provisions" that are common to all the preferential arrangements under the Regulation. Although one reason for which the arrangements may be temporarily withdrawn is "shortcomings in customs controls on export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money laundering"[377], this reason applies equally to the General Arrangements, the Drug Arrangements, and the other special incentive arrangements. Moreover, as

[374]Regulation, Art. 25.1(b).

[375]In response to questioning at the oral hearing, the European Communities confirmed that, although the sixth recital to the Preamble of the Regulation provides that the Drug Arrangements "should be closely monitored", the list of beneficiaries will be unaffected by the monitoring described in Articles 25.1 and 25.2 of the Regulation.

[376]European Communities' appellant's submission, para. 133.

[377]Regulation, Art. 26.1(d).

the Panel appeared to recognize, this condition is not connected to the question of whether the beneficiary is a "seriously drug-affected country".[378]

185. We note, moreover, that the Drug Arrangements will be in effect until 31 December 2004.[379] Until that time, other developing countries that are "similarly affected by the drug problem" can be included as beneficiaries under the Drug Arrangements only through an amendment to the Regulation. The European Communities confirmed this understanding in response to questioning at the oral hearing.

186. Against this background, we fail to see how the Drug Arrangements can be distinguished from other schemes that the European Communities describes as "confined *ab initio* and permanently to a limited number of developing countries".[380] As we understand it, the European Communities' position is that such schemes would be discriminatory, whereas the Drug Arrangements are not because "all developing countries are potentially beneficiaries" thereof.[381] In seeking a waiver from its obligations under Article I:1 of the GATT 1994 to implement the Drug Arrangements, the European Communities explicitly acknowledged, however, that "[b]ecause the special arrangements *are only available* to imports originating in [the 12 beneficiaries of the Drug Arrangements], a waiver ... appears necessary".[382] This statement appears to undermine the European Communities' argument that "all developing countries are potentially beneficiaries of the Drug Arrangements" and, therefore, that the Drug Arrangements are "non-discriminatory".[383]

187. We recall our conclusion that the term "non-discriminatory" in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation.

[378]Panel Report, para. 7.216.

[379]Regulation, Arts. 1.1 and 41.2. We understand that the Regulation has been extended to 31 December 2005. (Council Regulation (EC) No. 2211/2003 of 15 December 2003 amending Regulation (EC) No. 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 and extending it to 31 December 2005, *Official Journal of the European Union*, L Series, No. 332 (19 December 2003), p. 1)

[380]European Communities' appellant's submission, para. 185.

[381]*Ibid.*, para. 186.

[382]Council for Trade in Goods, Request for a WTO Waiver, *New EC Special Tariff Arrangements to Combat Drug Production and Trafficking*, G/C/W/328, 24 October 2001, p. 2. (emphasis added)

[383]European Communities' appellant's submission, para. 186.

Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

188. Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so.[384] As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are "similarly affected by the drug problem"[385], because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not.

189. For all these reasons, we find that the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be "non-discriminatory". Accordingly, we *uphold*, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".

VI. Findings and Conclusions

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

(a) upholds the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause is an "exception" to Article I:1 of the GATT 1994;

(b) upholds the Panel's finding, in paragraph 7.53 of the Panel Report, that the Enabling Clause "does not exclude the applicability" of Article I:1 of the GATT 1994;

(c) modifies the Panel's finding, in paragraph 7.53 of the Panel Report, that the European Communities "bears the burden of invoking the Enabling Clause and justifying its Drug Arrangements" under that Clause, by finding that it was incumbent upon India to *raise* the Enabling Clause in making its claim of inconsistency with Article I:1 of the GATT 1994, but that the European Communities bore the burden of *proving* that

[384]See *supra*, footnote 372.

[385]European Communities' appellant's submission, para. 186.

the Drug Arrangements satisfy the conditions of the Enabling Clause, in order to justify those Arrangements under that Clause; and finds, further, that India sufficiently raised paragraph 2(a) of the Enabling Clause in making its claim of inconsistency with Article I:1 before the Panel;

(d) need not rule on the Panel's conclusion, in paragraphs 7.60 and 8.1(b) of the Panel Report, that the Drug Arrangements are inconsistent with Article I:1 of the GATT 1994;

(e) reverses the Panel's finding, in paragraphs 7.161 and 7.176 of the Panel Report, that "the term 'non-discriminatory' in footnote 3 [to paragraph 2(a) of the Enabling Clause] requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations";

(f) reverses the Panel's finding, in paragraph 7.174 of the Panel Report, that "the term 'developing countries' in paragraph 2(a) [of the Enabling Clause] should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing a priori limitations, 'developing countries' may mean *less than all* developing countries"; and

(g) upholds, for different reasons, the Panel's conclusion, in paragraph 8.1(d) of the Panel Report, that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause".

191. The Appellate Body therefore recommends that the Dispute Settlement Body request the European Communities to bring Council Regulation (EC) No. 2501/2001, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with Article I:1 of the GATT 1994 and not justified under paragraph 2(a) of the Enabling Clause, into conformity with its obligations under the GATT 1994.

Signed in the original at Geneva this 18th day of March 2004 by:

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Georges Abi-Saab
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

Giorgio Sacerdoti
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS246/7
8 January 2004

(04-0070)

Original: English

EUROPEAN COMMUNITIES – CONDITIONS FOR THE GRANTING OF TARIFF PREFERENCES TO DEVELOPING COUNTRIES

Notification of an Appeal by the European Communities
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 8 January 2004, from the Permanent Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the European Communities hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel established in response to the request from India in the dispute *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (WT/DS246R).

The European Communities seeks review of the Panel's legal conclusion that the Special Arrangements to Combat Drug Production and Trafficking provided in Council Regulation (EC) No. 2501/2001 (the "Drug Arrangements") are inconsistent with Article I:1 of the *General Agreement on Tariff and Trade 1994* (the "GATT"). This conclusion is based on the following erroneous legal findings:

- that the Enabling Clause is an "exception" to Article I:1 of the GATT;

- that the Enabling Clause does not exclude the applicability of Article I:1 of the GATT;

- that the EC had the burden of proving that the Drug Arrangements were consistent with the Enabling Clause.

The above legal conclusion, and the related legal findings and interpretations are set out in paragraphs 7.31 to 7.60 and 8.1 (b) and (c) of the Panel report.

India did not make any claims under the Enabling Clause and, therefore, the Appellate Body should refrain from examining the consistency of the Drug Arrangements with the Enabling Clause. However, if the Appellate Body were to uphold the Panel's conclusion that the Drug Arrangements are inconsistent with Article I:1 of the GATT, or if the Appellate Body were to decide that India made a valid claim under the Enabling Clause, the European Communities appeals subsidiarily the Panel's

legal conclusion that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause". That conclusion is based on the following erroneous legal findings:

- that "the term "non-discriminatory" in footnote 3 to Paragraph 2(a) requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation, except for the implementation of a priori limitations"; and

- that the term "developing countries" in Paragraph 2(a) means all developing countries.

This legal conclusion and the related legal findings and interpretations are set out in paragraphs 7.61-7.177 and 8.1(d) of the Panel report.

Finally the EC seeks review of the Panel's legal conclusion that the European Communities has nullified or impaired benefits accrued to India under GATT 1994, which is set out in paragraph 8.1(f) of the Panel report

ANNEX 2

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT
RECIPROCITY AND FULLER PARTICIPATION
OF DEVELOPING COUNTRIES

Decision of 28 November 1979
(L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

(*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]

(*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(*a*) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(*b*) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

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[1] The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[2] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

(*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[4]

(*a*) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(*b*) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

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[4] Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

WORLD TRADE ORGANIZATION
APPELLATE BODY

Brazil – Measures Affecting Imports of Retreaded Tyres

European Communities, *Appellant*
Brazil, *Appellee*

Argentina, *Third Participant*
Australia, *Third Participant*
China, *Third Participant*
Cuba, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*
Korea, *Third Participant*
Mexico, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *Third Participant*
Thailand, *Third Participant*
United States, *Third Participant*

AB-2007-4

Present:

Abi-Saab, Presiding Member
Baptista, Member
Taniguchi, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (the "Panel Report").[1] The Panel was established to consider a complaint by the European Communities concerning the consistency of certain measures imposed by Brazil on the importation and marketing of retreaded tyres[2] with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

[1]WT/DS332/R, 12 June 2007.

[2]Retreaded tyres are used tyres that are reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls. (See Panel Report, para. 2.1) Retreaded tyres can be produced through different methods, all indistinctively referred to as "retreading". These methods are: (i) top-capping, which consists of replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. (See *ibid*., para. 2.2) The retreaded tyres covered in this dispute are classified under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types) of the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983. In contrast, used tyres are classified under subheading 4012.20. New tyres are classified under heading 4011. (See *ibid*., para. 2.4)

2. Before the Panel, the European Communities claimed that Brazil imposed a prohibition on the importation of retreaded tyres, notably by virtue of Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")[3], and that this prohibition was inconsistent with Article XI:1 of the GATT 1994.[4] The European Communities also contended that certain Brazilian measures providing for the imposition of fines on the importation of retreaded tyres, and on the marketing, transportation, storage, keeping, or warehousing of imported retreaded tyres[5], were similarly inconsistent with Article XI:1 or, alternatively, Article III:4 of the GATT 1994.[6] In addition, the European Communities made claims under Article III:4 of the GATT 1994 in respect of certain state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres.[7] Finally, the European Communities challenged the exemption from the import prohibition on retreaded tyres and associated fines provided by Brazil to retreaded tyres originating in countries of the Mercado Común

[3]Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. Article 40 of Portaria SECEX 14/2004 reads as follows:

> Article 40 – An import license will not be granted for retreaded and used tires, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tires, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the MERCOSUR Member States under the Economic Complementation Agreement No. 18.

(See Panel Report, para. 2.7)

[4]*Ibid*., paras. 3.1 and 7.1.

[5]Article 47-A of Presidential Decree 3.179 of 21 September 1999, as amended by Article 1 of Presidential Decree 3.919 of 14 September 2001, provides:

> Importing used or recycled tires:
>
> Fine of R$ 400.00 (four hundred reais) per unit.
>
> Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or recycled tire imported under such conditions.

(*Ibid*., para. 2.10 (referring to Exhibit BRA-72 submitted by Brazil to the Panel); see also Exhibit EC-34 submitted by the European Communities to the Panel)

[6]Panel Report, paras. 3.1 and 7.358.

[7]*Ibid*., para. 7.391. The measures of the State of Rio Grande do Sul are identified in paragraphs 2.11 and 2.12 of the Panel Report.

del Sur ("MERCOSUR") (Southern Common Market).[8] The European Communities contended that these exemptions were inconsistent with Articles I:1 and XIII:1 of the GATT 1994.[9]

3. Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with Article XI:1[10]; or that state measures prohibiting the marketing of, and/or imposing disposal obligations on the importers of, imported retreaded tyres were *prima facie* inconsistent with Article III:4[11]; or that the exemptions from both the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries were *prima facie* inconsistent with Articles I:1 and XIII:1 of the GATT 1994.[12] Instead, Brazil submitted that the prohibition on the importation of retreaded tyres and associated fines, and state measures restricting the marketing of imported retreaded tyres, were all justified under Article XX(b) of the GATT 1994.[13] Brazil contended that the fines associated with the import prohibition on retreaded tyres were justified also under Article XX(d) of the GATT 1994.[14] Brazil further maintained that the exemption from the import prohibition and associated fines afforded to imports of *remoulded* tyres from MERCOSUR countries was justified under Articles XX(d) and XXIV of the GATT 1994.[15]

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[8]The exemption from the import prohibition afforded to MERCOSUR countries is provided in Article 40 of Portaria SECEX 14/2004 (see *supra*, footnote 3) and applies exclusively to remoulded tyres, a subcategory of retreaded tyres. (See Panel Report, footnote 1440 to para. 7.265) The exemption from the fines associated with the import prohibition on retreaded tyres is provided in Article 1 of Presidential Decree 4.592 of 11 February 2003 (Exhibit BRA-79 submitted by Brazil to the Panel), and exempts imports of all categories of retreaded tyres originating in MERCOSUR countries from the fines provided in Article 47-A of Presidential Decree 3.179, as amended, in the following terms:

> Article 1: Article 47-A of Decree 3.179 of 21 September 1999 shall apply with the addition of the following paragraph, and the current sole paragraph shall be renumbered as (1):
>
> paragraph (2) – Imports of retreaded tyres classified under heading MCN 4012.1100, 4012.1200, 4012.1300 and 4012.1900, originating in the MERCOSUR member countries under Economic Complementation Agreement No. 18 shall be exempt from payment of the fine referred to in this Article.

(See *supra*, footnote 5; see also Panel Report, para. 2.16)

[9]Panel Report, para. 7.448.

[10]*Ibid*., paras. 7.2 and 7.359. Brazil did not acknowledge any inconsistency of the fines with Article III:4 of the GATT 1994. (See *ibid*., para. 7.359)

[11]*Ibid*., para. 7.392.

[12]*Ibid*., para. 7.449.

[13]*Ibid*., paras. 7.2, 7.217, 7.359, and 7.392.

[14]*Ibid*., para. 7.359.

[15]*Ibid*., para. 7.449.

4. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 12 June 2007. The Panel found that the import prohibition on retreaded tyres was inconsistent with Article XI:1 and not justified under Article XX of the GATT 1994.[16] In its analysis, the Panel found that the import prohibition on retreaded tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX(b).[17] However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreaded tyres being applied by Brazil in a manner that constituted both "a means of unjustifiable discrimination [between countries] where the same conditions prevail"[18] and "a disguised restriction on international trade"[19], within the meaning of the chapeau of Article XX of the GATT 1994.

5. The Panel found further that the fines associated with the import prohibition on retreaded tyres were inconsistent with Article XI:1 and not justified under either paragraph (b) or (d) of Article XX of the GATT 1994.[20] The Panel also determined that state law restrictions on the marketing of imported retreaded tyres and associated disposal obligations were inconsistent with Article III:4 and not justified under Article XX(b) of the GATT 1994.[21] The Panel exercised judicial economy with respect to the European Communities' claims that the exemption from the import prohibition and associated fines afforded to retreaded tyres imported from MERCOSUR countries was inconsistent with Articles I:1 and XIII:1 of the GATT 1994, and with respect to Brazil's related defence under Articles XX(d) and XXIV of the GATT 1994.[22] The Panel accordingly recommended that the Dispute Settlement Body (the "DSB") request Brazil to bring those measures found to be inconsistent into conformity with its obligations under the GATT 1994.[23]

6. At its meeting on 10 August 2007, the DSB agreed to a joint request by Brazil and the European Communities to extend the time period for adoption of the Panel Report until no later than 20 September 2007.[24] On 3 September 2007, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures*

[16]Panel Report, paras. 7.357 and 8.1(a)(i) and (ii).

[17]*Ibid*., para. 7.215.

[18]*Ibid*., para. 7.310; see also para. 7.306.

[19]*Ibid*., para. 7.349.

[20]*Ibid*., para. 8.1(b). The Panel did not rule on the European Communities' alternative claim that the fines associated with the prohibition on the importation of retreaded tyres were inconsistent with Article III:4 of the GATT 1994. (See *ibid*., para. 7.364)

[21]*Ibid*., para. 8.1(c).

[22]*Ibid*., paras. 7.456 and 8.2.

[23]*Ibid*., para. 8.4.

[24]WT/DS332/8, 31 July 2007. The minutes of the DSB meeting are set out in WT/DSB/M/237.

Governing the Settlement of Disputes (the "DSU"), and filed a Notice of Appeal[25] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[26] On 10 September 2007, the European Communities filed an appellant's submission.[27] On 28 September 2007, Brazil filed an appellee's submission.[28] On the same day, Argentina, Australia, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, and the United States each filed a third participant's submission.[29] Also on 28 September 2007, China, Cuba, Guatemala, Mexico, and Thailand each notified its intention to appear at the oral hearing as a third participant.[30] On 5 October 2007, Paraguay notified its intention to appear at the oral hearing as a third participant.[31]

7. On 28 September 2007, the Appellate Body received an *amicus curiae* brief from the Humane Society International. On 11 October 2007, the Appellate Body further received an *amicus curiae* brief submitted jointly by a group of nine non-governmental organizations.[32] The Appellate Body Division hearing the appeal did not find it necessary to take these *amicus curiae* briefs into account in rendering its decision.

8. The oral hearing in this appeal was held on 15 and 16 October 2007. The participants and the third participants, with the exception of Argentina, China, Guatemala, Mexico, Paraguay, and Thailand, made oral statements. The participants and the third participants responded to questions posed by the Members of the Division hearing the appeal.

[25]WT/DS332/9, 3 September 2007 (attached as Annex I to this Report).

[26]WT/AB/WP/5, 4 January 2005.

[27]Pursuant to Rule 21 of the *Working Procedures*.

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

[29]Pursuant to Rule 24(1) of the *Working Procedures*.

[30]Pursuant to Rule 24(2) of the *Working Procedures*.

[31]Pursuant to Rule 24(4) of the *Working Procedures*.

[32]These non-governmental organizations are: Associação de Combate aos Poluentes (ACPO), Brazil; Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Brazil; Centro de Derechos Humanos y Ambiente (CEDHA), Argentina; Center for International Environmental Law (CIEL), United States and Switzerland; Conectas Direitos Humanos, Brazil; Friends of the Earth Europe, Belgium; The German NGO Forum on Environment and Development, Germany; Justiça Global, Brazil; and Instituto O Direito por Um Planeta Verde, Brazil.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Necessity Analysis

9. The European Communities claims that the Panel erred in finding that the import prohibition on retreaded tyres imposed by Brazil (the "Import Ban") was necessary to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the Import Ban is not "necessary" within the meaning of Article XX(b).

10. The European Communities' claims of error are directed at three distinct aspects of the Panel's necessity analysis: first, the Panel's finding that the Import Ban contributed to the realization of its stated objective; secondly, the Panel's finding that there were no reasonably available alternatives to the Import Ban; and thirdly, the Panel's alleged failure to conduct the process of weighing and balancing the relevant factors and the alternatives that was required to determine whether the Import Ban was "necessary" under Article XX(b). The arguments advanced by the European Communities in relation to each of these claims of error are addressed in turn.

(a) The Contribution Analysis

11. The European Communities argues that the Panel erred in finding that the Import Ban contributed to the protection of human, animal, or plant life or health. The European Communities maintains that the Panel "applied an erroneous legal standard"[33] by examining whether the Import Ban could make, or *could have* made, a contribution to the protection of human life or health, rather than establishing the *actual* contribution of the measure to its objective. By applying a standard of potential contribution, rather than one of actual contribution, the Panel acted inconsistently with the case law of the Appellate Body[34], which requires the Panel to have assessed the extent of the contribution made by the Import Ban to the reduction of waste tyres arising in Brazil. The European Communities reasons that "no meaningful weighing and balancing is possible"[35] absent a proper determination of the extent of the contribution made by the measure, and that, for necessity to be demonstrated, the contribution required is "more than mere suitability", it must be "verifiable and significant".[36] In this case, assessing the contribution of the measure to the achievement of its stated

[33]European Communities' appellant's submission, para. 166.

[34]*Ibid*., para. 169 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 164).

[35]*Ibid*., para. 171.

[36]*Ibid*., para. 172.

goals involved assessing whether the Import Ban reduced the number of waste tyres in Brazil. The European Communities does not see how this could have been done in any way *other than* through quantification, and stresses that this is *not* a case involving scientific uncertainty about the existence of risks. Rather, that "[t]he very indirect nature of the alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of waste tyres arising in Brazil."[37]

12. In addition, the European Communities claims that the Panel did not make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in determining the contribution of the Import Ban to the realization of the ends pursued by it. The European Communities asserts that the Panel ignored significant facts and arguments in its analysis, and failed to conduct an overall assessment of the evidence, instead, referring to the evidence before it in a selective and distorted manner.

13. According to the European Communities, in concluding that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"[38] that were not capable of being retreaded, the Panel ignored evidence that demonstrated "the existence ... of low-quality non-retreadable tyres"[39] in Brazil. The Panel's finding that "at least some domestic used tyres are being retreaded in Brazil"[40] is based exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association of the Retreading Industry) (the "ABR Report")[41] and on Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality).[42] The European Communities submits that the Panel failed to consider that the former is directly contradicted by a second report by the ABR[43], or to discount the evidentiary value of the latter

[37]European Communities' appellant's submission, para. 177. For the European Communities, the indirect nature of the alleged risk distinguishes this case from *EC – Asbestos*, as the factual context of this case does not concern the evaluation of risk in quantitative or qualitative terms. Rather, it concerns the quantification of the contribution of the measure to achieving its stated objective. (See *ibid*., para. 175)

[38]*Ibid*., para. 183 (quoting Panel Report, para. 7.137).

[39]*Ibid*. (referring to Exhibits EC-15 and EC-67 to EC-71 submitted by the European Communities to the Panel; European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254-255).

[40]Panel Report, para. 7.136.

[41]European Communities' appellant's submission, para. 186 (referring to the report of the ABR on tyre retreading activities in Brazil, 26 May 2006 (Exhibit BRA-95 submitted by Brazil to the Panel), para. 6)).

[42]Exhibit BRA-163 submitted by Brazil to the Panel.

[43]European Communities' appellant's submission, para. 187 (referring to the report of the ABR on the reformed tyres sector in Brazil, 23 June 2006 (Exhibit BRA-157 submitted by Brazil to the Panel), para. 6)).

given that it was issued during the course of the Panel proceedings and contradicts the earlier INMETRO Technical Note 83/2000.[44]

14. Moreover, the European Communities contends that the Panel ignored evidence that contradicted its findings regarding the retreadability of used tyres in Brazil, namely, a study by the consultancy LAFIS [45], and the fact that domestic retreaders have sought court injunctions to obtain the right to import used tyres for further retreading in Brazil. The European Communities also denounces the Panel's references to measures that Brazil might adopt in the future (such as more frequent automotive inspections), emphasizing that the question of whether the Import Ban contributed to the achievement of its stated objective had to be determined at the time of the establishment of the Panel, and speculation about future events is not a sufficient basis for an objective assessment of the facts.

(b) Alternatives to the Import Ban

15. The European Communities argues that the Panel committed multiple errors in holding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection of human life and health. The European Communities points out that it presented two categories of alternative measures: measures to reduce the *accumulation* of waste tyres; and measures to improve the *management* of waste tyres.

16. In the view of the European Communities, the Panel improperly excluded measures to ensure a better implementation and enforcement of the import ban on *used* tyres from its analysis of possible alternatives to the Import Ban on *retreaded* tyres. The most relevant and obvious alternative that would allow Brazil to prevent the risks associated with the accumulation of waste tyres would be to put an end to the importation of used tyres. Thus, the European Communities insists, the Panel should have analyzed this alternative irrespective of whether it also considered the implementation of the import ban on used tyres as part of its analysis under the chapeau of Article XX.

17. The European Communities adds that the Panel incorrectly defined as "alternatives" to the Import Ban only measures that avoid the generation of waste tyres specifically from imported retreaded tyres. Such a narrow definition of "alternatives" wrongly links the notion of alternative measures to the *means* (avoidance or non-generation of waste tyres) employed by the measure at issue

[44]European Communities' appellant's submission, paras. 188 and 189; Exhibit EC-45 submitted by the European Communities to the Panel.

[45]*Ibid*., para. 190 (referring to the report by LAFIS, "Auto Parts and Vehicles: Tyres", 20 April 2006 (Exhibit EC-92 submitted by the European Communities to the Panel), p. 11). This study indicates that, in Brazil, the overall rate of retreading for all types of vehicles is 9.9 per cent.

to achieve its objective, rather than to the objective itself. Available alternatives to the Import Ban are not, therefore, as the Panel found, limited to non-generation measures, but include any alternatives that would allow Brazil to attain the stated objective of the Import Ban, namely, the protection of life and health from mosquito-borne diseases and from tyre fire emissions. In the European Communities' view, the Panel's narrow conception of "alternative" resulted in the erroneous rejection of several alternatives that were capable of achieving this objective, such as measures to improve the domestic retreading and retreadability of tyres, the collection and disposal scheme imposed by the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment), and measures relating to the management of waste tyres, such as co-incineration.

18. The European Communities points to two additional errors in the Panel's conception of alternative measures. First, the Panel refused to consider as alternatives measures that could be "cumulative rather than substitutable"[46] with the Import Ban. For the European Communities, a measure that is cumulative or complementary to the Import Ban is capable of achieving the same objective as the ban and, therefore, is an alternative that must be taken into account. Secondly, in examining the CONAMA scheme and co-incineration of waste tyres, the Panel did not inquire whether the proposed options exist and are reasonably available, but, instead, examined whether those options are actually being employed.

19. Moreover, the European Communities argues that the Panel erred by excluding as alternatives a correct and complete implementation of certain state measures merely on the basis that these measures have already been implemented in Brazil. Specifically, the European Communities submits that evidence before the Panel demonstrated that Brazil neither implements correctly the obligations under the CONAMA scheme, nor enforces properly its collection and disposal system. Therefore, a better enforcement of the CONAMA scheme is an alternative that would be more effective than the Import Ban in reducing risks associated with tyre waste. The Panel also erroneously ignored the European Communities' contention that collection and disposal programmes, such as Paraná Rodando Limpo[47] should be adopted by all states in Brazil.

20. The European Communities also challenges the Panel's findings that most of the material recycling alternatives it proposed could not constitute reasonably available alternatives to the Import Ban because they "are only capable of disposing [of] a small ... number of waste tyres".[48] The case law of the Appellate Body regarding Article XX(b) does not require that one single alternative

[46]European Communities' appellant's submission, para. 225 (quoting Panel Report, para. 7.169).

[47]See Exhibit EC-49 submitted by the European Communities to the Panel.

[48]European Communities' appellant's submission, para. 238 (referring to Panel Report, paras. 7.201, 7.205, and 7.206). (underlining omitted)

measure achieve the same objective as the challenged measure. Therefore, the Panel erred in rejecting several alternative measures on the grounds that, taken individually, each measure did not fully attain the objective of the challenged measure. The European Communities also considers that the Panel erred in its analysis by requiring alternatives to be capable of dealing with the management of *all* waste tyres in Brazil, rather than with the number of waste tyres attributable to imported *retreaded* tyres.

21. Finally, the European Communities submits that the Panel's factual findings regarding reasonably available alternatives were not based on an objective assessment of the facts, as required by Article 11 of the DSU. More specifically, the Panel's rejection of landfilling of waste tyres as an alternative to the Import Ban was based on evidence related exclusively to landfilling of *whole* tyres, when the only alternative proposed was the landfilling of *shredded* tyres, and the Panel did not take into account legislation that permits the landfilling of shredded tyres in Brazil. As regards controlled stockpiling, the Panel erred in rejecting this alternative on the grounds that stockpiling does not dispose of waste tyres, and that it entails some risk to human health and the environment. As recognized in the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal*[49], controlled stockpiling is a disposal operation that is used for temporary storage. It is a crucial element in managing waste tyres, and the mere fact that it does not avoid *all* the risks that the Import Ban seeks to eliminate does not mean that it could not be an alternative. Regarding co-incineration, the European Communities argues that the Panel relied on evidence on co-incineration activities in countries other than Brazil[50], and failed to require Brazil to explain why unused capacity in its existing incineration facilities could not be used to burn more waste tyres as an available alternative to the Import Ban. The European Communities adds that the Panel's finding that co-incineration "may potentially pose health risks to humans"[51] is based on outdated evidence that does not represent the current state of the art on energy recovery.

22. The European Communities contends further that the Panel's rejection of material recycling as an alternative to the Import Ban is also not based on an objective assessment of the facts. The Panel disregarded evidence presented by the European Communities and, instead, relied on a brief paper by an unidentified organization, which related to a single material recycling application—civil engineering—to conclude that "it is not clear that these [material recycling] applications are entirely

[49]Adopted 1989; entry into force 1992 (Exhibit EC-24 submitted by the European Communities to the Panel).

[50]European countries and the United States. See also Panel Report, footnote 1339 to para. 7.192.

[51]European Communities' appellant's submission, para. 262 (quoting Panel Report, para. 7.192).

safe".[52] The European Communities adds that the Panel's conclusion that material recycling alternatives, such as civil engineering and rubber asphalt, would not be "reasonably" available due to their prohibitive costs was based on evidence adduced exclusively in relation to a single material recycling application—devulcanization.

23. Finally, the European Communities claims that the Panel failed to analyze one of the possible alternative measures identified by the European Communities, and which has already been adopted by Brazil—the National Dengue Control Programme[53]—and that this failure constitutes a violation of Article 11 of the DSU.

(c) The Weighing and Balancing Process

24. The European Communities claims that the Panel failed to conduct the process of weighing and balancing the relevant factors and the alternatives that was required in order to determine whether the Import Ban was "necessary" under Article XX(b) of the GATT 1994. For the European Communities, weighing and balancing involves, first, an individual assessment of each element (importance of the objective pursued; trade restrictiveness of the measure; contribution of the measure to the achievement of the objective) and, then, a consideration of the role and relative importance of each element together with the other elements, for the purposes of deciding whether the challenged measure is necessary to achieve the relevant objective. The Panel, however, failed to weigh properly the trade restrictiveness of the Import Ban. Because the Panel incorrectly analyzed the extent of the contribution of the Import Ban to the reduction in the number of waste tyres and, indirectly, to the protection of human life and health, the Panel was also incapable of properly weighing and balancing this contribution against any of the other elements. The Panel failed to consider that the risks addressed by the Import Ban were not directly linked to retreaded tyres but to the waste they eventually turn into, and that the level of such risks depends on how waste tyres are managed and disposed of. Thus, the Panel failed to acknowledge the indirect, uncertain, and relative contribution of the Import Ban to its stated objective and, in turn, failed to limit the weight afforded to this element in the weighing and balancing process.

[52]European Communities' appellant's submission, para. 274 (referring to Panel Report, para. 7.208). The European Communities also criticizes the Panel for reaching its finding on high costs of rubber asphalt applications on the basis of a piece of evidence describing this application as a "promising outlet for recycled rubber because rubberised asphalt lasts longer than conventional asphalt". (*Ibid*., para. 279 (quoting Panel Report, footnote 1367 to para. 7.205, in turn quoting the report of the Organisation for Economic Co-operation and Development ("OECD"), Working Group on Waste Prevention and Recycling, ENV/EPOC/WGWPR(2005)3/FINAL, 26 September 2005 (Exhibit EC-16 submitted by the European Communities to the Panel)))

[53]Brazil's Ministry of Health National Dengue Control Programme (NDCP), adopted 24 July 2002 (Exhibit EC-93 submitted by the European Communities to the Panel).

25. The European Communities contends that the Panel based its weighing and balancing exercise on its flawed analysis of reasonably available alternatives. The Panel also failed to take proper account of the trade restrictiveness of the Import Ban in the weighing and balancing exercise. The Panel focused on non-generation measures, and overlooked the considerable advantages of sound waste tyre collection and disposal schemes, including the fact that the implementation of the CONAMA scheme is less trade restrictive than the Import Ban. The Panel conducted an individual analysis of possible alternatives, did not really carry out a global assessment, and discarded measures that have already been implemented without verifying the extent of implementation. In sum, asserts the European Communities, the Panel did not conduct a proper weighing and balancing of the relevant elements and alternatives, but, rather, a superficial analysis that repeated all of the errors it had already made in its assessment of the necessity of the Import Ban.

26. For all of the above reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the Import Ban was "necessary" to protect human, animal, or plant life or health, within the meaning of Article XX(b) of the GATT 1994. Should the Appellate Body accept this request, the European Communities further requests the Appellate Body to find that the Import Ban is not "necessary" within the meaning of Article XX(b) of the GATT 1994.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

27. The European Communities claims that the Panel erred in finding that the exemption from the Import Ban on imports of retreaded tyres from MERCOSUR countries (the "MERCOSUR exemption") did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade and was not, therefore, contrary to the chapeau of Article XX of the GATT 1994. These findings were based on a "confused" analysis "marred by serious errors of law".[54] In particular, the European Communities emphasizes that the fact that Brazil introduced the MERCOSUR exemption in order to comply with its obligations under MERCOSUR does not preclude a finding of "arbitrary" discrimination. The European Communities argues further that the volume of imports from MERCOSUR countries is irrelevant to the analysis of whether that exemption constitutes arbitrary or unjustifiable discrimination. The European Communities requests the Appellate Body to reverse this finding and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX.

[54]European Communities' appellant's submission, para. 304.

28. For the European Communities, the "arbitrary" discrimination and the "unjustifiable" discrimination mentioned in the chapeau of Article XX are closely related. Both require discrimination to be explained through convincing, reasonable, and rational arguments. What is arbitrary and unjustifiable discrimination must, in the view of the European Communities, be established in relation to the objective of the measure at issue and the conditions prevailing in the countries concerned. At the same time, the notions of "arbitrary" and "unjustifiable" are not identical: "the term 'arbitrary' has its 'centre of gravity' in the lack of consistency and predictability in the application of the measure, while the term 'unjustifiable' refers more to the lack of motivation and capacity to convince."[55]

29. The European Communities submits that, in its analysis, the Panel wrongly defined "arbitrary" discrimination as being limited to "capricious", "unpredictable", or "random" discrimination.[56] This definition failed to take into account the object and purpose of Article XX, as well as the context provided by the close link between "arbitrary discrimination" and "unjustifiable discrimination". The European Communities adds that this definition would deprive arbitrary discrimination of its useful value, because "few actions of governments are ever entirely 'random' or 'capricious'."[57] The chapeau of Article XX expresses "requirements of good faith, and requires a delicate balancing of the interests of the Member invoking an exception ... and the rights of other Members".[58] The European Communities contends that the Panel's approach, however, was not consistent with the required balancing of interests, because it would allow discrimination "on the basis of purely extraneous factors which have nothing to do with the objectives of the measure"[59], as long as the discrimination is not random or capricious.

30. According to the European Communities, whether a measure involves arbitrary discrimination can only be determined by taking into account the objective of the measure in respect of which Article XX is invoked. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"[60] in the light of that objective.

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[55]European Communities' appellant's submission, para. 310 (referring to European Communities' first written submission to the Panel, para. 152).

[56]Panel Report, paras. 7.272, 7.280, and 7.281.

[57]European Communities' appellant's submission, para. 316.

[58]*Ibid*., para. 319 (referring to Appellate Body Report, *US – Shrimp*, paras. 158 and 159, where the Appellate Body also found that the "rigidity" and "inflexibility" of certain certification requirements introduced by the United States constituted "arbitrary discrimination").

[59]*Ibid*., para. 319.

[60]*Ibid*., para. 321.

31. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it had been introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further, and has the potential of undermining, the stated objective of the measure (the protection of life and health from risks arising from mosquito-borne diseases and tyre fires), and for this reason must be regarded as unreasonable, contradictory, and thus arbitrary. For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The fact that the chapeau of Article XX prohibits discrimination "between countries where the same conditions prevail" provides further support for the European Communities' interpretation, because whether the same conditions prevail in different countries is an objective question, not a question of legal obligations *vis-à-vis* another country. It is thus "inconceivable that the mere compliance with an international agreement would suffice to render discrimination between countries where the same conditions prevail compatible with the chapeau of Article XX".[61]

32. As regards the Panel's attempt to buttress its reasoning by referring to Article XXIV of the GATT 1994 and the "'nature' of Mercosur as an agreement"[62] within the meaning of that provision, the European Communities submits that agreements justified under Article XXIV would not entitle Members to discriminate in the application of Article XX measures, because Article XXIV:8(a)(i) and (b) explicitly excludes measures that are justified under Article XX from the requirement to eliminate restrictive regulations of commerce with respect to substantially all the trade within a customs union or free trade area. The European Communities further criticizes the Panel for not verifying whether MERCOSUR is a customs union that complies with the requirements of Article XXIV of the GATT 1994.

33. The European Communities points to two additional flaws in the Panel's reasoning: its statement that it took into account "the nature of the ruling on the basis of which Brazil has acted"[63]; and the Panel's reliance on Brazil's statement that the MERCOSUR exemption was "the only course of action available to it"[64] to implement the ruling. The nature of the ruling on the basis of which Brazil has acted is irrelevant for the determination of whether the MERCOSUR exemption constitutes arbitrary discrimination. Moreover, before the MERCOSUR tribunal, Brazil chose not to defend the Import Ban by invoking an exception clause related to the protection of human life and health, and

[61]European Communities' appellant's submission, para. 325.

[62]*Ibid*., para. 329.

[63]*Ibid*., para. 330 (referring to Panel Report, para. 7.283).

[64]*Ibid*., para. 332 (referring to Panel Report, para. 7.280).

thus the fact that it invoked such grounds in this dispute must be regarded as arbitrary. The European Communities further submits that the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, because Brazil could have implemented the arbitral ruling by lifting the Import Ban with respect to all third countries.

34. The European Communities argues further that the Panel erred in finding that unjustifiable discrimination could arise only if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined. By assessing the existence of unjustifiable discrimination on the basis of import volumes, the Panel applied a test that has no basis in the text of Article XX and finds no support in WTO case law. The European Communities adds that, if adopted by the DSB, this finding would diminish its rights under the covered agreements, contrary to Article 3.2 of the DSU.

35. The European Communities submits that import volumes under the MERCOSUR exemption are irrelevant for determining whether this exemption constitutes arbitrary or unjustifiable discrimination. The specific volume of imports from MERCOSUR countries in a given year is not related to the manner in which the Import Ban is applied, but rather dependent upon economic factors relating to supply and demand. Moreover, this volume can fluctuate significantly from year to year, and may be more likely to do so if the Panel's finding stands, given that it creates an incentive to shift retreaded tyre production to MERCOSUR countries, especially to those that do not restrict the importation of used tyres. Thus, reasons the European Communities, in addition to being incorrect, the Panel's findings increase the likelihood of future litigation on whether increases in imports from MERCOSUR countries have rendered the exemption inconsistent with the chapeau. This is not consistent with Article 3.3 of the DSU, which provides that the prompt settlement of disputes "is essential for the effective functioning of the WTO".[65]

36. According to the European Communities, the Panel's approach is also inconsistent with the Appellate Body Report in *US – Gambling*, where "the Appellate Body did not attach importance to the 'volume' of services traded under [that] exemption, and to how that volume compared with the volume of online gambling services offered by Antigua and Barbuda or, in fact, all other WTO Members cumulatively."[66] The Panel's approach also goes against Appellate Body reports confirming the right of Members to challenge measures, *as such*, and the need to protect the security and predictability of the multilateral trading system that underpins that right.[67] Yet, under the Panel's

[65]European Communities' appellant's submission, para. 343.

[66]*Ibid*., para. 344 (referring to Appellate Body Report, *US – Gambling*, para. 369).

[67]*Ibid*., para. 345 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82).

approach, the question of which volumes of imports would be regarded as "significant" for purposes of the chapeau of Article XX would ultimately depend on market factors, and could be assessed only *ex post* based on data relating to trade flows.

37. The European Communities also contests the Panel's conclusions that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" within the meaning of the chapeau of Article XX. Like its finding on unjustifiable discrimination, the Panel's finding was based on the rationale that MERCOSUR imports have not been significant in volume. Thus, submits the European Communities, the Panel's finding on a disguised restriction on international trade is equally erroneous. The European Communities fails to understand how the Panel could characterize the imports under the MERCOSUR exemption, increasing tenfold since 2002 from 200 to 2,000 tons of tyres per year by 2004, as "insignificant".[68]

38. For these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, within the meaning of the chapeau of Article XX, and to find, instead, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the requirements of that provision.

(b) Imports of Used Tyres

39. With respect to the Panel's analysis of imports of used tyres under the chapeau of Article XX, the European Communities supports the Panel's conclusion that such imports constituted unjustifiable discrimination between countries where the same conditions prevail, but challenges several other findings made by the Panel in this part of its analysis. Specifically, the European Communities contends that the Panel erred, first, in finding that the imports of used tyres through court injunctions did not result in arbitrary discrimination and, secondly, in finding that such imports constituted unjustifiable discrimination and a disguised restriction on international trade only to the extent that they occurred in such amounts as to significantly undermine the objective of the Import Ban.

40. For the European Communities, the Panel adopted an overly restrictive approach to the notion of "arbitrary discrimination", in considering that action is not arbitrary as long as there is some cause or reason to explain it. What is arbitrary must be decided in the light of the stated objective of the measure. The European Communities reasons that, because, from the perspective of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the

[68]European Communities' appellant's submission, para. 348.

European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination. The European Communities adds that the Panel's attempt to distinguish between, on the one hand, the actions of Brazilian courts in granting injunctions allowing imports of used tyres and, on the other hand, the compliance of administrative authorities with those injunctions, is ill-founded. A WTO Member must assume responsibility for the acts of all the branches of its government. The contradiction between the actions of the branches of the Brazilian government that have allowed the importation of used tyres, and those that ban the importation of retreaded tyres, must be regarded as arbitrary behaviour on the part of Brazil.

41. The European Communities also submits that the Panel erred in finding that the imports of used tyres under court injunctions resulted in unjustifiable discrimination only to the extent that they significantly undermined the objective of the Import Ban. In analyzing whether imports of used tyres under court injunctions were inconsistent with the chapeau of Article XX, the Panel applied the same quantitative approach that it had incorrectly applied when assessing the MERCOSUR exemption under that provision. The European Communities refers to the arguments it advanced in relation to the MERCOSUR exemption to explain why the volumes of imports are irrelevant for purposes of determining the consistency of a measure with the chapeau of Article XX.

42. The European Communities observes further that the court injunctions effectively exempt Brazilian retreaders from the import ban on used tyres, because they do not contain any temporal or quantitative limitations. Thus, the Panel's quantitative approach engenders uncertainty for the implementation of the Panel Report and is not in accordance with the prompt settlement of the dispute as required by Article 3.3 of the DSU. The Panel characterized imports of 10.5 million used tyres into Brazil in 2005 as "significant", but failed to identify the threshold below which imports of used tyres would no longer be "significant". The European Communities adds that, for the same reasons adduced in relation to unjustifiable discrimination, the Panel erred in finding that the imports of used tyres through court injunctions resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports occurred in such quantities that they significantly undermined the objective of the Import Ban.

43. For all these reasons, the European Communities requests the Appellate Body to reverse the Panel's finding that imports of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, and constituted unjustifiable discrimination or a disguised restriction on international trade under the terms of this provision only to the extent that those imports significantly undermined the objective of the Import Ban. The European Communities requests the Appellate Body to find, instead, that imports of used tyres under court injunctions result

in the Import Ban being applied inconsistently with all of the requirements of the chapeau of Article XX of the GATT 1994.

3. Conditional Appeal

44. Should the Appellate Body not find, as requested by the European Communities, that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, then the European Communities conditionally appeals the Panel's decision to exercise judicial economy with respect to its separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994. In such circumstances, the European Communities requests the Appellate Body to reverse the Panel's decision to exercise judicial economy with respect to these claims and to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Articles XX(d) and XXIV of the GATT 1994.

(a) The Panel's Exercise of Judicial Economy

45. The European Communities submits that, in declining to rule on the European Communities' claims under Articles I.1 and XIII:1 of the GATT 1994, the Panel exercised "false judicial economy" and did not provide a positive resolution to the dispute as required by Articles 3.3, 3.4, and 3.7 of the DSU.[69] In the light of the Panel's finding that the Import Ban was inconsistent with the chapeau of Article XX only to the extent that imports of used tyres were occurring in amounts that significantly undermined the objective of the Import Ban, Brazil was under no obligation to remove the MERCOSUR exemption *per se*. Therefore, the Panel should have addressed the European Communities' claims that the MERCOSUR exemption *per se* is incompatible with Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

46. The European Communities submits that there are sufficient factual findings of the Panel and uncontested facts on record for the Appellate Body to complete the legal analysis and find that the MERCOSUR exemption is incompatible with Articles I:1 and XIII:1, and is not justified under Articles XX(d) and XXIV of the GATT 1994. The European Communities recalls that Brazil did not contest that the MERCOSUR exemption constitutes a violation of Articles I:1 and XIII:1. Therefore, the only question to be addressed by the Appellate Body is whether this measure can be justified under Articles XX(d) and XXIV.

[69]European Communities' appellant's submission, para. 375.

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

47. The European Communities argues that the MERCOSUR exemption is not justified under Article XXIV of the GATT 1994, because it does not satisfy the two conditions identified by the Appellate Body in its Report in *Turkey – Textiles*.[70] First, Brazil failed to demonstrate that MERCOSUR complies with the conditions of Article XXIV:8(a) and 5(a) of the GATT 1994. As explained extensively in the European Communities' submissions to the Panel, Brazil failed to demonstrate that MERCOSUR has achieved a liberalization of "substantially all"[71] the trade within MERCOSUR, as required by Article XXIV:8(a)(i). The European Communities contends that trade in the automotive and sugar sectors has not been entirely liberalized within MERCOSUR, and highlights that "the automotive sector alone accounts for approximately 29%"[72] of trade within MERCOSUR. In addition, according to the European Communities, exceptions to MERCOSUR's common external tariff "currently concern up to 10% of the tariff lines"[73] applicable to external trade, and individual MERCOSUR countries "maintain export duties and 'other regulations of commerce' on trade with third countries that are not common to all Mercosur countries."[74]

48. The European Communities adds that Brazil failed to demonstrate that MERCOSUR complies with the requirement in Article XXIV:5(a) of the GATT 1994 that duties and other restrictive regulations of commerce are not to be on the whole more restrictive than the general incidence of these measures prior to the creation of MERCOSUR, in particular, as regards non-tariff measures. Indeed, emphasizes the European Communities, the measure at issue in this dispute illustrates that MERCOSUR countries continue to adopt such non-tariff measures.

49. Secondly, the European Communities maintains that Brazil has not shown that the MERCOSUR exemption was necessary for the formation of MERCOSUR. Nothing in the reasoning of the Appellate Body Report in *Turkey – Textiles* suggests that this condition would not apply to cases such as this one where a restriction is first imposed on all goods, and then subsequently removed only for goods originating in the customs union. Moreover, the European Communities considers that "Article XXIV would be turned into an almost limitless exception, which would allow

[70]European Communities' appellant's submission, para. 381 (referring to Appellate Body Report, *Turkey – Textiles*, para. 58).

[71]*Ibid*., para. 383.

[72]*Ibid*.

[73]*Ibid*., para. 384 (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.17, 9 June 2006 (Exhibit EC-121 submitted by the European Communities to the Panel), p. 2).

[74]*Ibid*.

parties to a customs union to take any measure derogating from WTO obligations"[75] if WTO Members were not required to demonstrate that the measure was necessary for the formation of the customs union in question.

50. The European Communities submits that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Article XXIV:8(a)(i) explicitly exempts measures consistent with Article XX from the requirement to eliminate barriers to trade with respect to substantially all the trade between the constituent members of a customs union. For this reason, it follows that Article XX cannot be invoked in order to justify the selective elimination of such trade barriers only with respect to trade within the customs union or free trade area. Nor can the MERCOSUR exemption be characterized as necessary for the formation of MERCOSUR because it was adopted several years after the conclusion of MERCOSUR.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

51. The European Communities submits that the MERCOSUR exemption is also not justified under Article XX(d) of the GATT 1994. The Appellate Body found, in *Mexico – Taxes on Soft Drinks*, that the term "laws and regulations" in Article XX(d) covered "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member".[76] However, Brazil has not demonstrated that the obligation to comply with rulings of the MERCOSUR arbitral tribunals has been incorporated into the Brazilian legal system. The European Communities suggests further that the term "securing compliance" in Article XX(d) does not mean simply "complying". Instead, "securing compliance" refers to enforcement measures where compliance is achieved by persons other than the entity "securing" the compliance. Thus, Article XX(d) does not cover Brazil's adoption of the MERCOSUR exemption. Furthermore, the MERCOSUR exemption is not "necessary" within the meaning of Article XX(d) because Brazil could have complied with the ruling of the MERCOSUR arbitral tribunal by lifting the Import Ban with respect to all third countries, rather than only its MERCOSUR partners. Finally, the European Communities submits that the MERCOSUR exemption does not fulfil the requirements of the chapeau of Article XX, because it constitutes unjustifiable and arbitrary discrimination between countries where the same conditions prevail, in particular, given that, by virtue of it, Brazil allows the imports of retreaded tyres from MERCOSUR countries even when those tyres are made from used tyres originating in the European Communities.

[75]European Communities' appellant's submission, para. 392.

[76]*Ibid*., para. 402 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 79).

B. *Arguments of Brazil – Appellee*

1. The Necessity Analysis

52. Brazil maintains that the Panel properly found that the Import Ban was "necessary" to protect human, animal, or plant life or health within the meaning of Article XX(b) of the GATT 1994, and therefore requests the Appellate Body to uphold this finding.

(a) The Contribution Analysis

53. First, Brazil argues that the Panel correctly assessed the contribution made by the Import Ban to the achievement of its objective. The paragraphs set out in Article XX focus on the measure, as such, while the chapeau focuses also on the application of the measure. Therefore, actual contribution is not relevant to the analysis under paragraph (b) of Article XX, and the Panel applied the correct legal standard in using phrases such as "can contribute" and "capable of contributing".[77] Such a standard is also particularly appropriate given that some measures—for example, environmental measures—may not have immediate effect. The Panel's approach was in line with "virtually all" other cases that have examined a measure's contribution under paragraphs (b) and (d) of Article XX of the GATT 1994 or under Article XIV of the *General Agreement on Trade in Services* (the "GATS").[78] This is the case whether the risk sought to be avoided is direct or indirect. Brazil adds that the need to undertake the weighing and balancing exercise also illustrates that the European Communities cannot be correct. If a panel were required to assess the extent of a measure's actual contribution, it would have to do the same for alternative measures in order to compare them. Yet, this is impossible, because an alternative measure is one that has not yet been realized. That the Panel was not, as the European Communities claims, required to quantify the Import Ban's contribution to reducing waste tyre volumes is confirmed in the Appellate Body Report in *EC – Asbestos*, where the Appellate Body held that "a risk may be evaluated either in quantitative or *qualitative* terms".[79] Brazil also expresses its understanding that, according to existing case law, if the measure can make a contribution to its objective, and no reasonably available alternatives exist, then the measure is "necessary".

54. In addition, Brazil argues that the Panel acted consistently with its duty under Article 11 of the DSU in finding that the Import Ban contributed to the achievement of its objective. The Panel relied on numerous studies and reports, which provided it with more than a sufficient basis to find that

[77]Brazil's appellee's submission, para. 74 (referring to Panel Report, paras. 7.118 and 7.142).

[78]*Ibid*., para. 77 (referring to Panel Report, *US – Gambling*, para. 6.494; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.217; Panel Report, *Korea – Various Measures on Beef*, para. 658; and GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.31).

[79]*Ibid*., para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

tyres used in Brazil are retreadable and are being retreaded. The Panel referred to the ABR Report[80] and INMETRO Technical Note 001/2006[81] merely as examples of such reports and studies. In addition, the Panel's reliance on INMETRO Technical Note 001/2006, rather than on an earlier INMETRO note, was justified, because it is well established that a panel may rely on evidence that post-dates the panel's establishment, and because Brazil had explained why it was not appropriate for the Panel to rely on the earlier INMETRO note. The mere fact that the Panel did not describe its conclusions on each piece of evidence—or respond to each of the European Communities' objections—does not mean that it did not consider the evidence. The European Communities may disagree with the weight the Panel assigned to the various factual elements before it, but there is no indication that the Panel exceeded its discretion as the trier of fact.

55. As regards numerous other arguments raised by the European Communities, Brazil identifies evidence that provides support for the Panel's findings that retreaded tyres have a shorter lifespan than new tyres and that new tyres are retreadable and are being retreaded in Brazil, and asserts that the Panel did not, as the European Communities claims, base its findings on speculation about future events. Brazil also emphasizes that imports of used tyres under court injunctions and imports of retreaded tyres under the MERCOSUR exemption are extraneous to the Import Ban and do not properly form part of the "necessity" analysis.

(b) Alternatives to the Import Ban

56. Brazil contends that the Panel correctly determined that none of the measures suggested by the European Communities constituted a reasonably available alternative to the Import Ban. As a preliminary matter, Brazil contends that the European Communities' appeal on this issue is premised on a mistaken understanding of Brazil's chosen level of protection. Brazil is *not* seeking to reach a fixed level of health and safety, or only to protect against mosquito-borne diseases and tyre fire emissions (accumulation risks). Rather, it seeks to reduce accumulation, transportation, and disposal risks associated with the generation of waste tyres in Brazil *to the maximum extent possible*. Because the Panel's finding of fact correctly identified the level of protection sought by Brazil, and the European Communities, in its appeal, does not challenge this finding under Article 11 of the DSU, the European Communities' claims of error regarding reasonably available alternatives fall outside the scope of appellate review.

[80] *Supra*, footnote 41.

[81] *Supra*, footnote 42.

57. Taking account of the proper definition of its chosen level of protection (including against disposal risks), Brazil asserts that the Panel properly recognized that stockpiling, landfilling, co-incineration, and material recycling all present risks to human health and the environment. The Panel also correctly dismissed a better enforcement of the import ban on used tyres as an alternative to the Import Ban, because such a measure would not allow Brazil to reduce the number of additional waste tyres generated by imported short-lifespan retreaded tyres. Brazil also rejects the European Communities' assertion that the Panel applied an incorrect definition of "alternative", because, for Brazil, an alternative must allow a Member to achieve its chosen level of protection, and that level requires a reduction to the maximum extent possible of risks arising from waste tyre accumulation, transportation, and disposal risks. Because the Panel correctly defined Brazil's level of protection, it was also correct to consider that other complementary measures to reduce the overall number of waste tyres were not "alternatives" to the Import Ban on retreaded tyres. Brazil adds that, contrary to the European Communities' claims on appeal, the Panel did not require a single alternative measure to achieve fully the desired objective, did not refuse to consider the proposed alternatives collectively, and did not focus on whether options were actually being employed instead of whether they were reasonably available.

58. Furthermore, Brazil argues that the Panel's findings on the availability of alternative measures rested on an objective assessment of the facts, as required by Article 11 of the DSU. According to Brazil, the Panel based its finding that disposal of waste tyres presents serious health and environmental risks on an extensive factual record. The evidence on record fully supports the Panel's finding that landfilling of *both* whole and shredded waste tyres presents human health and environmental risks. Brazil also argues that the Panel's reference to the fact that the European Communities prohibits landfilling was relevant, because the health and environmental objectives listed in the European Communities' Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste [82] mirror Brazil's objective. Furthermore, the Brazilian legislation that allowed landfilling, and which the European Communities claims the Panel should have taken into account, was a temporary measure adopted in a single Brazilian state to combat a significant increase in dengue cases. That legislation does not demonstrate that landfilling is safe, but only that, in those circumstances, the short-term need to combat dengue was more pressing.

[82]Exhibit BRA-42 submitted by Brazil to the Panel.

59. In relation to stockpiling, Brazil submits that the evidence on record, including a study by the California Environmental Protection Agency[83], supports the Panel's finding that stockpiling presents human health and environmental risks. Furthermore, the European Communities itself acknowledges that "'controlled stockpiling is *not a final disposal operation*' but merely 'temporary storage.'"[84] As regards co-incineration, the evidence on record fully supports the Panel's finding that incineration of waste tyres presents risks to human health, that toxic emissions from the incineration of tyres cannot be eliminated, and that these emissions are higher than those generated by the burning of conventional fuels. In the light of these acknowledged risks, it would not have made sense, as the European Communities now argues, for the Panel to have required Brazil to provide evidence on co-incineration in Brazil rather than in other countries, or to use increased co-incineration as an alternative. The Panel acted within its discretion in determining the weight attributed to several reports that the European Communities considers outdated and, in any event, the evidence relied upon by the Panel is not as "outdated", nor is the evidence cited by the European Communities as "recent", as the European Communities claims on appeal. The Appellate Body, therefore, should reject the European Communities' attempts to have it second-guess the Panel's appreciation of the evidence.

60. In relation to material recycling, Brazil submits that the Panel did not consider only civil engineering in reaching its findings on alternative measures. The Panel also considered evidence related to rubber asphalt, use of rubber granulates, and devulcanization. Nor did the Panel base its finding that material recycling applications could not dispose of existing volumes of waste tyres on evidence of devulcanization alone. Instead, contends Brazil, the Panel cited documents suggesting that material recycling applications *collectively* lacked adequate disposal capacity.

(c) The Weighing and Balancing Process

61. Brazil asserts that the Panel properly weighed and balanced the relevant factors and proposed alternatives in determining that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994, and that the European Communities' appeal on this point amounts to mere disagreement with the Panel's exercise of its discretion in determining which evidence to rely upon in support of its findings. The Panel expressly recognized that the Import Ban is highly trade restrictive, but rejected the European Communities' argument that this fact alone precluded a finding that the ban was "necessary". Instead, the Panel properly recognized that there may be circumstances in which a highly restrictive measure is nonetheless necessary and, in the process of weighing and balancing,

[83]California Environmental Protection Agency (US), Integrated Waste Management Board, "Increasing the Recycled Content in New Tyres" (May 2004) (Exhibit BRA-59 submitted by Brazil to the Panel).

[84]Brazil's appellee's submission, para. 154 (quoting European Communities' appellant's submission, para. 255). (emphasis added by Brazil)

identified the specific circumstances of this case that led it to such a conclusion. With respect to the question of contribution, Brazil recalls its position that Article XX(b) does not require a party to quantify the measure's contribution to the objective pursued. In any event, the Import Ban's contribution is substantial "because it reduced imports of retreaded tyres from 18,455 tons in 1999 to 1,727 tons in 2005 (over 90 percent)."[85] Brazil also argues that, because imports of retreaded tyres, by definition, increase the amount of waste tyres in Brazil, the relationship between the Import Ban and Brazil's goal of reducing waste tyre risks to the maximum extent possible is both direct and certain.

2. The Chapeau of Article XX of the GATT 1994

(a) The MERCOSUR Exemption

62. Brazil argues that the Panel correctly held that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable" discrimination or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Accordingly, Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings in this respect.

63. Brazil asserts that the Panel properly interpreted the meaning of the word "arbitrary" in the chapeau of Article XX, in accordance with the customary rules of interpretation of public international law. The Panel took into account the ordinary meaning of the word, along with both the context and the object and purpose of the chapeau of Article XX, as well as previous panel and Appellate Body reports. On this basis, the Panel interpreted the word "arbitrary" "as lacking a reasonable basis and requiring the need to convincingly explain the rationale of the measure".[86]

64. Brazil disputes the European Communities' assertion that what constitutes arbitrary discrimination must be determined in relation to the objective of the measure. The specific contents of the measure at issue, including its policy objective, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX, in turn, requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objective. Brazil emphasizes that the European Communities' interpretation would impermissibly narrow the scope of the chapeau of Article XX and limit the flexibility that Members have to protect legitimate values under that provision. Brazil adds that, in any event, in this case the Panel did consider imports under the MERCOSUR exemption in relation to the objective of the measure at issue when it determined that, at the time of its examination,

[85]Brazil's appellee's submission, para. 177 (referring to Panel Report, para. 4.54; and Brazil's response to Question 40 posed by the Panel, Panel Report, p. 270).

[86]*Ibid*., para. 191 (referring to Panel Report, paras. 7.260, 7.273, and 7.283).

volumes of retreaded tyres imported under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, reasons Brazil, it would *not* have been reasonable or rational, in the light of the objective of the Import Ban, for Brazil to have implemented the MERCOSUR ruling by abolishing the ban altogether, as the European Communities suggests.

65. Brazil considers that the Panel correctly found that the discrimination resulting from the MERCOSUR exemption was not arbitrary. In Brazil's view, even under the European Communities' definition of "arbitrary", the following considerations identified by the Panel demonstrate that the MERCOSUR exemption did not amount to arbitrary discrimination: (i) Brazil introduced the exemption only after a dispute settlement tribunal established under MERCOSUR ruled that the ban violated Brazil's obligations under MERCOSUR; (ii) the MERCOSUR ruling was adopted in the context of an agreement intended to liberalize trade that is expressly recognized in Article XXIV of the GATT 1994; (iii) agreements of the type recognized by Article XXIV inherently provide for discrimination; (iv) Brazil had an obligation under international law to implement the ruling by the MERCOSUR tribunal; (v) Brazil applied the MERCOSUR ruling in the most narrow way possible, that is, by exempting imports of a particular kind of retreaded tyres (remoulded) from the application of the ban; and (vi) it was not reasonable for Brazil to implement the MERCOSUR ruling with respect to imports from all sources, because doing so would have forced Brazil to abandon its policy objective and its chosen level of protection. The Panel appropriately determined that these circumstances provided a rational basis for enacting the MERCOSUR exemption. Brazil rejects as a "blatant misrepresentation"[87] the European Communities' argument that the Panel's finding necessarily implies that mere compliance with any international agreement would exclude the existence of arbitrary discrimination, particularly given that the Panel expressly stated that its finding was limited to the "specific circumstances of the case".[88] Furthermore, the European Communities' systemic concerns in this respect are contrary to the well-established precept under general international law that "bad faith on the part of States is not to be presumed"[89], and it is "absurd"[90] to suggest that a WTO Member would conclude an agreement under Article XXIV for purposes of circumventing the requirements of the chapeau of Article XX.

66. Brazil also submits that the Panel correctly concluded that the legal standard under the chapeau of Article XX is different from the legal standard under Article XXIV. As Brazil argued

[87]Brazil's appellee's submission, para. 209.

[88]*Ibid*., para. 210 (quoting Panel Report, para. 7.283).

[89]*Ibid*., para. 213. (footnote omitted)

[90]*Ibid*., para. 214.

before the Panel, a measure that does not meet the requirements of Article XXIV can nevertheless meet the requirements of the chapeau of Article XX.

67. Brazil considers that the Panel correctly found that the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute unjustifiable discrimination. Brazil has difficulty understanding the European Communities' objections to the Panel's analysis since the European Communities itself argues that what constitutes arbitrary or unjustifiable discrimination must be established in relation to the objective of the measure at issue, and the Panel did precisely that. The Panel determined how Brazil's policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue. Brazil also explains that the level of imports could not rise to a level that would undermine the objective of the Import Ban in the future, because Resolution No. 38 of the Câmara de Comércio Exterior (Chamber of Foreign Trade) of 22 August 2007[91] established annual limits on the number of retreaded tyres that can be imported into Brazil from MERCOSUR countries. According to Brazil, these import volumes "correspond roughly" to the import volumes that the Panel found "were not significant".[92]

68. Brazil considers that the European Communities' reference to the right of Members to challenge measures, as such, is misplaced. The chapeau of Article XX requires an examination of the manner in which a measure is being applied, and this will "rarely" be based on "immutable, static situations".[93] The European Communities' challenge to the Panel's finding that 2,000 tons of retreaded tyres is "insignificant" is similarly without merit. According to Brazil, it is worth noting that the level of 2,000 tons is only one seventh of the 14,000 tons previously imported from the European Communities and, in any event, the Panel's finding that 2,000 tons is not a significant amount is a factual finding that cannot be revisited on appeal.

69. In addition, Brazil submits that the Panel's finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "a disguised restriction on international trade" under the chapeau of Article XX is legally sound, and refers to its arguments before the Panel in support of this position.

[91]Exhibit BRA-175 submitted by Brazil to the Appellate Body.

[92]Brazil's appellee's submission, para. 225 (referring to Panel Report, para. 7.288).

[93]*Ibid*., para. 229.

(b) Imports of Used Tyres

70. Brazil submits that the Panel committed no error in the analytical approach it adopted in determining whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary discrimination", "unjustifiable discrimination", or "a disguised restriction on international trade" within the meaning of the chapeau of Article XX of the GATT 1994. Brazil requests the Appellate Body to reject the European Communities' claims of error and to uphold the Panel's findings that the imports of used tyres did not constitute "arbitrary discrimination" and constituted "unjustifiable discrimination" or "a disguised restriction on international trade" within the meaning of that provision only to the extent that import volumes of used tyres "significantly undermined" the objective of the Import Ban.

71. Brazil argues that the Panel correctly found that the imports of used tyres under court injunctions did not result in the Import Ban being applied in a manner that constituted "arbitrary discrimination". The Panel was satisfied, on the basis of the evidence before it, that there was a rational basis for the importation of used tyres. Furthermore, as it did in the context of the MERCOSUR exemption, the Panel did analyze whether the imports of used tyres significantly undermined the objective of the Import Ban—that is, it took the very approach advocated by the European Communities. The Panel did *not*, as the European Communities now claims, draw a distinction between the actions of certain Brazilian courts granting injunctions and the compliance by Brazilian administrative authorities with those court injunctions. Brazil also rejects the European Communities' allegation that there is a contradiction between the actions of different branches of the Brazilian government. Rather, insists Brazil, the Import Ban, the court injunctions, and the enforcement of the injunctions by the customs authorities were the result of the operation of the Rule of Law. "There is nothing unpredictable, irrational, abnormal, unreasonable, or even illegal in the conduct of Brazil's legislative, executive, or judiciary branches."[94]

72. With respect to the Panel's analysis of "unjustifiable discrimination", Brazil submits that it was appropriate for the Panel to consider the level of imports of used tyres. For the same reasons that Brazil articulated with respect to the MERCOSUR exemption, the effect that the volume of imports of used tyres had on Brazil's ability to achieve its policy objective was relevant to the Panel's analysis of unjustifiable discrimination. Brazil points out the inconsistencies in the European Communities' arguments, which, on the one hand, criticize the Panel for taking into account the effects of import volumes on Brazil's ability to achieve its policy objective, and, on the other hand, insist that arbitrary and unjustifiable discrimination can be established only when analyzed in relation to the objective of

[94]Brazil's appellee's submission, para. 245.

the measure at issue. Brazil disputes the European Communities' assertion that the Panel's analysis of the volume of imports involves uncertainty for implementation of its report. According to Brazil, monitoring of a WTO Member's compliance is an integral part of the dispute settlement mechanism, and there are various examples of cases where panels made findings that were based on facts and circumstances that were potentially subject to change.[95]

73. Finally, Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted "a disguised restriction on international trade", and refers to the arguments it made before the Panel in support of this position.

3. The European Communities' Conditional Appeal

(a) The Panel's Exercise of Judicial Economy

74. Brazil considers that the Panel was justified in deciding to exercise judicial economy with respect to the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 and not justified under Articles XX(d) and XXIV of the GATT 1994. In the light of the Panel's finding that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, a separate finding in relation to an exemption to the Import Ban was not necessary to secure a positive resolution of the dispute. The MERCOSUR exemption could not exist in the absence of the Import Ban, which had previously been found to be inconsistent with the GATT 1994. The allegedly limited basis for the Panel's finding of inconsistency under Article XI:1 is not relevant, because Article 3.7 of the DSU "does not distinguish between different *degrees* of solutions".[96] Brazil also distinguishes the facts of this case from those in *EC – Export Subsidies on Sugar*, on the basis that "the remedies under the GATT and the DSU for a violation of Article XI (found by the Panel) are no different from the remedies for a violation of Article XIII or I."[97] Furthermore, the very condition on which the European Communities appeals the Panel's exercise of judicial economy contradicts its contention that separate rulings under Article I:1 and Article XIII:1 were necessary. According to Brazil, by conditioning its appeal on a finding by the Appellate Body that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with Article XX, the European Communities is implicitly recognizing that a finding that the Import Ban is

[95]See Brazil's appellee's submission, para. 253 (referring to Panel Report, *US – Section 301 Trade Act*, paras. 7.131-7.136, 7.170, 7.179, and 7.185; and Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 6.1).

[96]*Ibid*., para. 268. (original emphasis)

[97]*Ibid*., para. 269.

not justified under Article XX renders unnecessary findings on its separate claims under Articles I:1 and XIII:1.

(b) Completing the Legal Analysis

75. In the event the Appellate Body were to reverse the Panel's decision to exercise judicial economy, Brazil submits that the Appellate Body does not have a sufficient basis on which to complete the analysis of the European Communities' claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and with respect to Brazil's related defences under Articles XXIV and XX(d) of the GATT 1994. There are neither undisputed facts nor factual findings by the Panel concerning the consistency of MERCOSUR with Article XXIV:5(a) and 8(a) of the GATT 1994 or the justification of the MERCOSUR exemption under Article XX(d). Brazil specifically contests, as it did before the Panel, assertions made by the European Communities regarding intra-MERCOSUR liberalization of the automotive and sugar sectors, as well as with respect to alleged exceptions to the common external tariff. In addition, the European Communities' claims under Articles XIII:1 and I:1, and Brazil's related defence under Article XXIV, are not suitable for completion of the analysis, because they are not closely related to the provisions examined by the Panel, and because they involve novel legal issues that have not been explored in depth by the parties. Brazil cites as examples of such unexplored issues the questions of what constitutes "substantially all the trade" under Article XXIV:8(a)(i) and what constitutes "substantially the same duties and other regulations of commerce" under Article XXIV:8(a)(ii).

(c) The MERCOSUR Exemption and Article XXIV of the GATT 1994

76. In the event the Appellate Body considers it can complete the analysis with respect to the separate claims made by the European Communities in relation to the MERCOSUR exemption, Brazil submits that this measure is justified under Article XXIV of the GATT 1994.

77. Brazil argues that it submitted sufficient evidence before the Panel to make a *prima facie* case that MERCOSUR meets the requirements of Article XXIV:5(a) and 8(a). In particular, Brazil submitted the results of calculations made by the Secretariat for MERCOSUR and the WTO Secretariat showing that the duties and other regulations of commerce applied at the time of MERCOSUR's formation (1995), and in 2006, were not "on the whole" higher or more restrictive than those applied prior to its formation. Brazil further suggests there is evidence on record demonstrating that "substantially all the trade" between constituent members of MERCOSUR has been liberalized, and that MERCOSUR countries maintain substantially the same duties and other regulations of commerce on trade *vis-à-vis* third countries, thus complying with the requirements of Article XXIV:8(a). Brazil notes in this regard that, before the Panel, it incorporated by reference all

of the documents submitted by MERCOSUR members to the Committee on Regional Trade Agreements (the "CRTA").

78. Brazil contends that the European Communities has failed to rebut Brazil's *prima facie* demonstration that MERCOSUR is consistent with the requirements of Article XXIV:5 and 8. The fact that the CRTA and the Committee on Trade and Development did not reach the conclusion that MERCOSUR is in compliance with Article XXIV does not suggest that MERCOSUR is inconsistent with Article XXIV, in particular, because Members' measures are presumed WTO-consistent until sufficient evidence is presented to prove the contrary, and because the CRTA has only once concluded that a regional trade agreement was compatible with the GATT 1994.

79. In addition, Brazil maintains that the European Communities failed to substantiate its claims that MERCOSUR was inconsistent with Article XXIV. Although the European Communities asserts that the automotive and sugar sectors within MERCOSUR have not been fully liberalized, this is contradicted by the evidence it submitted to the Panel. According to Brazil, evidence before the Panel demonstrated that "the automotive sector has been the subject of continuing and progressive liberalization [and that] bilateral agreements between Mercosur members have already led, in practice, to duty-free trade in almost 100 percent of the commerce in the auto sector."[98] Brazil suggests further that the sugar sector alone cannot prevent compliance with the requirement under Article XXIV:8(a)(i) that "substantially all the trade" between the constituent territories be liberalized, because it "accounts for less than 0.001 percent of the total [trade]".[99] As regards the European Communities' assertion that there are exceptions to MERCOSUR's common external tariff, Brazil submits that the evidence on record demonstrates that MERCOSUR "applies a common external tariff to products in over 90 percent of the tariff lines and has a specific timetable in place to cover the remaining categories of products by 2008."[100] Brazil also rejects the European Communities' assertion that MERCOSUR does not meet the requirement under Article XXIV:5(a) that non-tariff barriers on trade with third countries not be "*on the whole* ... more restrictive"[101], noting that the only example provided by the European Communities is the Import Ban itself. According to Brazil, a single measure cannot constitute sufficient evidence to show that MERCOSUR does not meet the requirements of Article XXIV:5(a).

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[98]Brazil's appellee's submission, para. 295 (referring to Panel Report, para. 4.391; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

[99]*Ibid*. (referring to Committee on Trade and Development, "Examination of the Southern Common Market (MERCOSUR) Agreement", WT/COMTD/1/Add.16, 16 May 2006 (Exhibit BRA-170 submitted by Brazil to the Panel), para. 14; and WT/COMTD/1/Add.17, *supra*, footnote 73, p. 3).

[100]*Ibid*., para. 296 (referring to Brazil's response to Question 132 posed by the Panel, Panel Report, pp. 360-361, in turn citing WT/COMTD/1/Add.17, *supra*, footnote 73, p. 2).

[101]*Ibid*., para. 297. (emphasis added by Brazil)

80. Moreover, Brazil contends that the Appellate Body's decision in *Turkey – Textiles* cannot be read as requiring Brazil to demonstrate that the MERCOSUR exemption was introduced upon the formation of a customs union, and that its formation would have been prevented if it were not allowed to introduce such a measure. The analytical approach adopted by the Appellate Body in *Turkey – Textiles* should not be applied in the present dispute, because the MERCOSUR exemption does not impose new restrictions against third countries but, rather, eliminates restrictive regulations between the parties to the customs union.[102] Furthermore, Brazil contends that a Member should not be allowed to demonstrate the necessity of its measure *only* as of the time a customs union is formed, because such customs unions and the integration of their members evolve and deepen over time.

81. Brazil also rejects the European Communities' argument that the fact that the text of Article XXIV:8(a)(i) exempts Article XX measures from the requirement to eliminate duties and other restrictive regulations of commerce demonstrates that the MERCOSUR exemption was not necessary for the formation of MERCOSUR. Such an interpretation would require the members of the customs union to exempt Article XX measures from internal liberalization, "lest they are later challenged by third countries for discrimination and not permitted to invoke Article XXIV to justify those measures."[103] Moreover, the Appellate Body has explained that "the terms of [Article XXIV:8(a)(i)] offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade".[104] This flexibility in Article XXIV permits Brazil to eliminate the Import Ban in respect of MERCOSUR countries while maintaining it in respect of non-MERCOSUR countries. Brazil also emphasizes that the MERCOSUR exemption was not introduced pursuant to its obligations under Article XXIV:8(a)(i), but was rather the result of its unsuccessful attempt to defend the Import Ban before a MERCOSUR arbitral tribunal.

(d) The MERCOSUR Exemption and Article XX(d) of the GATT 1994

82. Should the Appellate Body decide to complete the analysis of the European Communities' claims under Articles I:1 and XIII:1 of the GATT 1994, Brazil submits that it should find the MERCOSUR exemption to be justified under Article XX(d) of the GATT 1994.

[102]For Brazil, *US – Line Pipe* is a more apposite case in the factual context of this dispute. (See Brazil appellee's submission, para. 301 (referring to Panel Report, *US – Line Pipe*, paras. 7.147 and 7.148))

[103]*Ibid*., para. 307.

[104]*Ibid*., para. 308 (quoting Appellate Body Report, *Turkey – Textiles*, para. 48).

83. Brazil submits that the Panel correctly interpreted and applied the term "to secure compliance" in Article XX(d), in contrast to the European Communities' interpretation that a state "secures compliance" within the meaning of Article XX(d) only when it enforces rules or regulations as regards other actors, and not when it secures its own compliance with the laws or regulations of its domestic legal system. Moreover, the Appellate Body's interpretation of Article XX(d) in *Mexico – Taxes on Soft Drinks* made no such distinction. Rather, the Appellate Body's interpretation of the text of Article XX(d) makes clear that domestic laws or regulations that ensure compliance by a state with its obligations are within the scope of that provision. Brazil also contends that it has incorporated the obligation to comply with rulings of MERCOSUR tribunals into its domestic law, and that evidence to that effect exists in the record.

84. Lastly, Brazil contends that the MERCOSUR exemption is "necessary" within the meaning of Article XX(d). Brazil argues that it could not have complied with the ruling of the MERCOSUR tribunal by simply exempting all third countries from the Import Ban, as the European Communities suggests it should have done, because this would have forced Brazil to abandon its policy objective of reducing unnecessary generation of tyre waste to the maximum extent possible.

C. *Arguments of the Third Participants*

85. Pursuant to Rule 24(2) and (4) of the *Working Procedures*, China, Cuba, Guatemala, Mexico, Paraguay, and Thailand chose not to file a third participant's submission but attended the oral hearing. Cuba, in its statement at the oral hearing, expressed its agreement with the Panel's findings that the Import Ban was necessary to reduce the exposure of human, animal, or plant life or health to risks arising from waste tyres. Cuba also emphasized the importance of the principle of sustainable development and environment preservation policies, and recalled that waste tyre management presents a challenge in particular for developing countries, given the significant environmental and economic costs it involves.

1. Argentina

86. Argentina agrees with the Panel's finding that the Import Ban contributed to the protection of human life and health within the meaning of Article XX(b) of the GATT 1994. Argentina submits that the Panel's necessity analysis was consistent with the case law of the Appellate Body, and that "the Panel's reasoning relie[d] on facts brought to its attention by the parties."[105] The Panel correctly rejected the European Communities' contention that the Import Ban did not contribute to reducing the number of waste tyres, based on its conclusion that "the direct effect of [the Import Ban] is to compel

[105]Argentina's third participant's submission, para. 14.

consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."[106] If the direct effect of the Import Ban were to impede additional imports of retreaded tyres with a shorter lifespan than new tyres, then it would fulfil Brazil's objective of avoiding generation and accumulation of waste tyres. Argentina underscores further that the Panel was not required to quantify the contribution of the Import Ban to the realization of the objective pursued.[107]

87. Argentina submits that the Panel was correct in concluding that the objective of protecting human health and life against life-threatening diseases "is both vital and important in the highest degree".[108] The Panel correctly found that the alternative measures identified by the European Communities aimed at reducing the number of waste tyres and at improving the management of waste tyres in Brazil, but not at preventing the generation of waste tyres to the maximum extent possible. Argentina also agrees with the Panel's finding that "the promotion of domestic retreading and enhanced retreadability of locally used tyres in Brazil would not lead to the reduction in the number of waste tyres additionally generated by 'imported short-lifespan retreaded tyres'."[109] For Argentina, the measures identified by the European Communities did not constitute alternatives that could be applied as a substitute for the Import Ban in preventing the generation of waste tyres to the maximum extent possible. Lastly, Argentina concludes that the Panel did not err in finding that there were no reasonably available alternatives to the Import Ban that would ensure the same level of protection to human life and health sought by Brazil.

2. Australia

88. Australia submits that the Panel erred in finding that the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. Article XX(b) should be interpreted so as to maintain the careful balance between the rights and obligations of WTO Members to secure their trade interests and the rights of Members to impose measures necessary to protect human, animal, or plant life or health. In Australia's view, the Panel incorrectly balanced these factors in making its findings on necessity.

[106]Argentina's third participant's submission, para. 16 (quoting Panel Report, para. 7.134).

[107]*Ibid.*, para. 18 (referring to Appellate Body Report, *EC – Asbestos*, para. 167).

[108]*Ibid.*, para. 26 (referring to Panel Report, para. 7.111).

[109]*Ibid.*, para. 24 (quoting Panel Report, para. 7.168).

89. Australia notes that the Panel, in identifying the measure at issue, should have considered the MERCOSUR exemption in relation to a breach of Article XI:1 of the GATT 1994. Australia encourages the Appellate Body to treat the Import Ban and the MERCOSUR exemption "as an 'integrated whole'"[110] under Article XX(b).

90. Moreover, although the Appellate Body stated that a "necessary" measure is significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution", the Panel applied a definition of "necessary" that is closer to "making a contribution" than to "indispensable".[111] The Panel correctly considered the relative importance of the interests or values pursued by the Import Ban, but did not correctly examine the contribution of the measure to the realization of the ends pursued by it. The Panel also failed to consider adequately the restrictive impact of the Import Ban when conducting the weighing and balancing process. If the measure is properly identified as including both the Import Ban and exemptions to that ban, it is then more appropriate to determine first whether such a measure, in its totality, is necessary in the context of Article XX(b), taking into account the potential restrictive impact on international commerce, among other factors.

91. In relation to the Panel's assessment of alternative measures, Australia submits that the Panel did not properly weigh and balance possible alternatives, because it incorrectly identified the ends pursued by the measure, incorrectly limited its consideration of alternatives to those available "in reality"[112], and failed to consider potential alternatives cumulatively rather than only on an individual basis. Australia also argues that the Panel incorrectly excluded a better enforcement of the import ban on used tyres as an alternative measure to the Import Ban. For Australia, there is no basis in Appellate Body case law for excluding from the necessity analysis alternatives that relate to the manner in which the relevant measure is implemented in practice. The Panel also applied an incorrect definition of "alternatives" when limiting its analysis to those measures seeking to avoid the accumulation of waste tyres generated from imported retreaded tyres. Finally, Australia disagrees with the Panel's reasoning that "complementary" measures were not "alternative" measures, because they could not be directly substituted for the Import Ban. Although the Panel recognized that a combination of measures may be appropriate where different alternatives are complementary in addressing the risk, in practice, the Panel evaluated each individual alternative measure in isolation.

[110]Australia's third participant's submission, para. 5 (referring to Appellate Body Report, *EC – Asbestos*, para. 64).

[111]*Ibid*., para. 6 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 161).

[112]*Ibid*., para. 20.

92. Australia argues further that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX of the GATT 1994. In defining "arbitrary" as "motivated by capricious or unpredictable reasons", the Panel placed too much emphasis on dictionary definitions and reduced the term to "inutility".[113] Consistent with the Appellate Body's statement in *US – Shrimp* that "the precise meaning of the terms in the chapeau [of Article XX] may shift 'as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ'"[114], the Panel should have considered the specific factual situation that was before it. Australia adds that, although it accepts that compliance with an international agreement "could be considered as a factor by a panel in deciding whether discrimination was 'arbitrary'"[115], this approach requires panels to "make a judgement on the status and validity of action under the agreement".[116]

93. With respect to the Panel's finding that unjustifiable discrimination occurs only to the extent that the objective of the Import Ban has been significantly undermined by a significant amount of imports, Australia submits that the Panel may have created a new test for the consideration of unjustifiable discrimination under the chapeau of Article XX. Australia recognizes that a measure with no real impact in practice may not constitute arbitrary or unjustifiable discrimination, but maintains that the import into Brazil of 2,000 tons of retreaded tyres per year would not appear to be insignificant or without practical impact. If the Appellate Body upholds the Panel's approach, the European Communities potentially would be forced to commence a new dispute under the DSU, either under Article 21.5 or under a newly constituted panel, in the event that imports of retreaded tyres from MERCOSUR countries increase to a level that would undermine the achievement of the objective of the Import Ban. Such re-litigation of essentially the same dispute would not ensure the prompt settlement of the dispute, as provided for in Article 3.3 of the DSU.

94. Finally, Australia considers that, for the same reasons as those presented in relation to the MERCOSUR exemption, the Panel erred in finding that the Brazilian court injunctions that permitted the importation of used tyres were not arbitrary.

[113]Australia's third participant's submission, para. 38 (referring to Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Canada – Dairy*, para. 133).

[114]*Ibid*., para. 39 (referring to Appellate Body Report, *US – Shrimp*, para. 159).

[115]*Ibid*., para. 42.

[116]*Ibid*.

3. Japan

95. Japan argues that what constitutes "arbitrary or unjustifiable discrimination" under the chapeau of Article XX of the GATT 1994 relates to the manner in which a challenged measure is applied and should not be defined in relation to the objective of that measure. The objective of a measure is relevant only to the determination of whether it falls under one of the paragraphs of Article XX, and not as an element to justify the measure's compatibility with the chapeau of that provision. The ordinary meaning of the term "arbitrary" indicates that an arbitrary discrimination test should focus primarily on *subjective* elements (such as motivations) in assessing the manner in which the measure is applied. As for the term "unjustifiable", the Panel correctly concluded that it suggests the "need to be able to 'defend' or convincingly explain the rationale for any discrimination in the application of the measure."[117] According to Japan, Members can reasonably provide such convincing explanation of the rationale based on *objective* elements, since they are considered to be easier to validate.

96. In addition, Japan agrees with the Panel that the importation of used tyres under court injunctions did not constitute arbitrary discrimination under the chapeau of Article XX, because the Panel focused on *subjective* elements in evaluating the manner of application of the Import Ban. For Japan, the administrative authority is obliged to follow a court order (where the authority has challenged it before the courts without success), and has no discretion not to obey it. Therefore, whether acts of all branches of a government are "arbitrary" usually needs to be examined in relation to the pertinent decision-making processes. In this case, the Panel correctly found that the actions of the Brazilian courts and those of Brazilian administrative authorities were not arbitrary. Japan adds that it does not necessarily follow that the government as a whole acted in an arbitrary manner just because acts of its difference branches contradict each other.

97. Japan next submits that the Panel was incorrect in assessing whether "unjustifiable discrimination" arose from the MERCOSUR exemption and from imports of used tyres under court injunctions on the basis of import volumes. Although import volumes may be a relevant factor in determining whether the application of a measure constitutes unjustifiable discrimination, import volumes are subject to strong fluctuation due to economic factors, and are therefore an inadequate benchmark for purposes of determining the consistency of a measure with the chapeau of Article XX. According to Japan, import volumes constitute a "vague threshold"[118] that would lead to disagreements between the parties as to the consistency of the measure in the implementation stage.

[117]Japan's third participant's submission, para. 11 (quoting Panel Report, para. 7.260).

[118]*Ibid.*, para. 25.

Japan suggests that Brazil's disposal capacity is a more reasonable threshold, because it is directly related to the reduction in the amount of waste tyre accumulation in Brazil. Japan adds that Brazil's disposal capacity is more easily quantifiable and less prone to fluctuation due to supply and demand than to import volumes.

98. Finally, Japan submits that the Panel erroneously exercised judicial economy with respect to the European Communities' claims that the MERCOSUR exemption was inconsistent with Articles I:1 and XIII:1 of the GATT 1994. The Panel should have examined these claims, because the European Communities had set out, in its panel request, claims that the MERCOSUR exemption as a specific measure was inconsistent with these GATT provisions. Japan considers that a panel's discretion in exercising judicial economy must not adversely affect the appropriateness of the recommendations and rulings of the DSB, which are key to the full and satisfactory settlement of a dispute.[119] In this case, the Panel's exercise of judicial economy prevented the satisfactory settlement of the matter, because the Panel's findings required Brazil to rectify the Import Ban only in relation to imports of used tyres under court injunctions, but did not necessarily require Brazil to address the measure's inconsistency in relation to the MERCOSUR exemption.

4. Korea

99. Korea submits that the Panel erred in concluding that the Import Ban was capable of contributing to the achievement of its objective. Korea agrees with the Panel that "there is no requirement that there be a precise measurement of the health risk involved".[120] However, Korea distinguishes the facts in *EC – Asbestos* from the facts in this dispute, because the measure at issue in *EC – Asbestos* "was a ban on the use of the product and the qualitative linkage was of the product to cancer"[121], while in the present dispute there is no inherent danger in the product itself. In particular, when unlimited domestic production and importation from MERCOSUR countries are permitted, the statement that "numerical precision" is not required can be abused as "an excuse for any lack of effort in assessing degrees of risk".[122] In Korea's view, Brazil failed to demonstrate what amount of waste tyre reduction is optimal for achieving Brazil's objective and its chosen level of protection and how the limitations introduced by the Import Ban relate to any such level.

[119]Japan's third participant's submission, paras. 31-32 (referring to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133; and Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 330-335).

[120]Korea's third participant's submission, para. 8 (referring to Panel Report, paras. 7.118 and 7.119).

[121]*Ibid*., para. 9.

[122]*Ibid*.

100. For Korea, the Panel's finding that the Import Ban was "capable of contributing to the overall reduction of the amount of waste tyres"[123] amounts to a violation of Article 11 of the DSU. It is unclear what the Panel understood as "capable of contributing", and the Panel should have quantified the extent of the actual contribution of the Import Ban to the achievement of its objective, particularly in the light of its subsequent finding that a quantity of 2,000 tons of retreaded tyres imported under the MERCOSUR exemption did not "significantly" undermine the objective of the measure.

101. Korea agrees with the Panel that Members can choose the level of protection they consider appropriate. However, the measure in question does not relate directly to the reduction of mosquito-borne diseases and tyre fire emissions. Rather, it is "derivative" and relates to the reduction in the number of waste tyres, which may have a "knock-on effect"[124] on the reduction of mosquito-borne diseases and tyre fire emissions. However, in Korea's view, the Panel failed to assess properly the relationship of the Import Ban to its stated goal of safeguarding human health through the reduction of waste tyres. For Korea, without a better assessment of whether or not the Import Ban actually results in a reduction of the accumulation of waste tyres, one cannot establish a measurable link (or, indeed, any link) to the stated health goal. Therefore, Korea reasons, "some sort of metric, even if not a precise one"[125], would have been necessary for the Panel to determine the contribution of the Import Ban to the achievement of its objective. Korea considers that the European Communities provided a number of alternatives to the Import Ban, any of which individually or in combination would provide less trade-restrictive measures in achieving the stated goal.

102. Korea argues further that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner inconsistent with the chapeau of Article XX of the GATT 1994. First, Korea agrees with the Panel that the ordinary meaning of the word "arbitrary" includes the "elements of capricious, unpredictable and inconsistent".[126] However, the Panel assessed the MERCOSUR exemption only in the light of the meaning of the terms "capricious" and "unpredictable". According to Korea, the term "inconsistent" informs the whole meaning of "arbitrary".[127] This is significant, because the MERCOSUR exemption is not capricious, or unpredictable. However, the Import Ban and the MERCOSUR exemption certainly were "inconsistent" in the light of the underlying justification, that is, the protection of humans from mosquito-borne diseases and tyre fire emissions. For Korea, there is no logical way of distinguishing

[123]Korea's third participant's submission, para. 10.

[124]*Ibid*., para. 11.

[125]*Ibid*., para. 12.

[126]*Ibid*., para. 19.

[127]*Ibid*., para. 20.

between retreaded tyres from a MERCOSUR country and retreaded tyres from another WTO Member in relation to the protection of human life and health objective pursued by Brazil.

103. Secondly, Korea submits that the Panel erred in finding that 2,000 tons of retreaded tyres imported from MERCOSUR countries did not significantly undermine the objective of the Import Ban. Korea asserts that the initial burden was on Brazil to establish adequately the factual link between the health goal and the measure in question, and to do so "with some certainty and demonstrability".[128] Thus, in the absence of such a benchmark provided by Brazil, the Import Ban is by definition "arbitrary", because it "may be applied or not applied in inconsistent manners without any factual or logical basis."[129] Korea argues that the Panel misinterpreted the nature of the exception provided under Article XXIV of the GATT 1994 and how it interacts with the exception under Article XX.

104. Finally, Korea argues that there was no legal basis for the Panel to find that the open-ended MERCOSUR exemption was consistent with Brazil's defence under Article XX based on the novel standard of significantly undermining the objective that the Panel had construed.[130] This reasoning implied that MERCOSUR imports could increase to some unknown level that might then significantly undermine the protection of human life and health objective stated by Brazil. Korea contends that the Panel's approach virtually invited future disputes. This is not consistent with Article 3.3 of the DSU, which provides that prompt settlement of disputes is a key element of the dispute settlement system. According to Korea, the Panel erred by attempting to make an "as applied" ruling based on transient facts, when the structure of the measure and the open-ended MERCOSUR exemption required an "as such" finding.

5. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu

105. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel erred in its interpretation of the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constituted either "arbitrary discrimination" or "a disguised restriction on international trade" within the meaning of the chapeau.

[128]Korea's third participant's submission, para. 29.

[129]*Ibid.*

[130]*Ibid.*, para. 33.

106. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that the Panel's finding that the MERCOSUR exemption did not constitute "arbitrary discrimination between countries where the same conditions prevail" was in error, because the MERCOSUR exemption "was done unpredictably".[131] In support of this argument, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu recalls that Brazil maintained a general ban on the importation of used tyres even after the formation of MERCOSUR, when Brazil should have eliminated most of the trade barriers with other MERCOSUR countries, and that Brazil even enacted new restrictions on imports when it enacted the Import Ban. Moreover, Brazil did not invoke the protection of human life and health in its defence before the MERCOSUR arbitral tribunal, and that tribunal did not specify how Brazil should implement its ruling. Brazil itself decided to adopt the MERCOSUR exemption. For these reasons, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu contends that "it is quite clear that no 'predictability' could be found in Brazil's trade policy, which would justify the effect of discrimination on retreaded tyres."[132] This lack of predictability results in the discrimination introduced by the MERCOSUR exemption being "arbitrary" within the meaning of the chapeau of Article XX.

107. In addition, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues that the MERCOSUR exemption should be considered arbitrary in the light of the objective of the Import Ban. It is uncontested that retreaded tyres exported from MERCOSUR countries into Brazil had the same potential to damage human life or health as retreaded tyres exported from non-MERCOSUR countries. For this reason, the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu submits that, "if the protection of human life or health necessitates Brazil adopting an import ban on retreaded tyres, a loophole in the ban would undermine Brazil's asserted objective."[133] The MERCOSUR exemption is just such a loophole, and the discrimination that it engenders is, therefore, arbitrary.

108. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu argues further that the Panel erred in finding that the discrimination engendered by the MERCOSUR exemption was permissible pursuant to Article XXIV of the GATT 1994. Even assuming that MERCOSUR is consistent with Article XXIV, Article XXIV:8(a) specifically excludes measures adopted consistently with Article XX from the obligation to liberalize "substantially all the trade" within a customs union.

[131]Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 7.

[132]*Ibid.*, para. 13.

[133]*Ibid.*, para. 15.

The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also highlights that the objectives of Articles XX and XXIV "are diametrically opposed".[134]

109. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu also argues that the Panel erred in finding that the MERCOSUR exemption did not constitute "a disguised restriction on international trade" under the chapeau of Article XX, "because the amount of imported retreaded tyres did not increase 'significantly' following [its] introduction".[135] The chapeau of Article XX does not require evidence of a disruption in trade flows for a complainant to make a case that a disguised restriction exists. The "logic"[136] of the Appellate Body's rulings in *US – Shrimp* and in *US – Gambling* was "to discourage a [WTO] Member from adopting a measure having an adverse effect on international trade."[137] Therefore, a disguised restriction on international trade should be found to exist when there is a *possibility* that it does exist. The Panel's test of "significance", in contrast, clearly lacked a legal basis.

110. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu adds that, as a result of the MERCOSUR exemption, "the trade flow of retreaded tyres to Brazil has been changed in a manner benefiting other MERCOSUR countries"[138], because these countries are now "able to import used tyres from non-MERCOSUR countries in the first place, retread them locally, and finally re-export retreaded tyres to Brazil."[139] The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu concludes that international trade in retreaded tyres will be distorted, and that a disguised restriction results from such trade distortion.

111. The Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu further suggests that the Panel's findings in this dispute might cause confusion for WTO Members when assessing whether a specific measure is WTO-consistent, create a tendency for WTO Members to initiate a multiplicity of WTO disputes, and undermine the security and predictability needed to conduct future trade. These problems stem from the Panel's failure to provide clear criteria for determining what volume of imports or increase in import volumes would be considered "significant". Moreover, since import volumes are generally determined by supply and demand, the Panel's significance test, if adopted, would make it difficult for WTO Members, who do not have the power to control trade flows into

[134]Third participant's submission of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, para. 21.

[135]*Ibid*., para. 23 (referring to Panel Report, para. 7.354).

[136]*Ibid*., para. 26.

[137]*Ibid*. (referring to Appellate Body Report, *US – Shrimp*, paras. 166-184; and Appellate Body Report, *US – Gambling*, para. 369).

[138]*Ibid*., para. 27.

[139]*Ibid*. (referring to Panel Report, para. 7.352).

their domestic markets, to adopt WTO-consistent measures or to eliminate WTO-inconsistent measures.

6. United States

112. The United States agrees with the European Communities that the manner in which the Panel considered the MERCOSUR exemption in its Article XX analysis was erroneous in a number of respects. First, the Panel erred in disregarding the MERCOSUR exemption when determining whether the Import Ban was "necessary" within the meaning of Article XX(b) of the GATT 1994. The MERCOSUR exemption is contained in Portaria SECEX 14/2004[140], and this was the measure found by the Panel to be inconsistent with Article XI:1 of the GATT 1994. For this reason, the Panel was obliged to determine whether Brazil had established that the same measure—Portaria SECEX 14/2004—was justified under Article XX, including by considering the aspect of the MERCOSUR exemption in its necessity analysis. The United States highlights that a single sentence of Portaria SECEX 14/2004 contains both the Import Ban and the MERCOSUR exemption. According to the United States, the Panel should have considered, in determining the contribution of the measure to the ends pursued by it, the fact that retreaded tyres continue to be imported due to the MERCOSUR exemption, and its failure to do so constituted a breach of Article 11 of the DSU.

113. However, the United States disagrees with the European Communities' apparent position that the contribution of the measure to the ends pursued must be evaluated quantitatively, or that demonstrating a contribution requires "verifiable" evidence of whether the measure "actually" contributed to the ends pursued.[141] Article XX(b) does not contain a requirement to quantify "necessity", and both quantitative and qualitative evidence may be relevant to the necessity analysis, including the analysis of the contribution of the measure to the ends pursued.

114. The United States also argues that the Panel erred in finding that the MERCOSUR exemption did not result in the Import Ban being applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade", contrary to the chapeau of Article XX. First, the Panel erred in basing its finding that the MERCOSUR exemption did not constitute arbitrary discrimination on the fact that the exemption was adopted to comply with a ruling issued by a MERCOSUR tribunal. The ruling did not prescribe any specific implementation action and, more fundamentally, the United States objects to the Panel's reference to Article XXIV in the context of the MERCOSUR ruling. The United States explains that "Article XXIV does not

[140]See *supra*, footnote 3.

[141]United States' third participant's submission, para. 6 (referring to European Communities' appellant's submission, paras. 172-174).

'expressly recognize' *any and all* frameworks for [WTO] Members to discriminate in favor of partners in customs unions or free trade areas, but rather recognizes particular agreements that meet the conditions specified therein."[142] The Panel could not have properly concluded that MERCOSUR is a type of agreement expressly recognized in Article XXIV, because it made no findings as to whether MERCOSUR meets the terms of Article XXIV.

115. Secondly, the United States maintains that the Panel erred in relying on the number of retreaded tyres imported into Brazil from MERCOSUR countries as a basis for its finding that the MERCOSUR exemption did not constitute "unjustifiable discrimination" or "a disguised restriction on international trade" under the chapeau of Article XX. The Panel found that the volume of imports from MERCOSUR countries appears not to have been "significant", but failed to offer any meaningful analysis of what volume would be "significant". The United States points out that import volumes may change, and that simple reliance on a figure "appears a dubious basis for the Panel's conclusion that the permitted imports will not 'undermine' the objective of the measure."[143] According to the United States, the chapeau of Article XX requires panels to evaluate whether unjustifiable discrimination or a disguised restriction on international trade exists, and not simply whether the discrimination that exists undermines the objective of the measure.

116. Finally, should the Appellate Body reach the European Communities' conditional appeal and decide to rule on the European Communities' separate claims that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994, the United States submits that Brazil may not rely on Article XXIV of the GATT 1994 as a defence. MERCOSUR has not been notified under Article XXIV as a customs union, as required by Article XXIV:7 of the GATT 1994. According to the United States, failure to notify a customs union under Article XXIV:7 does not merely render a customs union inconsistent with that paragraph; rather, pursuant to paragraph 1 of the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994* (the "*Understanding on Article XXIV of the GATT 1994*"), such a customs union is not consistent with Article XXIV as a whole. Members that opt not to subject their customs union to the procedures set out in Article XXIV and the *Understanding on Article XXIV of the GATT 1994* or its interpretation are not entitled to invoke that provision as a defence. Moreover, the United States notes that MERCOSUR countries notified MERCOSUR pursuant to paragraph 4(a) of the *GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* (the "Enabling Clause")[144] rather than under Article XXIV:7(a) of the GATT 1994. The

[142]United States' third participant's submission, para. 9. (original emphasis)

[143]*Ibid*., para. 11.

[144]L/4903, 28 November 1979, BISD 26S/203.

United States argues that regional arrangements as defined under Articles 1, 2, and 3 of the Enabling Clause have different characteristics and are subject to different obligations than customs unions and free trade areas covered by Article XXIV.

III. Issues Raised in This Appeal

117. The following issues are raised in this appeal:

(a) with respect to the Panel's analysis of "necessity" within the meaning of Article XX(b) of the GATT 1994:

(i) whether the Panel erred in finding that the Import Ban is "necessary" to protect human or animal life or health[145]; and

(ii) whether the Panel breached its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the Panel's interpretation and application of the chapeau of Article XX of the GATT 1994:

(i) whether the Panel erred in finding that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau[146]; and

(ii) whether the Panel erred in its analysis of whether imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau; and

(c) if the Appellate Body does *not* find that the MERCOSUR exemption results in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994, then:

(i) whether the Panel erred in exercising judicial economy in relation to the European Communities' separate claim that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 of the GATT 1994; and, if so

[145]Panel Report, para. 7.215.

[146]*Ibid.*, paras. 7.289 and 7.354.

(ii) whether the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1 and is not justified under Article XXIV or Article XX(d) of the GATT 1994.

IV. Background and the Measure at Issue

A. *Factual Background*

118. Tyres are an integral component in passenger cars, lorries, and airplanes and, as such, their use is widespread in modern society. New passenger cars are typically sold with new tyres. When tyres need to be replaced, consumers in some countries[147] may have a choice between new tyres or "retreaded" tyres. This dispute concerns the latter category of tyres.[148] Retreaded tyres are used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls.[149] Retreaded tyres can be produced through different methods, one of which is called "remoulding".[150]

119. At the end of their useful life[151], tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health.[152] Specific risks to human life and health include:

[147]We note that Brazil is not the only WTO Member that has adopted a ban on imports of retreaded tyres. According to Brazil, countries that have restricted imports of used and retreaded tyres include Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand, and Venezuela. (Brazil's first submission to the Panel, para. 67) At the oral hearing, Brazil identified the following as countries that ban imports of retreaded tyres: Argentina, Morocco, Nigeria, Pakistan, Thailand, Tunisia, and Venezuela.

[148]Retreaded tyres are classified in the *International Convention on the Harmonized Commodity Description and Coding System*, done at Brussels, 14 June 1983, under subheadings 4012.11 (motor cars), 4012.12 (buses and lorries), 4012.13 (aircraft), and 4012.19 (other types). (Panel Report, para. 2.4)

[149]Panel Report, para. 2.1.

[150]"Remoulding" consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. The other two methods of retreading are "top-capping", which consists of replacing only the tread, and "re-capping", which entails replacing the tread and part of the sidewall. (*Ibid*., para. 2.2)

[151]The Panel assumed that, on average, a tyre—whether new or retreaded—can be used on a passenger car for five years before it becomes a used tyre. (*Ibid*., para. 7.128)

[152]*Ibid*., para. 7.109.

> (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emissions caused by tyre fires which may cause loss of short-term memory, learning disabilities, immune system suppression, cardiovascular problems, but also cancer, premature mortality, reduced lung function, suppression of the immune system, respiratory effects, heart and chest problems. [153]

Risks to animal and plant life and health include: "(i) the exposure of animals and plants to toxic emissions caused by tyre fires; and (ii) the transmission of a mosquito-borne disease (dengue) to animals."[154]

120. Governments take actions to minimize the adverse effects of waste tyres. Policies to address "waste" include preventive measures aiming at reducing the generation of additional waste tyres [155], as well as remedial measures aimed at managing and disposing of tyres that can no longer be used or retreaded, such as landfilling, stockpiling, the incineration of waste tyres, and material recycling.

121. The Panel observed that the parties to this dispute have not suggested that retreaded tyres used on vehicles pose any particular risks compared to new tyres, provided that they comply with appropriate safety standards. Various international standards exist in relation to retreaded tyres, including, for example, the norm stipulating that passenger car tyres may be retreaded only once.[156] One important difference between new and retreaded tyres is that the latter have a shorter lifespan and therefore reach the stage of being waste earlier.[157]

B. *The Measure at Issue*

122. Article 40 of Portaria No. 14 of the Secretaria de Comércio Exterior ("SECEX") (Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry, and Foreign Trade), dated 17 November 2004 ("Portaria SECEX 14/2004")[158] reads as follows:

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[153]Panel Report, para. 7.109. See also *ibid*., paras. 7.53-7.83.

[154]*Ibid*., para. 7.112.

[155]See the Panel's finding, in paragraph 7.100 of its Report, that "policies to address 'waste' by non-generation of additional waste are a generally recognized means of addressing waste management issues", as well as footnote 1170 thereto, detailing the evidence on which the Panel relied in reaching this conclusion.

[156]*Ibid*., para. 2.3.

[157]*Ibid*., paras. 7.129 and 7.130.

[158]Exhibits BRA-84 and EC-29 submitted by Brazil and the European Communities, respectively, to the Panel. We note that, in November 2006, Article 40 of Portaria SECEX 14/2004 was replaced by Article 41 of Portaria SECEX No. 35 dated 24 November 2006, the text of which is identical to that of Article 40 of Portaria SECEX 14/2004. (European Communities' appellant's submission, para. 145 and footnote 18 thereto)

> Article 40 – An import license will not be granted for retreaded tyres and used tyres, whether as a consumer product or feedstock, classified under NCM code 4012, except for remoulded tyres, classified under NCM codes 4012.11.00, 4012.12.00, 4012.13.00 and 4012.19.00, originating and proceeding from the Mercosur Member States under the Economic Complementation Agreement No. 18.[159]

Article 40 of Portaria SECEX 14/2004 contains three main elements: (i) an import ban on *retreaded* tyres (the "Import Ban")[160]; (ii) an import ban on *used* tyres; and (iii) an exemption from the Import Ban of imports of certain retreaded tyres from other countries of the Mercado Común del Sur ("MERCOSUR") (Southern Common Market), which has been referred to in this dispute as the "MERCOSUR exemption".[161] The MERCOSUR exemption did not form part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX No. 8 of 25 September 2000 ("Portaria SECEX 8/2000")[162], but was introduced as a result of a ruling issued by a MERCOSUR arbitral tribunal.[163]

123. This dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres.[164] In its request for the establishment of a panel[165], the European Communities identified the Import Ban and the MERCOSUR exemption as distinct measures, and made separate claims against each of these measures. The European Communities claimed that the Import Ban was inconsistent with Article XI:1 of the GATT 1994, and

[159]See Panel Report, para. 2.7.

[160]Throughout this Report, reference to the "Import Ban" shall be understood as referring only to the import ban on retreaded tyres. It therefore does not include the MERCOSUR exemption, despite the fact that this exemption is contained in the same legal instrument as the Import Ban, that is, Article 40 of Portaria SECEX 14/2004.

[161]The MERCOSUR exemption applies exclusively to remoulded tyres, a subcategory of retreaded tyres, which result from the process of replacing the tread and the sidewall, including all or part of the lower area of the tyre. (See Panel Report, para. 2.74 and footnote 1440 to para. 7.265)

[162]Exhibits BRA-71 and EC-26 submitted by Brazil and the European Communities, respectively, to the Panel. See also Panel Report, para. 2.8.

[163]Following the adoption of Portaria SECEX 8/2000, Uruguay requested, on 27 August 2001, the initiation of arbitral proceedings within MERCOSUR. Uruguay alleged that Portaria SECEX 8/2000 constituted a new restriction of commerce between MERCOSUR countries, which was incompatible with Brazil's obligations under MERCOSUR. In its ruling of 9 January 2002, the arbitral tribunal found that the Brazilian measure was incompatible with MERCOSUR Decision CMC No. 22 of 29 June 2000, which obliges MERCOSUR countries not to introduce new *inter se* restrictions of commerce. (See Panel Report, para. 2.13; see also Exhibits BRA-103 and EC-40 submitted by Brazil and the European Communities, respectively, to the Panel) Following the arbitral award, Brazil enacted Portaria SECEX No. 2 of 8 March 2002, which eliminated the import ban for remoulded tyres originating in other MERCOSUR countries. (See Panel Report, para. 2.14; see also Exhibit BRA-78 submitted by Brazil to the Panel; see also Exhibit EC-41 submitted by the European Communities to the Panel) This exemption was incorporated into Article 40 of Portaria SECEX 14/2004.

[164]The European Communities confirmed, in response to questioning at the oral hearing, that it has not challenged the ban on the import of *used* tyres contained in Article 40 of Portaria SECEX 14/2004.

[165]WT/DS332/4, 18 November 2005. See also European Communities' first written submission to the Panel, para. 47.

could not be justified under Article XX of the GATT 1994.[166] The European Communities also made distinct claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and could not be justified under either Article XXIV:5 of the GATT 1994 or the Enabling Clause.[167] In comments made during the interim review, Brazil stated that it had treated the Import Ban and the MERCOSUR exemption as two separate measures contained in the same legal instrument.[168]

124. Following the approach of the parties, the Panel analyzed the claim made against the Import Ban separately from the claims made against the MERCOSUR exemption. The Panel found the Import Ban to be inconsistent with Article XI:1 of the GATT 1994.[169] It then turned to Brazil's related defence under Article XX(b) of the GATT 1994, stating that its analysis of Brazil's justification of the violation should focus also on the Import Ban, because this was the "specific measure" that had been found to be inconsistent with Article XI:1.[170] Thus, according to the Panel, its analysis of the necessity of *that* specific measure should not have taken account of "elements extraneous to the measure itself" or of situations in which the Import Ban "does *not* apply (i.e. the exemption of MERCOSUR imports)".[171] The Panel recognized, nonetheless, that "the MERCOSUR exemption is foreseen in the very legal instrument containing the import ban".[172] It then included the MERCOSUR exemption in its analysis of the chapeau of Article XX, because the chapeau involves consideration of the manner in which the specific measure to be justified (in this case, the Import Ban) is applied.

125. On appeal, the European Communities indicated, in response to questioning at the oral hearing, that the Import Ban and the MERCOSUR exemption are two aspects of a single measure—that is, Article 40 of Portaria SECEX 14/2004—and that this provision is the measure at issue. Notwithstanding this position, the European Communities does not appeal the Panel's analytical approach. More specifically, the European Communities does not contend that the Panel erred in

[166]See, for instance, European Communities' first written submission to the Panel, paras. 89-168.

[167]*Supra*, footnote 144. See also European Communities' first written submission to the Panel, paras. 193-222.

[168]Panel Report, para. 6.17.

[169]The Panel found that the prohibition of the issuance of import licences for retreaded tyres has the effect of prohibiting the importation of retreaded tyres, and is thus inconsistent with Article XI:1 of the GATT 1994. (*Ibid*., paras. 7.14, 7.15, and 7.34) In making the finding that Portaria SECEX 14/2004 is inconsistent with Article XI:1, the Panel focused on the import prohibition; its reasoning reflects the notion that an exemption from an import ban by its nature does not constitute a prohibition or restriction.

[170]*Ibid*., para. 7.106.

[171]*Ibid*., para. 7.107. (footnote omitted)

[172]*Ibid*., para. 7.237; see also para. 6.19.

identifying and separately treating as two distinct matters before it: a claim relating to the Import Ban; and a claim concerning the discrimination introduced by the MERCOSUR exemption.

126. We observe, nonetheless, that the Panel might have opted for a more holistic approach to the measure at issue by examining the two elements of Article 40 of Portaria SECEX 14/2004 that relate to retreaded tyres *together*. The Panel could, under such an approach, have analyzed whether the Import Ban in combination with the MERCOSUR exemption violated Article XI:1, and whether that *combined* measure, or the resulting partial import ban, could be considered "necessary" within the meaning of Article XX(b).[173]

127. Yet, the Panel's approach reflects the manner in which the European Communities formulated its claims to the Panel, and the fact that the MERCOSUR exemption was not part of the original ban on the importation of retreaded tyres adopted by Brazil (Portaria SECEX 8/2000), but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal. These considerations prompt us to examine the issues appealed on the basis of the conceptual approach adopted by the Panel in defining the scope of the measure at issue, which, as indicated above, has not specifically been appealed by the European Communities.

C. *Related Measures*

128. In addition to the Import Ban, Brazil has adopted a variety of other measures which were also challenged or discussed before the Panel. Although none of these measures are directly at issue in this appeal, we consider it useful to identify them briefly.

129. Presidential Decree 3.179, as amended[174], provides sanctions applicable to conduct and activities harmful to the environment, and other provisions, and its Article 47-A subjects the importation, as well as the marketing, transportation, storage, keeping or warehousing, of imported used and retreaded tyres to a fine of R$400/unit.

130. Resolution No. 258 of 26 August 1999 of the Conselho Nacional do Meio Ambiente ("CONAMA") (National Council for the Environment of the Ministry of the Environment) ("CONAMA Resolution 258/1999")[175], as amended by CONAMA Resolution No. 301 of 21 March

[173]Indeed, two of the third participants in this appeal—Australia and the United States—suggest that the Panel should have adopted such an approach. (Australia's third participant's submission, paras. 4 and 5; United States' third participant's submission, para. 5)

[174]See *supra*, footnote 5.

[175]Exhibits BRA-4 and EC-47 submitted by Brazil and by the European Communities, respectively, to the Panel.

2002[176], created a collection and disposal scheme that makes it mandatory for domestic manufacturers of new tyres and tyre importers to provide for the safe disposal of waste tyres in specified proportions.[177] CONAMA Resolution 258/1999, as amended in 2002, aims to ensure the environmentally appropriate final disposal of unusable tyres. Also, by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil[178], CONAMA Resolution 258/1999, as amended in 2002, seeks to encourage Brazilian retreaders to retread more domestically used tyres.

131. Brazilian states have also enacted measures aiming at reducing risks arising from the accumulation of waste tyres. Law 12.114 of the State of Rio Grande do Sul prohibits the commercialization of imported used tyres within its territory, which includes imported retreaded tyres, as well as retreaded tyres made in Brazil from imported casings.[179] A 2005 amendment to that law allows the importation and marketing of imported retreaded tyres provided that the importer proves that it has destroyed ten used tyres in Brazil for every retreaded tyre imported. In the case of imports of used tyre casings, however, the destruction of only one used tyre per imported tyre is required.[180] The State of Paraná has adopted Paraná Rodando Limpo, a voluntary programme to collect, *inter alia*, all existing unusable tyres currently discarded throughout the territory of Paraná.[181]

132. Finally, we note that, notwithstanding the import ban on used tyres contained in Article 40 of Portaria SECEX 14/2004, a number of Brazilian retreaders have sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres from those used tyres.[182] Although the Brazilian government has, within the Brazilian domestic legal system, opposed these injunctions, it has had mixed results in its efforts to prevent the grant, or obtaining the reversal, of court injunctions for the importation of used tyres.[183]

[176]Exhibit BRA-68 submitted by Brazil to the Panel.

[177]See para. 154 and footnote 253 thereto of this Report.

[178]Panel Report, para. 7.137.

[179]*Ibid*., para. 2.11.

[180]*Ibid*., para. 2.12.

[181]*Ibid*., paras. 7.66, 7.174, 7.175, and 7.178.

[182]*Ibid*., paras. 7.241 and 7.92-7.305.

[183]*Ibid*., para. 7.304.

V. The Panel's Analysis of the Necessity of the Import Ban

A. *The Panel's Necessity Analysis under Article XX(b) of the GATT 1994*

133. The first legal issue raised by the European Communities' appeal relates to the Panel's finding that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.[184] The European Communities challenges three specific aspects of the Panel's analysis under Article XX(b). First, the European Communities contends that the Panel applied an "erroneous legal standard"[185] in assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban. Secondly, the European Communities submits that the Panel did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities.[186] Thirdly, the European Communities argues that, in its analysis under Article XX(b), the Panel did not carry out a proper, if any, weighing and balancing of the relevant factors.[187] We will examine these contentions of the European Communities in turn.

1. The Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

134. In the analysis of the contribution of the Import Ban to the achievement of its objective, the Panel first recalled its previous findings that, through the Import Ban, Brazil pursued the objective of reducing exposure to the risks to human, animal, and plant life and health arising from the accumulation of waste tyres, and that such policy fell within the range of policies covered by paragraph (b) of Article XX of the GATT 1994.[188] The Panel also found that Brazil's chosen level of protection is the "reduction of the risks of waste tyre accumulation to the maximum extent possible".[189] In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres"[190], the Panel examined two questions. First, the Panel sought to assess whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil. Secondly, the Panel sought to evaluate whether a reduction in the number of waste tyres can

[184]Panel Report, para. 7.215.

[185]European Communities' appellant's submission, para. 166.

[186]*Ibid*., para. 209.

[187]*Ibid*., para. 285.

[188]Panel Report, para. 7.115.

[189]*Ibid*., para. 7.108. (footnote omitted)

[190]*Ibid*., para. 7.115.

contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres.[191]

135. Regarding the first question, the Panel noted Brazil's explanation that the Import Ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading. The Panel began by examining the replacement of imported retreaded tyres with new tyres on Brazil's market.[192] The Panel determined that "all types of retreaded tyres (i.e. for passenger car, bus, truck and aircraft) have by definition a shorter lifespan than new tyres."[193] Accordingly, the Panel reasoned that "an import ban on retreaded tyres may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."[194] The Panel verified next whether there is a link between the replacement of imported retreaded tyres with domestically retreaded tyres and a reduction in the number of waste tyres in Brazil.[195] If retreaded tyres are manufactured in Brazil from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of the accumulation of waste tyres in Brazil by "giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."[196] The Panel added that "an import ban on retreaded tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise"[197], because it "compel[s] consumers of imported retreaded tyres to switch either to retreaded tyres produced domestically or to new tyres."[198] The Panel then assessed whether domestic used tyres can be retreaded in Brazil. On the basis of the evidence provided by the parties, the Panel found that "at least some domestic used tyres are being retreaded in Brazil"[199], that Brazil "has the production capacity to retread domestic used tyres"[200], and that new tyres sold in Brazil have the potential to be retreaded.[201] The Panel also observed that "Article 40 of Portaria SECEX 14/2004 bans the importation of both used and retreaded tyres to Brazil" and that "the import ban on used tyres supports the effectiveness of the import ban on retreaded tyres regarding the reduction of waste

[191]Panel Report, para. 7.122.

[192]*Ibid*., paras. 7.126-7.130.

[193]*Ibid*., para. 7.130.

[194]*Ibid*.

[195]*Ibid*., para. 7.132.

[196]*Ibid*., para. 7.133.

[197]*Ibid*., para. 7.134. (footnote omitted)

[198]*Ibid*.

[199]*Ibid*., para. 7.136.

[200]*Ibid*., para. 7.142.

[201]*Ibid*., para. 7.137.

tyres."[202] The Panel concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil."[203]

136. The Panel then turned to the question of whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health arising from waste tyres. For the Panel, "the very essence of the problem is the actual accumulation of waste in and of itself."[204] The Panel added that "[t]o the extent that this accumulation has been demonstrated to be associated with the occurrence of the risks at issue, including the providing of fertile breeding grounds for the vectors of these diseases, a reduction in this accumulation, even if it does not eliminate it, can reasonably be expected to constitute a step towards the reduction of the occurrence of the diseases and the tyre fires."[205] The Panel concluded that:

> ... the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address.[206]

137. According to the European Communities, the Panel, in its assessment of the contribution of the Import Ban to the realization of the ends pursued by it, referred only to the potential contribution this measure might make.[207] The European Communities argues that the Panel applied an "erroneous legal standard"[208] in so doing, and that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution".[209] For the European Communities, the Panel was required to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective because, otherwise, it is not possible to weigh and balance properly this contribution against other relevant factors.[210] Accordingly, the European Communities contends, the Panel erred by not quantifying the reduction of waste tyres resulting from the Import Ban.[211] For the European Communities, "[t]he very indirect nature of the

[202]Panel Report, para. 7.139.

[203]*Ibid.*, para. 7.142.

[204]*Ibid.*, para. 7.146.

[205]*Ibid.*

[206]*Ibid.*, para. 7.148.

[207]European Communities' appellant's submission, para. 168.

[208]*Ibid.*, para. 166.

[209]*Ibid.*, para. 167.

[210]*Ibid.*, para. 171.

[211]*Ibid.*, para. 174.

alleged risks attributed to imported retreaded tyres should have called for a particularly diligent examination of the contribution made by the ban to the reduction of the number of the waste tyres arising in Brazil."[212]

138. Brazil counters that the Panel correctly assessed the contribution of the Import Ban to the achievement of its objective. Brazil argues that actual contribution is properly assessed under the chapeau of Article XX of the GATT 1994, which focuses on the application of the measure. Brazil asserts further that the Appellate Body expressly recognized, in *EC – Asbestos*, that "a risk may be evaluated either in quantitative or *qualitative* terms"[213] and, therefore, the Panel was under no obligation to quantify the Import Ban's contribution to the reduction in waste tyre volumes.

139. We begin by recalling that the analysis of a measure under Article XX of the GATT 1994 is two-tiered.[214] First, a panel must examine whether the measure falls under at least one of the ten exceptions listed under Article XX.[215] Secondly, the question of whether the measure at issue satisfies the requirements of the chapeau of Article XX must be considered.

140. We note at the outset that the participants do not dispute that it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve[216], as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.[217]

141. Article XX(b) of the GATT 1994 refers to measures "necessary to protect human, animal or plant life or health". The term "necessary" is mentioned not only in Article XX(b) of the GATT 1994, but also in Articles XX(a) and XX(d) of the GATT 1994, as well as in Article XIV(a), (b), and (c) of the GATS. In *Korea – Various Measures on Beef*, the Appellate Body underscored that "the word 'necessary' is not limited to that which is 'indispensable'".[218] The Appellate Body added:

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[212]European Communities' appellant's submission, para. 177.

[213]Brazil's appellee's submission, para. 81 (quoting Appellate Body Report, *EC – Asbestos*, para. 167). (emphasis added by Brazil)

[214]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 64.

[215]In other words, the policy objective of the measure at issue must fall under the range of policies covered by the paragraphs of Article XX of the GATT 1994. (See, for instance, Appellate Body Report, *US – Shrimp*, para. 149)

[216]Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at 28.

[217]Appellate Body Report, *EC – Asbestos*, para. 168.

[218]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

> Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[219] (footnote omitted)

142. In *Korea – Various Measures on Beef*, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d):

> ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[220]

143. In *US – Gambling*, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure"[221], and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".[222]

144. It is against this background that we must determine whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban. We begin by identifying the objective pursued by the Import Ban. The Panel found that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[223], and noted that "few interests are more 'vital' and 'important' than

[219]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[220]*Ibid*., para. 164.

[221]Appellate Body Report, *US – Gambling*, para. 306. (footnote omitted)

[222]*Ibid*. In *Korea – Various Measures on Beef*, the Appellate Body observed that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." (Appellate Body Report, *Korea – Various Measures on Beef*, para. 163)

[223]Panel Report, para. 7.102.

protecting human beings from health risks, and that protecting the environment is no less important."[224] The Panel also observed that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible."[225] Regarding the trade restrictiveness of the measure, the Panel noted that it is "as trade-restrictive as can be, as far as retreaded tyres from non-MERCOSUR countries are concerned, since it aims to halt completely their entry into Brazil."[226]

145. We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU.

146. We note that the Panel chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective.[227] In previous cases, the Appellate Body has not established a requirement that such a contribution be quantified.[228] To the contrary, in *EC – Asbestos*, the Appellate Body emphasized that there is "no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health".[229] In other words, "[a] risk may be evaluated either in quantitative or qualitative terms."[230] Although the reference by the Appellate Body

[224]Panel Report, para. 7.108 (referring to Brazil's first written submission, para. 101).

[225]*Ibid*. (footnote omitted)

[226]*Ibid*., para. 7.114.

[227]*Ibid*., para. 7.118.

[228]Appellate Body Report, *Korea – Various Measures on Beef*, paras. 163 and 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[229]Appellate Body Report, *EC – Asbestos*, para. 167. (original emphasis; footnote omitted)

[230]*Ibid*.

to the quantification of a risk is not the same as the quantification of the contribution of a measure to the realization of the objective pursued by it (which could be, as it is in this case, the reduction of a risk), it appears to us that the same line of reasoning applies to the analysis of the contribution, which can be done either in quantitative or in qualitative terms.

147. Accordingly, we do not accept the European Communities' contention that the Panel was under an obligation to quantify the contribution of the Import Ban to the reduction in the number of waste tyres and to determine the number of waste tyres that would be reduced as a result of the Import Ban.[231] In our view, the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution.

148. The Panel analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence. It examined first the impact of the replacement of imported retreaded tyres with *new tyres* on the reduction of waste. Secondly, the Panel sought to determine whether imported retreaded tyres would be replaced with *domestically retreaded tyres*, which led it to examine whether domestic used tyres can be and are being retreaded in Brazil. Thirdly, it considered whether the reduction in the number of waste tyres would contribute to a reduction of the risks to human, animal, and plant life and health.

149. The Panel's analysis was not only directed at an assessment of the current situation and the *immediate* effects of the Import Ban on the reduction of the exposure to the targeted risks. The Panel's approach also focused on evaluating the extent to which the Import Ban is likely to result in a reduction of the exposure to these risks.[232] In the course of its reasoning, the Panel made and tested some key hypotheses, including: that imported retreaded tyres are being replaced with new tyres[233] and domestically retreaded tyres[234]; that some proportion of domestic used tyres are retreadable and are being retreaded[235]; that Brazil introduced a number of measures to facilitate the access of

[231]European Communities, appellant's submission, para. 174.

[232]In the Panel's view, "it cannot be reasonably expected that the specific measure under consideration would entirely eliminate the risk ... or even that its impact on the actual reduction of the incidence of the diseases at issue would manifest itself very rapidly after the enactment of the measure." (Panel Report, para. 7.145)

[233]*Ibid.*, para. 7.130.

[234]*Ibid.*, paras. 7.133-7.135.

[235]*Ibid.*, para. 7.136.

domestic retreaders to good-quality used tyres[236]; that more automotive inspections in Brazil lead to an increase in the number of retreadable used tyres[237]; and that Brazil has the production capacity to retread such tyres.[238] The Panel sought to verify these hypotheses on the basis of the evidence adduced by the parties and found them to be logically sound and supported by sufficient evidence. In the next Section, we will examine the European Communities' claim that the Panel failed to make an objective assessment of the facts with respect to the verification of some of these hypotheses. Assuming, for the time being, that the Panel assessed the facts in accordance with Article 11 of the DSU, it appears to us that the Panel's analysis supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks.[239] We have now to determine whether this was sufficient to conclude that the Import Ban is "necessary" within the meaning of Article XX(b) of the GATT 1994.

150. As the Panel recognized, an import ban is "by design as trade-restrictive as can be".[240] We agree with the Panel that there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b). We also recall that, in *Korea – Various Measures on Beef*, the Appellate Body indicated that "the word 'necessary' is not limited to that which is 'indispensable'".[241] Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective. Thus, we disagree with Brazil's suggestion that, because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary.[242]

151. This does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to

[236]Panel Report, para. 7.137.

[237]*Ibid*., para. 7.138.

[238]*Ibid*., para. 7.141.

[239]*Ibid*., para. 7.148.

[240]*Ibid*., para. 7.211.

[241]Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[242]Brazil's appellee's submission, paras. 80 and 83. According to Brazil, given its chosen level of protection to reduce the risk of waste tyre accumulation to the maximum extent possible, "[i]f the Panel finds that there are no reasonable alternatives to the measure, the measure is necessary—no matter how small its contribution—because the WTO does not second-guess the Member's chosen level of protection." (*Ibid*., para. 80)

isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time.[243] In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.

152. We have now to assess whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres.

153. We observe, first, that the Panel analyzed the contribution of the Import Ban as initially designed, without taking into account the imports of remoulded tyres under the MERCOSUR exemption. As we indicated above, this is not the only possible approach. Nevertheless, we proceed with our examination of the Panel's reasoning on that basis for the reasons we explained earlier. In the light of the evidence adduced by the parties, the Panel was of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings[244], or with new tyres that are retreadable.[245] As concerns new tyres, the Panel observed, and we agree, that retreaded tyres "have by definition a shorter lifespan than new tyres"[246] and that, accordingly, the

[243]In this respect, we note that, in *US – Gasoline*, the Appellate Body stated, in the context of Article XX(g) of the GATT 1994, that, "in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable." (Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at 20)

[244]Panel Report, paras. 7.126-7.130.

[245]*Ibid.*, paras. 7.131-7.142.

[246]*Ibid.*, para. 7.130.

Import Ban "may lead to a reduction in the total number of waste tyres because imported retreaded tyres may be substituted for by new tyres which have a longer lifespan."[247] As concerns tyres retreaded in Brazil from local casings, the Panel was satisfied that Brazil had the production capacity to retread domestic used tyres[248] and that "at least some domestic used tyres are being retreaded in Brazil."[249] The Panel also agreed that Brazil has taken a series of measures to facilitate the access of domestic retreaders to good-quality used tyres[250], and that new tyres sold in Brazil are high-quality tyres that comply with international standards and have the potential to be retreaded.[251] The Panel's conclusion with which we agree was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life."[252] For these reasons, the Panel found that a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres. As the Panel's analysis was qualitative, the Panel did not seek to estimate, in quantitative terms, the reduction of waste tyres that would result from the Import Ban, or the time horizon of such a reduction. Such estimates would have been very useful and, undoubtedly, would have strengthened the foundation of the Panel's findings. Having said that, it does not appear to us erroneous to conclude, on the basis of the hypotheses made, tested, and accepted by the Panel, that fewer waste tyres will be generated with the Import Ban than otherwise.

154. Moreover, we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic manufacturers and importers of new tyres to provide

[247]Panel Report, para. 7.130.

[248]*Ibid*., para. 7.141. The Panel noted that, in 2005, 33.4 million new tyres (all types included) were sold in Brazil (either domestically produced or imported) and 18.6 million retreaded tyres were produced domestically.

[249]*Ibid*., para. 7.136.

[250]*Ibid*., para. 7.137.

[251]*Ibid*.

[252]*Ibid*., para. 7.133.

for the safe disposal of waste tyres in specified proportions.[253] For its part, CONAMA Resolution 258/1999, as amended in 2002, aims to reduce the exposure to risks arising from the accumulation of waste tyres by forcing manufacturers and importers of new tyres to collect and dispose of waste tyres at a ratio of five waste tyres for every four new tyres. This measure also encourages Brazilian retreaders to retread more domestic used tyres by exempting domestic retreaders from disposal obligations as long as they process tyres consumed within Brazil.[254] Thus, the CONAMA scheme provides additional support for and is consistent with the design of Brazil's strategy for reducing the number of waste tyres. The two mutually enforcing pillars of Brazil's overall strategy—the Import Ban and the import ban on used tyres—imply that the demand for retreaded tyres in Brazil must be met by the domestic retreaders, and that these retreaders, in principle, can use only domestic used tyres for raw material.[255] Over time, this comprehensive regulatory scheme is apt to induce sustainable changes in the practices and behaviour of the domestic retreaders, as well as other actors, and result in an increase in the number of retreadable tyres in Brazil and a higher rate of retreading of domestic casings in Brazil. Thus, the Import Ban appears to us as one of the key elements of the comprehensive strategy designed by Brazil to deal with waste tyres, along with the import ban on

[253]Article 3 of CONAMA Resolution 258/1999, as amended in 2002, provides:

> The time periods and quantities for collection and environmentally appropriate final disposal of unusable tyres resulting from use on automotive vehicles and bicycles covered by this Regulation are as follows:
>
> I – as of 1 January 2002: for every four new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> II – as of 1 January 2003: for every two new tyres produced in Brazil or imported new or reconditioned tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> III – as of 1 January 2004:
>
> a) for every one new tyre produced in Brazil or imported new tyre, including those on imported vehicles, manufacturers and importers must ensure final disposal of one unusable tyre;
>
> b) for every four imported reconditioned tyres, of any type, importers must ensure final disposal of five unusable tyres;
>
> IV – as of 1 January 2005:
>
> a) for every four new tyres produced in Brazil or imported tyres, including those on imported vehicles, manufacturers and importers must ensure final disposal of five unusable tyres;
>
> b) for every three imported reconditioned tyres, of any type, importers must ensure final disposal of four unusable tyres.

[254]Panel Report, para. 7.137.

[255]Leaving aside, as explained above, the imports under the MERCOSUR exemption and under court injunctions.

used tyres and the collection and disposal scheme established by CONAMA Resolution 258/1999, as amended in 2002.

155. As we explained above, we agree with the Panel's reasoning suggesting that fewer waste tyres will be generated with the Import Ban in place. In addition, Brazil has developed and implemented a comprehensive strategy to deal with waste tyres. As a *key element* of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres. On the basis of these considerations, we are of the view that the Panel did not err in finding that the Import Ban contributes to the achievement of its objective.

2. The Panel's Analysis of Possible Alternatives to the Import Ban

156. In order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must assess all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued. It rests upon the complaining Member to identify possible alternatives to the measure at issue that the responding Member could have taken.[256] As the Appellate Body indicated in *US – Gambling*, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."[257] We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[258] If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available".[259] As the Appellate Body indicated in *US – Gambling*, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or

[256]Appellate Body Report, *US – Gambling*, para. 311.

[257]*Ibid.*, para. 309. (original emphasis)

[258]*Ibid.*, para. 308.

[259]*Ibid.*, para. 311.

where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[260] If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary.[261]

157. Before the Panel, the European Communities put forward two types of possible alternative measures or practices: (i) measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil.[262] The Panel examined the alternative measures proposed by the European Communities in some detail, and in each case found that the proposed measure did not constitute a reasonably available alternative to the Import Ban. Among the reasons that the Panel gave for its rejections were that the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards.

158. Regarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres. The Panel observed that these measures had already been implemented or were in the process of being implemented[263] so that the impact of these measures and the Import Ban "could be cumulative rather than substitutable".[264] Therefore, the Panel disagreed with the European Communities that "the institution of domestic measures to encourage timely domestic retreading and to improve the retreadability of domestic used tyres would achieve the same outcome as the import ban".[265]

159. The Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions. The Panel noted that imports of used tyres were already prohibited by law in Brazil, "so that if the 'alternative measure' proposed by the European Communities is the prohibition of used tyres, it could be said that Brazil actually already imposes that measure."[266] Accordingly, the Panel concluded that the possible alternative measures identified by the European Communities to avoid the *generation* of waste tyres could not "apply *as a*

[260]Appellate Body Report, *US – Gambling*, para. 308.

[261]*Ibid*., para. 311.

[262]Panel Report, para. 7.159.

[263]*Ibid*., para. 7.169.

[264]*Ibid*.

[265]*Ibid*.

[266]*Ibid*., para. 7.171.

substitute" for the Import Ban but are, rather, complementary measures that Brazil already applies, at least in part.[267]

160. Turning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods.

161. The European Communities referred mainly to two collection and disposal schemes.[268] In the analysis of these schemes, the Panel recalled that "Brazil's chosen level of protection is the reduction of the risks associated with waste tyre accumulation to the maximum extent possible".[269] According to the Panel, "insofar as the level of protection pursued by Brazil involves the 'non-generation' of waste tyres in the first place", collection and disposal schemes, such as that adopted by CONAMA Resolution 258/1999 or the Paraná Rodando Limpo[270] programme, "would not seem able to achieve the same level of protection as the import ban".[271] The Panel also noted Brazil's concern that these collection and disposal schemes do not address or eliminate disposal risks.[272] The Panel concluded that these schemes cannot be considered as alternatives to the Import Ban at the level of protection sought by Brazil, because they were already implemented in Brazil and do not address the risks associated with the disposal of waste tyres.[273]

162. The Panel then examined the following disposal methods identified by the European Communities: (i) landfilling; (ii) stockpiling; (iii) incineration of waste tyres in cement kilns and similar facilities; and (iv) material recycling.

163. Concerning *landfilling*, the Panel found that the landfilling of waste tyres may pose the very risks Brazil seeks to reduce through the Import Ban, and for this reason cannot constitute a reasonably available alternative.[274] For the Panel, landfilling of waste tyres poses problems, including the "instability of sites that will affect future land reclamation, long-term leaching of toxic substances, and the risk of tyre fires and mosquito-borne diseases."[275] The Panel also observed that the evidence

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[267]Panel Report, para. 7.172. (original emphasis)

[268]The scheme adopted by CONAMA Resolution 258/1999, as amended in 2002, which makes it mandatory for domestic producers and importers of new tyres to provide for the safe disposal of waste tyres (or unusable tyres) in specified proportions; and a voluntary multi-sector programme called Paraná Rodando Limpo, which has been put in place in the State of Paraná. (See *supra*, footnote 253; see also *supra*, paras. 130 and 131)

[269]Panel Report, para. 7.177.

[270]See Exhibit EC-49 submitted by the European Communities to the Panel.

[271]Panel Report, para. 7.177.

[272]*Ibid.*

[273]*Ibid.*, para. 7.178.

[274]*Ibid.*, para. 7.186.

[275]*Ibid.*, para. 7.183. (footnote omitted)

it examined showing the existence of such risks did not make a clear distinction between landfilling of shredded tyres (also referred to as "controlled landfilling") and landfilling of whole tyres ("uncontrolled landfilling"). Thus, for the Panel, it was not possible to conclude that landfilling of shredded tyres does not pose risks similar to those linked to other types of waste tyre landfills.[276]

164. Regarding *stockpiling*[277], the Panel observed that this method does not "dispose of" waste tyres[278], and added that "the evidence shows that even the so-called 'controlled stockpiling' that is to say stockpiles designed to prevent the risk of fires and pests may still pose considerable risks to human health and the environment."[279] The Panel concluded that stockpiling did not constitute an alternative to the Import Ban.[280]

165. With respect to the *incineration* of waste tyres, the Panel found that sufficient evidence demonstrated that health risks exist in relation to the incineration of waste tyres, even if such risks could be significantly reduced through strict emission standards.[281] For the Panel, the evidence suggested that "the question still remains whether toxic chemicals emitted by incineration of waste tyres, regardless of the level of emission, may potentially pose health risks to humans."[282] The Panel added that, although emission levels can vary largely depending on the emission control technology, "the most up-to-date technology that can control toxic emissions to minimum levels is not necessarily readily available, mostly for financial reasons."[283]

166. Finally, the Panel examined *material recycling* applications. Regarding civil engineering applications using waste tyres, the Panel found that demand for these applications was fairly limited partly due to their high costs, that they are capable of disposing of only a small number of waste tyres, and that the evidence casts doubt on the safety of some of these engineering applications.[284] With respect to rubber asphalt, the Panel found that the information showed that "the use of rubber asphalt results in higher costs."[285] Consequently, "the demand for this technology is limited and its waste

[276]Panel Report, para. 7.184.

[277]Stockpiling consists of storing waste tyres in designated installations. (See European Communities' second written submission to the Panel, para. 104)

[278]Panel Report, para. 7.188.

[279]*Ibid*. (footnote omitted)

[280]*Ibid*., para. 7.189.

[281]*Ibid*., para. 7.194.

[282]*Ibid*., para. 7.192. (footnote omitted)

[283]*Ibid*., para. 7.193. (footnotes omitted)

[284]*Ibid*., paras. 7.201 and 7.202.

[285]*Ibid*., para. 7.205.

disposal capacity is reduced."[286] The Panel also noted that the use of rubber granulates in the production of certain products may dispose of only a limited amount of waste tyres.[287] Finally, as regards devulcanization and other forms of chemical or thermal transformation, the Panel observed that, "under current market conditions, the economic viability of these options has yet to be demonstrated."[288] In the light of these considerations, the Panel concluded that "it is not clear that material recycling applications are entirely safe"[289], and that even if they were completely harmless, "they would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs and thus cannot constitute a reasonably available alternative".[290]

167. On appeal, the European Communities contends that the Panel erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban. In particular, the European Communities submits that the Panel used in its analysis an incorrect concept of "alternative". In addition, the European Communities argues that the Panel should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes.

168. Brazil asserts that the Panel was correct in finding that none of the alternative measures suggested by the European Communities constituted "reasonably available" alternatives to the Import Ban. For Brazil, the Panel correctly took account of Brazil's chosen level of protection—that is, the reduction of risks associated with the generation of waste tyres in Brazil to the maximum extent possible—in concluding that none of the alternatives suggested by the European Communities avoided the generation of additional waste tyres in the first place.

169. The Panel examined each of the measures or practices put forward by the European Communities in order to determine whether they were reasonably available alternatives in the light of the objective of the Import Ban and Brazil's chosen level of protection.[291]

[286]Panel Report, para. 7.205. (footnote omitted)

[287]*Ibid*., para. 7.206. (emphasis and footnote omitted)

[288]*Ibid*., para. 7.207. (footnote omitted)

[289]*Ibid*., para. 7.208.

[290]*Ibid*. (footnote omitted)

[291]*Ibid*., para. 7.152.

170. We note that the objective of the Import Ban is the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[292] and that "Brazil's chosen level of protection is the reduction of [these] risks ... to the maximum extent possible"[293], and that a measure or practice will not be viewed as an alternative unless it "preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued".[294]

171. We recall that tyres—new or retreaded—are essential for modern transportation. However, at the end of their useful life, they turn into waste that carries risks for public health and the environment.[295] Governments, legitimately, take actions to minimize the adverse effects of waste tyres. They may adopt preventive measures aiming to reduce the accumulation of waste tyres, a category into which the Import Ban falls. Governments may also contemplate remedial measures for the management and disposal of waste tyres, such as landfilling, stockpiling, incineration of waste tyres, and material recycling. Many of these measures or practices carry, however, their own risks or require the commitment of substantial resources, or advanced technologies or know-how. Thus, the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban, which does not involve "prohibitive costs or substantial technical difficulties".[296]

172. Among the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes. In fact, like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres.[297] Substituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect. We are therefore of the view that the Panel did not err in rejecting as alternatives to the

[292]Panel Report, para. 7.102.

[293]*Ibid.*, para. 7.108. (footnote omitted)

[294]Appellate Body Report, *US – Gambling*, para. 308. (footnote omitted)

[295]See *supra*, para. 119.

[296]Appellate Body Report, *US – Gambling*, para. 308.

[297]The Panel noted that Brazil has already implemented or is in the process of implementing measures to encourage domestic retreading or improve the retreadability of tyres. (Panel Report, para. 7.169) The Panel observed that "imports of used tyres *are* already prohibited". (*Ibid*., para. 7.171 (original emphasis)) The Panel agreed with Brazil that "collection and disposal schemes such as Resolution CONAMA 258/1999 as amended [in 2002] and Paraná Rodando Limpo have already been implemented in Brazil". (*Ibid*., para. 7.178)

Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban.

173. We move now to the other measures or practices proposed by the European Communities as alternatives to the Import Ban.[298] The European Communities contends that the Panel committed an error of law by applying a "narrow definition of alternative"[299], according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres"[300], or one "equal to a waste non-generation measure".[301] For the European Communities, this narrow definition differs from "the objective allegedly pursued by the challenged measure"[302], and resulted in the rejection of several disposal and waste management measures presented by the European Communities that should have been accepted as alternatives to the Import Ban.

174. In evaluating whether the measures or practices proposed by the European Communities were "alternatives", the Panel sought to determine whether they would achieve Brazil's policy objective and chosen level of protection[303], that is to say, reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres"[304] to the maximum extent possible.[305] In this respect, we believe, like the Panel, that non-generation measures are more apt to achieve this objective because they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated. Furthermore, we note that, in comparing a proposed alternative to the Import Ban, the Panel took into account specific risks attached to the proposed alternative, such as the risk of leaching of toxic substances that might be associated to landfilling[306], or the risk of toxic emissions that might arise from the incineration of waste tyres.[307] In our view, the Panel did not err in so doing. Indeed, we do not see how a panel

[298]These measures or practices are the following disposal methods: landfilling; stockpiling; incineration of waste tyres; and material recycling.

[299]European Communities' appellant's submission, para. 227.

[300]*Ibid*., para. 219. (underlining omitted)

[301]*Ibid*., para. 222.

[302]*Ibid*., para. 221.

[303]Panel Report, para. 7.157.

[304]*Ibid*., para. 7.102.

[305]*Ibid*., para. 7.108. (footnote omitted) See also *ibid*., para. 7.152:

> We must therefore now consider whether any alternative measure, less inconsistent with GATT 1994, that is, less trade-restrictive than a complete import ban, would have been reasonably available to Brazil to achieve the same objective, taking into account Brazil's chosen level of protection. (footnote omitted)

[306]*Ibid*., para. 7.183.

[307]*Ibid*., para. 7.194.

could undertake a meaningful comparison of the measure at issue with a possible alternative while disregarding the risks arising out of the implementation of the possible alternative.[308] In this case, the Panel examined as proposed alternatives landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban.[309] Because these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives.

175. With respect to material recycling, we share the Panel's view that this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres. Material recycling applications are costly, and hence capable of disposing of only a limited number of waste tyres.[310] We also note that some of them might require advanced technologies and know-how that are not readily available on a large scale. Accordingly, we are of the view that the Panel did not err in concluding that material recycling is not a reasonably available alternative to the Import Ban.

3. The Weighing and Balancing of Relevant Factors by the Panel

176. The European Communities argues that, in its analysis of the necessity of the Import Ban, the Panel stated that it had weighed and balanced the relevant factors, but it "has not actually done it".[311] According to the European Communities, although the Appellate Body has not defined the term "weighing and balancing", "this language refers clearly to a process where, in the first place, the importance of each element is assessed individually and, then, its role and relative importance is taken into consideration together with the other elements for the purposes of deciding whether the challenged measure is necessary to attain the objective pursued."[312] The European Communities reasons that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and balancing' this contribution against any of the other relevant factors."[313] In addition, the

[308]This was recognized by the Appellate Body in *EC – Asbestos*, where it stated that the risks attached to a proposed measure should be included in the exercise of comparison aiming to determine whether it is a reasonably available alternative to the measure at issue. (Appellate Body Report, *EC – Asbestos*, para. 174)

[309]Panel Report, para. 7.195; see also para. 7.186 (landfilling); para. 7.189 (stockpiling); and para. 7.194 (waste tyre incineration).

[310]*Ibid*., paras. 7.201 and 7.205-7.208.

[311]European Communities' appellant's submission, para. 285.

[312]*Ibid*., para. 284.

[313]*Ibid*., para. 288.

European Communities contends that "the Panel base[d] ... its 'weighing and balancing' exercise on the wrong analysis it ... made of the alternatives".[314] In sum, the European Communities argues that the Panel conducted a "superficial analysis"[315] that is not a real weighing and balancing of the different factors and alternatives, because it did not balance "its arguments about the measure and the alternatives with the absolute trade-restrictiveness of the import ban and with a real evaluation of the contribution of the import ban to the objective pursued."[316]

177. Brazil counters that the Panel correctly weighed and balanced the relevant factors and proposed alternatives in its necessity analysis. Brazil argues that the Panel expressly recognized that the Import Ban is highly trade restrictive, but properly weighed and balanced this factor against the other relevant factors. In relation to contribution, Brazil considers that Article XX(b) of the GATT 1994 does not require quantification, and that, in any event, the Import Ban's contribution to the reduction of imports of retreaded tyres is "substantial".[317] Brazil adds that, because imports of retreaded tyres by definition increase the amount of waste tyres in Brazil, the contribution of the Import Ban to the reduction of risks arising from waste tyres to the maximum extent possible is "both direct and certain".[318]

178. We begin our analysis by recalling that, in order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.[319] It is through this process that a panel determines whether a measure is necessary.[320]

[314]European Communities' appellant's submission, para. 290. (underlining omitted)

[315]*Ibid*., para. 295.

[316]*Ibid*., para. 294.

[317]Brazil's appellee's submission, para. 177.

[318]*Ibid*., para. 178.

[319]Appellate Body Report, *US – Gambling*, para. 307.

[320]*Ibid*.

179. In this case, the Panel identified the objective of the Import Ban as being the reduction of the exposure to risks arising from the accumulation of waste tyres. It assessed the importance of the interests underlying this objective. It found that risks of dengue fever and malaria arise from the accumulation of waste tyres and that the objective of protecting human life and health against such diseases "is both vital and important in the highest degree".[321] The Panel noted that the objective of the Import Ban also relates to the protection of the environment, a value that it considered—correctly, in our view—important.[322] Then, the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective. It appears from the Panel's reasoning that it considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness. This finding of the Panel does not appear erroneous to us.[323]

180. The Panel then proceeded to examine the alternatives to the Import Ban proposed by the European Communities. The Panel explained that some of them could not be viewed as alternatives to the Import Ban because they were complementary to it and were already included in Brazil's comprehensive policy.[324] Next, the Panel compared the other alternatives proposed by the European Communities—landfilling, stockpiling, incineration, and material recycling—with the Import Ban, taking into consideration the specific risks associated with these proposed alternatives. The Panel concluded from this comparative assessment that none of the proposed options was a reasonably available alternative to the Import Ban.

181. The European Communities argues that the Panel failed to make a proper collective assessment of all the proposed alternatives, a contention that does not stand for the following reasons. First, the Panel did refer to its collective examination of these alternatives in concluding that "none of these, either individually *or collectively*, would be such that the risks arising from waste tyres in Brazil would be safely eliminated, as is intended by the current import ban."[325] Secondly, as noted by

[321]Panel Report, para. 7.210. (footnote omitted)

[322]*Ibid.*, para. 7.112.

[323]*Supra*, paras. 150-155.

[324]For example, measures to encourage domestic retreading and improve the retreadability of domestic used tyres, a better implementation of the import ban on used tyres, and a better implementation of existing collection and disposal schemes. See also Panel Report, paras. 7.169, 7.171, and 7.178.

[325]*Ibid.*, para. 7.214. (emphasis added)

the Panel and discussed above, some of the proposed alternatives are not real substitutes for the Import Ban since they complement each other as part of Brazil's comprehensive policy.[326] Finally, having found that other proposed alternatives were not reasonably available or carried their own risks, these alternatives would not have weighed differently in a collective assessment of alternatives.

182. In sum, the Panel's conclusion that the Import Ban is necessary was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban. The analytical process followed by the Panel is consistent with the approach previously defined by the Appellate Body.[327] The weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement. We therefore do not share the European Communities' view that the Panel did not "actually" weigh and balance the relevant factors[328], or that the Panel made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban.

183. In the light of all these considerations, we are of the view that the Panel did not err in the manner it conducted its analysis under Article XX(b) of the GATT 1994 as to whether the Import Ban was "necessary to protect human, animal or plant life or health".

B. *The Panel's Necessity Analysis and Article 11 of the DSU*

184. The European Communities claims that the Panel breached its duties under Article 11 of the DSU in its analysis of the "necessity" of the Import Ban under Article XX(b) of the GATT 1994. In particular, the European Communities submits that the Panel failed to make an objective assessment of the facts in its assessment of the contribution of the Import Ban to the achievement of its objective, and in its examination of the proposed alternatives.

[326]Panel Report, para. 7.213.

[327]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Gambling*, para. 306; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70.

[328]European Communities' appellant's submission, para. 285.

1. Article 11 of the DSU and the Panel's Analysis of the Contribution of the Import Ban to the Achievement of Its Objective

185. We recall that Article 11 requires a panel to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case". This assessment implies, among other things, that a panel must consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence.[329]

186. Within these parameters, it is generally "within the discretion of the panel to decide which evidence it chooses to utilize in making findings"[330], and panels are "not required to accord to factual evidence of the parties the same meaning and weight as do the parties".[331] A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence"[332]—and the Appellate Body "will not interfere lightly with the panel's exercise of its discretion".[333] Thus, a participant challenging a panel's findings of fact under Article 11 of the DSU is required to demonstrate that the panel has exceeded the bounds of its discretion as the trier of facts.

187. Against this background, we turn to the contentions of the European Communities. First, the European Communities argues that there was an insufficient factual foundation for the Panel's conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that were not capable of being retreaded[334], and that the Panel ignored "substantial evidence" produced by the European Communities demonstrating the existence of "low-quality non-retreadable tyres"[335] in the Brazilian market.

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[329]Appellate Body Report, *EC – Hormones*, paras. 132 and 133. See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; Appellate Body Report, *US – Gambling*, para. 363; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; and Appellate Body Report, *US – Carbon Steel*, para. 142.

[330]Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

[331]Appellate Body Report, *Australia – Salmon*, para. 267.

[332]Appellate Body Report, *EC – Asbestos*, para. 161.

[333]Appellate Body Report, *US – Wheat Gluten*, para. 151. (footnote omitted)

[334]Panel Report, para. 7.137; European Communities' appellant's submission, paras. 183 and 184.

[335]European Communities' appellant's submission, para. 183. (footnote omitted)

188. Brazil submits that the Panel's conclusion is supported by the evidence on record and adds that high rates of retreadability in the country demonstrate that new tyres sold in Brazil "generally have [the] potential for future retreading".[336]

189. We observe that, in support of its position that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres" that are not suitable for retreading, the Panel referred to standards applied to new tyres sold in Brazil that are "strict technical and performance standards that are based on international standards".[337] The European Communities argues that potential retreadability is not an element of these standards and that, therefore, the Panel's position on the retreadability of new tyres sold in Brazil had no factual basis.[338] We are not persuaded by this argument. The Panel's position was not that these standards include retreadability but, rather, that they result in a level of quality for new tyres that increases the potential for them to be retreaded.[339] Thus, the Panel's finding did not lack a factual basis since there was a relationship between the standards to which the Panel referred and its conclusion that it had "no reason to believe that new tyres sold in Brazil are low-quality tyres"[340] that are not retreadable.

190. Nor did the Panel disregard the evidence presented by the European Communities in reaching its conclusion on retreadability. To the contrary, the Panel expressly referred to various studies submitted by the European Communities in Exhibits EC-15 and EC-67 through EC-71, which related to the existence of "cheap low-quality new tyres in Brazil".[341] The Panel simply attached more weight to other pieces of evidence that were before it[342], as Article 11 of the DSU entitles it to do.[343]

191. The European Communities asserts further that the Panel relied on "arbitrarily chosen pieces of evidence" and failed to consider contradictory evidence[344] in basing its finding that "at least some domestic used tyres are being retreaded in Brazil"[345] exclusively on a statement contained in a report by the Associação Brasileira do Segmento de Reforma de Pneus (the "ABR") (Brazilian Association

[336]Brazil's appellee's submission, para. 116.

[337]Panel Report, para. 7.137.

[338]European Communities' appellant's submission, para. 184.

[339]Panel Report, para. 7.137.

[340]*Ibid*.

[341]*Ibid*., footnote 1252 to para. 7.137 (referring to European Communities' oral statement at the first Panel meeting, para. 28; and European Communities' response to Question 11 posed by the Panel, Panel Report, pp. 254 and 255, in turn referring to Exhibits EC-15 and EC-67 through EC-71 submitted by the European Communities to the Panel).

[342]*Ibid*., para. 7.137.

[343]Appellate Body Report, *EC – Asbestos*, para. 161.

[344]European Communities' appellant's submission, para. 185.

[345]Panel Report, para. 7.136.

of the Retreading Industry) (the "ABR Report").[346] According to the European Communities, the Panel neglected to consider evidence contained in a second report by the ABR[347] that contradicted this statement.[348] We do not find merit in this argument. The Panel relied on various studies and reports other than the ABR Report.[349] Moreover, the Panel took into account the evidence in the second report by the ABR[350] as the express reference it made to that report confirms.[351]

192. The European Communities next charges the Panel with failing to discount the evidentiary value of Technical Note 001/2006 of the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial ("INMETRO") (National Institute for Metrology, Standardization and Industrial Quality)[352], on the grounds that it was issued during the course of the Panel proceedings, and with neglecting to consider contradictory evidence contained in an earlier INMETRO Technical Note 83/2000.[353]

193. It is well settled that a panel may consider a piece of evidence that post-dates its establishment.[354] Thus, INMETRO Technical Note 001/2006 was clearly an admissible piece of evidence. The European Communities, however, seems to suggest that the fact that INMETRO Technical Note 001/2006 post-dates the establishment of the Panel undermines its "evidentiary value", because Brazil was well aware of the significance of INMETRO Technical Note 001/2006 at that time. In our view, this amounts to an argument that the Panel should have attached more weight to one piece of evidence than to another, and does not suffice to demonstrate that the Panel exceeded the bounds of its discretion by attaching more weight to INMETRO Technical Note 001/2006—a

[346]*Supra*, footnote 41.

[347]*Supra*, footnote 43.

[348]European Communities' appellant's submission, paras. 186 and 187.

[349]For example, the Panel relied on, *inter alia*, retreadability figures for the Brazilian company Mazola Comércio (Panel Report, para. 7.135 and footnote 1236 thereto (referring to Exhibit BRA-93 submitted by Brazil to the Panel)); studies by the consultancy LAFIS and the Institute of Technological Research of the State of São Paulo (*ibid*., footnote 1237 (referring to Exhibits EC-92 and BRA-159 submitted by the European Communities and Brazil, respectively, to the Panel)); a video by BS Colway (*ibid*., footnote 1239 (referring to Exhibit EC-72 submitted by the European Communities to the Panel)); and retreadability figures in Brazil (*ibid*., footnote 1241 (referring to Brazil's oral statement at the second Panel meeting, paras. 57-61; Brazil's comments on Question 107 posed by the Panel to the European Communities, Panel Report, pp. 317-323; Brazil's response to Question 117 posed by the Panel, Panel Report, pp. 332-334; and Exhibit BRA-162 submitted by Brazil to the Panel)) and in other countries (*ibid*., footnote 1242 (referring to Brazil's first written submission to the Panel, para. 79, where Brazil provided some examples of retreadability figures for the United Kingdom, the United States, Australia, and France)). See also Brazil's response to Question 17 posed by the Panel, *ibid*., p. 257.

[350]Exhibit BRA-157, *supra*, footnote 43.

[351]See Panel Report, footnote 1238 to para. 7.135 (referring to Exhibit BRA-157, *supra*, footnote 43).

[352]Exhibit BRA-163 submitted by Brazil to the Panel.

[353]European Communities' appellant's submission, paras. 188 and 189 (referring to INMETRO Technical Note 83/2000 (Exhibit EC-45 submitted by the European Communities to the Panel)).

[354]This was confirmed by the Appellate Body in its Report, *EC – Selected Customs Matters*, at para. 188.

more recent document—than to INMETRO Technical Note 83/2000. Furthermore, the Panel did not neglect INMETRO Technical Note 83/2000. As the European Communities acknowledges[355], the Panel expressly referred to this particular piece of evidence in its analysis.[356]

194. The European Communities further maintains that the Panel ignored evidence contained in a study by the consultancy LAFIS[357] indicating that the rate of retreading of passenger car tyres in Brazil is below 9.99 per cent.[358] The Panel, however, specifically considered the LAFIS study in its analysis as to whether domestic used tyres are retreadable and are being retreaded in Brazil.[359] It also discussed the arguments presented by Brazil and the European Communities in relation to this figure.

195. The European Communities charges the Panel with "bolster[ing] its conclusions"[360] on the retreadability of domestic casings with speculation on future measures that Brazil may take and, in particular, in stating that "mandatory inspections are taking place in Brazil and that more frequent inspections are to be expected once Bill 5979/2001 is approved".[361] However, the Panel's finding that "mandatory inspections are taking place"[362] was based on inspection requirements imposed by Brazil's National Code of Traffic and applicable technical standards, which were in force at the time the Panel conducted its review[363], and is not vitiated by the Panel's additional reference to possible consequences of the approval of Bill 5979/2001.

196. In addition, the European Communities contends that, in analyzing the contribution of the Import Ban to the realization of the ends pursued by it, the Panel erred in failing to accord any evidentiary weight to the fact that Brazilian retreaders have sought court injunctions that permit the importation of used tyres for further retreading.[364] The European Communities claims that the Panel engaged in a "wilful exclusion"[365] of evidence relating to the importation of used tyres through court injunctions, even though this evidence was relevant because it demonstrates that Brazilian retreaded

[355]European Communities' appellant's submission, para. 189 and footnote 56 thereto.

[356]Panel Report, footnote 1240 to para. 7.135.

[357]European Communities' appellant's submission, para. 190 (referring to LAFIS report, *supra*, footnote 45, p. 11).

[358]*Ibid.*, para. 190.

[359]Panel Report, para. 7.135 and footnote 1237 thereto.

[360]European Communities' appellant's submission, para. 195.

[361]Panel Report, para. 7.138.

[362]*Ibid.*

[363]See *ibid.*, para. 7.138 (referring to Law No. 9.503 of 23 September 1997 (National Code of Traffic) (Exhibit BRA-102 submitted by Brazil to the Panel); and Brazil's response to Question 8 posed by the European Communities).

[364]European Communities' appellant's submission, para. 191.

[365]*Ibid.*, para. 192.

tyres are produced with imported casings, and casts doubt on Brazil's position that domestic casings suitable for retreading are readily available in Brazil.[366]

197. We are not persuaded that the Panel ignored evidence relating to the importation of used tyres through court injunctions in its analysis of the contribution of the Import Ban to the realization of the ends pursued by it. The Panel acknowledged these injunctions and the arguments put forth by the European Communities in its analysis of the conflicting arguments and evidence regarding the level of retreadability of tyres in Brazil.[367] In the end, the Panel ascribed more weight to evidence adduced by Brazil suggesting that "at least some domestic used tyres are being retreaded in Brazil"[368] and that "domestic used tyres are suitable for retreading".[369] It appears to us that, in proceeding in that manner, the Panel did not exceed the bounds of its discretion as the trier of facts.

198. In the light of the above considerations, we *find* that the Panel did not fail to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, when evaluating the contribution of the Import Ban to the achievement of its objective.

2. Article 11 of the DSU and the Panel's Examination of Possible Alternatives to the Import Ban

199. The European Communities contends that, in its analysis of possible alternatives to the Import Ban, the Panel did not make an objective assessment of the facts as required by Article 11 of the DSU. The European Communities' claim of error under Article 11 is directed at the Panel's appreciation of the evidence concerning a number of disposal methods for waste tyres suggested by the European Communities as alternatives to the Import Ban, namely, landfilling, controlled stockpiling, co-incineration, and material recycling.

200. According to the European Communities, the Panel's factual findings in relation to each of these alternatives were not based on an objective assessment, because the Panel ignored important facts and arguments submitted by the European Communities and referred to the evidence before it "in a selective and distorted manner".[370] The European Communities also charges the Panel with failing to consider one specific alternative to the Import Ban suggested by the European Communities, namely, the National Dengue Control Programme.[371]

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[366]European Communities' appellant's submission, paras. 192 and 193.

[367]Panel Report, para. 7.140.

[368]*Ibid.*, para. 7.136.

[369]*Ibid.*, para. 7.142.

[370]European Communities' appellant's submission, para. 247.

[371]*Supra*, footnote 53.

201. Regarding the landfilling of waste tyres, the Panel reviewed the extensive evidentiary record on the risks posed by landfills of waste tyres.[372] In the course of its analysis of this evidence, the Panel noted the distinction made by the European Communities between "uncontrolled" and "controlled" landfills[373], but observed that "the evidence on the health and environmental risks posed by landfills of waste tyres does not make a clear distinction between 'uncontrolled' and the so-called 'controlled' landfills"[374], and that its assessment of that evidence indicated that "it [was] not possible to conclude that controlled landfills do not pose risks similar to those linked to other types of waste tyre landfills."[375] Therefore, contrary to the European Communities' assertion that the Panel erred in basing its findings exclusively on evidence relating to uncontrolled landfilling, the Panel's conclusion that landfilling "may pose the very risks Brazil seeks to avoid through the import ban"[376] was based on evidence that demonstrates that risks arise indistinctively from controlled and uncontrolled landfills.

202. The European Communities also suggests that the Panel erred under Article 11 in its rejection of landfilling as an alternative to the Import Ban because it did not take into account legislation allowing some landfilling of shredded tyres in Brazil. It is true that the Panel did not refer specifically to this legislation in its analysis. We note, however, that Brazil had argued that the legislation in question was exceptional, temporary, and in no way contradicted the existence or risks generally associated with landfilling.[377] A panel enjoys discretion in assessing whether a given piece of evidence is relevant for its reasoning[378], and is not required to discuss, in its report, each and every piece of evidence.[379]

203. We turn to the European Communities' argument that the Panel did not objectively assess the facts in observing that "stockpiling as such does not 'dispose of' waste tyres" and that controlled stockpiling "may still pose considerable risks to human health and the environment".[380] The Panel did not, as the European Communities contends, erroneously treat stockpiling as a "final disposal

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[372]Panel Report, para. 7.183 and footnotes 1318 and 1319 thereto (referring to Exhibits BRA-1, BRA-8, BRA-38, BRA-41, BRA-45, and BRA-58 submitted by Brazil to the Panel).

[373]*Ibid*., para. 7.184.

[374]*Ibid*.

[375]*Ibid*. In particular, we observe that the evidence relating to the risk of tyre fires and to the long-term leaching of toxic chemicals referred to in paragraph 7.183 and footnote 1318 thereto of the Panel Report does not appear to distinguish between landfilling of whole tyres and landfilling of shredded tyres.

[376]*Ibid*., para. 7.186.

[377]Brazil's appellee's submission, para. 152.

[378]See Appellate Body Report, *EC – Hormones*, para. 132.

[379]See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 240; see also Appellate Body Report, *EC – Hormones*, para. 138.

[380]Panel Report, para. 7.188. (footnote omitted)

operation".[381] To the contrary, the Panel recognized that stockpiling is used only for temporary storage.[382] Moreover, the Panel's finding that stockpiling, even as an intermediate operation, carries risks of its own rested on various pieces of evidence, including a California Environmental Protection Agency study that concludes, in relation to controlled stockpiling, that "[a]ll tire and rubber storage facilities should be considered high-risk storage facilities."[383]

204. Regarding co-incineration, the Panel found that "Brazil has provided sufficient evidence to demonstrate that health risks exist in relation to the incineration of waste tyres, even if such risks can be significantly reduced through strict emission standards."[384] In reaching this conclusion, the Panel relied on evidence consisting of technical studies and reports of regulatory agencies relating to activities in countries other than Brazil.[385] The Panel acted within its margin of discretion as the trier of facts in considering that evidence relating to co-incineration activities in countries other than Brazil was relevant to the question of whether co-incineration poses health risks if used in Brazil, and in relying on that evidence.

205. With respect to material recycling applications such as civil engineering, rubber asphalt, rubber products, and devulcanization, the Panel found that it is not clear that they "are entirely safe"[386], and that even if they were, material recycling applications "would not be able to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection due to their prohibitive costs".[387] The European Communities contends that both of these findings lacked a proper factual foundation.

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[381]European Communities' appellant's submission, para. 255.

[382]Panel Report, footnote 1330 to para. 7.188. The Panel referred to the *Basel Convention Technical Guidelines on the Identification and Management of Used Tyres* (1999) (Exhibit BRA-40 submitted by Brazil to the Panel), p. 12, which states, *inter alia*, that "[s]tockpiling with proper control can be used only for temporary storage before an end-of-life tyre is forwarded to a recovery operation."

[383]Panel Report, para. 7.189 and footnote 1331 thereto (referring to California Environmental Protection Agency (US), Integrated Waste Management Board, "Tire Pile Fires: Prevention, Response, Remediation" (2002) (Exhibit BRA-29 submitted by Brazil to the Panel)).

[384]*Ibid*., para. 7.194.

[385]*Ibid*., para. 7.192 and footnotes 1339-1342 thereto. In particular, the Panel referred to a report which concluded that "emissions of toxic organics ... [as a result of co-incineration of waste tyres] cannot be effectively controlled." (*Ibid*., footnote 1339 (quoting Okopol Institut für Ökologie und Politik GmbH, "Expertise on the Environmental Risk Associated with the Co-Incineration of Wastes in the Cement Kiln 'Four E' of CBR Usine de Lixhe, Belgium" (circa 1998) (Exhibit BRA-46 submitted by Brazil to the Panel)) The Panel also pointed to evidence that demonstrated that "there is no scientific basis for [concluding] that burning waste tires in cement kilns is safe" (*ibid*. (quoting letter from Seymour I. Schwartz to the California Integrated Waste Management Board, dated 21 January 1998 (Exhibit BRA-49 submitted by Brazil to the Panel)), and that "[u]se [of waste tyres] in wet cement kilns is not an optimal environmental solution" (*ibid*. (quoting European Environment Agency, "Waste from road vehicles" (2001) (Exhibit BRA-108 submitted by Brazil to the Panel)).

[386]*Ibid*., para. 7.208.

[387]*Ibid*.

206. The Panel stated that "*it is not clear* whether some of these engineering applications are sufficiently safe."[388] It also expressed the view that "the evidence is *inconclusive* on whether rubber asphalt exposures are more hazardous than conventional asphalt exposures."[389] Furthermore, the Panel did "not find evidence showing that devulcanization or other forms of chemical or thermal transformation such as pyrolisis pose substantial health or environmental risks."[390] It is on the basis of these findings that the Panel concluded that "*it is not clear* that material recycling applications are entirely safe."[391] The Panel relied on numerous pieces of evidence to make these findings[392], and the European Communities has not demonstrated that this evidence cannot support the Panel's finding. Moreover, in finding that material recycling was not a reasonably available alternative to the Import Ban, the Panel relied mainly on the limited disposal capacity of these applications; safety considerations were not central to its reasoning.

207. Indeed, the Panel determined that evidence adduced in relation to civil engineering[393], rubber asphalt[394], rubber products[395], and devulcanization[396] suggested that each of these applications involve high costs that would significantly limit their ability "to dispose of a quantity of waste tyres sufficient to achieve Brazil's desired level of protection".[397] The European Communities argues that the Panel erred in rejecting material recycling applications on the basis of their costs[398], suggesting that the Panel erroneously equated *high* costs with *prohibitive* costs, when only the latter would justify a finding that a given alternative is not "reasonably available". This argument is based on an artificial

[388]Panel Report, para. 7.202. (emphasis added)

[389]*Ibid*., para. 7.205. (footnote omitted; emphasis added)

[390]*Ibid*., para. 7.207.

[391]*Ibid*., para. 7.208. (emphasis added)

[392]*Ibid*., para. 7.202 and footnote 1359 thereto.

[393]*Ibid*., para. 7.201 and footnote 1358 thereto (referring to 2006 report by the European Tyre and Rubber Manufacturers' Association (Exhibit EC-84 submitted by the European Communities to the Panel); California Environmental Protection Agency (US), Integrated Waste Management Board, "Five-Year Plan for the Waste Tire Recycling Management Program" (2003) (Exhibit BRA-36 submitted by Brazil to the Panel); and K. Cannon, "Environment; Where Mosquitoes And Tires Breed", *The New York Times*, 8 July 2001 (Exhibit BRA-130 submitted by Brazil to the Panel)).

[394]*Ibid*., para. 7.205 and footnote 1367 thereto (referring to OECD Report, *supra*, footnote 52).

[395]*Ibid*., para. 7.206 and footnote 1368 thereto (referring to J. Serumgard, "Internalization of Scrap Tire Management Costs: A Review of the North American Experience", in Proceedings of the Second Joint Workshop of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and the International Rubber Study Group on Rubber and the Environment (1998) (Exhibit BRA-125 submitted by Brazil to the Panel); and Human Resources and Social Development Canada, Rubber Industry (circa 1999) (Exhibit BRA-131 submitted by Brazil to the Panel)).

[396]*Ibid*., para. 7.207 and footnote 1371 thereto (referring to Exhibits EC-15 and EC-18 submitted by the European Communities to the Panel; and Exhibit BRA-125 submitted by Brazil to the Panel).

[397]*Ibid*., para. 7.208.

[398]European Communities' appellant's submission, para. 278.

distinction between high and prohibitive costs. Further, in our view, this is not an issue relating to the Panel's appreciation of the evidence, but rather to its legal characterization of the facts. In any event, what disqualifies these alternatives, according to the Panel, is not their high costs as such, but the effect of these high costs in limiting the disposal capacity of these methods.

208. Finally, the European Communities claims that the Panel failed to analyze as a possible alternative measure the National Dengue Control Programme, and that this failure constitutes a violation of Article 11 of the DSU.[399] We observe that the European Communities referred to the National Dengue Control Programme in its second written submission to the Panel in support of its contention that "authorities in Brazil seem to encourage material recycling as an alternative."[400] We note further that the alternative measure identified there was material recycling, and that the National Dengue Control Programme was discussed under the subheading "Material recycling" in the European Communities' written submission merely as one example of material recycling.[401] Thus, the National Dengue Control Programme was not submitted by the European Communities as a distinct alternative measure but, rather, was presented as an illustration of material recycling, which the Panel discussed extensively.

209. Accordingly, we *find* that the Panel did not fail to conduct an objective assessment of the facts, as required by Article 11 of the DSU, in finding that the disposal methods for waste tyres suggested by the European Communities were not reasonably available alternatives to the Import Ban.

C. *General Conclusion on the Necessity Analysis under Article XX(b) of the GATT 1994*

210. At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is

[399]European Communities' appellant's submission, para. 280.

[400]European Communities' second written submission to the Panel, para. 137.

[401]See *Ibid*., para. 138 under subheading II.A.4 (c) iv) "Material recycling", p. 41.

as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.

211. The European Communities proposed a series of alternatives to the Import Ban. Whereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban. As regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres. The Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives.

212. Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we *uphold* the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary to protect human, animal or plant life or health."

VI. The Panel's Interpretation and Application of the Chapeau of Article XX of the GATT 1994

A. *The MERCOSUR Exemption and the Chapeau of Article XX of the GATT 1994*

213. After finding that the Import Ban was provisionally justified under Article XX(b) of the GATT 1994[402], the Panel examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX.

[402]Panel Report, para. 7.215.

214. The chapeau of Article XX of the GATT 1994 reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

215. The focus of the chapeau, by its express terms, is on the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX.[403] The chapeau's requirements are two-fold. First, a measure provisionally justified under one of the paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members.[404]

216. Having determined that the exemption from the Import Ban of remoulded tyres originating in MERCOSUR countries resulted in discrimination in the application of the Import Ban, the Panel examined whether this discrimination was arbitrary or unjustifiable. The Panel concluded that, as of the time of its examination, the operation of the MERCOSUR exemption had not resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination", within the meaning of the chapeau of Article XX.[405] The Panel also found that the MERCOSUR exemption had not been shown "to date" to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade", within the meaning of the chapeau of Article XX.[406] The European Communities appeals these findings of the Panel.

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[403]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20; Appellate Body Report, *US – Gambling*, para. 339.

[404]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Gambling*, para. 339.

[405]Panel Report, para. 7.289.

[406]*Ibid*., paras. 7.354 and 7.355.

1. The MERCOSUR Exemption and Arbitrary or Unjustifiable Discrimination

217. Regarding the issue of whether the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail, the Panel noted, first, that the health impact of remoulded tyres imported from MERCOSUR countries and their European counterparts can be expected to be comparable.[407] The Panel also observed that it was only after a MERCOSUR tribunal found Brazil's ban on the importation of remoulded tyres to constitute a new restriction on trade prohibited under MERCOSUR that Brazil exempted remoulded tyres originating in MERCOSUR countries from the application of the Import Ban.[408] For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR."[409] The Panel added that the discrimination arising from the MERCOSUR exemption was not "*a priori* unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."[410]

218. The European Communities argued before the Panel that Brazil was at least partially responsible for the ruling that resulted in the MERCOSUR exemption because it did not defend itself in the MERCOSUR proceedings on grounds related to human health and safety.[411] The Panel was not persuaded by this submission. Indeed, the Panel considered it would not be appropriate for it "to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings."[412]

219. For the Panel, the MERCOSUR ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary.[413] The Panel indicated, however, that it was not suggesting that "the invocation of any international agreement would be sufficient under any circumstances, in order to justify the existence of discrimination in the

[407]Panel Report, para. 7.270.

[408]*Ibid*., para. 7.271.

[409]*Ibid*., para. 7.272.

[410]*Ibid*., para. 7.273.

[411]Article 50(d) of the Treaty of Montevideo provides for an exception similar to Article XX(b) of the GATT 1994. (See *infra*, footnote 443)

[412]Panel Report, para. 7.276 and footnote 1451 thereto.

[413]*Ibid*., para. 7.281.

application of a measure under the chapeau of Article XX."[414] The Panel acknowledged that "casings from non-MERCOSUR countries, as well as casings originally used in MERCOSUR, may be retreaded in a MERCOSUR country and exported to Brazil as originating in MERCOSUR."[415] The Panel underscored that, "[i]f such imports were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination."[416] However, as of the time of the Panel's examination, "volumes of imports of retreaded tyres under the exemption appear not to have been significant."[417] The Panel concluded that the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination.[418]

220. The European Communities claims that the Panel erred in its interpretation and application of the term "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, and in finding that the MERCOSUR exemption does not constitute such discrimination. According to the European Communities, whether a measure involves arbitrary or unjustifiable discrimination can only be determined by taking into account the objective of the measure at issue, in this case, the protection of life and health from risks arising from mosquito-borne diseases and tyre fires. A measure will not be arbitrary if it "appears as reasonable, predictable and foreseeable"[419] in the light of this objective. It follows, according to the European Communities, that the Panel erred in finding that the MERCOSUR exemption did not constitute arbitrary discrimination because it was introduced in response to a ruling of a MERCOSUR arbitral tribunal. The MERCOSUR exemption does not further but may undermine the stated objective of the measure. For this reason, it must be regarded as "unreasonable, contradictory, and thus arbitrary".[420] For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau. The

[414]Panel Report, para. 7.283. The Panel also considered that it was not contrary to the terms of Article XXIV:8(a) of the GATT 1994—which specifically excludes measures taken under Article XX from the requirement to liberalize "substantially all the trade" within a customs union—to take into account, as it did, "the fact that the MERCOSUR exemption was adopted as a result of Brazil's obligations under MERCOSUR." (*Ibid*., para. 7.284)

[415]*Ibid*., para. 7.286.

[416]*Ibid*., para. 7.287.

[417]*Ibid*., para. 7.288. The Panel noted that imports of retreaded tyres under the MERCOSUR exemption had increased tenfold since 2002, from 200 to 2,000 tons per year by 2004. For the Panel, "[t]hat figure remains much lower than the 14,000 tons per year imported from the European Communities alone prior to the imposition of the import ban." (*Ibid*. (referring to European Communities' first written submission to the Panel, para. 80))

[418]*Ibid*., para. 7.289.

[419]European Communities' appellant's submission, para. 321.

[420]*Ibid*., para. 323.

European Communities adds that, in any event, the MERCOSUR tribunal did not oblige Brazil to discriminate between its MERCOSUR partners and other WTO Members, and that Brazil could have implemented the ruling by lifting the Import Ban for all third countries.[421]

221. With respect to the Panel's finding that unjustifiable discrimination could arise if imports under the MERCOSUR exemption were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined[422], the European Communities argues that the Panel applied a test that has no basis in the text of Article XX and no support in the case law of the Appellate Body or of previous panels. The European Communities also notes that "the level of imports in a given year may be subject to strong fluctuations, and for this reason ... is entirely inadequate for the purposes of assessing the compatibility of a measure with Article XX".[423]

222. Brazil, for its part, supports the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied in a manner that constitutes "arbitrary discrimination", contrary to the chapeau of Article XX. In addition, Brazil disputes the European Communities' argument that what constitutes "arbitrary discrimination" must be determined only in relation to the objective of the Import Ban. According to Brazil, the specific contents of the measure, including its policy objectives, must be examined under the exceptions listed in the paragraphs of Article XX. The chapeau of Article XX requires panels to examine whether the measure at issue is applied reasonably, in a manner that does not result in an abusive exercise of a Member's right to pursue its policy objectives. Brazil adds, for the sake of argument, that the Panel in any event considered the objective of the Import Ban when it determined that, at the time of its examination, volumes of imports of retreaded tyres under the MERCOSUR exemption did not significantly undermine the objective of the Import Ban. Furthermore, according to Brazil, the Panel was correct in finding that the ruling of the MERCOSUR tribunal provided a rational basis for the adoption of the MERCOSUR exemption.

223. For Brazil, the operation of the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute "unjustifiable discrimination". The Panel determined how Brazil's policy objective of reducing to the maximum extent possible unnecessary generation of tyre waste was being affected by imports of retreaded tyres under the MERCOSUR exemption. The level of imports and their effect on the objective of the Import Ban were relevant, in particular, because the chapeau of Article XX focuses on the application of the measure at issue.

[421]European Communities' appellant's submission, para. 332.

[422]Panel Report, para. 7.287.

[423]European Communities' appellant's submission, para. 340.

224. We begin our analysis by recalling that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.[424] In *US – Shrimp*, the Appellate Body stated that "[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith."[425] The Appellate Body added that "[o]ne application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.'"[426] Accordingly, the task of interpreting and applying the chapeau is "the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."[427] The location of this line of equilibrium may move "as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[428]

225. Analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination. Thus, we observe that, in *US – Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue.[429] As it found them unsatisfactory, the Appellate Body concluded that the application of the baseline establishment rules resulted in arbitrary or unjustifiable discrimination.[430] In *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. The assessment of these factors by the Appellate Body was part

[424]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

[425]Appellate Body Report, *US – Shrimp*, para. 158.

[426]*Ibid*. (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), chap. 4, at 125).

[427]*Ibid*., para. 159.

[428]*Ibid*.

[429]The *US – Gasoline* case involved a programme aiming to ensure that pollution from gasoline combustion did not exceed 1990 levels. Baselines for the year 1990 were set as a means for determining compliance with the programme requirements. These baselines could be either individual or statutory, depending on the nature of the entity concerned. Whereas individual baselines were available to domestic refiners, they were not to foreign refiners.

The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. (Appellate Body Report, *US – Gasoline*, pp. 25-26, DSR 1996:I, 3, at 23-24) Secondly, the United States explained that imposing the statutory baseline requirement on domestic refiners as well was not an option, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. (*Ibid*., p. 28, DSR 1996:I, 3, at 26-27)

[430]*Ibid*., p. 29, DSR 1996:I, 3, at 27.

of an analysis that was directed at the cause, or the rationale, of the discrimination.[431] *US – Shrimp (Article 21.5 – Malaysia)* concerned measures taken by the United States to implement recommendations and rulings of the DSB in *US – Shrimp*. The Appellate Body's analysis of these measures under the chapeau of Article XX focused on whether discrimination that might result from the application of those measures had a legitimate cause or rationale in the light of the objectives listed in the paragraphs of Article XX.[432]

226. The Appellate Body Reports in *US – Gasoline*, *US – Shrimp*, and *US – Shrimp (Article 21.5 – Malaysia)* show that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence. In this case, Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal. This ruling arose in the context of a challenge initiated by Uruguay against Brazil's import ban on remoulded tyres, on the grounds that it constituted a new restriction on trade prohibited under MERCOSUR. The MERCOSUR arbitral tribunal found Brazil's restrictions on the importation of remoulded tyres to be a violation of its obligations under MERCOSUR. These facts are undisputed.

227. We have to assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres. In doing so, we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the paragraphs of that provision.[433] In our view, there is

[431]These factors were: (i) the discrimination that resulted from a "rigid and unbending requirement" (Appellate Body Report, *US – Shrimp*, para. 177; see also para. 163) that countries exporting shrimp into the United States adopt a regulatory programme that is essentially the same as the United States' programme; (ii) the discrimination that resulted from the failure to take into account different conditions that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles (*ibid*., paras. 163 and 164); (iii) the discrimination that resulted from the application of the measure was "difficult to reconcile with the declared policy objective of protecting and conserving sea turtles" (*ibid*., para. 165), because, in some circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market; and (iv) the discrimination that resulted from the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members (*ibid*., paras. 166 and 172).

[432]Thus, the Appellate Body endorsed the panel's conclusion that conditioning market access on the adoption of a regulatory programme for the protection and conservation of sea turtles comparable in effectiveness—as opposed to the adoption of "essentially the same" regulatory programme—"allows for sufficient flexibility in the application of the measure so as to avoid 'arbitrary or unjustifiable discrimination'". (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 144) The Appellate Body also considered that the measures adopted by the United States permitted a degree of flexibility that would enable the United States to consider the particular conditions prevailing in Malaysia, notably because it provides that, in making certification determinations, the United States authorities "shall also take fully into account other measures the harvesting nation undertakes to protect sea turtles". (*Ibid*., para. 147)

[433]Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 21.

such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. We note, for example, that one of the bases on which the Appellate Body relied in *US – Shrimp* for concluding that the operation of the measure at issue resulted in unjustifiable discrimination was that one particular aspect of the application of the measure (the measure implied that, in certain circumstances, shrimp caught abroad using methods identical to those employed in the United States would be excluded from the United States market[434]) was "difficult to reconcile with the declared objective of protecting and conserving sea turtles".[435] Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.

228. In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

229. The Panel considered that the MERCOSUR exemption resulted in discrimination between MERCOSUR countries and other WTO Members, but that this discrimination would be "unjustifiable" only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined".[436] The Panel's interpretation implies that the determination of whether discrimination is unjustifiable depends on the quantitative impact of this discrimination on the achievement of the objective of the measure at issue. As we indicated above, analyzing whether discrimination is

[434]Appellate Body Report, *US – Shrimp*, para. 165.

[435]*Ibid*.

[436]Panel Report, para. 7.287.

"unjustifiable" will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination. By contrast, the Panel's interpretation of the term "unjustifiable" does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the *effects* of the discrimination. The Panel's approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of "arbitrary or unjustifiable discrimination" in previous cases.[437]

230. Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above[438], the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.

231. We also note that the Panel found that the discrimination resulting from the MERCOSUR exemption is not arbitrary. The Panel explained that this discrimination cannot be said to be "capricious" or "random"[439] because it was adopted further to a ruling within the framework of MERCOSUR.[440]

232. Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a

[437]See *supra*, paras. 225 and 226. We also observe that the Panel's approach was based on a logic that is different in nature from that followed by the Appellate Body when it addressed the national treatment principle under Article III:4 of the GATT 1994 in *Japan – Alcoholic Beverages II*. In that case, the Appellate Body stated that Article III aims to ensure "equality of competitive conditions for imported products in relation to domestic products". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, 97, at 109) The Appellate Body added that "it is irrelevant that 'the trade effects' of the [measure at issue], as reflected in the volumes of imports, are insignificant or even non-existent". (*Ibid*., at 110) For the Appellate Body, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products." (*Ibid*. (footnote omitted))

[438]*Supra*, para. 215.

[439]Panel Report, para. 7.281.

[440]*Ibid*., para. 7.272.

rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.[441]

233. Accordingly, we *find* that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination. Furthermore, we *reverse* the Panel's finding, in paragraph 7.287 of the Panel Report, that, under the chapeau of Article XX of the GATT 1994, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined". We therefore *reverse* the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination. We also *reverse* the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that, to the extent that the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination.

234. This being said, we observe, like the Panel[442], that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.[443] Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings[444], show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.[445]

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[441]See *supra*, paras. 227 and 228.

[442]Panel Report, paras. 7.275 and 7.276.

[443]Treaty of Montevideo, Instrument Establishing the Latin American Integration Association (ALADI), done at Montevideo, August 1980 (Exhibit EC-39 submitted by the European Communities to the Panel). Article 50(d) reads as follows:

> No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:
>
> ...
>
> d. Protection of human, animal and plant life and health;

[444]See Panel Report, para. 7.275.

[445]In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.

2. The MERCOSUR Exemption and Disguised Restriction on International Trade

235. The European Communities also challenges the Panel's conclusion that the MERCOSUR exemption had not been shown to date to result in the Import Ban being applied in a manner that would constitute "a disguised restriction on international trade".[446]

236. When examining whether the Import Ban was applied in a manner that constitutes a disguised restriction on international trade, the Panel was not persuaded by the European Communities' contention that Brazil adopted the prohibition on the importation of retreaded tyres as "a disguise to conceal the pursuit of trade-restrictive objectives".[447] The Panel recalled that Brazil bans both used and retreaded tyre imports; for the Panel, such an approach "is consistent with Brazil's declared objective of reducing to the greatest extent possible the unnecessary accumulation of short-lifespan tyres"[448], and "in principle deprives Brazilian retreaders of the opportunity to source casings from abroad".[449]

237. The Panel went on to examine more specifically the European Communities' argument that "the MERCOSUR exemption results in the application of the measure in a manner that constitutes a disguised restriction on international trade, as it alters trade flows in a manner that benefits, in addition to Brazilian retreaders, retreaders from other MERCOSUR countries."[450] The Panel recalled that, under this exemption, "it is quite possible for retreaders from MERCOSUR countries benefiting from the exemption to source casings from abroad (for example from the European Communities), retread them locally, and then export the retreaded tyres to Brazil under the MERCOSUR exemption."[451] The Panel referred to the reasoning that it had developed with respect to arbitrary or unjustifiable discrimination and considered that, if imports from MERCOSUR countries were to occur in significant amounts, the Import Ban would be applied in a manner that constitutes a disguised restriction on international trade.[452] The Panel was however of the view that, as of the time of its examination, "the volume of imports of remoulded tyres that has actually taken place under the MERCOSUR exemption has not been significant."[453]

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[446]Panel Report, para. 7.355.

[447]*Ibid*., para. 7.330 (quoting Panel Report, *EC – Asbestos*, para. 8.236).

[448]*Ibid*., para. 7.343.

[449]*Ibid*.

[450]*Ibid*., para. 7.350.

[451]*Ibid*., para. 7.352. (footnote omitted)

[452]*Ibid*., para. 7.353.

[453]*Ibid*., para. 7.354. (footnote omitted) See also *supra*, footnote 417.

238. On appeal, the European Communities does not challenge the Panel's conclusion that the Import Ban was adopted with the intention of protecting public health and the environment. Its appeal is, instead, limited to the specific findings made by the Panel in relation to the MERCOSUR exemption[454] and the imports of used tyres through court injunctions.[455] For the European Communities, the Panel addressed this question with a reasoning almost identical to that it had developed in respect of the existence of arbitrary or unjustifiable discrimination.[456] Therefore, the European Communities reasons, if the Panel's approach concerning arbitrary or unjustifiable discrimination is not endorsed by the Appellate Body, the Panel's finding that the MERCOSUR exemption has not been shown to date to result in a disguised restriction on international trade should also be reversed.[457] In response to questioning at the oral hearing, the European Communities confirmed that its claim in this regard is based on the same arguments it put forward in relation to arbitrary or unjustifiable discrimination.

239. We agree with the European Communities' observation that the reasoning developed by the Panel to reach the challenged conclusion was the same as that made in respect of arbitrary or unjustifiable discrimination. Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of significant imports of retreaded tyres that would undermine the achievement of the objective of the Import Ban. We explained above why we believe that the Panel erred in finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to take place in such amounts that the achievement of the objective of the Import Ban would be significantly undermined.[458] As the Panel's conclusion that the MERCOSUR exemption has not resulted in a disguised restriction on international trade was based on an interpretation that we have reversed, this finding cannot stand. Therefore, we also *reverse* the Panel's findings, in paragraphs 7.354 and 7.355 of the Panel Report, that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

[454]Panel Report, paras. 7.350-7.355.

[455]*Ibid.*, paras. 7.347-7.349 and 7.355. We examine this aspect of the European Communities' appeal in Section VI.B.2 of this Report.

[456]European Communities' appellant's submission, para. 366.

[457]*Ibid.*, paras. 367 and 368.

[458]*Supra*, Section VI.A.1.

B. *Imports of Used Tyres through Court Injunctions and the Chapeau of Article XX of the GATT 1994*

1. Imports of Used Tyres through Court Injunctions and Arbitrary or Unjustifiable Discrimination

240. The European Communities submits that the Panel erred in its analysis of the imports of used tyres through court injunctions under the chapeau of Article XX of the GATT 1994. We begin our analysis with the requirement in the chapeau of Article XX that the measure at issue not be applied in a manner that would result in "arbitrary or unjustifiable discrimination".

241. The Panel determined that the imports of used tyres through court injunctions resulted in discrimination in favour of domestic retreaders. This is because these imports enabled retreaded tyres to be produced in Brazil from imported casings, while retreaded tyres produced abroad using the same casings could not be imported.[459] Having done so, the Panel went on to examine whether this discrimination is arbitrary or unjustifiable.

242. The Panel noted that the importation of used tyres into Brazil is prohibited, and that "used tyres have been imported into Brazil in recent years only as a result of injunctions granted by Brazilian courts in specific cases."[460] The Panel found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and that, to this extent, the Import Ban was not applied in a manner that would constitute arbitrary discrimination.[461]

243. The Panel recalled, however, that the contribution of the Import Ban to the achievement of its objective "is premised on imports of used tyres being prohibited".[462] For the Panel, the granting of injunctions allowing used tyres to be imported "runs directly counter to this premise, as it effectively allows the very used tyres that are prevented from entering into Brazil *after* retreading to be imported *before* retreading."[463] The Panel examined the volumes of imports of used tyres that have taken place under the court injunctions. For the Panel, the amounts of imports of used tyres that have

[459]Panel Report, para. 7.243.

[460]*Ibid*., para. 7.292. (footnote omitted) The Panel also observed that Brazil has challenged these injunctions "with a certain degree of success". (*Ibid.*) For the Panel, the imports of used tyres were "the result of successful court challenges", and found their basis "in the customs authorities' need to give effect to judicial orders". (*Ibid*.) The Panel added that nothing in the evidence suggested that the decisions of the Brazilian courts granting those injunctions were capricious or unpredictable, nor does "the decision of the Brazilian administrative authorities to comply with the preliminary injunctions ... seem irrational or unpredictable". (*Ibid*., para. 7.293)

[461]*Ibid*., para. 7.294.

[462]*Ibid*., para. 7.295.

[463]*Ibid*. (original emphasis)

actually taken place under the court injunctions were significant.[464] Accordingly, the Panel found that, "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination."[465]

244. For the European Communities, the Panel erred in finding that the imports of used tyres through court injunctions do not result in arbitrary discrimination, given that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure".[466] Because, from the point of view of the protection of human life or health, there is no difference between, on the one hand, a retreaded tyre produced in the European Communities and, on the other hand, a retreaded tyre produced in Brazil from a casing imported from the European Communities, prohibiting imported retreaded tyres while allowing the importation of used tyres through court injunctions must be regarded as constituting arbitrary discrimination.[467] Furthermore, the European Communities maintains that, as regards the issue of whether court injunctions constitute unjustifiable discrimination, the Panel adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption.[468] The European Communities adds that the Panel's approach engenders uncertainty for the implementation of the Panel Report, because the Panel did not identify "the threshold below which the imports of used tyres would no longer be significant".[469]

245. Brazil submits that the Panel did not err in the analytical approach it adopted to determine whether imports of used tyres under court injunctions resulted in the Import Ban being applied in a manner that constituted "arbitrary or unjustifiable discrimination" under the chapeau of Article XX. For Brazil, it was appropriate for the Panel to consider the level of imports of used tyres in its determination. Brazil thus dismisses the European Communities' argument that the Panel's approach engenders uncertainty for the implementation of the Panel Report, and stresses that the monitoring of a WTO Member's compliance is an integral part of the dispute settlement system.

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[464]Panel Report, paras. 7.297 and 7.303. In particular, the Panel noted that, in 2005, Brazil imported approximately 10.5 million used tyres, compared to 1.4 million in 2000, the year in which the ban on imports of used and retreaded tyres was first enacted (Portaria SECEX 8/2000). The Panel also observed that the total number of retreaded tyres imported annually to Brazil, from all sources, was 2-3 million prior to the Import Ban. Thus, according to the Panel, in 2005, the imports of used tyres were approximately three times the amount of retreaded and used tyres combined that were imported annually prior to the Import Ban. (*Ibid.*, paras. 7.301 and 7.302)

[465]*Ibid.*, para. 7.306.

[466]European Communities' appellant's submission, para. 357.

[467]*Ibid.*

[468]*Ibid.*, para. 360.

[469]*Ibid.*, para. 363.

246. As we explained above, the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause or rationale given for the discrimination.[470] For Brazil, the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions.[471] We observe that this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible. The imports of used tyres through court injunctions even go against the objective pursued by the Import Ban. As we indicated above, there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective. Accordingly, we *find* that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

247. The Panel approached the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as it did with the MERCOSUR exemption. We explained above why we are of the view that this quantitative approach—according to which discrimination would be characterized as unjustifiable only if imports under the MERCOSUR exemption take place in such amounts that the achievement of the objective of the measure at issue would be "significantly undermined"[472]—is flawed.[473] Accordingly, we *reverse* the Panel's findings, in paragraphs 7.296 and 7.306 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban. Furthermore, for the same reasons as those explained in paragraph 232, we *reverse* the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of "capricious" or "random" action.

[470] *Supra*, Section VI.A.1.

[471] See Panel Report, paras. 7.292 and 7.293; see also Brazil's appellee's submission, para. 245.

[472] Panel Report, para. 7.287 (as regards the MERCOSUR exemption); see also para. 7.296 (with respect to the imports of used tyres through court injunctions).

[473] *Supra*, Section VI.A.1.

2. Imports of Used Tyres and Disguised Restriction on International Trade

248. The Panel found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied in a manner that constitutes a disguised restriction on international trade."[474] The Panel reasoned that the restriction on international trade inherent in the Import Ban has operated to the benefit of domestic retreaders, because "[t]he granting of court injunctions for the importation of used tyres has ... in effect meant that ... domestic retreaders have been able to continue to benefit from the importation of used tyres as material for their own activity in significant amounts, while their competitors from non-MERCOSUR countries have been kept out of the Brazilian market."[475]

249. The European Communities submits that the Panel erred in finding that the imports of used tyres through court injunctions would have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.[476] The European Communities refers to the arguments it made regarding the existence of arbitrary or unjustifiable discrimination, and reiterates its view that the Panel's reliance on import volumes for the purpose of determining compatibility with the chapeau of Article XX of the GATT 1994 is erroneous.[477]

250. Brazil argues that the Panel correctly considered the volume of imports of used tyres as part of its determination that the Import Ban was being applied in a manner that constituted a disguised restriction on international trade, and refers to the arguments that it made before the Panel in support of this position.

251. The reasoning elaborated by the Panel to reach the challenged finding was the same as that it developed in respect of "arbitrary or unjustifiable discrimination". Indeed, the Panel conditioned a finding of a disguised restriction on international trade on the existence of imports of used tyres in amounts that would significantly undermine the achievement of the objective of the Import Ban. We explained above why we consider this reasoning of the Panel erroneous. As the challenged finding results from the same reasoning that we have found to be erroneous and have rejected, this finding of the Panel cannot stand. Accordingly, we *reverse* the Panel's finding, in paragraph 7.349 of the Panel Report, that the imports of used tyres through court injunctions have resulted in the Import Ban being

[474]Panel Report, para. 7.349.

[475]*Ibid.*, para. 7.348. (footnote omitted)

[476]*Ibid.*, para. 7.349.

[477]European Communities' appellant's submission, para. 367.

applied in a manner that constitutes a disguised restriction on international trade only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban.

252. We found that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX of the GATT 1994. In the light of these findings, we *uphold*, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994.

VII. The European Communities' Claims that the MERCOSUR Exemption Is Inconsistent with Article I:1 and Article XIII:1 of the GATT 1994

253. Before the Panel, the European Communities made separate claims regarding the MERCOSUR exemption, namely, that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1 of the GATT 1994. Brazil did not contest that the MERCOSUR exemption was *prima facie* inconsistent with Articles I:1 and XIII:1, but claimed that it was justified under Articles XX(d) and XXIV of the GATT 1994.

254. After noting that the MERCOSUR exemption and the Import Ban have the same legal basis, namely, Article 40 of Portaria SECEX 14/2004[478], the Panel emphasized that, under Article 11 of the DSU, "it was required to address only those issues that are necessary for the resolution of the matter between the parties."[479] The Panel recalled its earlier findings that the Import Ban was inconsistent with Article XI:1 and not justified under Article XX(b). It then decided to exercise judicial economy in respect of the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1, and not justified under Articles XX(d) or Article XXIV of the GATT 1994. According to the Panel, the MERCOSUR exemption derives from and exists only in relation to the Import Ban. The Panel reasoned that, as it had already found that the Import Ban was inconsistent with the requirements of the GATT 1994, it was unnecessary to examine the European Communities' separate claims regarding the MERCOSUR exemption.[480]

[478]See Panel Report, para. 7.453.

[479]*Ibid.*, para. 7.454 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1996:I, 323, at 339).

[480]*Ibid.*, para. 7.455.

255. On appeal, the European Communities requests that we reverse the Panel's decision to exercise judicial economy in relation to its separate claims regarding the MERCOSUR exemption. The European Communities also requests us to complete the legal analysis and find that the MERCOSUR exemption is inconsistent with Articles I:1 and XIII:1, and not justified under Article XX(d) or Article XXIV of the GATT 1994. This request, however, is conditioned upon our upholding the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

256. As we have found that the MERCOSUR exemption results in the Import Ban being applied inconsistently with the chapeau of Article XX, the condition on which the European Communities' request is predicated has not been fulfilled. It is therefore not necessary for us to rule on the European Communities' conditional appeal. Accordingly, we do not examine the European Communities' conditional appeal and make no finding in relation to its separate claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, and not justified under Article XX(d) or Article XXIV of the GATT 1994.

257. Having said that, we observe that it might have been appropriate for the Panel to address the European Communities' separate claims that the MERCOSUR exemption was inconsistent with Article I:1 and Article XIII:1. We have previously indicated that the principle of judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute"[481], and it seems that the Panel assumed this to be the case in the present dispute. However, the Panel found that the MERCOSUR exemption resulted in the Import Ban being applied *consistently* with the requirements of the chapeau of Article XX. In view of this finding, we must acknowledge that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute. Therefore, a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[482]

[481]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[482]Appellate Body Report, *Australia – Salmon*, para. 223.

VIII. Findings and Conclusions

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

(a) with respect to the analysis of the necessity of the Import Ban under Article XX(b) of the GATT 1994:

(i) upholds the Panel's finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered "necessary" within the meaning of Article XX(b) and is thus provisionally justified under that provision; and

(ii) finds that the Panel did not breach its duty under Article 11 of the DSU to make an objective assessment of the facts;

(b) with respect to the analysis under the chapeau of Article XX of the GATT 1994:

(i) reverses the Panel's findings, in paragraphs 7.287, 7.354, and 7.355 of the Panel Report, that the MERCOSUR exemption would result in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that it results in volumes of imports of retreaded tyres that would significantly undermine the achievement of the objective of the Import Ban;

(ii) reverses the Panel's findings, in paragraphs 7.281 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in arbitrary discrimination; also reverses the Panel's findings, in paragraphs 7.288 and 7.289 of the Panel Report, that the MERCOSUR exemption has not resulted in unjustifiable discrimination; and finds, instead, that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX;

(iii) reverses the Panel's findings, in paragraphs 7.296, 7.306, 7.349, and 7.355 of the Panel Report, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban;

(iv) reverses the Panel's finding, in paragraph 7.294 of the Panel Report, that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination; and finds, instead, that the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX; and

(c) with respect to Article XX of the GATT 1994, upholds, albeit for different reasons, the Panel's findings, in paragraphs 7.357 and 8.1(a)(i) and (ii) of the Panel Report, that the Import Ban is not justified under Article XX of the GATT 1994; and

(d) with respect to the European Communities' claims that the MERCOSUR exemption is inconsistent with Article I:1 and Article XIII:1 of the GATT 1994, finds that the condition on which the European Communities' appeal is predicated is not satisfied, and therefore does not consider it.

259. The Appellate Body recommends that the DSB request Brazil to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 16th day of November 2007 by:

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Georges Abi-Saab
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

Yasuhei Taniguchi
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS332/9
3 September 2007

(07-3724)

Original: English

BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 3 September 2007, from the Delegation of the European Commission, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law covered in the Report of the Panel on *Brazil – Measures Affecting Imports of Retreaded Tyres*[1] and certain legal interpretations developed by the Panel.

2. The European Communities seeks review by the Appellate Body of the following aspects of the Report of the Panel:

(a) The Panel's finding that the import ban on retreaded tyres was necessary within the meaning of Article XX(b) of the GATT. The Panel's finding and corresponding reasoning are contained in paragraphs 7.103 to 7.216 of the Panel Report. The EC appeals this finding notably because:

- in assessing the contribution of the measure to the protection of human, animal and plant life and health, the Panel merely assesses whether the ban is capable of making a potential contribution to its stated objectives. This reasoning is inconsistent with Article XX(b) of the GATT. Moreover, in reaching its conclusion regarding the potential contribution of the ban, the Panel also fails to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU, and effectively shifts the burden of proof to the EC;

[1] WT/DS332/R, circulated on 12 June 2007.

- in assessing the reasonably available alternative measures, the Panel wrongly excludes some of the alternatives proposed by the European Communities, on the basis that those alternatives are related to the manner in which the import ban is implemented *in practice*, that they are not necessarily readily available, that they do not avoid the waste tyres arising specifically from imported retreaded tyres, that they already exist in Brazil, or that they are individually capable of disposing only of a small number of waste tyres. Moreover, the Panel has ignored important facts and arguments presented by the European Communities, has referred to the evidence submitted by the parties in a selective and distorted manner, and has effectively shifted the burden of proof to the EC. These findings are inconsistent with Article XX(b) of the GATT and with the Panel's duty to make an objective assessment of the matter before it, including of the facts of the case, as required by Article 11 of the DSU;

- contrary to Article XX (b) of the GATT, the Panel has erred by not carrying out a process of weighing and balancing the relevant factors and elements (objective pursued, trade-restrictiveness of the measure, contribution and alternatives);

(b) the Panel's finding that the exemption, from the import ban and other challenged measures, of imports of retreaded tyres from other Mercosur countries does not constitute arbitrary or unjustifiable discrimination (paragraphs 7.270 to 7.289 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(c) the Panel's finding that the imports of used tyres do not constitute arbitrary discrimination and that they constitute unjustified discrimination only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.292 to 7.294, 7.296 and 7.306 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(d) the Panel's finding that the Mercosur exemption does not constitute a disguised restriction on international trade, and that imports of used tyres would constitute a disguised restriction only to the extent that they significantly undermine the objectives of the ban (paragraphs 7.347 to 7.355 of the Panel Report). This finding is inconsistent with the chapeau of Article XX of the GATT;

(e) the Panel's decision to exercise judicial economy with respect to the European Communities' claims under Articles XIII:1 and I:1 of the GATT (paragraphs 7.453 to 7.456 and 8.2 of the Panel Report). Since the Panel found that the Mercosur exemption is not incompatible with the chapeau of Article XX GATT, a separate finding on the compatibility of this exemption with Articles XIII:1 and I:1 GATT would have been necessary to secure a positive resolution of the dispute, as required by Articles 3.3, 3.4, 3.7 and 11 of the DSU. The European Communities therefore asks the Appellate Body to find that the Mercosur exemption is incompatible with Articles XIII:1 and I:1 of the GATT, and is not justified either by Article XXIV or by Article XX(d) of the GATT.

WORLD TRADE ORGANIZATION
APPELLATE BODY

Mexico – Tax Measures on Soft Drinks and Other Beverages

Mexico, *Appellant*
United States, *Appellee*

Canada, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
Guatemala, *Third Participant*
Japan, *Third Participant*

AB-2005-10

Present:

Taniguchi, Presiding Member
Janow, Member
Sacerdoti, Member

I. Introduction

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (the "Panel Report").[1] The Panel was established to consider a complaint by the United States concerning certain tax measures and bookkeeping requirements imposed by Mexico on soft drinks and other beverages that use sweeteners other than cane sugar.

2. The measures challenged by the United States include: (i) a 20 per cent tax on the transfer or, as applicable, the importation of soft drinks and other beverages that use any sweetener other than cane sugar (the "soft drink tax"); (ii) a 20 per cent tax on specific services (commission, mediation, agency, representation, brokerage, consignment, and distribution), when such services are provided for the purpose of transferring products such as soft drinks and other beverages that use any sweetener other than cane sugar (the "distribution tax"); and (iii) a number of requirements imposed on taxpayers subject to the soft drink tax and to the distribution tax (the "bookkeeping requirements").[2] Before the Panel, the United States claimed that these measures are inconsistent with paragraphs 2 and 4 of Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

3. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to "decline to exercise its jurisdiction in this case"[3] and that it "recommend to the

[1]WT/DS308/R, 7 October 2005.

[2]These measures are described in more detail in paragraphs 2.2-2.5 of the Panel Report.

[3]Panel Report, para. 4.2.

parties that they submit their respective grievances to an Arbitral Panel, under Chapter Twenty of the NAFTA[4], which can address both Mexico's concern with respect to market access for Mexican cane sugar in the United States under the NAFTA and the United States' concern with respect to Mexico's tax measures."[5] Mexico also stated that, in the event the Panel decided to exercise jurisdiction, the Panel should find that the measures are justified pursuant to Article XX(d) of the GATT 1994.[6]

4. On 18 January 2005, the Panel issued a preliminary ruling in which it rejected Mexico's request.[7] In doing so, the Panel concluded that, "under the DSU[8], it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[9] The Panel added that, "even if it had such discretion, the Panel did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."[10]

5. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 7 October 2005, the Panel concluded that:

(a) With respect to Mexico's soft drink tax and distribution tax:

(i) As imposed on sweeteners, imported beet sugar is subject to internal taxes in excess of those applied to like domestic sweeteners, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994;

(ii) As imposed on sweeteners, imported HFCS[11] is being taxed dissimilarly compared with the directly competitive or substitutable products, so as to afford protection to the Mexican domestic production of cane sugar, in a manner inconsistent with Article III:2, second sentence, of the GATT 1994;

(iii) As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994;

(iv) As imposed on soft drinks and syrups, imported soft drinks and syrups sweetened with non-cane sugar sweeteners (including HFCS and beet sugar) are subject to internal taxes in excess of those applied to like domestic products, in a manner inconsistent with Article III:2, first sentence, of the GATT 1994.

[4]North American Free Trade Agreement (the "NAFTA").

[5]Panel Report, para. 3.2.

[6]*Ibid.*

[7]The Panel's preliminary ruling is reproduced as Annex B to the Panel Report.

[8]*Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

[9]Panel Report, para. 7.1.

[10]*Ibid.*

[11]High-fructose corn syrup ("HFCS").

> (b) With respect to Mexico's bookkeeping requirements: As imposed on sweeteners, imported beet sugar and HFCS are accorded less favourable treatment than that accorded to like products of national origin, in a manner inconsistent with Article III:4 of the GATT 1994.[12]

The Panel rejected Mexico's defence under Article XX(d) of the GATT 1994, concluding that "the challenged tax measures are not justified as measures that are necessary to secure compliance by the United States with laws or regulations which are not inconsistent with the provisions of the GATT 1994."[13] The Panel therefore recommended "that the Dispute Settlement Body request Mexico to bring the inconsistent measures … into conformity with its obligations under the GATT 1994."[14]

6. On 6 December 2005, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal[15] pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[16] On 13 December 2005, Mexico filed an appellant's submission.[17] In its appeal, Mexico challenges the Panel's preliminary ruling rejecting Mexico's request that the Panel decline to exercise jurisdiction in this case, as well as the Panel's findings concerning Article XX(d) of the GATT 1994. Mexico did not appeal the Panel's findings under Article III of the GATT 1994. On 6 January 2006, the United States filed an appellee's submission.[18] On the same day, China, the European Communities, and Japan each filed a third participant's submission.[19] Also on the same day, Canada and Guatemala each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.[20]

7. By letter dated 5 January 2006, Mexico requested authorization to correct certain clerical errors in its appellant's submission pursuant to Rule 18(5) of the *Working Procedures*. On 9 January 2006, the Appellate Body Division hearing the appeal ("the Division") invited all participants and third participants to comment on Mexico's request, in accordance with Rule 18(5). On 11 January 2006, the United States responded that, although some of the requested corrections are

[12]Panel Report, para. 9.2. (original underlining)

[13]*Ibid.*, para. 9.3.

[14]*Ibid.*, para. 9.5.

[15]WT/DS308/10 (attached as Annex I to this Report).

[16]WT/AB/WP/5, 4 January 2005.

[17]Pursuant to Rule 21(1) of the *Working Procedures*. A courtesy English translation of Mexico's appellant's submission, prepared by Mexico, was provided to the participants and third participants on 16 December 2005.

[18]Pursuant to Rule 22(1) of the *Working Procedures*.

[19]Pursuant to Rule 24(1) of the *Working Procedures*.

[20]Pursuant to Rule 24(2) of the *Working Procedures*.

not "clearly clerical", within the meaning of Rule 18(5), "[i]n the circumstances of this dispute", the United States did not object to Mexico's request. No other comments were received. By letter dated 16 January 2006, the Division authorized Mexico to correct the clerical errors in its appellant's submission but emphasized, however, that it had not been requested, and did not make, a finding "as to whether all of the corrections requested by Mexico are 'clerical' within the meaning of Rule 18(5) of the *Working Procedures*."

8. On 13 January 2006, the Appellate Body received an *amicus curiae* brief from *Cámara Nacional de las Industrias Azucarera y Alcoholera* (National Chamber of the Sugar and Alcohol Industries) of Mexico.[21] The Division did not find it necessary to take the brief into account in resolving the issues raised in this appeal.

9. The oral hearing in this appeal was held on 18 January 2006. The participants and third participants presented oral arguments (with the exception of Guatemala) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Mexico – Appellant*

1. Exercise of Jurisdiction

10. Mexico argues that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. According to Mexico, the Panel's decision was primarily based on the Panel's view that Article 11 of the DSU "compels a WTO [p]anel to address the claims" on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties to the dispute and that, therefore, a WTO panel has no discretion to decline to exercise validly established jurisdiction.[22] Mexico submits that this is incorrect and ignores the fact that, like other international bodies and tribunals, WTO panels have certain "implied jurisdictional powers"[23] that derive from their nature as adjudicative bodies. According to Mexico, such powers include the power to refrain from exercising substantive

[21]At the oral hearing, Mexico stated that its arguments are set out in it's appellant's and oral submissions. Mexico added, however, that it would not object should the Appellate Body decide to accept the *amicus* brief. The United States noted that the *amicus* brief had been received late in the proceedings and that it presented new arguments and claims of error that were not part of Mexico's Notice of Appeal. Accordingly, while taking the view that the Appellate Body had the authority to accept the brief, the United States argued that it should decline to do so in the circumstances of this dispute.

[22]Mexico's appellant's submission, para. 64 ("*obliga a un Grupo Especial de la OMC a abordar las reclamaciones*").

[23]*Ibid.*, para. 65 ("*facultades implícitas en relación con su competencia*").

jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law"[24] under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions or when one of the disputing parties refuses to take the matter to the "appropriate forum".[25] Mexico contends, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[26] concerning the conditions provided under the NAFTA for access of Mexican sugar to the United States market, and that only a NAFTA panel could resolve the dispute between the parties.

11. Mexico further emphasizes that there is nothing in the DSU that explicitly rules out the existence of a WTO panel's power to decline to exercise its jurisdiction even in a case that is properly brought before it. Mexico adds that the application by panels of the principle of "judicial economy" illustrates that notwithstanding the requirement of Article 7.2 of the DSU that panels address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute, WTO panels can decide not to address certain claims. Thus, according to Mexico, there is no question that WTO panels have an implicit or inherent competence. As other examples of panels' "implied jurisdictional powers", Mexico points, *inter alia*, to the power of panels to determine whether they have substantive jurisdiction over a matter and the power to decide all matters that are inherent to the "adjudicative function"[27] of panels.

12. Finally, referring to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, Mexico calls into question the "applicability" of its WTO obligations towards the United States in the context of this dispute.[28]

2. Article XX(d) of the GATT 1994

13. Mexico appeals the Panel's finding that the measures at issue are not justified pursuant to Article XX(d) of the GATT 1994. In addition, Mexico requests the Appellate Body to complete the analysis and find that its tax measures are justified under Article XX(d) of the GATT 1994, because

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[24]Mexico's appellant's submission, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional*").

[25]*Ibid.* ("*foro adecuado*").

[26]*Ibid*.

[27]*Ibid.*, para. 67 ("*función jurisdiccional*").

[28]See *ibid.*, paras. 73-74. The passage of the ruling that Mexico refers to reads as follows:

> … one party cannot avail himself of the fact that the other has not fulfilled some obligation … if the former party has … prevented the latter … from having recourse to the tribunal which would have been open to him.

(Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No. 9, p. 31) (underlining added by Mexico omitted)

the measures are necessary "to secure compliance" by the United States of its obligations under the NAFTA.

14. Mexico asserts that the Panel erred in finding that the measures at issue are not designed "to secure compliance" within the meaning of Article XX(d). According to Mexico, this finding is based on an erroneous interpretation of the terms "to secure compliance" as involving enforcement action within a *domestic* legal system. Mexico argues that there is no basis to exclude action taken to enforce *international* treaty obligations from the scope of Article XX(d). Mexico adds that, in the broader context of international law, countermeasures are measures aimed at securing compliance with international obligations. Mexico further submits that the Panel erred by equating the concept of "enforcement" with that of "coercion". In Mexico's view, the Panel's effort to distinguish between actions at the domestic level and at the international level based on its understanding of the concept of coercion in this dispute has no textual basis, because Article XX(d) simply does not refer to the use of coercion.

15. Moreover, Mexico asserts that the Panel erred by confusing the issue of the "design" of the measure under Article XX(d) with the issue of its "outcome".[29] Rather than examining whether Mexico's measures were put in place in order to secure the United States' compliance with its NAFTA obligations, the Panel considered the effectiveness of those measures. Mexico emphasizes that "even if the outcome of a measure is completely uncertain or unpredictable, the measure in question can, nevertheless be 'designed to secure compliance with laws and regulations' within the meaning of Article XX(d)".[30] Contrary to the Panel's finding, the issue of the likely outcome of a given measure is not legally relevant to the assessment of the design of the measure under Article XX(d). Thus, Mexico takes issue with the Panel's finding that the "uncertain outcome of international countermeasures is a reason for disqualifying them as measures eligible for consideration under Article XX(d)".[31] Mexico notes, in this regard, that nothing in the text of Article XX(d) suggests that any measure is *a priori* ineligible as a measure "to secure compliance with laws and regulations" on the basis of its "uncertain outcome".

16. Turning to the meaning of the terms "laws and regulations" in Article XX(d), Mexico notes that the Panel's interpretation of these terms is based on the erroneous conclusions reached by the Panel with respect to the terms "to secure compliance". Mexico submits that the words "laws" and

[29]Mexico's appellant's submission, para. 98 ("*destino*"; "*resultado*").

[30]*Ibid.*, para. 102 ("*aun si el resultado de la medida es totalmente incierto, impredecible, bien puede estar 'destinada a lograr la observancia de las leyes y reglamentos' en el sentido del artículo XX(d)*").

[31]*Ibid.*, para. 104 ("*el resultado incierto de las contramedidas internacionales es una razón para excluirlas como medidas que pueden ser objeto de consideración, en el marco del inciso (d) del artículo XX*") (quoting Panel Report, para. 8.187).

"regulations" are expressly qualified in other provisions of the covered agreements; the absence of qualifying language in Article XX(d) thus supports the view that the terms are not limited to *domestic* laws or regulations, but include international agreements. Mexico adds that a review of the Article XX exceptions reveals that only three—(paragraphs (c), (g), and (i))—are, expressly or by implication, concerned with an activity that would occur *within* the territory of the Member seeking to justify its measures. This position, according to Mexico, is supported by the Appellate Body's findings in *US – Shrimp (Article 21.5 – Malaysia)*.[32]

17. Mexico further requests, in the event the Appellate Body should reverse the Panel's conclusion, that it complete the Panel's analysis and find that the Mexican measures are "necessary" within the meaning of Article XX(d) and meet the requirements of the chapeau of that Article. According to Mexico, the uncontested facts and evidence in the Panel record, and the Panel's acknowledgement that Mexico's measures have "attracted the attention" of the United States, provide an ample basis on which to complete the analysis and conclude that the measures are "necessary" within the meaning of Article XX(d).

18. Mexico observes that, before the Panel, the United States could not identify any alternative measure that Mexico could and should have used in order to attain its legitimate objective. It further explains that the fact that a measure does not or has not yet achieved its objective does not mean that it is not "necessary" within the meaning of Article XX(d). It may mean that it is insufficient to secure compliance, or that it is insufficient to secure immediate compliance, but can do so over time; however, it says nothing about whether the measure is "necessary". Moreover, Mexico submits that the evidence on the record demonstrates that the measures at issue have contributed to securing compliance in the circumstances of this case by changing the dynamics of the NAFTA dispute and forcing the United States to pay attention to Mexico's grievances, and also contradicts the Panel's finding that Mexico's measures do not contribute to securing compliance in this dispute.

19. As regards the chapeau of Article XX of the GATT 1994, Mexico asserts that its measures neither arbitrarily nor unjustifiably discriminate between countries where the same conditions prevail. Rather than constituting "arbitrary or unjustifiable discrimination", the measures constitute "limited

[32]Mexico's appellant's submission, paras. 174 and 177-178 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 123-124 and 128-130).

sectoral retaliation in the relevant market segment (*i.e.*, the sweeteners market)."[33] Nor can the measures be said to be a "disguised restriction on [international] trade" because they constitute "a proportionate, legitimate and legally justified response to actions and omissions of the United States"[34], and, furthermore, the measures have been published.

20. Finally, Mexico argues that the Panel, "separately and in addition"[35] to the previous errors, failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[36] According to Mexico, the Panel's finding is based solely on the Panel's view that attracting the attention of the United States is not equivalent to securing compliance with a law or regulation and ignores that "achieving the objectives sought by the countermeasures can take time".[37]

B. *Arguments of the United States – Appellee*

1. Exercise of Jurisdiction

21. The United States submits that the Panel properly rejected Mexico's request for the Panel to refrain from exercising jurisdiction in the present dispute.

22. Referring to Article 11 of the DSU, the United States observes that, if the Panel had declined to exercise jurisdiction over this dispute, or had agreed to Mexico's request that it refrain from issuing findings and recommendations, the Panel would have made no findings on the United States' claims that Mexico's tax measures are inconsistent with Article III of the GATT 1994. This would have left the DSB "unable to give any rulings or (as is appropriate in this dispute) to make any

[33]Mexico's appellant's submission, para. 173 ("*retorsiones sectoriales limitadas al segmento del mercado relevante (i.e., el mercado de los edulcorantes)*"). Mexico asserts that the facts of this case are similar to the situation examined by the Appellate Body in *US – Shrimp (Article 21.5 – Malaysia)*. Mexico explains that, in that dispute, the Appellate Body found that a United States unilateral measure was not inconsistent with the chapeau of Article XX of the GATT 1994. According to Mexico, in that case, the Appellate Body did not require the United States to conclude an international agreement with the disputing parties, but rather required it to have made good faith efforts in that direction. In this case, Mexico argues that it has sought to resolve the dispute through NAFTA and bilateral negotiations, but "the United States has essentially blocked Mexico's ability to have its grievance resolved." (Mexico's appellant's submission, paras. 174-181 ("*Estados Unidos esencialmente ha bloqueado la posibilidad de México para resolver su agravio.*"))

[34]*Ibid.*, para. 182 ("*una respuesta proporcional, legítima y legalmente justificada a las acciones y omisiones de Estados Unidos*").

[35]*Ibid.*, heading III.E ("*independiente y adicional*").

[36]Panel Report, para. 8.186. See also, Mexico's Notice of Appeal, para. 3.

[37]Mexico's appellant's submission, para. 166 ("*la consecución de los objetivos de las contramedidas puede llevar tiempo*").

recommendations"[38] in accordance with the rights and obligations under the DSU and the GATT 1994. The United States emphasizes that such a result is incompatible with the text of the DSU and would have required the Panel to disregard the mandate given to it by the DSB. Moreover, the United States observes that the Panel's own terms of reference in this dispute instructed the Panel to examine the matter referred to the DSB by the United States and to make such findings as will assist the DSB in making the recommendations and rulings provided for under the DSU.

23. Referring to Articles 3.2 and 19.2 of the DSU, the United States adds that, if a panel were to decline to exercise jurisdiction over a particular dispute, it would diminish the rights of the complaining Member under the DSU and other covered agreements. The United States further notes that prior reports of panels and the Appellate Body also support the Panel's findings. In this regard, the United States refers to *Mexico – Corn Syrup (Article 21.5 – US)*, where the Appellate Body stated that "panels are required to address issues that are put before them by the parties to a dispute."[39]

24. The United States observes that Mexico has referred to the principle of judicial economy as an example of "situations where WTO panels have refrained from exercising validly established substantive jurisdiction on certain claims that are before them."[40] However, the United States submits that, "when a panel exercises judicial economy, it does not decline to exercise substantive jurisdiction either over a dispute or certain claims in a dispute. Rather, the panel … declines to make findings on certain claims when resolution of such claims is not necessary for the panel to fulfill its mandate under Article 11 of the DSU and its terms of reference."[41] In other words, judicial economy "does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute"[42] before it.

2. Article XX(d) of the GATT 1994

25. The United States submits that the Panel properly found that Mexico's tax measures are not designed "to secure compliance" and, thus, are not justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. It notes that previous GATT and WTO disputes in which Article XX(d) has been invoked have involved domestic laws or regulations.

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[38]United States' appellee's submission, para. 124.

[39]*Ibid.*, para. 127 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

[40]*Ibid.*, para. 129 (quoting Mexico's appellant's submission, para. 68).

[41]*Ibid.* (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340; and to Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

[42]*Ibid.*, para. 130.

26. The United States agrees with the Panel's analysis of the terms "laws or regulations" and, therefore, supports the Panel's finding that these terms refer only to *domestic* laws or regulations and not to obligations under international agreements. The United States explains that Article XX(d) refers to "laws" and "regulations" in the plural, while the singular "law" is used when referring to "international law".[43] The United States further observes that the terms "laws or regulations" precede the words "which are not inconsistent" in Article XX(d) and explains that the term "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, the WTO agreements use the word "conflict" when referring to international obligations.

27. The United States further submits that Mexico's interpretation of the terms "laws or regulations" would undermine Articles 22 and 23 of the DSU, as it would permit action, including the suspension of concessions, by any Member "outside the rules of the DSU".[44] The United States observes that Article XX(d) was not intended to provide the basis for suspending concessions under the WTO agreements upon a mere allegation of a breach of a non-WTO international agreement. Otherwise, according to the United States, "this would effectively convert WTO dispute settlement into a forum of general dispute resolution for all international agreements."[45] Furthermore, the United States argues that, if the terms "laws or regulations" are read to include obligations under non-WTO agreements, the WTO dispute settlement system "would become a forum for WTO Members to allege and obtain findings as to the consistency of another Member's measure with any non-WTO agreement."[46] The United States, therefore, disagrees with Mexico's arguments that the phrase "laws or regulations" in Article XX(d) refers to international agreements.

28. With respect to the Panel's interpretation of the phrase "to secure compliance", the United States notes that the references to coercion were intended "merely [to] reinforce the Panel's view that 'enforcement' does not refer to the international level"[47] and not, as Mexico argues, to create an additional requirement for justifying a measure under Article XX(d). The United States therefore agrees with the Panel that the terms "to secure compliance" do not apply to measures taken by one Member to induce another Member to comply with obligations under a non-WTO treaty.

29. The United States also rejects Mexico's submission that the "Panel wrongly found that measures with an 'uncertain outcome' are '*a priori* ineligible' as measures to secure compliance with

[43]The United States observes that Article 3.2 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* also use the term "law" in the singular when referring to "public international law".

[44]United States' appellee's submission, para. 37.

[45]*Ibid.*, para. 85. (footnote omitted)

[46]*Ibid.*, para. 41.

[47]*Ibid.*, para. 54 (referring to Panel Report, paras. 8.175 and 8.178).

laws or regulations."[48] While the United States concedes that the Panel's analysis "could have admittedly been clearer"[49], it also notes that the Panel did not require certainty, and argues that the Panel's remarks on this point simply characterized Mexico's failure to "put forth *any* evidence that its tax measures were designed to [secure] compliance."[50] The United States agrees with Mexico that "Article XX(d) does not require the party invoking the defense to establish that its measure will, without a doubt or with certainty, secure compliance with laws or regulations."[51] Nevertheless, the United States submits that Mexico has to provide some evidence that the measure is "designed" to secure such compliance.

30. For all these reasons, the United States submits that the Appellate Body should uphold the Panel's conclusion that Mexico's tax measures are *not* designed to secure compliance and, thus, are *not* justified as measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994.

31. In the event the Appellate Body should reverse the Panel's finding and accept Mexico's request to complete the analysis, the United States asserts that Mexico's measures are neither "necessary" for purposes of Article XX(d), nor do they meet the requirements of the chapeau of that Article. According to the United States, Mexico has not demonstrated that the measures at issue contribute to compliance by the United States with its NAFTA obligations and "ignores"[52] the fact that the trade impact of a measure is one of the factors that must be weighed and balanced when determining whether a measure is "necessary". The impact of Mexico's measures was "essentially [to] prohibit the use of imported HFCS in Mexican soft drinks and other beverages and to reduce import volumes".[53] The United States adds that "[i]t is difficult to understand how discriminating against imports from potentially every WTO Member is 'necessary' to secure [the United States'] compliance with [its] obligations under the NAFTA."[54] The United States further observes that the absence of alternative measures that could be reasonably available does not, in itself, mean that the challenged measures are "necessary". In any event, the United States submits that if Mexico's objective was to attract the attention of the United States, it could have pursued a variety of other actions, including pursuing the diplomatic avenues available under the NAFTA.

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[48]United States' appellee's submission, para. 70 (quoting Mexico's appellant's submission, paras. 104-105).

[49]*Ibid.*, para. 71.

[50]*Ibid.* (original emphasis)

[51]*Ibid.*, para. 72. (footnote omitted)

[52]*Ibid.*, para. 96.

[53]*Ibid.*, para. 97.

[54]*Ibid.*

32. The United States submits, furthermore, that Mexico's measures do not meet the requirements of the chapeau of Article XX of the GATT 1994. The only evidence that Mexico offers to support its contention that the measures do not constitute arbitrary or unjustifiable discrimination is the characterization of the measures as international countermeasures.[55] This is insufficient, argues the United States, for Mexico to meet its burden of proof. Moreover, the fact that Mexico may have been transparent about its measures is not sufficient to establish that such measures are not a "disguised restriction on trade".[56]

33. Lastly, the United States requests the Appellate Body to reject Mexico's contention that the Panel did not make an objective assessment of the facts, as required by Article 11 of the DSU. According to the United States, the Panel did not "ignore" arguments or evidence submitted by Mexico. The United States further explains that, in any event, the errors alleged by Mexico in support of its claim under Article 11 of the DSU "relate to the interpretation of Article XX, and do not support a conclusion that the Panel breached Article 11."[57]

C. *Arguments of the Third Participants*

1. China

34. Referring to Articles 7 and 11 of the DSU, China argues that a WTO panel does not have an implied power to refrain from performing its "statutory function".[58] China submits that, if a panel that is "empowered and obligated"[59] to assist the DSB in the settlement of a dispute declines to exercise jurisdiction, such a decision would create legal uncertainty and be contrary to the aim of providing security and predictability to the multilateral trading system as well as the prompt settlement of disputes as provided for in Article 3.3 of the DSU. China argues, moreover, that the notion of judicial economy is "relevant and applicable"[60] only if a panel has assumed the jurisdiction defined by its

[55]According to the United States, the Appellate Body rulings in *US – Shrimp (Articles 21.5 – Malaysia)* do not support Mexico's position, because that dispute did not involve a disagreement about the commitments made under an international agreement. (United States' appellee's submission, paras. 109-110)

[56]*Ibid.*, para. 114.

[57]*Ibid.*, para. 118.

[58]China's third participant's submission, para. 5.

[59]*Ibid.*, para. 6.

[60]*Ibid.*, para. 7.

terms of reference and has made "such findings as will assist the DSB" within the meaning of Article 11 of the DSU.

35. China asserts that the terms "laws or regulations" in Article XX(d) do not encompass international agreements. China states that Article X of the GATT 1994 provides contextual guidance for the interpretation of Article XX(d). Article X expressly distinguishes between "[l]aws, regulations, judicial decisions and administrative rulings" and "[a]greements … between the government or a governmental agency of any Member and the government or governmental agency of any other Member". China adds that interpreting "laws or regulations" to include international agreements would allow a WTO Member to justify under Article XX(d) its deviation from its WTO obligations in the name of any remedial measure in response to any alleged breach of any non-WTO international agreement. Such a scenario, according to China, is not consistent with the object and purpose of the GATT 1994.

2. European Communities

36. The European Communities submits that the Appellate Body should uphold the Panel's finding that it did not have the discretion to decline to exercise jurisdiction in this case. The European Communities submits that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."[61] On this basis, the European Communities agrees that a panel has an inherent power to establish whether it has jurisdiction, and whether a particular matter is within its jurisdiction. However, the European Communities argues that a panel may not freely, or by "the notion of 'judicial economy'", decide to refrain from exercising its jurisdiction "in a case properly brought before it under the DSU."[62]

37. The European Communities asserts, furthermore, that the Appellate Body should uphold the Panel's finding that only measures made applicable in the domestic legal order of a WTO Member constitute "laws or regulations" within the meaning of Article XX(d). The European Communities disagrees, however, with the Panel's finding that "international agreements, even when incorporated into the domestic law of a WTO Member, can never be regarded as 'laws or regulations' for the purposes of Article XX(d)".[63] In addition, the European Communities takes issue with the Panel's interpretation of the terms "to secure compliance" as requiring a degree of certainty in the results that may be achieved through the measure.

[61]European Communities' third participant's submission, para. 8.

[62]*Ibid.*, paras. 10-11.

[63]*Ibid.*, para. 44.

3. Japan

38. Japan disagrees with the Panel's interpretation of the terms "to secure compliance" in Article XX(d). In this regard, Japan submits that Article XX(d) does not necessarily exclude measures that have, as a purpose, to secure compliance, but are not accompanied by compulsory enforcement. According to Japan, compliance can be secured by a request or a command without being accompanied by any coercion. Japan considers that the Panel erred by indicating that the determination of whether a measure is designed "to secure compliance" should be analyzed based on the degree of certainty of its outcome. Nevertheless, Japan agrees with the Panel's finding that Article XX(d) does not cover international agreements. Japan explains that the terms "laws or regulations", read together with the phrase "to secure compliance", "presuppose a hierarchical structure that is associated with the relation between the state and its subjects"[64] and, therefore, excludes international agreements.

III. Issues Raised in This Appeal

39. The following issues are raised in this appeal:

(a) whether the Panel erred in concluding that a WTO panel "has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it"[65] and, if so, whether the Panel erred in declining to exercise that discretion in the circumstances of this dispute;

(b) whether the Panel erred in concluding that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994[66]; and

(c) whether the Panel failed to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in concluding that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance", within the meaning of Article XX(d) of the GATT 1994, "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[67]

[64]Japan's third participant's submission, para. 22.

[65]Panel Report, para. 7.18.

[66]*Ibid.*, para. 8.198.

[67]*Ibid.*, para. 8.186.

IV. The Panel's Exercise of Jurisdiction

A. *Introduction*

40. In its first written submission to the Panel, Mexico requested that the Panel decide, as a preliminary matter, to decline to exercise jurisdiction "in favour of an Arbitral Panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA)."[68] In a preliminary ruling, the Panel rejected Mexico's request and found instead that, "under the DSU, it had no discretion to decide whether or not to exercise its jurisdiction in a case properly before it."[69] The Panel added that even if it had such discretion, it "did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case."[70]

41. In its reasoning, the Panel opined that "discretion may be said to exist only if a legal body has the freedom to choose among several options, all of them equally permissible in law."[71] According to the Panel, "such freedom ... would exist within the framework of the DSU only if a complainant did not have a legal right to have a panel decide a case properly before it."[72] Referring to Article 11 of the DSU and to the ruling of the Appellate Body in *Australia – Salmon*, the Panel observed that "the aim of the WTO dispute settlement system is to resolve the matter at issue in particular cases and to secure a positive solution to disputes" and that a panel is required "to address the claims on which a finding is necessary to enable the DSB to make sufficiently precise recommendations or rulings to the parties."[73] From this, the Panel concluded that a WTO panel "would seem therefore not to be in a position to choose freely whether or not to exercise its jurisdiction."[74] Referring to Articles 3.2 and 19.2 of the DSU, the Panel further stated that "[i]f a WTO panel were to decide not to exercise its jurisdiction in a particular case, it would diminish the rights of the complaining Member under the DSU and other WTO covered agreements."[75] The Panel added that Article 23 of the DSU "make[s] it clear that a WTO Member that considers that any of its WTO benefits have been nullified or impaired as a result of a measure adopted by another Member has the right to bring the case before the WTO dispute settlement system."[76]

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[68]Panel Report, para. 7.1.

[69]*Ibid.*

[70]*Ibid.*

[71]*Ibid.*, para. 7.7.

[72]*Ibid.*

[73]*Ibid.*, para. 7.8 (referring to Appellate Body Report, *Australia – Salmon*, para. 223).

[74]*Ibid.*

[75]*Ibid.*, para. 7.9.

[76]*Ibid.*

42. On appeal, Mexico contends that the Panel erred in rejecting Mexico's request that it decline to exercise jurisdiction in the circumstances of the present dispute. Mexico submits that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies."[77] Such powers include the power to refrain from exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the NAFTA provisions" or "when one of the disputing parties refuses to take the matter to the appropriate forum."[78] Mexico argues, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[79] regarding access of Mexican sugar to the United States' market under the NAFTA. Mexico further emphasizes that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"[80] a WTO panel's power to decline to exercise validly established jurisdiction and submits that "the Panel should have exercised this power in the circumstances of this dispute."[81]

43. In contrast, the United States argues that, "[t]he Panel's own terms of reference in this dispute instructed the Panel 'to examine ... the matter referred to the DSB by the United States'"[82] and "to make such findings as will assist the DSB" in making the recommendations and rulings provided for under the DSU. China and the European Communities agree with the United States that the Panel had no discretion to decline to exercise jurisdiction. China submits that if a panel declines to exercise jurisdiction over a dispute, such a decision will create legal uncertainty, contrary to the aim of providing security and predictability to the multilateral trading system and the prompt settlement of disputes as provided for in Article 3.3 of the DSU.[83] The European Communities agrees with the Panel's finding that it did not have discretion to decline to exercise jurisdiction in this case, and emphasizes that "the functions and obligations of WTO Panels must be established on the basis of the DSU, and particularly Article 11 thereof."[84]

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[77]Mexico's appellant's submission, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

[78]*Ibid.*, para. 73 ("*los elementos predominantes de una disputa derivan de reglas del derecho internacional, cuyo cumplimiento no puede reclamarse en el marco OMC, por ejemplo las disposiciones del TLCAN*"; "*cuando una de las partes contendientes se rehúsa a someterse al foro adecuado*").

[79]*Ibid*.

[80]*Ibid.*, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

[81]*Ibid.*, para. 72 ("*el Grupo Especial debió haber ejercido esa facultad en las circunstancias de esta disputa*").

[82]United States' appellee's submission, para. 125.

[83]China's third participant's submission, para. 6.

[84]European Communities' third participant's submission, para. 8.

B. *Analysis*

44. Before addressing Mexico's arguments, we note that "Mexico does not question that the Panel has jurisdiction to hear the United States' claims."[85] Moreover, Mexico does not claim "that there are legal obligations under the NAFTA or any other international agreement to which Mexico and the United States are both parties, which might raise legal impediments to the Panel hearing this case".[86] Instead, Mexico's position is that, although the Panel had the authority to rule on the merits of the United States' claims, it also had the "implied power" to abstain from ruling on them[87], and "should have exercised this power in the circumstances of this dispute."[88] Hence, the issue before us in this appeal is not whether the Panel was legally precluded from ruling on the United States' claims that were before it, but, rather, whether the Panel could decline, and should have declined, to exercise jurisdiction with respect to the United States' claims under Article III of the GATT 1994 that were before it.

45. Turning to Mexico's arguments on appeal, we note, first, Mexico's argument that WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies"[89], and thus have a basis for declining to exercise jurisdiction. We agree with Mexico that WTO panels have certain powers that are inherent in their

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[85]Mexico's appellant's submission, para. 71 ("*México no discute que el Grupo Especial tiene competencia para resolver la reclamación que Estados Unidos ha interpuesto*") (quoting Mexico's response to Question 35 posed by the Panel; Panel Report, p. C-16). Mexico confirmed this point in response to questioning at the oral hearing.

[86]Panel Report, para. 7.13. In response to questioning at the oral hearing, Mexico argued that the panel in *Argentina – Poultry Anti-Dumping Duties* "at least contemplated the existence of a situation where an impediment found in another agreement might give rise to declining jurisdiction". The panel in *Argentina – Poultry Anti-Dumping Duties* referred to Article 1 of the Protocol of Olivos, which provides that, once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forum, that party may not bring a subsequent case regarding the same subject-matter in the other forum, and went on to state:

> The Protocol of Olivos ... does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.

(Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.38) (footnote omitted)

[87]Thus, Mexico suggested that, in the circumstances of this dispute, it would not have been "appropriate" for the Panel "to issue findings on the merits of the United States' claims." (Panel Report, para. 7.11 (referring to Mexico's first written submission to the Panel, paras. 102-103))

[88]Mexico's appellant's submission, para. 72 ("*debió haber ejercido esa facultad en las circunstancias de esta disputa*").

[89]*Ibid.*, para. 65 ("*tienen ciertas facultades implícitas en relación con su competencia, las cuales derivan de su propia naturaleza como órganos jurisdiccionales*").

adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it."[90] Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[91] For example, panels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings are not necessary "to resolve the matter in issue in the dispute".[92] The Appellate Body has cautioned, nevertheless, that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy."[93]

46. In our view, it does not necessarily follow, however, from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute. To the contrary, we note that, while recognizing WTO panels' inherent powers, the Appellate Body has previously emphasized that:

[90]Appellate Body Report, *US – 1916 Act*, footnote 30 to para. 54. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 53. In that dispute, the Appellate Body also stated that:

> … panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. ... [P]anels cannot simply ignore issues which go to the root of their jurisdiction—that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues—if necessary, on their own motion—in order to satisfy themselves that they have authority to proceed.

(Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

[91]Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248.

[92]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323, at 340. Mexico referred, in its appellant's submission, to a panel's discretion to apply judicial economy as "an example of situations where WTO panels have refrained from exercising validly established jurisdiction on certain claims that are before them." (Mexico's appellant's submission, para. 68 ("*un ejemplo de situaciones en las que grupos especiales de la OMC se han abstenido de resolver ciertas reclamaciones sobre las cuales tienen competencia sustantiva validamente establecida*")) Mexico clarified at the oral hearing, however, that "it is clear that in the context of the exercise of judicial economy a panel cannot decline entirely to exercise jurisdiction." The United States noted, in this regard, that the doctrine of judicial economy "does not relieve a panel from its duty to carry out its mandate under Articles 7 and 11 of the DSU to resolve the dispute" before it. (United States' appellee's submission, para. 130)

[93]Appellate Body Report, *Australia – Salmon*, para. 223.

> Although panels enjoy some discretion in establishing their own working procedures, *this discretion does not extend to modifying the substantive provisions of the DSU. … Nothing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU*.[94] (emphasis added)

47. With these considerations in mind, we examine the scope of a panel's jurisdictional power as defined, in particular, in Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU. Mexico argues that "[t]here is nothing in the DSU ... that explicitly rules out the existence of"[95] a WTO panel's power to decline to exercise its jurisdiction even in a case that is properly before it.

48. We first address Article 7 of the DSU, which governs the terms of reference of panels. Article 7 of the DSU states, in its first paragraph, that panels shall have the following terms of reference:

> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The Panel in this dispute was established with standard terms of reference[96], which instructed the Panel to "examine" the United States' claims that were before it and to "make findings" with respect to consistency of the measures at issue with Article III of the GATT 1994.

49. The second paragraph of Article 7 further stipulates that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The use of the words "shall address" in Article 7.2 indicates, in our view, that panels are required to address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.[97]

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[94]Appellate Body Report, *India – Patents (US)*, para. 92.

[95]Mexico's appellant's submission, para. 65 ("*Nada en el ESD ... explícitamente descarta que ... existan*").

[96]The Panel's terms of reference in this dispute were as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS308/4, the matter referred to the DSB by the United States 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.

(WT/DS308/5/Rev.1, para. 2)

[97]In this regard, we further note the Appellate Body's statement that, "as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute." (Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36)

50. We turn next to Article 11 of the DSU, which provides that:

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

51. Article 11 of the DSU states that panels *should* make an objective assessment of the matter before them. The Appellate Body has previously held that the word "should" can be used not only "to imply an exhortation, or to state a preference", but also "to express a duty [or] obligation".[98] The Appellate Body has repeatedly ruled that a panel would not fulfil its mandate if it were not to make an objective assessment of the matter.[99] Under Article 11 of the DSU, a panel is, therefore, charged with the *obligation* to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfil that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.

52. Furthermore, Article 23 of the DSU states that Members of the WTO *shall* have recourse to the rules and procedures of the DSU when they "seek the redress of a violation of obligations ... under the covered agreements". As the Appellate Body has previously explained, "allowing measures to be the subject of dispute settlement proceedings ... is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations … under the covered agreements, and to clarify the existing provisions of those agreements'."[100] We also note in this regard that Article 3.3 of the DSU provides that the "prompt settlement of situations in which *a Member considers* that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective

[98]Appellate Body Report, *Canada – Aircraft*, para. 187 (quoting *The Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1283).

[99]See, for instance, Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 329 and 335. See also Appellate Body Report, *Canada – Aircraft*, paras. 187-188; and Appellate Body Report, *EC – Hormones*, para. 133.

[100]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 89. (footnote omitted)

functioning of the WTO".[101] The fact that a Member may initiate a WTO dispute whenever it considers that "any benefits accruing to [that Member] are being impaired by measures taken by another Member" implies that that Member is *entitled* to a ruling by a WTO panel.

53. A decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU.[102] We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction."[103]

54. Mindful of the precise scope of Mexico's appeal[104], we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute[105], and

[101](emphasis added) Thus, the Appellate Body has explained that there is "little in the DSU that explicitly limits the rights of WTO Members to bring an action". (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312) In a similar vein, the Appellate Body has also observed that a WTO "Member has broad discretion in deciding whether to bring a case against another Member under the DSU." (Appellate Body Report, *EC – Bananas III*, para. 135) Further, Article 3.7 of the DSU states that "[b]efore bringing a case, a Member shall exercise *its judgement* as to whether action under these procedures would be fruitful." (emphasis added) Finally, Article 3.10 of the DSU stipulates that "if a dispute arises, *all Members will engage* in these procedures *in good faith in an effort to resolve the dispute*." (emphasis added)

[102]Article 3.2 of the DSU provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

Article 19.2 of the DSU states that "[i]n accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[103]Panel Report, para. 7.8.

[104]See *supra*, para. 44 and footnote 85 thereto.

[105]Mexico's appellant's submission, para. 73.

that only a NAFTA panel could resolve the dispute as a whole.[106] Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA ... and the dispute before us."[107] Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA.[108] It is furthermore undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA[109] had not been "exercised".[110] We do not express any view on whether a legal impediment to

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[106]In its appellant's submission, Mexico explains that, in 1998, it initiated NAFTA dispute settlement proceedings because it was of the view that the United States was acting inconsistently with its obligation under the NAFTA relating to market access for Mexican sugar to the United States market. In 2000, Mexico requested the establishment of a panel under Article 2008 of the NAFTA. Subsequently, according to Mexico, it appointed its panelists to the NAFTA panel; however, the United States failed to appoint its panelists and also instructed the United States' Section of the NAFTA Secretariat not to appoint panelists. (Mexico's appellant's submission, paras. 15-27)

As a result, "[n]o further step could be taken by Mexico to form the NAFTA panel and have its grievance heard." (Mexico's appellant's submission, para. 28 ("*No había otros pasos que México pudiera dar conforme a las disposiciones del tratado para conseguir integrar el panel y que su agravio fuera oído*")) Mexico explains that it subsequently adopted the measures at issue in this dispute "to compel the United States to comply with its obligations and [to] protect [Mexico's] own legal and commercial interests." (*Ibid*., para. 42 ("*para mover a Estados Unidos a cumplir con sus obligaciones, a la vez que protegió [los] legítimos intereses jurídicos y comerciales [de México]*"))

The United States disputes these arguments by Mexico and argues that "the Appellate Body [should not] undertake itself to assess the correctness of Mexico's assertions as to what the NAFTA requires." (United States' appellee's submission, para. 18) It submits that, if the WTO dispute settlement were to "become a forum for WTO Members to ... obtain findings as to the consistency of another Member's measure with any non-WTO agreement", this "would be a departure from the function the WTO dispute settlement system was established to serve". (*Ibid*., para. 41) The United States also submits that "it is in full compliance with its obligations under NAFTA's dispute settlement mechanism." (*Ibid*., para. 84)

While these NAFTA issues have been described by the parties by way of background to the WTO dispute, neither the Panel or the Appellate Body was called upon to examine these issues.

[107]Panel Report, para. 7.14. The Panel noted, in this regard, that:

> [i]n the present case, the complaining party is the United States and the measures in dispute are allegedly imposed by Mexico. In the NAFTA case, the situation appears to be the reverse: the complaining party is Mexico and the measures in dispute are allegedly imposed by the United States. As for the subject matter of the claims, in the present case the United States is alleging discriminatory treatment against its products resulting from internal taxes and other internal measures imposed by Mexico. In the NAFTA case, instead, Mexico is arguing that the United States is violating its market access commitments under the NAFTA.

[108]Mexico's response to questioning at the oral hearing.

[109]Article 2005.6 of the NAFTA provides:

> Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, *the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4*. (emphasis added)

[110]Mexico's response to questioning at the oral hearing.

the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present.[111] In any event, we see no legal impediments applicable in this case.

55. Finally, as we understand it, Mexico's position is that the "applicability" of its WTO obligations towards the United States would be "call[ed] into question"[112] as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panelists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism to resolve a bilateral dispute between Mexico and the United States regarding trade in sweeteners.[113] Specifically, Mexico refers to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, and "calls into question the 'applicability' of its WTO obligations towards the United States in the context of this dispute".[114]

56. Mexico's arguments, as well as its reliance on the ruling in *Factory at Chorzów*, is misplaced. Even assuming, *arguendo*, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations.[115] We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements. In light of the above, we do not see how the PCIJ's ruling in *Factory at Chorzów* supports Mexico's position in this case.

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[111]In this context, Mexico has alluded to paragraph 7.38 of the Panel Report in *Argentina – Poultry Anti-Dumping Duties*. See also *supra*, footnote 86.

[112]Mexico's appellant's submission, para. 73 ("*[es] cuestion[able]*").

[113]See Panel Report, para. 7.14.

[114]Mexico's appellant's submission, para. 73 ("*cuestiona que sus obligaciones sean aplicables frente a Estados Unidos a la luz del siguiente principio general del derecho internacional*"). The passage of the ruling that Mexico refers to reads as follows:

> … one party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

(Permanent Court of International Justice, *Factory at Chorzów (Germany v. Poland)* (Jurisdiction), 1927, PCIJ Series A, No. 9, p. 31) (underlining added by Mexico omitted)

[115]We also note that the ruling of the PCIJ in the *Factory at Chorzów* case relied on by Mexico was made in a situation in which the party objecting to the exercise of jurisdiction by the PCIJ was the party that had committed the act alleged to be illegal. In the present case, the party objecting to the exercise of jurisdiction by the Panel (Mexico) relies instead on an allegedly illegal act committed by the other party (the United States).

57. For all these reasons, we *uphold* the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it." Having upheld this conclusion, we *find* it unnecessary to rule in the circumstances of this appeal on the propriety of exercising such discretion.[116]

V. Article XX(d) of the GATT 1994

A. *Introduction*

58. We turn now to Mexico's claim that the Panel erred in finding that the challenged measures are not justified under Article XX(d) of the GATT 1994. Before proceeding, we note that Mexico has not appealed the Panel's conclusion that the challenged measures are inconsistent with Article III of the GATT 1994.[117]

59. Mexico argued before the Panel that its "measures are 'necessary to secure compliance' by the United States with the United States' obligations under the NAFTA, an international agreement that is a law not inconsistent with the provisions of the GATT 1994."[118] The United States responded that "the NAFTA is not a 'law or regulation,' and Mexico's taxes are not 'necessary to secure compliance.'"[119]

60. The Panel began its analysis by looking at the meaning of the terms "to secure compliance". According to the Panel, "to secure compliance" means "to *enforce* compliance".[120] The Panel noted that "the notion of enforcement contains a concept of action within a hierarchical structure that is associated with the relation between the state and its subjects".[121] It further observed that Article XX(d) "is concerned with action at a domestic rather than international level."[122] Based on this reasoning, the Panel concluded that "the phrase 'to secure compliance' in Article XX(d) does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty."[123]

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[116]Panel Report, paras. 7.1 and 7.18.

[117]Therefore, we express no view on the Panel's interpretation of Article III in this case.

[118]Panel Report, para. 8.162 (referring to Mexico's first written submission to the Panel, paras. 117-118 and 125).

[119]*Ibid*., para. 8.163.

[120]*Ibid*., para. 8.175. (emphasis added)

[121]*Ibid*., para. 8.178.

[122]*Ibid*., para. 8.179.

[123]*Ibid*., para. 8.181.

61. Having interpreted the terms "to secure compliance", the Panel proceeded to examine whether Mexico's measures are designed to secure compliance. The Panel explained that "when enforcement action is taken within a Member's legal system there will normally be no doubt, provided the action is pointed at the right target, that it will achieve that target."[124] In contrast, "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".[125] Therefore, the Panel reasoned, international countermeasures are "not eligible to be considered as measures 'to secure compliance' within the meaning of Article XX(d)."[126] The Panel added that "even if the assumption were to be made in the abstract that international countermeasures are potentially capable of qualifying as measures designed to secure compliance, the Panel's conclusion would be that Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[127] Thus, the Panel rejected Mexico's argument that "the challenged tax measures are *designed* to secure compliance by the United States with laws or regulations."[128]

62. The Panel then examined whether the challenged measures would fall within the meaning of the terms "laws or regulations" in Article XX(d). The Panel underscored the link between the terms "to secure compliance" and the terms "laws and regulations" as set out in Article XX(d). It indicated that the same reasoning that applies in determining whether Mexico's measures are measures "to secure compliance" must also apply in determining whether the measures are "laws or regulations" within the meaning of Article XX(d).[129] In the Panel's view, "the conclusion that these words refer to enforcement action within a particular domestic legal system, and that they do not extend to international action of the type taken by Mexico, necessarily applies to both parts of this expression."[130] The Panel further observed that, "even if it were to assume that the expression 'laws or regulations' in Article XX(d) could include international agreements such as the NAFTA, it would in any event conclude that, on the facts of the case, because of the uncertainty of their consequences, the challenged measures are not designed 'to secure compliance with laws or regulations which are not inconsistent with the provisions' of GATT 1994."[131]

63. Therefore, the Panel concluded that "Mexico has not demonstrated that the challenged measures are designed 'to secure compliance with laws or regulations', within the meaning of

[124]Panel Report, para. 8.185.

[125]*Ibid*., para. 8.186.

[126]*Ibid*.

[127]*Ibid*.

[128]*Ibid*., para. 8.190. (original emphasis)

[129]*Ibid*., para. 8.194.

[130]*Ibid*.

[131]*Ibid*., para. 8.197.

Article XX(d) of the GATT 1994."[132] Having made this finding, the Panel did not consider that it needed to examine whether Mexico's measures are "necessary" within the meaning of Article XX(d)[133], and whether the measures satisfy the requirements set out in the chapeau of Article XX.[134] Consequently, the Panel concluded that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994."[135]

64. On appeal, Mexico seeks review of the Panel's conclusion that Mexico's measures are not justified under Article XX(d) of the GATT 1994. According to Mexico, the Panel incorrectly interpreted the terms "to secure compliance" as excluding international countermeasures[136], and this error led the Panel to incorrectly interpret the terms "laws or regulations" in Article XX(d).[137] Mexico argues that the terms "laws or regulations" are "broad enough to include international agreements such as the NAFTA."[138] Mexico points out that "the use of the terms 'laws' and 'regulations' elsewhere in the GATT 1994 and in other WTO agreements does not demonstrate that such terms exclude international law rules."[139]

65. The United States responds that the Panel properly found that Mexico's measures are not justified under Article XX(d). It asserts that "the ordinary meaning of 'laws' and 'regulations' is that these are rules (e.g., in the form of a statute) issued by a government and not obligations under an international agreement."[140] The United States further explains that Mexico's interpretation of Article XX(d) is in conflict with Article 23 of the DSU, by allowing a WTO Member to take action outside the rules of the DSU to secure compliance with another Member's obligations under any international agreement, including the WTO agreements.[141] It would also undermine Article 22 of the DSU by "permit[ting] the suspension of concessions ... without DSB authorization and without any requirement to adhere to the rules established" in that provision.[142]

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[132]Panel Report, para. 8.198.

[133]*Ibid*., para. 8.202.

[134]*Ibid*., para. 8.203.

[135]*Ibid*., para. 8.204.

[136]Mexico's appellant's submission, para. 79 and footnote 49 thereto.

[137]*Ibid*., para. 126.

[138]*Ibid*., para. 129 ("*suficientemente amplia para incluir tratados internacionales, como el TLCAN*").

[139]*Ibid*. ("*el empleo de los términos "leyes" y "reglamentos" en el resto del GATT de 1994 y en otros Acuerdos de la OMC no demuestran que los tales términos excluyen las reglas del derecho internacional*"). (footnote omitted)

[140]United States' appellee's submission, para. 30 (referring to definitions in *Black's Law Dictionary*, (1990), p. 816).

[141]*Ibid*., para. 37.

[142]*Ibid*., para. 38. (footnote omitted)

B. *Analysis*

1. Are Mexico's Measures Justified under Article XX(d)?

66. Article XX(d) of the GATT 1994 reads:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices[.]

67. The Appellate Body explained, in *Korea – Various Measures on Beef*, that two elements must be shown "[f]or a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX".[143] The first element is that "the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994", and the second is that "the measure must be 'necessary' to secure such compliance."[144] The Appellate Body also explained that "[a] Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met."[145]

68. In our view, the central issue raised in this appeal is whether the terms "to secure compliance with laws or regulations" in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement.

[143]Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[144]*Ibid*.

[145]*Ibid*. (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 20-21; Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-16, DSR 1997:I, 323, at 335-337; and GATT Panel Report, *US – Section 337*, para. 5.27).

69. In order to answer this question, we consider it more helpful to begin our analysis with the terms "laws or regulations" in Article XX(d) (which we consider to be pivotal here) rather than to begin with the analysis of the terms "to secure compliance", as did the Panel. The terms "laws or regulations" are generally used to refer to domestic laws or regulations. As Mexico and the United States note, previous GATT and WTO disputes in which Article XX(d) has been invoked as a defence have involved domestic measures.[146] Neither disputes that the expression "laws or regulations" encompasses the rules adopted by a WTO Member's legislative or executive branches of government. We agree with the United States that one does not immediately think about international law when confronted with the term "laws" in the plural.[147] Domestic legislative or regulatory acts sometimes may be intended to implement an international agreement. In such situations, the origin of the rule is international, but the implementing instrument is a domestic law or regulation.[148] In our view, the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member.[149] Thus, the "laws or regulations" with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of *another* WTO Member under an international agreement.

70. The illustrative list of "laws or regulations" provided in Article XX(d) supports the conclusion that these terms refer to rules that form part of the domestic legal system of a WTO Member.[150] This list includes "[laws or regulations] relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices". These matters are typically the subject of domestic laws or regulations, even though some of these matters may also be the subject of

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[146]United States' appellee's submission, footnote 62 to para. 39; Mexico's response to questioning at the oral hearing.

[147]Panel Report, footnote 419 to para. 8.193; United States' appellee's submission, para. 31.

[148]In some WTO Members, certain international rules may have direct effect within their domestic legal systems without requiring implementing legislation. In such circumstances, these rules also become part of the domestic law of that Member.

[149]The European Communities notes that:

> [i]t is entirely possible that international agreements may be incorporated into the domestic legal order in such a way that they can be invoked as against individuals, and enforce[d] against them. If this is the case, the international agreement, albeit international in origin, may be regarded as having become an integral part of the domestic legal order of such Member, and thus a law or regulation within the meaning of Article XX (d) [of the] GATT [1994].

(European Communities' third participant's submission, para. 41)

[150]The participants agree that the list in Article XX(d) is not exhaustive. (See Mexico's response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, p. C-61; United States' response to Question 31 posed by the Panel after the first Panel meeting; Panel Report, p. C-42; and United States' response to Question 67 posed by the Panel after the second Panel meeting; Panel Report, pp. C-79-C-80)

international agreements. The matters listed as examples in Article XX(d) involve the regulation by a government of activity undertaken by a variety of economic actors (e.g., private firms and State enterprises), as well as by government agencies. For example, matters "relating to customs enforcement" will generally involve rights and obligations that apply to importers or exporters, and matters relating to "the protection of patents, trade marks and copyrights" will usually regulate the use of these rights by the intellectual property right holders and other private actors.[151] Thus, the illustrative list reinforces the notion that the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member.[152]

71. Our understanding of the terms "laws or regulations" is consistent with the context of Article XX(d). As the United States points out[153], other provisions of the covered agreements refer expressly to "international obligations" or "international agreements". For example, paragraph (h) of Article XX refers to "obligations under any intergovernmental commodity agreement". The express language of paragraph (h) would seem to contradict Mexico's suggestion that international agreements are implicitly included in the terms "laws or regulations".[154] The United States and China also draw our attention to Article X:1 of the GATT 1994[155], which refers to "[l]aws, regulations, judicial decisions and administrative rulings" and to "[a]greements affecting international trade policy which are in force between a government … of any Member and the government … of any other Member". Thus, a distinction is drawn in the same provision between "laws [and] regulations" and "international agreements". Such a distinction would have been unnecessary if, as Mexico argues, the terms "laws" and "regulations" were to encompass international agreements that have not been incorporated, or do not have direct effect in, the domestic legal system of the respective WTO Member. Thus, Articles X:1 and XX(h) of the GATT 1994 do not lend support to interpreting the terms "laws or

[151]European Communities' third participant's submission, para. 38.

[152]The United States also points out that the terms "laws or regulations" are qualified by the requirement that they not be "inconsistent" with the GATT 1994. The United States explains that the word "inconsistent" appears elsewhere in the GATT 1994 in connection with domestic measures. In contrast, when referring to treaty obligations, the WTO agreements use the word "conflict". (United States' appellee's submission, para. 33) In our view, this distinction supports the position that the terms "laws or regulations" refer to the rules that are part of the domestic legal system of a WTO Member, including international rules that have been incorporated or have direct effect in a particular domestic legal system.

[153]United States' appellee's submission, para. 34.

[154]If an international commodity agreement contains GATT-inconsistent provisions, Article XX(h) would still serve the purpose of justifying such an agreement, even if it could not be justified under Article XX(d).

[155]United States' appellee's submission, para. 35; China's third participant's submission, para. 21.

regulations" in Article XX(d) as including the international obligations of a Member other than that invoking the provision.[156]

72. We turn to the terms "to secure compliance", which were the focus of the Panel's reasoning and are the focus of Mexico's appeal. The terms "to secure compliance" speak to the types of measures that a WTO Member can seek to justify under Article XX(d). They relate to the design of the measures sought to be justified.[157] There is no justification under Article XX(d) for a measure that is not designed "to secure compliance" with a Member's laws or regulations. Thus, the terms "to secure compliance" do not expand the scope of the terms "laws or regulations" to encompass the international obligations of another WTO Member. Rather, the terms "to secure compliance" circumscribe the scope of Article XX(d).

73. Mexico takes issue with several aspects of the Panel's reasoning related to the interpretation of the terms "to secure compliance". We recall that, according to the Panel, "[t]he context in which the expression is used makes clear that 'to secure compliance' is to be read as meaning to enforce compliance."[158] The Panel added that, in contrast to enforcement action taken within a Member's legal system, "the effectiveness of [Mexico's] measures in achieving their stated goal—that of bringing about a change in the behaviour of the United States—seems ... to be inescapably uncertain."[159] Thus, the Panel concluded that "the outcome of international countermeasures, such as those adopted by Mexico, is inherently unpredictable".[160]

74. It is Mexico's submission that the Panel erred in requiring a degree of certainty as to the results achieved by the measure sought to be justified.[161] Mexico also asserts that the Panel, in its reasoning, incorrectly relied on the Appellate Body Report in *US – Gambling*.[162] We agree with

[156]The Panel noted that there are examples of international "regulations" within the WTO agreements themselves. The Panel cited, as examples, Article VI of the *Marrakesh Agreement Establishing the World Trade Organization* that refers to "regulations" to be adopted by the Ministerial Conference, and Article VII that refers to "financial regulations" to be adopted by the General Council and to the "regulations" of the GATT 1947. (Panel Report, footnotes 423 and 424 to para. 8.195) Article XXIV of the GATT 1994 also uses the term "regulations" when referring to rules applied by free trade areas or customs unions. Nevertheless, we agree with Japan that, in these instances, the context makes it clear that the regulations are international in character. (Japan's third participant's submission, paras. 17-19)

[157]Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

[158]Panel Report, para. 8.175.

[159]*Ibid*., para. 8.185.

[160]*Ibid*., para. 8.186. See also Mexico's appellant's submission, paras. 104-116.

[161]The European Communities and Japan agree with Mexico that the Panel erred in implying that whether a measure falls within the meaning of the phrase "to secure compliance" depends on the degree of certainty that the measure will achieve its intended results. (European Communities' third participant's submission, para. 26; Japan's third participant's submission, para. 10)

[162]Panel Report, paras. 8.187-8.188 (referring to Appellate Body Report, *US – Gambling*, para. 317).

Mexico that the *US – Gambling* Report does not support the conclusion that the Panel sought to draw from it. The statement to which the Panel referred was made in the context of the examination of the "necessity" requirement in Article XIV(a) of the *General Agreement on Trade in Services*, and did not relate to the terms "to secure compliance". As the Appellate Body has explained previously, "the contribution made by the compliance measure to the enforcement of the law or regulation at issue"[163] is one of the factors that must be weighed and balanced to determine whether a measure is "necessary" within the meaning of Article XX(d). A measure that is not suitable or capable of securing compliance with the relevant laws or regulations will not meet the "necessity" requirement. We see no reason, however, to derive from the Appellate Body's examination of "necessity", in *US – Gambling*, a requirement of "certainty" applicable to the terms "to secure compliance".[164] In our view, a measure can be said to be designed "to secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty.[165] Nor do we consider that the "use of coercion"[166] is a necessary component of a measure designed "to secure compliance". Rather, Article XX(d) requires that the design of the measure contribute "to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.

75. Nevertheless, while we agree with Mexico that the Panel's emphasis on "certainty" and "coercion" is misplaced, we consider that Mexico's arguments miss the point. Even if "international countermeasures" could be described as intended "to secure compliance", what they seek "to secure compliance with"—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because "laws or regulations" within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member.

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[163]Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.

[164]We note that, at the request of the United States, the Panel clarified in the interim review phase that:

> … its reasoning does not focus on whether the achievement of Mexico's objective through the measures at issue is certain or uncertain. Rather, the Panel considers that international countermeasures (as the ones allegedly imposed by Mexico) are intrinsically unable to *secure* compliance of laws and regulations. In contrast, national measures are, beyond particular factual considerations, usually in a position to achieve [] that objective, through the use of coercion, if necessary.

(Panel Report, para. 6.12) (original italics; underlining added)

[165]The European Communities notes that "even within the domestic legal order of WTO Members, enforcement of laws and regulations may not simply be taken for granted, but may depend on numerous factors". (European Communities' third participant's submission, para. 28)

[166]Panel Report, para. 8.178.

76. Mexico finds support for its interpretation in the Appellate Body's rulings in *US – Shrimp* and *US – Shrimp (Article 21.5 – Malaysia)*.[167] We fail to see how these rulings support Mexico's position. In those cases, the United States sought to justify its measures under Article XX(g) of the GATT 1994, and the measures at issue were domestic laws and regulations of the United States.[168] The reference to the Inter-American Convention for the Protection and Conservation of Sea Turtles (the "Inter-American Convention") was made in the context of the examination of whether the measures constituted "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" for purposes of the chapeau of Article XX.[169] The United States, in those cases, did not argue that its measures were justified under Article XX(d) because they were intended to secure compliance with the obligations of another Member under the Inter-American Convention. In the present case, Mexico seeks to justify its measures under paragraph (d) of Article XX, and not under paragraph (g). Moreover, Mexico not only refers to the NAFTA in relation to the chapeau of Article XX, but also seeks justification for its measures under paragraph (d) on the basis that they are allegedly intended to secure compliance with the United States' NAFTA obligations.

77. We observe, furthermore, that Mexico's interpretation of Article XX(d) disregards the fact that the GATT 1994 and the DSU specify the actions that a WTO Member may take if it considers that another WTO Member has acted inconsistently with its obligations under the GATT 1994 or any of the other covered agreements. As the United States points out[170], Mexico's interpretation of the terms "laws or regulations" as including international obligations of another WTO Member would logically imply that a WTO Member could invoke Article XX(d) to justify also measures designed "to secure compliance" with that other Member's WTO obligations. By the same logic, such action under Article XX(d) would evade the specific and detailed rules that apply when a WTO Member seeks to take countermeasures in response to another Member's failure to comply with rulings and recommendations of the DSB pursuant to Article XXIII:2 of the GATT 1994 and Articles 22 and 23 of the DSU.[171] Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.

[167]Mexico's appellant's submission, paras. 174-178.

[168]See Appellate Body Report, *US – Shrimp*, paras. 2-6.

[169]See *ibid*., paras. 169-172; and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia*), para. 128. See also United States' appellee's submission, para. 108.

[170]United States' appellee's submission, para. 37.

[171]Mexico's interpretation would also undermine the limitations in paragraphs 3 and 4 of Article 22 as to the magnitude and the trade sectors in which such countermeasures could be taken. (*Ibid*., paras. 37-38)

78. Finally, even if the terms "laws or regulations" do not go so far as to encompass the WTO agreements, as Mexico argues[172], Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes.[173] As we noted earlier[174], this is not the function of panels and the Appellate Body as intended by the DSU.[175]

79. For these reasons, we agree with the Panel that Article XX(d) is not available to justify WTO-inconsistent measures that seek "to secure compliance" by another WTO Member with that other Member's international obligations. In sum, while we agree with the Panel's conclusion, several aspects of our reasoning set out above differ from the Panel's own reasoning. First, we conclude that the terms "laws or regulations" cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.[176] Second, we have found that Article XX(d) does not require the "use of coercion" nor that the measure sought to be justified results in securing compliance with absolute certainty. Rather, Article XX(d) requires that the measure be designed "to secure compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.[177] Finally, we do not endorse the Panel's reliance on the Appellate Body's interpretation in *US – Gambling* of the term "necessary" to interpret the terms "to secure compliance" in Article XX(d).[178]

[172]At the oral hearing, Mexico argued that the terms "laws or regulations" would not include the WTO agreements because the latter are *lex specialis*.

[173]Article 3.2 of the DSU states that the WTO's dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of *those agreements*". (emphasis added)

[174]See *supra*, para. 56.

[175]We note that, in its analysis, the Panel also referred to the negotiating history of the GATT 1947, and particularly to the rejection of a proposal presented by India during the negotiations on the International Trade Organization (the "ITO") Charter according to which Members would be permitted to justify, on a temporary basis, retaliatory measures under Article XX. (See Panel Report, para. 8.176 (referring to ITO Doc. E/PC/T/180 (19 August 1947), p. 97; and "Havana Charter for an International Trade Organization", United Nations Conference on Trade and Employment, Final Act and Related Documents (Lake Success, New York, April 1948), pp. 33-34)

[176]See *supra*, paras. 69-71.

[177]See *supra*, para. 74.

[178]See *supra*, para. 74.

80. Therefore, we *uphold*, albeit for different reasons, the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994.

2. Mexico's Request to Complete the Analysis

81. Mexico requests the Appellate Body to complete the analysis by examining whether Mexico's measures are "necessary", within the meaning of Article XX(d) of the GATT 1994, and meet the requirements of the chapeau of that Article.[179] Mexico's request is premised on the Appellate Body reversing the Panel's conclusion that the measures are not designed "to secure compliance with laws or regulations" within the meaning of Article XX(d). We have upheld the Panel's conclusion that Mexico's measures do not constitute measures "to secure compliance with laws or regulations" within the meaning of Article XX(d) of the GATT 1994. Therefore, the premise on which Mexico's request is predicated is not fulfilled and, consequently, it is not necessary for us to complete the analysis as requested by Mexico.[180]

3. Mexico's Claim under Article 11 of the DSU [181]

82. Mexico argues, "separately and in addition"[182] to the previous errors, that the Panel failed to make "an objective assessment of the facts", as required by Article 11 of the DSU, in finding that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case."[183] Mexico argues that "[t]he evidence on the record demonstrates that the effects of the measures at issue have contributed to securing compliance in the circumstances of this case, by changing the dynamic of the NAFTA dispute and forcing the United States to pay attention to

[179]Mexico's appellant's submission, para. 138.

[180]See, for example, Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 74.

[181]In its Notice of Appeal, Mexico claimed that the Panel "failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties." (Mexico's Notice of Appeal (attached as Annex I to this Report), para. 4 (referring to Panel Report, paras. 8.231 and 8.232) (footnote omitted)) Mexico also asserted that "in concluding that international countermeasures cannot qualify for consideration as measures designed to 'secure compliance' within the meaning of Article XX(d) of the GATT 1994, the Panel improperly increased the obligations of WTO Members and reduced the rights of Members under the covered agreements." (*Ibid*., para. 5 (referring to Panel Report, paras. 8.181 and 8.186) (footnote omitted)) Mexico did not offer arguments to support these two claims in its appellant's submission. In response to questioning at the oral hearing, Mexico confirmed that it did not intend to pursue these claims further.

[182]Mexico's appellant's submission, heading III.E ("*independiente y adicional*").

[183]Panel Report, paragraph 8.186. See also, Mexico's Notice of Appeal, para. 3.

Mexico's grievances."[184] The United States submits that, contrary to Mexico's contention, the Panel did not "ignore" arguments or evidence submitted by Mexico.[185] The United States further explains that, in any event, Mexico's claim under Article 11 of the DSU "appears to be no more than a reiteration of its legal arguments that its ... measures are designed to 'secure compliance'".[186]

83. In Section B.1 above, we held that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994. Therefore, Mexico's claim under Article 11 of the DSU is predicated on an interpretation of Article XX(d) of the GATT 1994 that we have found to be incorrect. Since Mexico's measures cannot be justified under Article XX(d) as a *matter of law*, we reject Mexico's claim under Article 11 of the DSU.

4. Conclusion

84. For the reasons set out above, we *uphold* the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

VI. Findings and Conclusions

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

(a) upholds the Panel's conclusion, in paragraphs 7.1, 7.18, and 9.1 of the Panel Report, that, "under the DSU, it ha[d] no discretion to decline to exercise its jurisdiction in the case that ha[d] been brought before it";

(b) upholds the Panel's conclusion, in paragraph 8.198 of the Panel Report, that Mexico's measures do not constitute measures "to secure compliance with laws or regulations", within the meaning of Article XX(d) of the GATT 1994;

(c) rejects Mexico's claim that the Panel failed to fulfil its obligations under Article 11 of the DSU, in finding, in paragraph 8.186 of the Panel Report, that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case"; and

[184]Mexico's appellant's submission, para. 167 ("*Las pruebas en el expediente demuestran que las medidas en cuestión no están desprovistas de efectos que contribuyen a lograr la observancia en las circunstancias de este caso, cambiando la dinámica en la controversia derivada del TLCAN y forzando a Estados Unidos a prestar atención a los agravios de México*").

[185]United States' appellee's submission, para. 118.

[186]*Ibid*.

(d) as a consequence, upholds the Panel's conclusion, in paragraphs 8.204 and 9.3 of the Panel Report, that "Mexico has not established that the challenged measures are justified under Article XX of the GATT 1994".

86. The Appellate Body recommends that the Dispute Settlement Body request Mexico to bring the measures that were found in the Panel Report to be inconsistent with the *General Agreement on Tariff and Trade 1994* into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 8th day of February 2006 by:

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Yasuhei Taniguchi
Presiding Member

_____ _____

Merit E. Janow
Member

Giorgio Sacerdoti
Member

ANNEX I

WORLD TRADE ORGANIZATION

WT/DS308/10
6 December 2005

(05-5832)

Original: Spanish

MEXICO – TAX MEASURES ON SOFT DRINKS AND OTHER BEVERAGES

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification dated 6 December 2005, from the delegation of Mexico, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico hereby notifies its decision to appeal to the Appellate Body certain issues of law dealt with in the Report of the Panel on *Mexico – Tax Measures on Soft Drinks and Other Beverages* (WT/DS308/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that it has no discretion to decline to exercise jurisdiction in this case and its determination that, even if it had such discretion, the facts in the record do not justify a refusal by the Panel to exercise jurisdiction in this case. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Articles 3, 7, 11 and 19 of the DSU and Articles XXII and XXIII of the GATT 1994. These errors are contained, *inter alia*, in paragraphs 7.1 to 7.18, 8.215 to 8.230 and 9.1 of the Panel Report.

2. Mexico seeks review by the Appellate Body of the Panel's legal conclusion that the challenged tax measures are not justified under Article XX of the GATT 1994 as measures necessary to secure United States compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations concerning Article XX of the GATT 1994. Paragraphs 8.168 to 8.204 and 9.3 of the Panel Report, among others, contain such errors, including the following:

(a) The Panel's interpretation and application of the expression "to secure compliance" in Article XX(d) of the GATT 1994 and its conclusion that it does not apply to measures taken by a Member in order to induce another Member to comply with obligations owed to it under a non-WTO treaty.[1]

(b) The Panel's conclusion that the challenged tax measures "are not designed to secure compliance" within the meaning of Article XX(d) of the GATT 1994 and are not eligible for consideration under Article XX(d) of the GATT 1994.[2]

(c) The Panel's interpretation and application of the phrase "laws or regulations" contained in Article XX(d) of the GATT 1994 and its conclusion that this phrase does not cover international treaties such as NAFTA.[3]

(d) The Panel's failure to consider whether the Mexican measures are "necessary" to secure compliance with a law that is not inconsistent with the provisions of the GATT 1994.[4]

3. Mexico seeks review by the Appellate Body, in the light of DSU Article 11, of the Panel's conclusion that "Mexico has not established that its measures contribute to securing compliance in the circumstances of this case".[5] This conclusion does not reflect an objective approach to analysis of the available evidence on the effects of the Mexican measures, and is inconsistent with the treatment given by the Panel to relevant evidence. Accordingly, this conclusion is inconsistent with the Panel's duty to make an objective assessment of the matter before it.

4. Mexico considers that the Panel also failed to make an objective assessment of the matter before it, including the facts of the case, inconsistently with its obligation under Article 11 of the DSU, with respect to Mexico's request for determinations of fact, status and relevance of the NAFTA dispute between the parties.[6]

5. Mexico also considers that, in concluding that international countermeasures cannot qualify for consideration as measures designed to "secure compliance" within the meaning of Article XX(d) of the GATT 1994[7], the Panel improperly increased the obligations of WTO Members and reduced the rights of Members under the covered agreements.

6. In the event that the Appellate Body reverses the Panel's conclusion that Mexico's tax measures are not justified under Article XX(d) of the GATT 1994, Mexico requests that the Appellate Body complete the legal analysis under Article XX of the GATT 1994.

Those provisions of the covered agreements which Mexico considers the Panel to have interpreted or applied erroneously include Articles XX, XXII and XXIII of the GATT 1994 and Articles 3, 7, 11 and 19 of the DSU.

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[1] Panel Report, paragraphs 8.170 to 8.181.

[2] Panel Report, paragraphs 8.182 to 8.190 and 8.197 to 8.198.

[3] Panel Report, paragraphs 8.191 to 8.197.

[4] Panel Report, paragraphs 8.199 to 8.202.

[5] Panel Report, paragraph 8.186.

[6] Panel Report, paragraphs 8.231 and 8.232.

[7] Panel Report, paragraphs 8.181 and 8.186.