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The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English, French and Spanish. Starting with 1999, the first volume of each year contains a cumulative index of published disputes.

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## TABLE OF CONTENTS

*Page*

**Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (WT/DS155)**

Report of the Panel .......................................................................... 1779

**United States - Anti-Dumping Act of 1916 (WT/DS136/11, WT/DS162/14)**

Award of the Arbitrator under Article 21.3(c) of the DSU .............. 2017

**Canada - Term of Patent Protection (WT/DS170/10)**

Award of the Arbitrator under Article 21.3(c) of the DSU .............. 2031

**European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (WT/DS141)**

Report of the Appellate Body .......................................................... 2049

# ARGENTINA - MEASURES AFFECTING THE EXPORT OF BOVINE HIDES AND THE IMPORT OF FINISHED LEATHER

**Report of the Panel**
WT/DS155/R*

*Adopted by the Dispute Settlement Body on 16 February 2001*

**TABLE OF CONTENTS**


| | Page |
|---|---|
| I. PROCEDURAL BACKGROUND | 1785 |
| II. FACTUAL ASPECTS (MEASURES ON EXPORT OF BOVINE HIDES) | 1787 |
| A. Scope of the Claim | 1787 |
| B. The Products Concerned: Production and Processing of Raw and Semi-Tanned Hides | 1787 |
| C. Production, Price, and Trade Figures of Raw Hides, Semi-Finished and Finished Leather | 1788 |
| 1. Production Figures for Raw Hides in Argentina | 1788 |
| 2. Export Figures for Raw Hides and Semi-Tanned (wet blue) Leather | 1789 |
| 3. Import Figures for Raw Hides and Semi-Tanned (wet blue) Leather | 1790 |
| D. Context of Government Measures Regarding the Export of Raw Bovine Hides in Argentina | 1790 |
| E. Resolution 2235 | 1793 |
| F. The Practical Application of Resolution 2235/96 | 1794 |
| III. CLAIMS BY THE PARTIES | 1795 |
| IV. MAIN ARGUMENTS | 1796 |
| A. Violation of Article XI:1 of the GATT 1994 | 1796 |
| 1. Export Prohibitions or Restrictions Maintained by a Contracting Party, Made Effective through "other measures" | 1797 |
| 2. Rationale for the Enactment of the Resolution | 1803 |
| 3. Alleged Restrictive Effect Due to the Presence of ADICMA Representatives | 1808 |


* WT/DS155/R/Corr. 1

| | | | | Page |
|---|---|---|---|---|
| | | 4. | Alleged Disclosure of Confidential Information to ADICMA Representatives | 1810 |
| | | 5. | Market Power of Tanneries vs. Slaughterhouses and the Alleged Existence of a Cartel | 1815 |
| | | 6. | Claim that Export and Price Figures Reflect the Restrictive Effect of the Measure on Exports of Raw Bovine Hides | 1819 |
| | | (a) | Interpretation of Figures of Hide Production in Argentina | 1819 |
| | | (b) | Interpretation of Export Figures from Argentina | 1822 |
| | | (c) | Price Differential Between Argentine and US Hides | 1826 |
| | | (d) | Argument that the "shortfall" of Raw Hides Leads to Increased Imports of Raw and Wet Blue Hides | 1829 |
| | | (e) | Claim that Ratio of Production to Export in Argentina is Low | 1832 |
| | B. | Violation of Article X:3 (a) of the GATT 1994 | | 1833 |
| | | 1. | Allegation that Resolution 2235 Commits Argentina to an Administration of Customs Laws which is not Impartial, Reasonable, and Uniform | 1833 |
| | | 2. | Applicability of Article X:3(a) of the GATT 1994 to Resolution 2235 | 1837 |
| V. | THIRD PARTY SUBMISSION BY THE UNITED STATES | | | 1843 |
| VI. | FACTUAL ASPECTS (TAX MEASURES ON IMPORTS) | | | 1847 |
| | A. | The IVA | | 1847 |
| | B. | Advances on the IVA | | 1849 |
| | | 1. | Collection of the IVA on Imports | 1849 |
| | | 2. | Collection of the IVA on Internal Sales | 1850 |
| | C. | The IG | | 1851 |
| | D. | Advances on the IG | | 1852 |
| | | 1. | Collection of the IG on Imports | 1852 |
| | | 2. | Collection of the IG on Internal Sales | 1852 |
| VII. | CLAIMS BY THE PARTIES | | | 1853 |
| VIII. | MAIN ARGUMENTS | | | 1853 |
| | A. | Article III:2 of the GATT 1994 | | 1853 |

Page

1. Scope and Applicability of Article III:2 of the GATT 1994 ... 1854
   (a) Applicability of Article III:2 of the GATT 1994 to Advances on the IG ... 1856
   (b) Coverage of the Advance Systems by Article III:2 of the GATT 1994 ... 1859
   (c) Coverage of "lost interest" by Article III:2 of the GATT 1994 ... 1860
2. "Likeness" of Imported Products and Domestically Produced Products ... 1864
3. Claim that Imported Products Are Taxed "in excess of" Like Domestic Products ... 1871
   (a) Claim that the Advance IVA on Imports Results in a Heavier Tax Burden than the Advance IVA Domestic Sales ... 1872
      (i) Comparison of Tax Burden Between Imported and Domestic Products ... 1874
      (ii) Mechanism for the Exemption from Advance IVA Collection on Imports ... 1879
      (iii) Argument that the Impact of a Financial Cost is Limited to a Maximum of 30 Days ... 1882
      (iv) Existence of a Differential Between Generally Applicable Rates - Issue of Whether the Differential is Due to the Tax Collection Method ... 1882
      (v) The Additional IVA on Internal Transactions does not Apply to Sales by Non-Registered Taxable Persons, whereas the Additional IVA on Imports is Levied also on Imports by Non-Registered Taxpayers ... 1884
      (vi) Situation of Importers vis-à-vis Entities that are not Withholding Agents in Internal Sales ... 1885
      (vii) Situation of Importers vis-à-vis Certain Categories of Purchasers in Internal Sales ... 1886
      (viii) Threshold Amounts Available for Internal Sales, yet not for Imports ... 1887

Page

(ix) Equal Treatment of Imported and Domestic Products ............................... 1887

(x) De Minimis Qualification under Article III:2 of the GATT 1994........... 1889

(b) Claim that the IG "collected" on Imports Imposes a Heavier Tax Burden than the IG "withheld" on Domestic Sales ......................... 1890

(i) Mechanism for the Exemption from the Advance IG Collection on Imports. 1894

(ii) Mechanism for Refunds in Situations of Actual Overpayment of Taxes ......... 1895

(iii) de minimis qualification under Article III:2 of the GATT 1994........... 1896

4. The Requirement of "protection" in the Application of Article III:2 of the GATT 1994............................. 1896

B. General Exception of Article XX (d) of the GATT 1994 ...... 1900

1. Paragraph (d) of Article XX of the GATT 1994 ........ 1901

(a) "To secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" ........... 1901

(b) The "necessary" Character of the Measure...... 1902

2. Relationship of the "chapeau" of Article XX of the GATT 1994 to the Content of Paragraph (d)........ 1911

3. Justification of the Advance IVA and IG under the "chapeau" of Article XX of the GATT 1994........ 1914

(a) "Arbitrary or unjustifiable" Discrimination..... 1914

(b) Disguised Restriction ..................................... 1917

IX. THIRD PARTY SUBMISSION BY THE UNITED STATES......... 1917

X. INTERIM REVIEW ......................................................................... 1920

A. Background............................................................................ 1920

B. Claim under Article X:3(a) of the GATT 1994 ..................... 1920

C. Claim under Article III:2, First Sentence, of the GATT 1994 1923

D. Defence under Article XX(d) of the GATT 1994................. 1926

XI. FINDINGS......................................................................................... 1928

A. Claim under Article XI:1 of the GATT 1994......................... 1928

1. Measure at Issue and Overview of the Parties' Arguments .................................................................. 1928

| | | | | | Page |
|---|---|---|---|---|---|
| | 2. | Burden of Proof | | | 1932 |
| | 3. | Nature of the Claim before the Panel | | | 1933 |
| | 4. | Mere Presence of Tanners' Representatives as an Export Restriction | | | 1935 |
| | 5. | Presence of Tanners' Representatives along with Access to Information as an Export Restriction | | | 1939 |
| | 6. | Presence of Tanners' Representatives, Access to Confidential Information and Abuse of such Information as an Export Restriction | | | 1941 |
| B. | Claim under Article X:3(a) of the GATT 1994 | | | | 1945 |
| | 1. | Measure at Issue and Overview of the Parties' Arguments | | | 1945 |
| | 2. | How Article X:3(a) Relates to Other Provisions of the GATT 1994 | | | 1946 |
| | | (a) | General | | 1946 |
| | | (b) | Article X:3(a) and MFN | | 1946 |
| | | (c) | Substantive Rules Versus Administration | | 1948 |
| | | (d) | Laws of General Application | | 1949 |
| | 3. | Is Resolution 2235 Uniform, Impartial and Reasonable? | | | 1950 |
| | | (a) | General | | 1950 |
| | | (b) | Uniformity | | 1950 |
| | | (c) | Reasonableness | | 1952 |
| | | (d) | Impartiality | | 1955 |
| C. | Claims under Article III:2, First Sentence, of the GATT 1994 | | | | 1956 |
| | 1. | Factual Aspects | | | 1956 |
| | | (a) | Value-Added Tax (IVA) | | 1957 |
| | | | (i) | The IVA | 1957 |
| | | | (ii) | Pre-Payment of the IVA | 1958 |
| | | | Pre-Payment of the IVA on Imports | | 1958 |
| | | | Pre-Payment of the IVA on Internal Sales | | 1959 |
| | | (b) | Income Tax (IG) | | 1959 |
| | | | (i) | The IG | 1959 |
| | | | (ii) | Pre-Payment of the IG | 1960 |
| | | | Pre-Payment of the IG on Imports | | 1960 |

| | | | | Page |
|---|---|---|---|---|
| | | Pre-Payment of the IG on Internal Sales | | 1961 |
| 2. | Overview of the Parties' Arguments and Analytical Approach Followed | | | 1962 |
| 3. | Applicability of Article III:2 | | | 1965 |
| | (a) | Tax Measures | | 1965 |
| | (b) | Internal Measures | | 1967 |
| | (c) | Measures Applied to Products | | 1970 |
| 4. | Likeness of Imported and Domestic Products | | | 1971 |
| 5. | Comparison of Tax Burdens Imposed | | | 1975 |
| | (a) | Tax Burdens Imposed | | 1975 |
| | (b) | Pre-Payment of the IVA | | 1979 |
| | | (i) | Claims by the European Communities | 1979 |
| | | Lower Pre-Payment Rates Applicable to Internal Sales to Registered Taxable Persons | | 1980 |
| | | No Pre-Payment on Internal Sales to non-Registered Taxable Persons | | 1981 |
| | | No Pre-Payment on Internal Sales by non-*agentes de percepción* | | 1983 |
| | | No Pre-Payment on Internal Sales to Certain Financial Entities or *agentes de percepción/retención* | | 1984 |
| | | Minimum Pre-Payment Threshold for Internal Sales | | 1986 |
| | | (ii) | Broad Counter-Arguments by Argentina | 1988 |
| | | Adjustment for Prior-Stage Pre-Payment | | 1988 |
| | | Exemption Mechanism | | 1990 |
| | | Magnitude and Duration of the Tax Burden Differentials | | 1991 |
| | | Provisions of Domestic Law | | 1992 |
| | | (iii) | Conclusions | 1994 |
| | (c) | Pre-Payment of the IG | | 1994 |
| | | (i) | Claims by the European Communities | 1994 |
| | | Lower Pre-Payment Rates Applicable to Internal Sales by Registered Taxable Persons | | 1994 |

Page

No Pre-Payment on Internal Sales of Goods Destined for the Purchaser's Own Use or Consumption .................................................. 1995

Minimum Pre-Payment Threshold and Monthly Pre-Payment Allowance for Internal Sales .................................................. 1996

(i) Broad Counter-Arguments by Argentina ............................................ 1999

Exemption Mechanism .................................. 1999

Refund Mechanism ........................................ 2000

Magnitude of the Tax Burden Differential...... 2001

(ii) Conclusions ........................................ 2001

6. Defence under Article XX(d) of the GATT 1994 ...... 2002

(a) Overview of the Parties' Arguments and Analytical Approach Followed ...................... 2002

(b) Provisional Justification under Paragraph (d) of Article XX ................................................. 2003

(i) Existence of Measures which Secure Compliance with Other Laws or Regulations ......................................... 2003

(ii) Consistency with the GATT 1994 of those Other Laws or Regulations..... 2004

(iii) Necessity of the Measures Taken to Secure Compliance ............................. 2004

(c) Consistency with the Requirements of the Chapeau of Article XX .................................. 2006

(i) Interpretation and Application of the Chapeau ........................................ 2006

(ii) Justifiability of Discrimination ........... 2009

XII. CONCLUSIONS ............................................................................ 2014

## I. PROCEDURAL BACKGROUND

1.1 On 23 December 1998 the European Communities requested consultations with Argentina pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the "DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (hereinafter the "GATT 1994") regarding an alleged de facto export prohibition maintained by Argentina on raw and semi-tanned bovine hides; an "additional VAT" of nine percent raised by Argentina on the import of products into its territory; and an

"advance turnover tax" based on the price of the imported goods imposed on operators when importing goods into Argentina.[1]

1.2 Consultations were held in Geneva 5 February 1999, but did not lead to a mutually satisfactory resolution of the matter. On 31 May 1999, the European Communities requested the Dispute Settlement Body (hereinafter the "DSB") to establish a panel pursuant to Article XXIII of the GATT 1994, and Article 6 of the DSU. The European Communities claimed that the export prohibition maintained by Argentina violated Articles XI:1 and X:3 (a) of GATT 1994 and that the "additional VAT" and the "advance turnover tax" were not in conformity with Article III:2 of GATT 1994.

1.3 At its meeting on 26 July 1999, the DSB established a panel pursuant to the request of the European Communities, in accordance with Article 6 of the DSU. In document WT/DS155/3, the Secretariat reported that the parties had agreed that the panel would have the standard terms of reference. The terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS155/2, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 Document WT/DS155/3, "Argentina - Measures affecting the export of bovine hides and the import of finished leather," also reported that, on 31 January 2000, the Panel was constituted as follows:

Chairman: H.E. Ambassador Roger Farrell

Members: Mr. Victor Luíz do Prado

Mr. Sándor Simon

1.5 The United States reserved its rights to participate in the panel proceedings as a third party, and presented arguments to the Panel.

1.6 The Panel met with the parties 17 - 18 April 2000 as well as on 13 June 2000. It met wit the third party on 18 April 2000. The Panel issued its interim report to the parties on 13 October 2000. The panel issued its final report to the parties on 17 November 2000.

[1] See WT/DS155/1.

## II. FACTUAL ASPECTS (MEASURES ON EXPORT OF BOVINE HIDES)

### A. *Scope of the Claim*

2.1 The European Communities requested the establishment of a Panel (WT/DS155/2) claiming that Argentina maintained a "de facto export prohibition on raw and semi-tanned bovine hides which is implemented in particular through the authorization granted by the Argentinean authorities to the Argentinean tanning industry to participate in customs control procedures of hides before export." The European Communities requested "the panel to consider that this export prohibition constitutes a breach of Article XI:1 of the GATT 1994.

2.2 In the legal argument in its first submission, paragraph 71, "the European Communities considers that Resolution 2235/96[2] which provides the tanning industry with the possibility to control the exportation of hides and skins constitute an export restriction in the sense of Article XI as it allows the tanning industry to enforce an export ban imposed by that industry on the slaughterhouses("frigoríficos").[3] In paragraph 73 the European Communities continues: ″The facts set out above clearly show that the authorization leads to a de facto export ban from Argentina on those bovine hides on which the Argentinean industry is interested in adding value, namely raw hides."

2.3 In paragraph 1 of its oral statement, the European Communities claims that the measure in question "effectively acts to restrict exports of raw bovine hides from Argentina." In its answer to question 1 by the Panel, the European Communities states that "this dispute is about Argentinean government restrictions on raw bovine hides."

### B. *The Products Concerned: Production and Processing of Raw and Semi-Tanned Hides*

2.4 Bovine hides are a by-product of meat production. Each slaughter of a bovine animal results in the "production" of one hide. The value of one hide is about 5-10 percent of the animal's value.[4]

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[2] Resolución No 2235/96 of 27 June 1996 (hereinafter "Resolution 2235").

[3] In their submissions, the European Communities translates the Spanish word "frigorífico" as "slaughterhouse," while Argentina frequently refers to "meat-packing plant." For the purpose of this text, the term slaughterhouse is used as meaning also "frigorífico" and "meat packing plant."

[4] Argentina, in footnote 39 to para. 76 of its first submission argues of a value of 5-8 percent. A study by UN/ECLAC quoted by Argentina in para. 19 of the first submission, as well as in reply to a question by the Panel, argues for "approximately 10 percent"; UN/ECLAC, "La industrialización del cuero y sus manufacturas en la Argentina: un cluster en desarticulación o un complejo desarticulado?" in the framework of the project "A Natural Resource-Cluster Development Strategy: Growth, Distributive and Environmental Implications," by Gustavo Lugones and Fernando Porta, page 7, July 1999.

2.5 Raw, untanned, hides are mostly treated with salt so as to prevent decay during storage or during transport from the slaughterhouse to the tannery. Raw hides can also be dried or chilled to obtain a similar preservation effect. These treatments are either undertaken by the slaughterhouses, or the tanneries in cases where the tanneries pick up the hides from the slaughtering floor for processing.

2.6 Raw hides can be either "wholehides," or they can be split into "flesh split," i.e. the bottom split or reticular layer of the hide and "grain split," i.e. the upper portion of the hide (outside of the skin) which has been separated from the reticular or split layer.

2.7 Raw hides are usually purchased from slaughterhouses by specialised hides and skins traders, to be sold on to tanneries, or directly by the tanneries. There are cases where meatpacking plants and tanneries are integrated enterprises with the ability to process rawhides.

2.8 Leather tanning consists of several different operations and stages. Once they have entered a tannery, hides first undergo the so-called "liming process": they are cleaned while hair, flesh and other redundant fibres are removed from the hides' surface. During the subsequent process of tanning, raw hides and skins are transformed, through interaction with a tanning agent, into a durable material that serves as input for downstream sectors such as footwear,[5] clothing, upholstery, handbags and other leather goods. During production, the hide undergoes several processes, each leading to a new stage of leather production. The tanning agent used for approximately 90 percent of world production, and also in Argentina, is chromium (for shoe, upholstery and garment leather production). Chrome tanning produces a type of semi-finished leather commonly referred to as "wet blue," due to its bluish coloration. The remaining 10 percent are vegetable tanned leather, used for shoe sole leather, belts and luggage.

2.9 Raw hides constitute the most important input in the leather production process. Generally, the raw hides used represent 50 to 60 percent of the production cost of finished leather products.

### *C. Production, Price, and Trade Figures of Raw Hides, Semi-Finished and Finished Leather*

#### *1. Production Figures for Raw Hides in Argentina*

2.10 In the period from 1967-1971, Argentina had a cattle stock of about 49.8 million head.[6] The number increased to a peak of 59 to 61 million head in 1977[7] and declined steadily until it reached 50 to 52 million head in 1988. It remained stable at that rate until today, where Argentina's bovine livestock ranges between

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5 Footwear accounts for 70 percent of the end-products for which raw hides are used.

6 Figures quoted from FAO - See Exhibit EC I-41.

7 The figures vary between from Exhibit EC I-20 (figures on slaughter, exports etc. provided by Argentinean authorities) to Exhibit EC I-41 (figures from FAO).

49 and 51 million head, making Argentina one of the six largest cattle breeding countries.

2.11 The cattle slaughter rate and raw hide production in Argentina was about 11.1 million in 1966, rose to about 16 million in 1978 and decreased to 11.27 million in 1998. Between 1992 and 1996, the slaughter rate averaged 11.6 million head, with variations between 11.8 million and 11.4 million head for that period.

### 2. *Export Figures for Raw Hides and Semi-Tanned (wet blue) Leather*

2.12 For the last five years, the export figures (in kg.) for raw salted hides from Argentina, as provided by the parties, differ, except for the years 1998 and 1999.

| Year | Figures provided by Argentina | Figures provided by the European Communities |
|---|---|---|
| **1995** | 600900 | 387812 |
| **1996** | 298523 | 37557 |
| **1997** | 207027 | 1800 |
| **1998** | 3234 | 3234 |
| **1999** | 242875 | 242875 |

2.13 The ratio between slaughtered animals and exported raw hides is expressed in the table below. The number of exported raw/salted hides is derived from the export figures expressed in kg., as provided by Argentina, divided by 30.11 kg., which is the average weight of a raw hide. Both parties acknowledge this weight. While the European Communities contests the Argentine figures from 1996-1998, it accepts them to show that on the basis of the figures provided by Argentina, since 1996 the export of raw bovine hides was lower than 1/1000 of annual production of hides.

| Year | Number of cattle slaughtered | Number of raw/salted hides exported | Ratio of hides exported over hides produced |
|---|---|---|---|
| 1996 | 12916716 | 9914 | 1/1303 |
| 1997 | 12794718 | 6875 | 1/1861 |
| 1998 | 11.280.949 | 107 | 1/105429 |
| 1999 (estimated, Dec. missing) | 11800121 | 8066 | 1/1463 |

2.14 **Argentina** also provided the following export figures for wet blue hides (in kg.):

**1995:** 43521 kg.,

**1996:** 1087 kg.,

**1997:** 100297 kg.,

**1998:** 118689 kg.,

**1999:** 1034291 kg.

2.15 For 1999, exports of raw and wet blue hides corresponded to 0.78 percent of hide output.

2.16 Around 80-85 percent of the output of finished and semi-finished leather hides is exported.

### *3. Import Figures for Raw Hides and Semi-Tanned (wet blue) Leather*

2.17 From 1995 onwards, Argentina has imported raw and wet blue hides. The import figures for raw hides (in kg.) provided by Argentina and the European Communities vary as follows:

| Year | Argentina | European Communities |
|---|---|---|
| **1995** | 64020 | 34020 |
| **1996** | 3488950 | 3471400 |
| **1997** | 1714761 | 1691661 |
| **1998** | 4983383 | 3617403 |
| **1999** | 1492107 | 1762000 |

2.18 Over the same period Argentina imported the following quantities of *wet blue hides*:

**1995**: 129514 kg;

**1996**: 667731 kg.;

**1997**: 950357 kg.;

**1998**: 3025609 kg.;

**1999**: 6401562 kg.

## *D. Context of Government Measures Regarding the Export of Raw Bovine Hides in Argentina*

2.19 Before 1972, Argentina exported an important volume of hides to the rest of the world, including the European Communities. Argentina was an important source of supply for tanners of the European Communities. The average level of exports of raw bovine hides amounted to an average of 177000 tons a year in the

period 1961-1970. As from 1971 the number of exported hides started to decline (74000 tons).[8]

2.20 In May 1972, the government of Argentina imposed a prohibition of exports of raw (wet salted) bovine hides[9] with the stated purpose of "protect[ing] the adequate supplies of bovine hides to the tanning industry."

2.21 In this period, export of raw hides decreased from 144000 tons in 1970 to 7.000 tons in 1978.[10]

2.22 In August 1979, following a Section 301 petition filed by the US Tanners Council, the United States and Argentina reached an agreement, wherein Argentina committed itself to convert the export prohibition into a 20 percent export tax and then gradually reducing that tax to zero by 1 October 1981.

2.23 Argentina implemented the first stage of this Agreement in 1979 by introducing the agreed tax. At the same time, it imposed a minimum transaction price for the purpose of calculating the export tax.

2.24 In 1981 Argentina failed to implement the tax reduction as foreseen in the agreement. The US President terminated the agreement in 1982.

2.25 In the course of 1982 and 1984, when also export taxes were increased, export figures for raw bovine hides continued to decrease from 8000 tons in 1979 (with an upsurge to 31000 in 1981, and a downfall to 1000 tons in 1983) to 7000 tons in 1985.

2.26 In September 1985, a Resolution[11] by the Secretary of State for Industry of Argentina introduced a "suspension" on exports of raw hides and semi-finished leather in order "to maintain the volume of supply in raw materials adequate to the needs of the domestic market of the leather tanning and manufacturing sector facilitating a smooth flow of supplies while avoiding any undue increase in prices."

2.27 As from 1987 the Argentinean Government's statistics export of raw bovine hides, indicate "0," which means that exports were less than 1000 tons.

2.28 In October 1990, the United States imposed a 15 percent countervailing duty on imports of Argentinean leather.[12] Its authorities had found that a comparison of Argentinean and US hide prices during the period in which Argentina maintained the aforementioned "suspension" on the export of hides "clearly demonstrates that hide prices were consistently lower than US hide prices."[13]

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[8] See Exhibit EC I-18, taken from FAO World statistical compendium for raw hides and skins, leather and leather footwear 1961-1982.

[9] Decree No 2861/72.

[10] Exhibit EC I-20 (Figures on slaughter, exports etc. provided by Argentinean authorities)

[11] Resolution 321/85. This Resolution is also cited in the US decision imposing a countervailing duty; see Exhibit EC I-6 (US notice on imposition of countervailing duties on imports into the US of leather from Argentina), p. 40213 top of right hand column.

[12] See Exhibit EC I-6, Op. Cit.

[13] *Ibid.*, at 40214 top of middle column.

2.29 In April 1992, the Argentinean Government replaced the export ban by a 15 percent duty[14] on the exports of raw bovine hides[15] and bovine wet blue.[16] The export tax is calculated upon the basis of a reference price (Chicago quotation of Butt Branded Steer Hides) on the exports of raw bovine hides and wet blue, and an "additional" tax of 15 percent on such exports. That additional tax was later abolished and between 1993 and 1999, no additional export charges were levied.

2.30 Upon request of the Argentinean tanning industry on 17 February 1993, the Argentinean Government authorized on 15 April 1993 through Resolution 771/93, the presence of representatives of the *Argentinean Chamber for the Tanning Industry* (CICA) during customs controls of bovine raw hides (tariff headings 4101.10/21/22/29/30) and wet blue hides (tariff headings 4104.10.100, 4104.21.00, 4104.22.00 and 4104.29.10) before export. The measure was originally foreseen to apply only for 90 days, but was extended several times.[17] The authorization originally applied only to products falling under the same customs position as those which were subject to the export tax, i.e. raw hides and wet blue hides.

2.31 On 26 April 1994, upon its request, the system was extended to representatives of *the Association of Industrial Producers of Leather, Leather Manufactures and Related Products* ("ADICMA") and the customs position on which the system applies was extended to also cover finished leather and furs (all customs positions under 4104).[18] Since then, also persons appointed by the member organisations of ADICMA, i.e. representatives from Argentinean leather producers and leather goods producers, are allowed to be present when the goods concerned are presented for export.

2.32 In December 1994 the export duty was adapted to the Common Nomenclature of Mercosur.[19] A timetable for the progressive phasing out of the export duty was established. However, since then this timetable was modified on various occasions, slowing down the phase-out.[20]

2.33 In fact, although the total abolition of the export duty by the end of 1999 had been announced already in December 1994,[21] it was recently extended for (at least) another half year.[22] On 1 January 1998, the export tax was reduced to 10

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[14] Resolution MEOSP No: 537/92 of 29 April 1992 (See Exhibit EC I-7). The Resolution also introduced a 15 percent additional tax, but this tax was later abolished.

[15] With the exception of dried and pickled hides.

[16] With the exception of "flesh splits," which are the reticular layers of hides.

[17] See Resolution 1650/93 of July 1993 (Exhibit EC I-12); Resolution 3208/93 of 20 December 1993 (Exhibit EC I-13); Resolution 1024/94 of 26 April 1994 (Exhibit EC I-14); Resolution 1380/94 of 31 May 1994 (Exhibit EC I-15); Resolution 3746/94 of 28 December 1994 (Exhibit EC I-16); Resolution No 2257/95 of 31 July 1995 (Exhibit EC I-17).

[18] See Resolution 1024/94 of 26 April 1994 (Exhibit EC I-14).

[19] See Decree 2275/94 (Exhibit EC I-8).

[20] See for example Regulation MEOSP 722/95 of 21 December 1995 (Exhibit EC I-9).

[21] See Resolution 2275/94 (Exhibit EC I-8).

[22] See Resolution 20/99, (Exhibit EC I-10).

percent. On 1 January 1999, the export tax was reduced to 5 percent. That rate is currently still applied.

2.34 The one-before-last of the Resolutions perpetuating the authorization was Resolution 2235, which refers to a fresh request[23] by ADICMA to continue the system.[24]

### *E. Resolution 2235*

2.35 Upon request by ADICMA, the National Customs Administration of Argentina issued on 27 June 1996 Resolution 2235. Annex II of the Resolution sets out the "operative rules" and resolves as follows:

> 1. The entities listed in Annex III hereto may appoint members of their staff to participate jointly with the agents involved in the inspection of goods classified under the tariff headings listed in Annex IV.
>
> 1.1 For this purpose, they shall inform this national administration of the appointment of representative experts and draw up lists of those appointed, containing particulars of each one's address, telephone and fax or telex numbers and the different customs jurisdictions in which they will be involved in joint inspection activities. They shall also keep those lists up to date.
>
> 1.2 The authorization hereby conferred shall be applicable in all customs jurisdictions.
>
> 1.3 In the Buenos Aires and Ezeiza customs jurisdictions, if and when the final export destinations for consumption or temporary export so require, staff may be kept on a permanent basis to carry out these support tasks.
>
> 1.4 The same facilities may be authorized in the customs departments in the interior of the country.
>
> 1.5 Final export destinations for consumption shall be checked in the case of those for which the red channel (goods to declare) was selected as well as all temporary export destinations.
>
> 1.6 Goods shall be inspected by the technical inspection and valuation unit, with the possible support of the expert appointed by the respective entity, but this will be done without holding up shipment operation if the expert is not present.

2.36 Annex III lists, among other leather-manufacturing industry organizations, also CICA and ADICMA, as being involved in the inspection of goods classified

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[23] See first recital to the Resolution, which refers to Argentinean file number 412.739/96.

[24] *Ibid.*, file number 437.872/96.

under the tariff headings set out in Annex IV.[25] The products covered by Annex IV include bovine hides and calf skins, semi-finished leather and finished leather

2.37 Pursuant to a further request for prolongation by ADICMA, Resolution 716/97 of 28 February 1997 determined that the authorization would continue to apply indefinitely. No authorization similar to that contained in the Resolution exists for the export of any other product from Argentina. Argentina explained that no other similar request from other entities or industries had been made.

### *F. The Practical Application of Resolution 2235/96*

2.38 The export procedure for hides and the inspection of the goods (leather) by the Technical Unit for Verification and Valuation (UTVV) as well as the participation of the chambers in that process are not governed by any specific DGA resolution, but by the Customs Code (Law 22415), by Resolution ANA 1284/95 (regulating export transactions declared through the MARIA Computer System - SIM) and by Resolution ANA 125/97 and its modifying resolutions establishing the general procedures for all exportation.

2.39 ADICMA staff are allowed to witness the actions of the customs officer inspecting goods covered by Resolution 2235. Once Customs receives a notice of embarkation by the exporter or his customs broker, it notifies ADICMA that a clearance operation will take place, indicating the place, day and approximate time. ADICMA may be informed of this by a telephone call from the customs inspector, but there are instances in which they are notified of the date and approximate time of the clearance, the place, name of the exporter, identity of the means of transport, destination and description of the goods by the exporter's own customs clearance agent.[26]

2.40 Once at the place of inspection, the ADICMA representative accompanies the inspector in ascertaining that the exporter's declaration coincides with the goods to be cleared for export.

2.41 The inspection, classification and valuation of the goods declared are carried out by the UTVV. It verifies that what is declared in the permit of shipment is real, that the tariff heading indicated corresponds with the description of the goods and that the duties and charges proposed are appropriate, and then cross-checks supplementary data, number of packages and their identity.

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[25] Hereinafter, where the submissions speak of "ADICMA," "ADICMA representatives," "ADICMA staff," or "tannery representatives," the groups of organizations authorized through Resolution 2235 are meant by the parties.

[26] Copies of such faxes are contained in Exhibit ARG-XXVII.

2.42 All of this is done by the inspecting officer, in the presence of the customs officer, exporter[27] or his customs clearance agent and the staff detailed by ADICMA to attend.

2.43 If the DGA determines that the merchandise has been correctly classified, the shipment goes ahead. If the inspecting officer detects irregularities, shipment is not allowed. If there are discrepancies in the amount, quality and/or value of the goods, the appropriate complaint will be lodged with the Disputes Section or with the competent local customs office, pursuant to the rules.

2.44 If ADICMA representatives disagree with the decision of the customs officers, they may submit a complaint subsequently or, if appropriate, file with a court charge on alleged criminal offences. According to Resolution 2235, there must not be any delays as a result of ADICMA participation in the inspection. Resolution 2235 does not provide that shipments can be stopped on account of any possible objection from the ADICMA representatives who are present during the inspection.

## III. CLAIMS BY THE PARTIES

3.1 The European Communities requests the Panel to find that:

- the authorization granted to representatives of Argentina's tanning industry to participate in customs control procedures of raw bovine hides before export, which is currently contained in Resolution 2235 of the National Customs Administration (the "ANA") is inconsistent with Article XI:1 of the GATT.
- the said authorization is inconsistent with Article X of the GATT.

3.2 Argentina requests the Panel to:

- find that the authorization granted to representatives of the tanning industry under Resolution 2235 neither has the characteristics nor gives rise to the consequences alleged by the European Communities in its written submission and therefore cannot be deemed to infringe the provisions of Article XI:1 of the GATT 1994;
- reject the allegations of the European Communities that Resolution 2235 is being administered in a manner that is partial, not uniform and unreasonable in light of the obligations arising from Article X:3(a) of the GATT 1994.

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[27] Article 340 of the Argentinean Customs Code provides: "The exporter or, as appropriate, the customs clearance officer acting on his behalf shall be present during the inspection of the goods. Failing this, he shall forfeit the right to raise any objections to the outcome of the inspection determined by the customs department."

## IV. MAIN ARGUMENTS

### A. *Violation of Article XI:1 of the GATT 1994*

4.1 The **European Communities** claims that Resolution 2235 provides the Argentine tanning industry with the possibility to control the exportation of bovine hides and skins, thus allowing the tanning industry to enforce an export ban imposed by that industry on the *slaughterhouses.* Resolution 2235 therefore constitutes an export restriction in the sense of Article XI:1 of the GATT 1994. The European Communities argues that the measure cannot be justified on technical grounds and pursues, in reality, a clear protectionist purpose as it discourages, in practice any *slaughterhouse* from exporting.

4.2 The European Communities argues that the presence of the tannery representatives during the inspection will allow them to obtain confidential business information. Exporters of raw hides will be dissuaded from engaging in export transactions they know that thereby their domestic buyers will receive business confidential information of that company. What is more, the tanneries can use this information - as they hold a dominating market position over the slaughterhouses - to dissuade the slaughterhouses from exporting.

4.3 **Argentina** contests the European Communities' assertion that it is *de facto* imposing a prohibition on exports of bovine hides. ADICMA representatives have no legal authority to restrict exports pursuant to Resolution 2235. Argentina also contests that the presence of ADICMA representatives imposes a prohibition by creating a chilling effect on exports of raw hides and semi tanned hides. Argentina further states that the European Communities was not able to explain, even upon request by the Panel in the second oral hearing, how the so called chilling effect took place at the customs. In addition, Argentina explained that ADICMA representatives do not have access to confidential information and all the information they do have access to is freely available and in the public domain. Argentina also points out that the government officials are barred by criminal law from divulging any confidential information to the ADICMA representatives. The EC has not been able to provide a single example about any attempted export that was rejected, complicated or aborted by the Argentinean customs authorities as a result of Resolution 2235. Argentina argues, moreover, that the European Communities has failed to adduce evidence to support its claim that there was price-collusion on the part of the tanning industry, noting that it was not aware of any complaint in this regard to its competition authority. Argentina further states that the meat-producing industry has a four-times higher turnover than the tanning industry, and the value of the raw hide represents only 5-8 percent of the value of the animal at the time of slaughter. Against this backdrop, it can hardly be claimed that the tanneries could exert pressure on the meat packing plants.

4.4 As for the lack of exports of bovine hides, Argentina recalls that the meat-producing industry has been in a state of economic decline over the past few years. Argentina also argues that, while its own bovine hides are comparable to

US hides in terms of quality, the prices quoted by the European Communities relate to products at different stages of processing. According to Argentina, in the US, the tanning industry receives and pays for a product that has already undergone some initial processing, whereas in Argentina this is not the case. If Resolution 2235 did bring about the effects alleged by the European Communities, those suffering from its effects would have challenged it under relevant Argentinean law. According to Argentina, they did not do so.

### 1. *Export Prohibitions or Restrictions Maintained by a Contracting Party, Made Effective through "other measures"*

4.5 Article XI:1 GATT 1994 stipulates that export restrictions can be made effective not only through quotas or licenses but also though "other measures." The **European Communities** claims that it is irrelevant that the authorization contained in Resolution 2235 is not a formal prohibition or quantitative restriction. As confirmed by numerous Panel decisions, Article XI:1 is comprehensive and covers *all* measures restrictive of trade other than measures taking the form of customs duties and charges.[28] Moreover, in *Guatemala-Cement* the Appellate Body stressed that "[i]n the practice established under the GATT 1947, a "measure" may be *any* act of a Member (…)."[29]

4.6 The European Communities states that the resolution - to use the words of Article XI - "makes effective" this export restriction, since it creates the possibility that the ADICMA representatives obtain confidential business information.

4.7 **Argentina** argues that the participation of private sector representatives in the inspection of raw bovine hide exports cannot contravene Article XI, which specifically refers to quantitative restrictions attributable to government action. Nor is there any contravention in the form of a *de facto* restriction.

4.8 Argentina maintains that "other measures" in the sense of Article XI:1 GATT 1994 cannot be just any kind of measures. GATT/WTO practice lays down the requirements to be met by "other measures" in order for a de facto prohibition to be proven. The authorization at issue is not "mandatory" or "binding" in nature.

4.9 In the *Japan - Semiconductors*[30] case which the European Communities mentions, the Panel considered that two criteria had to be fulfilled to find a violation of Article XI:1:

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[28] See Japan – Restriction on Imports of Certain Agricultural Products, March 22, 1988, BISD 35S/163 ; Japan –Trade in Semiconductors, 4 May 1988, BISD 35S/116, Korea – Restrictions on Imports of Beef, 7 November 1989, BISD 36S/286.

[29] See Report by the Appellate Body, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* (*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, footnote 47 to para. 69.

[30] See Japan - Trade in Semiconductors, Report of the Panel, L/6309, para. 108.

(a) that sufficient incentives or disincentives existed for non-mandatory measures to take effect; and

(b) that the operation of the measures was essentially dependent on government action.

4.10 Only if both criteria were satisfied, the measures in question became "measures [which] would be operating in a manner equivalent to mandatory requirements."[31]

4.11 Argentina states that when applying these criteria, *mutatis mutandis* to the case at hand, the presence of representatives of ADICMA for the conduct of customs control procedures does not imply a legal authority[32] to impede customs clearance (Article 1.6 of Annex II to Resolution 2235 and concordant legislation in the Customs Code).

4.12 The legal conditions of their presence (lack of legal authority to prohibit export) show that the alleged de facto prohibition can in no way be carried out by this fact alone. Consequently, the first requirement for proving a de facto prohibition in respect of "other measures" under Article XI:1, as set out in the precedent relied upon by the European Communities, is not fulfilled.

4.13 An analysis of the second requirement of the *Japan - Semiconductors* case, namely whether the operation of a measure designed to restrict exports is essentially dependent on government action. In this respect, Argentina states that the achievement of the objective of the sole measure contested by the European Communities, Resolution 2235, does not depend, in terms of enforcement of the resolution, on any government action.

4.14 In other words, the resolution authorizes the voluntary participation of technical experts in the goods inspection process, for the sole purpose of assisting the customs expert. But just as representatives of the industry chambers are not legally entitled to prevent the customs clearance of the goods, neither is the government legally entitled to compel them to participate in the inspection process, so that the voluntary participation of the industry chambers in the inspection process can in no way be considered to constitute the equivalent of what in the *Semiconductors* case was described as a "coherent" system restricting sales.[33]

4.15 In short, Resolution 2235 authorizes the presence of technical experts of the industry, but that authorization does not guarantee a specific effect with regard to private actors,[34] or with regard to the exported products. Resolution 2235

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[31] See Japan - Trade in Semiconductors, Report of the Panel, L/6309, para. 109.

[32] As in indicated in Article 23(p) of the Customs Code and Article 1.6 of Annex II to RG 2235/96.

[33] See Japan - Trade in Semiconductors, Op. Cit., para. 117.

[34] Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.46: "In line with this observation of the Japan - Agricultural Products Panel, we consider that our analysis of the alleged "measures" in this case must proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors."

applies no incentive or disincentive of any kind to prevent the export of raw and semi-tanned hides: its text provides for none, either in its legal grounds or in the operative part. As was mentioned above, the outcome of its implementation is also not dependent on government intervention. It is merely an authorization to obtain technical support for inspection of the export of all types of hides.

4.16 The **European Communities** disagrees with Argentina's analysis of the *Semiconductors* Panel Report. Unlike in that case, the measure in question here is an obligatory government measure.

4.17 The European Communities states that the measure is of course a government measure, as it was issued by the Argentinean government. Based on the Resolution, the Argentinean customs authorities inform the ADICMA representatives whenever hides and skins are submitted to them for inspection before export and invite them to be present.

4.18 **Argentina** states that the qualification of Resolution 2235 as a government measure is irrelevant to these proceedings. Argentina never denied that the Resolution was an administrative act of the Argentine Government and that it had the legal status of a governmental act. This has nothing to do with meeting the requirements of Article XI:1. If we were not speaking of a governmental act, the Panel would never have been established. The WTO dispute settlement mechanism does not deal with the acts of private individuals.

4.19 The **European Communities** asserts that the measure is of an obligatory nature. Due to the contested Resolution, anybody who wishes to export hides from Argentina, is obliged to accept that ADICMA-representatives may be present when hides are inspected by the customs authorities. That ADICMA is perhaps not obliged to be represented is irrelevant: the measure is mandatory, since the potential exporter is forced to undergo the ADICMA-presence if ADICMA chooses to be present. The reasoning, which Argentina builds upon the *Japan-Trade in Semiconductors* Panel Report, is therefore flawed, as the measure is obligatory by nature.

4.20 In reply to a question by the Panel, the European Communities further underlines that the Resolution, which is a government measure, directly causes the restrictive effect on exports by allowing the CICA/ADICMA presence; it is a *conditio sine qua non* for creating that effect. In a similar manner to the *Japan-Trade in Semiconductors Panel* Report, Argentina violates Art. XI by encouraging - through allowing the CICA/ADICMA presence -pressure by the tanneries on a slaughterhouse. Also, Argentina violates Art. XI by providing the tanneries with confidential information regarding that export transaction, which in itself - as the slaughterhouses confirm - restricts them in exporting freely. The EC finally notes that if Art. XI:1 could be circumvented by WTO Members simply by giving private operators sensitive information and "letting them do the work", that provision could be rendered completely ineffective. The fact that exports of raw hides from Argentina are marginal, especially in comparison with years with comparable slaughter rates before Argentina started its long series of measures prohibiting exports of hides, proves that Res. 2235/96 severely restricts exports.

4.21 **Argentina** responds that Resolution 2235 is in no way mandatory in terms of giving ADICMA the authority to detain any shipment. If ADICMA does not have any authority to detain a shipment, the fact that the potential exporters must accept the possible presence of ADICMA (" … the potential exporter is forced to undergo CICA presence if CICA chooses to be present") is irrelevant with respect to the obligatory nature of the measure.

4.22 For this obligatory nature to prove the existence of a "de facto ban" which fits the broad definition of "other measures," there must be a direct relationship between the content of the rule and the effect it is meant to achieve. In other words, the substantive content of the obligatory rule must be relevant to the intended effect. If there is no such relationship, and if by its obligatory nature alone it does not produce any effect on the market, the alleged obligatory nature of the measure is irrelevant in establishing a violation of Article XI:1.

4.23 Even if one was to assume that the definition of "depending on government action," in the meaning indicated by the European Communities, had any value in proving the restriction, and the European Communities has not been able to demonstrate that it does, the fact is that even if the measure were considered "obligatory," the requirement that it should have an effect, as set out in *Semiconductors,* would remain. Argentina showed that there are exports, thereby disproving *per se* the existence of the alleged ban. Therefore, the other requirement established by *Semiconductors* -the effectiveness of the measure- is not fulfilled either in this case."

4.24 What is more, ADICMA's participation does not have any impact on exports, as proved by the fact that when exports did increase, it was as a result of the "phase out" of export duties. If the presence of the ADICMA *per se* had any influence on exports, the exports would not react to the level of duty. Consequently, the questioned measure has no effect in achieving any kind of ban.

4.25 Two graphs were presented by Argentina, showing both intrazone and extrazone export trends for salted hides and wet blue, as follows. This division was made based on the destination of exports, considering that the duties were different for both zones until 1999.

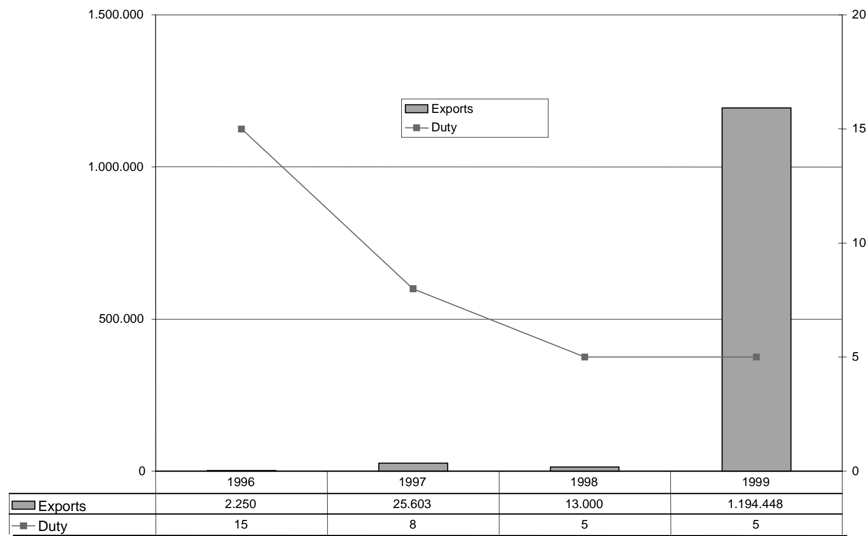
4.26 Both zones show a high correlation between the levels of duties and the amounts of exports for 1996, 1997 and 1999. That correlation is distinctly greater for 1999.

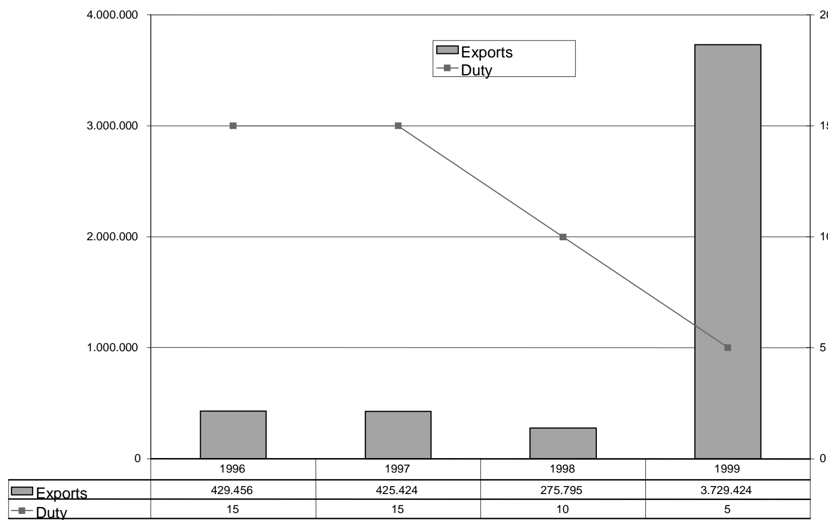
4.27 In intrazone trade it is observed that the reduction from *15 to 8* percent in duties translated into a sizeable increase in exports, from $2.250 to $25.603.

4.28 Extrazone trade for 1996 and 1997 showed no significant changes in export quantities, duties having been maintained at the same levels.

4.29 No correlation was seen between the variables studied for 1998 in both zones. It is worth recalling that 1998 was an atypical year for the hide trade, having been severely affected and influenced by the crisis in the Asian countries, which led to a contraction of trade and to price volatility.

4.30 It is concluded that duties are a sufficiently suitable instrument for encouraging the processing of raw materials on the domestic market, but we must also point out that they are not hampering salted hide and wet blue exports, as such exports have indeed been taking place.




4.31 The European Communities state that exports of raw bovine hides and wet blue from Argentina have never been subject to tax refunds. Quite to the contrary, bovine hides were, and still are, subject to an export tax. However, Resolu-

tion ANA 771/93 of 15 April 1993, which for the first time allowed representatives of the Argentinean tanning industry to be present at customs control of hides before export, applied exclusively to raw hides and wet blue, not to crust and finished leather.

4.32 The justification given by Argentina for the measure is therefore absurd. One cannot reasonably argue that an export control procedure on raw hides and wet blue only was introduced to prevent fraud in the system of tax refunds for *finished* leather. In this context it is also important that the CICA letter of 17 February 1993, requesting the measure, does not invoke such a justification at all. It focuses on the fact that hides are a scarce material whose commercialisation - CICA argues - is restricted in almost all other countries, and therefore argues that the most extensive export verification system should be applied to them ("En atención a que el cuero es una materia prima atípica y escasa siendo su comercialización restringida en casi todos los países (…)") This is confirmed by the fact that Resolution 771/93 does not mention the prevention of fraud in the systems of tax refunds as a justification for its adoption.

### 2. *Rationale for the Enactment of the Resolution*

4.33 The **European Communities** states that the authorization of representatives of the tanning industry to be present during customs inspections of raw bovine hides designated for export leads to a de facto export ban. The Argentine government is not only fully aware that the adoption and maintenance of the Resolution leads to export restrictions, but it is clear that this restriction is the rationale for the enactment of the Resolution.

4.34 The European Communities recalls that since the early 1970s, that is to say during over 20 years before the adoption of the measure, Argentina had maintained measures prohibiting or restricting hide exports, consisting of an outright export prohibition between 1972 and 1979, an export tax based on minimum prices between 1979 and 1985, and again an outright prohibition between 1985 and 1992.

4.35 In 1992-1993, after replacement of the export ban by a tax, the tanners became aware that the export tax was insufficient to restrict exports and asked for authorization to be present at customs clearance of hides before exports.[35] Therefore, the Argentinean tanning industry had requested to participate in the inspections in order to obtain knowledge of any attempt by slaughterhouses to export hides, instead of selling them to the domestic tanneries. The measure was continued as a result of further requests by the Argentinean tanning industry. The tanning industry is interested in adding value to the raw hides and wants to secure a

[35] According to the European Communities, this is similar to what happened in 1979 when first after pressure by the US the embargo was replaced by an export tax, which was then however nullified by the introduction of a minimum price.

cheap supply of raw hides. It is not a coincidence that the original measure, Resolution ANA 771/93, applied to exactly the same products as those that were subject to the export tax under Resolution MEOSP 537/92.[36] This fact makes clear that the aim of the measure was simply to restrict exports.

4.36 The European Communities argues that Argentina has never concealed that the underlying intention of these measures was to support its tanning industry by restricting foreign purchasers' access to that industry's most precious raw material, *i.e.* bovine hides.

4.37 It is in this particular context that in 1993 CICA, the Chamber of the Argentinean tanning industry, made a request to participate in the customs control of bovine hides before exports.[37] The letter focuses on the fact that hides are a scarce material whose commercialisation was (as CICA alleges) restricted in almost all other countries. Therefore, the letter argues that the most extensive export verification system should be applied to them ("*En atención a que el cuero es una materia prima atípica y escasa siendo su comercialización restringida en casi todos los países* (…)"). CICA has always openly admitted that it was seeking to restrict exports of bovine hides. In 1996 the Chairman of CICA openly declared in an interview with a specialised magazine that: "*one cannot allow total liberalisation of the hides market so that companies from other countries can buy up our scarce raw material.*"[38]

4.38 The European Communities contends that slaughterhouses have repeatedly complained about the fact that they are unable to export hides so as to benefit from the higher prices in the world market. Recently, in a press release issued together with associated industries they complained not only about the continued application of the export tax, but also about the privilege granted to the leather industry to assist when (in particular) hides are offered for export.[39]

4.39 The European Communities argues that the fact that the leather tanning industry is the only industry that has ever requested to participate in customs control before exports, only confirms that the aim of the measure is to restrict exports. The Argentinean leather tanning industry is the very industry for the benefit of which the export of its raw material has been squarely prohibited or severely restricted between 1972 and 1992, and which has always been opposed to the free export of it. Moreover, the industry's request was made not long after the last export prohibition was repealed. This is surely not a coincidence.

4.40 **Argentina** states that the presence of technical experts from the tanning industry during the inspection was authorized to give customs the benefit of pro-

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[36] Namely positions 4101.10.00, 4101.21.00, 4101.22.00, 4101.29.00, 4101.30.00, 4104.10.00, 4104.21.00, 4104.22.00, 4104.29.100; See Resolution 537/92 (Exhibit EC I-7) and Resolution 771/93 (EC I-11).

[37] See copy of a letter provided in Exhibit ARG-XXXIII.

[38] See Exhibit EC I-29, from "Leather Magazine," July 1996 p. 42, 2nd column middle.

[39] See Press release contained in Exhibit EC I-28.

fessional advice for the correct classification of goods. This reason given by ADICMA were set out in its note to the National Customs Administrator: "*This Association has asked to participate in the inspection of some leather products under Chapters 41, 42, 64 and 94 in order to co-operate with the customs in endeavouring to clarify and avoid the recurrence of certain irregularities affecting the industry through market distortions, and the State through taxes foregone or the payment of undue refunds.*"[40]

4.41 ADICMA's arguments are convergent with the interests of the State as encapsulated in the preamble to Resolution ANA 125/97 modifying Resolution ANA 3023/93, which regulates export controls and the resulting payments of benefits and collection of the duties generated by that activity:"… *It is deemed necessary to take steps to reinforce this National Administration's powers of control with respect to export transactions which are accorded incentives. In that regard, it has been considered useful to expand and adapt the guidelines laid down in the preamble to the aforementioned resolution and amendments thereto, which established controls on the submission of Export Applications for inputs, and that it is necessary to step up such controls to be effected on selective inspections and on formalities to ensure the correct assessment of duties and payment of benefits by including the guidelines set in current provisions ….*"

4.42 The interest for the ADICMA representatives to be present is hence to have the assurance that under no circumstance will raw or semi-tanned hides - essential inputs for the industry - leave the domestic market without paying the corresponding export duty.

4.43 For the Government, the presence of the tanning industry at the time of inspection is merely one additional element whereby to ensure that its customs staff will make no mistakes in the classification of products. This ensures that that export refunds are paid only to those exports that qualify for them. Export refunds are granted in respect of tanned hides (i.e. hides to which value has been added),[41] which means that the industry also has an interest in ensuring that unprocessed products do not benefit from a refund to which they are not entitled. As is known, the refund mechanism is used by States in pursuit of the general objective of adding value to raw material, which is consistent with GATT-WTO obligations.

4.44 The State, in turn, also has an interest in paying only such refunds as are strictly appropriate to the characteristics of the product, and it is in the interests of the industry to ensure that those who push back the production frontier by incorporating added value and technology to the raw material, are the ones to benefit from the refunds rather than others. In the same way, the government is interested in collecting export duties for export of raw and wet blue hides. Needless to

[40] Note from ADICMA to the National Customs Administrator dated 4 April 1994. Page 1 of National Customs Administration File 412576/94; see Exhibit ARG-XXXIII.

[41] See Decree 1011/91, Exhibit ARG-XXXIV.

say, these unlawful acts may be committed both in exporting rawhides and wet blue, on which export duties are due, and in exporting finished leather or semi-finished leather, which in certain cases are eligible for refunds. In reply to a question by the Panel, Argentina states that since the effective date of Resolution 2235, no complaints have been lodged regarding irregularities in which Argentina views as evidence that the goal of avoiding fraud has been achieved.

4.45 Argentina asserts that the presence of ADICMA representatives would furthermore lend greater transparency to the goods inspection process and enables the different interests involved to be represented.

4.46 In reply to questions by the Panel, Argentina stated that no measures similar to Resolution 2235 existed in other industries is explained by the fact that no other industry has requested participation in the customs inspection of goods for export.

4.47 The **European Communities** argues that Argentina has failed to show any plausible justification why leather industry representatives should be present during the customs inspections concerned. The only justification, which Argentina puts forward in some detail, is that the measure is aimed at preventing fraud in the systems of tax refunds. It states that these refunds apply to exports of *finished/tanned* leather (cueros curtidos). Exports of *raw bovine hides* and *wet blue* have never been subject to tax refunds. However, Resolution ANA 771/93 of 15 April 1993, which for the first time allowed representatives of the Argentinean tanning industry to be present at customs control of hides before export, applied exclusively to raw hides and wet blue, not to crust and finished leather.

4.48 The European Communities states that Argentina's justification for the measure is absurd. It cannot reasonably be argued that an export control procedure on raw hides and wet blue only was introduced to prevent fraud in the system of tax refunds for *finished* leather.

4.49 The CICA letter of 17 February 1993,[42] requesting the measure, does not invoke such a justification at all. This is confirmed by the fact that Resolution 771/93 does *not* mention the prevention of fraud in the systems of tax refunds as a justification for its adoption.

4.50 The fact that the presence of the tanning industry at customs control was also authorized later on with regard to exports of finished leather and furs (Resolution 1024/94) does not change in any way that their presence is completely unnecessary when raw hides or wet blue are offered for export.

4.51 The European Communities states that Argentina has provided no evidence regarding the exact products to which refunds apply. However, according to the evidence obtained, such tax refunds currently only apply to processed leather products (wallets, belts, clothes etc.) and to certain types of finished leather.[43] There is no risk to confuse a raw hide or wet blue with those

[42] See letter from CICA, Op. Cit., Exhibit ARG-XXXIII.

leather.[43] There is no risk to confuse a raw hide or wet blue with those products.[44] Argentinean customs officials therefore do not need ADICMA representatives in order to ensure that a raw hide would be wrongly classified as - e.g. - a wallet[45] and that a refund would be paid. During the second meeting, the European Communities showed examples of inter alia raw hides and wet blue on the one hand, and finished leather on the other hand, arguing that the various products can very easily be distinguished.

4.52 Moreover, if there was really a risk that raw hides and wet blue would receive refunds unduly, the Argentinean government would ensure the presence of experts by its own initiative, in order to avoid undue payments, and not only act as a reaction to a request by industry. After all, the Government is the first to become aware of fraud and is the only victim of it. Similarly, the Argentinean government might have granted such a request only on condition that ADICMA experts would be present at all transactions.[46]

4.53 The European Communities argues that the Appellate Body has held that "[A]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."[47] In the present case, the protective application in the sense of "export restricting nature" of the measure can be discerned in particular from the very special historic context of the measure, its exceptional nature and the absence of any reasonable objective for it.

4.54 **Argentina** states that the question of the need to hire independent experts never arose. Besides, that would result in an additional cost to the economy. The authorization was never questioned by any of the parties.

4.55 Argentina emphasizes that Resolution No. 2235/96 was enacted under the authority granted to the National Customs Administration by Article 23(i) of the Customs Code (Law 22415) and was therefore subject to the provisions of Articles 25 and 26 of the same Code which authorized members of the public to

[43] See Exhibit EC I-42 , which gives the relevant page of Argentinean Resolution 257/2000, published in the Argentinean Official Journal of 29376 of 10 April 2000. The European Communities notes that the list does not include products under customs heading 4101. See also Exhibit EC I-43, which provides the Argentinean nomenclature for customs heading 4202.

[44] The European Communities argues that, similarly, even if it were true that refunds are available for finished leather generally as Argentina seems to argue without however providing evidence, there is no risk to confuse between raw hides and wet blue on the one hand and finished leather on the other hand.

[45] The European Communities argue that, in the line of the previous footnote, i.e. if the refunds applied to finished leather generally, even a piece of finished leather.

[46] According to the European Communities, Argentina's answer to the question of the Panel is wholly unconvincing; of course the Argentinean government could have granted the request only on the condition that the ADICMA experts would be present in all cases.

[47] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Liquor Taxes*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 120.

lodge appeals against the Resolution. Pursuant to Article 26 of the Customs Code, «citizens who claim an individual right or a legitimate interest may appeal to the State Secretariat for Finance against the general rules referred to in Article 25[48] within a maximum of 10 days from the day following their publication in the Official Journal (Boletín Oficial).

4.56 Consequently, if the Argentine Meat Packer's Association (Asociación de Frigoríficos Argentinos) or any exporter of raw or semi-tanned hides had considered Resolution 2235 and the previous related texts to violate their rights, they could have lodged appropriate appeals to obtain the repeal or amendment of the Resolution; in other words they were not all without any means of defence. We do not see how the EC can contend that there is a de facto export ban when the parties interested in doing so have not used the mechanisms available to them under national legislation to request appeal of the regulations which, in theory and according to the EC's arguments, prevent them from exporting raw and semi-tanned hides.

4.57 In that connection, Argentina wonders, why in the argument of the European Communities, would there be any point in ADICMA's presence during customs control for the sole purpose of obtaining data concerning the identity of the exporter when that data can be accessed by other means already mentioned, such as the Exporters' Guide or on-line systems. Argentina also challenges the European Communities to explain why ADICMA should be present at the verification of flesh split exports, for example, when the presence merely serves to prevent exports of raw hides, as alleged by the European Communities.

### *3. Alleged Restrictive Effect Due to the Presence of ADICMA Representatives*

4.58 The **European Communities** alleges that the mere fact that ADICMA representatives may be present during export verifications creates the risk that the ADICMA representatives will be informed of confidential information, including the name of the exporter. The European Communities states that it has shown that ADICMA representatives in fact do get access to such information. As the representatives from ADICMA have an interest in keeping the raw hides in the country for further processing; they may also attempt to put pressure on the customs officials present not to approve or to suspend approval of the export transaction. Any disagreement between customs officials and CICA/ADICMA representatives may lead to a delay of the shipment. If this delay takes too long (say several weeks or a month), this may affect the quality of the bovine hides which, although they are

[48] Article 25 of the Argentinean Customs Code provides: "The general rules enacted pursuant to Article 23, paras. (i), (j), (k) and (l) shall enter into force on the day following their publication in the Official Journal (Boletín Oficial), unless they specify a later date, and shall be binding on citizens, without prejudice to their right to lodge the relevant appeals in particular cases where their individual rights are affected".

treated (salted) to slow down decay, nevertheless continue to deteriorate after a while. The mere risk that the CICA/ADICMA representatives may be tempted by (unnecessary) dilatory manoeuvres, which may lead to the deterioration of the exported products, will also be a strong deterrent to avoid export transactions. Foreign buyers and traders are also aware of such risks, and could therefore refrain from buying Argentinean raw hides.

4.59 **Argentina** stressed that the so called chilling effect was never proved by the EC, and that no example of its existence were provided. In light of the existence of exports of wet blue and raw hides, the existence of which the EC acknowledges, the EC argument about the chilling effect appears clearly contradictory. Argentina states that the presence of ADICMA representatives can under no circumstances lead to the holding-up of a shipment, as Resolution 2235 does neither delegate legal powers or State responsibility to ADICMA representatives. In reply to a question by the Panel, Argentina explains that the export procedure for hides and the inspection of the goods (leather) by the Technical Unit for Verification and Valuation (UTVV) as well as the participation of the chambers in that process are not governed by any specific DGA resolution, but by the Customs Code (Law 22415), by Resolution ANA 1284/95 (regulating export transactions declared through the MARIA Computer System - SIM) and by Resolution ANA 125/97 and its modifying resolutions establishing the general procedures for all exportation.

4.60 ADICMA is informed of the transaction only after it has been concluded between the slaughterhouse and the foreign importer, which means that its role is of no consequence with regard to the conclusion of such an export transaction. At that stage the deal has been done and ADICMA cannot influence it in any way. Secondly, ADICMA has no legal authority to hold up a transaction. The representatives merely witness the verification process. Signing of documents is only to attest to this witnessing, yet does not signify approval of the verification or any legal obligation. The signing occurs because the customs personnel prefer to have evidence attesting to the presence of those representatives. In other words, it is completely irrelevant in terms of the completion of the customs clearance procedure. In fact, Argentina notes that the European Communities has not cited a single case where a consignment had been delayed or stopped in course of or following the proceedings.

4.61 In a later statement, Argentina maintains that possible disagreement of ADICMA with the customs decision is not evidenced in any specific official document connected with the shipment. ADICMA merely witnesses the verification process and, as it is allowed to be present, may voice possible disagreement in the form of a report to the Sub-Directorate General of Operations, which will forward it to the inspection division. Notwithstanding the foregoing administrative procedure, ADICMA may also file a criminal suit.

4.62 Argentina notes that also the exporter or his representative may be present when the customs controls for export are taking place. Only when present can the exporter challenge the decisions by the customs officers.

4.63 The **European Communities** contends that it is irrelevant that legally speaking the ADICMA-representatives can not formally impede that particular export shipment. What matters is rather the fact that they may be present and may receive information concerning the exporter and the export transaction, which they can then make available to all companies within ADICMA. This setting provides a "chilling" effect on any slaughterhouse, since any attempt at export could immediately be known by all the Argentinean tanneries - i.e. all his potential Argentinean buyers - who have a collective interest in restricting hide exports.

4.64 As concerns the suggestion by the European Communities of dilatory manoeuvres that could be attempted by the ADICMA representatives, **Argentina** replies that if this were ADICMA's intention and if the customs officers were so vulnerable, then logically there would be no need to exert this hypothetical pressure at the actual time of inspection when it could be applied through non-customs mechanisms not requiring the authorization of Resolution 2235.

### *4. Alleged Disclosure of Confidential Information to ADICMA Representatives*

4.65 The **European Communities** argues that the decision to whom a company, including a slaughterhouse, sells its products should remain its business secret. The authorization granted to representatives of ADICMA through Resolution 2235 to be present at the export controls is at odds with that basic principle. Pursuant to the authorization, tanners and other hide-using industries, who are working together through various institutions such as chambers of commerce or ADICMA have access to confidential business information and could use this information in their business dealings with the slaughterhouse concerned.

4.66 The measure provides the Argentinean tanning industry with the means of having immediate and prior information about, and thus control over, any attempts to export raw bovine hides. The Argentine tanning industry has expressed its intent to prevent bovine hides from being exported as it has an interest in adding value to these raw materials through processing. In other words, those who are collectively interested in keeping raw hides in Argentina as a cheap raw material would be informed as soon as a slaughterhouse attempts to export.

4.67 The European Communities alleges that a dissuasive effect results from the de facto availability of confidential business information to ADICMA representatives due to the Argentinean government's measure, as a company will refrain from engaging in export transactions if it knows that thereby its domestic buyers will receive business confidential information of that company. A slaughterhouse that does not want its confidential business information disclosed (including all details such as what it exports and at what price) to the representatives of the tanneries will not even attempt to export. It is the resolution which - to use the words of Article XI - "makes effective" this export restriction, since it creates the possibility that the ADICMA-representatives obtain this information.

4.68 The European Communities assert that ADICMA representatives get to see the documents related to the export transactions and may receive a copy of them. They may also be invited by the customs officials to sign the documents for approval. The European Communities claims that the copy of a document provided[49] shows that all relevant information - product, quantity, destination, price and in particular the name of the exporter - are present on the document which is seen by the ADICMA representative when he signs it. In other words ADICMA is *de facto* provided insight in essential trade information, which even under Argentinean law itself it should not have access to.

4.69 The European Communities states that the slaughterhouses have stressed that the violation of their business secrets due to the measure is a problem for them, which hinders them in their exports.[50] The European Communities refers to a press release of 13 May 1999 by various chambers of the Argentinean meat-producing industries, in which they request the Argentinean Minister for the Economy to repeal existing tariff barriers as well as Resolution 2235 which the press release qualifies as a "non-tariff barrier," "*since the tanning industry participates in the scrutiny of customs operations affecting trade in these products* [raw or semi-tanned hides], *thereby violating standards of statistical and commercial secrecy*." The press release continues: "*This situation has enabled the tanning industry to become one of the few sectors (or the only one) receiving an indirect subsidy through having a captive market for its raw material."*

4.70 The European Communities stresses that, as put forward by the meat producers in the press release above, even according to Argentinean law itself, the data which CICA/ADICMA obtain, should be considered confidential.[51] Article 10 of that Law clearly provides that statistical information must be kept secret, and cannot be published in a way that violates commercial or business secrets, nor individualising the persons or entities to which it refers.

4.71 **Argentina** rejects the European Communities' assertion that the customs personnel provide the ADICMA representatives with confidential information, i.e. a copy of the customs clearance document. The document provided by the European Communities concerned a transaction of wet-blue split exports by an ADICMA associated tannery where the disclosure of confidential information was not an issue. Furthermore, the second page of the document does not contain sensitive information, and there is no evidence that the person signing the second page has seen also the first page. In Argentina's view, the EC cannot prove the alleged access to confidential information or the effects on trade which this hypothetical access might have. Argentina noted that the Law cited in Exhibit EC I 55 does not correspond to this case, since it is intended to establish the National

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49 See Exhibit EC I-35.
50 See Exhibit EC I-28, Press release dated 13 May 1999 by the Argentinean meat and associated industry.
51 See EC I-55, Argentinean law on official statistics.

Institute of Statistics and Censuses and lay down its rules. Firstly, it is not a law that regulates the publication of data by customs. Secondly, Article 10 expressly excludes the following from statistical confidentiality: "name or company name, address and branch of activity".

4.72 Argentina questions the evidentiary value of the press statement by the slaughterhouses. As an explanation why the slaughterhouses have issued the release, Argentina suggests that it is in their interest to have the 5 percent export duty eliminated and because, for reasons which have nothing to do with an alleged and never proven *chilling effect*, they prefer that there should not be any witnesses present when the goods are inspected.

4.73 In reply to a question by the Panel, Argentina asserts that in the course of its participation in customs procedures, ADICMA representatives have access to the sale/export prices (f.o.b. value), the country of destination, and the means of transportation; ADICMA representatives do not have access to the identity of the exporter or the importer's name. Argentina further states that it is possible that the dispatcher himself - the exporter's agent - could supply the ADICMA personnel with information not provided by the customs. In reply to a question by the Panel, Argentina explains that the exact information to which the ADICMA representatives have access during the inspection is information on destinations recorded after having been stamped by the first intervening DGA agent ("submitted"). This information does not include data pertaining to the customs clearance agent, the transporter and the flag of the means of transport. In reply to a question by the Panel, Argentina denies that ADICMA representatives would have access to the identity of the exporter and the name of the importer (consignee) in course of their participation in the customs procedures.

4.74 The information to which the ADICMA representatives have access is information in the public domain to which anyone may have access through an on-line systems operated by the DGA and other private bodies. In reply to a question by the Panel, Argentina states that since May 1999, the DGA no longer makes available on-line the name of the exporters and importers, and information on prices. Neither is such information any longer furnished to private operators of on-line systems. The information furnished by other private on-line systems to their clients is supplied by the business chambers and associations of the various sectors of industry (e.g., the case of America Edita).[52] It is possible to find the exporter's particulars in these other cases. All the systems mentioned are used by subscribers, who become members by paying a subscription fee. The cost of access to such systems is US$ 85 + VAT per month in the case of NOSIS and US$ 1900 for 12 months in the case of America Edita.

4.75 In reply to a question by the Panel, Argentina specified that the following information was accessible on-line: (i) the recorded destinations (documentation concerning permits of shipment, import clearance, goods in transit); (ii) notices

[52] Exhibit ARG-XLII.

of embarkation (these are notices by which the customs clearance agent informs the customs department that he is about to clear the merchandise); and (iii) refund payments. In response to another question, Argentina stated that information on (i) the sale price, (ii) the country of destination, (iii) the means of transportation, and (iv) tariff classification of the product is available on-line.

4.76 Argentina asserts that disclosure of confidential information, which the European Communities alleges, constitutes offences covered by Argentine criminal law, Chapter 3 "Violation of Secrecy" and Chapter 9 *bis* "Illicit enrichment of civil servants or employees."[53] If confidential information was divulged, administrative and judicial proceedings would have been instituted in Argentina to prove that such offences had been committed, and the Argentine industries - concerning which the European Communities can only produce press cuttings or notes which lack binding force[54] - should be the ones most interested in instituting court proceedings if they had prima facie evidence to back up such assertions.

4.77 Argentina maintains that the information requirements to customs for all exporters and importers of rawhides for the purposes of foreign trade transactions are the same. In reply to a question by the Panel, whether the meat-packing plants have to provide the same information as for an export transaction when selling to domestic tanners, Argentina asserts that domestic transactions by the meat-packing plants are by nature different from export transactions. Consequently, the requisite information is also different, such as that needed for tax purposes for instance. Neither do foreign buyers have access to that information, as there is no official register in the domestic market equivalent to customs, given the differing nature of the transactions. Nevertheless, that information may be accessed via the respective chambers. Anyone wishing to know export prices or other export-related data may obtain that information through the services that are publicly available.

4.78 The **European Communities** responds that Argentina makes an inconsistent argument. In its first written submission, Argentina argued that the information in the customs file (i.e. quantity and price of the goods, and in particular the name of the exporter) was confidential information, and that contrary to what the

[53] See Argentine Criminal Code, Chapter 3 Violation of Secrecy, Article 157: "Any civil servant who reveals facts, actions or documents required by law to be kept secret shall be liable to a term of imprisonment of between one month and two years and specific disqualification from office for between one and four years." Article 156: "Anyone who by reason of his status, office, employment, profession or trade, has knowledge of a secret which could cause injury by being disclosed and reveals that secret without just cause, shall be punishable by a fine of between one hundred and fifty thousand and fifteen million australes and special disqualification, where appropriate, for six months to three years." Argentine Criminal Code, Chapter 4, Abuse of authority and breach of professional duty by civil servants; Article 249: "Any civil servant who unlawfully […] shall be punishable by a fine of between one hundred thousand and two million australes and special disqualification for one month to one year.

[54] See Exhibit EC I-27, Letter from the President of Asociación de Industrias Argentinas de Carnes to Cotance (EC leather industry association); attached in Exhibit ARG-XIII.

European Communities had stated, the ADICMA-representatives had no access to it. It stressed that the Argentinean customs officials would be prosecuted if they divulged such sensitive information. At the 1st meeting, the European Communities provided a document[55] which shows that the ADICMA do have access to this information. Argentina appears to wish to attempt to keep its old line, by arguing that the document provided by the European Communities would for some unclear reason not be representative, and that the information is in fact not provided to the ADICMA representatives. On the other hand, Argentina argues that the ADICMA-representatives receive the same information that is also available on line, which includes the name of the exporter, price, etc.

4.79 In view of the evidence which is supplied and the second statement of Argentina, it is clear that the ADICMA representatives do obtain the information - which was qualified as business confidential earlier on by Argentina itself - as a result of the measure.

4.80 **Argentina** explained that the Exhibit EC I-35 was not representative because it constituted a copy of a customs declaration coming from an ADICMA Member and, moreover, the signature is on the back, where none of the particulars listed by the EC appear.

4.81 The **European Communities** stresses that for purposes of analysing the contested measure under the GATT, it is not relevant that the Argentinean government is also taking other measures through which the same information is provided "on-line." The violation of Article XI GATT resulting from Resolution 2235 does not cease to be a violation of that Article because there is also another measure which partly has the same effect. Moreover, the fact that Argentina now also makes the information available on-line only proves that Argentina's assertion that the contested measure is necessary for transparency reasons is wholly unfounded.

4.82 At the second meeting, the European Communities provided documents which according to them showed that since around May 1999, the Argentinean government was no longer providing the name of the exporter. The European Communities underlined that Resolution 2235 provides only to a certain group of industry information on any attempts which their suppliers would make to export.

4.83 In reply to a question by the Panel, **Argentina** stated that since May 1999, its "Dirección General de Aduanas" no longer supplied the names of ex-/importers to "on-line" information systems.

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[55] See Exhibit EC I-35, Op. Cit.

### 5. *Market Power of Tanneries vs. Slaughterhouses and the Alleged Existence of a Cartel*

4.84 The **European Communities** contends that the disclosure of confidential information to ADICMA representative regarding export transactions attempted by slaughterhouses allows the tanneries to exert pressure on the slaughterhouses not to export. ADICMA representatives can provide this information to all tanneries who in turn may (ab)use it in their business relations with the slaughterhouse concerned, including by not buying from those slaughterhouses. The European Communities states that each slaughterhouse is highly dependent on domestic tanners for the sale of its hides and skins. Domestic tanners are in a position to exert market dominance on a slaughterhouse by using their (collective) purchasing power. For this reason, the slaughterhouses do not even attempt to sell abroad (even though they would obtain higher prices abroad). The European Communities states that a slaughterhouse would indeed risk facing retaliatory measures from tanners, including termination by tanners of contracts which would endanger the entire domestic sales of the slaughterhouses. Bearing in mind that most of its sales are domestic, a slaughterhouse will not risk undermining its domestic sales situation for the sake of exporting limited hide quantities even if in so doing, for that limited quantity, it could obtain a higher price.

4.85 Even though the value of the skins accounts only for about 10 percent of the value of the animal, the European Communities asserts that the threat of losing 10 percent of the proceeds of each animal slaughtered can make the difference between running a profitable or a loss-making company. Finding, immediately, foreign buyers for all hides which a slaughterhouse produces will in all likelihood be impossible; it will cost time and effort, especially because once hides are "produced" (i.e. removed from the animal when slaughtering) they have to be sold as soon as possible (even if they can be preserved for some weeks, hides finally deteriorate). This does not prevent hides from being exported (European Communities and US hides, for instance, are exported world wide including to Argentina), but it is always safer for a slaughterhouse to have as wide opportunities as possible to sell its hides (be it domestically or in export markets). The slaughterhouses are restricted in their exports since they cannot freely choose to export part of their raw hides and sell the other part domestically; as soon as a slaughterhouse exports one shipment of hides, however small, all Argentinean tanners will know.

4.86 The European Communities also underlines that a hide represents 55 to 60 percent of the production costs of leather. Therefore, the Argentinean tanners have a great interest in the information which the ADICMA representatives obtain due to their presence, and in using it in their business dealings with the slaughterhouse concerned in order to keep its hides to themselves, at a low price.

4.87 The European Communities states that the Argentinean tanning industry is dominated by a relatively small number of tanning groups. In 1996, the 10 largest companies (of around 150 tanneries) accounted for more than 70 percent of the country's leather exports.[56]

4.88 The European Communities asserts that the effectiveness of the pressure by the tanneries can be seen in the absence of any noticeable exports of raw hides. Like in the *Japan-Semiconductor* case, the measure has as an effect to allow tanneries to put pressure on slaughterhouses not to export. This possibility to exercise pressure and to foster uncertainty - in this case with regard to the possibility to continue domestic sales, which is created by government - in this case the Argentinean one - was condemned by that Panel as contrary to Article XI.[57]

4.89 The European Communities states that the tanneries are generally believed to engage in market-restrictive practices. For instance, according to the Chairman of the association of slaughterhouses "*the reality is that the tanners rarely deviate from the prices established in a list which is published on a weekly basis by a private operator, which clearly indicates that there is a previous price-fixing agreement*."[58]

4.90 Moreover, in an explanation of a draft law introduced in 1992 relating to the exportation of raw hides, including raw bovine hides, Argentinean (then) MP, Mr. Antonio T. Berhongaray, (now Secretary of State for Agriculture), referred to the existence of a pricing cartel.[59] In his explanation of his proposal, Mr. Berhongaray emphasises that there is a high degree of concentration in the tannery market. More importantly, he notes that somewhat less than 10 companies gather each week to fix the prices which they will pay the following week, and that these prices for raw hides are even published in a bulletin which will be applied that following week. In short, a member of the current Argentinean government has, in the past, confirmed in an official parliamentary document related to introducing new legislation that such a cartel exists.

4.91 The European Communities also quotes an editorial in the Argentinean newspaper "La Nación" which, according to the European Communities, describes the Argentinean export restrictions, including the introduction of the export tax, and adds (translation by the European Communities): "*Soon afterwards the screw was tightened even more: an ad hoc body of representatives of the leather industry was created in order to - in conjunction with customs officers - check all the shipments abroad of hides, so that any possible filtering through of non-processed goods is blocked*." (Poco después … procesar.")[60]

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[56] See in Exhibit EC I-26, a list of exporters in "Leather Magazine," June 1997, as well as a list of the biggest exporters published in "Supercampo," July 1999.
[57] See Japan – Semiconductors, Op. Cit., para. 117.
[58] See Exhibit EC I-27 Op. Cit..
[59] Exhibit EC I-36.
[60] See Exhibit EC I-56; La Nación, "La exportación de cueros," 24 June 2000.

4.92 **Argentina** argues that questions regarding the Argentinean hide market are not covered by the claim based on Article XI of the GATT, which refers exclusively to prohibitions or quantitative restrictions attributable to the conduct of a government, rather than that of the market.

4.93 Moreover, the European Communities does not provide any evidence to back its allegation of a cartel. A mere note from the President of the Meat Packers' Association cannot be interpreted by the Panel in such a way as to refute the established principle that the party asserting a fact must prove it. With regard to the question of what may be called the "burden of proof," the Appellate Body has confirmed that it is for the complaining party to establish the violation it alleges, and that it is for the party asserting a fact to prove it.[61] In the present case, the European Communities has not fulfilled that requirement, since a mere assertion by an interested party does not constitute sufficient evidence of price fixing. Moreover, in that note submitted by the European Communities, the President of the Argentine Meat Packers' Association (*Asociación de Frigorificos de la Argentina*) acknowledges: "*We have no concrete evidence of the existence of market agreements among tanners.*"[62] Furthermore, no complaints on the subject have been received by the National Commission for the Protection of Competition from any of the parties most interested in the sale of raw hides. Argentina considers that the allegations of "irregularities" in the national market for hides leather must be rejected because they are unfounded and not supported by any evidence.

4.94 Argentina further questions whether the "journalistic" evidence produced by the European Communities can be regarded as proof of the alleged incompatibility of the Argentine measure in question with the WTO Agreements.[63] The European Communities cites only a single sentence from the editorial, which clearly identifies itself with the interests of a particular sector, while avoiding any reference to its main theme, namely opposition to the possible renewal of the legitimate duty being applied to rawhide exports, which expired only six days later, on 30 June 2000. This sentence is strikingly similar to those used by the European Communities in its submissions to the Panel with reference to Resolution 2235 and offers no explanation of how that measure continues to operate "so that any possible filtering through of non-processed goods is blocked." Once again in this case, through public declarations with scandalous embellishments having no basis in fact and without making any administrative or judicial com-

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[61] See footnote 37 referring to *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*"), WT/DS56/R, adopted 22 April, 1998, DSR 1998:III, 1033, para. 6.35. See also Report of the Appellate Body in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323 at page 337.

[62] See Exhibit EC I-27, Op. Cit.

[63] With reference to the European Communities' quotation of the editorial in the newspaper "La Nación," Argentina questions the European Communities' right to submit this piece of information, as this was done outside the time-periods stipulated by the Panel.

plaint, a particular sector is claiming to alert people to some plot affecting both its own and the general interest. Argentina recalls that it is surprising if a powerful sector of the Argentine economy such as the meat packing industry would fail to use the administrative and judicial remedies within the reach of any ordinary citizen to demand the removal of an allegedly unlawful restraint on the pursuit of its activities and merely engage in a few skirmishes in the media, in parallel with the complaint which the European Communities has brought before the WTO.

4.95 Argentina states that the Argentine tanning industry does not form a cartel. It is made up of more than 150 enterprises. Moreover, Argentina emphasizes that the meat packing companies are for the most part not small-scale producers and that they therefore have the same or greater negotiating powers than the tanneries. The points made by the European Communities concerning the alleged long-term unwritten agreements between the economic operators involved are irrelevant for the purposes of this dispute.

4.96 The fact that the price of a raw hide represents no more than 10 percent of the value of the animal at the time of slaughter is regarded by Argentina as an unrepresentative figure on which to base the argument that it jeopardizes the meat packing business. Moreover, annual turnover in the meat packing industry has exceeded 4,000 million pesos since 1997. The value of the tanning industry's output does not exceed 1000 million pesos per year. In terms of turnover, therefore, the meat industry is four times bigger than the tanning industry, and this gives an idea of the relative potential capacity and importance of each. It should also be noted that the value of the meat packing plants' output grew substantially (by 20 percent) in 1998, the first year of the contraction in the tanning industry caused by falling international demand for hides, as reflected in the 17 percent drop in total exports by the industry. Given such a disparity in turnover trends, it can hardly be claimed that the tanneries could exert pressure on the prices of raw hides.

4.97 The falling livestock level of cattle in Argentina has strengthened the bargaining power of the slaughterhouses vis-à-vis the tanneries.

4.98 Against this backdrop, Argentina questions why should it be necessary to believe in the existence of a *cartel* of buyers of a product if the latter is in short supply. In circumstances in which a powerful sector of the Argentine economy, the controller of a scarce resource, is faced with a sector of less relative importance but with a fundamental need to secure the supply of its principal raw material, it is hard to believe that the tanners would provoke a conflict with the meat packers, thereby jeopardizing their relationship with their source of supply.

4.99 Argentina also challenges the effectiveness of an export restricting cartel, asserting that if the tanners were to stop purchases of raw hides, all hides affected could simply be sold on the international market since there is a relative scarcity of raw hides internationally as well.

4.100 With regard to the European Communities' comments about the existence of irregularities in the setting of domestic prices, Argentina points out that in the market for hides/leather, it is not a price-setter but, on the contrary, a price-taker.

4.101 Argentina states that in the case at issue, the burden of proof lies with the EC. The point has not been reached where it should be shifted to Argentina. Argentina has refuted mere assertions by the EC with facts: the EC said that "there are no exports" and Argentina provided figures to refute that assertion; the EC said that the measure was obligatory, and Argentina explained the scope of Resolution 2235; the EC claimed that there was no scarcity of raw material, and Argentina once again provided import figures; and so it is that Argentina continually has to respond to arguments which the EC puts forward and then modifies. When Argentina showed that there were exports, the EC said that they only amounted to 1/1000 because the exports relevant to the case at issue were raw hides exports. When Argentina presented the figures for the EC, the EC claimed that they were inaccurate; when Argentina stated that the rules were applied in an impartial and reasonable manner, the EC said that they violated business secrets without specifying which ones, and so forth.

### 6. *Claim that Export and Price Figures Reflect the Restrictive Effect of the Measure on Exports of Raw Bovine Hides*

4.102 The **European Communities** argues that the restrictive nature of the measure in question is reflected in the negligible quantities of raw bovine hides exported from Argentina, even though the competitive price and quality of Argentinean hides would suggest higher exports. The European Communities points out that it does not claim that, in itself, the negligible amount of exports is sufficient evidence to show that a restriction exists. However, in the particular context of the challenged Argentinean measure the quasi-absence of exports of Argentinean raw bovine hides constitutes further evidence that Resolution 2235 acts as an export restriction.

4.103 **Argentina** asserts that a scarcity of raw material in the domestic market exists. Raw-hide producers could sell their products on the domestic market, and did not need to engage in the establishment of a costly infrastructure for raw hide export. Also, Argentina contests the European Communities claim that there are no exports of raw and wet-blue hides and maintains that the ratio of raw hide production to exportation does not differ in Argentina significantly from figures obtained by European Communities members States.

#### (a) Interpretation of Figures of Hide Production in Argentina

4.104 The **European Communities** states that Argentina's production of raw bovine hides has remained relatively stable since the 1970s. In the five-year period 1966-1970, the average slaughter rate was about 12.6 million head.[64] The

[64] See Exhibit EC I-20, Op. Cit.

slaughter rate in a country corresponds to the production of hides, as one slaughtered animal produces one hide. According to official statistics from the Argentinean authorities, during 1992-1996 on average about 11,6 million head were slaughtered.[65] In the last five years for which complete data are available (1994-1998), the average number of cattle slaughtered in Argentina was about 12.7 million heads. Other data from the Argentinean Ministry of Agriculture give even higher slaughter rates for that period and more recent years.[66] In 1995, it was about 4 percent of the world's total production and made Argentina the world's 7th largest bovine hides producer in that year. [67] The European Communities concludes that production of raw bovine hides does hence not differ significantly from the period of 1966-1972, the year in which the first export ban was introduced.

4.105 The European Communities contends further that according to the information received from the Argentinean authorities, the average size of livestock in Argentina after 1992 (i.e. after the end of the export "suspension") was not substantially different from that during 1966-1972 (before the official export ban).[68]

4.106 **Argentina** asserts that the leather market cannot be analysed separately from the other variables affecting the leather production cycle. In as much as raw bovine hides are raw materials of inelastic supply, being a by-product of meat production, their availability depends on livestock inventories and slaughter rates. The slaughter rate in Argentina fell from 16 million heads per year in 1978 to 11.27 million in 1998.[69] This dramatic decline in slaughter is due to the loss of traditional markets for Argentine meat products, as a result of subsidization policies and import restrictions imposed by some buyers, certainly including the European Union.

4.107 These restrictions on access to the international market for meat made it necessary, on the one hand, to adjust livestock slaughter rates to meet demand and, on the other, to develop a policy of livestock resource protection combined with greater industrialization of the livestock sector, which explains the measure introduced in 1972. Barriers to market entry and an over-supply of meat triggered a drop in prices which led to a reduction in livestock inventories owing to the unprofitability of livestock-related activities. The "stock" was depleted to such an extent that it even became necessary to impose a temporary closed season on meat consumption with a view to replenishing the resource and ensuring its survival.

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[65] See Exhibit EC I-20, Op. Cit., column 2.
[66] See Exhibit EC I-22; cattle slaughter rate 1990-1999.
[67] According to FAO statistics world production of bovine hides was estimated at 287.5 million pieces in 1995. FAO World statistical compendium for raw hides and skins, leather and leather footwear, 1977-1995, published in 1996. See Exhibit EC I-21.
[68] See Exhibit EC I-20, Op. Cit., column 1.
[69] Source: Ministry of Agriculture, Livestock, Fisheries and Food.

4.108 Due to the crisis, the Argentine meat industry had to close meat packing plants and the installed capacity by those that survived was under-utilized. This crisis, combined with subsequent developments, has adversely affected the sector up to the present time. The use of installed capacity was a mere 40 percent in July 1999.[70]

4.109 Once the extreme circumstances that gave rise to the initial measures had been overcome, the ban was removed and replaced by export duties within the framework of a resource management policy combined with growing industrialization of the raw material, the clear objective being to regulate management of the resource which, by its very nature, is exhaustible.[71] Thus, the preamble to Resolution 537/92, under which the export duties were introduced, provides as follows: "[whereas] there is a world-wide shortage of raw hides due to the fact that population growth and the rising living standards of the world population far outstrip the natural increase in livestock. This scarcity of raw material is especially acute in the Argentine Republic as a result of the dramatic decline in livestock slaughter rates … [whereas] it is necessary to maintain a level of supply appropriate to the requirements of the domestic market for raw and semi-finished hides …."[72] This combination of measures adopted by Argentina served to create the right conditions for guaranteeing, within a virtuous cycle of livestock herd replenishment, a supply of hides which, while safeguarding the primary resource (bovine animals), enabled the leather industry to incorporate added value in its production and to ensure long-term sustainability.

4.110 Furthermore, from the historical perspective, what the European Communities shows in its Exhibit EC I-20, while claiming to prove that the cattle stock and the slaughter rate were maintained, is in fact that, at the point in time when Argentina introduced the restriction on raw hide exports in 1972, a persistent decline of approximately 7.17 percent had been observed in that stock between 1967 and 1970.[73] The above-mentioned export restraint was combined with internal measures designed to restrict meat consumption,[74] in response to a crisis situation in the industry which the European Communities itself confirms.

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[70] UN/ECLAC, Op. Cit., page 7.

[71] Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 128:" which acknowledges that living resources are just as "finite" as non-living resources."

[72] See Resolution 537/92; Exhibit EC I-7and Exhibit ARG-V.

[73] Percentage differences in stock cited by the European Communities in Exhibit EC I-20 (1967-1970).

[74] See for 1970: Decree 1654/70 of the Ministry of Industry and Trade, prohibition on the preparation or supply of meat on Thursdays and Fridays. Resolution 71/70 of the Ministry of the Economy and Labour, temporary reduction of slaughter output for domestic consumption.

1971: Law 18949 on indicative sale prices and prohibition of domestic consumption; Law 19095 repealing the aforementioned law and implementing the prohibition on cattle meat with sanctions for non-compliance; Decree 2358 suspending the prohibition (July); Decree 2885 reinstating the prohibition (August). Exhibit ARG-X.

4.111 It is important to emphasize and reiterate that the Argentine tanning industry has for several years been confronted with a shortfall in the supply of raw materials for processing. The industry's tanning capacity has reached peaks of 16 million hides per year, a figure rising to 18 million if the introduction of technology is taken into account, which contributes to greater efficiency in the production process. Nevertheless, the domestic availability of raw material does not exceed 11.27 million hides, owing to low livestock slaughter rates.

4.112 The problem of the scarcity of raw material in the Argentine market has also been noted by the international publication Market News Service, which in its issue 3/2000[75] states that, in the case of Argentina, owing to the 8.4 percent decrease in cattle stocks over the last five years and given a relatively high level of per capita meat consumption by international standards, the current shortage of raw hides for the industry is expected to continue. Specifically, this publication maintains that the industry experienced a shortfall of one million raw hides per year over the last five years, in terms of the quantity required to satisfy its production capacity.

(b) Interpretation of Export Figures from Argentina

4.113 The **European Communities** states that prior to 1972, Argentina exported an important volume of hides to the rest of the world, including the European Communities. The level of exports of raw bovine hides amounted to an average of 177.000 tons a year during the period of 1961-1970. This shows that prior to the imposition of export restrictions, foreign purchasers were highly interested in Argentinean products. The European Communities argues that as from 1971 the number of exported hides started to decline.[76] The export ban introduced in 1972 led to a boom of the Argentinean tanning industry and its export capacity. Nowadays, state-of-the-art Argentinean tanneries export wet blue flesh splits, crust and finished leather to the whole world.[77]

4.114 The European Communities quotes official Argentinean figures[78] for the period 1996-1998, which show negligible raw hides exports for the period from1996-1999, namely

1996: 37 tonnes

1997: 1.8 tonnes

1998: 3.2 tonnes

1999: 242 tonnes[79]

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75 See Exhibit ARG-VIII.

76 See Exhibit EC I-18, taken from FAO World statistical compendium for raw hides and skins, leather and leather footwear 1961-1982.

77 See Exhibit EC I-19, Op. Cit.

78 See Exhibit EC I-23. Produced by INDEC, the Argentinean statistical office.

4.115 Even considering of the higher export figures provided by Argentina in its first submission,[80] less than one per thousand of Argentina's annual hide production of raw bovine hides were exported since 1996. The table shows, in the middle column, how many bovine animals were slaughtered in Argentina over the last four years.[81] This figure which corresponds to the number of hides produced in Argentina, varied between 11.3 and almost 13 million. In the right column, the table shows how many raw (i.e. only salted) hides were exported.

| Year | Total slaughtered | Exported raw/salted* |
|---|---|---|
| 1996 | 12916716 | 9914 |
| 1997 | 12794718 | 6875 |
| 1998 | 11280949 | 107 |
| 1999[82] | 11800121 | 8066 |

*(expressed in units)

4.116 Despite similar livestock and slaughter figures even though the export "suspension" was formally terminated in 1992, there have been no or at the most negligible exports of raw bovine hides since. In 1999, just over 240 tons of raw hides were exported, so less than 0.2 percent of the pre-export restrictions level of exports of about 177000 tonnes. In earlier years in the recent period this was even much less. Data provided by the Argentinean authorities confirm this.[83] The entries in the column no 9, raw hides exports ("*Exportacion Cueros Crudos*"), all read "0" from 1992-1995.

4.117 The European Communities claims that even Argentina itself confirms in its answer to question 29 of the Panel the absence of exports, where it states that Argentina's exports of raw hides are "*casi marginal*."

4.118 This situation is reflected in the absence of any international quotation of prices of Argentinean raw hides (and even wet blue grains).[84] The

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79 The European Communities argues that in 1999, 120 tons of raw hides were destined for Uruguay, where some Argentinean tanneries have invested.

80 In particular the figures provided in para. 70 of Argentina's first written submission and the slaughter rates taken from Argentinean official figures and provided in Exhibit EC I-22. To calculate the number of hides exported in 1996-1998, the export figures in kg. were divided by the average weight of Argentinean wet salted hides. The latter figure was obtained by dividing the figure of 242875 kg for 1999, as provided under para. 70 of Argentina's first written submission by 8066, the figure Argentina claims to correspond to these 242875 kg, which results in 30.11 kg. This weight appears reasonable as experts consulted by the EC confirmed that the average weight of an Argentinean hide is in the range of 28-35 kg.

81 The figure for December 1999, which is not yet available was estimated by taking the average of the slaughter rate for the other months of that year.

82 Estimated, figures for December are missing.

83 The data were provided in the context of the European Communities' investigation preceding the launch of this Panel procedure. See Exhibit EC I-20, Op. Cit. column 8.

84 See for instance Exhibits EC I-23.

WTO/UNCTAD International Trade Centre's bi-weekly "Market News Service," which is the world-wide reference for hides and leather prices[85] never mentions prices for these products.[86]

4.119 On the other hand, prices for crust and wet blue flesh splits, i.e. semi-tanned leather, - which can freely be exported from Argentina - are always quoted. The only reason for this is that there is no visible international trade in Argentinean bovine raw hides and wet blue grains.

4.120 **Argentina** contests the assertion that no prices for raw hides are quoted in the Market News Service, and produces excerpts of 4 MNS-issues which, according to Argentina, quote prices of Argentinean raw hides.[87] Moreover, it is possible to find prices listed in a variety of publications including mass circulation national newspapers (e.g. La Nación).[88]

4.121 The **European Communities** comments on Argentina's reply to the assertion that none of these issues "*quote*" any price for Argentinean raw hides by stating that all issues do quote prices for wet blue splits ("W/b split"), natural crust and dyed crust from Argentina. Only the comments in the margin of the bi-weekly price quotations refer to raw hides prices as part of the general information on the situation in the domestic market.[89]

4.122 **Argentina** asserts that it does indeed export raw hides and wet blue. Over recent years, wet blue exports have increased in value by 4027 percent and approximately 2400 percent in kilos (1995-1999).[90] Argentina provides the following export figures for wet-blue hides (in kg.):

**1995:** 43521 kg.,

**1996:** 1087 kg.,

**1997:** 100297 kg.,

**1998:** 118689 kg.,

**1999:** 1034291 kg.

4.123 Exports of untanned (raw and wet blue) hides for 1999 accounted for 0.78 percent of the output: 94768 hides as against 12141366 animals slaughtered. Salted bovine hides were computed at a rate of 30 kg. each. Wet blue hides at 25

85 Also the Argentinean authorities consider this publication to be authoritative, since Resolution 537/92 (Exhibit EC I-7) refers to the "MNS" quotation of US hides as calculation basis for the export tax.

86 See e.g. Exhibit EC I-23.

87 See Exhibit ARG-XV

88 See Exhibit ARG-XIV.

89 For example, issues 20/1999 and 4/2000 do mention raw hide prices, but only as part of the general comment on the internal market situation, and not as a commercial quotation, unlike what is the case for other countries. For instance, the European Communities refers to the quotations for Australia, which are visible on the same pages as Argentina, where there are always specific commercial quotations of bovine wet salted hides ("W/s…").

90 See Exhibit ARG-XXIII.

kg. and full grain wet blue flesh splits at 10 kg. each. In 1998, 121923 kg. of salted and wet blue hides were exported (7114 hides in total). In 1999, 1277166 kg. of salted and wet blue hides were exported (94768 hides in total).

4.124 Argentina states that these figures *per se* negate the Community's contention that there is a "de facto ban" on exports, as Argentina is indeed present on the international market for raw hides and wet blue.

4.125 The **European Communities** contests that exports of wet blue hides are of importance in the present context: Wet blue hides have already undergone the first, and decisive, stage of tanning. Wet blue is thus already in the possession of the tanneries. Usually, tanners have no interest in selling their leather at the wet blue stage, since value can still be added through further processing (although there may sometimes be reasons to sell wet blue), which explains why also export figures for wet blue are low. In any event, export of wet blue is - in principle - under the exclusive control of the tannery which produced it. Therefore, the export restrictive effect of the measure which the European Communities contests - restraining slaughterhouses in their exports of raw hides - does not apply in the same way to "wet blue" hides.

4.126 The European Communities argues that against the backdrop of export figures set out above, and with the lowered export tariff of now 5 percent, Argentinean meat producers should export a far higher number of hides than is presently the case, in particular as raw hide prices on export markets are higher than those on the Argentinean market. The slaughterhouses could thus obtain a better price abroad than in Argentina. The marginal export figures cannot be explained by a lack of infrastructure by the slaughterhouses. As far as meat is concerned, the slaughterhouses are among Argentina's top exporting industry: they are used to operating in international markets and have extensive international contacts, be it in the US, the European Communities, the Far East etc…. Export is part and parcel of their commercial mentality. Moreover, hides and leather traders are present on the Argentinean markets. Argentina exports crust, finished leather and wet blue splits. This is mostly done through the intermediary of traders. Leather traders also trade in hides, because both markets are closely interconnected. As far as infrastructure is concerned, raw bovine hides do not need any other infrastructure than, for example, wet blue splits (which are massively exported from Argentina). Like wet blue splits, raw hides are usually shipped in containers by boat or by aircraft. In other words, all necessary commercial and transport infrastructure for export of raw hides is present in Argentina.

4.127 **Argentina** argues that the explanation for the low export figures of raw bovine hides is the scarcity of raw material in the international leather market. As there is a strong domestic demand, meat packers are able to make all their sales on the domestic market. Thus, for example, they feel no need to set up the more costly infrastructure that would be required to prepare hides for export. Meat-packing plants would also have to incur the costs of cleaning the hides prior to export which is done when sold in the local market, at the tanneries. If meat packing plants were to run their own export transactions, they would - in addition

to selecting - and hence discarding hides - and preparing their product - have to provide the staff and facilities for export operations, and incur the costs of customs dispatchers, communications, brokerage, transportation, insurance, and so on.

4.128 Argentina maintains that the marketing of hides is not the same as the marketing of meat and, moreover, in Argentina the packers who export meat represent only a very small proportion of the total for this branch of industry, amounting to barely 10 percent of all operators. It is moreover not true that salted hide exports require an infrastructure similar to that for hides in the wet blue state. On the contrary, tanning facilities are required to go over from a salted hide to the wet blue state.

4.129 Argentina stresses that there are also meat packing plants exporting wet blue. This contradicts the EC's argument that the tanneries manipulate the leather market and the meat packing plants wishing to export are dissuaded from doing so.[91]

4.130 With respect to the difference in the cost of preparing hides for export as between the EU and Argentina, it is not technically appropriate to compare figures corresponding to different cost structures.

4.131 Argentina asserts that the absence of an international benchmark price is indicative of the scant development of the market for that product. Foreign demand for Argentine hides is largely for wet blue.

4.132 Argentina states that, moreover, export figures could not constitute non-compliance by Argentina. There is no WTO obligation with regard to exporting a certain volume of goods.

(c) Price Differential between Argentine and US Hides

4.133 The **European Communities** contends that an export market of raw hides would exist in the absence of the measure under dispute, as Argentinean raw hides are sold domestically at prices that would make their export lucrative. National prices, as published in "*Cuerecon - Informativo quincenal de la industria del cuero*" (an Argentinean bi-weekly newsletter on the hide market)[92] show that the average prices for US and Argentinean raw salted bovine hides for the period January 1994-August 1999, expressed in US$/kg were as follows:

[91] See Exhibit ARG XXVII.

[92] The European Communities attaches one example of this newsletter as Exhibit EC I-25. It attaches more detailed information on the prices as Exhibit EC I-31.

| Year | US[93] | Argentina[94] | Difference as percent of US price |
|---|---|---|---|
| 1994 | 1.77 | 1.23 | 30% |
| 1995 | 1.79 | 1.20 | 33% |
| 1996 | 1.69 | 1.20 | 29% |
| 1997 | 1.71 | 1.28 | 25% |
| 1998 | 1.34 | 1.13 | 15% |
| 1999[95] | 1.34 | 0.77 | 43% |

4.134 Between January 1994 and August 1999 price differences between comparable US and Argentinean hides represented an average of 32 percent of the US price.

4.135 It is important to note that during that same period the Argentinean export taxes on hides were set at respectively 15 percent (1994-1997), 10 percent (1998) and 5 percent (1999) of the price of US hides. Hence, even after application of the export tax, Argentinean hide prices remain attractive for foreign purchasers.[96] The export tax alone can also not be the reason for the quasi-absence of exports.

4.136 **Argentina** states that a price differential does indeed exist, but that it is due to different degrees of processing of the products concerned. Butt Branded is a steer hide that has been degreased and from which all unusable parts, such as feet, hooves, etc. have been removed. In other words, it is a clean hide. Argentine salted hides, in the state in which they leave the meat packing plants for tanning, are dirty, having been neither degreased nor trimmed. In other words, although the hides concerned are of similar quality, each type reaches the tannery in a different condition. In Argentina, tanners are responsible for cleaning, trimming and degreasing. This additional activity justifies the difference in prices. United States tanners receive hides that have already been prepared and are ready for tanning. Argentina emphasizes that it is not true that the meat-packing plant could sell at a higher price on the international market, since the product that is easily sold on the domestic market is not in the same state of processing as that required for sale on the external market, as we have been explaining. Indeed, preparation for sale abroad involves at least a 20 percent cost increase. To this must be added the cost of export infrastructure (customs dispatcher, communications, brokerage, transportation, insurance, and so on).

4.137 The **European Communities** argues that Argentina's explanation of a difference in cleanliness and in the level of processing of Argentinean and US

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[93] The US price is the FOB Central US price in dollar/kg of US Butt Branded Steer of less than 68 lbs. (31 kg) on the Chicago Market

[94] The Argentinean price is the FOB Buenos Aires price for salted "novillo" hides

[95] Figures for January -August

[96] As the European Communities has shown in its answer to question 3(c) of the panel; see also Exhibit EC I-40.

hides is unconvincing. Argentina further provides no evidence whatsoever for its assertion, which should therefore be rejected. The Argentinean assertion is contradicted by a well reputed trade magazine, which in a 1996 Article - annexed by the European Communities to its first written submission[97] - describes that the slaughterhouses have a tradition in taking great care in washing and preparing the hides.

4.138 The price selected by the European Communities is moreover the price of a type of hide which is qualified in Argentina - quoted from the Argentinean newsletter for the tanning industry (Cuerecon) - as "buen desuello" (well flayed bovine)[98] which corresponds to the US Butt Branded Steer hides. In an Argentinean book on tanning,[99] this type of hide is described as follows : "well de-fleshed, free of claws, ears, muzzles, horns, hoofs, with less than 25 cm. of tail, cleaned and adequately salted, with clean salt, with or without brine." In other words, these hides are sold in the same clean state as is the case for Butt Branded Steer hides.[100]

4.139 Moreover, the US in its 1990 investigation found that Argentinean and US hide quality was comparable. The US authorities had been confronted with similar arguments as Argentina is now again putting forward, but concluded that Argentina steer hides (novillos) and US butt-branded steer hides, for both of which the European Communities has given prices in its first written submission, were comparable.[101]

4.140 The European Communities refers to the reply by the United States to a question by the panel as to whether the quality of US butt-branded steer hides are comparable with novillo hides. In its reply, the US confirmed that an investigation by the Department of Commerce had found that the quality of US and Argentine hides was comparable, and that the divergence in prices between US and Argentine hides could not be explained by any quality differences.[102] The United States further found that the prices of US and Argentine hides were similar during periods in which there was no export embargo, but that they diverged significantly (with Argentine prices declining) when the Argentine export embargo was in place. The US also stated that after consulting various persons with expertise in the leather industry, there was no reason to believe that differences in quality, cleanliness or level of processing between US and Argentine hides have appeared since the time of that determination.

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[97] See Exhibit EC I-30 at p. 25 left column.
[98] See copies of "Cuerecon" under Exhibit EC I-25.
[99] "Curtición de Cueros y Pieles" by Alberto M. Lacerca, Editorial Albatros, Buenos Aires.
[100] See Exhibit EC I-32, at p. 37.
[101] See Exhibit EC I-6, at p. 42014 (first and middle column) and page 40217.
[102] See Exhibit EC I-6, U.S. Department of Commerce's final countervailing duty determination, published at 55 Fed. Reg. pp. 40212, 40214 (cols 1 and 2) and 40217 (Comment 3); October 2, 1990.

4.141 The European Communities continues that finally, Argentina itself uses the Butt Branded Steer price as a reference price in order to determine the tax base for the application of its export tax on bovine hides,[103] so it is very surprising that it now argues that one cannot compare its hides to those hides. Argentina had not produced any evidence on the horrible state in which, according to its assertions, hides are provided by the frigoríficos to the tanners. In fact, the evidence provided by Argentina itself contradicts its position. The page from La Nación[104] submitted by Argentina does give a price for the "buen desuello" category. In other words, contrary to what Argentina implies, that type of hide is available on the Argentinean market. Furthermore, Argentina itself confirms that the "buen desuello" quality is comparable to US Butt Branded Steer.[105]

4.142 **Argentina** asserts that the EC has confused several sources of information dealing with different issues. Hence it states that Argentina maintained in paragraph 78 of its first written submission that there is a difference in the degree of processing of the hides, which is true. But then it links this to the content of paragraph 80 of the same submission which addresses the alleged absence of raw hide prices on the Argentine market. In that paragraph, Argentina cites Annex ARG-XIV to demonstrate that the mass circulation national daily La Nación does publish Argentine raw hide prices. At no time, however, did Argentina maintain that the buen desuello hides appearing in La Nación were those being referred to in paragraph 78. As the EC points out, buen desuello refers to the state of the hides. The very name indicates this, as the term means that it is a hide that has been properly removed from the animal. US Butt Branded Steer hides have also been properly removed.

4.143 Argentina also differs with the EC statement that the problem of exposure of hides to damage caused by the environment in which the animals live (insects, thorny plants, barbed wire, walking long distances, etc.) is a typical problem for the tanning industry world-wide. The particular characteristics of cattle raising in Argentina aggravates these problems. There are basically two main factors: firstly, cattle breeding in our country is "extensive," in other words the animals are much more exposed to the above-mentioned problems; and secondly, while the implementation of programmes to improve this situation has begun, results can only be expected in the longer term.

(d) Argument that the "shortfall" of Raw Hides Leads to Increased Imports of Raw and Wet Blue Hides

4.144 **Argentina** argues that the decline in the supply of raw hides in recent years, together with the expansion of the tanning industry, led to greater demand

[103] See Exhibit EC I-7

[104] See Exhibit ARG-XIV.

[105] See its answer to question 29, 4th para : "El cuero del US Butt Branded Steer tambien ha sido bien arrancado."

for hides and thereby created an opening for the import of salted and "wet blue" skins. This has compounded a previously existing situation of insufficient supply, which neither the growing trend to resort to imports of untanned hides or crust nor the existence of export duties on raw hides has managed to attenuate.[106] The shortfall of raw materials for the tanning industry is reflected by the statistics on the importation of hides.

*Imports of Cattle Hides in kg./US dollars*

| Category | 1995 | 1996 | 1997 | 1998 | 1999 |
|---|---|---|---|---|---|
| **Salted** | 64020 kg.<br>90265<br>USD | 3488950 kg.<br>7571487<br>USD | 1714761 kg.<br>3922164<br>USD | 4983383 kg.<br>8953975<br>USD | 1492107 kg.<br>2282672<br>USD |
| **Wet blue** | 129514 kg.<br>502141<br>USD | 667731 kg.<br>2656393<br>USD | 950357 kg.<br>3607689<br>USD | 3025609 kg.<br>12321641<br>USD | 6401562 kg.<br>22235537<br>USD |
| **Total** | 193534 kg.<br>592406<br>USD | 4156681 kg.<br>10227880<br>USD | 2665118 kg.<br>7529853<br>USD | 8008992 kg.<br>21275616<br>USD | 7893669 kg.<br>24518209<br>USD |

*Source*: National Institute of Statistics and Censuses (INDEC).

4.145 Wet-blue imports increased by 516 percent between 1997 and 1999, rising in value from US$ 3 million to US$ 22 million. This category of hides has recorded the biggest increase.

4.146 Argentina concludes that 415361 wet blue hides and 49737 salted hides were imported in 1999, adding up to a combined total of 465098 hides. Compared with exports of 94768 hides, these import figures give a clear idea of the industry's need for raw materials for processing, given their scarcity on the domestic market.

4.147 The **European Communities** states that even if the domestic leather industry's demand would indeed exceed the annual hide production, thus leading to imports, this would still not exclude that in the absence of the contested measure, substantial exports should occur.

4.148 In the European Communities, for instance, as shown in Exhibit European Communities I-33, the annual apparent consumption (i.e. production + imports minus exports), which reflects the leather industry's demand, is higher than the annual production of hides in the European Communities. For example, in 1995, the European Communities produced 723900 tons of bovine hides, and imported 378000 tons from other sources, while still exporting about 153400 tons of bo-

[106] CEPAL/ONU Publication, July 1999, "La industrialización del cuero y sus manufacturas en la Argentina: un cluster en desarticulación o un complejo desarticulado?" in the scope of proyect "Estrategia de desarrollo de clusters en torno a recursos naturales: su crecimiento e implicancias distributivas y medioambientales", by Gustavo Lugones and Fernando Porta.

vine hides (or 20 percent of total European Communities production). This is a normal situation in an open economy, where hide transactions are only based on the law of supply and demand.

4.149 Moreover, the fact that a WTO Member imports certain goods does not prove in any way that that WTO Member is not at the same time applying WTO-illegal export restrictions to the same goods which have been domestically produced. On the contrary, as shown by recent Argentinean import statistics, part of these imports into Argentina come from the European Communities.[107] The existence of exports of hides from Europe to Argentina proves that exports of hides from Argentina to the rest of the world, including Europe, should not only be economically interesting, but also - in the absence of the measure which European Communities contests - technically possible.

4.150 Raw hides exports from those member States are also infinitely higher than what Argentina exports in terms of the percentage which they constitute of national production.

4.151 **Argentina** argues that it does not export raw bovine hides because its whole production of raw bovine hides is processed in Argentinean tanneries. There is even a shortage of hides in the country as a direct result of the shortage in livestock. This shortage is due to problems on meat export markets, as a result of which the slaughterhouses do not work at full capacity.

4.152 The **European Communities** argues that even if a shortfall existed, this would still not exclude the possibility of exports. The European Communities, with a high demand for raw hides, still exports significant numbers. The theory that only the "surplus" of a certain raw material, that is the amount exceeding the domestic users' processing capacity, should be exported does not reflect the way free and open markets, as guaranteed by the abolition of export restrictions by Article XI and the neutral application of customs rules under Article X, work. In free and open markets deals are struck according to the law of offer and demand, and not on the basis of the nationality of the parties involved. The European Communities does not claim here that all products or in particular all raw materials of a particular country should be bought up by foreign purchasers. The point the European Communities wants to make here is that there should be free competition, that is to say equal competitive opportunities for all purchasers, be they foreign or domestic.

4.153 Moreover, when looking at the European Communities' annual apparent consumption of raw bovine hides it would appear, at least in Argentina's logic, that there is an even more important shortage of hides in the European Communities.[108] Nevertheless, the European Communities exports a considerable amount

[107] See Exhibit EC I-34.

[108] In 1999, the EU tanners processed far more hides (965110 tons) than the EU produced (779735 tons). There is thus a serious "shortage" of hides in the EU, at least when one compares production

of hides. Even if Argentina's argument that its internal demand is much higher than its supply were true - it has provided no evidence thereof - it can therefore not explain the negligible export quantities.

(e) Claim that Ratio of Production to Export in Argentina is Low

4.154 **Argentina** argues, that European Communities Members share of output to exports would be similar to those of Argentina. The figures given in Exhibit ARG. XXIV show, for instance, that in 1998, the percentages of the output of hides and skins in kilos exported were the following: France 4.16 percent, Spain 1.54 percent and Ireland 4.51 percent, which is not too far removed from the Argentine figure of 0.85 percent. Hence, in perspective with European Communities figures, Argentine exports are not "negligible."

4.155 In the absence of any legal obligation whatsoever, what criterion of economic logic should lead Argentina to slaughter its cattle stock in order to increase the international supply of hides?

4.156 The **European Communities** contests the figures provided by Argentina with regard to France, Spain and Ireland. The statistics that the European Communities has at its disposal show that:[109]

- In 1999, France exported 38.719 tons of raw bovine hides (7.322 tons to non-EU countries and 31.397 tons to European Communities Member States), while its 1999 production of raw bovine hides is estimated at 159.838 tons. In other words, in 1999 France exported about 20 percent of its hide production.
- In 1999, Spain alone exported 27603 tons of raw bovine hides (3083 tons to non-EU countries and 24520 tons to other EU countries) while its 1999 production of raw bovine hides is estimated at 72489 tons. In other words, in 1999 Spain exported about 35 percent of its bovine raw hide production.
- In 1999, Ireland exported 46464 tons of raw bovine hides (6190 tons to non-EU countries and 40274 to EU Member States), while its 1999 production is estimated at 59340 tonnes. In other words, in 1999, Ireland exported more than 75 percent of its raw bovine hides production (Ireland's capacity to tan bovine hides is rather limited as there are only three relatively small tanneries which process bovine hides)
- In 1999, the 15 EU Member States altogether exported 134127 tons of raw hides to non-EU Member States, while the 1999 EU 15

figures with consumption (about 190000 tons). Nevertheless, in 1999 the EU exported 17.2percent of its raw bovine hides production.

[109] See exhibit EC I-38.

production of raw bovine hides is estimated at 779735 tons. In other words, in 1999 the EU 15 exported about 17.2 percent of its raw bovine hide production.

4.157 That same year, the 15 EU Member States imported 319502 tons of raw hides from non-European Communities Member States. Its apparent consumption (production -exports + imports) was 965110 tons. Thus, in 1999, the EU tanners processed far more hides (965110 tons) than the EU produced (779735 tons). There is thus a serious "shortage" of hides in the EU, at least when one compares production figures with consumption. Nevertheless, in 1999 the EU exported 17.2 percent of its raw bovine hides production.

4.158 The European Communities states that Argentina compares figures that cannot be compared when comparing its own production of raw bovine hides with its export of raw hides and wet blue. The proper comparison to be made is between production of raw *hides* and export of *raw hides*. The second page only concerns export figures (from France, Spain and Ireland) of *raw hides* only (and no wet blue). Again, the proper comparison to be made is that between export of Argentinean raw hides (less than 1/1000 of annual hide production) and French, Spanish and Irish exports of raw hides (which are all several percent, as shown above).

4.159 **Argentina** disagrees with the approximation used by the EC in its submissions when it refers to exports of Argentine bovine hides using export data based on raw hides and disregarding exports of wet blue hides. This contradicts the very terms of reference established by the EC in its initial complaint.[110]

4.160 The figures put forward by Argentina when it refers to its exports of bovine hides concern raw hides and *wet blue*, since this is consistent with the terms of reference of this Panel. We stress that these figures clearly show that there is no *de facto* ban on the export of bovine hides in Argentina.

4.161 Argentina maintains that the EC's attempt to divert the original complaint concerning the alleged export restrictions on both types of hides constitutes an adjustment of the original complaint in the light of the growing Argentinean exports of wet blue.

### B. Violation of Article X:3 (a) of the GATT 1994

#### 1. Allegation that Resolution 2235 Commits Argentina to an Administration of Customs Laws which is not Impartial, Reasonable, and Uniform

4.162 The **European Communities** claims that the authorization contained in Resolution 2235 is inconsistent with GATT Article X:3(a), which stipulates that Members must administer trade regulations in a uniform and impartial manner.

[110] Para. 10 of the first written submission and reply by the Community to question 1 of the Panel.

The authorization - through Resolution 2235 - of representatives of the Argentinean tanning industry to be present during the customs' export verification procedures of raw hides, makes an impartial, reasonable, and uniform application of the Argentinean customs law impossible, as the industry so authorized has an interest in having exclusive access to raw material when that raw material is legitimately offered for export.

4.163 In its *European Communities-Bananas* ruling, the Appellate Body compared the language of Article X:3(a) of the GATT with that of Article 1:3 of the WTO Import Licensing Agreement. The panel noted that there were differences between both Articles, in that the latter provides that

> "the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable way."

4.164 The Appellate Body nevertheless attached no importance to this difference in wording:

> "In our view, the two phrases are, for all practical purposes, interchangeable."[111]

4.165 These findings of the Appellate Body clearly indicate that Article X:3(a) is about basic principles of *fair, equitable, neutral and equal treatment* in the application of laws, regulations and (administrative) procedures related to trade in goods.

4.166 The European Communities avows that both the right contained in Resolution 2235 of representatives of the Argentinean tanning industry to be informed whenever anybody attempts to export, as well as the fact that representatives of ADICMA, an industry which has a strong interest in keeping raw material in Argentina, may be present at the customs inspection results in a violation of Article X, paragraph 3 a of the GATT, as since under such circumstances a "*uniform, impartial and reasonable"* application of the Argentinean customs laws is impossible. The Argentinean government is of course equally aware that Resolution 2235 has this effect. This is underscored in particular by:

- the fact that the industry allowed to participate is the only user of the raw material concerned, and that the raw material in question concerned represents more than 50 percent of the production cost of the finished product (leather);
- the fact that this industry has always expressly and openly stated that it wants access of foreign buyers to its domestic raw material be restricted, hence shown its partiality and interest in the products concerned;

[111] Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 203 2nd subparagraph.

- the fact that, until just before the introduction of that measure the export of the product subject to that measure was squarely prohibited, and had been subject to open prohibitions and restrictions during more than 20 years;
- the fact that it does not take specific expertise to distinguish between products eligible for refunds and raw hides or wet blue.

4.167 It cannot be considered "reasonable" that the interested industry is informed of all (attempts at) exports by those from whom they wish and effectively managed to obtain the exclusive right to purchase hides. The European Communities maintains that Argentina completely fails to explain why the very peculiar situation that sellers must submit to the presence of representatives of their potential domestic buyers when they export goods should be considered "reasonable."

4.168 As was noted above, the measure was introduced and expanded upon repeated requests of an industry that (i) uses a certain raw material, namely hides, (ii) has an obvious interest in keeping this commodity's market closed; and (iii) has expressed the view that one cannot allow for a liberalisation of this market.

4.169 Given this context, allowing an industry to participate in customs control of a raw material in which it has a vested interest can only be designed to allow that industry to have that procedure applied to its advantage.

4.170 It is obvious that the participation of representatives of an industry which has a clear interest in impeding the export of its raw material introduces a manifest element of partiality into a customs procedure. Legislation which unnecessarily allows certain interested private parties to take part in customs procedures which can be turned to their commercial advantage by definition creates the risk that there will be partial administration of those procedures.

4.171 The fact that the Argentinean government was apparently making certain information available on-line does not detract from the fact that the presence of persons who are not a party to the export transaction is incompatible with Article X:3(a).

4.172 The European Communities also argues that it cannot be considered reasonable when customs formalities are applied in such a way that a representative of all potential Argentinean hide buyers, any time when one of their suppliers would like to sell abroad rather than to them, is allowed to see and sign a document which contains the details of the export deal, including business confidential information to which even under Argentinean law itself access should be legally restricted. In fact, the immediate context of Article X:3 makes clear that the drafters of the General Agreement would have considered this clearly unreasonable. This results from the fact that in Article X:1, last sentence, it is stipulated that the obligations of that paragraph shall not require WTO Members *to "disclose confidential information which (…) would prejudice the legitimate commercial interests of particular enterprises, public or private.*" The Argentinean measure therefore results in the opposite of what the drafters of Article X considered important, i.e. protection of legitimate business secrets.

4.173 In reply to a question by the Panel, the European Communities elaborates its claim, that Resolution 2235 is in violation of Article X:3(a), inter alia, because it entails an administration of relevant customs rules which is not uniform in that for the particular products mentioned in the Resolution a separate method of administration is introduced. The European Communities accepts that for e.g. certain agricultural products special sanitary and phytosanitary checks at the border may be indispensable and that to that extent the administration of customs procedures will not be uniform. However, the obligation to administer trade regulations (in the sense of Article X:1) in a uniform manner must be read in its context, which is to administer those regulations in a "uniform, impartial and reasonable" manner. These words inform one another and clarify the meaning of the obligation. The fact is that Resolution 2235 only applies to certain products, while for very many products "*reembolsos*" exist. This means that the justification given by Argentina for Resolution 2235 is not valid. Therefore, in this case the non-uniform application of the Argentinean export procedures - i.e. the fact that Argentina only gives a certain industry the right to be present, for certain products - shows that the Decree violates Article X:3(a).

4.174 Moreover, the European Communities maintains that the three criteria of X:3(a) are cumulative. So even if one considers that the fact that a certain method of administration of trade laws in the sense of Article X:3(a) is not "uniform" is not a problem in itself, Resolution 2235 certainly is neither a reasonable nor impartial way of administering those export procedures.

4.175 **Argentina** contests the European Communities' interpretation of the last sentence of Article X:1, since that sentence represents a waiver of the obligation to publish confidential information, and not a ban on the publication of such information. The final sentence of paragraph 1 is an exemption from the obligation to publish. It is not an obligation. The Agreement has left it to the discretion of Members to decide whether or not to publish the confidential information contained in the laws, regulations, judicial decisions and administrative rulings.[112]

4.176 Argentina asserts that the ADICMA experts have no access whatsoever to the material "offered for export." The experts intervene only when the deal to export the goods, i.e. the export operation, has already been closed. Consequently, it is not clear how this could be in breach of the obligation under Article X:3(a), even allowing for the legal interpretation put forward by the European Communities.

4.177 The **European Communities** argues that Argentina misunderstands its the arguments. The European Communities has never argued that the Resolution which it contests allows ADICMA-representatives to be present during contractual negotiations, e.g. when a slaughterhouse would send a fax to a potential for-

[112] The obligation to publish, combined with the exemption from such obligation in the case of confidential information, is irrelevant for the purposes of determining the alleged unreasonable application of RG 2235/96; see Argentina second submission B III 3.

eign buyer. However, as ADICMA-representatives may be present when Argentinean customs procedures related to exportation of goods are applied, they are present when export regulations are being administered, which falls under Article X of the GATT, including paragraph 3 thereof. The European Communities recalls that Article X:1 - to which Article X:3 refers back - covers *inter alia* "requirements, restrictions or prohibitions on imports and exports" and that in for instance *European Communities-Bananas,*[113] import licensing regulations were found to fall under Article X, paragraphs 1 and 3.

4.178 **Argentina** argues that the European Communities has neither provided any evidence to show that impartial application of customs rules is impossible in the presence of ADICMA representatives, nor has it been able to explain what is "not reasonable" about industry participation in this procedure. Argentina regards ADICMA participation as reasonable for the purpose of checking the quality and tariff classification of the goods for export.

### 2. *Applicability of Article X:3(a) of the GATT 1994 to Resolution 2235*

4.179 **Argentina** maintains that the European Communities mistakenly applies the Article X:3(a) to Resolution 2235 which is a substantive rule of specific nature. The Article, however is only applicable to general rules. Moreover, Article X applies only between WTO Members, but not within the territory of a Member State. In addition, Argentina points out that Article X:1 only authorizes the exemption from the obligation to publish and does not mention an explicit obligation to protect confidentiality, which would be protected indirectly by Article X:3(a) through Article X:1.

4.180 Argentina maintains that Resolution 2235 is not a general rule, but a substantive rule of a specific nature, as it is directed towards a perfectly identifiable number of persons, the members of ADICMA to whom it grants the authority to be present during export procedures. The specific nature of the rule is also shown since it was issued only on the application of a party. This definition is consistent with precedent, according to which:

> "... If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application."[114]

[113] Report by the Appellate Body on *European Communities – Bananas*, *supra*, footnote 111, para. 203.

[114] Report of the Panel in *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear* ("*US – Underwear*"), WT/DS/24/R, adopted 25 February 1997, DSR 1997:I, 31. para.

4.181 The essential requirement, as recognized by the Appellate Body, is that it should be designed to affect an unidentified number of persons. In the case at issue, the number of persons is perfectly identifiable. Thus, Resolution 2235 is not covered by Article X:3(a) of the GATT 1994.

4.182 Argentina states that GATT Article X refers to the same rules of a general nature throughout the text of the entire Article. The European Communities cannot argue that the alleged general rules regulating Argentine exports (which it does not identify) are those set forth in paragraph 1 of Article X, and that Resolution 2235 concerns the administration of those rules, and is consequently covered by paragraph 3(a) of Article X. The difference between the paragraphs lies in the fact that paragraph 1 of Article X refers to the publication of rules, while paragraph 3(a) refers to their administration. The European Communities interpretation of Resolution 2235 as constituting a particular method of administering export regulations is supported neither by the text of the Resolution nor by the object and purpose pursued.

4.183 Argentina asserts that the scope of Article X of the GATT covers only the administration of a rule, yet not its own substantive character. Article X:3(a), was not designed for situations where the substantive content of a rule is questioned. In the case at issue, the European Communities merely argued that the substantive content of Resolution 2235 was inconsistent, i.e. the authorization granted by the Argentine State for the designated ADICMA representatives to be present during the customs clearance of the goods. In other words, what the European Communities claims to be inconsistent is the substantive content of the rule in question and not its administration.

4.184 In support of its arguments, Argentina quotes the Appellate Body:[115]

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7.65, confirmed by the Appellate Body, and Report of the Appellate Body in *European Communities - Measures Affecting the Importation of Certain Poultry Products* ("*EC – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, para. 113. "… if, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, we find it to be a measure of general application."

[115] Report of the Appellate Body in *European Communities – Bananas*, *supra*, footnote 111, para. 200: "The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations," and a reading of the other paras. of Article X, make it clear that Article X applies to the administration of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994." Report of the Appellate Body on EC - Poultry Products, Op. Cit., para. VI.7: "Thus, to the extent that Brazil's appeal relates to the substantive content of the European Communities rules themselves, and not to their publication or administration, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive

> "Article X relates to the *publication and administration* of "laws, regulations, judicial decisions and administrative rulings of general application," rather than to the *substantive content* of such measures. In *European Communities - Bananas*, we stated:
>
> > The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations," and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."
>
> Thus, to the extent that Brazil's appeal relates to the *substantive content* of the European Communities rules themselves, and not to their *publication or administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."[116]

4.185 Argentina contends that Resolution 2235 is administered or applied in a uniform, impartial and reasonable manner to all of the subjects covered by it. The European Communities has not proven otherwise. The European Communities is taking an erroneous approach to the issue in thinking that because other persons are not authorized to be present during customs clearance of the goods, the rule is being administered in a partial, non-uniform and unreasonable manner. The fact is, there is no reason for other persons to be present during clearance because the rule is not designed for that purpose. The presence of the other interested parties, the exporter or the exporter's customs agent, is governed by Articles 340 and 36 of the Argentine Customs Code.[117]

4.186 In conclusion, if the European Communities considers that the rule is inconsistent because it authorizes ADICMA to be present during customs clearance of the goods or because other persons should be present, in other words because

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content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."

[116] Report of the Appellate Body in *EC - Poultry*, footnote 114, para. 115.

[117] Article 340 of the Argentine Customs Code stipulates that: "the exporter or, where appropriate, the customs agent acting as a representative of the exporter, must participate in the inspection of the goods ... ."

of its substantive content, its allegation should be examined under other provisions of the Agreement, as stated by the Appellate Body. Only because the European Communities doubts whether it can prove the alleged de facto ban on hides exports (Article XI:1) does it erroneously resort to Article X:3(a), applying it to a situation for which it was not designed.

4.187 Argentina argues further that Article X:3(a) does not deal with the application of laws, regulations, decisions and rulings of a general nature within the territory of the member State, but refers to the manner in which a Member applies its rules *vis-à-vis* other Members of the WTO.

4.188 In the present case, the European Communities makes an erroneous interpretation which is totally at variance with the one it offered in the case brought by Chile in respect of dessert apples. In that case, the European Communities maintained that the Article referred to the application of its regulations relating to apple-exporting members, not to their application in an impartial manner within its own territory. In the case cited, the European Communities argued that: "… the Chilean case was based on a misinterpretation of Article X:3(a), whose correct meaning they gave as requiring in substance that the administration of trade measures by the various administrations should not be discriminatory among the contracting parties … The European Communities denied that the Community surveillance measures were administered in a different manner with regard to imports of Chilean apples and imports of apples originating in other contracting parties."[118]

4.189 Argentina maintains that it applies Resolution 2235 in an impartial manner, as the resolution allows ADICMA representatives to be present when hides were being exported to any destination, not only the European Union.

4.190 The **European Communities** argues that Argentina's assertion that Article X:3 can only apply in case trade regulations are applied differently to different WTO Members is unfounded. Such a way of administering trade regulation certainly would fall foul of Article X:3 since it would clearly not be "uniform." However, Article X:3 also prohibits partial and unreasonable ways of administering trade regulations. Argentina's reading of Article X:3 would deprive those words of meaning, which is contrary to the Appellate Body's constant case-law that a treaty interpreter must give full meaning to all terms in a treaty, and cannot read parts of a treaty into redundancy.[119]

4.191 **Argentina** maintains that Article X:3(a) does not concern the application of the laws, regulations, judicial decisions and administrative rulings of general application within the territory of the Member, but rather with the way in which the Member applies its rules in respect of the other Members of the WTO.

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[118] "EEC - Restrictions on Imports of Dessert Apples - Complaint by Chile," 36S/132, para. 6.5.

[119] See for instance the Report by the Appellate Body on *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*"), WT/DS103/AB/R and Corr. 1, WT/DS113/AB/R and Corr. 1, adopted 27 October 1999, DSR 1999:V, 2057, para. 133.

4.192 Argentina submits that the European Communities itself had invoked the precedent of *Bananas III*, in which it requests the Appellate Body to rule on two issues:

> "The first issue is whether the requirements of uniformity, impartiality and reasonableness set out in Article X:3(a) preclude the imposition of different import licensing systems on like products imported from different Members …."

4.193 Argentina argues that the European Communities refers to different import licensing systems on like products imported from different Members. It is not referring to different import licensing systems for importers, but licensing systems which are different in respect of different Members of the WTO. While it is true that the Appellate Body reversed the Panel's conclusion based on the attribution of a minimum value as a precedent to the Interpretative Note of the Director-General, it is also true that the Appellate Body did not rule against the argument that this was a form of discrimination among Members, but reversed the Panel's conclusion based on the finding that the question raised referred to the substantive content or administration of the rules that were supposed to be examined in the light of the Article X:3(a) obligations. In this case, the Appellate Body defined the import licensing regulations as being of substantive content, and having defined Article X:3(a) as referring to the application of the laws, regulations, judicial decisions and administrative rulings of general application, the substantive content of the rule was not covered by the Article.[120] The Appellate Body found in this legal reasoning sufficient grounds for reversing the conclusion of the Panel, which had amalgamated the concepts of "substantive content" and "administration."

4.194 Regarding the argument concerning confidential information, the European Communities once again uses the kind of reasoning it used with respect to Article XI:1, applying the same arguments to persuade the Panel that Argentina administered its laws, regulations, judicial decisions and administrative rulings of general application badly, adducing that the immediate context of paragraph 3(a) of Article X is paragraph 1 of that Article. Argentina agrees entirely with this assertion, because paragraph 3(a) itself refers to the rules of general application mentioned in paragraph 1.

4.195 Argentina does not agree with the idea that the confidential information in the last sentence of paragraph 1 is relevant for the purposes of determining whether it administers Resolution 2235 in conformity with paragraph 3(a) of Article X.

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[120] "The context of Article X:3(a) within Article X, which is entitled 'Publication and Administration of Trade Regulations', and a reading of the other paras. of Article X, makes it clear that Article X applies to the Administration of laws, regulations, decisions and rulings … ." Para. 200 of the report of the Appellate Body in *European Communities - Bananas*, *supra*, footnote 111.

4.196 The European Communities is using the last sentence of Article X:1 wrongly, since that sentence represents a waiver of the obligation to publish confidential information, and not a ban on the publication of such information. Moreover, the publication referred to in paragraph 1 of Article X concerns laws, regulations, judicial decisions or administrative rulings of general application that a WTO Member has put into force.

4.197 The final sentence of paragraph 1 is an exemption from the obligation to publish. It is not an obligation. The Agreement has left it to the discretion of Members to decide whether or not to publish the confidential information contained in the laws, regulations, judicial decisions and administrative rulings. In any case, as far as publication is concerned, Argentina fulfilled all of its obligations under Article X:1, which does not form part of these proceedings.

4.198 This obligation to publish, combined with the exemption from such obligation in the case of confidential information, is irrelevant for the purposes of determining the alleged unreasonable application of Resolution 2235.

4.199 The **European Communities** state that they agree with Argentina that the contested measure is not one "of general application" but rather an instance of "administration" of the generally applicable customs procedures for exports in Argentina within the meaning of Art. X:1. It is precisely for that reason that the contested measure falls under Art. X:3(a).

4.200 According to the European Communities, the contested measure relates to the *administration* of other laws, regulations and so forth in the sense of Art. X:3(a) GATT, and is therefore properly challenged by the European Communities under that provision. Argentina has confirmed that there are various laws, regulations and so forth which apply to the exportation of goods from Argentina. For instance, as Exhibit Arg-XXX it has provided a Resolution No. 1,284/95, providing rules on what kind of export declarations must be made. Also it has provided Resolution No. 125/97 on customs controls when products are exported.

4.201 The European Communities contend that the contested measure (Res. 2235/96) prescribes a certain *method of administration* of such laws. It stipulates that for certain products, when an export declaration has been made, ADICMA will be informed. It also stipulates that when those products are checked by Argentinean customs officials, ADICMA-representatives may be present. In other words, it provides for a certain way of administering the general customs procedures when certain products are concerned.

4.202 The European Communities do not contest the fact that Argentina applies customs checks before exports are allowed, which is a general measure falling within the scope of Art. X:1. The European Communities contest that when this regulation on export checks is administered - i.e. applied - to certain products (namely those mentioned in Res. 2235/96) it is administered in a way which allows and enables ADICMA-representatives to be present.

4.203 The European Communities state that since Res. 2,235.96 has an export restrictive effect, they challenge the *substance* of that measure under Art. XI.

Since, for the products it covers, it makes an impartial and reasonable *application* of Argentinean export procedures impossible, the EC properly challenges that effect of the measure under Art. X:3.(a).

4.204 The European Communities consider that contrary to what Argentina argues, Article X:3 (a) clearly applies to the administration of trade laws in the sense of Article X:1 within a WTO Member's territory. That follows from the plain wording of Article X:3 (a). In fact it is hard to see where else a WTO Member can administer its trade laws than within its own territory.

4.205 The European Communities state that contrary to what Argentina argues, Art. X :3(a) applies to all unreasonable and partial methods of administering trade laws. Since the provision *inter alia* obliges WTO Members to administer trade laws[121] "in a uniform . manner", it certainly prohibits discriminatory application in an unreasonable and partial manner of trade laws.

4.206 According to the European Communities, it is however not limited to that situation. It is clear from the wording of Art. X :3(a) that it enunciates three cumulative obligations ; trade laws must be administered not only in a uniform manner, but also in an impartial manner, and in a reasonable manner. Applying national export regulations to certain products in a partial and unreasonable manner is a violation of Art. X :3(a), also if that is done with regard to exports irrespective of their destination."

## V. THIRD PARTY SUBMISSION BY THE UNITED STATES

5.1 In its third party submission, the **United States** makes observations on the purpose and scope of Article XI GATT; and offers observations on some factual aspects of the dispute. It concludes that the measure in question may well constitute a prohibited export restriction under Article XI of GATT 1994.

5.2 An export restriction under the apparent circumstances of the present case, that is, potentially intended to benefit domestic industry, either by bestowing a raw material price advantage on the domestic industry, or by restricting the supply of the raw material to foreign competitors, is precisely the trade distortion the Article XI seeks to prohibit. The US recalls that hides are a by-product of meat production, and their supply is dictated by the demand for meat, not by the demand for hides. It argues that when demand for hides is limited, the supply does not decline as it would normally do in the case of non-by-products. Rather, supply continues, unaffected by demand, and the prices decline to reflect the limited demand relative to supply. For this reason, restricting exports of hides from Argentina could have enormous economic value to Argentine tanners: if there is a large supply of hides produced by the meat industry and a limited demand by Argentine tanners, this will result in low input costs for the Argentine tanners.

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[121] By trade laws in this section are meant all laws, regulations etc. covered by Art. X:1.

Further, eliminating sales of Argentine hides to competing tanneries outside of Argentina would keep world market prices of hides — the prices that the Argentine tanners' competitors must pay — relatively high. In other words, restricting exports of hides from Argentina could bestow a substantial economic benefit on the Argentine tanning industry, and could disadvantage its foreign competitors.

5.3 The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes,"[122] which examined the use of both import and export restrictions, concluded that:

> "the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. However, it was agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case."

5.4 Any export restrictions on Argentine hides, therefore, could potentially be a textbook example of the kind of practice that Article XI:1 is intended to prevent.

5.5 As concerns the scope of GATT Article XI, the US observes that language of the provision is broad, and prohibits export restrictions "made effective," not just through quotas and licenses, but also through "other measures" of a contracting party. As the Panel in "*Japan - Trade in Semiconductors"* noted,

> "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations, but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export or products was covered by this provision, irrespective of the legal status of the measure."

5.6 In addition to not being limited to laws and regulations, Article XI:1 is also not limited to measures that explicitly restrict exports, such as export quotas or licenses. Rather, it prohibits export restrictions that are "made effective" by measures, whether or not those measures, by their literal terms, prohibit or restrict exports.

5.7 Whether an export restriction is made effective through a measure can be a fact-intensive inquiry, depending heavily on the context and the surrounding factual circumstances. In *Japan - Trade in Semiconductors*, the Panel had to consider whether certain measures of the Japanese government were export restrictions, even though they were not legally binding or mandatory. The Panel examined the entire factual context of the measures, after noting that government-

[122] GATT/CP. 4/33, Sales No. GATT/1950-3

industry relations vary from country to country and from industry to industry, and concluded that

> "All these factors led the Panel to conclude that an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs. … These measures operated furthermore to facilitate strong peer pressure to comply with requests by MITI and at the same time to foster a climate of uncertainty as to the circumstances under which their exports could take place. The Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control ... . The Panel concluded that the complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to market other than the United States, inconsistent with Article XI:1."[123]

5.8 The United States maintains that the factual and historical context of Argentina's measure concerning the export of bovine hides, described in the European Communities' submission, strongly suggests that this measure operates as a prohibited export restriction:

5.9 The United States notes that Article XI:1 does not prohibit all export restrictions, but only export restrictions other than transparent and non-discriminatory means of taxes, duties, or charges. In the present case, the Argentine authorities found that the export tax was insufficient to achieve its purposes, and so conjoined it with some other non-tax measure apparently aimed at discouraging exports. Those other measures are what Article XI:1 is aimed at eliminating. This is particularly true in the case of export-restricting measures that are not, by their literal terms, export restricting, but which have the purpose and effect of restricting exports.

5.10 The United States notes that, the presence of the hide exporter's domestic customers at the export processing would, in the absence of strict and reliable procedures, raise a well-founded fear that valuable commercial information could be compromised and/or misused by the domestic customers. This alone could chill exports and constitute an export restriction. The protection of confidential business information from disclosure is critical to the rights and obligations assumed under the WTO. There is a wide recognition under the WTO Agreements that the threat of compromising confidential information may prevent interested parties from benefiting from the rights granted by the WTO[124]. The United States

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[123] L/6309, adopted on May 4, 1988, 35S/116, 153-155, para. 117.

[124] For instance, Article X of the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation) and Article 2.9 - 2.13 of the Agreement on Preshipment Inspection recognize the importance of protecting confidential information from disclosure in the context of customs

points out, however, that the possible disclosure of sensitive confidential information is only one aspect of this measure that might effect an export restriction. Even if confidential information is protected, the right of notification and presence of the tanners may still act as a strong disincentive to export.

5.11 The United States notes that this dispute, although presented in the context of a particular export restriction, may raise concerns of a more systemic nature. Whether a Member can avoid prohibitive restrictions under the WTO simply by putting the "fox in charge of the henhouse" (rather than taking the specific prohibited action itself) is an issue that could apply as easily to import restrictions as to export restrictions. The Panel should consider the systemic implications of this dispute as it undertakes its task.

5.12 As concerns the scope of Article XI:1, the United States further disagrees with Argentina's interpretation of the standard developed in the *Japan - Trade in Semiconductors* dispute:

5.13 First, the United States contends that dispute at issue is very different from that presented in the Semiconductors case, and it can be misleading to apply the criteria used in that dispute to this dispute. While in Semiconductors, the focus was measures undertaken by the Japanese government aimed at the producing/exporting entities, in the present case, the measure is directed, not at the producer/exporters, but at their domestic customers who have the right to be notified of, and participate in, the export processing of products that they apparently do not want exported. Consequently, to apply correctly the first criterion of Semiconductors to this case, i.e. are there reasonable grounds to believe that sufficient incentives or disincentives for non-mandatory measures to take effect, the Panel should ask whether, given the apparent opposition of Argentine tanners to hide exports and the long history of the restriction of such exports, a measure that notifies Argentine tanners of hide exports and that gives them the right to participate in the export processing of those hides would act effectively as a disincentive to exports, regardless of a legally binding effect.

5.14 With respect to the second criterion, i.e. that the operation of the measures was dependent on Government action or intervention, the United States argues that the measure operates by virtue of Government action, both because it results from government resolutions and because it is apparently through government action that the Argentine tanners are notified of exports and are invited to participate in their customs processing.

5.15 As concerns arguments on factual aspects of the case, the United States observes that it is not dispositive whether or not the Argentine tanners have the

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processing. Article 2.14 of the latter agreement also recognizes the need for preshipment entities to avoid conflicts of interest. More generally, Section 7 of the Agreement on Trade-Related Aspects of Intellectual Property Rights protect the rights of persons to prevent proprietary information from being "disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices."

legal ability to stop the particular export they are asked to oversee. That the tanners are notified of any exports and will become privy to information related to those exports (e.g., the identity of the hide seller) could itself effectively chill export trade. Even if the particular export at issue cannot be stopped or made complicated in some manner by the Argentine tanners, the same cannot be said about subsequent transactions.

5.16 Concerning the alleged purpose of the tanner representatives at export verification, it seems curious that an industry association would put so much effort - first in obtaining the right to be present, then in actually overseeing export processing - simply to ensure the accuracy of the government's export statistics.

5.17 The United States observes further that it is irrelevant that the tanners may be verifying exports of their own products, as well as those of their suppliers. The point is that, as applied to their suppliers, this measure could amount to an export restriction.

5.18 Concerning Argentina's argument that no domestic complaints over Resolution 2235 had been launched, the United States argues that this is not probative of whether the Argentine measures are export restrictions under the WTO. Argentine law might or might not prohibit actions that a WTO panel might find to constitute prohibited export restrictions under Article XI. Further, there may be many reasons for not bringing a formal complaint to Argentine authorities that have nothing to do with the merits of the claim.

5.19 The United States argues that the lack of exports following the imposition of a measure may well be probative of whether the measure constitutes an export restriction. This is particularly true where there is an apparent strong interest in trade in Argentine hides, and where the economic conditions appear favourable for such trade. In a similar manner, the Panel in Semiconductors examined prices before and after the measures at issue in that case, to determine whether the measure was having an impact on exports.[125]

## VI. FACTUAL ASPECTS (TAX MEASURES ON IMPORTS)

### A. *The IVA*

6.1 The IVA is a general value added tax system. It is regulated in:

- the Law on the IVA (*Ley del Impuesto al Valor Agregado)* (the "IVA Law");[126]
- the Decree 692/98 implementing the IVA Law[127] (the "IVA Regulation"); and

[125] Japan - Trade in Semiconductors, Op. Cit., para. 119.

[126] Ley del Impuesto al Valor Agregado No 23349 (B.O. of 15.4.97) (Exhibit EC – II.1), as last amended by Law No 25239 of 31 December 1999 (Exhibit EC –II.3).

- the resolutions (*resoluciones*) issued from time to time by the *Administración Federal de Ingresos Públicos - Dirección General Impositiva* (the "AFIP-DGI"*).*

6.2 The types of transactions subject to the IVA include, *inter alia*, the sale of goods within the Argentine territory[128] and the definitive importation of goods into that territory.[129] In the case of imports, the IVA is collected together with any applicable import duties.[130] In the case of internal sales, the seller must charge the IVA to the purchaser[131] and then pay the amounts so collected to the Treasury on a monthly basis,[132] after deducting therefrom any IVA paid on its own purchases and imports during the same period.[133]

6.3 The IVA rates applicable to both imports and internal sales are the following:[134]

| Transaction | Applicable rate |
|---|---|
| Generally applicable rate | 21 % |
| Live bovine animals, meat and offal of bovines, and fresh fruits, vegetables and pulses | 10.5 % |

6.4 Taxable persons whose annual sales do not exceed a certain amount may choose not to register themselves with the tax authorities.[135] Non-registered taxable persons (*responsables no inscriptos*) are dispensed from making direct payments to the Treasury in respect of their internal sales.[136]

6.5 The IVA Law confers to the AFIP-DGI the authority to regulate the "collection at the source" (*percepción en la fuente*) of the IVA.[137] On that basis, the AFIP-DGI has issued Resolutions 3431[138] and 3337,[139] which provide, respec-

[127] Decreto del Poder Ejecutivo 692/98 (B.O. of 17.6.1998).
[128] Articles 1 a) and 4 a) and b) of the IVA Law.
[129] *Ibid.*, Articles 1 c). See also Article 2 of the IVA Regulation.
[130] Article 27 of the IVA Law.
[131] *Ibid.*, Articles 37, 39 and 41.
[132] *Ibid.*, Article 27.
[133] *Ibid.*, Article 12.
[134] *Ibid.*, Article 28.
[135] *Ibid.*, Article 29.
[136] Where a registered taxpayer makes a sale to a non-registered one, it must charge, besides the IVA due on that sale, an additional amount determined by assessing the applicable IVA rate on 50 percent of the net sales price (cf. Articles 4, 30 and 38 of the IVA Law). That additional amount is assumed to represent the IVA due on the subsequent re-sale of the goods by the non-registered taxpayer.
[137] Article 27 of the IVA Law. See also Decree 2394 (B. O. of 11 November 1991), which empowers the Administración Nacional de Aduanas to act as an agent for the "collection" of the IVA, Exhibit EC II.4.
[138] Resolución General No 3431 of 19 November 1991 (hereinafter, "RG 3431"), Exhibit EC – II.5.
[139] Resolución General No 3337 of 7 March 1991 (hereinafter, "RG 3337"), Exhibit EC – II.6.

tively, for the "collection at the source" of the IVA on the importation of goods and on certain internal sales.

### *B. Advances on the IVA*

#### *1. Collection of the IVA on Imports*

6.6 Resolution 3431 provides that, where goods are definitively imported into Argentine territory, the customs authorities must "collect" (*percibir)* an additional amount, besides the ordinary IVA due on that import transaction. This advance on the final IVA liability may be credited against the ordinary IVA due on the subsequent re-sale of the good in cases in which the importer is a registered taxpayer .[140] Where the importer is a non-registered taxpayer, the additional amount cannot be credited because non-registered taxpayers are dispensed from making direct payments to the Treasury in respect of their internal sales. Currently, the advance on imports is collected at the following rates:[141]

| | Live bovine animals, offal of bovines, and fresh fruits, vegetables & pulses | Other goods |
|---|---|---|
| Registered Taxpayers | 5 % | 10 % |
| Non-registered taxpayers | 5.8 % | 12.7 % |

6.7 The above rates are applied on the same base as the ordinary IVA,[142] so that the following rates are charged at import:

| | Live bovine animals, offal of bovines, and fresh fruits, vegetables & pulses | Other goods |
|---|---|---|
| Registered Taxpayers | 15.5 % | 31 % |
| Non-registered taxpayers | 16.3 % | 33.7 % |

6.8 The advance IVA is collected on all import transactions, with the following exceptions:[143]

- re-importation of goods exempt from import duties;[144]

[140] RG 3431, Article 4.
[141] RG 3431, Article 3.
[142] RG 3431, Article 3.
[143] RG 3431, Article 2.
[144] See also Article 26 of the IVA Law.

- imports of goods intended for the private use or consumption of the importer;[145]
- imports of so-called *bienes de uso*, *i.e.* goods intended for use in the economic activity of the importer,[146] except in the case of imports made by non-registered taxpayers; and
- imports of live bovines, under certain conditions.

### 2. *Collection of the IVA on Internal Sales*

6.9 Resolution 3337 provides that where certain categories of persons sell goods to a registered taxpayer they must collect (*percibir*), besides the ordinary IVA, an advance amount.[147] For internal sales, the advance amount, paid on account of the final IVA liability, may be credited by the purchaser of the goods against the IVA due on the re-sale of the goods.[148]

6.10 The applicable rate on all internal transactions subject to the advance IVA is currently at 5 percent.[149] That rate is applied on the same tax base as the ordinary IVA.[150] Thus, the overall IVA rates charged on internal sales are the following:

| Transaction | Applicable rate |
|---|---|
| Generally applicable rate | 26 % |
| Sales of live bovine animals, meat and offal of bovines, and fresh fruits and vegetables | 15.5 % |

6.11 The persons required to collect the advance IVA on internal sales (the *agentes de percepción*) are:[151]

- the central Government, including its autonomous agencies;[152]
- the companies listed in Annex I to Resolution No 18/97;[153]
- the exporters included in a list published in the Official Journal by the AFIP-DGI;[154]

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145 See also Article 8 a) of the IVA Law.

146 In accordance with Article 33 of the IVA Law, bienes de uso are those with a useful life of more than two years for the purposes of the Impuesto a las Ganancias.

147 RG 3337, Article 1.

148 *Ibid.*, Article 9.

149 *Ibid.*, Article 2.

150 *Ibid.*

151 *Ibid.*, Article 1.

152 Article 2 of Resolución General No 18 of 23 September 1997 (hereinafter "RG 18"), Exhibit EC - II.7. RG 18 has replaced Resolución General No 3125 cited in Article 1 of RG 3337.

153 *Ibid.*; The European Communities states that these are, generally speaking, large companies.

154 *Ibid.*

- the markets of grains; and
- the consignatarios de hacienda and auctioneers.

6.12 By way of exception, no payment on accounts are made on, *inter alia*, the following internal transactions:

- sales of bienes de uso;[155]
- sales to agentes de percepción;[156]
- sales to financial entities subject to Law No 21526 (such as e.g. commercial banks, investment banks, mortgage banks and savings banks);[157]
- sales to non-registered taxpayers; and
- sales where the amount of the tax collected would be lower than Pesos 21,30.[158]

### *C. The IG*

6.13 The IG is an annual tax on income, which applies to both natural and juridical persons. It is regulated in:

- the Law on the IG (*Ley del Impuesto de Ganancias*) (the "IG Law"); [159]
- the Decree 1344/98 implementing the IG Law;[160] and
- the Resolutions issued from time to time by the DGI - AFI.

6.14 The IG is levied on all sources of income,[161] including the profits derived from the sale of merchandise and other movable property, both domestic and imported.[162]

6.15 Currently, the profits derived from the exercise of an economic activity by a juridical person are taxed at the rate of 35 percent.[163] In the case of natural persons, the rate increases in proportion to the amount of taxable income.[164] In both cases, the rate applicable is the same, irrespective of whether the profits are obtained with the sale of domestic or of imported goods.

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[155] Article 1 of RG 3337.
[156] *Ibid.*, Article 3. b).
[157] *Ibid.*, Article 3. c).
[158] *Ibid.*, Article 5.
[159] Ley de Impuesto a las Ganancias, as codified by Decree No 649/97 (B. O. 6.8.97),Exhibit EC II-2, as last amended by Law No 25239 of 31 December 1999, Exhibit EC II-3.
[160] Decreto Reglamentario 1344/98 (B. O. 25.11.1998).
[161] Articles 1 and 2 of the IG Law.
[162] *Ibid.*, Articles 2; 49; 52 a) b) c) d) and e); 58; and 65.
[163] *Ibid.*, Article 69.
[164] *Ibid.*, Article 90.

### D. Advances on the IG

#### 1. Collection of the IG on Imports

6.16 Resolution 3543[165] provides that the customs authorities shall "collect" (*percibir*) a certain amount on account of the IG when goods are definitively imported into Argentine territory.[166] The amount so collected can be credited against the IG due by the importer in the same fiscal period.[167] The advance IG is collected on all import transactions, with the following exceptions:

- the re-importation of goods exempt from import duties;[168] and
- the importation of *bienes de uso*.[169]

6.17 The rate applicable is 3 percent.[170] By way of exception, in the case of imports for the importer's own use or consumption, the rate is 11 percent.[171]

#### 2. Collection of the IG on Internal Sales

6.18 Resolution 2784[172] provides that certain taxable persons (the so-called *agentes de retención*) must withhold and pay to the Treasury a certain amount when making a payment subject to the IG to another taxable person. That amount can be subsequently deducted from the IG due by the person receiving the payment.

6.19 The transactions subject to withholding include the internal sale of the following categories of goods:[173]

- merchandise for resale, raw materials and materials;[174]
- processed goods;[175]
- goods in process;[176]
- livestock;[177]
- cereals, oleaginous, fruits and other agricultural produce;[178]

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165 See Exhibit EC I-20, Op. Cit.
Resolución General No 3543, of 7 July 1992 (hereinafter, "RG 3543"), Exhibit EC II-8.

166 The Decreto Presidencial 1,076/92 (B. O. of 2 July 1992) authorizes the Agencia Nacional de Aduanas to act as an agent for the collection of the IG, Exhibit EC II-9.

167 RG 3543, Article 8.

168 Article 2 of RG 3543.

169 *Ibid.*

170 *Ibid.*, Article 4.

171 *Ibid.*

172 Resolución General No 2784 of 25 January 1988 (hereinafter, "RG 2,784"), Exhibit EC II-10.

173 Article 1 of RG 2784.

174 Article 52 a) of the IG Law.

175 *Ibid.*, Article 52 b).

176 *Ibid.*, Article 52 c).

177 *Ibid.*, Article 52 d).

178 *Ibid.*, Article 52 e).

- depreciable movable property;[179] and
- other goods falling within Article 65 of the IG Law;.

6.20 Monthly payments below Pesos 11242.70 are not subject to withholding.[180] In addition, no IG is withheld if the amount that would have to be withheld is less than Pesos 3.75.[181] No equivalent minimum threshold exists for IG advances on imports.

6.21 The *agentes de retención* are listed in Article 3 of Resolution 2784. That list includes most forms of juridical persons. Natural persons are required to withhold the IG only where they make a payment to a taxable person as a result of the exercise of an economic activity.[182]

6.22 The applicable withholding rates are 2 percent in the case of payments made to registered taxpayers, and 4 percent in the case of payments made to non-registered taxpayers.[183]

## VII. CLAIMS BY THE PARTIES

7.1 The European Communities requests the Panel to find that:

- the additional IVA on imports and the advance IG on imports are inconsistent with Article III:2, first sentence, of the GATT 1994.

7.2 Argentina requests the Panel to

- find that the "payment on account" of the value-added tax (IVA) and the gains tax (IG) are consistent with the first sentence of Article III:2 of the GATT 1994;
- alternatively, in the event that the Panel rejects the above petition, Argentina requests that it find that the "payments on account" are a measure covered by the provisions of Article XX:(d) of the GATT 1994.

## VIII. MAIN ARGUMENTS

### A. *Article III:2 of the GATT 1994*

8.1 The **European Communities** claims that tax rules enacted by Argentina in relation to the country's value-added tax (the so-called IVA law) and the tax on gains (the so-called IG law) violate Article III:2, first sentence, of the GATT

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[179] Article 52 a) of the IG Law, Article 58.
[180] Article 15.3 of RG 2784.
[181] *Ibid.*, Article 16.
[182] *Ibid.*, Article 3 f).
[183] *Ibid.*, Article 14. 3.

1994, in that they impose a higher tax burden on imported products than on like domestic products.

8.2 **Argentina** contests the European Communities claim and argues that the IVA and IG laws treat domestic and like imported products the same. These tax rules do not result in the levying of additional taxes, but merely constitute advances which are deductible at the time of settlement of the definitive tax liability. Therefore, imported products are not being subject to internal taxes in excess of domestic products and no breach whatsoever of the obligation contained in Article III GATT 1994 can be established.

### *1. Scope and Applicability of Article III:2 of the GATT 1994*

8.3 **Argentina** states that a distinction should be drawn between tax-related economic policy measures and those that are typical tax administration tools.

8.4 The creation and structure of taxes fall into the first category - that of tax-related economic policy - whereas measures to achieve efficient tax administration, minimizing tax collection costs, reducing tax evasion, covering the informal sector and promoting horizontal tax equity are a natural part of tax administration policy.

8.5 The first sentence of Article III:2 concerns all tax-related economic policy decisions that could give rise to tax discrimination between imported and domestic products.

8.6 GATT/WTO precedents indicate that Article III:2 "does not impose an obligation on contracting parties to adopt a specific tax system or specific taxation methods".[184]

8.7 On that same aspect, "Under Article III:2, first sentence, WTO Members are free to choose any system of taxation they deem appropriate provided that they do not impose on foreign products taxes in excess of those imposed on like domestic products".[185]

8.8 In other words, it emerges from both, the text of the first sentence of that Article and from its context and the prevailing interpretation thereof, that it is intended exclusively to govern tax differentials ("internal taxes or other internal charges … "), which, as has been stated, are dictated by tax-related economic policy.

8.9 As regards the creation and structure of taxes, a discipline covered by Article III:2, the Argentine regulations in question have the following features:

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[184] Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34/S/83, para. 5.13, page 123.

[185] Panel Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Liquor Taxes* "), WT/DS/8, WT/DS10, WT/DS11/R, adopted 1 November 1996, DSR 1996:I, 125, para. 6.24,.

(a) In the case of the IVA, Article 45 of that Argentine Law (Text harmonized in 1997 and amendments thereto) provides that there shall be no discriminatory treatment with regard to rates or exemptions based on the domestic or foreign origin of goods.

(b) In the case of the IG, the Gains Tax Law contains no similar regulation as it is a tax that is entirely unrelated to goods or products but instead targets the net income of the natural or legal persons subject to it.

8.10 The Argentine Republic believes that this Panel's terms of reference, which contain the misnomer "Additional IVA on imports" in one case or speak of "Advance on IG" in another, undoubtedly address measures to achieve efficient tax administration, in which connection WTO Members have reserved for themselves a certain margin of discretion.

8.11 The **European Communities** state that the policy objectives of a tax measure are not pertinent in assessing its consistency with Article III:2, first sentence. Those objectives may become relevant only at a subsequent stage, in order to determine whether a measure that is incompatible with Article III:2, first sentence, is nevertheless justified under Article XX of GATT.

8.12 This was confirmed by the Appellate Body in *Japan - Liquor Taxes.*[186] In assessing the consistency of a tax measure with Article III:2, first sentence, it is necessary to address only two issues, ie. 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.

8.13 It is well-established that Article III:2, first sentence, calls for a comparison of tax burdens, and not merely of tax rates[187]. Thus, in assessing whether imported products are taxed «in excess of» domestic like products, it is necessary to consider not only the applicable rates, but also any other element of the tax which may have an impact on the fiscal burden imposed on the products, including the rules for the collection of the tax. Indeed, if the distinction drawn by Argentina between «substantive» tax measures and measures for the collection of the tax were upheld, it would become extremely easy for WTO Members to circumvent the requirements of Article III:2.[188]

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[186] Appellate Body Report in *Japan – Liquor Taxes, supra*, footnote 47, at 111-112. See also the Appellate Body Report in *Canada – Certain Measures Concerning Periodicals* (" *Canada - Periodicals*"), WT/DS 31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 464.

[187] Panel Report on Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/83, at para. 5.8. See also the Panel report on US – Measures affecting the Importation, Internal Sale and Use of Tobacco, DS44/R, adopted 4 October 1994, at para. 98.

[188] Although it concerns GATT Article III:4, the following passage of the Panel report on United States – Section 337 of the Tariff Act of 1930 (adopted 7 November 1989, BISD 36S/345, at para. 5.10) is also pertinent here:

> "In the Panel's view, enforcement procedures cannot be separated from the substantive provision they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national

(a) Applicability of Article III:2 of the GATT 1994 to advances on the IG

8.14 Argentina asserts that the IG is not a tax on products but one assessed on the income of natural or legal persons, whether importers or local market operators (as it can be inferred from the IG Law [189]), and is therefore not covered by the disciplines of Article, III:2 which deal with taxes or other charges on products.

8.15 In consequence, neither does Article III:2 cover IG payments on account effected at the time of importation or when transactions take place on the domestic market.

8.16 Article 1 of General Resolution (DGI) No. 3543 states: "There is hereby established a collection regime for the income tax, which shall be applied to transactions involving the final import of goods".

8.17 It can be seen that the levy instituted by the above resolution represents, beyond all doubt, an advance payment on the gains tax, and it bears repeating that this tax does not apply to specific products but to certain gains. In other words, we must distinguish between the IG to which natural and legal persons are liable, and the method of collecting that tax, involving the obligation to pay an advance when goods are imported. Depending on the circumstances of the case, that advance subsequently receives the treatment outlined in reply No. 45(e).

8.18 In this regard the EC itself stated in paragraph 59 of its first written submission that "the IG is an annual tax on income, which applies to both natural and juridical persons", and is regulated by the IG Law, Decree 1344/98 and by the Resolutions issued by the AFIP-DGI.

8.19 Similarly, in paragraph 60 of its first written submission, the EC admitted that "the IG is levied on all sources of income, including the profits derived from the sale of merchandise and other moveable property, both domestic and imported"[190].

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treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin."

[189] Article 1: "All gains (ganancias) earned by natural or legal persons are subject to the emergency levy established by this Law. The persons referred to in the preceding para. who are resident in the country shall pay tax on all their gains earned in the country or abroad, and may credit against the tax governed by this Law the sums actually paid under analogous levies on their activities abroad, up to an amount not exceeding the increased tax obligation resulting from inclusion of the gains earned abroad. Non-residents shall pay tax only on their gains from Argentine sources, in accordance with the provisions of Title V. Undivided estates are taxpayers on accordance with the provisions of Article 33."

[190] This was confirm by the EC in its answer 39 to the question of the panel dated 10/May/00. "The tax measure in dispute is not the Impuesto a las Ganancias, which the EC agrees is not a tax applied to products. Rather, tax measure at issue is the harge in the form of an additional financial cost imposed by the percepcion on imports provided for in Resolución N° 3543"

8.20 On this basis and in accordance with the general legal principle whereby the principal issue rules the subsidiary one, it is our view that if a tax - in this case the IG - is not covered by Article III:2, then neither is the advance payment thereof (IG advances).

8.21 Argentina therefore refutes the notion that the IG advance is a tax separate from the IG because if the IG did not exist, it would not be possible to collect advances against it.

8.22 This is consistent with the general criteria supporting advance payments, which are regimes for withholding or levy collection at source, being precautionary tools based on presumed tax-bearing capacity. This presumption is a crucial element in applying a precautionary tool, since tax evasion inevitably occurs in a process comprised of all the stages in the production and marketing chain.

8.23 The fact is that no one imports or trades on the domestic market without hoping to make a gain. If at the end of the period that gain does not materialize, in both cases (imports and domestic market) the excess payment is refunded with interests.

8.24 It may be concluded from the foregoing that IG payments on account are in no way related to products but affect the income ultimately accruing to an operator who trades in products".

8.25 The **European Communities** concurs with Argentina that the IG is not a tax applied to products. However, the measure in dispute is not the IG, but rather the charge[191] in the form of an additional financial cost imposed on importers by the payment on account on imports provided for in Resolution No 3543. Those costs cannot be credited against the taxpayer's final IG liability and, therefore, are taxes or charges "applied to products". Indeed, the Argentinean tax authorities do not pay any interest to the taxpayer on the amounts that he has pre-paid. Interest is paid only on the amounts pre-paid in excess of the final IG liability determined at the end of the one-year tax period and only from the moment that those amounts are claimed.

8.26 Income taxes are not excluded *per se* from the scope of application of Article III:2. Ordinary income taxes fall outside the scope of Article III:2 because they apply to all income, irrespective of the source, rather than to income derived from the sale of goods only. For that reason, it is assumed that they are not passed on into the prices of the products. That assumption, however, is not justified in the case of the «advance» IG, which is collected whenever a product is

[191] The EC recalls that Article III:2 applies to "internal taxes or other internal charges of any kind". In EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables" (BISD 25S/68, adopted on 18 October 1978, at para. 4.15), the Panel concluded that the "lost interest" associated with the provision of an import deposit was a "duty or charge of any kind imposed on or in connection with importation" in the sense of GATT Article II:1(b). By the same token, the financial costs imposed by percepciones and retenciones are "internal taxes or other internal charges of any kind" within the meaning of Article III:2.

imported. Moreover, the financial costs imposed by the «advance» IG cannot be credited against the *Impuesto a las Ganancias*.

8.27 The **European Communities** argues that Argentina, in its first submission had attempted to justify the application of a higher rate on imports on the grounds that it was necessary to compensate for the *retenciones* on account of the IG previously collected on domestic products[192]. That argument involves an admission on the part of Argentina that the costs imposed by the «advance» IG are passed on into the price of the products and, therefore, that it is a tax on products covered by Article III:2.

8.28 **Argentina** rejects the conclusion drawn by the EC, saying that what it stated was that the IG advance is based on the income that it is presumed will accrue to the importer when the goods are marketed, as well as on the apparent tax-bearing capacity in the cases of taxpayers importing articles for their personal use or consumption. In that context, Argentina refutes that the alleged cost arising from the IG advance is passed on to the price of product.

8.29 The **European Communities** argues that the "taxable event" giving rise to the imposition of that *percepción*, and consequently to the financial cost generated by that *percepción*, is not the accrual of a profit. The obligation imposed upon the customs authorities to collect the *percepción* arises whenever a product is imported, whether or not the import transaction concerned generates any profit. Furthermore, the amount of the *percepción* is computed on the basis of the customs value of the imported goods, and not of the profit margin obtained with the import transaction.

8.30 The mere fact that a tax on products may be credited against another tax is not sufficient to exclude that tax on products from the scope of Article III:2. That interpretation would be open to circumvention and lead to absurd results. Thus, for example, by applying the same logic, it could be argued that the VAT on the sale of products is not a tax on products where, as it is generally the case, it can be credited against the VAT on the provision of services.

8.31 The European Communities further argues that the profits generated by an import transaction do not accrue to the importer, but to the foreign exporter. Yet, as confirmed by the explanations provided by Argentina in response to Question 52, foreign exporters are not subject to the *Impuesto a las Ganancias*. Furthermore, the subsequent resale of the imported goods by the importer is already subject to a *retención* pursuant to *Resolución* 2784 on account of the profits earned by the importer on that resale. Thus, Argentina cannot claim that the «advance» IG purports to tax the importer's profits.

8.32 The European Communities contends that in any event, the tax measure in dispute is not the *percepción* as such, but rather the financial cost imposed by the

[192] See paras. 166-167 of Argentina's first Submission.

*percepción*. That charge cannot be credited by the taxpayer against the *IG*. For the EC, it is indisputable that it constitutes a tax on products and not on income.

(b) Coverage of the Advance Systems by Article III:2 of the GATT 1994

8.33 **Argentina** asserts that in the case *"Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages"* of 1987, the Panel noted that the first sentence of Article III:2 prohibited the direct or indirect imposition of:

> "internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

8.34 The Panel noted that the interpretation of this prohibition of discriminatory taxes was a strict one.

8.35 It was also strictly applied in GATT practices, for example, prohibiting even a very small tax differential (amounting to US$ 0.0002 per litre of imported petroleum) and ruling out a *de minimis* standard based on an alleged minimum trade effect (see L/6175, paragraphs 5.1.2 to 5.1.9). The Panel then found that the words "direct or indirect" and "internal taxes … of any kind" meant that in order to decide whether there was tax discrimination, not only was it necessary to consider the applicable tax rates but also the methods of taxation (e.g. different classes of internal taxes, direct taxation of finished products or indirect taxation through taxes on the raw material used in the product at the different stages of its production) and the rules on tax collection (e.g. tax bases).

8.36 Argentina states that the interpretation of Article III:2 must be limited to tax systems, rates and bases of determination. This is the case since the only way to achieve discrimination is by the setting of tax rate differentials or by applying the same tax rate on different tax bases, which would ultimately amount to a different tax depending on whether the tax base is higher or lower in the various cases.

8.37 The payments on account systems for the IG and IVA that are being questioned in this case are not part of the method of taxation, but are tax administration and collection measures that in no way alter the main tax liability, that is, that which arises from the tax law. WTO Members have reserved for themselves a certain margin of discretion as concerns *measures to achieve efficient tax administration*. Therefore, the payments on account instituted under these tax systems do not fall within the ambit of Article III:2.

8.38 Argentina considers that the payments on account are not a method of taxation and that they are tax administration measures that do not alter the main tax liability, it can hardly be considered that their rate differentials are akin to the concept of "*internal taxes*" or "*other charges*" *of any kind.*

8.39 In addition, given that the payments on account are not taxes in themselves and in the light of the applicable rate differentials, adequate mechanisms have been put in place to avoid any such impact (for example, refund of credit

balances and exemption mechanisms). The Tax Court of the Nation stated in that connection:

> " … it is obviously in keeping with the laws that those balances may be set off, refunded or transferred, as those mechanisms make it possible to avoid imposing on taxpayers in certain circumstances a burden heavier than that provided for under the tax law itself."[193]

8.40 Argentina argues that Article III does not prescribe a certain tax system which Members have to apply.

8.41 While the **European Communities** agrees that Article III does not prescribe a certain tax system and does not challenge the Argentinean IVA and IG laws *per se*, it argues that the payment on account systems are covered by Article III.

8.42 The European Communities argues that if the distinction drawn by Argentina between substantive" tax measures and " measures of tax administration" were upheld, it would become extremely easy for WTO Members to circumvent the requirements of Article III:2.[194]

8.43 The European Communities professes that Argentina's extremely narrow interpretation of the scope of Article III:2 finds no support in the wording of that provision. To the contrary, the wording "directly or indirectly" and "internal taxes or charges of any kind" clearly indicate that it was the drafters' intention to capture all possible forms of tax discrimination.

(c) Coverage of "lost interest" by Article III:2 of the GATT 1994

8.44 The **European Communities** states that Article III:2, first sentence, calls for a comparison of tax burdens, and not merely of tax rates. In assessing whether imported products are taxed "in excess of" domestic like products, it is necessary to consider not only the applicable rates, but also any other element of the tax which may have an impact on the fiscal burden imposed on the products, including the rules for the collection of the tax. As noted by the panel in *Japan - Cus-*

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[193] Ruling of the Tax Court of the Nation, Chamber "A," Case File No. 14.250 – I of 18 April 2000, "Cía. Industrial y Comerical Sanjuanina S.A.."

[194] Although it concerns GATT Article III:4, the following passage of the Panel report on United States – Section 337 of the Tariff Act of 1930 (adopted 7 November 1989, BISD 36S/345, at para. 5.10) is also pertinent here: "In the Panel's view, enforcement procedures cannot be separated from the substantive provision they serve to enforce. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin."; Cf. the Report by the Appellate Body in *Canada – Certain measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995, para. 142.

*toms Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages,*[195]

> "[…] the wording 'directly or indirectly' and 'internal taxes … of any kind' implie[s] that, in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods […] and of the rules for the tax collection […]."

8.45 The Panel mentioned as an example of the latter the application of "different basis of assessment." That example, however, is by no means the only one. The mechanisms for the pre-payment of taxes, such as the *percecpiones* or *retenciones,* constitute another obvious example of "rules for the tax collection" which may give rise to discrimination prohibited by Article III:2, first sentence.

8.46 The cost for a taxpayer of pre-paying part of the tax is not the same as the cost of paying the tax in full at the end of the relevant tax period, even if the nominal amount to be paid is the same in both cases. If the taxpayer were not required to pre-pay part of the tax, he would have the opportunity to earn profits on that amount until the end of the relevant fiscal period. The loss of that revenue represents an additional cost for the taxpayer, which must be taken into account for the purposes of Article III :2.[196]

8.47 The tax authorities can compensate that loss by paying interest on the amounts pre-paid. The Argentinean authorities, however, do not do so. As a result, by requiring the pre-payment of part of the IVA and the IG, they impose an additional cost on the taxpayers. To the extent that the *percepciones* are collected at a higher rate on imports than on internal sales, that additional cost is heavier on imported goods than on like domestic goods, in violation of Article III:2, first sentence.

8.48 The European Communities maintains that the "additional" IVA imposes a financial cost from the importation, when the "additional" IVA is collected, until the moment where the imported goods are resold internally and the "additional" IVA may be offset against the ordinary IVA collected by the importer on that resale. In the case of the "advance" IG, the importer bears a financial cost from the importation, when the "advance" IG is collected, until the liquidation of the *Impuesto a las Ganancias* at the end of the one-year tax period.

8.49 The European Communities argues that this lost interest is covered by Article III:2. The European Communities draws an analogy to the Panel report on *EEC - Minimum Import Prices.*[197] which it argues stands for the proposition that " lost interest " constitutes a "charge" for the purposes of Article II.1 b) GATT.

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[195] Panel Report on Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/83, at para. 5.8. See also the Panel report on US – Measures affecting the Importation, Internal Sale and Use of Tobacco, DS44/R, adopted 4 October 1994, at para. 98.
[196] See footnote 191.
[197] *Ibid.*

By the same token, "lost interest" must be considered as a "charge" also for the purposes of Article III:2.

8.50 **Argentina** contests that the reference in Article III:2 to "internal taxes or other internal charges" is related to the alleged "lost interest" argued by the European Communities. Argentina questions the relevance of the European Communities' analogy from the 1978 case *"EEC - Minimum Import Prices for Certain Processed Fruits and Vegetables* and states that this case was analysing the application of Article II:1(b) of the General Agreement and not of Article III:2. In other words, the above-cited case deals with bound import duties (Schedule of Concessions in Article II of the General Agreement), while the present case pertains to national treatment as concerns domestic taxes (Article III of that Agreement).

8.51 Argentina recalls that subsequent to the findings of the Panel in 1978, Members adopted the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994* as part of the Agreements reached during the 1994 Uruguay Round. That Understanding clarifies the scope of the terms *"other duties or charges"* applicable to imports by prescribing that such measures must be recorded in the Schedules of Concessions, where it can be seen that they represent duties or other charges to be collected by the State on imports. It states in this regard:

> "In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of Concessions and annexed to GATT 1994 against the tariff item to which they apply. (…)."

8.52 Argentina states that the Understanding reached by Members could hardly be referring to a foggy notion of "lost interest" while demanding, for the sake of creating certainty, the presentation of schedules showing charges applied to imports, other than duties.

8.53 Neither is there anything in the schedules actually submitted to indicate that Members wished to equate that concept (lost interest) with the concept of *other charges*, as they do not contain a single example of charges representing lost interest of any kind. What is more, none of the Schedules of Concessions include charges that are anything but levies made by the State as a result of the importation of goods into its territory.

8.54 The foregoing paragraphs confirm the strict interpretation that must be given to Article II:1(b) of the General Agreement where it states "such products shall also be exempt from all other duties or charges of any kind *imposed* on or in connection with the importation …." Lost interest cannot be considered as similar to the duties or charges connected with importation; had that been the intent of Members, they would so have agreed in the Uruguay Round and would have included it in the Understanding on Article II:1(b) of the General Agreement.

8.55 Furthermore, the use of the verb *to impose* implies a specific and precise action intended to create an obligation on the importer. In turn, the expression "*the importation*" specifies the cause of the legal obligation, that is, the introduction of merchandise into the customs territory of a Member State.

8.56 In the case *"Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages"* of 1987, the Panel noted that the first sentence of Article III:2 prohibited the direct or indirect imposition of

> "internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."

8.57 The Panel noted that the interpretation of this prohibition of discriminatory taxes was a strict one.

8.58 It was also strictly applied in GATT practices, for example, prohibiting even a very small tax differential amounting to US$ 0,0002 per litre of imported petroleum) and ruling out a *de minimis* standard based on an alleged minimum trade effect (see L/6175, paragraphs 5.1.2 to 5.1.9). The Panel then found that the words "direct or indirect" and "internal taxes … of any kind" meant that in order to decide whether there was tax discrimination, not only was it necessary to consider the applicable tax rates but also the methods of taxation (e.g. different classes of internal taxes, direct taxation of finished products or indirect taxation through taxes on the raw material used in the product at the different stages of its production) and the rules on tax collection (e.g. tax bases).

8.59 In addition, Argentina states that even if lost interest could be considered to be covered by Article III:2, it would have to be higher than that which domestic products themselves would have to bear, as required by the rule being invoked by the European Communities (Article III:2).

8.60 Finally, it may be concluded that thus far the European Communities has produced no precedent whatsoever that is applicable to this case and which supports the broad interpretation it wishes to give to the scope of the terms "*taxes ... or other internal charges ... of any kind*" of Article III:2, making it possible to consider the "lost interest" as falling under the national treatment rule.

8.61 The **European Communities** contests that the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994* does purport to "clarify the scope" of the notion of "other duties or charges." The *Understanding* merely provides that "other duties or charges" must be recorded in each Member's schedule of concessions.

8.62 The European Communities also states that Argentina's view is refuted by the *Understanding on the Balance of Payments provisions of the GATT 1994*, which reads as follows in relevant part (at paragraph 2):

> Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as " price-based " measures) shall be understood to include import surcharges, *import deposit requirements* or other equivalent trade measures with an

> impact on the price of imported goods. It is understood that, *notwithstanding the provisions of Article II,* price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. (…) [emphasis added]

8.63 If, as alleged by Argentina, the "lost interest" associated with making an import deposit was not a "duty or charge of any kind" in the sense of GATT Article II, it would have been unnecessary to include "import deposit requirements" among the "price-based measures" which Members are encouraged to apply in place of quantitative restrictions, "notwithstanding the provisions of Article II."

8.64 The additional IVA and the advance IG impose on importers of foreign products a heavier tax burden than that placed upon the buyers of like domestic goods by the additional IVA and the IG withheld on the internal sale of goods, respectively. As a result, imported products are taxed "in excess of" like domestic products, contrary to the prohibition set forth in GATT Article III:2, first sentence.

### 2. *"Likeness" of Imported Products and Domestically Produced Products*

8.65 The **European Communities** asserts that the tax differentials at issue are based only and exclusively on the type of taxable transaction, and not on the characteristics of the taxed products. In other words, they are based on whether the taxed products are being imported or sold within Argentina, and not on the physical characteristics or end-uses of the products. Therefore, the European Communities states that it is not necessary to show that the products imported from the European Communities are "like" domestic products in light of criteria such as their physical characteristics or end uses, since imported products would be taxed differently from "like" domestic products even by the narrowest definition of "like product."[198]

8.66 The *percepciones* provided for in Resolutions No 3431 and No 3543 are collected exclusively upon the importation of products. Accordingly, by definition, they apply only to imported products. The mere fact that a product has Argentinean origin is not sufficient *per se* to confer upon that product properties which make it "unlike" any imported product. In other words, even if a foreign product were identical in all respects to a domestic product, the importation of

[198] See Panel Report, *Indonesia - Certain Measures affecting the Automotive Industry* ("*Indonesia – Autos*"), WT/DS54/R and Corr. 1,2,3,4, WT/DS55/R and Corr. 1,2,3,4, WT/DS59/R and Corr. 1,2,3,4, WT/DS64/R and Corr. 1,2,3,4, adopted 23 July 1998, DSR 1998:VI, 2201. The Panel noted, at para. 14.113, that "… [an] origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products." See also the Panel report in *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Autos*"), WT/DS139/R, WT/DS142/R, adopted 19 June 2000, DSR 2000:VII, 3043.

that foreign product into Argentina would still be taxed differently from the internal sale of the domestic product. Thus, even by the narrowest definition of "like product," imported products would still be taxed differently from "like" domestic products.

8.67 The **European Communities** states that GATT Article III is concerned with the protection of competitive opportunities, and not with the protection of actual trade flows.[199] For that reason, whether or not the products currently being imported into Argentina are "like" the products of Argentinean origin is not dispositive. What matters is whether the products that might be imported from the European Communities are "like" the Argentinean products.

8.68 A comparison with the situation at issue shows that the contested tax measure in *Japan - Liquor Taxes* was of a different nature.[200] That measure did not distinguish on its face between domestic and imported products, but instead between types of products. Specifically, Japan applied a lower tax rate to shochu (whether Japanese or imported) than to vodka (again whether Japanese or imported). It was therefore necessary to ascertain whether shochu was "like" vodka in light of criteria such as their physical characteristics, end-uses, etc.

8.69 In contrast, in the present case the tax differentials in dispute are based exclusively on the origin of the products, i.e. whether the goods are being imported into Argentine territory or sold within that territory. While the tax rates on internal sales apply to both imported and domestic products, the higher tax rates on imports apply, by definition, only to imported products.

8.70 **Argentina** contests the European Communities assertion that the products imported by Argentina are necessarily and automatically on the basis of the definition of the "type of taxable transaction," "like products" to the domestic products.

8.71 Additionally, as far as the European Communities' argumentation on "like products" encompasses the IG tax, Argentina argues that the IG tax is not a product tax, so that Article III:2 does not apply in the first place.

8.72 While Argentina agrees that the object of Article III of the GATT is to ensure equal competitive opportunities on the domestic market for the imported product, it argues that the European Communities overlooks the existence of one of the requirements considered necessary in Article III:2, first sentence, for verifying that the competitive conditions have been altered or could potentially be altered: that those competitive expectations exist between "*like products*."

8.73 Argentina states that the European Communities takes its definition of "like product" based on the type of taxable transaction from the report of the

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[199] See Appellate Body Report, *Japan – Liquor Tax*, *supra*, footnote 47, at 110 and the cases cited therein.

[200] *Ibid.*

Panel on "*Indonesia - Certain Measures Affecting the Automobile Industry.*"[201] As concerns that report, Argentina comments that according to GATT/WTO doctrine, expressly confirmed by the Report of the Appellate Body and the Panel in the case "*Japan - Alcoholic Beverages*," a report adopted by a panel is only binding on the parties to the dispute and does not constitute a definitive interpretation of the provisions of the GATT and/or the WTO.[202]

8.74 Moreover, in that case Indonesia itself did not expressly question the likeness of the product as defined by the European Communities.[203] In the present case, Argentina does question the definition given by the European Communities, i.e. "the tax differentials at issue are based on the type of taxable transaction, and not on the characteristics of the taxed products. More specifically, they are based on whether the goods are being imported into Argentine territory or sold within that territory."

8.75 Argentina states that the definition of "like product," one of the two requirements for establishing a violation of Article III:2, has been extensively dealt with in the GATT/WTO case law. Thus, a basic criterion found throughout the case law is a "case-by-case" analysis of the definition. A second element involves the existence of a set of criteria which contribute to that definition. A third aspect is the acknowledged tendency, as of the GATT 1994, to circumscribe and narrow the concept of likeness.

8.76 The requirement for a case-by-case analysis is in line with the need to interpret the various definitions in the light of each of the Agreements which provide for this requirement. Consequently, the scope of the concept of "like product" may be different under Article III:2 of the GATT 1994 compared to the scope of the definition in other agreements. This was corroborated in "*Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*," where the Panel did not deem it appropriate to apply the "very narrow definition" of "like product" contained in Article 2 of the 1979 *Anti-Dumping Agreement*.[204] Conversely, in "*Japan - Alcoholic Beverages*," which to some extent constitutes a more recent pronouncement and, furthermore, one more relevant to the GATT 1994, the Appellate Body stated:

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[201] See Panel Report, *Indonesia – Autos*, *supra*, footnote 198.

[202] Report of the Appellate Body on *Japan – Liquor Taxes, supra,* footnote 47, page 107." … 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… 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."

[203] Panel Report, *Indonesia – Autos*, *supra*, footnote 198, paras. 14.106 and 14.110: "Indonesia does not specifically argue that the complainants have not demonstrated the elements necessary to establish a violation of Article III:2 (… like products)." In addition, the Panel emphasized that "… Indonesia has submitted no evidence or argument to rebut the presumption of likeness …."

[204] Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, BISD 34S/83, para. 5.6.

> "… We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed."[205]

8.77 Argentina contends that the tendency to narrow the definition of "like product" in the GATT 1994 is consistent with the main body of obligations and disciplines agreed by the parties in the framework of the Uruguay Round negotiations, and is moreover necessary to prevent any unwanted restriction of the regulatory powers which the WTO Members have reserved to themselves in the taxation field, for purposes other than protection of the domestic industry.

8.78 The second element, i.e. the characteristics of the product, meaning "… the product's end uses in a given market; consumers' tastes and habits … the product's properties, nature," etc.,[206] is and will continue to be an essential criterion for defining a "like product." Among these criteria, there is none which "*per se*" could exclude any other. Thus, the physical characteristics of the product may be combined with the fact that it is or is not destined for end use in a domestic market. In any event, it is by means of a case-by-case analysis that it is possible to confirm the definition of like product.

8.79 Argentina illustrates its argument by giving an example involving finished leather: an importer may bring finished leather into the Argentine market for marketing, in which case he/she will make a payment on account in accordance with Resolution 3431. If the same importer were to bring in the same finished leather, add value to it and then re-export it, he/she would not have to pay any advance on account.[207] Argentina argues that this example shows that a definition of like product based on the national or imported origin of the same product with a nominal difference in the applicable tax rate for the payment on account, is empirically incorrect. Moreover, a definition of these characteristics also does not square with the system of payments on account which ultimately are no more than advances tailored to a tax which is applied at an equal rate to imported and domestic products and which also, as will be shown below, does not impose a heavier burden on imported products.

8.80 Finally, a broad definition of like product, as chosen by the European Communities, is at variance with the criterion considered by the Appellate Body to be implicit in this concept in the GATT 1994, would undermine the definition which has been worked out precisely to ensure conditions of competition between imported and domestic products in a specific case and not in general terms. It thus makes sense to examine whether a higher tax is applied to finished leather imported for marketing in the domestic market, or to oil imported for the same

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[205] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, page 114.
[206] Panel Report, *Indonesia –Autos*, *supra*, footnote 198, para.14.109.
[207] Decree 1439/96, Temporary Imports, see Exhibit ARG-XVI.

purposes *vis-à-vis* locally produced oil, if we follow the doctrine established in the *Superfund* case.[208]

8.81 In a situation where, as in the present case, there is an alleged infringement of Article III:2, first sentence, " … likeness must be construed narrowly and on a case-by-case basis"[209] and not on the basis of hypothesis. The European Communities definition means a departure from one of the requirements clearly laid down in various precedents, e.g. "*Canada - Periodicals,"* where it was established that to determine a violation of Article III:2, first sentence, it is necessary to follow what might be called a "two-track approach," that is, first to define "like product" and second, to prove that the imported product is taxed in excess.

8.82 Argentina is aware that there are precedents in which, in the absence of tangible imports, hypothetical bases have been used to define "like products." However, if the determination of "like product" can be done simply by comparing the situation of products on the market, there is no point in developing a hypothesis. Doing so could amount to a kind of non-application of the provisions of the GATT 1994 to the concrete case. In other words, the determination of whether imported and domestic products are like products calls for the application of legal rules, in this case Article III:2, to the specific circumstances of the case. In this instance, it is a matter of verifying whether the foreign goods present on the Argentine market are competing with their "likes," or with products that are "directly competitive" or "substitutable."

8.83 The precedents introduced by Argentina do not introduce into the text of Article III:2 a new category of "types of products." Those precedents merely confirmed the various factors that must be considered in order to define a "like product." Although some of those precedents addressed specific aspects of the elements used to define "like products," such as the criteria of physical characteristics used to evaluate similarity between shochu and vodka, as a whole they do underscore a series of key criteria that are applicable in defining "like products." These include: " … *the product's end-uses in a given market; consumers' tastes and habits; and the product's properties, nature and quality*."[210]

8.84 These same criteria, Argentina argues, which could include the imported or domestic origin of the product, are the ones that must be considered in defining a "like product." No single blanket criterion can be made to prevail (domestic or imported origin) when it is not valid for meeting the requirements of the specific case at hand. Argentina argues that the European Communities is applying such a "blanket criterion" in the hope that by considering this to be a proven instance of like products within the meaning of the first sentence of Article III:2, there will be dispensation from having to prove the existence of "protection to

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[208] See United States – Taxes on Petroleum Products and Certain Imported Substances, L 6175; BISD 34/136.

[209] See Appellate Body Report, *Canada - Periodicals*, *supra*, footnote186, at 465.

[210] See Appellate Body Report, *Canada - Periodicals*, *supra*, footnote186, at 466.

domestic production," thereby preventing the other party from benefiting under any possible *de minimis* criterion.

8.85 Furthermore, the European Communities is unable to specify even one example of an imported "like" product which, when sold on the market in its final stage, must bear a higher tax for being an import.

8.86 Finally, Argentina finds contradictions in the European Communities' arguments in that on the one hand it claims that imports are by definition subject to higher taxes and, on the other, it ignores, for instance, the unquestionable fact of imports for re-exportation. This fact alone confirms that the origin of the good is not enough to qualify it as a "like product," as in this case the origin of the merchandise is irrelevant for the purposes of the customs treatment it receives. It is the product's end-use that determines whether or not it is subject to a payment on account. In other words, it is only by applying the methodology developed by the various GATT/WTO precedents that we can determine whether this is a case of like product. Can rawhides imported for re-exportation, which are not subject to payments on account, be considered a "like product" to rawhides intended for the domestic market and liable to payments on account?

8.87 Argentina contends that imported or domestic origin is not enough to determine that one is dealing with like products. Other elements must be considered: in this case the "end-use" which is clearly among the criteria that pervade the concept of "like product." In other words, if the "end-use" requirement is not fulfilled for both products - the domestic and the imported one - it is not a case of "like products."[211] Otherwise put, if the end-use is different, there cannot be "like products," as the concept of "like product" is particularly narrow in the sense of Article III:2, first sentence, on account of the exemption from the burden of proof involved. In contrast, the notion of directly competitive or substitutable products (both types of rawhide are substitutable for the purposes of their subsequent processing) is much more fitting, since in this case, although the products fall into the same category, if an infringement of Article III:2 were alleged, they would fall under the second sentence of that same Article and it would be necessary to prove the intention to protect domestic industry, in which case a "*de minimis*" standard would become operative.

8.88 Argentina considers that the broad definition of "like product" being used by the European Communities in this case is inconsistent with the narrow interpretation that has been made in the precedents cited, which Argentina regards as relevant. The second sentence of Article III:2 would seem to cover more adequately the type of competition that exists between domestic and imported products on the Argentine market.

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[211] Panel Report, *Japan – Alcoholic Beverages*, *supra*, footnote 185, para. 6.22, "In the view of the Panel the term 'like product' suggests that for two products to fall under this category they must share, apart from commonality of end-uses, essentially the same physical characteristics."

8.89 If all these alternatives could not be proved empirically, the Panel's resort to a hypothesis would be understandable. As there are indeed imports, specifically of the product at the origin of these proceedings (the name of the Panel refers to "imports of finished leather," even though the European Communities is now discussing all imports), a "case-by-case" analysis should be used to define "like product."

8.90 Argentina argues that there is a wide range of situations envisaged under the different general resolutions issued by the Tax Administration and the consequent rate differential existing for payments on account. There are several regimes for payments on account depending on different factors: such as certain categories of buyers, the amounts involved. This refutes the generalization that the mere origin of the product generates a difference in the tax. It is indispensable for the European Communities to be specific in regard to excessive payments on account in order to be able to consider that the first requirement for determining a violation under Article III:2" first sentence has been met. In other words, the difference in the rate for the "payment on account" does not serve to define "like product" in general, as the imported or domestic origin does not automatically mean that they can be considered "like."

8.91 The **European Communities** contests Argentina's view and states that the fact that some import transactions (e.g. imports for re-exportation) are exempted from the IVA and some internal sales are subject to different tax rates,[212] based on factors such as the type of product,[213] or the means of payment,[214] does not detract from the fact that the tax differentials in dispute in this case are based, only and exclusively, on whether the goods are being imported or sold internally, and not on the physical characteristics or end-uses of the taxed products, which renders an analysis of those factors totally irrelevant, because it remains true that only imported products, and not domestic products, are subject to Resolutions No 3431 and No 3543.

8.92 Whether or not imported products are taxed "in excess of" like domestic products that are subject to other tax measures is a different issue to be considered subsequently under the second step of Article III:2, first sentence. Argentina's arguments, however, systematically confuse those two issues.

8.93 The mere fact that, as argued by Argentina, some import transactions (e.g. imports for re-exportation) are exempted from the IVA does not undermine the EC's position, because it remains true that only imported products, and not domestic products, are subject to Resolutions No 3431 and No 3543.

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[212] The European Communities argues that Exhibit ARG – XXVI overstates the variety of systems of "pagos a cuenta" of the IVA. Some of the Resolutions cited by Argentina (e.g. Nos 549, 3130, 3316, and 3469) concern the provision of services and, therefore, are totally irrelevant for the purposes of this dispute. Resolutions Nos 129, 212, 140, 4059 and 4131 concern the internal sale of goods, but have a very limited scope of application and are not at issue in this dispute.

[213] See for example, Resolutions 4131 and 4059.

[214] See for example, Resolution 140.

8.94 Furthermore, the end-uses that are relevant for a like product determination are not the end-uses actually given to the product in a particular case but, rather, their objective end-uses. Whether I use an egg for cooking an omelette or a fried egg, the egg is still the same and, therefore, «like». By the same token, the fact that a piece of imported raw skin is re-exported from Argentina does not make it "unlike" any piece of imported raw skin which is used within Argentina. The relevant issue for a "like product" determination is whether imported eggs, or raw skins, can be put to the same end-uses as the domestic products.

8.95 **Argentina** argues that the tax rates is the same in all cases, a blanket rate of 21 percent. What differs are the rates for collection of advance taxes. However, the regime of "collection" and withholdings" (payments on account) is irrelevant for the purpose of defining the taxable transaction subject to the IVA. Moreover, the law itself does not allow for discriminatory treatment based on the national or foreign origin of goods (Article 45, IVA Law). The withholdings or payments on account are simply advance payments of one and the same tax, and not "additional" taxes whether it is the IVA liability or the IG payable by the natural or physical person in the form of "payments on account" against that tax.

8.96 As the "tax" at issue is simply an advance payments of one and the same tax, no product is subject to a tax because of its origin. As the Argentine IVA is a single tax with a rate of 21 percent that is identical for domestic and imported products, we fail to see the discrimination based on the origin of the good.

8.97 If in the light of the various regimes for payments on account in place there is no definition of "like products" in the narrow sense prescribed under Article III:2, first sentence, it is necessary to consider whether the situation of competition between imported and domestic products on the Argentine markets (in terms of the impact of "payments on account") would not be one involving products (for example finished hides of European origin) that could be competitive or substitutes on the market within the meaning of the second sentence of Article III:2.

8.98 The **European Communities** takes issue with Argentina's suggestion that imported and domestic products are not "like" but simply "directly competitive or substitutable." The arguments made by Argentina in order to deny that imported and domestic products are "like" would logically have the consequence that they could not be considered as "directly competitive or substitutable" either.

8.99 **Argentina** submits that the strict requirements of the first sentence of Article III:2 for the determination of "like products" have not been met and that there is consequently no infringement whatsoever of the obligation of national treatment.

### *3. Claim that Imported Products are Taxed "in excess of" Like Domestic Products*

8.100 The **European Communities** asserts that the advances collected on imports according to the rules relating to the IVA and IG laws impose an additional

tax burden on imports. Although also domestically produced products are subject to IVA and IG advances, due to the different applicable tax rates and the different coverage of those additional IVA laws, imports are being disadvantaged contrary to Article III:2, first sentence.

8.101 The European Communities does not allege that the overall rates of the IVA or the IG are discriminatory. The European Communities does neither question Argentina's right to levy *percepciones* and *retenciones* on account of those taxes. The European Communities' complaint is concerned with the fact that the *percepciones* levied on imports are higher than those levied on the internal sale of goods, with the consequence that importers bear a heavier fiscal burden than the buyers of domestic goods.

8.102 The European Communities notes that, even if the additional IVA and the IG on imports could be credited by the importers against their definitive tax liability under the IVA and the IG, the discrimination would persist since importers would be required to "advance" larger amounts of money to the Argentinean Treasury than purchasers of like domestic products.

8.103 **Argentina** argues that both the IVA law and the IG law treat imported and like domestic products the same. The separate tax rules challenged by the European Communities merely constitute advances which are deductible at the time of settlement of the definitive tax liability. Moreover, the *percepciones* and *retenciones* are tax collection mechanisms which fall outside the scope of Article III:2

(a) Claim that the Advance IVA on Imports Results in a Heavier Tax Burden than the Advance IVA Domestic Sales

8.104 The **European Communities** maintains that the following differences between the additional IVA on imports and the additional IVA on internal sales have the consequence that imported products are taxed "in excess of" like domestic products.

- the generally applicable rate on imports by registered taxable persons is 10 percent while the rate applicable on internal sales of goods to registered taxable persons is 5 percent.
- the additional IVA on internal transactions does not apply to sales by non-registered taxable persons, whereas the additional IVA on imports is levied also on imports by non-registered taxpayers;
- the additional IVA on internal sales is collected only upon the sales made by *agentes de percepción.* In contrast, the additional IVA on imports applies to all importers.
- the additional IVA on internal sales is not collected on sales to certain categories of purchasers (including in particular the *agentes de percepción* and the main types of financial entities), whereas, to repeat, the additional IVA applies to all importers; and

- the additional IVA on domestic sales does not apply to sales below a certain amount, while the additional IVA on imports is levied on all imports, irrespective of their value.

8.105 Argentina's IVA law, through Resolution 3431, imposes an additional IVA tax on imports. Even though there are also additional IVA taxes levied on domestic sales[215], the different applicable tax rates and coverage of those additional IVA laws disadvantage imports compared to domestic products, contrary to Article III:2, first sentence.

8.106 Even where the additional IVA on imports can be credited by the importers against their definitive tax liability under the IVA, the discrimination persists since importers are be required to "advance" larger amounts of money to the Treasury than purchasers of like domestic products.

8.107 **Argentina** states that the IVA Law does not discriminate between imported products and domestic products when establishing the rates for the taxes concerned. Both for imported and domestic products, the rates are up to 21 percent.

8.108 It is true that, in the case of imported products, the rates of the levies (*percepcíones*) - payments on account - are 5 percent and 5.8 percent in respect of live bovine animals, etc., depending on whether or not the taxpayer is a registered taxable person, while the equivalent rates for levies or withholding operations (*percepciones o retenciones*) - payments on account - in respect of other goods are 10 percent and 12.7 percent, depending on whether or not the taxpayer is a registered taxable person.

8.109 However, these rates are only advances or payments on account to the Treasury, arising from a single type of taxable transaction. It is therefore conceptually erroneous to add such levies to the general rate of 21 percent (identical for imported and domestic products) and to conclude that imported goods are actually subject to an IVA of 31 percent or 15.5 percent, in the case of live bovine animals, etc.

8.110 What the European Communities calls an "additional" IVA is in fact a method of payment of advances payable prior to final settlement of that tax. The European Communities thus gives a distorted picture of the tax burden on importers, which is identical for both imported and domestic products, i.e. up to 21 percent .

8.111 In short, Argentina maintains that it cannot be asserted that a static view of one part of the tax assessment process, i.e. the point at which a payment on account is effected when the goods undergo inward customs clearance, implies that at the time of final settlement of the tax liability, imported products are subject to a heavier tax burden than domestic products.

[215] See Resolution 3337.

8.112 Argentina argues that the advance collection of the IVA was in fact established to provide equal treatment of imported and domestic products. Previously, imports were not subject to any system of payment on account. Marketing transactions in the domestic market were as a rule previously subject to the following payments on account, without prejudice to others applied in particular cases:

- the *retención* (withholding) regime under Resolution 3125, superseded by Resolution 18: (10.5 percent);
- the *percepción* (collection) regime under Resolution 3337: (5 percent).

8.113 Imports were not subject to any system of payment on account. In order to provide for equivalent treatment for import transactions, therefore, Resolution 3431 was enacted, establishing a single regime for imported products, for which the tax rate is currently 10 percent.

8.114 In view of the fact that import transactions can only be covered through a collection regime, since foreign sellers are not liable to the levy and cannot therefore be made subject to withholding operations, a tax rate of 10 percent was established for the collection and withholding regimes applied in the domestic market.

8.115 Argentina emphasizes that collection *(percepción)* in customs does not impose a heavier tax burden compared with domestically produced goods, bearing in mind that it does not establish a new tax on imports but merely applies a system of payment in respect of the final import of movables thereby according the same treatment as for domestic marketing operations, concerning which various collection and withholding regimes had been duly established (Resolutions 3337, 4059, 4131, 18, and 129).

#### (i) Comparison of Tax Burden Between Imported and Domestic Products

8.116 **Argentina** maintains that the tax affects foreign and domestic products equally and there is no additional cost to the former. Argentina illustrates this by way of making the following comparison between imported leather and domestically produced leather:

| Output of finished leather on the domestic market | | Imports of finished leather | |
|---|---|---|---|
| Sale of raw or salted hides | | | |
| Taxable price | 30.00 | | |
| IVA 21% | 6.30 | | |
| GR 4059 | 0.50 | | |
| Sale of crust | | Imports | |
| Taxable price | 60.00 | Taxable c.i.f. price | 68.00 |
| IVA 21% | 12.60 | IVA 21% | 14.28 |
| GR 18 | 6.30 | GR 3431 | 6.80 |
| Sale of finished leather | | Sale of imported leather by the importer | |
| Taxable price | 100.00 | Taxable price | 100.00 |
| IVA 21% | 21.00 | IVA 21% | 21.00 |
| GR 3337 | 5.00 | GR 3337 | 5.00 |
| Payments on account made: | | Payments on account made | |
| 0.50 | | | |
| 6.30 | | 6.80 | |
| 5.00 | | 5.00 | |
| **11.80** | | **11.80** | |

8.117 Argentina states that the domestic *product* "finished leather" bears a greater tax burden - in terms of payments on account and withholding taxes - than the like imported product, if account is taken of tax payments made at stages *prior to* the sale of the finished product (i.e. upon the sales of the raw hides and semi-finished leather. Argentina elaborates that the example above shows the various collection and withholding regimes applicable to the chain of production and marketing of finished leather, for the imported product, as well as the same product manufactured on the domestic market. On the domestic market, the finished product must bear payments on account totalling $ 11,80 ($ 0,5 + $ 6,30 + $ 5). In turn, it can be seen that imported finished leather pays an identical amount of $ 11,80 in the form of payments on account. In Argentina's view, the foregoing confirms the fact that the importer does not bear a heavier tax burden.

8.118 Finally, if the alleged financial cost did exist, Article 45 of the IVA Law itself clearly states that " … no discriminatory treatment based on the national or foreign origin of goods shall be admissible in respect of rates or exemptions."[216] Although this is no more than the written expression of a guideline that inspires the entire Argentine tax system, its express inclusion in a law is tantamount to the unquestionable granting of a precise and clearly defined right. By virtue of that right, which coincides with the obligation laid down under Article III of GATT

[216] See Exhibit EC II-1, page 86.

1994 (which also forms part of the Argentine domestic legal system), any person may proceed against the State if that person considers that the Public Administration is causing him injury in any way. Nevertheless, it is highly significant that the importers who made IVA and IG payments on account amounting to $ 11585015195.97 between 1992 and 1999 have not launched massive legal actions against the State to claim redress for these differences.

8.119 Argentina also recalls that the method of payments on account was applied to imported products subsequent to domestic products because its implementation had created an imbalance in favour of imported goods.

8.120 Argentina further points out that in its report adopted on 26 February 1955,[217] the *Review Working Party II on Schedules and Customs Administration*, at the proposal of Germany, examined the meaning of the words "*internal taxes and other internal charges*" in relation to taxes which are levied at various stages of production. What was studied in particular in that case was whether the rule of national treatment would allow a government to tax imported products at a rate calculated to be the equivalent of the taxes levied at various stages of production of the like domestic product or only at the rate of the tax levied at the last stage. Several representatives supported the former interpretation as they believed that the opposite case would establish a discrimination against countries which chose to levy taxes at various stages and in favour of those which levy a single turnover tax on finished products. The United States, for its part, believed that the reference to internal taxes covered only a tax levied on the final product competitive with the imported article. In view of that discrepancy, the above-mentioned Working Group decided not to recommend the insertion of an interpretative note, indicating that it was understood that the principle of equality of treatment would be upheld in the event of a tax on imported products being challenged under the consultation or complaints procedure of the Agreement.

8.121 Argentina argues that this decision indicates that it is the principle of equality that should prevail when it comes to judging cases in which there are "cascading" internal taxes on domestic products as opposed to a tax levied once on the imported product. If we extrapolate this to the case of payments on account of internal taxes, it could be said with even greater justification that the same principle must prevail in the analysis of consistency with Article III:2.

8.122 What was at issue in the study carried out by the members of: *the Review Working Party II on Schedules and Customs Administration* was the *optical illusion* that could result from showing a *photograph* taken only at one of the various marketing stages of a product and which therefore does not reflect the tax liabilities affecting each of those stages which must be considered when analysing the national treatment that should be given to the imported article.

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[217] See Guide to GATT Law and Practice, Vol. I, pages 144-147, updated 6th Edition, 1995. Interpretation and application of Article III:2, para. 4.2(d).

8.123 The suggested use of the principle of equality to analyse the tax rate also applies to the study of measures which by definition are of lesser impact, such as the rates of payment on account of internal taxes, these being identical. If members recommended the use of the equality criterion in studying the GATT/WTO-consistency of a tax levied on successive stages, in accordance with the general principle of law whereby the principal issue rules the subsidiary one, the same rule of equality must be used in examining the impact of the payments on account on competitive conditions on the market.

8.124 This same principle was endorsed in a different context in recent WTO cases. In one instance, the following is stated:

> "though the statutory language as such may be prima facie inconsistent, such inconsistency may be lawfully removed upon examination of other administrative or institutional elements of the same law."[218]

8.125 The **European Communities**, in response to the Panel's question 32, raises the possibility that the taxpayers might try to pass on the additional financial cost imposed on them as a result of the lost interest. Whether or not the cost resulting from lost interest can be passed on, depends on the market situation. The same is true of the 21percent IVA as well.

8.126 The European Communities agrees that, in accordance with the GATT rules on border tax adjustments,[219] Argentina may be entitled to compensate for the costs imposed on domestic products at prior processing stages. But the burden of proving that the rate differentials do not lead to overcompensation lies with Argentina. The rate differentials identified by the European Communities constitute *prima facie* evidence that imported products are taxed in excess of like domestic products. Since Argentina contends that those differentials purport to compensate for the taxes previously borne by the domestic products at previous manufacturing stages, it is for Argentina to prove that assertion.[220] Moreover, the kind of evidence required to furnish that proof is available only to the Argentinean tax authorities. In this regard, the European Communities recalls once again the conclusion of the *Working Party on Border Tax Adjustments* that

> "It was generally agreed that countries adjusting taxes should, at all times, be prepared, if requested, to account for the reasons for adjustment, for the methods used, for the amount of compensation and to furnish proof thereof."[221]

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[218] See Panel Report, *United States, Sections 301 – 310 of the Trade Act of 1974* ("*US – Section 301 Trade Act*"), WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, para. 7.27.
[219] Cf. Article II.2(a) of GATT and Working Party on Border Tax Adjustments, at para. 14.
[220] See the Report of the Appellate Body in *US – Wool Shirts and Blouses*, *supra*, footnote 61, at 335.
[221] Working Party on Border Tax Adjustments, para. 17.

8.127 In the view of the European Communities, Argentina has failed to meet that burden of proof. Indeed, Argentina has not produced any evidence showing that the rate differentials between imports and internal sales correspond to the actual difference in costs borne by the products, or at the very least to a reasonable estimate thereof.[222]

8.128 The European Communities states that Argentina's contentions are refuted by the fact that rates on imports are always the same, irrespective of the degree of processing of the imported products. Yet, upon Argentina's construction, the rates should logically be higher on imports of processed products, since domestic processed products are likely to have been subjected to *percepciones* or *retenciones* on more occasions than domestic primary products.

8.129 The purely hypothetical examples presented by Argentina do not prove Argentina's assertions. It is sufficient to change some of the factual variables posited by Argentina in order to arrive at a totally different result.

8.130 For example, if the manufacturer of semi-finished leather were an *agente de retención/percepcion*, the example would have to be reformulated as follows:

| **Domestic product** | | **Imported product** | |
|---|---|---|---|
| *Sale of raw or salted hides* | | | |
| Taxed price | 30 | | |
| IVA (21%) | 6.30 | | |
| Relención R.G. 4,059 | 0.50 | | |
| *Sale of semi-finished leather* | | | |
| Taxed price | 60 | CIF price | 68 |
| IVA (21%) | 12 | IVA (21%) | 14.28 |
| Relención R.G. 18 | exempt[223] | Percepción R.G. 3431 (10%) | 6.8 |
| Percepción R.G. 3337 | exempt[224] | | |
| *Sale of finished leather* | | *Sale of finished leather* | |
| Taxed price | 100 | Taxed price | 100 |
| IVA (21%) | 21 | IVA (21%) | 21 |
| Percepción R.G. 3337 | 5 | Percepción R.G. 3337 | 5 |
| **Payments on account** | | **Payments on account** | |
| 0.5 | | 6.8 | |
| *5* | | *5* | |
| **5.5** | | **11.8** | |

[222] In the case of cascade taxes or taxes on ingredients, it is a generally accepted practice to compensate on the basis of average rates calculated for each category of product. See Working Report on Border Tax Adjustments, at para. 16.
[223] See Article 5. a) of RG 18.
[224] See Article 3. b) of RG 3337

8.131 Argentina contests the reformulation of the numerical example given by the European Communities which merely included the seller of semi-finished leather as an additional withholding agent. In the first place, Argentina wishes to clarify that in the example originally given, the location of the withholding/collection agents in the marketing chain was not a random matter but reflected the place they occupy in actual economic fact.

8.132 Therefore, the appointment of withholding/collection agents is decided unilaterally by the Tax Administration based on the fiscal interest attaching to the taxpayers for those purposes. It is therefore unacceptable, for withholding/collection agents to be situated at any stage in the production or marketing chain as the European Communities is submitting. Instead they will be located at those points where their activity is most efficacious for tax purposes.

8.133 Hence, in the example given by Argentina, the seller of rawhides acts as the collection agent under Resolution 4059, while the seller of finished leather acts as the withholding agent under Resolution 18 when he purchases semi-finished leather and as withholding agent within the meaning of Resolution 3337 when he sells his product.

8.134 If a new withholding/collection agent were to be introduced into the example in the manner put forward by the European Communities, that introduction would have to yield some tax benefit, since, as explained before, the appointment of those agents is done exclusively by the Tax Administration based on its fiscal interests.

8.135 Against this background, it is not clear what logic inspires the European Communities' recasting of the example, as the only effect of introducing a new withholding/collection agent into a chain in which other agents already exist in upstream and downstream stages is that of removing one of the phases of the payments on account regimes, which is not in line with the fiscal interest which the Fiscal Authority is always presumed to be pursuing.

8.136 Argentina therefore rejects the validity of the reformulation submitted by the European Communities, as it does not simply represent a change in a variable that leads to a different result, but the formulation of an example that it is designed to produce an outcome than runs counter to the fiscal logic that underlies the mechanism of withholdings and collections.

#### (ii) Mechanism for the Exemption from Advance IVA Collection on Imports

8.137 **Argentina** asserts that exemption systems the mechanism envisaged in Resolution 17 has been established to secure exemption from the collection regimes covering import transactions for those cases where the directly collected tax revenue could result in overpayment in excess of a taxpayers compliance with his respective tax liabilities. While there are several reasons why payments on account can give rise to overpayment, Argentina contends that none of those reasons stems exclusively from import transactions or domestic market transactions.

By way of example, one possible cause could be that the mark-up with which the taxable person operates is lower than the added value assumed under the different collection or withholding regulations.

Example:

| | |
|---|---|
| Import of merchandise worth | $100 |
| Taxable price | $100 |
| IVA 21% - Tax credit | $21 |
| Levy collected (GR 3431) 10% | $10 |
| Sale of the imported merchandise at | $140 |
| Taxable price | $140 |
| IVA 21% - Tax debit | $29.40 |
| On the import transaction the taxpayer pays in $21 as an IVA tax credit and $10 as the collectable IVA levy. | |
| Upon sale, the seller collects $29.40 from the buyer as the IVA tax debit. | |
| Importer's sworn declaration: | |
| Tax debit: | 29.40 |
| Tax credit: | (*21.00*) |
| Tax for the period: | 8.40 |
| Levy collected/payment on account: | (*10.00*) |
| Balance in favour of the importer: | (1.60) |

8.138 Resolution 17 establishes that if the amount of the IVA withholdings, collections and/or payments on account are in excess of the final tax liability, the taxable person may request full or partial exemption from the regimes for withholding, collection and payments on account. In reply to a question by the Panel, Argentina asserts that the mechanism envisaged in Resolution 17 does apply for the purposes of securing exemption from the collection regimes covering import transactions.

8.139 The exemption granted - whether full of partial - applies to all IVA payments on account regimes. In consequence, the taxpayer cannot be exempted from only one specific payments on account regime, instead that exclusion would cover all the IVA payment on account regimes applicable to him.

8.140 Applications for such exemptions are processed by means of what Resolution 17 itself describes in Article 5 as an "automatic computation" for determin-

ing eligibility under the regime.[225] Ultimately, this computation mechanism is no more than a composite of variables pertaining to the tax situation of the taxpayer which takes the form of a mathematical formula for processing the application.[226] The condition for requesting exclusion is that the taxpayer must have a tax balance in his favour, which must be shown in the sworn declaration covering the fiscal period immediately preceding the filing date of that request. The condition to grant the exclusion is that the taxpayer has a favourable tax balance in the month immediately preceding the date of the filing of the request. This balance must be shown in the sworn declaration covering the fiscal period. The exemption is granted for six tax periods (six months) and may be renewed at the end of that time. The exemption mechanism is hence a legal precaution and is aimed precisely at avoiding a situation such as that the rate differentials for different products - depending on whether the taxpayer is registered or non-registered and/or whether the product is of the imported or domestic origin - generate a financial cost that alters the competitive expectations of the respective goods. In the final analysis, this is no more than a reaffirmation of the general principle established under Article 45 of the IVA Law mentioned above.

8.141 Argentina notes, however, that the exemption mechanism from the advance IVA, but also from the advance IG, are hardly used, as the number of situations in which the payments on account actually generate a credit in favour of the taxpayer is virtually negligible. AFIP figures show that of the entire universe of taxpayers, less than 2 percent request to be placed under the system of exemption. This clearly shows that over 98 percent of importers have had no credit balances with the tax authority as a result of their obligation to make payments on account.[227]

8.142 The **European Communities** states that contrary to Argentina's contentions, the "exclusion" mechanism provided for in Resolution 17 does not remedy the discrimination which is the subject of the European Communities' claim. An importer may request to be "excluded" from *percepciones* only where it can be anticipated that those pre-payments will exceed its tax liability at the end of the tax period. Moreover, the exclusion is not granted in respect of all *percepciones*, but only to the extent that it is anticipated that the *percepciones* will exceed the final tax liability.

8.143 The European Communities' complaint, however, is not concerned with those importers which find themselves in a loss position at the end of the relevant fiscal period. It is concerned with the extra financial cost imposed by the *percepciones* during the tax period. That cost is incurred whether or not the importer is able to credit the full amount of the *percepciones* within the relevant tax period.

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[225] See Article 5, RG 17.
[226] The document, General Instruction 373/97, is attached as Exhibit ARG-XXII.
[227] This argument has been made under the IVA and IG exemption mechanisms.

(iii) Argument that the Impact of a Financial Cost is Limited to a Maximum of 30 Days

8.144 **Argentina** points out that the hypothesis of a financial cost affecting both products (domestic and imported) is limited to a maximum time-frame of 30 days (this being the maximum period in which an importer can be required to clear any credits or debits in his monthly position), and should there be credit balances in favour of the taxpayer (importer or domestic market operator), automatic exemption from the regime of payments on account can be immediately obtained.

8.145 The **European Communities** states that the financial cost may exceed 30 days if the importer does not resell the imported goods within that time period, or if, (as illustrated by the example contained in Argentina's response to Question No 45 b), the ordinary IVA charged on the re-sale of the goods is less than the combined amount of the ordinary IVA and the additional IVA collected upon the importation of the goods. Argentina seems to derive the 30 day limit from the fact that, where a taxpayer shows that it could not fully credit all IVA *percepciones* and *retenciones* within the preceding one month tax-period, it is entitled to apply for an "exclusion" under *Resolution*17 for the subsequent periods. That limit, however, would not apply in the case of the advance IG, which cannot be credited until the end of the one-year tax period. In addition, the European Communities recalls once again, however, that the prohibition of discriminatory taxes in Article III:2, first sentence, is not qualified by a *de minimis* standard.[228]

(iv) Existence of a Differential Between Generally Applicable Rates - Issue of Whether the Differential is Due to the Tax Collection Method

8.146 The **European Communities** states that the generally applicable rate on imports to registered taxable persons is 10 percent, while the rate applicable on internal sales of goods to registered taxable persons is 5 percent.

8.147 **Argentina** maintains the application of different tax rates to import transactions does not affect the final determination of the tax, since the levies imposed constitute payments on account towards the tax, which have their domestic market equivalent in the respective withholding, collection and payment-on-account regimes, like the one established under Resolution 4,059.[229] The nominal difference in tax rates is due to the tax collection method, which is not covered by WTO disciplines. Once the tax liability is settled, the same overall tax rates apply to imported and like domestic products. While it is true that the advance IVA on

[228] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.
[229] See Exhibit ARG-XX.

imports has a different scope than that on domestic sales, these differences are justified.[230]

8.148 In Part VI, paragraph B, of its written submission, Argentina has set forth all the reasons for which it insists that payments on account do not constitute a "tax" in themselves but an advance payment against a future tax, which is not in *excess*. It has also denied the existence of an additional financial burden on imported products and *furthermore* it has pointed *out* the existence of a system of reinsurance (an exemption mechanism for the IVA and its equivalent for IG, applicable to this case):

8.149 This assertion is supported by the following: the advance payments are neither taxes nor rates additional to the taxpayer's fiscal liability but are advance payments that are direct, unrestricted and deductible from the final tax liability.

8.150 The advance payments are part of a tax collection method or technique not subject to WTO disciplines and recognized as such in the compared doctrine.

8.151 The rate differential of advance payments is dictated by tax collection policy considerations and certainly not by an interest in protecting domestic industry. The rationale behind establishing different rates (always based on a tax rate of 21 percent) lies in the tax evasion loopholes observed in the marketing chains of particular products. Accordingly, these rates bear a relationship to the key operational points of concentration of funds and where economic transactions can be gauged.

8.152 As already described above, those rates differ in terms of the marketing features of certain goods, which means that the determination that in a specific case the amount (of the rate of the payment on account) is *different* for the imported product - which is not the case - cannot be done in the abstract, but must entail an analysis of the specific "like product" or the imported product that is a substitute or direct competitor.

8.153 To determine the rates for advance payments, the features of the transactions underlying the payments have been considered. In that regard, specific cases have been selected involving appreciable volumes of invoicing, as they perform a crucially important function of automatic surveillance through formal channels, which in turn serves the purposes of "levying" various other informal stages. This makes it possible to detect possible "upstream" and "downstream" tax evasion and also revitalises tax collection (some examples of selected cases are: Legal Aid Funds, Professional Bodies and Councils, Banking Entities - for payment of professional fees - rate: 14 percent; Entities forming part of lunch voucher systems - for the amount of each settlement - rate: 17 percent; Financial Entities - services provided abroad - rate 21 percent; Customs - for imports - rate: 10 percent, among others).

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[230] For an analysis of this argument, see the discussion below regarding the defence under Article XX (d).

### (v) The Additional IVA on Internal Transactions does not Apply to Sales by Non-Registered Taxable Persons, whereas the Additional IVA on Imports is Levied also on Imports by Non-Registered Taxpayers

8.154 The **European Communities** asserts that the additional IVA on internal transactions does not apply to sales by non-registered taxable persons, whereas the additional IVA on imports is levied also on imports by non-registered taxpayers. In the case of sales by a registered taxpayer to a non-registered taxpayer, the seller must collect, besides the IVA on that sale, an additional amount equivalent, as a general rule, to 10.5 percent of the net sales price (50 percent of the generally applicable IVA rate, i.e. 21 percent). No IVA is charged on the sales by a non-registered taxpayer to another non-registered taxpayer. By contrast, the additional IVA is levied on imports by non-registered tax payers at the rate of 12.7 percent

8.155 **Argentina** argues that while it is true that there is no payment on account on internal transactions by non-registered taxable persons, in the case of imports the requirements laid down by tax legislation make it practically impossible for a situation to arise where an operator importing goods through customs is not legally required to register as a taxable person liable to the levy. Here, the regime perpetuates an element which was found in earlier stages of Argentine tax history, but which is today anachronistic because it cannot possibly occur in practice.

8.156 This difference in treatment was due to the fact that non-registered taxable persons did not pay the tax and so registered taxable persons were unable to act as *agentes de retención* responsible for withholding tax on the purchases they effected. In the case of a registered taxable person, on the other hand, tax was withheld on the basis of a combined rate, i.e. a taxable base supplemented by an added-value estimate equivalent to 50 percent of the transaction.

8.157 In this connection, Argentina mentions a statement by the then Minister for Public Revenue and originator of the system, Carlos Miguel Tacchi,[231] to the effect that non-registered taxable persons are subject to a higher tax rate for payments on account, which tends to cover the tax corresponding to their stage, together with an additional amount under the regulations governing the levy. This is the case because, in transactions effected by a registered taxable person with a non-registered person, there is no differential tax treatment, since the tax law provides that the former must act as collection agent (*agente de percepción*) for the latter, and is required to take in the increased tax payable by the non-taxable person at the next stage.

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[231] See his Article "Revolución Tributaria en la Argentina" Boletin DGI 500, August 1995, page 877. et seq.

8.158 In addition, **Argentina** notes that the status of non-registered taxable persons is a voluntary one, since any individual can obtain the status of registered taxable person merely by applying to the tax authority. In view of the above, the treatment indicated facilitates payment of the levy by means of this assessment mechanism, while reducing the number of taxpayers subject to inspection.

8.159 In reply to a question by the Panel, the **European Communities** states that it is not aware of the existence of any measure which would, as matter of law, prohibit the importation of goods by non-registered taxpayers. The fact that Resolution 3431 lays down a different rate of *percepción* for imports by non-registered taxpayers confirms that those imports are "legally possible." Argentina itself does not argue that it is not "legally possible" for non-registered taxpayers to import goods. Rather, Argentina contends that imports by non-registered tax payers are "practically" impossible. Even if true, that proposition would be irrelevant. As recalled above, by now it is well-established that "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."[232] For that reason, even the mere theoretical possibility of imports by non-registered taxpayers could be sufficient to establish a violation of Article III:2, first sentence.

(vi) Situation of Importers *vis-à-vis* Entities that are not Withholding Agents in Internal Sales

8.160 The **European Communities** argues that the additional IVA on internal sales is collected only upon the sales made by *agentes de percepción.* In contrast, the additional IVA on imports applies to all importers.

8.161 **Argentina** points out that the exemption of buyers who are required to act as withholding agents from the levy collectable under Resolution 3337 was necessary as otherwise both collection and withholding would occur in one and the same transaction, as the seller would have to collect the levy from the buyer, who would in turn have to withhold the corresponding amount under Resolution 18, on the payment to the seller.

8.162 The **European Communities** states that that *retención,* however, is withheld only on the sales made to the so-called *agentes de retención* (which are the same as the *agentes de percepción*, i.e. essentially big companies)[233] by any registered taxpayer[234] which is not itself an *agente de percepción/retención*[235].

8.163 It remains that the internal sales made *by* the *agentes de percepción/retención* are subject to a lower *percepción* than the importation of goods. Furthermore, all internal sales not involving one *agente de percepción/retención*

232 See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.
233 RG No 18, Article 2.
234 *Ibid.*, Article 4.
235 *Ibid.*, Article 5 a).

as either the buyer or the seller are free from both the 5 percent *percepción* and the 10.5 percent *retención*. Likewise, the internal transactions where both the buyer and the seller are *agentes de percepción/retención* are exempted from those two taxes.

(vii) Situation of Importers *vis-à-vis* Certain Categories of Purchasers in Internal Sales

8.164 The **European Communities** states that the additional IVA on internal sales is not collected on sales to certain categories of purchasers (including in particular the *agentes de percepción* and the main types of financial entities), whereas the additional IVA applies to all importers.

8.165 **Argentina** states that financial entities governed by Law 21526 are excluded from the collection system because they ensure that collection takes place with a high degree of efficiency and security. It was therefore deemed unnecessary to include those financial entities, as they fall under the control of the country's monetary authority (Central Bank). Financial entities may only engage in financial activities as their corporate purpose does not include trading. It may therefore be inferred that import operations effected by such entities would have to do with goods intended for use in their economic activity (*bienes de uso*) and are therefore not subject to the tax collection regime under Resolution 3431. The exemption of buyers who are required to act as withholding agents from the levy collectable under Resolution 3337 was necessary as otherwise both collection and withholding would occur in one and the same transaction, as the seller would have to collect the levy from the buyer, who would in turn have to withhold the corresponding amount under Resolution 18, on the payment to the seller.

8.166 In response to Argentina's argument that the commercial resale of imported goods is not within the "*objeto social*" of financial entities, the **European Communities** notes that neither is the re-sale of domestic goods. Yet the internal purchase of goods by financial entities is specifically excluded form the scope of Resolution 3337.[236] Even if Argentina's proposition was true it would be irrelevant for the purposes of Article III:2, first sentence. The prohibition on tax discrimination set forth in that provision is not conditional on a trade effects test, nor is it qualified by a *de minimis* standard.[237] For that reason, even the mere theoretical possibility of imports by financial entities could be sufficient to establish a violation of Article III:2, first sentence.

[236] See Article 3 c) of RG 3337.
[237] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.

### (viii) Threshold Amounts Available for Internal Sales, yet not for Imports

8.167 The European Communities asserts that the additional IVA on domestic sales does not apply to sales below a certain amount, while the additional IVA on imports is levied on all imports, irrespective of their value.

8.168 Argentina states that Article 5 of Resolution 3337 establishes that collection will take place only when the amount to be levied is in excess of $ 21,30[238] per transaction, this stipulation having been made for the sake of the reasonable, economical and practical management of the system of collection.

8.169 No minimum amounts have therefore been set under the Resolution 3431 system of collection as it is assumed that import transactions always involve large sums. Besides, samples of a value not exceeding US$ 100 are subject neither to the payment of customs duties[239] nor to the system of payments on account, which in fact indicates that there is a certain threshold that is also applicable to imports.

8.170 In response to Argentina's arguments, the European Communities recalls that 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."[240]

### (ix) Equal Treatment of Imported and Domestic Products

8.171 **Argentina** states that marketing transactions in the domestic market were in the past as a rule previously subject to the following payments on account, without prejudice to others applied in particular cases:

- The *retención* (withholding) regime under Resolution 3125, superseded by Resolution 18: (10.5 percent);
- the *percepción* (collection) regime under Resolution 3337: (5 percent). Imports were not subject to any system of payment on account.

8.172 In order to provide for equivalent treatment for import transactions, therefore, Resolution 3431 was enacted, establishing a single regime for imported products, for which the tax rate is currently 10 percent.

8.173 In view of the fact that import transactions can only be covered through a collection regime, since foreign sellers are not liable to the levy and cannot therefore be made subject to withholding operations, a tax rate of 10 percent was es-

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[238] Exchange rate: $1 = US$1.

[239] Article 560 of the Argentinean Customs Code: "Samples are objects representing a specific category of finished goods, intended exclusively for exhibition or demonstration purposes with a view to concluding trade transactions involving those goods that it is planned to produce, provided that the quantity of samples for either purpose does not exceed what is usual in such cases."

[240] See J Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.

tablished for the collection and withholding regimes applied in the domestic market.

8.174 The **European Communities** states that that *retención,* however, is withheld only on the sales made to the so-called *agentes de retención* (which are the same as the *agentes de percepción*, i.e. essentially big companies)[241] by any registered taxpayer[242] which is not itself an *agente de percepción/retención.*[243]

8.175 The European Communities illustrates, in the table below, that it remains that the internal sales made by the *agentes de percepción/retención* are subject to a lower *percepción* than the importation of goods. Furthermore, all internal sales not involving one *agente de percepción/retención* as either the buyer or the seller are free from both the 5 percent *percepción* and the 10.5 percent *retención*. Likewise, the internal transactions where both the buyer and the seller are *agentes de percepción/retención* are exempted from those two taxes.

| | |
|---|---|
| Imports by registered taxpayers | Percepción 10 % |
| Imports by non-registered taxpayers | Percepción 12.7 % |
| Sales by non-registered taxpayers[244] | Exempted |
| Sales to non-registered taxpayers[245] | Exempted |
| Sales by an agente de percepción/retención to another agente de retención/percepción[246] | Exempted |
| Sales by non-agentes de percepción/retención to an agente de retención/percepción[247] | Retención 10.5 % |
| Sales by an agente de retención/percepción to non-agentes de percepción/retención[248] | Percepción 5 % |
| Sales by a non-agente de percepción/retención to another non-agente de percepción/ retención[249] | Exempted |

8.176 The mere fact that, under certain circumstances, imports are taxed at a lower rate than internal sales is not sufficient to exclude a violation of Article III:2, first sentence, in accordance with the well-established principle that more favourable treatment of imports in certain instances may not be balanced against less favourable treatment of imports in other cases.[250]

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241 RG No 18, Article 2.
242 *Ibid.*, Article 4.
243 *Ibid.*, Article 5 a).
244 Article 4 of RG 18.
245 Article 1 of RG 3337.
246 Article 3 b) of RG 3337 and Article 5 a) of RG 18.
247 Articles 2 and 8 of RG 18.
248 Articles 1 and 2 of RG 3337.
249 Article 1 of RG 3337 and Article 2 of RG 18
250 Panel Report on United States - Measures affecting the Importation, Internal Sale and Use of Tobacco, adopted on 4 October 1994, para. 98. In support of this conclusion, the Panel referred to the "no-balancing" principle established with respect to Article III:4 by the Panel report on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387.

### (x) De Minimis Qualification under Article III:2 of the GATT 1994

8.177 **Argentina** maintains that in case the panel accepts that "lost interest" is covered by Article III:2, and it is accepted that those charges are higher than those affecting domestic products, which Argentina refutes, then that concept should be governed by a *de minimis* criterion.

8.178 Argentina argues that all the precedents cited leading to the consolidation of the doctrine of the exclusion of a *de minimis* criterion in analysing the first sentence of Article III:2 were cases where what was at stake was the rate of internal taxes assessed on imported goods. In this case, the elements of fact being studied are very different from those of the cases cited. Argentina assesses internal taxes at rates identical for imported and domestic products. The higher charge being alleged by the European Communities would comprise the difference in the interest supposedly foregone by an importer for the brief period during which he was unable to set off the amount of his payment on account against his tax debits for the period and the interest that would have accrued to a purchaser of domestic goods.

8.179 Considering the borrowing rate indicated by the European Communities, which is approximately 7 percent per annum in Argentina, in the light of the differential between the 10 percent IVA levied on imports and the 5 percent on the domestic market, that lost interest would be, at the most, 0.029 percent of the amount of the levy or, otherwise expressed, 0.00029 percent of the value of the imports. Argentina notes that this example does not reflect the fact that the local product has already suffered said "lost interest" also in its previous processing stages.

8.180 The **European Communities** argues that the Appellate Body recalled in *Japan - Liquor Taxes* that the first sentence of Article III:2 is not qualified (unlike the second sentence of that Article) by a *de minimis* standard.[251] Accordingly, "even the smallest amount of 'excess' is too much."[252] In addition, the European Communities argues that that the effects of the tax differentials are far from negligible. It may be estimated that in 1999 the financial costs imposed upon the importers by the additional IVA and the advance IG amounted to 36 million pesos.

8.181 The European Communities also contests the figures put forward by Argentina and states that, on the assumption that the financial cost imposed by the additional IVA is limited to 30 days, the amount of the cost differential would be

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This principle was restated by the Panel Report on *United States - Standards for Conventional and Reformulated Gasoline* ("*US – Gasoline*"), WT/DS2/R, adopted 20 May 1996, DSR 1996:I, 29, paras. 6.14-6.15.

[251] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.

[252] *Ibid.*

between 0.29 percent (and not 0.029 percent, as stated erroneously by Argentina) and 0.58 percent of the *percepción*.

(b) Claim that the IG "collected" on Imports Imposes a Heavier Tax Burden than the IG "withheld" on Domestic Sales

8.182 The European Communities asserts that an advance IG is collected on all imports.[253] While for domestic sales, a certain amount of the IG is withheld at source and can a be deducted from the definitive IG,[254] the advance IG collected on imports imposes a greater tax burden than the IG withheld on domestic sales. The European Communities notes that the IG on imports is paid by the importer on top of the sales price invoiced by the foreign seller and has hence the effect of increasing the cost of the goods to the importer, whereas the IG on internal sales is deducted from the price charged by the seller and so does not increase the cost to the purchaser. The European Communities states that Argentina has maintained during earlier consultations, that the advance IG on imports has its domestic counterpart in the IG withheld on certain internal sales. As shown in the arguments above, those two collection mechanisms, however, operate very differently and cannot be considered to be equivalent.

8.183 The European Communities further argues that, even if the IG on imports and the IG on internal sales were considered to be comparable, the following differences in rates and coverage would still be sufficient to find that imported products are taxed "in excess of" like domestic products:

(1) the rate at which the advance IG is collected on imports (3 percent or 11 percent) is higher than the withholding rate on internal sales (2 percent or 4 percent);

(2) the advance IG is collected on imports of goods for the importer's own use or consumption. By contrast, in domestic transactions, no IG is withheld on payments by natural persons, except where they are made as a result of the exercise of an economic activity; and

(3) whereas the advance IG is collected on all imports, irrespective of their value, no IG is withheld on internal sales below certain thresholds.

8.184 **Argentina** argues that the European Communities makes a simplistic analysis of the rates of the *percepciones* (payments on account) applied to imports (3 percent and 11 percent), compared with the withholding rates (*retenciones*) - payments on account - applied in the domestic market (2 percent and 4 percent).

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253 See RG 3,543.
254 See RG 2,784.

8.185 Argentina believes that the European Communities confuses the nature of the *percepción* (payment on account) with the tax obligation based on the type of tax liability (gains) which is assessed annually, but also disregards the fact that the annual cycle of IG assessment means that, in the case of the domestic market, the taxpayer is liable to withholding (*retención*) - payment on account - on a monthly basis, whereas in the case of importers, customs effects the *percepción* (payment on account) once only, i.e. when the goods undergo inward customs clearance.

8.186 In Argentina's view, in the case of the IG the European Communities once again makes a static reading of the rates, disregarding what could be called the cycle of assessment of the tax, which in the case of gains (*ganancias*) is the annual fiscal period.

8.187 Argentina notes that the 11 percent rate established under Resolution 3543 for imports of goods intended for the importer's personal use or consumption was introduced in line with its counterpart (Resolution 3,995), in order to extend the reach of the tax collection system by taking account of the real tax paying capacity of taxable persons and to help improve horizontal equity by achieving greater efficiency in combating tax avoidance, as emerges from the second and third recitals of that Resolution.

8.188 Therefore, it is clear that the rate differential criticized by the European Communities (11 percent under Resolution 3543 and 4 percent under Resolution 2784) is based on the different uses for which the goods are intended, as the first category of goods do not enter into a marketing chain and will therefore not be subject to any other collection or withholding systems.

8.189 On the contrary, the 4 percent *withholding* provided for under Article 14.3.2 of Resolution 2784 is applied to non-IG-registered income earners, that is, rather than being confined to a single stage, it is applied to all but the final marketing stage of the product.

8.190 It may therefore rightly be insisted that the amounts in question, whether collected or withheld, are tax payments on account. In the case of importers, the 3 percent payment on account, which is applied to both registered and non-registered taxpayers, is no more than the average of the rates levied on the internal market, which are 2 and 4 percent for registered and non-registered taxpayers respectively.

8.191 The **European Communities** states that the justification offered by Argentina is misguided as a matter of law because, as recalled before, Article III:2, first sentence, does not allow the "balancing" of more favourable treatment in certain instances against less favourable treatment in other cases. Moreover, the rationale for averaging the two rates is dubious, to say the least, since in practice imports by non-registered taxpayers are likely to be relatively unimportant compared to those made by registered taxpayers. The European Communities wonders why Argentina does not apply different rates to imports by registered and by non-registered importers, as it does in the case of the additional IVA.

8.192 As regards the 11 percent rate applied to imports made for the importer's own use or consumption, the European Communities states that Argentina's argument does not explain why the internal sale of goods for the purchaser's own use or consumption is exempted from the *retención* levied pursuant to Resolution 2784.[255]

8.193 **Argentina** argues that the *withholding* system simplifies collection and control by reducing the number of taxpayers subject to it. Bearing in mind that one premise of any tax system is minimizing collection costs, it is clear that in the absence of a minimum amount below which the *withholding* is not effected, the system would become inefficient for both the taxpayer and the tax authority.

8.194 The absence of a minimum amount for *collection* under the regime for imported goods established by Resolution 3543 similar to the $ 3.75 minimum established under its counterpart Resolution 2784 for domestic products, can be explained by the following facts:

(a) The number of taxpayers subject to the Resolution 2784 regime is substantially greater than that covered by the Resolution 3543 regime. If no minimum had been set for the first aforementioned regime, the tax system would have become inefficient and would not be fulfilling the premise of minimizing collection costs.

(b) As it is assumed that import transactions always entail larger sums, it was not considered necessary to set minimum amounts. Furthermore, imported samples of a value not exceeding a certain threshold are also not subject to IG.

8.195 The minimum monthly amounts not subject to *withholding* envisaged in Article 15 of Resolution 2784 are justified in that the importation giving rise to the payment at customs constitutes an instant taxable transaction which is completed once the operation is over. On the internal market in contrast, account is taken of all taxable transactions taking place throughout each monthly period in order to compute the *withholding*, in other words, a series of transactions take place, which justifies the setting of the minimum amounts in question.

8.196 The **European Communities** states that while Argentina contends that the exemption of sales below certain amounts is necessary to minimise collection costs. That objective, even if true, would not exclude a violation of Article III:2, first sentence. In any event, there is no reason why that objective could not be served by exempting also imports below the same threshold.

8.197 As regards the withholding mechanism described by Argentina, the European Communities argues that the IG is not withheld on a monthly basis. The

[255] Natural persons are required to withhold the IG only where they make a payment to a taxable person as a result of the exercise of an economic activity. See the European Communities' First Submission, paras. 68 and 96 (2), and Article 3 f) of RG 2784

truth is that, in principle, the IG must be withheld on each internal transaction at the moment when the payment is made.

8.198 Article 5 of Resolution 2784 provides in that respect that "La retención deberá ser practicada en el momento en que se efectue el pago, distribución, liquidación o reintegro del importe correspondiente al concepto sujeto a retención."

8.199 Article 13, first paragraph, of Resolution 2784 further provides that "La retención deberá practicarse sobre el importe de cada pago que se efectúe por los conceptos sujetos a retención …"

8.200 Argentina appears to be alluding to the special method for calculating the amount of the *retención* provided for in Article 13, second paragraph, of Resolution 2784 in connection with the situation where an *agente de retención* makes several payments within the same calendar month to the same person. The purpose of that method is to take into account that, in accordance with Article 15.3 of Resolution 2784, monthly payments below a certain amount are exempt from withholding.[256]

8.201 Article 13, second paragraph of Resolution 2784 suggests that while *retenciones* are withheld on a transaction basis, those amounts already withheld must be taken into account by the *agente de retención* in assessing the amount to be withheld in subsequent purchases.

8.202 The argument set out at paragraph 125 of Argentina's First Submission is not only inaccurate, but also irrelevant. Indeed, far from accounting for the tax differentials at issue, the difference alleged by Argentina would have the consequence of imposing yet another additional financial cost on imports compared to internal sales.

8.203 The European Communities holds that Argentina's argument to show why importers cannot benefit from a monthly allowance from the advance IG is not convincing. The mere fact that the advance IG is collected upon the importation of the goods does not exclude the possibility of granting a monthly allowance. As shown above, in principle, the IG is withheld also on each single internal transaction. Argentina does not explain why a method similar to the one provided for in Article 13, second paragraph, of Resolution 2784 could not be applied by the customs authorities with respect to imports.

8.204 In addition, the European Communities recalls, once more, that Article III:2, first sentence is not qualified by any *de minimis* standard.

[256] See European Communities' First Submission, para. 67 and Article 15.3 of RG 2784.

(i) Mechanism for the Exemption from the Advance IG Collection on Imports

8.205 Following its arguments relating to the exemption mechanism for the IVA, **Argentina** states that the exemption mechanism in Resolution 2784[257] has been established to secure exemption from the collection regimes covering import transactions for those cases where direct tax revenue could give rise to overpayment in complying with the respective tax liabilities. In reply to a question by the Panel, Argentina asserts that the mechanism envisaged in Resolution 2784 does apply for the purposes of securing exemption from the collection regimes covering import transactions.

8.206 With respect to exemption from the IG *withholding* and *collection* regimes, Article 28 of Resolution 2784 provides for the issue of a special non-withholding certificate, when the direct taxes to be assessed in the fiscal period could give rise to a payment in excess of the tax liability.

8.207 Circular 1277 for its part explained that gains tax non-withholding certificates issued in accordance with Article 28 are a valid basis for the customs authority to waive the assessment of the levy collectable under Resolution 3543. The application for exemption may be filed before final tax liability is determined, provided that the rule - Article 28 of Resolution 2784 - does not stipulate as a condition that the tax payer must have a tax balance in his favour.

8.208 To benefit under the provisions of Article 28 of Resolution 2784, a taxpayer must show that the withholdings to which he is subject during the course of the tax period - annual - will give rise to overpayment in the discharge of his tax liability. For those purposes, an examination is made of the breakdown of IG payments on account made during the current tax period, projected gains for the remainder of the period, and the possibility of absorbing losses and credit balances arising from the sworn IG declaration for the preceding tax period. If at the time the gains tax liability is determined the taxpayer is in a loss position and therefore owes no income tax, he may request the refund of the amounts paid as "IG advances."

8.209 Argentina notes, however, that the exemption mechanism from the advance IG, but also from the advance IVA, are hardly used, as the number of situations in which the payments on account actually generate a credit in favour of the taxpayer is virtually negligible. AFIP figures show that of the entire universe of taxpayers, less than 2 percent request to be placed under the system of exemption. This clearly shows that over 98 percent of importers have had no credit balances with the tax authority as a result of their obligation to make payments on account.

8.210 The **European Communities** states that contrary to Argentina's contentions, the "exclusion" mechanism provided for in Article 28 of Resolution 2784

[257] See Exhibit EC II-10.

does not remedy the discrimination which is the subject of the European Communities' claim.[258] An importer may request to be "excluded" from *percepciones* only where it can be anticipated that those pre-payments will exceed its tax liability at the end of the tax period. Moreover, the exclusion is not granted in respect of all *percepciones*, but only to the extent that it is anticipated that the *percepciones* will exceed the final tax liability.

8.211 The European Communities' complaint, however, is not concerned with those importers which find themselves in a loss position at the end of the relevant fiscal period. It is concerned with the extra financial cost imposed by the *percepciones* during the tax period. That cost is incurred whether or not the importer is able to credit the full amount of the *percepciones* within the relevant tax period.

(ii) Mechanism for Refunds in Situations of Actual Overpayment of Taxes

8.212 **Argentina** contends that in the event that the IG advances should exceed the tax liability determined, the taxpayer may request the refund of the excess amounts paid as "IG advances" in keeping with the provisions of Resolution 2224.

8.213 **Argentina** also notes that Resolution 1253/98 issued by the then Minister for the Economy, Works and Public Services[259] set the interest rate (0.5 percent per month) payable by the Government when the IG advances exceed the tax liability determined for the period. This interest is calculated as of the filing date of the refund request by taxpayer.

8.214 The **European Communities** states that, for similar reasons than the exemption mechanism, also the refund mechanism fails to dispose of the European Communities' claim. That mechanism does not allow to claim the refund of the financial costs imposed by the *percepciones* during the tax period. It allows only to request the refund of the amount by which the *percepciones* already paid exceed the taxpayer's final liability at the end of the fiscal period. If the refund claim is accepted, the tax authorities will pay interest exclusively on the amount refunded from the moment where the claim was filed. Yet, in order to avoid the discriminatory effects complained of by the European Communities, the tax authorities would have to pay interest on the full amount of the *percepciones* from the moment they are collected by customs.

[258] The same argument is made above with regard to exemptions from the advance IVA.
[259] See Exhibit ARG-XXXVII.

(iii) de minimis qualification under Article III:2 of the GATT 1994

8.215 **Argentina** maintains that in case the panel accepts that "lost interest" is covered by Article III:2, and it is accepted that those charges are higher than those affecting domestic products, which Argentina refutes, then that concept should be governed by a *de minimis* criterion.

8.216 Argentina argues that all the precedents cited leading to the consolidation of the doctrine of the exclusion of a *de minimis* criterion in analysing the first sentence of Article III:2 were cases where what was at stake was the rate of internal taxes assessed on imported goods. In this case, the elements of fact being studied are very different from those of the cases cited. Argentina assesses internal taxes at rates identical for imported and domestic products. The higher charge being alleged by the European Communities would comprise the difference in the interest supposedly foregone by an importer for the brief period during which he was unable to set off the amount of his payment on account against his tax debits for the period and the interest that would have accrued to a purchaser of domestic goods.

8.217 The **European Communities** argues that the Appellate Body recalled in *Japan - Liquor Taxes* that the first sentence of Article III:2 is not qualified (unlike the second sentence of that Article) by a *de minimis* standard.[260] Accordingly, "even the smallest amount of ‘excess' is too much."[261] In addition, the European Communities argues that the effects of the tax differentials are far from negligible. It may be estimated that in 1999 the financial costs imposed upon the importers by the additional IVA and the advance IG amounted to 36 million pesos.

8.218 The European Communities also contests the figures put forward by Argentina and states that, the financial cost imposed by the advance IG amounts to 7 percent of the *percepción.*

*4. The Requirement of "protection" in the Application of Article III:2 of the GATT 1994*

8.219 **Argentina** argues that "protection of the domestic production" is - together with the existence of a "higher tax" - a necessary requirement in order to ascertain an inconsistency of a measure with Article III:2.

8.220 Argentina contends that the European Communities is correct in asserting that the Appellate Body, in its report *Japan - Taxes on Alcoholic Beverages*, found that in order to establish a violation of Article III:2, first sentence, it was not necessary for the complaining party to prove, as a separate requirement, that the measure at issue is applied so as to afford protection to domestic production.

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[260] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 115.
[261] *Ibid.*

8.221 However, the Appellate Body clearly established that the first paragraph of Article III of the Agreement informs paragraph 2 of that same Article. It then pointed out that "Article III:2, first sentence does not refer specifically to Article III:1," and that "[t]here 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.'" It therefore concludes that "[t]his omission must have some meaning." According to the Appellate Body, that 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."

8.222 Argentina notes that special attention should be paid here to two terms used by the Appellate Body, namely, *simply* and *separately*. The Appellate Body says *simply* precisely because it is not attempting to read into that omission an exemption from a requirement that clearly informs the entire Article III. The word *simply* is underscoring the fact that there is nothing outside of the general rule, nothing exceptional, but *simply* that it is not necessary to establish *separately* the existence of the requirement of protection of domestic industry.

8.223 The Appellate Body used the adverb "*separately*" and not the adjective "*separate*." What the Appellate Body was doing was describing the action of "establishing" with the adverb "*separately*" rather than qualifying the noun "*requirement*" with the adjective "*separate*." In other words, the analysis must be done jointly and not *"separately."* The Appellate Body is not talking about the existence or otherwise of the requirement, but about the way in which its existence must be determined, that is, jointly with the other "specific requirements" and not "*separately*." In other words, the Appellate Body's pronouncement in no way implies that there is no need to demonstrate the existence of the aforementioned element of protection.

8.224 Argentina argues that its contention is further clarified as the Appellate Body, in the same case, goes on to state that " … this does not mean that the general principle of Article III:1 does not apply to this [first] sentence [of Article III:2]." Immediately thereafter it adds: "[r]ead in their context and in the light of the overall object and purpose of the WTO Agreement, the words of the first sentence [of Article III:2] require an examination of the conformity of an internal tax measure with Article III …"

8.225 In Argentina's view, this shows irrefutably that the statement referred to by the European Communities must not be interpreted outside the general context of section *F. Interpretation of Article III* of that report, where it is repeatedly explained that the object being pursued by Members in Article III is to prohibit the application of higher taxes in order to protect domestic industry. Accordingly, on page 15 it is clearly established that "[t]he 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 in-

ternal measures not be applied to imported or domestic products so as to afford protection to domestic industry'."

8.226 Subsequently, also on page 15, the Report again states "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."

8.227 The Appellate Body also cites, in the same case, the words of a delegate in the Tariff Agreement Committee at the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment in the discussion as to whether to include in the GATT 1947 the national treatment clause from the draft Charter for an International Trade Organization: "That purpose was to prevent the use of internal taxes as a system of protection."

8.228 But, as if that were not enough to establish the need to interpret the first sentence of Article III: 2 in the context of the entire Article III and of the other WTO disciplines, on page 17 the Appellate Body adds a quotation from the Panel report on the case *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, which says that the object and purpose of Article III:2 was "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." It can be seen that here again, the concept of protection appears together with that of discrimination.

8.229 The preceding quotations do not cover all the occasions on which the Appellate Body made this point in the case cited to by the European Communities. That is to say, in the case of *Japan - Alcoholic Beverages*, the Appellate Body repeatedly reaffirms that the criterion for verifying the inconsistency of a measure with Article III:2 clearly contains the element of protection of domestic products.

8.230 This is the same interpretation that is given on page 125 of the Guide to GATT Law and Practice (Sixth updated edition, 1995), where the report of the Panel on the case *United States - Section 337 of the Tariff Act of 1930* is quoted as follows " … 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' (Article III:1)." The same Guide (page 126) also quotes the 1992 Panel Report *United States - Measures Affecting Alcoholic and Malt Beverages* as follows: " … with respect to the application of the Article III rules which compare the tax treatment accorded to "like products": The basic purpose of Article III is to ensure … 'that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products … should not be applied to imported or domestic products so as to afford protection to domestic production'." Immediately thereafter the same Guide cites another statement by the Panel affirming with the utmost clarity: "The purpose of Article III is thus not to prevent contracting parties from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production. Specifically, the purpose of Arti-

cle III is not to prevent contracting parties from differentiating between different product categories for policy purposes unrelated to the protection of domestic production." Conversely, therefore, the protection of domestic production is an indispensable requirement in determining consistency with Article III. The same Panel reaffirms this in regard to that case by going on to state that "… it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'."

8.231 Further on, the Panel refers to the purpose of Article III as being: "… to ensure that internal taxes and regulations 'not be applied to imported or domestic products so as to afford protection of domestic production'." As can be seen, there is no first sentence of Article III: 2 that diverges from the general system of that Article which establishes the requirement of protection of domestic production as an essential element in assessing the consistency of a measure with the Agreement in general and with Article III in particular.

8.232 The **European Communities** contests Argentina's interpretation of Article III:2, and argues that according to the Appellate Body, the first sentence of Article III:2 is an "application" of the general principle embodied in Article III :1. For that reason, "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 like domestic products, then it is inconsistent with Article III:1 first sentence."[262] In *Japan - Taxes on Alcoholic Beverages*, the Appellate Body clarified that, although the general principle set forth in Article III:1 informs also the first sentence of Article III:2, in order to establish a violation of Article III:2, first sentence, it is not necessary for the complaining party to prove, as a separate requirement, that the measure at issue is applied "so as to afford protection to domestic production."[263]

8.233 The European Communities recalls that the purpose of Article III is to provide equality of competitive conditions for imported products. For that reason, it is not incumbent upon the complaining party to prove that the tax measures in dispute are capable of having any particular effect. In the words of the Appellate Body,[264]

> "It is irrelevant that the 'trade effects' of the tax differential between imported and domestic products, as reflected in the volume of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume, but rather of

[262] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 112.

[263] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 109; see also the Appellate Body report on *European Communities - Bananas*, *supra*, footnote 111, para. 216.

[264] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 110; See also the Appellate Body Report on *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3, paras. 119 and 153.

the equal competitive relationship between imported and domestic products."

8.234 The European Communities argues that Argentina's position brings to mind the so-called "aims-and-effect" approach applied by the Panel in *US - Malt and Alcoholic Beverages.*[265] The Appellate Body in *Japan - Liquor Taxes*, however, rejected that approach.[266]

8.235 The analysis conducted by the Appellate Body in *Japan - Liquor Taxes* confirms beyond doubt that the presence of "protective application" is not a relevant criterion for a like product determination.[267] The European Communities adds that the presence of "protective application" is neither relevant for determining whether imported products are taxed "in excess" of domestic products. As recalled by the Appellate Body in *Japan - Liquor Taxes* "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."[268]

### *B. General Exception of Article XX (d) of the GATT 1994*

8.236 **Argentina** asserts that in case the Panel should consider the payments on account to be in violation of Article III:2, they would be covered by the provisions of Article XX(d) of the GATT 1994.

8.237 The **European Communities** states that Article XX(d) is a limited and conditional exception from the substantive obligations contained in other provisions of the GATT.[269] As such, it must be interpreted narrowly.[270] Moreover, in the view of the European Communities, Argentina has not shown that the measure is necessary.

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[265] Panel report on United States – Measures Affecting Alcoholic and Malt Beverages, BISD 39S/206, at paras. 5.23-5.26.

[266] As confirmed by the Report of the Appellate Body on *European Communities – Bananas*, *supra*, footnote 111, para. 241.

[267] See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47 at 111-115.

[268] *Ibid.*, p. 115.

[269] See Appellate Body Report, *United States- Standards for Conventional and Reformulated Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I 3, at 20.

[270] The Panel Report on United States – Restrictions on Imports of Tuna, circulated on 16 June 1994, not adopted, DS29/R, recorded (at paras. 5.26 and 5.38) that "the long-standing practice of panels has ... been to interpret this provision [Article XX] narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. The Panel referred to the Panel Reports on Canada - Administration of the Foreign Investment Review Act, BISD 30S/140, para. 5.20, and United States - Section 337 of the Tariff Act of 1930, BISD 36S/345, para. 5.27.

### *1. Paragraph (d) of Article XX of the GATT 1994*

8.238 **Argentina** states that paragraph (d) of Article XX spells out two types of requirements for justifying the existence of a measure. It must be "necessary" and intended to secure compliance with "laws or regulations which are not inconsistent" with the General Agreement.

(a) "To secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"

8.239 **Argentina** first points out that the IVA and IG Laws are compatible with the General Agreement and that they have not been contested by the European Communities. Similarly, the regimes for the collection of advances established under Resolutions 3431 (collection of IVA advances), and 3543 (collection of IG advances) as a tax collection method have not been questioned by the European Communities and have specifically been accepted by it as consistent with WTO obligations.

8.240 The "measures" ( Resolutions 3431 and 3543) were chosen by the Argentine State as tools with which to avert illegal actions under the IVA and IG Laws, such as failure to pay the specified tax. The rules on the collection of IVA and IG advances at customs were drafted in order to ensure compliance with the respective laws.

8.241 Over and above the State's general interest in preventing tax evasion, the measures in question are tools that establish an obligation to pay a percentage on account at the time of importation, that is, an "advance payment" that covers the following stage of tax payment in the case of the IVA and that of the payment on account against gains accruing in the future in the case of the IG. The payments on account serve as a compulsory reserve that ensures compliance with the tax liability at the appropriate time. Consequently, Resolutions 3431 and 3543 were specifically designed to ensure compliance with the obligations imposed by the IG and IVA Laws. In the case of the IG, the objective is to ensure payment of the due taxes to the tax authority based on gains obtained by natural or legal persons on the basis of Article 1 of the IG Law. As for the IVA, the purpose is to ensure payment of amounts due under the respective taxable transactions covered under Article 1 of the IVA Law (sales, imports, services etc.), Articles 69 and 90 of the IG Law and Article 28 of the IVA Law, among others.

8.242 The measures in question comply with the requirements of Article XX(d) inasmuch as they were necessary to "secure compliance" with laws or regulations that are consistent with the General Agreement. This is in line with what was established by the Panel on the case *EEC - Imports of Parts and Components*, where it was stated that

> "the main function of Article XX(d) would be to permit contracting parties to act inconsistently with the General Agreement whenever such inconsistency is necessary to ensure that the obligations that

the contracting parties may impose consistently with the General Agreement under their laws or regulations are effectively enforced."[271] Further on, the same Panel held that "Article XX(d) covers only measures related to the enforcement of obligations under laws and regulations consistent with the General Agreement."

8.243 The same Panel then went on to state

" … the general anti-dumping Regulation of the EEC does not establish obligations that require enforcement, it merely establishes a legal framework for the authorities of the EEC. Only the individual regulations imposing definitive anti-dumping duties give rise to obligations that require enforcement, namely the obligation to pay a specified amount of anti-dumping duties. The Panel noted that the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties."[272]

8.244 As has been mentioned above, with their rates different for imported products depending on the case, the payments on account are ideal instruments for ensuring compliance with the obligations arising from the IVA and the IG Laws. These are the "objectives of the laws and regulations" in the same sense as in the case *Canada - Certain Measures Concerning Periodicals*.[273]

(b) The "necessary" Character of the Measure

8.245 **Argentina** states that it is incumbent on the party applying a measure under Article XX (d) to assess the necessity thereof. This is so because no one else could be better placed to judge what is necessary for implementing a tax administration function, such as ensuring tax collection.

8.246 Argentina argues that the rights and obligations of Members are "set forth and clarified" by the panels on the basis of a definition of necessity as invoked by a Contracting Party.

8.247 To spell out the scope of the expression "necessary to secure compliance … ," the sequence text, context and end objective of the Vienna Convention must be followed, rather than beginning by adding to the text obligations not contained therein: "if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."

8.248 With respect to the first aspect, the text of Article XX(d) in no way qualifies the content of "necessary," nor does it attach any specific requirements such as determining "a reasonable alternative" that could be used and which moreover would not be "inconsistent" with GATT/WTO provisions. By its very definition -

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[271] EEC – Regulation on Imports of Parts and Components. BISD 37S/132-199, para. 5.17.
[272] Idem, para. 5.18.
[273] See Panel Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/R and Corr. 1, adopted 30 July 1997, DSR 1997:I, 481, para. 5.9.

as an exception - Article XX deals with "measures" that are somehow inconsistent with the GATT.

8.249 It is hard to imagine that a government, faced with the choice of a measure "consistent" with GATT/WTO rules and disciplines and which meets its need to ensure compliance with laws and regulations, would willingly opt for an inconsistent alternative. Accepting such a line of reasoning as a principle would mean assuming a lack of good faith on the part of a WTO Member by considering that it would be prepared to use what is an exception - the Article XX justification - as a habitual routine for flouting the obligations deriving from the General Agreement.

8.250 The context of paragraph (d) is conditioned by its *chapeau*, which establishes the conditions for invoking an exception. That is, that it does not constitute a means of "arbitrary discrimination … or a disguised restriction …." There can be no more precise context for determining the scope of the requirement of "necessity" than that provided by the very *chapeau* to that article, in conjunction with a textual interpretation of the relevant paragraph, in this case, paragraph (d), which immediately goes on to specify the conditioning or qualifying element that sets the scope of the concept of "necessary" measures; i.e. that they must be necessary to secure the observance of laws and regulations.

8.251 Argentina contends that it would not be appropriate for panels to begin evaluating the alternatives that a country may have used in order to ensure observance of laws and regulations, beyond what is textually required in subparagraph (d). Where does subparagraph (d) prescribe that the government of a State must analyse an array of options, and choose the least restrictive? What is the yardstick for defining what is less restrictive? Accepting this approach would mean supplanting the sovereignty of governments by a panel's evaluation. To begin with, a panel cannot evaluate a government's need, for various reasons, to adopt a tool that assures it of compliance with another rule. In the second place, neither does it have a standard nor yardstick against which to judge necessity, as the concept of necessity depends on various factors that no one can better evaluate than the country taking the measure. Lastly, the role of the DSU pursuant to Article 3.2 is to clarify the provisions of the agreements covered and not to create additional rights and/or obligations.

8.252 The test of necessity required under Article XX (d) cannot be made conditional upon a largely relative test, given that the full range of alternatives available in a case could be very difficult to determine, especially for a developing country. Such an approach would mean transforming a case covered by the Article XX:(d) exception into a situation, at least in theory, which could always be legally challenged as possible new available alternatives emerge. A certain degree of discretion must therefore be allowed the Member invoking the exception in determining which measure is necessary for securing observance of laws and regulations that are not inconsistent with the general agreement.

8.253 The **European Communities** argues that it is well established that, while it is for each Member to define its policy goals (*in casu* the desired level of en-

forcement of the tax measures), it is the Panel's task to examine whether the measures applied by a Member are "necessary" to achieve those goals.[274] Therefore Argentina's reasoning that the assessment of the necessity of a measure should be left "basically" to the Member invoking Article XX (d) is clearly mistaken.

8.254 The relevant "test" is found in the Panel report in *US - Section 337*, which held that a Member cannot justify a measure as "necessary" in terms of Article XX (d) "if an alternative measure which could be reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[275] The same test was applied in *Thailand - Cigarettes*[276] and in *US - Gasoline,*[277] two cases concerning Article XX (b), which also includes the term "necessary."

8.255 Contrary to Argentina's assertions, the test enunciated in *US - Section 337* does not read any additional requirements into Articles XX(b) or (d). The ordinary meaning of "necessary" is "unavoidable," "that cannot be dispensed with," "essential."[278] Therefore, it is plain that a measure cannot be considered as "necessary" to achieve a certain objective if the same objective can be attained through other means.

8.256 Argentina's view that it is enough to show that the measure is merely "intended" ("*destinada*") to secure compliance ignores the ordinary meaning of the term "necessary" and effectively reads that requirement out of Article XX(d).

8.257 In *US - Gasoline*, the Appellate Body criticised the Panel for importing the "necessity" test provided for in Article XX(b) into Article XX(g), where the drafters chose not to use the term "necessary" but instead the phrase "primarily aimed at."[279] The Appellate Body emphasised that, in view of the different wording of the exceptions listed in Article XX,

> "it does not seem reasonable to suppose that the WTO members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure and the state interest or policy sought to be promoted or realized."[280]

8.258 The European Communities believes that Argentina makes the same mistake as the Panel in *US - Gasoline*. It disregards the express wording of Article XX(d) and seeks to replace the "necessity" test provided therein by a differ-

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[274] Panel Report on United States – Section 337 of the Tariff Act of 1930, BISD 36S/345, para. 5.25 et seq.; Panel Report on Thailand – Restrictions on Importation and Internal taxes on Cigarettes, BISD 37S/200, para. 72 et seq.; and Panel Report on *US - Gasoline*, *supra*, footnote 250, para. 39.
[275] Panel report on US – Section 337, at para. 5.26.
[276] Panel report on Thailand – Cigarettes, Op. Cit., para. 5.26.
[277] Panel Report, *US - Gasoline*, *supra*, footnote 250, para. 6.24.
[278] Webster's New World Dictionary, Third College Edition.
[279] See Appellate Body Report, *US - Gasoline*, *supra*, footnote 269, at 15.
[280] *Ibid.*, at pp. 16-17.

ent test; more similar to that found in letters (c), (e) or (g) of Article XX. Argentina's explanations may be relevant in order to show that the collection of *percepciones* and *retenciones* is "necessary" to fight tax fraud. But they fail to explain why it is necessary to collect them at higher rates on imported than on domestic products.

8.259 **Argentina** considers that the rate differential questioned by the European Communities is justified given the varying degrees of tax avoidance existing across the various sectors of the economy. Thus, a 10 percent rate is applied in the import sector while withholding agents apply a 10.5 percent rate in their transactions with their suppliers and a 5 percent rate for transactions with their purchasers.

8.260 In response to a question by the Panel, **Argentina** explains why, in its view, it is necessary within the meaning of Article XX(d) for Argentina to collect a 3 percent advance IG compared to a withholding rate of 2 percent in the case of internal sale and to use an advance IVA rate of 10 percent on imports by registered taxable persons and a rate of only 5 percent on internal sales to registered taxable persons.

8.261 Argentina states that the context of the introduction of the payment on account systems was tax evasion and the need for fiscal balance. These systems have enabled Argentina to effectively collect taxes and secure compliance with the tax obligations stemming from the IVA and IG Laws.

8.262 Argentina maintains that the measures have been highly effective:[281]

1. The 30 percent of overall IVA collection (total IVA tax take for 1999: $ 21894964000; tax take from payments on account: $ 6703655000) was possible thanks to the withholding and collection regime. This percentage testifies to the importance of the regime, in particular considering that revenue from payments on account are spread over the tax period.
2. The 48 percent of overall gains tax revenue was the result of the regimes for withholding and collection at source (overall IG tax revenue: $ 9239968000; tax revenue from withholdings and levies collected: $ 4507305000).

8.263 The existing rate differences applicable to import transactions and domestic transactions result from the fact that imported goods represent a considerable proportion, while on the internal market, to obtain the same product, the raw material undergoes a series of processes and changes.

8.264 Argentina explains that here are 19 payment on account regimes existing on the domestic market, some of which apply to the different marketing stages of one and the same product, by assessing the different payments on account at the various stages in the chain. Collection at customs on the other hand is a one-off

[281] See Exhibit ARG-XXXIX

operation and therefore justifies rates of payment on account that presupposes the incorporation of added value, generally of up to 50 percent.

8.265 The **European Communities** points out that Argentina's argument that the rate differential is necessary to compensate for the fact that domestic products have been subjected to *percepciones* and *retenciones* at previous stages of production is misplaced in the context of Article XX. Indeed, if true, it would exclude a violation of Article III:2, first sentence, and therefore would make it unnecessary for Argentina to invoke Article XX.

8.266 **Argentina** further argues that there is a high degree of centralization of formal transactions and that the customs posts are therefore of crucial importance in collecting advance payments that will ensure transparency in subsequent transactions. The rationale behind the rate differentials arises from the generic difference between import and domestic market transactions. On the internal market, given the wide geographical spread of transactions, it is possible to apply lower rates which then add up to equal and/or surpass the rates applied to import transactions. The reason for applying the 10 percent advance IVA rate and a 3 percent IG rate at customs was set due to the heavier concentration of transactions, since it has a multiplier effect with respect to tax collection, given that it acts as an incentive to formalise subsequent transactions in the chain of payment. This is the rationale behind the higher rates that are applied at Customs.

8.267 The **European Communities** contests Argentina's argument and states that from the fact that the collection of taxes on imports is easier, it does not follow logically that it is "necessary" to collect higher taxes on imports. If anything, the implication to be drawn from that proposition would be the opposite, namely that the tax rates on internal sales should be higher than on imports, so as to compensate for the fact that more internal sales escape taxation.

8.268 **Argentina** recalls that the application of different rates under the withholding or collection regimes does not affect the determination of final tax liability, as those amounts represent payments on account against the tax.

8.269 Argentina argues that both at the time when it was decided to introduce the payments on account regime and subsequent thereto, in the light of its performance, there was no other reasonable alternative available to Argentina that could have enabled it to achieve the level of compliance with the IVA and the IG Laws that are now being witnessed. What is more, even in Argentina's present fiscal situation, there are no other alternatives. This is borne out as well by the numbers given in the forms in Exhibit ARG-XXXIX, from which the following conclusions may be drawn:

1. The percentage of IVA payments on account collected on domestic market operations is 82 percent (total take from payments on account: $ 6703655,000; payments on account on the domestic market: $ 5514068000 and at customs: $ 1189586000) and 18 percent on import transactions.

2. The percentage gains tax take from withholdings and levies collected is $ 4507305000, with the domestic market accounting for $ 4091227000 (90 percent) and import transactions for $ 416078000 (10 percent).

8.270 At the present rate of 10 percent, payments on account at customs yield an average income of around US$ 100 million per month in the case of the IVA. The IG equivalent is approximately 34 million per month. Hence, a one-point difference in the rate of collection of any of the two payments on account (IVA and IG) means a monthly tax revenue loss of 14 million pesos from two taxes under which payments on account represent 30 percent and 48 percent of the overall tax take as explained earlier.

8.271 The **European Communities** notes that the *percepciones* on imports are pre-payments of the final tax. Therefore, it cannot be assumed that the loss of tax revenue due to a reduction of the *percepciones* would be definitive. Moreover, Argentina does not explain why raising the rates applicable to internal sales could not compensate loss of tax revenue.

8.272 **Argentina** asserts that the payments on account help to improve collection as they account for practically 50 percent in the case of the IG.

8.273 In other words, the various regimes for withholding and/or collection are indispensable to securing observance of tax laws and are at the same time an efficacious means of averting tax evasion. This is so because the existence of those regimes helps to cover marginal sectors of the economy as those assessed for withholdings and/or levies are obliged to declare all their transactions, precisely because those payments are in the nature of advances.

8.274 The **European Communities** recalls that the "additional IVA" does not purport to "enforce" the "ordinary" IVA due on the importation (which is fully paid upon importation, together with any applicable customs duties, and cannot be evaded unless the goods are smuggled into Argentina), but instead the "ordinary" IVA due on the subsequent re-sale of the imported goods. That re-sale is an internal transaction. Therefore, Argentina's argument that the "control mechanisms" referred to cannot be applied by Customs is totally irrelevant. The European Communities argues that Argentina has not provided evidence that the "ordinary" IVA due on the re-sale of imported goods is more frequently evaded, or easier to evade, than the "ordinary" IVA on the internal sale of domestic goods. Indeed, Argentina cannot provide that evidence because the only difference between the two types of transactions is the origin of the goods sold.

8.275 **Argentina** stresses that the initial rates were lower than those now in force under the various payment on account regimes and that the rates were successively increased in order to narrow the gap between actual and potential tax collection. The effect is reflected by the fact that with the successive increases in the rates for payments on account, final tax revenue also increased, which means that the increases made it possible to tap the informal sectors of the economy. If those untaxed informal sectors did not exist, the increase in the payments on ac-

count rates would not have led to an increase in the final tax take, as those payments on account are credited against the final settlement of the tax.

8.276 Argentina also points out that in fact, since the institution of the payments on account regimes at customs (1991 and 1992), not only have imports increased steadily, but in proportional terms, their growth has also outstripped sales on the domestic market.

8.277 With respect to small local buyers, a higher rate would not have the same multiplier effect of lending greater transparency to downstream operations because, coming almost at the end of the marketing chain, there is the risk that payments on account could give rise to overpayment in the discharge of tax liability. An increase in the rate would therefore lead to a greater number of applications for exemption and that could open the way to informal transactions with the consequent reduction in tax collection.

8.278 The **European Communities** recalls that exclusions are granted only to the extent that the final liability exceeds the amount paid by way of *percepciones* and *retenciones*. Therefore, while higher *percepción* and *retención* rates may result in an increase in the number of exclusions, they will not lead *per se* to a loss of "advance" tax revenue. In any event, importers also re-sell the imported goods to small local buyers. Argentina's argument does not explain why those re-sales are subject to a higher *percepción* rate than the sales of domestic goods to small local buyers.

8.279 **Argentina** underlines that in those cases where there is an equivalent on the domestic market, a rate of payment on account is applied equal to or greater than that levied at customs. Such is the case of the withholding agents under Resolution 18, which, being equivalent to customs as far as the concentration of formal transactions is concerned, must withhold 10.5 percent on transactions with their suppliers, pursuant to that regulation. What is more, in other activities where there is a similarly high concentration of transactions, such as payments of certain professional fees, a 14 percent rate is withheld (Resolution 3316/91).

8.280 Therefore, the financial impact represented by each percentage point in the rate of collection is considerable (for the Argentine economy is US$ 14 million). Argentina states that it has demonstrated above that it cannot be argued that as the tax rate is a single one, the final fiscal income will be the same.

8.281 Argentina wishes to clarify in that regard that in the context of high tax evasion, the rate of payment of account set for imports obliges importers to declare their subsequent transactions, which means that if that rate is reduced, the overall tax rate would fall because, in the absence of an incentive to be open about their subsequent transactions, these taxpayers would not declare them, thereby not subjecting them to the tax.

8.282 Argentina therefore rejects the European Communities claim that a reduction of the rate of payment on account would not affect the definitive tax take.

8.283 Argentina also notes that a reduction in the rate of payment on account would spawn another financial problem, given that Argentina's tax accounts are

reviewed on a quarterly basis by the IMF and the revenue from the payments on account helps to achieve the targets set.

8.284 In other words, ensuring revenue of US$ 14 million for each point of payment on account at the close of a quarter in which there is a specific IMF deficit commitment (with the possibility of failure to comply and the need to request a waiver) is not the same as making an evaluation for a longer fiscal period, such as a year, when the obligations assumed do not envisage that possibility.

8.285 Besides, it has been observed that increasing the 5 percent rate of IVA payments on account would not increase final tax revenue, for recent years have seen a steady increase in the number of requests for exemptions, from which it may be inferred that an increase in the rate would trigger an increase in such requests rather than an increase in revenue.

8.286 To a question by the Panel why Argentina cannot refund the lost interest allegedly resulting from the tax differential, Argentina replies that none of the rules governing any payments on account regimes provides for interest refunds. This is so because the normal mechanics of the tax, consisting of a chain of tax debits and credits, eventually cancel out any financial costs. This results from the fact that the National Tax Authority does not reclaim interest from the withholding and/or collection agents on the sums withheld or collected and held by them for a period of around 15 days. Furthermore, even if there were lost interest, it would be virtually impossible to quantify it, since that would require an evaluation of the rate of interest foregone by the taxpayer and which depends on a range of factors (the time-lapse between each payment on account and its corroboration in the sworn declaration, etc.). If interest had to be paid, the resulting cost to the Government of verifying the appropriateness and of subsequent quantification would be exorbitant enough to cause the failure of the payments on account system.

8.287 In reply to the question by the Panel why an increase in the rate for domestic transactions would not result in more (i) "advance" revenue (ii) "final" revenue, Argentina states that an increase in the rate of payments on account for domestic market transactions would elicit a larger number of applications for exemption, which would certainly undermine the purpose of the payments on account regimes as the original taxpayers targeted by them are excluded from the system. Accordingly, the statistics from the collection agency (Exhibit ARG-XLV) show a steady rise in the number of exemptions granted, from 2,322 in 1997 (the system of exemptions began operating in October 1997) to 9,000 for 1998 and 10,746 for 1999. These figures illustrate that a rate increase would only lead to a higher number of exemptions, with the following twofold negative impact: (1) loss of advance tax collection and (2) loss of control over compliance with tax liability by means of the payments on account mechanism, with the consequent upsurge in informal transactions, ultimately diminishing tax revenue.

8.288 In response to the question by the Panel why there have been more and more requests for exclusion from the advance IVA, particularly for domestic transactions rather than import transactions, Argentina states that domestic mar-

ket transactions are subject to a greater number of payments on account regimes, which explains why domestic market operators seek exemptions, given the greater possibility of overpayment in discharge of their tax liability.

8.289 The **European Communities**, in comments on Argentina's replies, states that Argentina has provided no evidence that the increase in the number of exclusions is linked to an increase in the *percepción* or *retención* rates. The increase shown may be the result of other factors (e.g. increase in the number of taxpayers as a result of the success of the system of *percepciones* and *retenciones* and the other measures taken by Argentina to fight tax evasion; greater familiarity of the taxpayers with the exclusion system, etc.) The European Communities further argues that Argentina has not provided any evidence that exclusions are more frequently requested, in relative terms, in the "internal sector" than in the "import sector" (assuming that it is feasible to draw such a distinction). Argentina merely assumes that they must be so because the *retenciones* and *percepciones* on internal transactions are higher. That assumption, however, has been disputed by the European Communities in this case. In any event, as explained above, an increase in the number of exclusions does not have to translate into a loss of "advance" tax revenue.

8.290 Argentina asserts that even accepting the EC's argument that the increase may be the result of other factors, it is obvious that, if these factors persist, an increase in *percepción* rates could only lead to an increase in the number of exclusions.

8.291 Likewise, since advance IVA cannot be collected from those taxpayers who have obtained an exclusion, the greater the number of taxpayers excluded, the smaller the amount collected by way of advance IVA.

8.292 The European Communities takes issue with the argument that "collecting a tax such as the IVA is not the same in the case of a taxpayer who has a habitual relationship with the tax authorities based on regular operation on the domestic market, and in that of an importer, who may only occasionally generate a taxable transaction, i.e. when he decides to effect the inward customs clearance of merchandise is not persuasive. The European Communities argues that most importers are also involved in making internal sales. Accordingly, it is misleading to say that importers have only "occasional" contacts with the tax authorities, while those persons making internal sales have a "habitual" relationship with those authorities. Taxpayers subject to the IVA on imports are, as a general rule, the same as those subject to the IVA on internal sales. What is more, most imports are made by registered taxpayers, which therefore are well known to the tax authorities. Indeed, according to Argentina, it would be "practically impossible" that a non-registered taxpayer may ever be subject to the additional IVA on imports.

8.293 The European Communities finds it moreover difficult to understand why an importer could be interested in not charging the ordinary IVA when it resells the merchandise, since that is the easiest way for that importer to credit the ordinary IVA paid on the import transaction.

8.294 Overall, the European Communities asserts that Argentina has not demonstrated that the measures are justified under Article XX (d). In particular, Argentina, has not shown that the rate differentials are "necessary."

### 2. *Relationship of the "chapeau" of Article XX of the GATT 1994 to the Content of Paragraph (d)*

8.295 **Argentina** argues that if a measure is intended to secure observance of a WTO-consistent law or regulation, as in the present case, it is inappropriate to add to the concept of necessary measures further additional obligations that go beyond a literal interpretation of the text.

8.296 Neither the "reasonableness" of the measure nor its being the "least inconsistent" with the GATT 1994 are concepts that have to do with the requirements laid down in the various subparagraphs of Article XX, but must instead be examined in the light of the prescriptions in the *chapeau*, which address "not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied."[282]

8.297 Argentina believes that in setting the requirements for invoking any of exceptions (a) to (j) ("arbitrary discrimination … or a disguised restriction …"), the *chapeau* to Article XX establishes the standard that must be met by the various exceptions envisaged in the subparagraphs. In other words, if the requirements of the *chapeau* are satisfied, this should mean that the measure is being applied in a "reasonable" manner. This is consistent with the statement by the Appellate Body that "… the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions …'. In other words, the measures falling within the particular exceptions must be applied reasonably …."[283] The evaluation of the reasonableness of the application of a specific measure must be done by matching it against the standard set in the *chapeau* to Article XX and not against the requirements that must be met for a measure to be in line with any of the subparagraphs.

8.298 A contrary interpretation incorporating into the legal framework of the rule in a particular subparagraph of Article XX an additional criterion of "reasonableness" beyond that established in the *chapeau* (which is applicable to all the exceptions) would be adding a double requirement for invoking each of the subparagraphs in Article XX. Accepting this criterion, which is based on Panel interpretations of the GATT 1947, which did not examine the *chapeau* to Article XX in the light of the Vienna Convention as did the Appellate Body in the *Gasoline* Case, would lead to the formulation of a criterion of reasonableness for each subparagraph, considering that they deal with completely different situations and are already inspired by the provisions of the *chapeau*.

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[282] Appellate Body Report, *US - Gasoline*, *supra*, footnote 269, at 20.
[283] *Ibid.*, p. 20.

8.299 For example, what would be the standard for defining "reasonableness" or a "less inconsistent" alternative in subparagraph (e) " … products of prison labour," or in (f) "national treasures … "? Would it be the same standard as for (g) "natural resources … "? Creating conditions of reasonableness different from those of the *chapeau* for each subparagraph would generate an unlimited caseload and would add requirements to each exception not envisaged in the Agreement.

8.300 The test of "reasonableness" is foreseen in the *chapeau* and, according to the Appellate Body, is much stricter than matching the exception with a specific subparagraph of Article XX. If that "test" can be adequately done based on compliance with the requirements of the *chapeau* ("arbitrary discrimination … or a disguised restriction … "), for which purposes the objectives of the measure take on crucial importance, it is inappropriate again to require additional "reasonableness" for each subparagraph. What is appropriate is examining whether the exception matches the type addressed in each subparagraph.

8.301 In addition, if the criterion of reasonableness were considered to be applicable to each subparagraph, what could then be defined as reasonable for a developing country such as Argentina, when it establishes a payment on account mechanism to improve tax collection and meet the targets established with the IMF in a context of high levels of tax evasion such as prevailed in the early 1990s?

8.302 The overriding reason why the Argentine Republic established the withholding and collection regimes at the root of this dispute is, without any doubt, tax evasion. The payments on account mechanisms established under Resolutions 3431 and 3543 are aimed at ensuring compliance with the IVA and the IG Laws, thereby guaranteeing tax revenue for the tax authorities and preventing tax evasion. In this connection, the doctrine supporting payments on account first of all analyses the definition of tax evasion, for the sake of greater clarity.

8.303 Tax evasion arises from the difference between potential and effective tax revenue. It becomes much more acute in unstable economic situations. The facts therefore show that the problem is much more pronounced in developing countries. Indeed, these latter countries often lack a reasonable degree of political and economic stability and are likely to display many of the features that lend themselves to tax evasion (e.g. an informal economy, inflation, an inequitable tax system, tolerance of failure to comply with regulations, lack of simple and precise rules, inefficient tax administration, corruption, low levels of education, a disregard for tax-paying obligations, etc.). In the Argentine Republic, tax evasion is an entrenched social ill that is sometimes accentuated by cyclical factors. That scourge reached alarming proportions in the 1990s. Argentina quotes Vito Tanzi: "In countries where the average tax backlog is high for the entire system and

where inflation and the initial level of taxation are also high, the loss of tax revenue as a proportion of national income can be extremely high … ."[284]

8.304 The modern trend among tax administrations is to differentiate their action depending on the situation with which they have to deal, that is whether there is a high or a low level of compliance with tax liabilities. In the first case, the administration must focus on restraint, while in the second, the focus is on precautionary measures. Specifically in the case of precautionary action, rules and regulations that enable it to achieve its targets must support the administration.

8.305 It is unquestionably of great utility for them to include a system of presumptions as an instrument for determining certain fiscal obligations, given that presumption implies that on the basis of an unquestionable, proven fact from which reasonable inferences can be made, and whose existence is not in doubt, an affirmation can be made as to the probable existence of another fact that is inferred, presumed and well-founded.

8.306 The regimes for withholding and collection at source are precautionary instruments based on presumptions reflecting both the tax-bearing capacity of those concerned and the established fact that tax evasion is inevitable in a process comprised of all the stages of the production and marketing chain. They also simplify and reduce the cost of tax administration.

8.307 In instituting a comprehensive network of agents for withholding and collection at source in Argentina, an analysis was made of the main operational channels in the various sectors of the economy, making it possible to detect possible "upstream" and "downstream" tax evasion, in turn giving greater flexibility to tax collection by improving the flow of funds. In that connection, the customs is of crucial importance as an agent of collection as it is an important focal point where economic traffic can be gauged and where business transactions are concentrated, thus making it possible to lend transparency to business dealings and avoid "downstream" tax evasion. Argentina discussed the importance of levy collection in customs in detail in its replies to questions 56 and 57.

8.308 In the light of the foregoing, it cannot be concluded that those regimes are intended to alter the competitive conditions for imported goods on the Argentine market nor that the design of the specific instruments (the timing of payments) and the rates established are such as to have that effect (so much so that ultimately the only European Communities claim is lost interest, which, as far as Argentina is concerned, is not covered by Article III:2).

[284] "Macroeconomic policies and taxation levels in developing countries," paper prepared for the "Twentieth Symposium on Public Finances," Córdoba, Argentina, September 1997.

### 3. *Justification of the Advance IVA and IG under the "chapeau" of Article XX of the GATT 1994*

#### (a) "Arbitrary or unjustifiable" Discrimination

8.309 **Argentina** argues that for the requirements of the chapeau of Article XX(d) to apply, it must first be determined whether the measure is being applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

8.310 The adjectives "arbitrary" and "unjustifiable" are predicated upon the idea that if a case of discrimination exists, it could be "not arbitrary" or "justified." In other words, discrimination could be present in a "measure" which it is being sought to justify under Article XX, and could be consistent with it, provided that it does not constitute "the abuse of the exception provided for in Article XX."

8.311 Argentina states that this reasoning has been well circumscribed by the Appellate Body:

> " … the fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[285]

8.312 If by definition the invocation of Article XX indicates the existence of some kind of discrimination, it is when we attempt to define the "abuse" that the qualification of that discrimination, i.e. arbitrary or unjustifiable, becomes important.

8.313 Argentina considers that in examining whether the first requirement of the chapeau has been met, one must begin by analysing the content of the concept of discrimination. In its broad sense, discrimination may be defined as "a failure to treat equally."[286] In its narrow sense and as far as the chapeau to Article XX is concerned, according to WTO precedents, discrimination would be applying different treatment to countries where the same conditions prevail.

8.314 In the present case, all countries exporting goods to Argentina receive the same treatment under the payments on account mechanism. Discrimination arises when a different treatment is given under equal conditions, as might have been presumed from the different time-frames given in the "*Shrimp*" case to the three complaining Members[287] to adapt their fishing methods, by comparison with the time allowed to other WTO Members.

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[285] Appellate Body Report, *US - Gasoline*, *supra*, footnote 269, at 23.

[286] Black's Law Dictionary. Revised Fourth Edition, 1968, page 553.

[287] See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), WT/DS58/R and Corr.1, adopted 6 November 1998, DSR 1998:VII, 2821, para. 7.31, , " … India, Pakistan and Thailand, have been given substantially less notice than the other countries … initially affected countries, before being forced to comply with TEDs requirements."

8.315 In the same case, it was clear which were the "Members" amongst which the same conditions prevailed. The aforementioned Panel stated:

> " … the US measure at issue applies to all Members seeking to export to the United States … shrimp retrieved mechanically from waters where sea turtles and shrimp occur concurrently. We consider those Members to be 'countries where the same conditions prevail', within the meaning of Article XX. We further note that some of those countries have been ... and are subject to an import ban. Consequently, discriminatory treatment is applied to shrimp from non-certified countries."[288]
>
> It was also established at the time that
>
> " … the US administration currently has to apply the import ban, including on TED-caught shrimp, as long as the country concerned has not been certified. In addition, certification is only granted if comprehensive requirements regarding use of TEDs by fishing vessels are applied by the exporting country concerned, or if the shrimp trawling operations of the exporting country take place exclusively in waters in which sea turtles do not occur."[289]

8.316 It was precisely this double standard that the Panel considered to be "unjustifiable discrimination between countries where the same conditions prevail."[290]

8.317 Given the conditions under which payments on account are applied, that is, without discrimination by origin, Argentina believes that it is incorrect to argue that discrimination could arise between Argentina and the European Communities.

8.318 Argentina asserts that the country applying the measure must necessarily be excluded from the definition of Member, otherwise the entire Article XX would become redundant and useless. This has been well established in various precedents by the finding that

> "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."[291]

8.319 In this context, the interpretation of who are Members between which discrimination could be possible is also reaffirmed in other precedents, where it was stated that

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[288] See Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), WT/DS58/R and Corr.1, adopted 6 November 1998, DSR 1998:VII, 2821, para. 7.33.
[289] *Ibid.*, para. 7.48.
[290] *Ibid.*, para. 7.49.
[291] See Appellate Body Report, *US – Gasoline*, *supra*, footnote 269, page 21.

> "the exclusion order was 'not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against countries where the same conditions prevail', because it 'was directed against imports … from all foreign sources and not just from Canada'."[292]

8.320 Along these same lines, in the case *Tuna I*, it was stated

> "The United States action of 31 August 1979 had been taken exclusively against imports of tuna and tuna products from Canada, but similar actions had been taken against imports from Costa Rica, Ecuador, Mexico and Peru and then for similar reasons, the Panel felt that the discrimination of Canada in this case might not necessarily have been arbitrary nor unjustifiable."[293]

8.321 In sum, Argentina professes that the application of the payments on account mechanism to imports from all origins does not discriminate between countries where the same conditions prevail, that is, between all WTO Member countries exporting to Argentina.

8.322 The **European Communities** argues that the tax differentials, even if assuming that they were "necessary," do not meet the requirements of the "chapeau." The chapeau is not only concerned with "arbitrary and unjustifiable discrimination" between exporting countries, but extends also to discrimination between the importing country and the exporting countries, as accepted by the Appellate Body in *US - Gasoline.*[294]

8.323 In arguing that Article XX would become redundant, since by definition a violation of Article III presupposes that kind of discrimination, the European Communities asserts that Argentina overlooks, the understanding of the Appellate body on this question which is that the "nature and quality of the discrimination [in the chapeau] is different from the discrimination … which was already found to be inconsistent with one of the substantive obligations of the GATT 1994."[295]

8.324 **Argentina** argues that the finding in *US - Gasoline*, which was later cited in *Shrimp*, was applicable to the specific case in which the parties had a common interpretation of the field of application of the standards set forth in the *chapeau* to Article XX. This was corroborated by the Appellate Body in *Gasoline*, where that Body did not see the need "… to make a ruling at variance with the common understanding of the participants." [296]

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[292] United States – Imports of Certain Automotive Spring Assemblies, BISD 30S/107, para. 55.

[293] United States –Prohibition of Imports of Tuna and Tuna Products from Canada, BISD 29S/91, para. 4.8.

[294] See Appellate Body Report, *US – Gasoline*, *supra*, footnote 269, page 22. See also the Report of the Appellate Body on *US – Shrimp*, *supra*, footnote 71, para. 150.

[295] *Ibid.*, para. 150.

[296] Appellate Body Report, *US - Gasoline*, *supra*, footnote 269, at 22.

(b) Disguised Restriction

8.325 **Argentina** believes that the other requirement arising from the *chapeau* to Article XX, i.e. that the measure is not applied in a manner which would constitute a "disguised restriction," must be studied jointly with the condition that the measure must not be a means of "arbitrary or unjustifiable" discrimination. It has already been clarified, according to Argentina, that such discrimination is neither present nor taking place between countries where the same conditions prevail. In addition, the payments on account are not intended to restrict international trade. Their basis and purpose is to combat tax avoidance and to ensure tax revenue by compelling the taxpayer concerned to make an advance payment of the tax at a point where there is a high concentration of transactions. The system was hence designed to ensure tax collection and place foreign goods on an equal footing with domestic products for the purposes of IVA treatment.[297]

8.326 What is more, there is an objective interest in increasing trade, considering that increased trade means increased tax collection. If it were a disguised restriction on international trade, the aim of ensuring tax collection would also be thwarted. Argentina states that figures provided to the Panel prove precisely the opposite: trade increased and so did tax collection as a consequence.[298] It would be preposterous to think that the whole design of this system, which was aimed at improving tax collection in the framework of agreements with the IMF, could have included a "disguised" element that would restrict trade, the very source of the tax revenue that it set out to increase.

## IX. THIRD PARTY SUBMISSION BY THE UNITED STATES

9.1 The **United States** limits its third party submission to the question whether the advance payment of income taxes is within the scope of Article III:2.

9.2 The United States argues that Article III:2, by its express language, applies to "internal taxes or other internal charges" that are "applied ... *to...products.*" This language indicates that only taxes on a physical product itself come within the scope of Article III:2. Other types of taxes, such as taxes on income, are outside the scope of Article III.2.

9.3 Article III:2, first sentence, is violated when a higher tax is imposed on an imported product than is imposed on a like domestic product. There is no requirement for a showing that this differential application of taxes provides protection to the domestic product.

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[297] Recitals of Resolution 3.43: "The regime to be implemented aims to accord the aforementioned marketing transactions equal treatment with those covered by the regime of collection established under RG 3.337 (domestic market),"

[298] See Exhibit ARG XXI.

9.4 The United States argues that the negotiating history of Article III:2 demonstrates that the paragraph does not apply to income taxes. During discussions in Sub-Committee A of the Third Committee at the Havana Conference, which considered Article 18 of the Charter (on national treatment), it was stated that the sub-committee on Article 25 [XVI] "had implied that exemptions from income taxes would constitute a form of subsidy permissible under Article 25 [XVI] and therefore not precluded by Article 18." It was agreed that "neither income taxes nor import duties came within the scope of Article 18 [III] since this Article refers specifically to internal taxes on products."[299] Moreover, the negotiating history makes clear that the reference in Article III:2 to "directly or indirectly" is not a reference to indirect taxes, as that term is used in the Illustrative List of Export Subsidies.[300] Rather, it means an indirect method of imposing a tax on a product:

9.5 In initial discussions at the London session of the Preparatory Committee, it was suggested that while this phrase in the US Draft Charter referred to "taxes and other internal charges imposed on or in connection with like products," the rapporteurs in the Working Party on Technical Articles had used the phrase 'directly or indirectly' instead, owing to the difficulty of obtaining the exact equivalent in the French text. In later discussions in Commission A at the London session of the Preparatory Committee, it was stated that the word "indirectly" would cover even a tax not on a product as such but on the processing of the product.[301]

9.6 The text of Article III:2, reinforced by its negotiating history, clearly demonstrates that the Article deals only with internal taxes imposed upon goods (including taxes imposed on the processing of goods). It does not apply to income taxes.

9.7 As to question whether the "advance" IG violates Article III:2 by imposing a higher tax on imported products than upon like domestic products, the United States argues that a tax that is imposed on products is within the scope of Article III:2, regardless of whether the taxing authorities of a government subsequently permit the proceeds of the tax on products to be credited by the taxpayer against its income tax liability. The crediting of the proceeds of a tax on products

[299] E/CONF.2/C.3/A/W/32, p.1-2; statement repeated in Havana Reports, p. 63. para. 44. See also E/CONF.2/C.3/SR.13, p.1. cited in Analytical Index of the GATT, volume 1, 1995, at 144.

[300] The distinction between taxes on a product and taxes that are not on a product is set forth in footnote 58 of Annex I, "Illustrative List of Export Subsidies" to the Agreement on Subsidies and Countervailing Measures. Footnote 58 defines "direct taxes" as "taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership or real property." By contrast, "indirect taxes" are defined as "sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges." While these definitions are legally applicable only to the Agreement on Subsidies and Countervailing Measures, this footnote embodies generally accepted distinctions between taxes imposed on a product ("indirect taxes") and taxes imposed on income ("direct taxes").

[301] Proposal by UK, EPCT/C.II/11; discussion at EPCT/C.II/W.5, p.5; EPCT/A/PV/9 p.19; EPCT/W/181, p. 3, cited in Analytical Index of the GATT, Volume 1, 1995, at p. 141.

against income tax liability does not convert the tax on products into an income tax. If the tax is imposed on imported products in a manner that violates Article III:2, that violation is not cured by applying the proceeds thereof against the liability for an income tax that is itself beyond the reach of Article III:2.

9.8 The United States suggests that in order to determine whether a tax violates Article III:2, the Panel must first determine whether a withholding scheme imposes a tax upon products or upon income. If the withholding is upon income, then no further examination is warranted under Article III:2. If, however, the tax is imposed upon products, then the Panel should decide whether there is a violation of Article III:2.

9.9 The United States points out that its examination of the written submissions by the European Communities and Argentina has not provided sufficient information for the United States to opine on whether the "advance" IG is, in fact, a tax on products, within the scope of Article III:2, or whether it is a withholding of income tax, outside the scope of Article III:2. The United States offers the following observations concerning income tax withholding, in general, and how the "advance" IG compares with normal income tax withholding practice.

9.10 The United States states that it is normal for tax authorities to impose a withholding tax on income at the source in order to secure compliance with income tax rules. Back up withholding generally applies to broad categories of transactions. A taxpayer can generally credit the back up withholding against its net income tax liability by filing a tax return; if the back-up withholding exceeds the taxpayer's net income tax, the excess is refunded. Back-up withholding is intended to enforce net-basis taxation of residents; therefore such systems generally provide an exemption for persons who are *not* taxpayers in that country. The Argentine "advance" IG does not seem to be a back-up withholding mechanism because it is imposed on the purchaser of the product, *not* the person who would be subject to tax on the payment.

9.11 Secondly, the United States observes that the "advance" IG is also unlike withholding taxes imposed on non-residents. Most countries impose substantive ("final") withholding tax on non-residents. Non-residents generally cannot be forced to file a return and pay tax on a net basis; if a country fails to collect tax when the payment is made, tax is unlikely ever to be paid. These taxes generally are imposed on investment income and other types of determinable income; payments for products generally are not subject to withholding taxes. Argentina imposes final tax on non-residents with respect to dividends, interest, royalties, service fees, rents and certain capital gains.

9.12 As noted before, the "advance" IG is imposed on the purchaser, not the person selling the products. The "advance" IG may be closest in theory to collection mechanisms that are intended to prevent a company from being left without cash to pay its taxes. However, these types of taxes are relatively rare, and generally apply to payments between the company and its shareholders, which might be suspected of colluding to avoid taxes. If the "advance" IG is, indeed, a tax on income, rather than a tax on products, then it should logically apply to all pay-

ments that reduce the amount of cash available for the payment of taxes. In addition, Argentina requires a corporation to make periodic payments of estimated income tax, which should alleviate any concerns about non-payment.

## X. INTERIM REVIEW[302,303]

### *A. Background*

10.1 In letters dated 25 October 2000, the European Communities and Argentina requested an interim review by the Panel of certain aspects of the interim report issued to the parties on 13 October 2000. Neither party requested an interim review meeting. As agreed by the Panel, both parties were permitted to submit further comments on the other party's interim review requests. The parties submitted such further comments on 2 November 2000.

10.2 Neither party requested that the Panel further review its findings with respect to the European Communities' claims under Article XI:1 of the GATT 1994. Accordingly, the interim report findings of the Panel with respect to that issue shall become the final findings of the Panel. The requests and comments regarding Articles X:3(a), III:2, first sentence, and XX(d) of the GATT 1994 are addressed in that order below.

### *B. Claim under Article X:3(a) of the GATT 1994*

10.3 Argentina raises questions concerning our conclusion that Resolution (ANA) No. 2235/96 (hereafter "Resolution 2235") is a rule of general application. According to Argentina, it applies only to ADICMA representatives and not generally. Only those specific persons are permitted to be present during the Customs clearing process. Therefore, the measure cannot be considered a rule of general application. The European Communities has responded that Argentina has incorrectly interpreted the Appellate Body's findings in *European Communities - Measures Affecting the Importation of Certain Poultry Products*[304]. The European Communities also disagrees with certain aspects of the Panel's analysis in this regard. According to the European Communities, it is the administered substantive measure which must be a rule of general application, but not the administrative measure itself, the latter being the issue under Article X:3(a).

10.4 First, we must note a point of disagreement with the European Communities characterization of a part of the findings. We did not find that only the Cus-

[302] Pursuant to Article 15.3 of the DSU, the findings of the final panel report shall include a discussion of the arguments made at the interim review stage. This Section of our report is therefore part of our findings.
[303] Unless otherwise indicated, references to paras. and footnotes in this Section are to the interim Panel report and bracketed references to paras. and footnotes are to the Final Panel report.
[304] Appellate Body Report on *EC – Poultry*, *supra*, footnote 114.

toms rules on classification and export duties were subject to Article X:1, while the administrative measure contained in Resolution 2235 was subject to Article X:3(a). What we stated was that the rules on Customs classification and export duties, among others, were the substantive rules that should be examined if necessary under other provisions of the GATT 1994. In contrast, Resolution 2235 is an administrative measure applying those substantive rules and must therefore be applied in accordance with Article X:3(a). However, we are of the view that such administrative provisions must also be published in accordance with Article X:1. We think the European Communities has seen a dichotomy between Articles X:1 and X:3(a) that does not exist, particularly in light of the reference to Article X:1 contained in Article X:3(a). The language of the Appellate Body findings in *European Communities - Poultry* was not limited to Article X:1.

10.5 Second, the above observation being made, we agree with the underlying premise of the European Communities' point. To read Article X:3(a) the way suggested by Argentina would render it virtually meaningless, particularly with respect to the term "uniformly". The distinction drawn by the Appellate Body in *European Communities - Poultry* was between rules of general application and a claimed requirement to publish information with respect to "specific transactions".[305] That is simply not an issue here. Resolution 2235 is not a transaction-specific provision. Rather there is a general right to be present accorded to ADICMA and that is generally applicable to all exports of bovine hides.

10.6 On this last point, Argentina states that the thrust of its arguments is that Resolution 2235 refers only to ADICMA representatives and that this is an identifiable operator and therefore too specific. However, the exports are not those of ADICMA but of bovine hides exporters. It is the latter as exporters who have the right to receive application of the Customs laws, regulations, decisions or rulings in a manner that is uniform, impartial and reasonable. It is the obligation to such exporters which is accorded by Article X:3(a), not to unrelated entities permitted to observe the transaction. We decline to alter our findings with respect to this issue.

10.7 With respect to the issue of confidentiality of information, Argentina argues that there is no duty under Article X to maintain confidentiality of information. Furthermore, Argentina states that this question of confidentiality was not within the terms of reference of the Panel, having only allegedly been raised by the European Communities in its first oral statement and thereafter.

10.8 With respect to the question of the terms of reference, we are of the view that the issue is properly within the terms of reference. The European Communities claimed that Resolution 2235 was inconsistent with the requirements of Article X:3(a). Thus, a measure and treaty provision were clearly defined and the basis of the claim was summarized (i.e., admission of ADICMA personnel to the

[305] Appellate Body Report on *EC – Poultry*, *supra*, footnote 114, at para. 109.

Customs clearance process).[306] It is then up to the parties to argue as to the basis for interpretation of the specific terminology of that treaty provision and how it applies to the facts at hand. This was the case here. Indeed, we note that the European Communities argued that mere presence of ADICMA representatives was inconsistent with Argentina's obligations contained in Article X:3(a). The Panel did not agree that the obligation extended so far with respect to the specific facts of this dispute but instead focussed on the issue of release of confidential information. Clearly these issues of detailed argumentation are not required to be stated in the request for establishment of a panel and therefore included in the terms of reference. We decline to change our findings in this regard.

10.9 With respect to the broader question of confidentiality under Article X, we agree with Argentina that Article X:1's language to the effect that release of confidential information is not required does not give rise to a substantive obligation to protect confidential information. The European Communities argued at one point that such was the case. We did not agree with the European Communities' arguments because, in our view, they were beside the point. The question here is what is required by the specific standards contained in Article X:3(a) in the light of the facts of this dispute. In deciding whether it is partial or unreasonable in the context of these facts for Argentina to provide confidential business information to ADICMA in contravention of the obligations of Article X:3(a), it is irrelevant that Article X:1's rules regarding publication do not establish an independent obligation to protect confidential information. We decline to change our findings in this regard.

10.10 Argentina argues that the Panel did not establish a standard for confidentiality. Argentina argues that simply because ADICMA had access to information that was not strictly necessary for its role regarding product classification, it does not follow that such information was therefore confidential. Furthermore, Argentina disagrees with the Panel's reference to the definition of confidential business information used in the Antidumping Agreement. Finally, according to Argentina, the Panel did not follow the rules of interpretation of the Vienna Convention.

10.11 With regard to the first two points, which we think must be considered together, we discussed precisely why we found the release of the information unreasonable. It was a two step process. First, was the information confidential and, second, was its release unreasonable? We confirm our reference to the language in Article 6.5 of the Antidumping Agreement (and Article 12.4 of the Agreement on Subsides and Countervailing Measures, which is identical, as the European Communities correctly points out). This definition seems logical and general in nature and it made sense in the context of the specific question before us. The information, such as pricing and the identity of the exporters, is confidential, for example, because it could be used by the downstream industry, made up

[306] See WT/DS155/2.

of ADICMA members, when negotiating for the purchase of hides from the *frigoríficos*.[307] It is unreasonable to give such information to customers and can be considered partial to them if there are no safeguards to prevent its abuse. The fact that such information was released to the downstream domestic industry in a process which did not, in itself, need such information showed why such release was unreasonable. However, the fact that the information was released did not go to the definition of whether it was "confidential".

10.12 With respect to the method of treaty interpretation, we disagree with Argentina's assertion that our analysis is not in accord with the Vienna Convention. It is true that we did not specifically cite or quote the Vienna Convention, but that is not necessary. Recitation of such treaty provisions is not required or desirable at every step. It is well accepted at this point that WTO treaty interpretation should follow the general guidance provided in the Vienna Convention. In our view, there was no need here to note a specific passage from the Vienna Convention. We simply proceeded in this section and the others contained in the findings to apply the rules. Part of the rules are that the various WTO Agreements can provide the context for interpreting terms. It is also important to recognize that a specific term can mean different things in different places as, for instance, is the case with respect to the term "like product".[308] However, we do not think that is the case here. We examined every instance in the WTO Agreements where the term "confidential" was used. We found most to be lacking in any definition, but none inconsistent with the use of the term in the Antidumping Agreement. Thus, for purposes of this specific dispute we found the definition contained in Article 6.5 of the Antidumping Agreement provided a useful reference, but only a reference. We then proceeded to review what we considered to be confidential business information in this case. We decline to change our findings in this regard.

### *C. Claim under Article III:2, First Sentence, of the GATT 1994*

10.13 With respect to footnote 456 (476), the European Communities refers to the Panel Report on *United States - Import Measures on Certain Products from the European Communities*.[309] In that report, the panel found that the additional interest charges associated with the lodging of additional bonds intended to secure the payment of increased customs duties were inconsistent with Article II:1(b), second sentence, of the GATT 1994.[310] The European Communities contends that, according to our approach, the panel in *United States - Certain Prod-*

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[307] We note that such information arguably could be used by ADICMA members to the detriment of their foreign competitors who are also purchasing hides from the frigoríficos.

[308] See the Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, *supra*, footnote 47, at 113.

[309] Panel Report on *United States – Import Measures on Certain Products from the European Communities* (hereafter "United States – Certain Products"), under appeal, WT/DS165/R and Add. 1, adopted 10 January 2001.

[310] *Ibid.*, at para. 6.62.

*ucts* should have considered these charges as part of the customs duties and therefore find them in violation of Article II:1(b), first sentence. We note that the majority on that panel considered that the WTO compatibility of the additional bonding requirement had to be determined by reference to, *inter alia*, Article II:1(b), first sentence. While it is arguable then that the WTO compatibility of the additional loss of interest could likewise be assessed under Article II:1(b), first sentence, we take no position on whether that would be the correct analysis with respect to the issue presented in *United States - Certain Products*. We consider that we have correctly interpreted and applied Article III:2, first sentence, to the issue presented in the case before us. We do not, therefore, see a reason to change our findings.[311]

10.14 The European Communities recalls that the 12.7 percent rate payable under RG 3431 by non-registered taxable persons is not creditable and requests us to reconsider para. 10.202 (11.202) with this point in mind. There is, in our view, no need to do so. We have highlighted the non-creditability of the 12.7 percent rate in paras. 10.109 (11.109), footnote 453 (473) and para. 10.202 itself. The use of the term "pre-payment" in connection with the 12.7 percent rate has been addressed in para. 10.109.

10.15 The European Communities has identified a technical error in para. 10.203 (para. 11.203). We have made appropriate corrections in para. 10.203 as well as in para. 10.199 (para. 11.199).

10.16 The European Communities has commented on paras. 10.220-10.222 (11.220-11.222), saying that our reasoning did not dispose of Argentina's defence. We disagree. Moreover, we have stated clearly that internal sales by *agentes de percepción/retención* to *agentes de percepción/retención* are subject neither to the 5 percent rate under General Resolution (DGI) No. 3337/91 nor to the 10.5 percent rate under General Resolution (AFIP) No. 18/97. Nowhere do we suggest that such transactions are subject to pre-payment at a rate of 10.5 percent. Footnote 488 (508) does not say so. It simply addresses Argentina's argument that, without an exemption from the pre-payment requirement, the transactions in question would be subject to collection *and* withholding.

10.17 Concerning footnote 498 (518), the European Communities refers to the 1970 Working Party report on Border Tax Adjustment for the proposition that so-called cascade taxes qualify for border tax adjustment. We are not persuaded by the European Communities that there is a need to discuss the aforementioned

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[311] In response to the European Communities' comment, it may further be noted that it is not inconsistent to say, as we have, that the loss or payment of interest in the present case does not, in itself, constitute a charge, but that General Resolution (DGI) No. 3431/91 (hereafter "RG 3431") and General Resolution (DGI) No. 3543/92 (hereafter "RG 3543") qualify as charges. Similarly, it is not inconsistent to say that the loss or payment of interest in the present case is incidental to the prepayment of the IVA and IG required by RG 3431 and RG 3543, but that RG 3431 and RG 3543 are not "incidental to" the IVA Law and IG Law. Indeed, it would be counter-intuitive, in our view, to conclude otherwise.

Working Party report in footnote 498. In contrast, we considered it appropriate to refer to the Working Party II report on Schedules and Customs Administration because that report specifically addresses the legal issue raised by Argentina's counter-argument. The European Communities' also requests that we drop the reference to the Appellate Body's findings in *United States - Tax Treatment for "Foreign Sales Corporations"*[312] on the grounds that that case dealt with direct taxes and is therefore irrelevant. However, the Appellate Body opinion in *United States - FSC* included pertinent reasoning on the implications of Members' choices of world-wide or territorial taxation systems and it is useful, in our view, to note this. Had Argentina supplied sufficient evidence to support its assertion in this regard, we would have addressed this issue in depth. We therefore decline to make the changes requested by the European Communities.

10.18 Regarding footnote 519 (539), the European Communities asserts that it did make a claim concerning the fact that imports for importers' own use or consumption are subject to pre-payment of the IG at a rate of 11 percent, whereas internal sales transactions are taxed at rates of either 2 percent or 4 percent. Since the European Communities has not been able to point to any statements or arguments which we might have overlooked or misunderstood, we are not persuaded to change our view. It is clear to us that the complaining party bears the risk of a lack of clarity and specificity in setting out and supporting its claims.[313] Unlike with other claims made by the European Communities, it is simply not clear from para. 96 of the EC First Written Submission or from any subsequent EC submissions that the European Communities makes a claim regarding the two rate differentials in question (i.e. 11 percent vs. 2 percent and 11 percent vs. 4 percent).[314] But the European Communities has not only failed to spell out such a claim in clear and unambiguous terms, it has also failed to present *specific* arguments to substantiate such a claim. In those circumstances, it is not possible for us to proceed to make findings in respect of this purported EC claim. Footnote 519 therefore remains unchanged but for a correction of a typographical error and a small stylistic change.

10.19 Argentina requests that the Panel reconsider its finding and conclusion in para. 10.161 (11.161) regarding the applicability of Article III:2, first sentence, to RG 3543. We see no need to accede to Argentina's request. As we stated in our findings, while RG 3543 is an aspect of a direct tax (the IG), it nevertheless is an internal charge applied to products for purposes of Article III:2, first sentence. Simply because the IG is not challenged and allegedly not inconsistent with Arti-

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[312] Appellate Body Report on *United States – Tax Treatment for "Foreign Sales Corporations* (hereafter "United States – FSC"),WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.

[313] We nevertheless note that we have evaluated all of the European Communities' claims thoroughly and in good faith. See, for example, footnote 492 (512) as well as paras. 10.201 (11.201)and 10.208 (11.208) of this report.

[314] The European Communities does not argue, in its comments on the interim report, that it is making a claim in respect of only one of the two rate differentials in question.

cle III:2, first sentence, does not alter this fact. We wish to note, however, that it does not follow from our conclusion that RG 3543 is inconsistent with Article III:2, first sentence, that Argentina cannot require the pre-payment of the IG on imports. Argentina merely needs to do so in a manner consistent with Article III:2, first sentence.

10.20 Argentina further requests modification of our conclusion in para. 10.228 (11.228). Argentina argues that, were it to provide for a minimum pre-payment threshold also in RG 3431, such a provision would be a dead letter owing to the fact that any individual effecting imports in the (small) amount concerned would be a final consumer with a status not covered by RG 3431. Even ignoring the fact that Argentina is presenting a new argument here, we note that Argentina has provided no evidence in support of its statement that all individuals importing goods in the relevant amount would be final consumers.[315] It is not obvious to us why import transactions of a specified value would necessarily involve final consumers as importers.

10.21 Argentina requests a similar modification of our conclusion in para. 10.271 (11.271). We do not, however, see a reason for doing so. While Argentina's comments in this regard are less than clear and lack specific references, it seems to us that they relate to the absence of a monthly pre-payment allowance in RG 3543. Argentina again is presenting a new argument, namely that making available a monthly pre-payment allowance also to importers would be administratively burdensome since, according to Argentina, such an allowance would only apply to small enterprises, which it alleges are not regular importers. Regarding the alleged administrative burden, we refer to our considerations in para. 10.226 (11.226), which, *mutatis mutandis*, would appear to be relevant in the present context as well.[316]

### *D. Defence under Article XX(d) of the GATT 1994*

10.22 In response to comments by the European Communities on para. 10.305 (11.304), we felt appropriate to remove part of the last sentence thereof and to clarify our understanding and assessment of the European Communities' position in the new para. 11.306 and the new footnote 564. Even ignoring the fact that we disagree with the European Communities' characterisation of its own statement, summarised at para. 8.258 (8.258), as "at best ambiguous", we note that our findings and conclusion in the relevant section of our report do not depend on it.

10.23 The European Communities has requested us to reconsider our interpretative approach to Article XX. Specifically, the European Communities requests that we find, on the basis of paras. 10.316-10.331 (11.316-11.331), that the con-

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[315] See also the last sentence of para. 10.226 (11.226) of this report.

[316] We further note that Argentina has, in any event, failed to explain and support its assertion that a monthly pre-payment allowance would apply only to small enterprises and that small enterprises are not regular importers.

tested measures are not necessary within the meaning of Article XX(d).[317] We have carefully considered the European Communities' comments, but remain unconvinced, in light, *inter alia*, of the Appellate Body report on *United States - Standards for Reformulated and Conventional Gasoline*[318], that we should follow the approach proposed by the European Communities. Notwithstanding this, we felt that the European Communities' comments warranted a clarification of certain aspects of our findings. Accordingly, we converted para. 10.304 into the new footnote 560, made changes to paras. 10.303 (11.303), 10.306-10.307 (11.306-11.307), 10.312-10.313 (11.312-11.313), 10.315 (11.315), 10.322-10.324 (11.322-11.324) and 10.330 (11.330), including, where appropriate, to the footnotes accompanying those paragraphs, and added new footnotes (562, 565-566).

10.24 In light of comments made by the European Communities and seeing that it was not essential, we decided to delete footnote 542.

10.25 Regarding the European Communities' comment on footnote 543 (560), we considered that no change was called for. It should be noted, nonetheless, that we have found it convenient to combine its content with that of the new footnote 560. It may be mentioned in this context that, contrary to what the European Communities suggests, we do not consider anything other than the actual measures before us, i.e. RG 3431 and RG 3543, to be the "measures" which we must look at in our analysis under Article XX.[319]

10.26 The European Communities also asserts that we disregard the fact that the nature and quality of the discrimination to be considered in an analysis under the chapeau is different from the discrimination at issue in an analysis under Article III. This is not the case, as is evident from para. 10.315 (11.315). Our approach and examination are, moreover, fully consistent with the Appellate Body's view that "[t]he 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."[320]

10.27 Argentina points out, regarding footnote 551 (570), that it has made statements in the course of these proceedings which it considers the Panel should reference in the footnote. Those statements do not appear to us to be directly relevant to the issue under consideration in footnote 551. It should be noted, however, that we have taken due account of the statements referred to by Argen-

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[317] The European Communities has requested changes to paras. 10.313-10.314 (11.313-11.314), without, however, explaining what it wishes the Panel to change. We therefore decline to make changes, but refer to our comments on Argentina's request for changes to footnote 551 (570).

[318] Appellate Body Report on *United States – Gasoline, supra,* footnote 269.

[319] In accordance with the approach followed by the Appellate Body in *United States – Gasoline*, we evaluate those provisions of RG 3431 and RG 3543 which, taken together, give rise to inconsistencies with Article III:2, first sentence. See the Appellate Body Report on *United States – Gasoline*, supra, footnote 269, at 12-13.

[320] Appellate Body Report on *United States – Gasoline*, *supra*, footnote 269, at 21 (emphasis added).

tina, including the fact that Argentina is a developing country Member, in our assessment of whether RG 3431 and RG 3543 fall within the terms of Article XX(d).[321] In light of Argentina's comments, we nevertheless deemed it appropriate to clarify our position by modifying footnote 551 in relevant part, but maintain our overall conclusion in para. 10.331 (11.331).

10.28 Finally, the old footnote 545 was brought forward and now is footnote 561.

10.29 The Panel has also corrected several typographical errors and made a number of minor stylistic changes.

# XI. FINDINGS

## A. *Claim under Article XI:1 of the GATT 1994*

### 1. *Measure at Issue and Overview of the Parties' Arguments*

11.1 The European Communities has alleged that certain measures imposed by Argentina restrict the export of bovine hides from Argentina. According to the European Communities this is contrary to Argentina's obligations under Article XI:1 of the GATT 1994. Article XI:1 provides as follows:

> 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.

11.2 The European Communities has argued that the measure in question, Resolution (ANA) No. 2235/96[322], operates as a *de facto* restriction on exports. Resolution 2235 provides as follows:

> *Resolution No. 2235/96 of the IAANA*
> *Hides (Export). Approval of Rules Concerning the Participation of Certain Private Entities in the Inspection Process*
>
> …
>
> HAVING REGARD TO the request in file No. 412739/96, submitted by the Association of Industrial Producers of Leather, Leather Manufactures and Related Products (ADICMA), and
>
> WHEREAS:

[321] See paras. 11.299-11.307 of this report.
[322] Hereafter "Resolution 2235".

In a submission made in 1993, the Argentinean Tanning Industry Association requested the restoration of its role in the inspection of hides destined for export;

Resolution No. 771/93 authorized officials appointed by the above-mentioned Association to participate jointly with customs personnel in the inspection of hides classified under the tariff headings set out in Annex IV hereto;

Resolutions Nos. 1650/93, 3208/93, 1024/94, 1380/94, 3746/94, 2257/95 and 134/96 extended the validity of Resolution No. 771/93 and expanded the list of the institutions involved;

The arguments put forward and the experience acquired provide reasonable grounds for granting the request made in the above-mentioned file, by making continued use of the services provided by the experts for a reasonable period of time so that the results obtained can be evaluated and a decision taken on the desirability or necessity of a further extension of those services;

It is considered appropriate to enact a regulation unifying the provisions in force;

By virtue of the powers conferred by Article 23(i) of Law 22415,

Wherefore,

The National Customs Administrator

Resolves:

Article 1. To approve the rules contained in Annexes I, II, III and IV which form an integral part of this Resolution, relating to the participation of certain private entitities in the inspection of hides destined for export operations.

Article 2. To repeal Resolutions Nos. 771/93, 1650/93, 3208/93, 1024/94, 1380/94, 3746/94, 2257/95 and 134/96.

…

ANNEX II [TO RESOLUTION 2235]

*Operative Rules*

1. The entities listed in Annex III hereto may appoint members of their staff to participate jointly with the agents involved in the inspection of goods classified under the tariff headings listed in Annex IV.

1.1 For this purpose, they shall inform this national administration of the appointment of representative experts and draw up lists of those appointed, containing particulars of each one's address, telephone and fax or telex numbers and the different customs jurisdictions in which they will be involved in joint inspection activities. They shall also keep those lists up to date.

> 1.2 The authorization hereby conferred shall be applicable in all customs jurisdictions.
>
> 1.3 In the Buenos Aires and Ezeiza customs jurisdictions, if and when the final export destinations for consumption or temporary export so require, staff may be kept on a permanent basis to carry out these support tasks.
>
> 1.4 The same facilities may be authorized in the customs departments in the interior of the country.
>
> 1.5 Final export destinations for consumption shall be checked in the case of those for which the red channel (goods to declare) was selected as well as all temporary export destinations.
>
> 1.6 Goods shall be inspected by the technical inspection and valuation unit, with the possible support of the expert appointed by the respective entity, but this will be done without holding up shipment operation if the expert is not present.

11.3 The measure in question was first implemented pursuant to a request of CICA[323]. Currently, it is implemented through the presence of representatives of ADICMA[324] in the export process. As explained by Argentina, the actual export clearance process works in the following manner:[325]

11.4 When Customs receives a notice of embarkation by the exporter or his customs clearance agent, it notifies ADICMA that a clearance operation will take place, indicating the place, day and approximate time. ADICMA may be informed of this by a telephone call from the customs inspector, but there are instances in which it is notified of the place, date and approximate time of the clearance by the exporter's own customs clearance agent.

11.5 The inspection, classification and valuation of the goods declared are carried out by the Technical Inspection and Valuation Unit (UTVV). It verifies whether what is declared in the permit of shipment is correct, whether the tariff heading indicated corresponds to the description of the goods and whether the duties and charges proposed are appropriate and also cross-checks supplementary data, the number of packages and their identity. All of this is done in the presence of the customs officer, the ADICMA representative and the exporter or his customs clearance agent. The exporter or his customs clearance agent must be present during the inspection of the goods, failing which the exporter forfeits the

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[323] CICA is the Argentinean Chamber for the Tanning Industry (Cámara de la Curtidora Argentina).

[324] ADICMA is the Association of Industrial Producers of Leather, Leather Manufactures and Related Products (Asociación de Industrias del Cuero, sus Manufacturas y Afínes). CICA itself is a member of ADICMA.

[325] See paras. 2.38-2.44 of this report.

right to raise any objections to the outcome of the inspection determined by the customs department.[326]

11.6 If the inspecting officer determines that the merchandise has been correctly classified, the shipment goes ahead. If, on the other hand, the inspecting officer detects irregularities, shipment is not allowed. To the extent that there are discrepancies in the amount, quality and/or value of the goods, a complaint is lodged either with the Disputes Section of the customs department or with the competent local customs office.

11.7 Where ADICMA representatives disagree with the decision of the inspection officers, they may submit a complaint subsequently or, if appropriate, file criminal charges with a court. According to Argentina, shipments are not stopped on account of any possible objection from ADICMA representatives. Pursuant to Resolution 2235, there must not be any delays as a result of the failure of ADICMA representatives to participate in the inspection.

11.8 The European Communities has acknowledged that the Argentinean government is not overtly limiting exports except pursuant to certain export taxes which are not the subject of the European Communities' complaint. Instead, it is alleged that the Argentinean government has knowingly put in place a system which necessarily results in improper export restrictions. The European Communities has presented a number of arguments describing how these alleged export restraints operate, but we think they can best be summarized in the following manner by a series of questions which we will address:

(a) Does the mere presence of ADICMA constitute an export restriction?

(b) If not, does the alleged fact that ADICMA, by virtue of its presence, has access to business confidential information constitute an export restriction?

(c) If not, does the alleged fact that ADICMA has access to business confidential information constitute an export restriction if taken together with the alleged fact that the tanners form a cartel in the Argentinean market?

11.9 The European Communities has provided evidence supporting their allegations which we will examine in due course as we assess the merits of the arguments. We note specifically that the core of the factual case presented by the European Communities is the allegation of low levels of exports of bovine hides from Argentina in light of higher world prices that cannot be explained in any manner other than export restrictions. The European Communities has also cited the long history of export restrictions on bovine hides and argued that the current measures must be reviewed in light of that history.

11.10 Argentina has disputed all the claims made by the European Communities. Argentina has argued that there are in fact exports of bovine hides and that the export levels are not all that different from other countries, including some mem-

[326] See Article 340 of Argentina's Customs Code.

bers of the European Communities.[327] According to Argentina, the representatives of ADICMA are there to promote accurate, efficient and effective export clearance. The Argentinean government had problems with misclassification of exports in particular. This led to an underpaying of the required export duties as well as an overpaying of certain export "refunds" available on processed hides.[328] Argentina has emphasized that ADICMA representatives do not have the authority to prohibit or even slow down exports.[329] Argentina has also stated that ADICMA representatives have access to no information that is not otherwise available through on-line services, i.e., is in the public domain.

### 2. *Burden of Proof*

11.11 The relevant rules concerning burden of proof, while not expressly provided for in the DSU, are well established in WTO jurisprudence. The general rule is set out in the Appellate Body report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses*, wherein it is stated that:

> [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. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[330]

11.12 In application of this rule, once we have satisfied ourselves that the party who asserts the affirmative of a particular claim or defence has succeeded in raising a presumption that its claim is true, it is incumbent on us to assess the merits of all the arguments made and the admissibility, relevance and weight of all the factual evidence submitted with a view to establishing whether the party contesting a particular claim has successfully rebutted the presumption raised. Should this assessment reveal that the arguments and the factual evidence adduced by the parties remain in equipoise, we must, as a matter of law, find against the party who bears the burden of proof.

11.13 Thus, it is for the European Communities as the complaining party to submit arguments and evidence sufficient to raise a presumption that Argentina acts inconsistently with its obligations under Articles XI:1.[331] If the European

[327] See paras. 4.155-4.158 of this report.
[328] See paras. 4.42-4.48 of this report.
[329] See paras. 4.61-4.66 of this report.
[330] Appellate Body Report, *United States – Shirts and Blouses*, *supra*, footnote 61, at 335. In our view, the rule set forth in this statement applies to claims of any kind, i.e. legal and factual claims.
[331] The question of burden of proof raised here applies likewise to our analyses with respect to Article X:3(a) of the GATT 1994 and Article III:2, first sentence, of the GATT 1994. In contrast, as regards Article XX of the GATT 1994, invoked by Argentina as an affirmative defence with respect to the Article III:2 allegations, the burden of proof rests with Argentina.

Communities succeeds in raising such a presumption, our task becomes a matter of weighing the evidence available to us to determine whether, on balance, we are convinced that Argentina has imposed measures incompatible with the provisions of the GATT 1994.

11.14 This dispute presented some difficulties for the Panel with respect to developing the facts. Whenever there is an assertion of a *de facto* restriction on trade, the importance of the factual analysis becomes accentuated. We have asked the parties an extensive series of questions in an attempt to understand the functioning of the market and the measure at issue in this dispute. We felt that there were facts of which we were not aware and which might be of importance and, therefore, we have not been fully satisfied that we have had a truly comprehensive view of some aspects of the situation. Ultimately, the burden of proof in any dispute rests with the complainant to support the claims made.

### *3. Nature of the Claim before the Panel*

11.15 The European Communities claims that Argentina maintains an export restriction which is "made effective" through Resolution 2235. The European Communities recognizes that nothing on the face of Resolution 2235 restricts exports of bovine hides. The European Communities maintains, rather, that Resolution 2235 constitutes a *de facto* restriction.

11.16 Argentina has responded that the participation of the private sector representatives in the inspection of raw bovine hide exports cannot contravene Article XI, which specifically refers to quantitative restrictions attributable to government action. Nor, in Argentina's view, is there any contravention here in the form of *de facto* government restrictions. Argentina argues that "other measures" in the sense of Article XI cannot be just any kind of measures. GATT/WTO practice provides that the requirements of Article XI be met by authorization for private action that is mandatory or binding in nature and those requirements are not met here.

11.17 There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.[332] It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of "other measures".[333]

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[332] See the Panel Report on Japan – Trade in Semi-Conductors, adopted on 4 May 1988, BISD 35S/116, at paras. 105-109. In other contexts, see the Appellate Body Report on *European Communities – Bananas*, *supra*, footnote 111, paras. 232-234, citing European Economic Community – Imports of Beef from Canada, adopted on 10 March 1981, BISD 28S/92; Spain – Tariff Treatment of Unroasted Coffee, adopted on 11 June 1981, BISD 28S/102, and Japan – Tariff on Imports of Spruce-Pine-Fir (SPF) Dimension Lumber, adopted on 19 July 1989, BISD 36S/167.

[333] RG 2235 neither establishes a "quota" nor sets up a regime of "export licences".

11.18 Furthermore, and notwithstanding Argentina's assertion to the contrary, Resolution 2235 is, in our view, a legally binding governmental measure.[334] It is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1. This said, we recall the statement of the panel in *Japan - Measures Affecting Consumer Photographic Film and Paper* to the effect that:

> [P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.[335]

11.19 We agree with the view expressed by the panel in *Japan - Film.* However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.[336]

11.20 Finally, as to whether Resolution 2235 makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows.[337] In order to establish that Resolution 2235 infringes Article XI:1, the European Communities need not prove actual trade effects. However, it must be borne in mind that Resolution 2235 is alleged by the European Communities to make effective a *de facto* rather than a *de jure* restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.

11.21 Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions,[338] it is necessary for a complaining party to establish a causal link between the contested measure and the low level of ex-

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[334] We note that, even though the measure merely authorizes presence, it is still binding in the sense that it gives a right to be present to a private entity, ADICMA, which right cannot be retracted at the discretion of the government.

[335] Panel Report on *Japan – Film, supra*, footnote 34, para. 10.56.

[336] As we understand it, Article XI:1 does not incorporate an obligation to exercise "due diligence" in the introduction and maintenance of governmental measures beyond the need to ensure the conformity with Article XI:1 of those measures taken alone.

[337] See the Appellate Body Reports on *Japan – Taxes on Alcoholic Beverages* (hereafter "*Japan – Alcoholic Beverages II*"), *supra*, footnote 47, at 110; *Korea – Taxes on Alcoholic Beverages*, *supra*, footnote 264, paras. 119-120 and 127.

[338] For example, it will be recalled that in the present case there is an export duty on raw hides which has not been challenged.

ports.[339] In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports.

*4. Mere Presence of Tanners' Representatives as an Export Restriction*

11.22 The European Communities acknowledges that the representatives of the tanning industry do not have the *de jure* ability to halt bovine hide exports. However, according to the European Communities, having such representatives present during the export clearance process in itself restricts exports in the context of the facts of the case. The European Communities has advanced several reasons why this might be so. The European Communities refers to the GATT dispute of *Japan - Semiconductors* for the proposition that there can be export restrictions without overt actions by the government to physically stop exports. According to the European Communities, in that case it was sufficient for the government to set up a system where peer pressure was used to discourage exports. In the present case, the European Communities urges that Argentina be found to have violated Article XI by encouraging - as a consequence of allowing CICA/ADICMA presence - that pressure be applied by the tanneries on a *frigorífico* not to export. In this case it is not peer pressure from other exporters of hides. Rather, *frigoríficos* will be inhibited by the more powerful pressure from customers who might refuse to buy hides domestically from a *frigorífico* found to be exporting hides.

11.23 The European Communities also asserts that by participating in the process, the tanners can pressure Customs officials to prevent shipments of hides. The European Communities further argues that the ADICMA representatives can operate to delay shipments for weeks or even months and that such delays can be very harmful commercially. Indeed, delays can result in unacceptable physical deterioration of the products.

11.24 The European Communities has argued that the extraordinarily low levels of shipments of bovine hides from Argentina serves to support these allegations. The European Communities argues that export statistics demonstrate that a mere 1/1500 of Argentina's production of bovine hides are exported raw and that this is extraordinarily low particularly in light of the price differential between Argentinean domestic prices and those available on the international market. The European Communities cites information from an investigation by the United States

[339] The Appellate Body in European Communities – Measures Affecting the Importation of Certain Poultry Products similarly required of the complaining party in that case a demonstration of a causal relationship between the imposition of an EC licensing procedure and the alleged trade distortion. See the Appellate Body Report *on European Communities – Poultry*, *supra*, footnote 114, paras. 126-127. While this interpretation related to a claim under the Agreement on Import Licensing Procedures, it is not apparent why the logic should be any different in the case of a claim under Article XI:1 of the GATT 1994.

International Trade Commission as well as some other evidence for the proposition that Argentina's domestic raw hide prices are 30 percent lower than what would be available in the export market. Even the 15 percent export duty (which has declined to 10 percent and is scheduled to decline further to five percent) would not make up for this differential. The European Communities claims that the quality levels are comparable and also would not account for the price differential. The European Communities notes that the *frigoríficos* are active exporters of meat and that there is thus no lack of knowledge or expertise which should operate to inhibit them from taking advantage of these higher international prices.

11.25 Argentina has responded that there are in fact exports of bovine hides, so it remains unproved by the European Communities that there is any such pressure mechanism in effect. Moreover, according to Argentina, the European Communities' assertions do not make sense. Hides represent only about ten percent of the value of a slaughtered animal. They are only by-products. It is illogical that *frigoríficos* would be intimidated by the mere presence of an ADICMA representative with respect to the export of something of only residual value to them. There is no leverage. Furthermore, even if the tanners did refuse to buy hides domestically from *frigoríficos* that exported, the exporters would, according to the European Communities' own arguments find ample international customers for their products. In such a case, all of that *frigorífico's* hides could be exported and it would not be reliant on the domestic tanning industry. Again, there is no pressure mechanism.

11.26 Argentina has responded to the other arguments of the European Communities by stating that it would be contrary to Argentinean law for Customs officials to prevent exports pursuant to the pressure of ADICMA. As for ADICMA causing delays of shipments, Argentina cites the lack of either legal authority or factual evidence for such occurrences.

11.27 With respect to the export levels, Argentina has challenged the data presented by the European Communities. Argentina disagrees that it has an extraordinarily low level of exports, claiming that its exports of raw hides are not dissimilar from EC member States' exports to non-EC markets. Furthermore, according to Argentina, there is demand in Argentina for more hides than can be produced by the domestic industry and, therefore, the local supply is absorbed almost completely rather than exported. Argentina also claimed that there are significant quality differences that explained the discrepancy in prices. Furthermore, the cost of exporting could be as much as 20 percent higher than selling locally, according to Argentina.

11.28 The European Communities has advanced several theories as to why the presence alone of ADICMA representatives might result in export restrictions. However, the European Communities as complainant cannot rely on mere theories alone. This should not be construed to mean that a complaining party may not establish the existence of an export restriction largely on the basis of circumstantial evidence. It clearly may. However, in our view, a panel cannot, consistently with its obligation to make an objective assessment of the matter before it,

draw inferences from the circumstantial evidence placed on record, unless that evidence clearly and convincingly sustains the complainant's suggested conclusion.[340]

11.29 We are not persuaded by the circumstantial evidence presented to us by the European Communities. This evidence simply does not lead to the conclusion that there is a restriction on exports by reason of the mere presence of ADICMA personnel. It seems to us that the exports of hides from Argentina may be lower than what could normally be expected. This is particularly so in light of the evident price premium that *frigoríficos* could obtain by exporting even taking into account the export duties. We recognize that there almost certainly are higher costs in exporting rather than selling domestically, although the 20 percent cited by Argentina may be too high. There may also be some quality differences, but we do not think the evidence supports Argentina's contention that the differences are dramatic. Thus, we are of the view that, overall, there would be some, albeit undefined, price premium to the *frigoríficos* for exporting which may not be consistent with the low levels of exports. But that is not enough to show that there are export restraints or, if there were, that *this* measure in dispute is the way in which such export restriction is "made effective".

11.30 For example, there is no evident reason why ADICMA needs the right to be present at the Customs inspection of specific export shipments for it to be able to exert pressure on Customs officials. ADICMA and the individual tanners themselves also could attempt to influence the decisions of Customs officials from outside the Customs house, i.e. without being present during the Customs inspection of export shipments of raw hides.

11.31 It must be stated, in addition, that if an attempt on the part of ADICMA to put pressure on the Customs officials in charge of a particular inspection were successful, those officials would act unlawfully under Argentinean law.[341] However, absent evidence to the contrary, it cannot simply be presumed that Customs officials bow to possible pressure from ADICMA. Even disregarding that, if we were to find that Argentina violates Article XI:1 on the basis that uncondoned, unlawful conduct by its Customs officials would have a trade-restrictive effect we would be engaging in a most expansive reading of Article XI that is not justified

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[340] For an analogous approach to the proper weight to be given to circumstantial evidence see the judgement of the International Court of Justice (ICJ) in the Corfu Channel Case (Merits), Judgement of 9 April 1949, ICJ Rep. 1949, p. 18. We recognize that there are distinctions between that case and the present dispute. In the Corfu Channel case, the question was whether circumstantial evidence could support a finding with respect to a factual aspect of the case rather than a legal conclusion as here. However, as that factual point was so central and led so directly, if established, to the legal conclusion, we believe the reference is useful.

[341] See paras. 4.61-4.62 of this report.

by either the text of that Article nor the GATT/WTO jurisprudence that has developed with respect to it.[342]

11.32 It is clear from the foregoing that, for it to carry weight, the European Communities' argument that ADICMA representatives may attempt to put pressure on Customs officials must be buttressed by sufficient factual evidence. The European Communities, however, has not submitted any such evidence. Furthermore, in reply to a question of the Panel, the European Communities stated that it was not aware of any instances where a specific export shipment was unjustifiably refused clearance by Customs officials.[343]

11.33 On the basis of the above considerations, we are unable to accept the European Communities' argument that the mere presence of ADICMA representatives during Customs inspections constitutes an export restriction because those representatives may attempt to exert pressure on the Customs officials in charge. We also do not agree that there is an inherent "chilling effect" on the exporter in this factual situation that rises to the level of an export restriction under Article XI.

11.34 The European Communities' other argument in support of its claim is that export shipments may be delayed in the event of disagreement between the Customs officials performing the inspection and the ADICMA representatives acting in accordance with their support function. The European Communities refers to delays of several weeks or one month as being particularly harmful. The European Communities does not explain, however, why a disagreement over product classification should give rise to a delay of several weeks. We note in this respect that it is the sole legal responsibility of Customs officials to carry out the Customs clearance. Whether or not ADICMA representatives agree with the decisions reached has no legal relevance.[344] We note further, based on information supplied by Argentina, that in case of disagreement ADICMA representatives cannot hold up the export shipments in question, but may only initiate administrative or criminal proceedings. Furthermore, we must add that the European Communities has not adduced any evidence which would show that disagreement between Customs officials and ADICMA representatives have ever occurred. In reply to a question of the Panel as to whether the European Communities had any evidence of instances where export shipments were unduly delayed by Customs

[342] For instance, as an additional matter, the European Communities would also need to prove that this private action was attributable to the Argentinean government under the doctrine of state responsibility, but because the initial factual point has not been established, we do not need to reach that issue here.
[343] EC reply to Panel Question 6.
[344] Argentina has acknowledged that Customs officials in practice like to have evidence, in the form of a signature, attesting to the presence of ADICMA representatives. Argentina has, however, stated that such signatures are not relevant for purposes of Customs clearance. In any event, the European Communities has not argued that this practice gives rise to delays in Customs clearance.

officials, the European Communities stated that it had no knowledge of such instances.[345]

11.35 We agree that it is unusual to have representatives from a downstream consuming industry involved in the Customs process of export clearance. As noted above, it seems to us that the levels of exports of raw hides from Argentina may be low. The European Communities has stated the matter to us in the form of a rhetorical question - what other purpose could these downstream industry representatives have in this government process of export clearance than restricting exports? However, it is up to the European Communities to provide evidence sufficient to convince us of that. In this instance, we do not find that the evidence is sufficient to prove that there is an export restriction made effective by the mere presence of tanners' representatives within the meaning of Article XI.

#### 5. *Presence of Tanners' Representatives along with Access to Information as an Export Restriction*

11.36 The European Communities argues that ADICMA and its members have access to certain confidential business information of the *frigoríficos*. The European Communities alleges that a broad range of information is made available to the tanners through ADICMA. This includes prices, quantities, destination and, most significantly, the identity of the exporter. The European Communities offered as evidence a two page document[346] the first page of which shows the name of the exporter and the second of which was signed by an ADICMA representative. The European Communities also referred to a statement made by the *frigoríficos* complaining that their commercial secrets were being compromised as a result of Resolution 2235.[347]

11.37 According to the European Communities, the *frigoríficos*, like any businesses, do not want to give up confidential business information to their customers. This results in an inhibition to export in light of the sensitivity of information made available and the parties to whom it is provided.

11.38 Argentina denies that confidential business information of the *frigoríficos* is being provided to the tanners. Argentina states that the document with the ADICMA signature is not relevant to the dispute. It is an ADICMA document rather than a government document and it deals with exports of wet blue splits from a tannery rather than raw hides from a *frigorífico*. Argentina also stated that it was a two-sided document and argued that a signature on the second page does not mean that the person signing it saw any allegedly confidential information on the first page.

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[345] See paras. 4.60 and 4.63 of this report.
[346] Exhibit EC I.35.
[347] Exhibit EC I.28.

11.39 With respect to the press statement by the *frigoríficos*, Argentina simply questions its probative value. In response to a direct question from the panel, Argentina argues that ADICMA no longer has access to the name of the exporter or importer.[348] However, FOB price information as well as the country of destination and the means of transport are available. According to Argentina, these data are available through on-line services and are in the public domain. ADICMA does not have access to them by reason of the measure in question.

11.40 Obviously, there is a disagreement between the parties as to exactly what information is made available to the tanners and under what conditions. With respect to the identity of the exporter, we have seen a document[349] that is related to the export of products from tanners. While we note that this document addresses exports of downstream products and not hides shipped by *frigoríficos*, we also recognize that it seems to be a document generated generally with respect to Resolution 2235. Argentina argued that this was not an "official" document. However, it was signed by an Argentinean Customs official on the bottom of the first page, so we fail to see the significance of Argentina's point in this regard. Finally, Argentina argued that this was a two-sided document and that the ADICMA representative signed only the second page, thereby not proving that he had actually seen the first page.[350] Even though we have some concerns with Argentina's explanations, we nonetheless must note that, in our view, this single exhibit is not sufficient evidence to reach a conclusion that the identities of the exporters have actually been revealed in specific instances.

11.41 As for the other information, it does appear to be made available to ADICMA, but not necessarily by reason of this measure. The European Communities has argued that this does not justify the release of confidential information pursuant to Resolution 2235 because that information is improperly made available elsewhere. The question here is whether *this* measure results in an export restraint contrary to Article XI. It cannot be the case that exporters will feel inhibited by this measure letting ADICMA be present and having access to certain confidential business information when that information is not actually confidential because it is otherwise available. There can be no export inhibition from *this* measure in this regard.[351]

11.42 That leaves us with only the question of the identity of the exporter. Argentina has argued that its Customs laws are balanced in that the exporters them-

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[348] Argentina acknowledges that such information may have been available as recently as May 1999, but that it was no longer being provided by Customs.

[349] Exhibit EC I.35.

[350] We note that it is difficult to see why the ADICMA representative would sign a document on its empty second page apparently in attestation of the information on the first page which he allegedly has not seen. Nonetheless, we must acknowledge that there was no direct evidence presented to us to contradict Argentina's assertion.

[351] We note that this conclusion is distinct from the issue of whether it is reasonable to reveal such information as a part of the Customs process. That will be dealt with in Section XI.B.3(c) of this report.

selves can be present during the Customs process. Thus, it seems clear to us as a general matter (as opposed to specific instances, of which we have no definitive proof) that in exercising their right to be personally present, the exporters will, at least potentially, give up the confidentiality of their identity. Does the revelation of this information along with the presence of ADICMA personnel result in prohibited export restrictions? Again, we are in the situation described in the previous Section where we are drawing inferences from circumstantial evidence. The question is whether such circumstantial evidence clearly and convincingly leads us to the conclusion proposed by the complainant and, effectively, no other. Even if we were to assume that information, including the name of the exporter, is released during the Customs clearance process, we are not convinced that this has resulted in an export restriction in this case. In the absence of additional evidence, we remain unconvinced that releasing such information in and of itself necessarily leads to export restrictions. Indeed, it is often an affirmative public relations goal of companies to describe their export activities. If an exporter does not want its name revealed for some purposes, confidentiality may be appropriate as a matter of Customs practice, but we will address that subsequently. Just the fact of presence of ADICMA personnel as well as the potential for revelation of the name of an exporter cannot suffice to prove that there is an export restriction.

11.43 We are not convinced by the evidence before us that the presence of the tanners' representatives along with the alleged access to information results in a chilling effect on exporters resulting in an export restriction. There must be some other proven allegation as to why such revelation of information leads to a conclusion of an export restriction for us to find a violation of Article XI on these grounds. We address the further allegations of the European Communities in this regard in the next Section.

*6. Presence of Tanners' Representatives, Access to Confidential Information and Abuse of Such Information as an Export Restriction*

11.44 The European Communities has argued that, in fact, the Argentinean tanners do abuse the information to which they have access. According to the European Communities, there is a reason for the *frigoríficos* to be concerned about the release to their domestic customers of their confidential business information, particularly the name of the exporters. The European Communities alleges that there is a cartel of tanners operating in the Argentinean market and that this cartel has as one of its objects the stifling of exports of its raw materials, bovine hides.

11.45 The European Communities has supported these allegations by introducing several pieces of information. Among these are a trade magazine article describing the structure of the Argentinean tanning industry as being concen-

trated.[352] Also, a statement has been provided from the president of the association of *frigoríficos* to the effect that price collusion is taking place.[353] The European Communities also point in particular to an explanation offered by a member of the *Congreso de la Nación* regarding a draft law introduced in 1992 to the effect that there was a pricing cartel among the tanners.[354] The European Communities points out that the member who provided this explanation is now Argentinean Secretary of State for Agriculture. The European Communities also provided a copy of a recent newspaper editorial referring to these restrictions.[355]

11.46 The European Communities also argues that the Panel must take into account the historical context for the measures in question. The European Communities notes that in 1972 Argentina imposed a prohibition on exports of raw (wet salted) bovine hides with the stated objective of "protect[ing] the adequate supplies of bovine hides to the tanning industry".[356] In 1979, following a Section 301 petition filed with the U.S. government by the U.S. Tanners council, Argentina committed itself to convert the export prohibition into an export tax which was to have been phased out within a certain time-frame. In 1985, Argentina introduced a "suspension" on exports of raw hides and semi-finished leather in order "to maintain the volume of supply in raw materials adequate to the needs of the domestic market of the leather tanning and manufacturing sector facilitating a smooth flow of supplies while avoiding any undue increase in prices".[357] In 1992, the "suspension" was replaced by an export duty of 15 percent on the exports of raw bovine hides and bovine wet blue as well as an additional tax which was later abolished.[358] In 1993, Argentina authorized the presence of CICA representatives during customs inspection of raw bovine hides and wet blue bovine hides destined for export.[359] This authorization applied to the same products that were subject to the aforementioned export duty. Finally, in 1994, Argentina for the first time authorized ADICMA representatives to participate in the customs inspection not only of raw hides and wet blue hides destined for export, but also of products destined for export which fall under customs position 4104, which includes finished leather and furs.[360]

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[352] Exhibit EC I.26.
[353] Exhibit EC I.28.
[354] Exhibit EC I.36.
[355] Exhibit EC I.56. Argentina contested the Panel's decision to accept this exhibit because it was submitted after the deadlines set out in the working procedures and without the necessary showing of good cause. However, we were informed that the article in question was only published after the passing of the initial deadlines. In light of this and considering the paucity of probative information provided in this dispute, we considered it appropriate to accept the exhibit. Also, Argentina had the opportunity to comment on the article and did so.
[356] Decree No. 2861/72.
[357] Resolution No. 321/85 (Exhibit EC I.6).
[358] Resolution (MEyOSP) No. 537/92 (Exhibit EC I.7).
[359] Resolution (ANA) No. 771/93 (Exhibit EC I.11).
[360] Decree No. 2275/94 (Exhibit EC I.8).

11.47 According to the European Communities, in light of both the current cartelized tanning industry and the stated goals of the industry as they have been implemented historically, there is a great incentive for the *frigoríficos* not to export their products and risk losing their domestic customers. The European Communities argues that the measure in question, Resolution 2235, provides the means for making effective these export restrictions.

11.48 Argentina responds to the European Communities' allegations by claiming that the European Communities has provided no specific evidence to support the allegations. A self-serving statement by the *frigoríficos* does not suffice to prove anything. The *frigoríficos* do not even provide any evidence themselves of the allegations they are making. Argentina points out that no complaints have been received by the Argentinean competition authority. Furthermore, the European Communities' allegations are not logical. The tanners and the *frigoríficos* have essentially equal bargaining power, particularly in light of the fact the value of the raw hides is only about 10 percent of the value of the slaughtered animal. Because hides are a mere by-product for the *frigoríficos*, that is the real reason they have not paid much attention to exporting; the risks and costs are not worth the rewards in an ancillary line of business. Furthermore, the *frigoríficos* have larger overall sales than the tanners, hardly making them presumptively subject to pressure from the tanners not to export their raw hides.

11.49 We begin by noting that it is possible that there is a cartel operating among the tanners. It is possible that they collude to set prices. But this leads to another question. Namely, it is not at all clear what the relationship is between an alleged price cartel (operating either vertically or horizontally - the European Communities has been vague about this) and the alleged export restrictions. Indeed, even assuming we are looking at a vertically operating cartel (i.e., an agreement by cartel members not to pay more than a certain price for raw materials) imposed on the suppliers of raw hides, there is no direct link to a quantitative export limitation resulting therefrom. More analytical steps are needed to move from one to the other (e.g., the price cartel has created and enforced a surplus domestic supply of hides by restricting exports) and each step would need to be supported by some evidence. The allegations by a parliamentarian (even one who is now a Secretary of State) and the various mentions in newspaper articles do not serve to prove that there is a cartel operating, much less how it operates and why such operation leads to export restrictions.

11.50 It is the case, as we have discussed above, that the levels of exports of hides from Argentina seem to be unusually low. It also seems that the price of hides in Argentina is lower than the world price and does not seem to correlate to the low level of exports. However, this is not enough. As we also discussed, in situations where circumstantial evidence is used, it must lead clearly and convincingly to the conclusion sought. Reasonable alternatives must be eliminated. It is simply not sufficient for the European Communities to assert that there is no *ratio legis* for Resolution 2235 other than for it to be designed to restrict exports. The European Communities must prove it and, in our view, it has not.

11.51 In our view, it is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility. But we have not reached that stage here. It may be the case that it will be difficult for one Member to prove that there is a cartel operating within the jurisdiction of another Member. Nonetheless, we cannot ignore the need for sufficient proof of a party's allegations simply because obtaining such proof is difficult.

11.52 The evidence before us is quite thin. We have a newspaper article and opinion piece, a press release from the *frigoríficos* and a statement by a member of the *Congreso de la Nación*. Such evidence would certainly not support a case in a domestic court. While it may be an open question whether the same quantum of evidence is necessary to support such allegations in a WTO dispute under Article XI of the GATT 1994, surely the difference cannot be that great. What is clear is that whatever level of proof may be required, it was not reached here. And we note again that there is no obligation under Article XI for a Member (Argentina in this instance) to assume a full "due diligence" burden to investigate and prevent cartels from functioning as private export restrictions.

11.53 It remains a possibility that individual tanners might abuse the information obtained through participation in the Customs process. However, as the European Communities has implicitly acknowledged in the way its argument has been presented, only collective action can result in an export restriction. If one tanner misuses the information, a *frigorífico* may always sell to another.[361] We must also emphasize that the European Communities has also not provided sufficient evidence to support a claim even of a chilling effect which results in a restriction on exports due to the potential for individual tanners to abuse information.

11.54 As we discussed above, the European Communities must prove that this measure is taken to make an export restriction effective. Indeed, it is entirely possible to conclude that such an export limiting cartel could operate wholly independently of this measure. The European Communities would have had to prove that there was a causal relationship rather than a coincidental one here. Even if we were to agree that there were a cartel operating in this industry, there is simply no proof that Resolution 2235 is what is causing (or making effective) the export restriction.

11.55 Thus, in conclusion, we do not find that the evidence is sufficient to prove that there is an export restriction made effective by the measure in question within the meaning of Article XI of the GATT 1994.

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[361] With respect to abuse of the information in a manner other than imposition of export restrictions, we will deal with that possibility in the Section XI.B.3 of this report.

## B. Claim under Article x:3(a) of the GATT 1994

### 1. Measure at Issue and Overview of the Parties' Arguments

11.56 Article X:3(a) of the GATT 1994 provides as follows:

> 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.

11.57 Article X:1 of the GATT 1994, as referenced by Article X:3(a), provides as follows:

> 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.

11.58 The European Communities' claim under Article X:3(a) relates to Argentina's Resolution 2235, i.e. the same Resolution which the European Communities is challenging under Article XI:1. The European Communities argues that the presence of "partial and interested" representatives of the tanning industry makes an impartial application of the relevant customs rules impossible.[362] The European Communities also considers that it is not "reasonable" within the meaning of Article X:3(a) that the interested industry is informed of all attempts at exports by those from whom they wish to obtain the exclusive right to purchase hides.[363] The European Communities argued that the Argentinean administration of its laws also was not "uniform". According to the European Communities it was improper for Argentina to construct a special set of procedures for administering its export laws for only one type of product. Other products are subject to export duties or are eligible for export "refunds". In light of this, hides should not be singled out.

11.59 Argentina considers that the European Communities' claim under Article X:3(a) should fail. First, Argentina notes that the European Communities has failed to explain what is not reasonable about industry participation in the cus-

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[362] See para. 4.166 of this report.
[363] See para. 4.167 of this report.

toms procedures at issue.[364] The law was impartial because the exporter has a right to be present as well. Also, the law was not administered in a non-uniform manner because other industries in a similar position could obtain such treatment, but no such requests had been received. Moreover, Argentina argues that, in any event, Article X:3(a) only applies where a Member applies its trade rules *vis-à-vis* other Members. Thus, Argentina could only be found to be violating Article X:3(a) if, for instance, Resolution 2235 required industry presence only when hides were exported to the European Communities.[365] The Resolution, however, governs exports of bovine hides to all countries.

### 2. *How Article X:3(a) Relates to Other Provisions of the GATT 1994*

#### (a) General

11.60 Regarding the relationship of Article X:3(a) to other provisions of the GATT 1994, the Appellate Body has made the following statement:

> The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[366]

11.61 Thus, it is incumbent upon us to ensure that in our analysis we focus on the administration of the Customs laws of Argentina. We must not look at issues which would constitute violations of the "substantive" provisions of the GATT 1994. In this dispute, those involved allegations of inconsistency with Article XI and have already been examined.

#### (b) Article X:3(a) and MFN

11.62 Argentina has argued that Article X:3(a) only applies in situations when there is discrimination in treatment with respect to, in this case, exports to two or more Members. Argentina cites the European Communities' appeal in *European Communities - Bananas*, wherein Argentina notes that the European Communities appealed on the issue of:

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[364] See para. 4.178 of this report.
[365] See paras. 4.187-4.188 of this report.
[366] Appellate Body Report on *European Communities – Bananas*, *supra*, footnote 111, para. 200 (emphasis in the original). See also the Appellate Body Report on *European Communities – Poultry*, *supra,* footnote 114, para. 115, wherein the Appellate Body emphasized that to the extent Brazil's appeal related to the substantive content of the EC rules rather than to their publication or administration, it fell outside of Article X.

> [W]hether the requirements of uniformity, impartiality and reasonableness set out in Article X:3(a) preclude the imposition of different import licensing systems on like products imported from different Members.[367]

11.63 According to Argentina, the European Communities has not demonstrated that there is such differential treatment taking place. Indeed, there is none according to Argentina as can be seen from an examination of Resolution 2235. It is completely neutral on its face and in its application. It applies equally to exports destined to any Member.

11.64 The European Communities responded that there is no requirement that Article X:3(a) apply only in situations where there is non-MFN treatment. Indeed, such a requirement would be counter to the point that Article X does not apply in situations where there is a violation of a substantive provision of the GATT 1994. The European Communities also stated that it could, in any event, be argued that such non-MFN application of Customs laws and regulations could be considered inconsistent with the requirement of Article X:3(a) that such application be "uniform", but to make that the only basis for a complaint would effectively nullify the other requirements of impartiality and reasonableness.

11.65 In our view, in the appeal of the European Communities in *European Communities - Bananas,* the European Communities was not arguing to the Appellate Body in that case that Article X:3(a) was limited to situations where there was non-MFN application of Customs laws and regulations. The European Communities was actually arguing exactly the opposite and claimed that the error was to read an MFN requirement into Article X:

> According to the European Communities, the Panel distorted the interpretation of this provision in such a way that the Article is now equivalent to a repetition on the most-favoured-nation ("MFN") provision in Article I:1 of the GATT 1994.[368]

11.66 In fact, the Appellate Body agreed with the position of the European Communities in this regard.[369] Furthermore, this is precisely what Argentina has argued when it claims that Article X:3(a) does not apply in this case because it is a substantive rule which must be addressed exclusively under the substantive provisions of the GATT 1994.

11.67 In our view, there is no requirement that Article X:3(a) be applied only in situations where it is established that a Member has applied its Customs laws and regulations in an inconsistent manner with respect to the imports of or exports to two or more Members.

11.68 Furthermore, Article X:3(a), by its terms, calls for a uniform, impartial and reasonable administration of trade-related regulations. Nowhere does it refer to Members or products originating in or destined for certain Members' territo-

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[367] Appellate Body report, *European Communities – Bananas*, *supra*, footnote 111, para 199.
[368] *Ibid.*, at para. 32.
[369] *Ibid.*, at para. 201.

ries, as is explicitly contained in other GATT 1994 Articles such as I, II and III. Indeed, Article X:1 requires the prompt publication of trade-related regulations "so as to enable governments and *traders* to become acquainted with them." Similarly, Article X:3(b) requires Members to provide for domestic review procedures relating to customs matters to which normally only private traders, not Members would have access.[370] These references undercut Argentina's argument that Article X can only apply in situations where there is discrimination between WTO *Members*.

(c) Substantive Rules Versus Administration

11.69 Argentina has argued that the European Communities has no grounds for alleging a violation of Article X:3(a) because the European Communities essentially is challenging the substance of a regulation and not its administration. According to Argentina, this is explicitly contrary to the Appellate Body's holdings in *European Communities - Bananas* and *European Communities - Poultry*. According to Argentina, Resolution 2235 is a substantive rule that is not subject to Article X:3(a) as such.

11.70 We are not persuaded by Argentina's arguments in this regard. In our view, Argentina has attempted to stretch the Appellate Body finding that Article X is not applicable when the alleged inconsistency involves the substance of another GATT 1994 provision, to argue that Article X cannot be referred to when challenging the substance of any measure. Of course, a WTO Member may challenge the substance of a measure under Article X. The relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994.

11.71 If the substance of a rule could not be challenged, even if the rule was administrative in nature, it is unclear what could ever be challenged under Article X. First, there is no requirement in Article X:3(a) that it apply only to "unwritten" rules. Again, this would be contrary to that provision's own language linking it to Article X:1. Second, such an approach would also likely run counter to the other aspect of the Appellate Body's holding in *European Communities - Poultry* regarding Article X, to the effect that it applies to rules of general application and not to specific shipments.[371] Looking only to individual Customs officers' enforcement actions, rather than measures such as Resolution 2235, as Argentina implies, would almost certainly require a review of a specific instance of

[370] In fact, Article X:3(b), in its second sentence, uses the word "importer".

[371] In European Communities – Poultry, the Appellate Body further stated that Article X is relevant only to measures "of general application" and not to the particular treatment of each individual shipment. See the Appellate Body Report on *European Communities – Poultry*, *supra*, footnote 114, paras. 111 and 113.

abuse rather than the general rule applicable.[372] This would effectively write Article X:3(a) out of existence, which we cannot agree with.[373]

11.72 Thus, we are left with a situation where we have a written provision, Resolution 2235, and we need to determine whether this Resolution is substantive or administrative. In our view it is administrative in nature and therefore properly subject to review under Article X:3(a). Resolution 2235 does not establish substantive Customs rules for enforcement of export laws. Argentina has pointed out that those are contained primarily in the Customs Code (Law No. 22415), Resolution (ANA) No. 1284/95 and Resolution (ANA) No. 125/97.[374] Rather, Resolution 2235 provides for a means to involve private persons in assisting Customs officials in the application and enforcement of the substantive rules, namely, the rules on classification and export duties. Resolution 2235 does not create the classification requirements; it does not provide for export refunds; it does not impose export duties. It merely provides for a certain manner of applying those substantive rules. This measure clearly is administrative in nature.

(d) Laws of General Application

11.73 Argentina has also argued that Article X should not apply in this case because it only relates to laws of general application and does not apply to the handling of specific shipments of products. This question arises because Article X:3(a) refers specifically to the method of application of measures identified in Article X:1. Article X:1, in turn, states that it applies to "laws, regulations, judicial decisions and administrative rulings of general application ..." According to Argentina, Resolution 2235 only refers to the right of ADICMA representatives to be present at the time of particular shipments and only those shipments are thus affected. It is, according to Argentina, a very shipment-specific regulation.

11.74 We cannot agree with Argentina in this regard. In our view, Resolution 2235 provides for a right generally for ADICMA representatives to be present. Whether they actually are present in any given instance is not relevant to our consideration. We are examining the existence of that right to be present along with corollary factors such as access to information.

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[372] We make this statement arguendo and do not imply agreement with Argentina's implicit assumption of no violation in such instances.

[373] See the Appellate Body Reports on *United States – Gasoline*, *supra*, footnote 269, at 21; *Japan – Alcoholic Beverages II*, *supra*, footnote 47, at 104; *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina - Footwear (EC)*"), WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 81.

[374] Even some of these provisions arguably are procedural in nature.

11.75 As noted in the previous Section, we have another difficulty with Argentina's argument. It would seem that any rule of "general application" would be deemed a substantive rule by Argentina based on its use of that term elsewhere in its arguments. This would then leave a situation where any rule of general application could not come under Article X because it would involve substantive rules rather than administrative ones. On the other hand an administrative rule, as that would appear to be defined, could not be a rule of general application. This also would render Article X effectively a nullity, which obviously cannot be the case.

### 3. *Is Resolution 2235 Uniform, Impartial and Reasonable?*

#### (a) General

11.76 Having decided that Resolution 2235 is properly subject to the provisions of Article X:3(a), we must next test it against the requirements that the Customs laws of Argentina be applied in a manner that is uniform, impartial and reasonable. In applying these tests, it is important to recall that we are not to duplicate the substantive rules of the GATT 1994. Thus, for example, the test generally will not be whether there has been discriminatory treatment in favor of exports to one Member relative to another. Indeed, the focus is on the treatment accorded by government authorities to the traders in question. This is explicit in Article X:1 which requires, *inter alia*, that all provisions "shall be published promptly in such a manner as to enable governments and *traders* to become acquainted with them." (emphasis added). While it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically references the importance of transparency to individual traders.

11.77 Thus, it can be seen that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a possible impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc.

#### (b) Uniformity

11.78 The European Communities has argued that it was improper for Argentina to introduce a system which constructs a separate way of administering its export rules with respect to only one type of product. To the extent that Argentina has tried to justify Resolution 2235 by referring to its provision of export tax refunds for certain processed products derived from hides (and the need to distinguish

these from the hides themselves), the European Communities notes that there are many products for which such tax refunds exist. However, only in this sector do representatives of the domestic downstream industry have the ability to participate in the Customs processes.

11.79 Argentina has responded that the only reason that there are no systems in place with respect to other products is that no other industries have requested such a right. Therefore, the potential exists elsewhere; it is merely that it has been exercised in this sector.

11.80 The first question in this regard is to define what the term "uniform" means in Article X:3(a). The dictionary provides the following definition:

> Of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times.[375]

11.81 The term "uniform" appears in the GATT 1994 only with respect to administration of Customs laws. Article VII:2(b) provides that when assessing Customs valuation on the basis of "actual value" variations may exist based on quantities provided that such prices are uniformly related to quantities in other transactions.

11.82 In addition to the term appearing in paragraph 3(a) of Article X, it also appears in paragraph 2 of that Article requiring uniform practices for certain changes in applying Customs laws. Finally, *Ad* Article I, paragraph 4, provides for uniform practices in re-application of tariff classifications and imposition of certain new classifications at the time of the provisional applications of the GATT 1947.

11.83 It is obvious from these uses of the terms that it is meant that Customs laws should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members. That would be a substantive violation properly addressed under Article I. This is a requirement of uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places.

11.84 We are of the view that this provision should not be read as a broad anti-discrimination provision. We do not think this provision should be interpreted to require all products be treated identically. That would be reading far too much into this paragraph which focuses on the day to day application of Customs laws, rules and regulations. There are many variations in products which might require differential treatment and we do not think this provision should be read as a general invitation for a panel to make such distinctions.

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[375] The New Shorter Oxford English Dictionary, Vol. II, Oxford (1993), at p. 3488.

11.85 In our view, there is no evidence that Argentina has applied Resolution 2235 in a non-uniform manner with respect to hides. All hides exports are uniformly subject to the possibility of ADICMA representatives being present. Indeed, the European Communities' complaints are about Resolution 2235's application across the board. The difficulties of Argentina's administration of its Customs laws pursuant to Resolution 2235 are adequately dealt with under the other provisions of Article X:3(a).

(c) Reasonableness

11.86 As a preliminary matter, we note that Article X:3(a) provides that the administration of Customs laws, regulations and rules must be uniform, impartial and reasonable. Normally, we would address these three considerations in the order they appear in the treaty text. However, we note that in this instance the three requirements are legally independent in that Customs laws regulations and rules must satisfy each of the three standards. This gives us some freedom in the manner of discussing them. In the present instance, the requirement of reasonableness, we believe, turns on the question of information flows and whether it is reasonable to allow persons access to certain information which is irrelevant to the stated purpose of the legislation in question. In our view, the requirement of impartiality in this instance turns on the question of who has access to such information by reason of their presence in the Customs process. Although the requirements of reasonableness and impartiality are distinct in nature, both relate to the question of information flows in this case. We will deal first with the requirement of reasonableness as that is most directly related to the question of access to information. Our analysis of the requirement of impartiality flows logically from that.

11.87 The European Communities has argued that it is unreasonable for Argentina to apply its Customs formalities in a manner such that Argentinean hide buyers are able to see and sign a document containing details of the export deals of their customers, including business confidential information. The European Communities further argues that the context of Article X:3 makes it clear that this is unreasonable. The European Communities notes that the last sentence of Article X:1 stipulates that the obligations of that paragraph shall not require WTO Members to "disclose confidential information which ... would prejudice the legitimate commercial interests of particular enterprises, public or private." The European Communities asserts that no particular expertise is required to distinguish between raw or salted hides on the one hand and more processed products on the other. Furthermore, if specialized expertise were necessary, Argentina should train its own officials adequately rather than relying on the sporadic presence of ADICMA representatives. If it were necessary to have ADICMA representatives present to combat fraud, such presence should be mandatory rather than permissive. Finally, the European Communities notes that irregularities in the administration of the export tax regime or refund programs for processed

products were not cited in the original request by CICA (one of the ADICMA member groups) for permission to be present.

11.88 Argentina has responded that the last sentence of Article X:1 cannot be read as a prohibition as the European Communities reads it. Rather, it is an exemption from the obligation to publish otherwise contained in Article X:1. Furthermore, the information to which the European Communities refers is not business confidential information. It is the same information which is available in the public domain through on-line services both from the Argentinean government and private services. Argentina contests the document that the European Communities has produced showing a signature, in that the document was that of a tanner, not a hide supplier, and therefore is of no relevance to the European Communities' claims. In response to a question from the Panel, Argentina has stated that the name of an exporter of a particular shipment is no longer provided either publicly or to the ADICMA representative. In contrast to the European Communities' claims, Argentina asserts that having ADICMA present is very much in the interest of fair and transparent Customs processes. It helps combat tax fraud. To ensure proper enforcement, ADICMA representatives must be present because their only recourse is to bring a complaint against the government for any irregularities and presence is required in such instances.

11.89 The European Communities countered by stating that a procedure which allows the representatives of an industry that has actively sought and in part obtained bans on exportation of its raw material, bovine hides, into the heart of the export clearance process is inherently unreasonable regardless of what information is provided on-line in Argentina.

11.90 In considering this requirement, we first turn to the stated objective for Resolution 2235 offered by Argentina. Argentina stated that it required assistance in the classification of bovine hides when exported in order to ensure there were no mistakes or fraud regarding the proper payment of export duties and awarding of export "refunds". While a manifestly WTO-inconsistent measure cannot be justified by assertions of good intentions, we consider it reasonable in this instance to accept for purposes of analysis the proffered explanation in light of all the facts of the dispute.

11.91 In our view, the analysis of this issue with respect to reasonableness then will turn on the information that is supplied to ADICMA representatives and its direct relevance to the product classification question. We agree with the European Communities that it is unreasonable to allow ADICMA representatives into the Customs clearance process in light of the access to information that it affords. The explanation offered by Argentina for this presence raises serious questions. We do not see why ADICMA must have access to such information, which by its

nature is confidential[376] and which is made available to it as a participant in the Customs clearance process for the purposes of proper classification[377], in order to combat fraud and mistakes with respect to assessment of export duties and awarding of export "refunds".[378]

11.92 To provide some specific examples, ADICMA representatives should not be able to see the pricing information of the suppliers to ADICMA's members. This is information which ADICMA members could use to their commercial advantage in negotiations with the *frigoríficos*. We should note in this regard that Argentina bases its export duties on prices of hides quoted in the United States. Thus, even if we were to consider it reasonable for the tanners to be involved in the export clearance process, there would be no reason whatever for them to see the prices as these would be irrelevant to the assessment of export duties. We also see no need for them to be made aware of the destination or quantities involved as these data are irrelevant to the tasks ADICMA representatives are involved in.

11.93 We think it is particularly important for the reasonable administration of Argentina's export laws that the tanners not be provided the name of exporters. Argentina claims that this is no longer possible. However, as it was part of the European Communities' claims and was unarguably possible as recently as May of 1999 that such written information was supplied to ADICMA, we consider it necessary to specifically find that it is unreasonable for such information to be provided to ADICMA or its members. However, this question goes beyond just supply of the name in writing. Argentina has stressed in its arguments under all three conditions of Article X:3(a) that the process is balanced because the exporters may be present during the Customs process. However, it necessarily fol-

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[376] In this regard, we refer to Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Antidumping Agreement), which provides that information could be considered by its 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 that person acquired the information.

[377] We note that we are dealing here with the question of administration of Customs laws rather than effecting an export restriction pursuant to a measure. We recall that under Article XI, we stated that if certain information were in the public domain, even arguably improperly, it could not be as a result of the measure in question that such an alleged export restriction was being implemented by reason of such information. Here the issue is different because we are directly addressing what information is actually made available pursuant to this measure. The fact that such information might be made available elsewhere by the government is not relevant to the question of information potentially released by this measure.

[378] We note that we make no explicit ruling on whether Argentina is correct in saying that it needs expert advice in classification. In this regard, we do not think that the mere presence of ADICMA, or any other private persons, is in and of itself unreasonable. (See the discussion in the next Section regarding "impartiality"). We further note, however, that it remains unclear to us why the tanners are the only industry that has the right to send representatives to participate in the Customs clearance of their suppliers' exports and for which the Argentinean government requires such expertise.

lows that exercising this right would reveal the identity of the exporter. While it could be argued that the exporter could send a representative or agent and may thereby conceal his identity, imposing such a burden with respect to an exporter's own products would be unreasonable.

11.94 Therefore, we must conclude that a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a).

(d) Impartiality

11.95 The European Communities has argued that the presence of ADICMA representatives makes the application of Argentinean laws in an impartial manner impossible. That is, there is an inherent conflict of interest in having such persons present that cannot be solved by merely having further safeguards in place. The European Communities' contention is that there is no legitimate purpose for private persons from the domestic downstream industry to be involved in the customs clearance process, so their mere presence must render the process partial to them over Argentinean exporters of hides. Implicitly, the European Communities argues that, even if there is not an actual conflict of interest in their presence, there is at least a potential conflict of interest in that it puts ADICMA and its members into a position where they could abuse their presence or any information obtained thereby. Given this potential conflict of interest inherent in the measure, it cannot be considered an impartial application of the general Customs laws.

11.96 The European Communities notes that the tanning industry has campaigned for many years for export restrictions on their raw materials, i.e., hides. In fact, they have been successful in these endeavours. In light of these positions, it must be considered a partial administration of Customs laws to let them participate in the export clearance process.

11.97 Argentina responds that there is no partiality involved in this situation because the hides exporters also have the right to have a representative present. Thus, there is a balance of interests which is the essence of impartiality. ADICMA representatives are not there to stop shipments and have no authority to do so. This is a matter of transparency and efficiency in customs administration, not partiality.

11.98 The only private parties that have a contractual legal interest in the product and transaction are the exporter (and his agent) and the foreign buyer. The government also has a relevant legal interest in the transaction based on the sovereign right to regulate and tax exports. In contrast with this, the ADICMA representatives have, outside of the measure in question itself, no legal relationship with either the products or the sales contract. ADICMA, in fact, represents an adverse commercial interest in that the exports are not in its members' interests as

such exports potentially drive up the costs of hides. Furthermore, ADICMA members are competitors of the foreign buyers of the hides.[379]

11.99 Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of ADICMA representatives in such processes. It all depends on what that person is permitted to do.[380] In our view, the answer to this question is related directly to the question of access to information as part of the product classification process as discussed in the previous Section. Our concern here is focussed on the need for safeguards to prevent the inappropriate flow of one private person's confidential information to another as a result of the administration of the Customs laws, in this case the implementing Resolution 2235.

11.100 Whenever a party with a contrary commercial interest, but no relevant legal interest[381], is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.

11.101 While this situation could be remedied by adequate safeguards, we do not consider that such safeguards presently are in place. Therefore, Resolution 2235 cannot be considered an impartial administration of the Customs laws, regulations and rules described in Article X:1 and, thus, is inconsistent with Article X:3(a) of the GATT 1994.

### *C. Claims under Article III:2, First Sentence, of the GATT 1994*

#### *1. Factual Aspects*

11.102 The European Communities' complaint is in respect of certain mechanisms maintained by Argentina for the collection of its value-added tax (hereafter the "IVA") and income tax (hereafter the "IG"). The European Communities considers that certain features of these mechanisms are inconsistent with Argentina's obligations under the GATT 1994.

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[379] In this regard, we take note of Article 2:14 of the Agreement on Preshipment Inspection. This agreement deals specifically with the role of private persons in certain Customs transactions and specifically recognizes the problem of conflicts of interest.

[380] In this regard, we recall that we are not dealing under this Article with export restraints. We already decided in the previous Section that the allegations of such restraints within the meaning of Article XI imposed through RG 2235 remain unproved. Thus, any chilling effect with respect to the exports themselves has not been established.

[381] Again, we note that there is, arguably, a "legal interest" created by RG 2235 itself. However, that is the measure in question and should not be seen to self-generate a legal relationship that would not otherwise exist.

11.103 A brief description is provided below of the IVA and IG as well as of some of the relevant mechanisms for their collection.[382] Additional factual aspects are introduced as necessary in Sections XI.C.2-6 of this report.

(a) Value-Added Tax (IVA)

(i) The IVA

11.104 The IVA (*Impuesto al Valor Agregado*) is a general value-added tax. Its principal legal basis is the Law on the IVA[383].

11.105 The types of transactions subject to the IVA include, *inter alia*, the sale of goods inside Argentina's territory and the definitive importation of goods into its territory. With respect to imports, the IVA is collected together with any applicable import duties. With respect to internal sales, sellers must charge the IVA to the purchasers and then pay the amounts so collected to the tax administration on a monthly basis, after deducting therefrom any IVA paid on their own purchases and imports during the same period.

11.106 The IVA is applied to both imports and internal sales at a general rate of 21 percent *ad valorem*.[384]

11.107 Taxable persons whose annual sales do not exceed a certain amount may choose not to register themselves with the tax authorities.[385] Non-registered taxable persons are not directly liable to pay the IVA in respect of their internal sales. Thus, no IVA is charged on sales by non-registered taxable persons to other non-registered taxable persons. However, where registered taxable persons make sales to non-registered ones, the former are directly liable for the tax payable by the latter on their subsequent re-sales. Accordingly, registered taxable persons must collect not only the IVA due on their sales to non-registered taxable persons, but also an additional amount which is assumed to represent the IVA due on the subsequent re-sales by non-registered taxable persons. That additional amount is calculated by applying the relevant IVA rate to 50 percent of the net sales price of the goods in question.[386] Where the applicable IVA rate is 21 percent, the additional amount is therefore equivalent to 10.5 percent of the net sales price.

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[382] See also paras. 6.1 et seq. of this report.

[383] Law No. 23349/97 (Exhibit EC II.1), as last amended by Law No. 25239/99 (Exhibit EC II.3) (hereafter the "IVA Law").

[384] Lower rates apply to transactions involving certain specified products, including live bovine animals, offal of bovines as well as fresh fruit and vegetables.

[385] See Article 29 of the IVA Law.

[386] See Articles 4, 30 and 38 of the IVA Law.

(ii) Pre-Payment of the IVA

11.108 The Directorate-General of Taxes (*Dirección General Impositiva*) has issued, *inter alia*, General Resolutions (DGI) No. 3431/91[387] and No. 3337/91[388], which provide, respectively, for the collection at source of the IVA on the importation of goods and on certain internal sales of goods.

Pre-Payment of the IVA on Imports

11.109 RG 3431 provides that when goods are definitively imported into Argentinean territory, the Directorate-General of Customs (*Dirección General de Aduanas*) must collect from importers not only the IVA due on the import transaction itself, but also an additional amount. Where the importer is a registered taxable person, that additional amount collected represents a pre-payment of part of the IVA liability which arises once the imported goods are re-sold in Argentina. The pre-payment made can be credited at the time of settlement of the definitive IVA liability.[389] Where the importer is a non-registered taxable person, the additional amount to be paid is assumed to represent a pre-payment of the full IVA which is payable on the re-sale of the imported goods. That pre-payment cannot be credited because, as already mentioned, non-registered taxable persons are not directly liable to pay the IVA in respect of their internal sales.

11.110 The pre-payments on imports are collected at the following general *ad valorem* rates[390]:

- imports by registered taxable persons: 10 percent
- imports by non-registered taxable persons: 12.7 percent

11.111 As a general rule, all import transactions are subject to pre-payment of the IVA in accordance with RG 3431. No pre-payment is collected, however, on certain import transactions, including the following[391]:

- re-importation of goods exempt from import duties[392];
- imports of goods intended for the private use or consumption of the importer[393];
- imports of so-called *bienes de uso*, i.e. goods intended for use in the economic activity of the importer, except imports by non-registered taxpayers; and
- imports of live bovines, under certain conditions.

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387 Exhibit EC II.5 (hereafter "RG 3431").
388 Exhibit EC II.6 (hereafter "RG 3337").
389 See Article 4 of RG 3431.
390 See Article 3 of RG 3431. Lower rates apply to import transactions involving certain specified products, including live bovine animals, offal of bovines as well as fresh fruit and vegetables. The European Communities does not challenge those rates.
391 See Article 2 of RG 3431.
392 See also Article 26 of the IVA Law.
393 See also Article 8 a) of the IVA Law.

Pre-Payment of the IVA on Internal Sales

11.112 RG 3337 provides that when certain categories of persons sell goods in Argentina to a registered taxable person, they must collect from their purchasers the IVA due on the particular sales transactions as well as an additional amount.[394] That additional amount collected on internal sales represents a pre-payment of part of the IVA liability which arises once the goods are re-sold in Argentina.[395] The pre-payment made can be credited at the time of settlement of the definitive IVA liability.[396]

11.113 The persons required to collect the pre-payment on internal sales, the so-called collection agents (*agentes de percepción*), are appointed by the tax administration on the basis of its fiscal interests. Those persons include, e.g., large companies of the private sector.

11.114 The pre-payments on internal sales are collected at the following *ad valorem* rate:

- sales to registered taxable persons[397]: 5 percent

11.115 By way of exception, no pre-payments are collected on the following internal sales by *agentes de percepción*:

- sales to other agentes de percepción[398];
- sales to financial entities subject to Law No. 21526 (such as commercial banks, investment banks, mortgage banks and savings banks)[399];
- sales to non-registered taxable persons; and
- sales which give rise to a pre-payment of the IVA of less than Pesos 21.30 per transaction[400].

(b) Income Tax (IG)

(i) The IG

11.116 The IG (*Impuesto a las Ganancias*) is a tax on income, which applies to both natural and juridical persons. Its principal legal basis is the Law on the IG[401].

11.117 The IG is levied on all sources of income[402], including the profits derived from the sale of domestic and imported goods.[403] The IG must be paid to the tax administration on an annual basis.

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394 See Article 1 of RG 3337.
395 See Article 9 of RG 3337.
396 *Ibid.*
397 See Article 2 of RG 3337.
398 See Article 3 b) of RG 3337.
399 See Article 3 c) of RG 3337.
400 See Article 5 of RG 3337.
401 As codified by Decree No. 649/97 (Exhibit EC II.2) and last amended by Law No. 25239/99 (Exhibit EC II.3) (hereafter the "IG Law").

11.118 The profits derived from the exercise of an economic activity by a juridical person are taxed at a rate of 35 percent.[404] With respect to natural persons, the rate increases in proportion to the amount of taxable income.[405] In both cases, the rate applicable is the same irrespective of whether the profits are obtained from the sale of domestic or imported goods.

(ii) Pre-Payment of the IG

11.119 The Directorate-General of Taxes (*Dirección General Impositiva*) has issued, *inter alia*, General Resolutions (DGI) No. 3543/92[406] and No. 2784/88[407], which provide, respectively, for the collection at source of the IG on the importation of goods and the withholding at source of the IG on certain internal sales of goods.

Pre-Payment of the IG on Imports

11.120 RG 3543 provides that when goods are definitively imported into Argentinean territory the National Customs Administration (*Administración Nacional de Aduanas*) must collect from importers a certain amount on account of the IG. The amount collected represents a pre-payment of part of importers' definitive IG liability for the same tax period. The pre-payments made can be credited at the time of settlement of the definitive IG liability.[408]

11.121 The pre-payments on imports are collected at the following *ad valorem* rates:

- imports in general[409]: 3 percent
- imports for the importers' own use or consumption[410]: 11 percent

11.122 As a general rule, all import transactions are subject to pre-payment of the IG in accordance with RG 3543. No pre-payment is collected, however, on certain import transactions, including the following:

- re-importation of goods exempt from import duties[411]; and
- importation of *bienes de uso*[412].

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402 See Articles 1 and 2 of the IG Law.
403 See Articles 2; 49; 52 a) b) c) d) and e); 58; and 65 of the IG Law.
404 See Article 69 of the IG Law.
405 See Article 90 of the IG Law.
406 Exhibit EC II.8 (hereafter "RG 3543").
407 Exhibit EC II.10 (hereafter "RG 2784").
408 See Article 8 of RG 3543; Argentina's reply to Panel Question 55.
409 See Article 4 of RG 3543.
410 *Ibid.*
411 See Article 2 of RG 3543.
412 *Ibid.*

### Pre-Payment of the IG on Internal Sales

11.123 RG 2784 provides that certain persons must withhold and pay to the tax administration a certain amount on account of the IG when making payments for certain categories of goods sold to them by taxable persons. The amount withheld represents a pre-payment of part of the sellers' definitive IG liability for the same tax period. The pre-payments made can be credited at the time of settlement of the definitive IG liability.

11.124 The persons required to withhold the IG on internal sales, the so-called withholding agents (*agentes de retención*), are appointed by the tax administration on the basis of its fiscal interests. Those persons include, e.g., most forms of juridical persons.[413] Natural persons are required to withhold the IG only where they make payments to taxable persons as a result of the exercise of an economic activity.[414]

11.125 The transactions subject to withholding include the internal sale of the following categories of goods[415]:

- merchandise for resale, raw materials and other materials[416];
- processed goods[417];
- goods undergoing processing[418];
- livestock[419];
- grains, oilseeds, fruit and other products of the earth, excluding forestry products[420];
- depreciable movable property[421]; and
- other goods falling within Article 65 of the IG Law;.

11.126 The pre-payments on internal sales are withheld at the following *ad valorem* rates[422]:

- sales by registered taxable persons: 2 percent
- sales by non-registered taxable persons: 4 percent

11.127 By way of exception, no pre-payments are withheld on the following internal sales:

- sales which give rise to monthly payments of Pesos 11,242.7 or less[423];

413 See Article 3 of RG 2784.
414 See Article 3 f) of RG 2784.
415 See Article 1 of RG 2784.
416 See Article 52 a) of the IG Law.
417 See Article 52 b) of the IG Law.
418 See Article 52 c) of the IG Law.
419 See Article 52 d) of the IG Law.
420 See Article 52 e) of the IG Law.
421 See Article 58 of the IG Law.
422 See Article 14.3 of RG 2784.
423 See Article 15.3 of RG 2784.

- sales which give rise to a pre-payment of the IG of less than Pesos 3.75[424].

### 2. *Overview of the Parties' Arguments and Analytical Approach Followed*[425]

11.128 Article III:2, first sentence, of the GATT 1994 provides as follows:

> 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.

11.129 The European Communities claims that RG 3431 and RG 3543, which provide for the pre-payment of part of the IVA and IG upon importation of goods, are inconsistent with Article III:2, first sentence. According to the European Communities, the pre-payments on imports required by RG 3431 and RG 3543 exceed the pre-payments to be made on internal sales of goods, with the consequence that importers bear a heavier financial cost than buyers of like domestic goods. The European Communities notes that its complaint is concerned with that additional financial cost imposed on importers and is not meant to question Argentina's right to require the pre-payment of taxes.

11.130 Argentina rejects the European Communities' claims. Argentina recalls that the IVA Law and IG Law treat imported and domestic products alike. The measures challenged by the European Communities do not, according to Argentina, create additional taxes, but rather provide for the pre-payment of the IVA and IG. Argentina submits that RG 3431 and RG 3543 are tax administration and collection measures and that, as such, they fall outside the scope of Article III:2. Argentina notes, moreover, that the pre-payments made pursuant to RG 3431 and RG 3543 can be credited at the time of settlement of the definitive tax liability arising from the IVA Law and IG Law. Argentina considers that imported products are thus in any event not subject to internal taxes in excess of those applied to like domestic products.

11.131 We consider that, for a measure to infringe Article III:2, first sentence, an affirmative conclusion must be reached in respect of each of the following three requirements:

(i) the measure must qualify as an *internal tax or other charge of any kind applied*, directly or indirectly, *to* imported and domestic *products*;

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[424] See Article 16 of RG 2784.

[425] It should be noted that notwithstanding the fact that the present case is entitled *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* ("*Argentina – Hides and Leather*"), WT/DS 155/R and Corr. 1, adopted 16 February 2001 the European Communities' claims under Article III:2, first sentence, are not limited to finished leather, but rather extend to imported products in general. See the European Communities' request for the establishment of a panel (WT/DS155/2).

(ii) the taxed imported and domestic products must be *like*; and

(iii) imported products must be subject, directly or indirectly, to internal taxes or charges *in excess of* those applied, directly or indirectly, to like domestic products.

11.132 Our examination of the European Communities' claims under Article III:2, first sentence, addresses these requirements in turn. Prior to beginning that task, however, we need to consider Argentina's contention that, for a complaining party to establish a case under Article III:2, first sentence, it must demonstrate, as a necessary requirement, the presence of a protective application of the contested measure.

11.133 Argentina acknowledges that the Appellate Body, in its report on *Japan - Alcoholic Beverages II*, found that, for purposes of a claim under Article III:2, first sentence, a complaining party does not need to establish, as a separate requirement, that the challenged measure is applied so as to afford protection to domestic production. However, according to Argentina's reading of that report, the Appellate Body did not imply that there is no need to show the presence of a protective application. Rather, what the Appellate Body report says, in Argentina's view, is that the existence of a protective application must be determined together with the other specific requirements contained in Article III:2, first sentence, rather than separately. Argentina considers that this must be so considering that the Appellate Body stated that the first paragraph of Article III informs the second paragraph.

11.134 The European Communities disagrees with Argentina's interpretation of the Appellate Body report on *Japan - Alcoholic Beverages II*. In its view, it is clear from the report that there is no need for a complaining party to prove, as a separate requirement, the presence of a protective application of the challenged measure. Nor is there a need, according to the European Communities, to show the presence of a protective application for purposes of a "like products" determination or a determination of whether imported products are taxed in excess of like domestic products.

11.135 In its report on *Japan - Alcoholic Beverages II*, the Appellate Body addressed the omission of a specific reference in Article III:2, first sentence, to Article III:1[426] in the following terms:

> This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established

[426] Article III:1 provides as follows:

> 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. (note omitted) *Japan – Alcoholic Beverages II*, *supra,* footnote 47.

> 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.[427]

11.136 Argentina attaches great importance to the highlighted portion in the above statement. It appears to us that Argentina essentially argues that since, according to the Appellate Body, the general principle of Article III:1 applies to Article III:2, first sentence, and since the presence of a protective application need not be established *separately* from the specific requirements included in Article III:2, first sentence, this must mean that the presence of a protective application must be established *together with* the specific requirements of Article III:2, first sentence.

11.137 We are unable to agree with Argentina's interpretation of the Appellate Body's statement. As we understand it, the presence of a protective application need be established neither separately nor together with the specific requirements contained in Article III:2, first sentence. The quoted passage from the Appellate Body report in *Japan - Alcoholic Beverages II* makes clear that Article III:2, first sentence, is, in effect, an application of the general principle stated in Article III:1. Accordingly, whenever imported products from one Member's territory are subject to taxes in excess of those applied to like domestic products in the territory of another Member, this is deemed to "afford protection to domestic production" within the meaning of Article III:1. It follows that, in applying Article III:2, first sentence, recourse to the general principle of Article III:1 is neither necessary nor appropriate.[428] The only requirements that need to be demonstrated by the complaining party are those contained in Article III:2, first sentence, itself.[429]

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[427] Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, footnote 47, at 110-111 (emphasis added).

[428] We find further support for our view in the following statement made by the Appellate Body in its report on *European Communities – Bananas*, *supra*, footnote 111, para. 216:

> Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure "afford[s] protection to domestic production".

While this statement relates to Article III:4 of the GATT, which is not at issue in the present case, it nevertheless provides useful clarification for purposes of analysing Argentina's argument in respect of Article III:2, first sentence. It clearly emerges from this statement that not only is there no requirement separately to establish the presence of a protective application, but that there is not even a requirement separately to consider whether there is a protective application.

[429] We note Argentina's contention that the GATT 1947 panel reports on Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages (hereafter "Japan – Alcoholic Beverages I"), adopted on 10 November 1987, BISD 34S/83; United States – Section 337 of the Tariff Act of 1930 (hereafter "United States – Section 337"), adopted on 7 November 1989, BISD 36S/345, and United States – Measures Affecting Alcoholic and Malt Beverages (hereafter "United States – Malt Beverages"), adopted on 19 June 1992, BISD 39S/206, lend support to its

11.138 In light of the foregoing, we conclude that there is no requirement to establish, separately or otherwise, the presence of a protective application in order to show an infringement of Article III:2, first sentence.

### *3. Applicability of Article III:2*

11.139 As indicated, we commence our analysis of the European Communities' claims with an inquiry into whether the contested measures, i.e. RG 3431 and RG 3543, fall within the ambit of Article III:2. For Article III:2 to apply to those measures, they must, in our view, (i) constitute taxes or other charges of any kind, (ii) constitute internal measures and (iii) apply, directly or indirectly, to imported and domestic products. We examine each of these requirements below.

#### (a) Tax Measures

11.140 Neither party disputes that the IVA and the IG are taxes. It is also common ground that RG 3431 and RG 3543 are mechanisms for the collection of those taxes. The parties disagree, however, on whether the mechanisms used by Argentina for collecting those taxes are subject to the disciplines of Article III:2.

11.141 The European Communities considers that the mechanisms for the pre-payment of the IVA and IG fall within the scope of Article III:2. It consistently refers to these mechanisms as "taxes" or "tax measures". The European Communities notes that the wording of Article III:2, in particular the terms "directly or indirectly" and "internal taxes or charges of any kind", clearly indicates that it was the drafters' intention to capture all possible forms of tax discrimination. According to the European Communities, it is not appropriate, therefore, to draw a distinction between "substantive" tax measures, such as the IVA and IG, and "measures of tax administration", such as the measures at issue in the present case. Otherwise it would be extremely easy for Members to circumvent the prohibition contained in Article III:2, thereby defeating its object and purpose.

11.142 Argentina considers that the contested collection mechanisms are not covered by Article III:2. According to Argentina, those mechanisms can hardly be considered to be akin to the concept of "internal taxes" or "other charges of any kind". Argentina argues that RG 3431 and RG 3543 are not taxes in themselves. They constitute tax administration and collection measures which do not alter the definitive tax liability arising from the relevant tax law, i.e. the IVA Law or IG Law. Argentina contends that tax collection methods are not covered by WTO disciplines. Argentina therefore is of the view that Members enjoy a mar-

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view that the presence of a protective application must be established for purposes of a claim under Article III:2, first sentence. See paras. 8.228 et seq. of this report. Since all of the aforementioned reports pre-date the Appellate Body reports on Japan – Alcoholic Beverages II and European Communities – Bananas and since those Appellate Body reports directly address the issue before us, we see no need to further consider the GATT 1947 reports in this regard.

gin of discretion with respect to measures designed to achieve efficient tax administration.

11.143 We consider that RG 3431 and RG 3543 are properly viewed not as taxes in their own right, but as mechanisms for the collection of the IVA and IG. What is special, however, about RG 3431 and RG 3543 as mechanisms for the collection of the IVA and IG is that they provide for the imposition of charges. We recall that Article III:2 covers "charges *of any kind*" (emphasis added). The term "charge" denotes, *inter alia*, a "pecuniary burden" and a "liability to pay money laid on a person…"[430]. There can be no doubt, in our view, that both RG 3431 and RG 3543 impose a pecuniary burden and create a liability to pay money.[431] Moreover, the charges provided for in RG 3431 and RG 3543 represent advance payments of the IVA and IG. RG 3431 and RG 3543 in effect impose on importers part of their definitive IVA and IG liability.[432] It is clear to us, therefore, that the charges in question qualify as tax measures. As such, they fall to be assessed under Article III:2.

11.144 With regard to Argentina's argument that RG 3431 and RG 3543 are measures designed to achieve efficient tax administration and collection and as such do not fall under Article III:2, it should be noted that Argentina has provided no support for this argument, except to say that it is up to Members to decide how best to achieve efficient tax administration. We agree that Members are free, within the outer bounds defined by such provisions as Article III:2, to administer and collect internal taxes as they see fit.[433] However, if, as here, such "tax administration" measures take the form of an internal charge and are applied to products, those measures must, in our view, be in conformity with Article III:2.[434] There is nothing in the provisions of Article III:2 to suggest a different conclusion. If it were accepted that "tax administration" measures are categorically excluded from the ambit of Article III:2, this would create a potential for abuse and circumvention of the obligations contained in Article III:2. It must be stated, moreover, that the applicability of Article III:2 is not conditional upon

[430] The New Shorter Oxford English Dictionary, Vol. I, Oxford (1993), p. 374.

[431] See e.g. Articles 1, 3 in fine, and 5 of RG 3431 and Articles 1 and 5 of RG 3543. While it is true that payments made pursuant to RG 3431 and RG 3543 may be credited against the definitive liability arising from the IVA Law and IG Law, this does not detract from the fact that those collection mechanisms create a financial liability. Argentina has acknowledged this in stating that RG 3543 "… establishes … the obligation to effect an IG payment on account". See Argentina's Second Oral Statement, p. 7.

[432] We recognize that Argentina has stated that this is a presumed liability in that at the time pre-payments of the IVA and IG are made in accordance with RG 3431 and RG 3543, the definitive liability under the IVA Law and IG Law has not yet been determined. This fact does not alter our analysis.

[433] We recall, however, that other provisions of the GATT 1994, such as Article X:3(a), may constrain Members' freedom of action in this regard.

[434] Members of course retain the right to invoke exceptions, such as those set forth in Article XX of the GATT 1994.

the policy purpose of a tax measure.[435] On that basis, we cannot agree with Argentina that charges intended to promote efficient tax administration or collection *a priori* fall outside the scope of Article III:2.

(b) Internal Measures

11.145 We turn first to the pre-payment of the IVA established by RG 3431. Neither party to these proceedings has disputed that RG 3431 is an internal measure within the meaning of Article III:2, first sentence. We see no reason to take a different view. RG 3431 applies to definitive import transactions, but only if the products imported are subsequently re-sold in the internal Argentinean market.[436] In other words, RG 3431 provides for the pre-payment of the IVA chargeable to an *internal* transaction.[437] It should also be pointed out that the fact that RG 3431 is collected at the time and point of importation[438] does not preclude it from qualifying as an internal tax measure.[439] We also agree with the parties that RG 3337 may be regarded as the domestic equivalent of RG 3431.[440] RG 3337 applies to sales transactions involving domestic and (internally re-sold) imported goods.[441]

11.146 As concerns, next, the pre-payment of the IG established by RG 3543, the European Communities considers that RG 3543 is an internal tax measure subject to Article III:2. The European Communities argues, however, that there is no collection mechanism equivalent to RG 3543 which governs internal sales transactions. More specifically, the European Communities contests that the withholding mechanism established by RG 2784 can be viewed as such. The European Communities notes that the pre-payments made by importers pursuant to RG 3543 are assessed on top of the sales price invoiced by the foreign sellers

[435] See the Panel Reports on United States – Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/160, at para. 5.2.4, EEC – Regulation on Imports of Parts and Components, adopted on 16 May 1990, BISD 37S/132, at para. 5.6.

[436] Import transactions intended for private use or consumption by the importer are specifically excluded from the scope of application of RG 3431. See Article 2.1 of RG 3431. See also Article 5 thereof.

[437] This becomes clear also from Article 3 in fine of RG 3431.

[438] See Article 1 of RG 3431.

[439] The Note Ad Article III provides that:

> Any internal tax or other internal charge … 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 … and is accordingly subject to the provisions of Article III.

[440] Argentina notes that one of the recitals of RG 3431 specifically states that "[t]he regime to be implemented aims to accord the aforementioned marketing transactions equal treatment with those covered by the regime of collection established under General RG 3337 (domestic market)". See para. 8.325 of this report and accompanying footnote.

[441] See Articles 1 and 4 of RG 3337, which latter incorporates by reference Article 5 of the IVA; Argentina's reply to Panel Question 44.

and thus have the effect of increasing the price of goods for importers. In contrast, under the withholding mechanism set forth in RG 2784, the pre-payments to be made by the seller are deducted from the price charged by the seller and hence do not increase the price of goods for purchasers.

11.147 Argentina contests that RG 3543 falls within the scope of Article III:2, but nevertheless is of the view that RG 2784 is the internal analogue of RG 3543.

11.148 It should be noted that RG 3543 applies only to sales transactions involving the definitive importation of goods and that it is assessed at the time and point of importation.[442] Again, this does not, *per se*, remove RG 3543 from the scope of Article III:2, first sentence.[443] The parties disagree, however, on whether RG 2784 is the domestic equivalent of RG 3543. We note that RG 2784 applies to both domestic and (internally re-sold) imported products.[444] It does not apply to the definitive importation of goods.[445] The different scopes of application of RG 3543 and RG 2784 are consistent, in our view, with Argentina's contention that RG 2784 is the domestic analogue of RG 3543.

11.149 Another difference between RG 3543 and RG 2784 is that RG 3543 envisages a collection regime and defines the purchaser as the taxable person, whereas RG 2784 establishes a withholding regime and defines the seller as the taxable person. Regarding these differences, we note as relevant the following statement by the GATT 1947 panel in *Japan - Alcoholic Beverages I*:

> … Article III:2 does not prescribe the use of any specific method or system of taxation. … [T]here 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.[446]

11.150 Applying the same reasoning to the present case, it is clear that the fact that RG 3543 creates a collection regime and not a withholding regime does not establish, in itself, that RG 2784 is not equivalent to RG 3543. The use of a different method of taxation may be justified by objective reasons. In this regard, it seems logical to us to collect pre-payments of an income tax from the sellers of a product, as indeed RG 2784 envisages. As we understand it, RG 3543 does not do so, *inter alia*, because foreign sellers are not normally subject to income taxation in Argentina.[447] In those circumstances, Argentina apparently saw fit to adjust for the adverse competitive effect of RG 2784 on domestic products by collecting pre-payments from importers in accordance with RG 3543.

11.151 The European Communities alleges that there is yet another difference between RG 3543 and RG 2784, namely that the collection regime established by

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[442] See Articles 1, 2, 3 and 5 of RG 3543.
[443] See the Note Ad Article III.
[444] Argentina's reply to Panel Question 54.
[445] See Article 1 f) of RG 2784.
[446] Panel Report on Japan – Alcoholic Beverages I, supra, at para. 5.9.
[447] Argentina's reply to Panel Question 53; see also para. 8.114 of this report.

RG 3543 has the effect of raising the price of a good for the purchaser, whereas the withholding regime established by RG 2784 does not produce such an effect. In making this assertion, the European Communities assumes that domestic sellers are unable partially or wholly to shift forward to their domestic purchasers the tax burden resulting from RG 2784. Conversely, the European Communities assumes that foreign sellers are able to prevent importers from shifting backward part or all of the tax burden imposed by RG 3543. We find these assumptions inconsistent. Absent evidence to the contrary, we do not see why, as a general matter, foreign sellers should be able to avoid bearing part or all of the tax burden but domestic sellers should not or why domestic purchasers should be able to avoid bearing part or all of the tax burden but importers should not.[448]

11.152 We find it more plausible and consistent to proceed on the assumption that, if the tax burdens[449] imposed by RG 3543 and RG 2784 are the same, then the price effects of RG 3543 and RG 2784 should be the same. Thus, depending on the market situation, RG 3543 and RG 2784 should either cause the prices of like imported and domestic products to rise to the full extent of the tax burden imposed, to some extent or not at all, if the tax burden is fully absorbed by foreign and domestic sellers.

11.153 It is apparent from the foregoing considerations that the differences between RG 3543 and RG 2784 do not preclude those mechanisms from being compared for purposes of an analysis under Article III:2. To the contrary, in our assessment, the transactions caught by RG 3543 may properly be seen as the cross-border equivalent of the transactions subject to RG 2784. Whether a cross-border transaction involves a foreign producer and an importer or a foreign trader and an importer, an analogous internal transaction would or could be governed by RG 2784.[450] We further regard as relevant the fact that RG 3543 specifically refers to RG 2784 and declares its provisions applicable as a subsidiary matter.[451]

11.154 For these reasons, we find that RG 3543 establishes a mechanism for the collection of the IG at the border which is equivalent in nature to the IG withholding mechanism established by RG 2784. In accordance with the Note *Ad* Article III, we therefore conclude that RG 3543 is an internal measure within the meaning of Article III:2.

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[448] We note that the European Communities has not presented any evidence which would establish that the supply elasticity of foreign sellers is significantly greater than that of domestic sellers and/or that the demand elasticity of importers is significantly smaller than that of domestic purchasers.

[449] In using the term "tax burden" here and hereafter, we are mindful that RG 3543 and RG 2784 (and likewise RG 3431 and RG 3337) are not taxes in themselves, but are aspects of broader tax systems. We use the term "tax burden" merely for the sake of brevity of expression.

[450] The mere fact that some equivalent transactions are not subject to RG 2784 or are subject to different rates does not, in our view, detract from the comparability of RG 3543 and RG 2784. In fact, such differences may constitute infringements of Article III:2, first sentence.

[451] See Article 9 of RG 3543.

### (c) Measures Applied to Products

11.155 Neither party has expressed the view, as far as the pre-payment of the IVA is concerned, that RG 3431 does not apply to goods. In our view, there can be no doubt in this respect.[452]

11.156 Regarding the pre-payment of the IG, the European Communities considers that RG 3543 establishes a tax on products and not on income. The European Communities notes that those payments must be made whether or not the underlying import transactions generate any profit and that the amount to be paid is computed on the basis of the customs value of the imported goods rather than the profit margin obtained with the import transactions. While the European Communities acknowledges that the IG itself is not a tax on products but on income, the mere fact that the pre-payments of the IG may be credited against the definitive IG liability does not, in the European Communities' view, convert RG 3543 into an income tax outside the scope of Article III:2.

11.157 Argentina submits that the IG is not a tax on products and is therefore not subject to the provisions of Article III:2. According to Argentina, if the IG is not covered by Article III:2, then neither is a mechanism providing for its pre-payment such as RG 3543. Argentina further argues that the pre-payment of the IG provided for in RG 3543 is in no way related to products as such but to the presumed tax-bearing ability of a taxable person or the presumed income accruing to a taxable person who trades in products. Argentina submits that no-one imports goods without hoping to make a profit. Argentina also notes that the pre-payments to be made are calculated on the basis of the customs value simply because this is the only yardstick available at the time the pre-payments must be made.

11.158 We note that the provisions of RG 3543 clearly state that they apply to goods.[453] Moreover, the amount to be collected pursuant to RG 3543 is determined by "applying the tax rate … to the normal price defined for the application of import duties, to which are added any import-related charges"[454]. In other words, the pre-payments to be made are measured in terms of the (import duty-adjusted) price of the product itself. This assessment is unaffected by Argentina's explanation that RG 3543 uses the product price as a proxy for future income or tax-bearing ability.[455] For these reasons, we find that RG 3543 is a tax measure which is "applied to products" within the meaning of Article III:2.

11.159 Argentina argues that, if the IG does not fall within the scope of Article III:2, neither does the collection regime established by RG 3543. We note

[452] See Articles 1 and 3 of RG 3431 and Article 1 of RG 3337.
[453] See Articles 1 and 4 of RG 3543.
[454] Article 4 of RG 3543.
[455] It should be noted in this regard that in *Canada – Periodicals*, *supra*, footnote 186, at 463, the Appellate Body found that the tax at issue applied to goods, notwithstanding the fact that it was measured in terms of advertising carried by each issue of a split-run magazine, i.e. not in terms of the price of the magazine itself.

that both parties concur that the IG is an income tax. We agree. We also agree that income taxes, because they are taxes not normally directly levied on products, are generally considered not to be subject to Article III:2.[456] It is not obvious to us, however, how the fact that the IG is an income tax outside the scope of Article III:2 logically leads to the conclusion that RG 3543 does not fall within the ambit of Article III:2, even though RG 3543 is a tax measure applied to products. Not only do we see nothing in the provisions of Article III:2 which would preclude the applicability of these provisions to RG 3543 merely because of the latter's linkage to the IG. Were we to accept Argentina's argument, it would also not be difficult for Members to introduce measures designed to circumvent the disciplines of Article III:2.

11.160 It should be pointed out, in addition, that the Appellate Body faced a similar issue in *Canada - Periodicals*. At issue in that dispute was an excise tax imposed by Canada on advertisements in split-run periodicals. The tax was applied to the value of advertising carried by each issue of a split-run magazine. Canada maintained that the tax was a measure pertaining to advertising services and therefore not within the purview of the GATT 1994. The Appellate Body acknowledged that both the editorial and the advertising content of periodicals could be viewed as having services attributes, but observed that they nevertheless combined to form a physical product. It then went on to conclude that the GATT 1994 was applicable to the contested tax, reasoning that that tax "clearly applies to goods - it is an excise tax on split-run editions of periodicals"[457]. Consistently with the Appellate Body's approach in *Canada - Periodicals*, we attach significance to the fact that RG 3543 is a tax measure which "clearly applies to goods". Merely that it is a measure pertaining to the IG does not remove it from the purview of Article III:2.

11.161 In light of all our considerations in Section XI.C.3, we find that RG 3431 and RG 3543 are internal tax measures applied to products. We therefore come to the overall conclusion that the provisions of Article III:2 apply to RG 3431 and RG 3543.

#### 4. *Likeness of Imported and Domestic Products*

11.162 The question we now turn to is whether the imported and domestic products subject to the collection mechanisms at issue in the present case are "like" within the meaning of Article III:2, first sentence.

11.163 The European Communities notes that the rates applicable under those mechanisms are based exclusively on whether the taxed products are imported or sold within Argentina and not on their physical characteristics or end-uses. The

[456] See the Working Party Report on Border Tax Adjustments, adopted on 2 December 1970, BISD 18S/97, at para. 14.

[457] Appellate Body Report on *Canada – Periodicals*, *supra*, footnote 186, at p. 463.

European Communities considers, however, that the mere fact that a product has Argentinean origin is not sufficient *per se* to confer upon that product properties which make it "unlike" any imported product.

11.164 The European Communities notes further that, under the current collection mechanisms, even if a foreign product were identical in all respects to a domestic product, the importation of the foreign product would still be taxed differently from the internal sale of the domestic product. Thus, even using the narrowest definition of the term "like product", imported products would be taxed differently. It is therefore not necessary, according to the European Communities, to show that products imported from the European Communities are like domestic products in light of criteria such as their physical characteristics or end-uses. The European Communities considers, moreover, that whether or not the products currently imported into Argentina are like the products of Argentinean origin is not dispositive. What matters is whether the products that might be imported from the European Communities are like Argentinean products. The European Communities maintains that the panel report on *Indonesia - Certain Measures Affecting the Automobile Industry*[458] supports its position.

11.165 Argentina argues that the Appellate Body has established in *Canada - Periodicals* that for purposes of an Article III:2, first sentence, analysis it is necessary first to define the products which are "like". Argentina argues that such a "like products" determination must be made on a case-by-case basis rather than in abstract terms. This is particularly important, in Argentina's view, in cases where there are imports so that a "like products" determination can be made by comparing actual products sold on the Argentinean market rather than hypothetical products. Argentina further submits that likeness can only be established by specific reference to the well-established criteria for defining likeness. Argentina considers that the European Communities has not done any of the above and has not identified even one specific example of like products. Regarding the panel report on *Indonesia - Automobiles*, Argentina notes that Indonesia in that case did not challenge the definition of likeness proffered by the complaining parties.

11.166 Specifically with regard to the measures at issue, Argentina contests that imported products covered by RG 3431 or RG 3543 are subject, by virtue of their origin, to higher pre-payment of the IVA or IG than like domestic products. In support of its argument Argentina refers to Decree No. 1439/96[459], according to which products which are imported with a view to processing in Argentina and subsequent re-exportation are not subject to any pre-payment of the IVA or IG. Argentina also recalls the multiplicity of regimes for the collection of the IVA, which vary depending on such factors as the categories of buyers or the amounts involved. In the view of Argentina, it is not possible, therefore, without discuss-

[458] Panel Report on *Indonesia – Automobiles*, *supra*, footnote 198.
[459] Exhibit ARG-XVI (hereafter "Decree 1439").

ing specific products, to conclude that the different collection mechanisms treat imported products less favourably.

11.167 It is well to recall at the outset that the Appellate Body, in its report on *Canada - Periodicals*, stated that "… Article III:2, first sentence, normally requires a comparison between imported products and like domestic products …"[460] The Appellate Body, in the same report, further noted that a determination of likeness for purposes of Article III:2, first sentence, must be made by reference to relevant factors including the products' end-uses in a given market, consumers' tastes and habits and the products' properties, nature and quality

11.168 In the case before us, the European Communities has neither compared specific products nor addressed the criteria relevant to determining likeness. The European Communities considers that it is not incumbent upon it to do so. We agree. In circumstances such as those confronting us in this case no comparison of specific products is required.[461] Logically, no examination of the various criteria relevant to determining likeness is then called for either.

11.169 We consider that in the specific context of a claim under Article III:2, first sentence, the quantum and nature of the evidence required for a complaining party to discharge its burden of establishing a violation is dependent, above all, on the structure and design of the measure in issue.[462] The structure and design of RG 3431 and RG 3543 and their domestic counterparts RG 3337 and RG 2784 are such that the level of tax pre-payment is not determined by the physical characteristics or end-uses of the products subject to these resolutions, but instead is determined by factors which are not relevant to the definition of likeness, such as whether a particular product is definitively imported into Argentina or sold domestically as well as the characteristics of the seller or purchaser of the product.[463] It is therefore inevitable, in our view, that like products will be subject to RG 3431 and its domestic counterpart, RG 3337. The same holds true for

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[460] Appellate Body Report on *Canada - Periodicals*, *Canada – Periodicals*, *supra*, footnote 186, at p. 463.

[461] This should not be construed to mean that we disagree with the appropriateness, in different factual circumstances, of the approach outlined by the Appellate Body in Canada – Periodicals.

[462] As the Appellate Body has stated in *United States – Shirts and Blouses, supra*, footnote 61, at 335:

> In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.

[463] In our view, the mere fact that a product is of non-Argentinean origin or that it is being definitively imported into Argentina does not, per se, distinguish it - in terms of its physical characteristics and end-uses - from a product of Argentinean origin or a product which is being sold inside Argentina. Nor does likeness turn on whether the sellers or purchasers of the products under comparison qualify as registered or non-registered taxable persons or as agentes de percepción under Argentinean tax law.

RG 3543 and its domestic counterpart, RG 2784.[464] The European Communities has demonstrated this to our satisfaction, and, in our view, this is all it needs to establish in the present case as far as the "like product" requirement contained in Article III:2, first sentence, is concerned.[465]

11.170 This view is consistent with that adopted by the panel in *Indonesia - Automobiles*. That panel was of the view that:

> … an origin-based distinction in respect of internal taxes suffices in itself to violate Article III:2, without the need to demonstrate the existence of actually traded like products.[466]

11.171 Argentina submits that it is not correct that imported products are automatically subject to higher pre-payment of the IVA and IG than like domestic products. In support, Argentina cites the example of Decree 1439 on temporary imports, in respect of which importers are not liable to pre-pay the IVA. We note that imports for re-exportation are not destined for consumption in Argentina.[467] As such, they may not be subject to the provisions of Article III:2. The example of temporary imports may therefore be irrelevant. We do not decide this issue here because, even assuming Article III:2 applied to such imports, this would not detract from the European Communities' claim that like products are governed by RG 3431 and RG 3337.[468]

11.172 Argentina further points out that there are various resolutions governing internal sales which establish regimes for the collection at source of the IVA and that no general statement may therefore be made to the effect that the origin of a product determines its level of tax pre-payment. We recall that the resolutions at

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[464] This view is unaffected by the fact that, according to the Appellate Body, the term "like products", as it appears in Article III:2, first sentence, is to be construed narrowly and on a case-by-case basis. See the Appellate Body Report on *Japan – Alcoholic Beverages II*, *supra*, footnote 47, at 112.

[465] We consider that the European Communities can challenge RG 3431 even if no trade involving like imported products actually exists. As the Appellate Body has noted in its report *on Japan – Alcoholic Beverages II*, *supra*, footnote 47, at 112 (footnote omitted): "[Article III] protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products". Thus, Article III provides protection not only to those EC producers who are actually contesting the Argentinean internal market, but also to those who are planning on contesting it or are preparing to do so. As to whether like products can exist, we confine ourselves to noting that, in our view, the European Communities, like other Members, is a potential producer and exporter of a wide range of products which are like Argentinean products, even considering the narrow definition of likeness appropriate in the context of Article III:2, first sentence.

[466] Panel Report on *Indonesia – Automobiles*, *supra*, footnote 198, para. 14.113. See also the Panel Reports on *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), under appeal, WT/DS161/R, WT/DS169/R, para. 627 (with respect to Article III:4 of the GATT 1994) and *United States – Import Measures on Certain Products from the European Communities*, under appeal, *supra*, footnote 309, para. 6.54 (with respect to Article I:1 of the GATT 1994).

[467] See Articles 1 and 3 of Decree 1439.

[468] The fact that the imported products caught by Decree 1439 are not destined for consumption in Argentina would not, in our view, render them "unlike" imported products subject to RG 3431 or domestic products subject to RG 3337.

issue in the present dispute are RG 3431, which deals with import transactions, and RG 3337, which deals with domestic sales transactions. The fact that special regimes may apply in certain cases does not alter our conclusion with respect to whether like products fall under RG 3431 and RG 3337.[469]

11.173 It follows from the preceding considerations that like products will be subject to the resolutions referred to by the European Communities, i.e. RG 3431 and RG 3337 (with respect to collection at source of the IVA), on the one hand, and RG 3543 and RG 2784 (with respect to collection at source of the IG), on the other hand. We therefore conclude that the "like products" requirement contained in Article III:2, first sentence, is fulfilled in the present case.

### 5. *Comparison of Tax Burdens Imposed*

11.174 It will be recalled that the third and last step in an inquiry under Article III:2, first sentence, involves a comparison of the tax burdens imposed on imported and like domestic products. If the tax burden on imported products is in excess of the tax burden on like domestic products, there is an infringement.

11.175 We first turn to analyse the tax burdens imposed by the tax pre-payment mechanisms at issue in the present case. Thereafter, we proceed to an examination of the European Communities' claim that those mechanisms impose a greater tax burden on imported products than on like domestic products. This examination is conducted separately for the pre-payment of the IVA and the pre-payment of the IG.

#### (a) Tax Burdens Imposed

11.176 The European Communities submits that, even if the pre-payments of the IVA and IG may be credited against the definitive tax liability under the IVA Law and IG Law, taxable persons are still required to "advance" money to the Argentinean tax authorities. The European Communities points out in this regard that the cost for taxable persons of pre-paying part of the IVA or IG is not the same as the cost of paying those taxes in full at the end of the relevant tax period, even if the nominal amount to be paid is the same in both cases. The European Communities asserts that, if taxable persons were not required to pre-pay part of the tax, they would have the opportunity to earn interest on the amount pre-paid until the end of the relevant tax period. According to the European Communities, the loss of that revenue represents an additional financial cost for taxable persons. The European Communities considers that that additional cost is higher for importers than for buyers of domestic goods since the collection mechanisms applicable to imports provide for higher collection rates.

[469] We note that Argentina has not argued that any of those special regimes has superseded RG 3431 or RG 3337 in their entirety.

11.177 The European Communities argues that the additional cost resulting from the pre-payment of the IVA and IG must be taken into account for purposes of an Article III:2 analysis. In support, the European Communities refers to the GATT 1947 panel report on *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*[470], which, in its view, stands for the proposition that "lost interest" constitutes a charge for purposes of Article II:1(b) of the GATT 1994. The European Communities considers that, by the same token, "lost interest" must be considered as a charge also for purposes of Article III:2.

11.178 Argentina recalls that the overall rates of the IVA and IG are the same for imported and domestic products and that the measures challenged by the European Communities merely provide for the pre-payment of the IVA and the IG. In Argentina's view, it is not correct to take a static view of the tax assessment process and to focus only on the point in time at which the pre-payments of the IVA and IG are effected. Argentina notes that those pre-payments are creditable at the time of settlement of the definitive IVA and IG liability. Argentina considers that the IVA and IG do not therefore impose a heavier tax burden on imported products than on like domestic products.

11.179 As regards the European Communities' allegation that importers must bear a greater financial cost as a result of the fact that the collection mechanisms applicable to imports provide for higher collection rates, Argentina considers that this additional financial cost is an opportunity cost associated with importation. Argentina argues that if purchasers decide to import a product rather than buy it on the local market, they must bear certain opportunity costs. Argentina asserts that the import-related financial cost in the present case, i.e. the lost interest, is no different, for instance, from the cost of hiring a customs agent to carry out the customs clearance of goods. Domestic goods do not bear that cost, but, in Argentina's view, this is no basis for considering that there is discrimination.

11.180 Argentina disputes, in any event, that "lost interest" is covered by Article III:2. In its view, "lost interest" cannot be considered as an "internal tax or other internal charge of any kind" within the meaning of Article III:2. Argentina also questions the relevance of the European Communities' analogy from the panel report on *EEC - Fruits and Vegetables*, noting that that case involved the application of Article II:1(b). Argentina further points out that there is nothing in the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 or in Members' actual Schedules of Concessions to indicate that Members wished to equate the concept of "lost interest" with the concept of "other charges".

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[470] Panel Report on EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables (hereafter "EEC – Fruits and Vegetables"), adopted on 18 October 1978, BISD 25S/68.

11.181 Article III:2, first sentence, stipulates that imported products must 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". It is apparent that the application of this Article calls for a comparison of "taxes" or "charges" imposed on imported products with "taxes" or "charges" applied to like domestic products. What is less apparent is under what aspect those taxes or charges are to be compared.

11.182 In this regard, it is necessary to recall the purpose of Article III:2, first sentence, which is to ensure "equality of competitive conditions between imported and like domestic products"[471]. Accordingly, Article III:2, first sentence, is not concerned with taxes or charges as such or the policy purposes Members pursue with them, but with their economic impact on the competitive opportunities of imported and like domestic products. It follows, in our view, that what must be compared are the tax burdens imposed on the taxed products.

11.183 We consider that Article III:2, first sentence, requires a comparison of actual tax burdens rather than merely of nominal tax burdens. Were it otherwise, Members could easily evade its disciplines. Thus, even where imported and like domestic products are subject to identical tax rates, the actual tax burden can still be heavier on imported products. This could be the case, for instance, where different methods of computing tax bases lead to a greater actual tax burden for imported products. In this regard, the GATT 1947 panel in *Japan - Alcoholic Beverages I* has stated that:

> … in assessing whether there is tax discrimination, account is to be taken not only of the rate of the applicable internal tax but also of the taxation methods (*e.g*. different kinds of internal taxes, direct taxation of the finished product or indirect taxation by taxing the raw materials used in the product during the various stages of its production) and of the rules for the tax collection (*e.g*. basis of assessment).[472]

11.184 It may thus be stated, in more general terms, that a determination of whether an infringement of Article III:2, first sentence, exists must be made on the basis of an overall assessment of the actual tax burdens imposed on imported products, on the one hand, and like domestic products, on the other hand.

11.185 With this in mind, we now turn to examine the actual tax burdens which RG 3431 and RG 3543 impose on imported products. We recall that under RG 3431 imports are subject, upon importation, to pre-payment of the IVA at a rate of 10 percent or 12.7 percent *ad valorem*. Under RG 3543, the IG must be pre-paid on imports at a rate of 3 percent or 11 percent *ad valorem*. In both cases, the amount thus paid may be credited at the time when the taxable persons must settle their definitive liability under the IVA Law and IG Law.[473]

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[471] Appellate Body Report on *Canada – Periodicals*, *supra*, footnote 186, at 464.
[472] Panel Report on *Japan – Alcoholic Beverages I*, *supra*, 185, para. 5.8.
[473] The collection rate of 12.7 percent is not creditable. See the parties' replies to Panel Question 33.

11.186 Argentina is correct, in our view, in pointing out that a factual situation such as the one before us calls for a dynamic view of the taxation process. Thus, taking a dynamic view, it is apparent that RG 3431 and RG 3543 do not give rise to net tax *payments*, given that the amounts paid are creditable against the definitive liability under the IVA Law and IG Law. However, this does not mean that no actual tax *burden* is imposed by RG 3431 and RG 3543. As a matter of fact, an actual tax burden does arise.

11.187 The actual tax burden which arises from RG 3431 and RG 3543 may take one of two forms, depending on the factual circumstances of each case. First, in situations where taxable persons have disposable working capital to finance the pre-payment of the IVA or IG, they are forced, on account of the pre-payment requirement, to forego interest on that working capital in the interval between the tax pre-payment and its crediting. Alternatively, in situations where taxable persons do not have disposable working capital to finance the pre-payment of the IVA or IG, they need to raise the necessary capital and pay interest on it in the interval between the tax pre-payment and its crediting.

11.188 It is clear to us that both of these situations give rise to a financial burden, an opportunity "cost" in one case and a debt financing "cost" in the other.[474] Likewise, it is readily apparent that that financial burden is incidental to and directly caused by RG 3431 and RG 3543.[475] For these reasons, it is properly regarded as an integral part of the actual tax burden imposed by RG 3431 and RG 3543.[476] As such, it falls squarely within the scope of Article III:2, first sentence.

474 We recall that no a priori statements are possible as to who bears that financial burden. Depending on the market situation, the taxable person may have to bear that burden and suffer lower profit margins. Alternatively, where the market situation allows a taxable person to sell a product at a higher price, the burden may be borne by the purchaser of the product. Regardless of who bears the burden, it has an immediate impact on the competitive opportunities of the products affected.

475 We note that if RG 3431 and RG 3543 were to cease to exist, so would those tax burdens. It should be noted in this context that we do not agree with Argentina that the extra financial burden in the form of interest lost or paid is a "cost" necessarily associated with all import transactions in the same way as certain inherently import-related costs, such as customs clearance-related costs or certain freight and insurance costs. It is important to recall in this regard that the pre-payment mechanisms established by RG 3337 and RG 2784, i.e. those governing internal sales transactions, impose the same type of financial burden on the purchasers or sellers involved in these transactions.

476 We note the European Communities' view that the interest lost or paid by importers constitutes, in itself, an "internal tax or other internal charge of any kind" within the meaning of Article III:2, first sentence. In favour of its argument, the European Communities refers to the report of the GATT 1947 panel in EEC - Fruits and Vegetables. It is true that in that case, which dealt with Article II:1(b) of the GATT 1947, the panel found that lost interest and other related costs were "other duties or charges of any kind imposed on or in connection with importation" within the meaning of Article II:1(b). See EEC – Fruits and Vegetables, supra, at para. 4.15. Even considering the fact that the aforementioned panel did not deal with Article III:2, first sentence, we consider that our approach is not inconsistent with that panel's finding. The interest charges and costs at issue in EEC – Fruits and Vegetables were connected to the lodging of a security, which in turn was required to guarantee a minimum import price established for tomato concentrates. In our view, those were factual circum-

11.189 We therefore conclude that, even in a dynamic perspective, both RG 3431 and RG 3543 impose actual tax burdens on the products governed by them.

11.190 Before proceeding to analyse the European Communities' claims that imported products are subject to an actual tax burden which exceeds that imposed on like domestic products, it is necessary once again to draw attention to the direct causal link between the tax pre-payments specifically envisaged in RG 3431 and RG 3543, on the one hand, and the incidental financial burden in the form of interest foregone or paid, on the other hand. Thus, to the extent that, pursuant to RG 3431 and RG 3543, higher nominal pre-payment *rates* apply to imported products than to like domestic products, this necessarily implies that a heavier actual tax *burden* is imposed on imported products.

11.191 In view of the fact that Argentina does not compensate importers subject to RG 3431 and RG 3543 for all or part of the interest lost or paid,[477] it is sufficient, for purposes of establishing violations of Article III:2, first sentence, for the European Communities to demonstrate that imported products are subject to higher nominal pre-payment rates than like domestic products or are subject to pre-payment when like domestic products are not.

(b) Pre-Payment of the IVA

(i) Claims by the European Communities

11.192 The European Communities has made several specific claims to the effect that, pursuant to RG 3431, import transactions are subject to higher pre-payment of the IVA than internal sales transactions or are subject to such pre-payment when internal sales transactions are not. Those claims are examined below individually, together with those of Argentina's counter-arguments which are specific to each of the European Communities' claims. Argentina has also made a number of broad counter-arguments in respect of the European Communities' claims. For the sake of convenience and economy of effort, those counter-arguments of a broad nature are addressed separately in Section XI.C.5(b)(ii) of our findings. It follows from this that, should we conclude in this Section that one or other of the European Communities' claims is justified, that conclusion cannot

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stances which are quite unlike those prevailing in the present case. In the present case, the loss or payment of interest is incidental to the pre-payment of the IVA and IG envisaged in RG 3431 and RG 3543. In EEC – Fruits and Vegetables, the loss of interest was not incidental to the payment of the applicable customs duty – which would have been a situation under Article II:1 analogous to that in the present case. Instead, the loss of interest arose as a consequence of the measure establishing the minimum import price, which, in legal terms, was distinct from the customs duty. In light of the foregoing, we see no need to make findings on the merits of the European Communities' argument.

[477] Argentina's reply to Panel Question 81(a). Argentina's argument that compensating importers for the interest lost or paid would be too costly is addressed in Section XI.C.6 below, where we consider Argentina's defence under Article XX(d) of the GATT 1994.

be considered definitive until and unless we have reached the further conclusion that Argentina's broad counter-arguments are not sustainable.

Lower Pre-Payment Rates Applicable to Internal Sales to Registered Taxable Persons

11.193 The European Communities notes that RG 3431 establishes a generally applicable pre-payment rate for imports by registered taxable persons of 10 percent.[478] The European Communities points out that, on the other hand, pursuant to RG 3337, internal sales of goods to registered taxable persons are subject to pre-payment at a lesser rate of 5 percent.[479]

11.194 Argentina points out that internal sales transactions may be subject to either collection at source in accordance with RG 3337 or withholding pursuant to General Resolution (AFIP) No. 18/97[480]. RG 18 establishes a withholding rate of 10.5 percent.[481] Argentina further points out that, previously, no pre-payment of the IVA had to be made on imports. Argentina notes that RG 3431 was enacted to ensure equal treatment of imports and internal sales.

11.195 We note that imports governed by RG 3431 are subject to pre-payment of the IVA at a rate of 10 percent, whereas, in accordance with RG 3337, internal sales of like products by *agentes de percepción* to registered taxable persons are subject to pre-payment of the IVA at a lower rate of 5 percent.

11.196 Even recognizing that a heavier tax burden is imposed on internal sales transactions which are governed by RG 18 (which provides for a withholding rate of 10.5 percent) than on import transactions falling under RG 3431 (which provides for a collection rate of 10 percent) and involving like products, this would not be inimical to the European Communities' claim. The provisions of Article III:2, first sentence, are applicable to each and every import transaction. It is well established that the fact that some imported products receive more favourable tax treatment than like domestic products cannot successfully be invoked as justification for less favourable tax treatment of other imported products.[482]

11.197 In light of the foregoing, we conclude that RG 3431, by providing for higher pre-payment rates for imports by registered taxable persons than for internal sales subject to RG 3337, is inconsistent with Article III:2, first sentence.

[478] See Article 3 a) of RG 3431.
[479] See Article 2 of RG 3337.
[480] Exhibit ARG-XVIII (hereafter "RG 18").
[481] See Article 8 (a) of RG 18. Import transactions are not subject to withholding.
[482] See the Panel Report on United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco (hereafter "United States – Tobacco"), adopted on 4 October 1994, DS44/R, at para. 98. For reports with respect to Article III:4 of the GATT 1994, see the Panel Reports on United States – Section 337, supra, at para. 5.14*; United States – Gasoline*, *supra*, footnote 250, para. 6.14.

No Pre-Payment on Internal Sales to Non-Registered Taxable Persons

11.198 The European Communities points out that no pre-payment of the IVA is due in the case of internal sales to non-registered taxable persons, whereas the IVA must be pre-paid in the case of imports by non-registered taxable persons.

11.199 Argentina acknowledges that no pre-payment of the IVA is due in cases of internal transactions between non-registered taxable persons. Argentina asserts, however, that it cannot possibly occur in practice that non-registered taxable persons are habitual importers, because registration is compulsory for those taxable persons whose income from transactions exceeds a specified limit. Argentina further argues that the status of "non-registered taxable person" is a voluntary one, since any individual can obtain the status of "registered taxable person" by applying to the tax authority.

11.200 As concerns sales by registered taxable persons to non-registered taxable persons, Argentina recalls that registered taxable persons must act, in such transactions, as *agentes de percepción* for non-registered taxable persons and collect an additional amount which corresponds to an estimate of the IVA which is payable by non-registered taxable persons on the re-sale of the products purchased. Argentina considers that there is therefore no discrimination between non-registered taxable persons who purchase from foreign sellers and those who purchase from domestic registered taxable persons. Argentina further notes that the aforementioned special collection mechanism facilitates payment of the IVA and reduces the number of taxable persons subject to inspection.

11.201 We understand the European Communities' claim to be based on a comparison of the pre-payment required with respect to import transactions, on the one hand, and the pre-payment required on either of two types of internal sales transactions, on the other hand.[483] Those two types are (i) internal sales by non-registered taxable persons to non-registered taxable persons and (ii) internal sales by registered taxable persons to non-registered taxable persons.

11.202 Regarding the first comparison, we note that internal sales by non-registered taxable persons to non-registered taxable persons are not subject to the IVA and consequently not to any pre-payments of it either.[484] In contrast, pursuant to RG 3431, the IVA must be pre-paid on imports by non-registered taxable persons at a rate of 12.7 percent.[485] That pre-payment cannot be credited against the IVA.[486] As concerns the second comparison, we note that, in the case of inter-

[483] E.g., EC reply to Panel Question 33.
[484] Parties' replies to Panel Question 33.
[485] See Article 3.2 b) of RG 3431.
[486] See Article 4 of RG 3431 as well as the parties' replies to Panel Question 33. As a result, to the rate of 12.7 percent must be added to the rate of 21 percent, which is chargeable pursuant to the IVA Law. Since our terms of reference do not encompass the IVA Law, we base our examination on the rate applicable under RG 3431.

nal sales by registered taxable persons to non-registered taxable persons, the purchasers must make an additional, i.e. non-creditable, IVA payment of 10.5 percent.[487] On the other hand, as already mentioned, the IVA must be pre-paid on imports by non-registered taxable persons at a rate of 12.7 percent. It is apparent from the foregoing that, in both situations, imported products are subject to a heavier tax burden than like domestic products.

11.203 Argentina submits that it cannot possibly occur in practice that non-registered taxable persons are habitual importers, because registration is compulsory for those taxable persons whose income from transactions exceeds a specified limit. It should be noted, first, that Article III:2 applies to all imported goods and not only to those imported by habitual importers. We further note that Argentina does not argue that it is legally impossible for non-registered taxable persons to import goods.[488] Moreover, even assuming it were true, as a factual matter, that there are presently no or only few non-registered taxable persons who import goods, this would not, *per se*, warrant the conclusion that such persons could not import goods in the future. Likewise, the fact that the rate of 12.7 percent may not have had a significant trade effect thus far, would not, in line with general practice under Article III:2, first sentence, be fatal to the European Communities' claim.[489] For all these reasons, we are not convinced by Argentina's argument.

11.204 Argentina further points out that any individual can obtain the status of a registered taxable person by applying to the tax authorities. While this may be correct,[490] we fail to see how the possibility of obtaining the status of a registered taxable person could prevent imports by non-registered taxable persons from being subject, as a matter of law, to a heavier tax burden than like domestic products purchased by non-registered taxable persons.

11.205 As regards, finally, Argentina's assertion that the collection of an additional amount of IVA by registered taxable persons on their internal sales to non-registered taxable persons facilitates payment of the IVA and reduces the number of taxpayers subject to inspection, we note that it is not obvious to us, in the absence of specific information on this point, why Argentina nevertheless considers that all imports by non-registered taxable persons warrant such inspection. In any event, nothing in the terms of Article III:2, first sentence, justifies a departure therefrom on the basis that doing so is in the interest of efficient tax administration.[491]

11.206 We therefore conclude that RG 3431, by requiring the pre-payment of the IVA on imports by non-registered taxable persons when no pre-payment of

[487] This rate is in addition to the regular IVA rate of 21 percent. See Articles 4, 30 and 38 of the IVA Law; Argentina's reply to Panel Question 33. RG 3337 does not apply to sales transactions between agentes de percepción and non-registered taxable persons. See Article 1 of RG 3337.
[488] Argentina's reply to Panel Question 46.
[489] See the Appellate Body Report on *Canada – Periodicals*, *supra*, footnote 186, at 463.
[490] See Article 29 of the IVA Law; Exhibit ARG-XXXVIII.
[491] Parties' replies to Panel Question 30.

the IVA or additional IVA payment of equal amount is required on internal sales to non-registered taxable persons, is inconsistent with Article III:2, first sentence.

*No Pre-Payment on Internal Sales by non-agentes de percepción*

11.207 The European Communities argues that the pre-payment of the IVA is required only on internal sales made by *agentes de percepción*, whereas the IVA must be pre-paid with respect to essentially all import transactions.

11.208 As we understand it, the European Communities' claim is in respect of the fact that internal sales transactions involving sellers other than *agentes de percepción* are not within the purview of RG 3337,[492] whereas the IVA must be pre-paid, pursuant to RG 3431, on essentially all import transactions[493] and regardless of the "status" of the foreign seller. More specifically, it appears to us that the European Communities' broad claim arises out of the fact that no pre-payment is required on (i) internal sales transactions involving registered taxable persons as both sellers and purchasers[494] and (ii) internal sales transactions between non-registered taxable sellers and registered taxable purchasers[495].[496]

11.209 Argentina has not specifically addressed this claim by the European Communities.[497] Argentina has explained, however, that collection at source regimes *inter alia* serve as means of preventing tax evasion in that they involve adversarial-style checks between *agentes de percepción* and tax debtors.[498] While with respect to imports it is the Directorate-General of Customs which serves as *agente de percepción*, for internal sales transactions Argentina appoints certain persons, often large companies, to act as *agentes de percepción*.

11.210 It is not incumbent upon us to speculate why Argentina chose not to appoint other persons as *agentes de percepción* and for what reasons it did not

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[492] See Article 1 of RG 3337.

[493] Pursuant to Article 2 of RG 3431, certain categories of import transactions do not fall within the scope of RG 3431. Our findings do not extend to those exempt categories, nor are our findings affected by the existence of those categories.

[494] Internal sales by registered taxable persons to agentes de retención are subject to withholding at a rate of 10.5 percent in accordance with RG 18. We consider that those transactions are not within the scope of the European Communities' claim in view of the fact that import transactions are subject to collection at source at a rate of 10 percent.

[495] Pursuant to Article 4 of RG 18, internal sales transactions involving non-registered taxable persons as sellers are not subject to withholding.

[496] There is no need for us to consider internal sales transactions between registered or non-registered taxable sellers, on the one hand, and non-registered taxable purchasers, on the other hand. We have already addressed these transactions under the previous sub-heading.

[497] We note that Argentina has not disputed that internal sales transactions involving non-agentes de percepción as sellers are not subject to collection at source. The exception of transactions falling under RG 18 has already been acknowledged.

[498] Argentina's First Written Submission, at para. 128.

see fit to subject to IVA pre-payment internal sales by non-*agentes de percepción*. It is sufficient to note that we are not aware, and have not been made aware, of any reason why it would not be possible, as a matter of Argentinean law or as a factual matter, for non-*agentes de percepción* to be involved in internal sales transactions as sellers. As a further consideration, we add that, in the context of an inquiry under Article III:2, first sentence, the mere fact that a domestic product is sold by a non-*agente de percepción* does not, in our view, render a product which is otherwise like an imported product "unlike" that product.[499]

11.211 In light of the foregoing, we can only conclude that Argentina, by requiring the pre-payment of the IVA in the case of imported products when like domestic products sold by a non-*agente de percepción* are not subject to any pre-payment of the IVA, acts inconsistently with its obligations under Article III:2, first sentence.[500]

*No Pre-Payment on Internal Sales to Certain Financial Entities or agentes de percepción/retención*

11.212 The European Communities submits that no pre-payment of the IVA is required on internal sales to certain categories of purchasers, including in particular the financial entities governed by Law No. 21526 and *agentes de percepción/retención*, whereas the IVA must be pre-paid with respect to essentially all import transactions.

11.213 Argentina argues that the financial entities governed by Law No. 21526 are excluded from the collection mechanism established by RG 3337 because they ensure that collection takes place with a high degree of efficiency and security and also fall under the control of Argentina's Central Bank. Argentina further submits that the corporate purpose (*objeto social*) of financial entities does not include trading. In Argentina's view, it may thus be inferred that any imports effected by such entities would involve goods intended for use in their economic activity (*bienes de uso*), which goods are not subject to RG 3431, i.e. the collection mechanism applicable to import transactions. With regard to the exemption

[499] See also the Panel Reports on *United States – Gasoline*, *supra*, footnote 250, para. 6.11; United States – Malt Beverages, supra, at para. 5.19. These panels held that differential regulatory or tax treatment of imported and like domestic products cannot be maintained, consistently with Article III, on the basis that the characteristics and circumstances of the producers of those products are different. The same logic must apply, in our view, to cases where tax distinctions between like imported and domestic products are based on the characteristics and circumstances of the sellers or purchasers of those products.

[500] Regarding the scope of this conclusion, it should be stated, as previously explained, that it applies only to import transactions subject to RG 3431. It should further be recalled that this conclusion has been reached on the basis of a consideration of certain types of internal sales transactions only, namely those involving registered or non-registered taxable persons as sellers and registered taxable persons as purchasers.

from RG 3337 of *agentes de retención*, Argentina asserts that this is necessary as otherwise both collection at source and withholding of the IVA would occur in one and the same internal sales transaction.[501]

11.214 We first consider the European Communities' claim in respect of financial entities. RG 3337 excludes from its scope of application financial entities governed by Law No. 21526 as modified.[502] By contrast, financial entities of the same kind are not specifically excluded from the provisions of RG 3431.

11.215 According to Argentina, financial entities are not subject to RG 3337 because they do not cause significant collection problems and are under the supervision of the Central Bank. Even if true, this does not justify imposing a greater tax burden on products imported by financial entities than on products purchased domestically by the same entities. To the contrary, this constitutes an infringement of the provisions of Article III:2, first sentence.

11.216 Regarding Argentina's contention that, in view of their corporate purpose (*objeto social*), financial entities could not import and re-sell goods, we note that Argentina has not submitted any evidence establishing that financial entities are legally barred from engaging in cross-border trading of goods.[503] Moreover, we fail to see, and Argentina has not explained to us, why the same rationale, if it had any legal basis, should not apply in the same way to internal purchase and resale transactions involving financial entities. We cannot, therefore, accept this argument.

11.217 Furthermore, it is not convincing for Argentina to argue that any import transactions undertaken by financial entities would involve goods intended for use in those entitities' economic activity (*bienes de uso*), which transactions are not governed by RG 3431.[504] In our understanding, internal sales transactions involving the same category of goods (*bienes de uso*) are not subject to RG 3337 either.[505] Yet RG 3337 specifically exempts financial entities from its purview, whereas RG 3431 does not.

11.218 The foregoing leads us to the conclusion that, by subjecting products imported by financial entities to a heavier tax burden than domestic products bought by those entities, Argentina is in breach of Article III:2, first sentence.

11.219 We now turn to examine the European Communities' claim concerning the exemption from RG 3337 of internal sales by *agentes de percepción* to *agentes de percepción/retención*. Pursuant to Article 3 b) of RG 3337, *agentes de percepción/retención* which buy from *agentes de percepción/retención* are not

[501] Argentina notes that sellers would have to collect the pre-payment of the IVA from their purchasers, who would in turn have to withhold, pursuant to RG 18, the corresponding amount on their payments to the sellers.
[502] Article 3 c) of RG 3337.
[503] Argentina's reply to Panel Question 35.
[504] See Article 2.3 of RG 3431.
[505] See Article 1 of RG 3337.

required to pre-pay the IVA.[506] On the other hand, importers are generally liable to pre-pay the IVA under RG 3431.[507]

11.220 Argentina points out that the exemption for purchases by *agentes de percepción/retención* is necessary to avoid a situation where one and the same internal sales transaction is subject to both collection and withholding at source. For present purposes, we need not decide whether this exemption is indeed necessary.[508] Article III:2, first sentence, prohibits the imposition of different tax burdens on imported and like domestic products. The identity and circumstances of the persons involved in sales transactions cannot, in our view, serve as a justification for tax burden differentials.[509]

11.221 Moreover, nothing in Article III:2, first sentence, provides any basis for subjecting imported products to heavier tax burdens than like domestic products on the grounds that this is dictated by the details of a particular tax system. This should not be construed to mean that Members are not free, in principle, to choose and implement any kind of product tax system. They clearly are.[510] However, that choice must be consistent with the disciplines of Article III:2, first sentence.[511]

11.222 We therefore conclude that RG 3431 is inconsistent with Article III:2, first sentence, by subjecting imported products to a heavier tax burden than like domestic products subject to RG 3337 and purchased by *agentes de percepción/retención*.

Minimum Pre-Payment Threshold for Internal Sales

11.223 The European Communities asserts that no pre-payment of the IVA is required on internal sales below a certain amount, while the IVA must be prepaid by importers irrespective of the value of import transactions.

11.224 Argentina argues that the minimum pre-payment threshold for internal sales transactions set out in Article 5 of RG 3337 serves the reasonable, economical and practical management of the collection mechanism established by

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[506] See also Article 5 (a) of RG 18, according to which sales by agentes de retención are not subject to withholding.

[507] Pursuant to Article 2 of RG 3431, certain categories of import transactions do not fall within the scope of RG 3431. Our findings do not extend to those categories, nor are our findings affected by the existence of those exempt categories.

[508] We simply note that, at least as a matter of logic, it does not follow from Argentina's argument that it would not be possible to subject such an internal transaction to tax pre-payment at least once, whether in the form of collection at source or in the form of withholding.

[509] See the Panel Reports on *United States – Gasoline*, *supra*, footnote 250, para. 6.11; United States – Malt Beverages, supra, at para. 5.19. See also footnote 499 of this report. The disciplines of Article III:2, first sentence, are of course subject to whatever exceptions a Member may justifiably invoke.

[510] See the Appellate Body Report on *United States – FSC*, *supra*, footnote 312, para. 179.

[511] It should again be mentioned here that the disciplines of Article III:2, first sentence, are subject to whatever exceptions a Member may justifiably invoke.

RG 3337. Argentina submits that no minimum threshold exists for pre-payments resulting from import transactions as there is an assumption that such transactions always involve large sums of money. According to Argentina, this is so because of the quantities and/or cost involved in cross-border transactions. Argentina considers that small import transactions would be hardly worth importers' while, since importation requires a specific type of business structure. Argentina further points out that no pre-payment of the IVA is required for samples of a value not exceeding US$100, which, in Argentina's view, shows that there is a certain threshold also for imports.

11.225 We note that Article 5 of RG 3337 provides for a minimum pre-payment threshold. Where a taxable transaction gives rise to an amount of pre-payment which is equal to or below the pre-payment threshold amount, no pre-payment is collected.[512] No such minimum pre-payment threshold is set forth in RG 3431.

11.226 We are unable, in the context of an inquiry under Article III:2, first sentence, to accept Argentina's argument that the minimum pre-payment threshold, which is available only for domestic products, is appropriate for purposes of the "reasonable", "economical" and "practical" administration of the collection of the IVA. Nothing in Article III:2, first sentence, suggests that Members need not adhere to its provisions where doing so would compromise administrative efficiency.[513] Even assuming such an argument could be accepted in principle, we are not persuaded that the administrative constraints cited by Argentina apply only to domestic products. Moreover, Argentina has not demonstrated that import transactions "always" involve large amounts of money so that no minimum pre-payment threshold is necessary.

11.227 Notwithstanding Argentina's assertion to the contrary, it is immaterial, in our view, that samples of a certain money value are not subject to RG 3431.[514] Even if that assertion were correct, the fact remains that the minimum pre-payment threshold set out in Article 5 of RG 3337 extends to products other than samples. As a result, with respect to imported products which are not samples, the differential treatment and the attendant tax burden differential persist.

11.228 On that basis, we conclude that, by providing for a minimum pre-payment threshold exclusively for the benefit of domestic products, Argen-

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[512] Article 5 of RG 3337 does not provide for a minimum transaction value threshold, as suggested by the European Communities. It is nevertheless clear to us that the European Communities' claim relates to Article 5 and the minimum pre-payment ("tax") threshold provided for therein. Since the European Communities has specifically referred us to Article 5 and has cited the correct threshold amount and since Argentina has not raised any objection to our consideration of this claim and has in fact built its defence on the assumption that the European Communities' claim concerns Article 5, we find that we may proceed with our examination of this claim. Argentina's rights of defence have not, in our view, been impaired as a result of the European Communities' error.

[513] Parties' replies to Panel Question 30.

[514] We note in this regard that Argentina has not submitted direct documentary evidence supporting its assertion that samples not exceeding a certain value are not covered by the provisions of RG 3431.

tina imposes on imported products falling under RG 3431 a greater tax burden than on like domestic products, which is contrary to Article III:2, first sentence.

(ii) Broad Counter-Arguments by Argentina[515]

Adjustment for Prior-Stage Pre-Payment

11.229 Argentina asserts that imported products do not bear a greater tax burden than like domestic products if account is taken of pre-payments of the IVA made at marketing stages prior to the sale of the finished domestic products. Argentina maintains that the total amount of pre-payments of the IVA borne by domestic finished products is equal to or greater than the pre-payment of the IVA collected on imported finished products at the time of importation.[516] Argentina argues that it may be deduced from the report of the Working Party II on Schedules and Customs Administration[517] that such "domestic" prior-stage pre-payments of the IVA must be taken into consideration for purposes of an analysis under Article III:2.

11.230 The European Communities agrees that Argentina may be entitled to compensate for the financial costs imposed on domestic products at prior processing stages. The European Communities notes, however, that what could be compensated for is not the amount of the pre-payments of the IVA at prior domestic processing stages, but only the additional financial cost imposed on taxable persons in the form of lost interest. The European Communities further submits that Argentina has not provided evidence showing that the different rates applied to imports and internal sales correspond to the actual difference in costs borne by imported and like domestic products or, at least, to a reasonable estimate thereof. The European Communities adds that the rates on imports do not vary depending on their degree of processing. According to the European Communities, the rates should be higher on imports of processed products, since domestic products are likely to have been subjected to pre-payments on more occasions than unprocessed products.

11.231 We note that both parties to these proceedings consider that Argentina may, in principle, impose on imported products a tax or other charge equivalent to and not in excess of the taxes or other charges levied internally at the various stages of production of the like domestic product. It is not necessary for us to

[515] The broad counter-arguments grouped together here are not in the nature of affirmative defences, but are brought forward by Argentina in an attempt to rebut the European Communities' claims in respect of RG 3431. We have already found in Section XI.C.5(b)(i), albeit not definitively, that the European Communities has succeeded in establishing that RG 3431 is inconsistent with Article III:2, first sentence. It is therefore up to Argentina to demonstrate that its broad counter-arguments rebut the European Communities' claims and that we should therefore modify our earlier findings of violation.

[516] For a numerical example presented by Argentina, see para. 8.116 of this report.

[517] Report of the Working Party II on Schedules and Customs Administration, adopted on 26 February 1955, BISD 3S/205.

take position on this legal issue in the present case.[518] Even assuming that the parties' view were legally correct, we consider that Argentina has not presented argument and evidence sufficient for us to modify our earlier findings in respect of RG 3431.

11.232 Argentina has not adduced any evidence which would establish that the interest lost or paid due to the collection at source of the IVA on imported products is equivalent to the cumulative interest lost or paid due to the collection or withholding at source of the IVA on like domestic products at the various stages of their production.[519]

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[518] We simply note that this issue was specifically addressed, but not resolved, by the Working Party II on Schedules and Customs Administration. The relevant passage of the Working Party's report reads as follows:

> The delegate for Germany proposed the insertion of the following interpretative note to para. 2:
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> > "the words 'internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products', as employed in the first sentence of paragraph a, shall be construed to denote the overall charge, including the charges borne by like domestic products through being subjected to internal taxes or other internal charges at various stages of their production (charges borne by the raw materials, semi-finished products, auxiliary materials, etc. incorporated in, and by the power consumed for the production of, the finished products)."
>
> The Working Party considered the significance of the phrase "internal taxes or other internal charges" in relation to taxes which are levied at various stages of production, and in particular whether the rule of national treatment would allow a government to tax imported products at a rate calculated to be the equivalent of the taxes levied at the various stages of production of the like domestic product or only at the rate of the tax levied at the last stage. Several representatives supported the former interpretation, while the representative of the United States, on the other hand, thought the reference to internal taxes covered only a tax levied on the final product competitive with the imported article. Against the latter view it was argued that that interpretation would establish a discrimination against countries which chose to levy taxes at various stages and in favour of those which levy a single turnover tax on finished products. Some other representatives were of the opinion that the equivalent of the taxes on the final product and on its components and ingredients would be permitted, but not taxes on power consumed in manufacture, etc. In view of these differences of opinion, the Working Party does not recommend the insertion of an interpretative note, it being understood that the principle of equality of treatment would be upheld in the event of a tax on imported products being challenged under the consultation or complaint procedure of the Agreement.

See the Working Party II Report on Schedules and Customs Administration, supra, para. 10. We also note that the Appellate Body report on *United States – FSC*, *supra*, footnote 312, may have implications for the ability of a Member with a territorial system of taxation to assess excess taxes to account for processes undertaken on the imported product when outside the importing Member's jurisdiction, which processes might be accounted for if a world-wide system were utilised.

[519] Nor has Argentina produced any evidence demonstrating that equivalence is achieved at least by reasonable approximation, which might be appropriate in situations where the calculation of the exact amount of adjustment would be overly difficult or administratively burdensome. For the propo-

11.233 Moreover, Argentina has not supplied a convincing explanation of why imports are subject to a flat rate of collection notwithstanding the varying degrees of processing of imported products.[520] In our view, Argentina's assertion that the rate differentials adjust for prior-stage tax burdens borne by domestic products implies that the amount of adjustment should normally be greater (and hence the rates of collection higher) for imported products with a high level of processing than for imported products with a low level of processing. This is because, in the case of imported products with a high level of processing, like domestic products may reasonably be assumed to have undergone a greater number of production and processing stages and thus to have given rise to a greater number of pre-payments of the IVA than domestic products with a low level of processing.

11.234 In light of the foregoing, we cannot accept Argentina's argument that imported products covered by RG 3431 are not subject to greater tax burdens than like domestic products, if account is taken of prior-stage tax burdens borne by like domestic products.

Exemption Mechanism

11.235 Argentina submits that General Resolution (AFIP) No. 17/97[521] establishes a mechanism for the exemption of taxable persons from the various mechanisms for the collection or withholding at source of the IVA. According to Argentina, such exemption is automatically granted in cases where those collection regimes could give rise to pre-payments of the IVA which exceed a taxable person's definitive tax liability under the IVA Law.[522] Argentina argues that the exemption mechanism is aimed precisely at avoiding a situation where the rate differentials challenged by the European Communities generate a financial cost which alters the competitive opportunities of imported and domestic products.

11.236 The European Communities argues that RG 17 does not remedy the discrimination which is the subject of its complaint. The European Communities submits that importers may be granted an exemption from the requirement to pre-pay the IVA only in situations where it can be anticipated that they will find themselves in a loss position *at the end* of the relevant tax period. The European

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sition that account may be taken, for purposes of border tax adjustment, of the fact that the calculation of the exact amount of adjustment may be difficult in some cases, see the Working Party Report on Border Tax Adjustments, supra, at para. 16.

[520] It should be recalled that the European Communities' complaint concerns only the general collection rates provided for in Article 3 of RG 3431. The European Communities does not challenge the special and lower collection rates also laid down in Article 3 of RG 3431. Those special rates apply to import transactions involving certain specified products, including live bovine animals, offal of bovines as well as fresh fruit and vegetables.

[521] Exhibit EC II.7 (hereafter "RG 17").

[522] Argentina notes that overpayment might arise, for example, because the mark-up with which a taxable person operates is lower than the added value presumed under the different collection regimes. See Argentina's reply to Panel Question 45(b).

Communities' complaint is concerned, however, with the extra financial cost caused by the pre-payments of the IVA *during* the tax period.

11.237 As a factual matter, the first thing that should be noted is the limited availability of the exemption mechanism envisaged in RG 17.[523] In order for taxable persons to benefit from the mechanism, they must be able to demonstrate an actual tax balance in their favour in the month immediately preceding the date of an application for exemption.[524] In other words, taxable persons must already have made pre-payments of the IVA in excess of their definitive tax liability to be able to avail themselves of the mechanism.

11.238 As regards the benefit of the mechanism, either full or partial exemption may be granted from the pre-payment of the IVA, depending on the circumstances of each case.[525] Exemptions are granted only for the tax period following the date of the application for exemption. Argentina has confirmed that exemptions cannot be granted for tax periods prior to the date of application.[526] As we understand it, this means that pre-payments made in excess of actual tax liability cannot be recovered.

11.239 On the basis of the above, it is clear to us that the exemption mechanism benefits only a limited class of taxable persons and then only for the future. Moreover, where exemptions are granted, they do not compensate for actual excess pre-payments of the IVA and the lost interest associated with such overpayments. In such circumstances, we fail to see how the exemption mechanism provided for in RG 17 could be said to prevent RG 3431 from infringing Article III:2, first sentence, even for those importers who meet the relevant eligibility criteria. *A fortiori*, RG 17 cannot provide legal cover for Argentina with respect to the class of importers who do not satisfy its eligibility criteria.

11.240 We cannot, therefore, accept Argentina's argument based upon the exemption mechanism set forth in RG 17.

Magnitude and Duration of the Tax Burden Differentials

11.241 Argentina argues that the tax burden differential challenged by the European Communities is *de minimis*.[527] According to Argentina, the present case is very different from the cases in which it has been established that Article III:2, first sentence, does not contain a *de minimis* exception. Argentina submits that all those previous cases were based on tax rate differentials, whereas, in the present case, the IVA Law provides for identical tax rates for imported and domestic

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[523] In reply to Panel Question 45(a), Argentina has confirmed that the exemption mechanism envisaged in RG 17 is available to importers.

[524] See Article 2 of RG 17.

[525] See Article 5 of RG 17.

[526] Argentina's reply to Panel Question 77.

[527] For the parties' quantitative estimate of one particular tax burden differential see paras. 8.179 and 8.181 of this report.

products. Argentina further argues that the impact of the loss of interest alleged by the European Communities is limited to a maximum of 30 days.

11.242 The European Communities submits that the Appellate Body has confirmed in *Japan - Alcoholic Beverages II* that Article III:2, first sentence, is not qualified by a *de minimis* standard. The European Communities also questions the correctness of Argentina's contention that the impact of the lost interest is limited to 30 days, stating that the impact may last longer than 30 days in cases where, for instance, an importer does not re-sell the imported goods within that time-period.

11.243 With respect to the permissibility of tax burden differentials, the Appellate Body stated in *Japan - Alcoholic Beverages II* that:

> 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."[528]

11.244 In light of this statement, we disagree with Argentina's argument that the tax burden differential resulting from RG 3431 and RG 3337 is consistent with Article III:2, first sentence, because the magnitude of the differential is *de minimis*. Nor are we convinced by Argentina's contention that the tax burden differentials in the present case are qualitatively different from those at issue in earlier GATT/WTO cases.[529]

11.245 As regards Argentina's assertion that the tax burden differential is limited to a 30-day period, we find it unnecessary to decide whether Argentina is correct as a factual matter because, even if the impact of the tax differential were limited to a 30-day period, this would not remove or justify any of the violations of Article III:2, first sentence, we have found earlier. The terms of Article III:2, first sentence, prohibit tax burden differentials irrespective of whether they are of limited duration. Moreover, since we have found above that even the smallest tax burden differential is in violation of Article III:2, first sentence, it would be inconsistent for us to allow tax burden differentials on the basis that their impact is limited to a 30-day period.

11.246 In light of the foregoing, we do not accept Argentina's arguments based on the magnitude and duration of the tax burden differentials.

### Provisions of Domestic Law

11.247 Article 45 of the IVA Law provides:

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[528] Appellate Body Report on *Japan – Alcoholic Beverages II*, *supra*, footnote 47 at 115 (footnote omitted).

[529] We recall in this regard that it is immaterial for purposes of the legal assessment of RG 3431 that, pursuant to the IVA Law, the same ultimate tax rates apply to imported and like domestic products.

> For the purposes of this law, no discriminatory treatment based on the national or foreign origin of goods shall be admissible in respect of rates or exemptions.

11.248 Argentina maintains that in view of the existence of Article 45 it cannot be said that the regime for the pre-payment of the IVA discriminates against imported products. According to Argentina, the provisions of Article 45 coincide with those of Article III:2. Argentina argues that, by virtue of Article 45, any person may proceed against the State if that person considers that the public administration is causing him injury in any way. Argentina finds it highly significant, therefore, that importers subject to the mechanism for the pre-payment of the IVA have not launched massive legal actions against the State to claim redress for the tax burden differentials alleged by the European Communities.

11.249 The European Communities argues that the mere existence of a domestic remedy against tax discrimination would not be sufficient, *per se*, to exclude a violation of Article III:2. The European Communities also submits that the right of a Member to bring a matter before a panel is not subject to the prior exhaustion of local remedies. The European Communities further notes that it is by no means certain that Article 45 provides an effective remedy. In the view of the European Communities, the wording of Article 45 is different from Article III:2 and, in any event, Argentina makes a reading of Article 45 which is at variance with the well-established interpretation of Article III:2.

11.250 We are not persuaded that the reference to "this law" in Article 45 necessarily implies a linkage to RG 3431. Article 45, by its own terms, relates only to the rates or exemptions provided for in the IVA Law. The text of Article 45 makes no reference to the collection mechanism foreseen in RG 3431. Moreover, Argentina has stated that, under Argentinean law, there is a difference, at least in matters of taxation, between a law (*ley*), such as the IVA Law, and a resolution (*resolución*), such as RG 3431.[530] For these reasons, unlike Argentina, we do not find it significant that importers subject to, and feeling discriminated by, RG 3431 have apparently not initiated legal proceedings pursuant to Article 45.[531]

11.251 Even if Article 45 implied a linkage to RG 3431, it should be borne in mind that we have found that, as a matter of fact, RG 3431 discriminates against imports, notwithstanding the provisions of Article 45. The existence of a linkage to RG 3431 could not affect this finding, unless Article 45 would set aside the provisions of RG 3431 to the extent of a conflict between the provisions of Arti-

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[530] According to Argentina, at least in tax matters, laws are enacted by the national legislature, the Congreso de la Nación, whereas resolutions are promulgated by administrative agencies. See Argentina's Second Oral Statement, at pp. 6-7.

[531] It may be noted that, to the extent Argentinean law requires the institution of legal proceedings to ensure the conformity of RG 3431 with Article III:2, first sentence, this could in itself fall short of the unconditional and full compliance required of Members. See e.g. the Panel Report on *Argentina – Textiles and Apparel*, *supra*, footnote 61, para. 6.68.

cle 45 and RG 3431. Argentina has not, however, addressed the legal consequences, under its domestic law, of possible incompatibilities between the IVA Law and RG 3431. We therefore see no need to consider this point further.

11.252 For these reasons, we are unable to accept Argentina's argument that any inconsistencies of RG 3431 with Article III:2, first sentence, are "cured" by Article 45.

(iii) Conclusions

11.253 As we are unable to accept Argentina's broad counter-arguments, we confirm the conclusions we have reached in Section XI.C.5(b)(i) regarding the European Communities' claims that imported products falling under RG 3431 are subject to a tax burden which exceeds that imposed on like domestic products.

11.254 It follows, therefore, that, by maintaining RG 3431, Argentina is acting inconsistently with its obligations under Article III:2, first sentence.

(c) Pre-Payment of the IG

(i) Claims by the European Communities

11.255 The European Communities has also made a number of claims to the effect that, pursuant to RG 3543, import transactions are subject to higher pre-payments of the IG than internal sales transactions involving like products or are subject to such pre-payments when internal sales transactions involving like products are not. Argentina has presented counter-arguments which are specific to each of the European Communities' claims. In addition, Argentina has advanced several broad counter-arguments. Our approach to examining the European Communities' claims in respect of RG 3543 parallels that we have followed for RG 3431 in respect of the pre-payments of the IVA. Accordingly, should our examination in this Section lead us to the conclusion that one or other of the European Communities' claims is justified, that conclusion does not become definitive until and unless we have reached the further conclusion, in Section XI.C.5(c)(ii) below, that Argentina's broad counter-arguments are not sustainable.

Lower Pre-Payment Rates Applicable to Internal Sales by Registered Taxable Persons

11.256 The European Communities points out that the rate at which the IG must be pre-paid, which is either 3 percent or 11 percent, is higher than the withholding rate on internal sales, which is either 2 percent or 4 percent.

11.257 Argentina argues that the collection of the IG on imports at a rate of 3 percent corresponds to the average of the withholding rates applicable to internal sales transactions, which are 2 percent and 4 percent.

11.258 We recall that, pursuant to RG 3543, imports are subject to pre-payment of the IG at a rate of 3 percent.[532] As regards internal sales transactions, the IG is to be pre-paid at a rate of 2 percent in the case of sales by IG-registered taxable persons and at a rate of 4 percent in the case of sales by non-IG-registered taxable persons.[533]

11.259 It is readily apparent that the 3 percent rate applicable to imports exceeds the 2 percent rate applicable to like domestic products sold by IG-registered taxable persons. While it is true, as Argentina points out, that the rate for imports corresponds to the average of the rates for internal sales, the fact remains that the rate applicable to imports is higher than that applicable to like domestic products sold by IG-registered taxable persons.[534]

11.260 It must be acknowledged that the 3 percent rate applicable to imports is lower than the 4 percent rate applicable to like domestic products sold by non-IG-registered taxable persons. Such reverse discrimination is, however, of no avail to Argentina. Article III:2, first sentence, is applicable to each individual import transaction. It does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances.[535]

11.261 We therefore conclude that RG 3543, by subjecting imports to a tax burden which exceeds that imposed on like domestic products sold by IG-registered taxable persons, fails to satisfy the requirements of Article III:2, first sentence.

No Pre-Payment on Internal Sales of Goods Destined for the Purchaser's Own Use or Consumption

11.262 The European Communities points out that the IG must be pre-paid on imports of goods for the importer's own use or consumption. The European Communities further points out that where natural persons purchase domestic goods, they are not required to withhold the IG on their payments to taxable sell-

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[532] See Article 4 of RG 3543. Article 4 also provides that definitive imports of goods intended for use or consumption by the importer are subject to a collection rate of 11 percent. The collection rate of 11 percent is addressed under the next sub-heading.

[533] See Article 14.3 of RG 2784.

[534] It should again be recalled in this context that the identity and circumstances of the persons involved in sales transactions cannot, in our view, serve as a justification for tax burden differentials. See the Panel Reports on United States – Gasoline, supra, at para. 6.11; United States – Malt Beverages, supra, at para. 5.19. See also footnote 499 of this report.

[535] See the Panel Report on United States – Tobacco, supra, at para. 98. For reports with respect to Article III:4 of the GATT 1994, see the Panel Reports on United States – Section 337, supra, at para. 5.14; *United States – Gasoline*, *supra*, footnote 250, para. 6.14.

ers, unless those payments result from the exercise of an economic activity on the part of those natural persons.[536]

11.263 It should be recalled that, pursuant to RG 3543, the IG must be pre-paid at a rate of 11 percent in the case of definitive imports of goods intended for use or consumption by the importer.[537] In contrast, RG 2784 provides that natural persons are required to withhold the IG only where they make payments for internal purchases resulting from an economic activity on their part.[538] In other words, internal sales of goods intended for use or consumption by natural persons are not subject to withholding at source of the IG.

11.264 We are not aware, in the context of an examination under Article III:2, first sentence, of any justification which could be offered in support of this discriminatory exemption of the aforementioned type of internal sales transactions from the requirement to pre-pay the IG. We therefore conclude that RG 3543, because it requires the pre-payment of the IG on definitive imports of goods intended for use or consumption by the importer when no such pre-payment is required on internal sales of like domestic goods intended for use or consumption by a natural person, does not conform to the requirements of Article III:2, first sentence.[539]

Minimum Pre-Payment Threshold and Monthly Pre-Payment Allowance for Internal Sales

11.265 The European Communities notes that the IG must be pre-paid pursuant to RG 3543 with respect to essentially all import transactions, irrespective of

[536] Argentina has not submitted specific arguments in respect of this claim by the European Communities.

[537] See Article 4 of RG 3543.

[538] See Article 3 f) of RG 2784.

[539] In our view, the European Communities does not challenge the fact that imports for importers' own use or consumption are subject to pre-payment of the IG at a rate of 11 percent, whereas internal sales transactions are taxed at rates of either 2 percent or 4 percent, depending on whether the sales are made by IG-registered or non-IG-registered taxable persons. The European Communities' submissions on this issue, taken as a whole, do not suggest that the European Communities makes such a claim. Those submissions do not, in any event, contain specific arguments supporting and substantiating such a claim. See EC First Written Submission, at para. 96; First Oral Statement, at paras. 53-55; Second Written Submission, at paras. 103-105. We therefore refrain from making findings in respect of these rate differentials. It should nonetheless be pointed out that Argentina has presented arguments to justify one of these rate differentials. See paras. 8.187-8.189 of this report. With respect to Argentina's argument that that differential is justified in light of the tax-bearing ability of the taxable persons concerned, we simply recall that we have previously expressed the view that it is not permissible under Article III:2, first sentence, to impose different tax burdens on imported and like domestic products on the basis of the circumstances or characteristics of the purchasers or sellers of those products. As concerns Argentina's argument that the differential is beyond question in view of the different uses for which the goods in question are intended, we limit ourselves to noting that, in our view, it is not the actual use to which a product is put by its user which is relevant for purposes of a "like products" determination under Article III:2, first sentence, but the potential end-uses of the products as such.

their value. The European Communities points out that under RG 2784, on the other hand, no IG is withheld on internal sales (i) when the amount of IG which would have to be withheld does not reach a certain threshold amount and (ii) when the purchaser's monthly payments do not exceed a certain amount.

11.266 Argentina argues that the number of taxable persons subject to RG 2784 is substantially larger than the number of taxable persons subject to RG 3543. According to Argentina, if no minimum withholding amount had been fixed, the withholding mechanism would have become inefficient and would not have helped minimise collection costs. Argentina further contends that import transactions always involve large sums of money and that it was therefore not considered necessary to set minimum amounts. Argentina further points out that, in any event, imported samples of a value not exceeding a certain threshold are also not subject to collection at source of the IG.

11.267 With respect to the minimum monthly amounts which are not subject to withholding under RG 2784, Argentina submits that importers must pre-pay the IG once, namely when the goods undergo inward customs clearance. Argentina argues that, in contrast, in the case of internal sales transactions, the taxable person is liable to withholding on a monthly basis and hence account is taken of all transactions taking place during each monthly period, which justifies the setting of the minimum amounts.

11.268 We note that RG 2784 provides for a minimum pre-payment threshold.[540] Where a taxable transaction gives rise to an amount to be withheld which is below that amount, no withholding is to be effected. No such minimum pre-payment threshold is set forth in RG 3543. We further note that RG 2784 provides for a monthly pre-payment allowance. Monthly payments for internal sales involving the same seller and purchaser and not exceeding a specified amount are not subject to withholding.[541] Again, no such "tax"-exempt threshold amount is envisaged in RG 3543 for import transactions in like circumstances.

11.269 We begin our analysis with the minimum pre-payment threshold. According to Argentina, the threshold laid down in RG 2784 is necessary for purposes of efficient tax administration. No such threshold exists under RG 3543, according to Argentina, because the number of taxable persons subject to it is substantially smaller and because import transactions always involve large sums of money. We are unable to accept these arguments. Neither by its terms nor by implication does Article III:2, first sentence, permit the imposition of different tax burdens on imported and like domestic products on the grounds that they are in the interest of administrative efficiency.[542] By the same token, Argentina's statement that domestic traders outnumber importers, even if true, would not provide a justification for discriminating against imported products. Finally, we must

[540] See Article 16 of RG 2784.

[541] See the introductory paras. of Articles 13 and 15 of RG 2784 as well as Article 15.3 of RG 2784.

[542] Parties' replies to Panel Question 30.

note that Argentina has not demonstrated that import transactions "always" involve large amounts of money.

11.270 We next turn to the monthly pre-payment allowance for internal sales. Argentina submits that these allowances are warranted in the case of internal transactions as they relate to situations where a series of transactions take place during each monthly period. Conversely, according to Argentina, import transactions are instantly "taxable" upon importation. We are not persuaded by this argument. Like import transactions, internal sales transactions are subject to pre-payment on a "per transaction" basis.[543] This is true, in our understanding, even where a series of transactions involving the same seller and purchaser is undertaken within the same month.[544] We therefore fail to see a fundamental difference between internal sales transactions and import transactions in this regard. In any event, it is clear to us that, by granting a monthly pre-payment allowance to certain domestic sellers based upon sales transactions with a particular purchaser, which allowance is not available to importers of like products, Argentina acts inconsistently with its obligations under Article III:2, first sentence.[545]

11.271 For the foregoing reasons, we conclude that RG 3543 violates Article III:2, first sentence, by denying imported products the benefit of a minimum pre-payment threshold and a monthly pre-payment allowance when such benefits are available to like domestic products.

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[543] See Article 5 of RG 2784. We note that Argentina does not explain how its contention that internal sales transactions are subject to withholding on a monthly basis can be reconciled with the provisions of Article 5 of RG 2784. See Argentina's First Written Submission, at para. 125. If it were true that internal sales transactions are subject to withholding on a monthly basis whereas import transactions are subject to collection at source on a "per transaction" basis, this could, in our view, add to the existing tax burden differential with respect to imported and like domestic products. Since our overall conclusion on the European Communities' claim in respect of the monthly pre-payment allowance for internal sales is not affected by whether or not the IG is withheld on internal sales transactions on a monthly basis, we need not pursue this issue further.

[544] See Article 13 of RG 2784.

[545] See the Panel Reports on *United States – Gasoline*, *supra*, footnote 250, para. 6.11; United States – Malt Beverages, supra, at para. 5.19. See also footnote 499 of this report. It should also be noted that Argentina has not explained why it would not be possible to make available to all importers a monthly pre-payment allowance equivalent to that provided for in RG 2784.

(i) Broad Counter-Arguments by Argentina[546] [547]

Exemption Mechanism

11.272 Argentina points out that Article 28 of RG 2784 establishes a mechanism for the exemption of taxable persons from the various mechanisms for the collection or the withholding at source of the IG. Argentina notes that Article 28 provides for the issuance of a special certificate of non-withholding in situations where the pre-payments of the IG in the relevant tax period could exceed the definitive tax liability arising from the IG Law. Argentina submits that Article 28 is designed to prevent the rate differentials challenged by the European Communities from generating a financial cost which alters the competitive opportunities of imported and domestic products.

11.273 The European Communities considers that Article 28 does not remedy the discrimination which is the subject of its complaint. The European Communities recognizes that importers may be granted an exemption from the requirement to pre-pay the IG in situations where it can be anticipated that they will find themselves in a loss position at the end of the relevant tax period. The European Communities' recalls, however, that its complaint is concerned with the extra financial cost caused by the pre-payments of the IG during the tax period.

11.274 Argentina has confirmed that the exemption mechanism set forth in Article 28 of RG 2784 applies to both imported and domestic goods.[548] In our understanding, the availability of the exemption mechanism is conditional upon a showing by the taxable person that the pre-payments of the IG to be made in the course of the annual tax period could exceed the definitive tax liability under the IG Law. Applications for exemption may be filed before the definitive tax liability is assessed.[549] If the Argentinean tax authorities determine that an overpayment situation could arise, an exemption from the requirement to pre-pay the IG

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[546] It should be borne in mind, in accordance with what we have previously said in Section XI.C.5(b)(ii), that the broad counter-arguments grouped together here are not in the nature of affirmative defences.

[547] It appears to us that Argentina does not contend that the discriminatory tax burden imposed on importers by RG 3543 adjusts for prior-stage pre-payments borne by the like domestic product. We understand Argentina to argue that the interest lost or paid by taxable persons as a result of the pre-payment of the IG, as envisaged in RG 2784, cannot be passed on to the next processing or marketing stage. See Argentina's reply to Panel Question 32; Argentina's Second Oral Statement, p. 8. In those circumstances, we fail to see a rationale for adjustment for prior-stage pre-payment of the IG. We therefore do not address this counter-argument here. In any event, our considerations on the same argument in respect of the pre-payments of the IVA envisaged in RG 3431 would be equally applicable. See Section XI.C.5(b)(ii) above.

[548] Argentina's reply to Panel Question 45(a). Argentina's reply is consistent with the provisions of Article 9 of RG 3543. Argentina further refers to Circular 1277. See para. 8.207 of this report.

[549] Argentina has stated that this is subject to the condition that Article 28 of RG 2784 does not stipulate as a condition that the taxable persons must have a balance in their favour. See Argentina's reply to Panel Question 45(c). No such stipulation is evident on the face of the currently applicable Article 28.

is granted.[550] Exemptions are valid for the tax period during which the application for exemption is filed and also cover part of the following tax period.

11.275 In light of the foregoing, we consider that, by virtue of Article 28, an eligible importer can to some extent prevent overpayment situations from arising. As an incidental effect, the importer who is granted an exemption can also avoid the discriminatory tax burden resulting from RG 3543. However, Argentina has not clearly explained to us what, if any, remedy is available to an importer who files an application for exemption only after having made a certain number of pre-payments of the IG. In our view, Argentina could avoid a violation of Article III:2, first sentence, only to the extent that pre-payments already made are refunded with appropriate interest.[551] Even disregarding this open issue, the fact remains that Article 28 is *a priori* of no avail to those importers who cannot demonstrate a possible overpayment situation in the course of a given tax period.

11.276 We are therefore not persuaded, even basing ourselves on assumptions most favourable to Argentina, that Article 28 ensures the conformity of RG 3543 with Article III:2, first sentence.

### Refund Mechanism

11.277 Argentina notes that, in case the pre-payments of the IG made in the course of the tax period exceed the definitive tax liability arising from the IG Law, the taxable person may request the refund of the excess payments pursuant to Resolution 2224. Argentina further points out that the actual overpayments are refunded with interest in accordance with Resolution (MeyOySP) No. 1253/98[552]. Argentina submits that, like the exemption mechanism provided for in Article 28, the refund mechanism serves to prevent the rate differentials challenged by the European Communities from generating a financial cost which alters the competitive opportunities of imported and domestic products.

11.278 The European Communities points out that the refund mechanism does not provide for the refund of the financial costs caused by the pre-payments of the IG during the tax period. It only allows the refund of the amount by which the pre-payments of the IG made during the tax period exceed the taxable person's definitive tax liability under the IG Law. The European Communities considers therefore that the refund mechanism fails to dispose of the European Communities' complaint.

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[550] Exemptions do not extend to pre-payments to be made on the basis of the income of employees. See Argentina's reply to Panel Question 78.

[551] Argentina has referred to General Resolution (DGI) No. 2224 (hereafter "RG 2224"), according to which taxable persons may apparently request the refund of excess pre-payments. Argentina has not made clear, however, how RG 2224 relates to the provisions of Article 28 and, in particular, whether a taxable person can be granted an exemption under Article 28 and at the same time receive a refund of pre-payments already made. We note that Argentina has not submitted to us RG 2224.

[552] Exhibit ARG-XXXVII (hereafter "Resolution 1253").

11.279 We note that, notwithstanding our request, Argentina has not provided us with documentary evidence regarding the refund mechanism, which it claims is set out in RG 2224. From Argentina's submissions, it appears that RG 2224 envisages the possibility to request the refund of the pre-payments of the IG made in situations where taxable persons have made actual pre-payments in excess of their definitive tax liability under the IG Law. According to Argentina, where a refund is granted, not only are the full amounts of the excess payments refunded, but interest is paid on those amounts in accordance with Resolution 1253.[553] This interest is calculated as of the date of filing of a refund request.[554]

11.280 Even disregarding the lack of documentary support for Argentina's argument, we are not persuaded, on the basis of Argentina's submissions, that the refund mechanism precludes RG 3543 from infringing Article III:2, first sentence. It is sufficient to note in this regard that the refund mechanism is apparently available only to taxable persons, including importers, who are in a situation of actual overpayment of the IG, but not to all others. Moreover, those importers who are granted a refund receive interest only as of the date of filing of their refund request and not as of the date on which they have made the pre-payments of the IG. They thus do not appear to be compensated for the full amount of interest lost or paid as a result of the pre-payments of the IG made in excess of their definitive IG liability.

11.281 In light of the foregoing, we do not accept Argentina's argument based upon the refund mechanism.

Magnitude of the Tax Burden Differential

11.282 Regarding Argentina's argument that the magnitude of the tax burden differential resulting from RG 3543 and RG 2784 is *de minimis*, we note that our considerations relating to the same argument in respect of the pre-payments of the IVA envisaged in RG 3431 and RG 3337 are equally applicable here.[555] Accordingly, we disagree with Argentina's argument in respect of the magnitude of the tax differential.

(ii) Conclusions

11.283 As we are unable to accept Argentina's broad counter-arguments, we confirm the conclusions we have arrived at in Section XI.C.5(c)(i) regarding the European Communities' claims that imported products falling under RG 3543 are subject to a tax burden which exceeds that imposed on like domestic products.

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553 Argentina's reply to Panel Question 45(e). Resolution 1253 sets the interest rate payable at 0.5 percent per month.
554 Argentina's reply to Panel Question 45(e).
555 See Section XI.C.5(b)(ii) above. A short summary of the parties' arguments relating to this issue can also be found in that Section.

11.284 It follows, therefore, that, by maintaining RG 3543, Argentina is acting inconsistently with its obligations under Article III:2, first sentence.

### 6. *Defence under Article XX(d) of the GATT 1994*

#### (a) Overview of the Parties' Arguments and Analytical Approach Followed

11.285 Article XX of the GATT 1994 reads in relevant part:

> 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;

11.286 Argentina asserts that, should we find that the contested mechanisms for the collection of the IVA and IG are inconsistent with the provisions of Article III:2, first sentence, those mechanisms would nevertheless be justified under the provisions of Article XX of the GATT 1994. More particularly, Argentina submits that those mechanisms fall within the terms of Article XX(d).

11.287 The European Communities considers that Argentina has failed to demonstrate that the mechanisms at issue satisfy the requirements of Article XX(d). The European Communities also argues that Article XX must be interpreted narrowly.

11.288 We note that a measure found to be inconsistent with one or several of the substantive obligations of the GATT 1994 must withstand a two-tiered analysis in order for it to be justified under Article XX. Specifically, that measure must:

(i) fall within the scope of one of the recognised exceptions set out in paragraphs (a) to (j) of Article XX in order to enjoy provisional justification and

(ii) meet the requirements of the introductory provisions of Article XX, the so-called chapeau.[556]

11.289 In examining Argentina's affirmative defence under Article XX(d), we first anlyse whether the contested measures fall within the terms of paragraph (d)

[556] See the Appellate Body Report on *United States – Gasoline*, *supra*, footnote 269, at 20.

of Article XX. If such is the case, we proceed to an analysis of the same measures under the chapeau of Article XX.

### (b) Provisional Justification under Paragraph (d) of Article XX

11.290 It is apparent from the text of paragraph (d) of Article XX that it is incumbent upon Argentina to demonstrate three elements. Those three elements are:

(i) the measures for which justification is claimed secure compliance with other laws or regulations;

(ii) those other laws or regulations are not inconsistent with the provisions of the GATT 1994; and

(iii) the measures for which justification is claimed are necessary to secure compliance with those other laws or regulations.

11.291 Accordingly, our analysis proceeds in three steps.

#### (i) Existence of Measures which Secure Compliance with Other Laws or Regulations

11.292 Argentina contends that the contested mechanisms for the collection at source of the IVA and IG, i.e. RG 3431 and RG 3543, were put in place in order to avert actions which are illegal under the terms of the IVA Law and IG Law, such as failure to declare or pay the IVA or IG. Argentina argues, therefore, that those mechanisms were specifically designed to secure compliance with the IVA Law and IG Law respectively.

11.293 The European Communities does not contest that RG 3431 and RG 3543 are measures which, *inter alia*, secure compliance with the IVA Law and IG Law respectively.

11.294 We agree with the parties in this respect. As regards RG 3431, the fact that pre-payments made in accordance with it are creditable at the time of settlement of the definitive IVA liability creates an incentive for importers to declare the re-sale of the imported products to the tax authorities, which re-sale is taxable under the IVA Law.[557] RG 3543, on the other hand, helps secure compliance with the IG Law inasmuch as the pre-payments for which it provides reduce evasion of the IG resulting from failure to declare taxable income.

11.295 We therefore conclude that RG 3431 and RG 3543 serve to secure compliance with the IVA Law and IG Law respectively.

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[557] It will be recalled that the pre-payments are collected upon importation in anticipation and on account of the re-sale of the imported products. Failing declaration of the re-sale transaction, importers lose the pre-payments made upon importation.

### (ii) Consistency with the GATT 1994 of those Other Laws or Regulations

11.296 Argentina asserts that the IVA Law and IG Law are consistent with its obligations under the GATT 1994.

11.297 The European Communities does not question the consistency with the GATT 1994 of either the IVA Law or the IG Law.[558]

11.298 We continue, therefore, on the basis that the IVA Law and the IG Law must be presumed to be consistent with the GATT 1994.

### (iii) Necessity of the Measures Taken to Secure Compliance

11.299 Argentina contends that Members invoking Article XX(d) are entitled to a certain degree of discretion in determining whether a measure is "necessary". Argentina considers that the Member taking a measure is best placed to assess whether that measure is necessary. Argentina also argues that paragraph (d) of Article XX does not say that a Member must evaluate a number of alternative measures which would ensure the observance of its laws and then choose the least trade-restrictive among them.

11.300 The European Communities argues that it is our task to examine whether Argentina's measures are "necessary" to achieve Argentina's desired level of enforcement of the IVA Law and IG Law. The European Communities considers that the relevant test for assessing the necessity of a measure can be found in the report of the GATT 1947 panel on *United States - Section 337*. The European Communities notes that that panel held that a Member cannot justify a measure as necessary in terms of Article XX(d) "if an alternative measure which [that Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it".[559]

11.301 Argentina asserts that, even if the European Communities' interpretation were correct, the contested mechanisms for the collection of the IVA and IG upon importation of goods are the only measures reasonably available to it for securing compliance with the IVA Law and IG Law. Argentina notes that tax evasion is an entrenched social ill in Argentina. According to Argentina, in such a situation, a government's primary focus must be on the prevention of tax evasion rather than its repression. Argentina contends that the aforementioned mechanisms are preventative in nature. Argentina points out in this regard that the creditable pre-payments of the IVA and IG ensure the settlement of the definitive tax liability at the appropriate time and that the mechanisms concerned also make it possible to detect, and thus reduce, tax evasion by rendering transparent the business dealings of taxable persons.

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[558] See para. 8.41 of this report.
[559] Panel Report on United States – Section 337, supra, at para. 5.26.

11.302 The European Communities considers that Argentina's submissions may be relevant for purposes of demonstrating that the contested mechanisms are necessary to fight tax fraud. The European Communities notes, however, that those submissions fail to explain why it is necessary to impose a heavier tax burden on imported products than on like domestic products.

11.303 It must be stated, as a preliminary matter, that the question which we must examine here is whether the contested *measures* are "necessary" to secure compliance with the IVA Law and the IG Law.[560] At this point in our analysis, we look at the relationship of Argentina's claimed policy objective of securing compliance with the IVA Law and the IG Law and the *general* design and structure of RG 3431 and RG 3543.[561]

11.304 Having clarified this point, it should be recalled, next, that the parties are in disagreement over the correct interpretation to be given to the term "necessary" as it appears in Article XX(d). For the European Communities, a measure can be said to be necessary only if no alternative measure which is consistent with the GATT 1994 is reasonably available to a Member. Argentina, on the other hand, rejects this approach as overly restrictive of a Member's right to invoke the exception set forth in Article XX(d). We see no need to resolve this interpretative issue.

11.305 We are satisfied that Argentina has adduced argument and evidence sufficient to raise a presumption that the contested measures, in their general design and structure, are "necessary" even on the European Communities' reading of that term. Argentina stresses the fact that tax evasion is common in its territory and that, against this background of low levels of tax compliance, tax authorities cannot expect to improve tax collection primarily through the pursuit of repressive enforcement strategies (e.g. aggressive criminal prosecution of tax offenders). In those circumstances, Argentina maintains, tax authorities must direct their efforts towards preventing tax evasion from occurring in the first place. According to

[560] The Appellate Body stated in United States – Gasoline that "[t]he chapeau of Article XX makes it clear that it is the "measures" which are to be examined under Article XX(g), and not the legal finding of [violation]". See the Appellate Body Report on *United States – Gasoline*, *supra*, footnote 269, at 15. While this statement refers to Article XX(g), the Appellate Body's reasoning relies on the chapeau, which applies equally to Article XX(g) and Article XX(d). The Appellate Body's reasoning must therefore also extend to Article XX(d). Accordingly, we do not consider it appropriate to examine under Article XX(d) whether the less favourable tax treatment accorded to imported products as a result of the application of RG 3431 and RG 3543 is "necessary". It should be noted that the GATT 1947 panel in United States – Section 337 considered that "what [had] to be justified as "necessary" under Article XX(d) [was] each of the inconsistencies with another GATT Article found to exist". See the Panel Report on United States – Section 337, supra, at para. 5.27. While the approach adopted by the panel in United States – Section 337 could be seen to be based on the view that the "necessity" test set forth in Article XX(d) gives rise to a somewhat different Article XX analysis than, for instance, the "relating to" test contained in Article XX(g), we see no need to dwell upon this point, since the Appellate Body has outlined, in the more recent United States – Gasoline case, what, in its view, is the correct and general approach to interpreting and applying Article XX.

[561] See the Appellate Body Report on *United States – Shrimp*, *supra*, footnote 71, para. 149.

Argentina, this is precisely what RG 3431 and RG 3543 are designed to accomplish.[562]

11.306 The European Communities does not dispute that, in the circumstances of the present case, collection and withholding mechanisms are necessary to combat tax evasion.[563] Nor has the European Communities submitted other arguments or evidence which would rebut the presumption raised by Argentina in respect of the "necessity" of RG 3431 and RG 3543.[564]

11.307 In light of the foregoing, we conclude that, in view of their general design and structure, RG 3431 and RG 3543 are "necessary" measures within the meaning of Article XX(d).

11.308 Since it has thus been established that RG 3431 and RG 3543 satisfy all of the requirements set forth in Article XX(d), we further conclude that they enjoy provisional justification under the terms of Article XX(d).

(c) Consistency with the Requirements of the Chapeau of Article XX

(i) Interpretation and Application of the Chapeau

11.309 Argentina argues that the pre-payment of the IVA and IG is intended to combat tax evasion and not to restrict trade. Argentina submits that, since increased trade means increased tax collection, the contested collection mechanisms cannot possibly be regarded as constituting a "disguised restriction on international trade".

11.310 Regarding the chapeau's additional requirement that those mechanisms not be a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", Argentina notes that the use of the terms "arbitrary" and "unjustifiable" indicates that there could be discrimination which is "not arbitrary" or "justifiable". Argentina further is of the view that the aforementioned requirement is concerned with discrimination between exporting

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[562] In our view, the presumption raised by Argentina of the existence of a relationship of necessity between Argentina's declared objective of securing compliance with the IVA Law and IG Law and the general design of RG 3431 and RG 3543 is not affected by the inconsistency of these measures with Article III:2, first sentence.

[563] See para. 8.258 of this report.

[564] It is true that the European Communities disputes that the higher rates applied to imported products pursuant to RG 3431 and RG 3543 are "necessary" in order to secure compliance with the IVA Law and IG Law. See e.g. EC First Oral Statement, at paras. 79, 82 and 84. We consider that this contention goes to the question of whether Argentina makes improper use of the exception set out in Article XX(d) and not to the question of whether RG 3431 and RG 3543, in light of their general design and structure, fall within the terms of Article XX(d). We therefore address the justifiability of applying higher rates to imported products when we appraise RG 3431 and RG 3543 under the chapeau of Article XX. This approach is in accordance with that followed by the Appellate Body in United States – Gasoline. See the Appellate Body Report on *United States – Gasoline*, *supra*, at 15 and 23-27.

countries, but not with discrimination between the importing country and exporting countries. Argentina argues that the fact that the Appellate Body in *United States - Gasoline* found otherwise does not detract from its view. According to Argentina, the Appellate Body did so only because, in that specific case, the parties had a common interpretation of the requirement in question.

11.311 The European Communities considers that the chapeau *is* concerned with discrimination between the importing country and exporting countries. The European Communities recalls that the Appellate Body accepted this interpretation in *United States - Gasoline* and that the Appellate Body later confirmed it in *United States - Shrimp*. The European Communities submits that the fact that a violation of Article III presupposes discrimination between an importing country and an exporting country does not make Article XX redundant since the discrimination at issue in the chapeau is of a different kind than that at issue in Article III.

11.312 It is well to recall at the outset that the fundamental purpose of the chapeau of Article XX is to avoid abuse or misuse of the particular exceptions set forth in Article XX, in the present case of the exception set forth in Article XX(d).[565] Accordingly, whereas our focus was on the general design and structure of RG 3431 and RG 3543 when we examined whether these measures fall within the terms of Article XX(d), our focus here is on whether their application constitutes a misuse of that exception.[566]

11.313 The chapeau sets forth three standards which a particular measure must meet.[567] Those standards are cumulative in nature. As a result, if the measure for which justification is claimed fails to meet one of them, the measure *ipso facto* fails to satisfy the requirements of the chapeau. The order in which the standards are examined is therefore immaterial. In the present case, we consider it appropriate to analyse first whether the application of RG 3431 and RG 3543 consti-

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[565] See the Appellate Body Report on *United States – Gasoline*, supra, footnote 269, at 21 and 23.

[566] By its terms, the chapeau refers to the manner in which a contested measure is "applied". The chapeau thus clearly covers individual acts of application of a contested measure. We consider, moreover, that, where a measure itself requires certain action inconsistent with the standards contained in the chapeau, that measure will, of necessity, be applied in a manner inconsistent with the standards contained in the chapeau. It may be noted in this connection that, in our understanding, in United States – Gasoline, the Appellate Body did not so much focus on the manner in which the baseline requirements were applied in specific instances. Rather, the Appellate Body's concern appears to have been with the question of whether the United States could "impose" and apply, as a matter of law (i.e. in its Gasoline Rule), a statutory baseline requirement on foreign refiners and an individual baseline requirement on domestic refiners. The Appellate Body addressed the justifiability of this regulatory differentiation under the chapeau. See the Appellate Body Report on *United States – Gasoline*, *supra*, footnote 269, at 23-27.

[567] The chapeau provides that the measure in question must not be applied in such a manner as to constitute (i) a means of "arbitrary … discrimination between countries where the same conditions prevail", (ii) a means of "unjustifiable discrimination between countries where the same conditions prevail" or (iii) a "disguised restriction on international trade".

tutes a means of "unjustifiable discrimination between countries where the same conditions prevail".

11.314 According to the Appellate Body, the phrase "unjustifiable discrimination between countries where the same conditions prevail" is sufficiently broad to encompass not only discrimination between exporting Members, but also discrimination between exporting Members and the importing Member in question.[568] To this we would add that, in our view, the phrase "discrimination between countries where the same conditions prevail" is also broad enough to encompass discrimination between *products* of the territories of those countries.[569]

11.315 Since we have already found that RG 3431 and RG 3543 give rise to discrimination between imported products and like domestic products, the only remaining issue is whether the discrimination resulting from the application of RG 3431 and RG 3543 is "unjustifiable".[570] It is important to bear in mind that the standard of "unjustifiable" discrimination is different in nature and quality from the standard of discrimination contained in Article III:2, first sentence.[571] As Argentina correctly points out, the prohibition on unjustifiable discrimination in the application of a measure by necessary implication leaves room for justifiable discrimination. On the other hand, this does not imply that some discrimination is always justifiable. Whether or not any discrimination is justifiable, in a given instance, and if so, to what extent, must be ascertained by way of analysis of the specific circumstances of each case.

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[568] See the Appellate Body Reports on *United States – Shrimp*, *supra*, footnote 71, para. 150; *United States – Gasoline*, *supra*, footnote 269, at 21-22. We do not share Argentina's view that the Appellate Body adopted this interpretation of the phrase "discrimination between countries where the same conditions prevail" on the sole basis that, in that specific case, the parties had a common understanding of it. The Appellate Body also observed in United States – Gasoline that the term "countries" in the chapeau was textually unqualified. See *United States – Gasoline*, *supra*, footnote 269, footnote 46. And in United States – Shrimp, the Appellate Body stated that, in United States – Gasoline, it had "accepted" the assumption of the parties that discrimination within the meaning of the chapeau could also occur between the importing country and exporting countries. See *United States – Shrimp*, *supra*, footnote 71, para. 150.

[569] It may be pointed out, in addition, that there is nothing in the chapeau to suggest that it does not cover "discrimination" in respect of internal taxation.

[570] Argentina has not been able to convince us that, in the present case and for purposes of applying the chapeau, "the same conditions [do not] prevail" between Argentina and the European Communities. In particular, the fact that Argentina is a developing country Member which has to contend with low levels of compliance with its tax laws, does not, in our view, provide a justification for discriminating against imported products under the facts of the present case. It should be recalled, moreover, that the Appellate Body in United States – Gasoline - a case which also involved discrimination between imported and like domestic products - did not specifically examine and make a finding on whether the "same conditions prevail[ed]" between Brazil and Venezuela, on the one hand, and the United States, on the other hand. See the Appellate Body Report on *United States – Gasoline*, *supra*, footnote 269, at 23-27. We therefore do not see a need to further examine this element.

[571] See the Appellate Body Report on *United States – Shrimp*, *supra*, footnote 71, para. 150; *United States – Gasoline*, *supra*, footnote 269 at 21.

(ii) Justifiability of Discrimination

11.316 Argentina submits that the rates applicable to import transactions pursuant to RG 3431 and RG 3543 are warranted because Customs represents a point where there is a high concentration of formal transactions. Argentina notes that in cases where there is a comparable concentration of formal transactions in the internal market, Argentina applies rates equal to or higher than those applied at Customs. Argentina refers to the examples of RG 18, pursuant to which the IVA is to be withheld at a rate of 10.5 percent, and of General Resolution No. 3316/91, which envisages a 14 percent withholding on payments of certain professional fees.

11.317 Specifically with respect to the pre-payment of the IVA, Argentina submits that any lowering of the 10 percent rate applicable to import transactions would undermine the goal of combating tax evasion and would lead to a loss of net tax revenue. Argentina argues that this is so because a reduction of the current rate would lessen the incentive for importers to declare their subsequent internal re-sale transactions, which transactions could therefore not be subjected to taxation. Argentina asserts that a one percentage point reduction of the 10 percent collection rate for imports would translate into a monthly tax revenue loss of US$10 million. Argentina points out in this regard that the revenue raised from the various mechanisms for the pre-payment of the IVA and IG is used to comply with certain quarterly deficit commitments Argentina has made *vis-à-vis* the International Monetary Fund (IMF). Argentina maintains that a reduction of the rate currently applicable to imports would jeopardise Argentina's meeting those deficit targets.

11.318 Argentina further argues that an increase in the 5 percent rate for the pre-payment of the IVA on internal sales by *agentes de percepción* to small local buyers would not further reduce tax evasion. According to Argentina, a rate increase would not make transactions at subsequent marketing stages more transparent, since the aforementioned transactions tend to take place almost at the end of the marketing chain. Argentina contends that, for that reason and also because of the greater number of pre-payment mechanisms applying to internal sales transactions, there would be a risk that higher rates for the pre-payment of the IVA would give rise to a situation of overpayment of the IVA. Argentina argues that an increase in the rate would therefore ultimately lead to a higher number of exemptions granted under RG 17, with the consequence that there would be more informal transactions and, as a result, a net decrease in tax revenue collected. Argentina points out that, even at the current rate, there has in recent years been a steady increase in the number of exemptions granted.

11.319 The European Communities argues that from the fact that the collection of pre-payments is easier for imports it does not follow that it is necessary to collect those pre-payments at rates which are higher than those applicable to internal sales. The European Communities further submits that it is not clear why the collection of pre-payments of the IVA on imports at a rate of less than 10 percent would constitute a "disincentive" to declare subsequent transactions. The Euro-

pean Communities notes in this regard that it is difficult to understand why importers could be interested in not charging the IVA on their re-sales, since that would seem to be the easiest way for them to credit the IVA paid on their import transactions. The European Communities also wonders why the collection of pre-payments of the IVA on internal sales by *agentes de percepción* to local buyers at a rate of only 5 percent does not create a "disincentive" to declare subsequent transactions. On this point, the European Communities maintains that Argentina has not provided evidence demonstrating that the payment of the IVA is more frequently evaded when imported goods are re-sold by importers than when domestic goods are re-sold by "domestic" sellers.

11.320 The European Communities also disputes that an increase in the 5 percent rate for the pre-payment of the IVA on internal sales by *agentes de percepción* to small local buyers would produce the revenue loss predicted by Argentina. The European Communities submits that, while an increase in the collection rate may result in an increase in the number of exemptions, this would not necessarily reduce the revenue collected through the mechanism for the pre-payment of the IVA. The European Communities recalls in this regard that exemptions are granted only in cases where the pre-payments made exceed the definitive liability under the IVA law. The European Communities points out, in addition, that the increase in the number of exemptions granted in recent years may be the result of factors which are unrelated to the rate at which the pre-payments are collected, such as greater familiarity of taxable persons with the exemption mechanism. The European Communities also notes that Argentina has not provided evidence which would show that exemptions are more frequently requested, in relative terms, by "domestic" sellers than by importers.

11.321 In response to a question of the Panel regarding why Argentina cannot refund the additional loss of interest suffered by importers, Argentina submits that it would be virtually impossible to quantify the interest lost, since this would require an analysis of a range of factors, such as the time-lapse between each payment on account and its corroboration in the tax statement. Argentina notes, furthermore, that the resulting cost to the government of verifying the appropriateness of a refund and of the quantification of the interest lost would be exorbitant, so much so that it would cause the failure of the various mechanisms for the pre-payment of the IVA and IG.[572]

11.322 We commence our examination by recalling that it is not the rate differentials[573] *per se* which render RG 3431 and RG 3543 inconsistent with Article III:2, first sentence, but rather the fact that importers must forego or pay more interest than their "domestic" counterparts in the interval between the

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[572] Argentina's reply to Panel Question 81.

[573] For the sake of ease of reference, we hereafter treat internal sales transactions as being subject to pre-payment of the IVA and IG at a "zero rate" when those transactions are not subject, in certain circumstances, to any pre-payment of the IVA and IG.

pre-payment of the IVA and IG and its crediting against the definitive tax liability arising from the IVA Law and IG Law. Therefore, it is not the rate differentials themselves which require justification for purposes of our analysis under the chapeau of Article XX but the extra tax burden imposed on importers as a result of those rate differentials.

11.323 For purposes of assessing the justifiability of that extra tax burden, it is important to recall our earlier finding that RG 3431 and RG 3543 fall within the terms of Article XX(d) because they are necessary to secure compliance with the IVA Law and the IG Law respectively. The justifying protection of Article XX(d) does not and cannot extend beyond that limited purpose. Argentina has not argued that the extra tax burden imposed on importers in the form of interest lost or paid specifically serves to secure compliance with the IVA Law or IG Law. It is apparent, in our view, that it does not serve that specific purpose.

11.324 The question then becomes whether the extra tax burden imposed on importers in the form of interest lost or paid is nevertheless justifiable because it is unavoidable for the operation of RG 3431 and RG 3543, which, in our view, fall within the scope of protection of Article XX(d).

11.325 We note in this regard that one alternative course of action available to Argentina would be to reimburse importers for the additional interest foregone or paid. Similarly, Argentina could provide for the additional interest lost or paid to be creditable against the tax liability arising from the IVA Law and IG Law. Whichever way compensation of importers is achieved, it would not, in our view, call into question the usefulness of RG 3431 or RG 3543 as measures for securing compliance with the IVA Law or IG Law. We do not therefore consider that the extra tax burden imposed on importers in the form of interest lost or paid is unavoidable.

11.326 Argentina argues that compensating importers would not be an option because it would be virtually impossible to quantify an importer's additional loss or payment of interest. We do not find this argument convincing. It is true that relevant market rates for determining the interest lost or paid are subject to change over time and that the level of those rates tends to vary depending on the length of the term for which capital is invested or borrowed. It does not follow, however, that compensation is therefore impossible. Even if it were administratively too difficult to use actual market rates as a basis for calculating the additional loss or payment of interest (which has not been demonstrated to the Panel), it would still be possible, in our view, to use other appropriate rates[574], such as

[574] It is worth noting that the same "appropriate interest" standard is also used, in similar context, in footnote 59 to item (e) of Annex I to the Agreement on Subsidies and Countervailing Measures. According to that footnote, "… Members recognize that deferral [specifically related to exports of direct taxes paid or payable by industrial or commercial enterprises] need not amount to an export subsidy where, for example, appropriate interest charges are collected".

average market rates[575].[576] We also agree that for purposes of quantification of the additional interest lost or paid it is necessary to determine the time-period between the pre-payments of the IVA and IG and their subsequent crediting, which period may vary from transaction to transaction.[577] In this regard, it seems to us that it should be possible, for example, for Argentina's customs authorities and/or the importers themselves to keep records regarding the date of the pre-payments of the IVA and IG.

11.327 Argentina submits, in addition, that compensation of importers for the extra tax burden in the form of interest lost or paid would result in an excessive administrative cost for the government, which would cause the failure of RG 3431 and RG 3543. It must be acknowledged that compensation would entail some administrative cost for the government. However, so do the exemption mechanisms provided for in RG 17 (with respect to the pre-payment of the IVA) and RG 2784 (with respect to the pre-payment of the IG) as well as the refund mechanism set forth in RG 2224 (with respect to the pre-payment of the IG). Argentina has not shown why compensating importers for the additional loss or payment of interest would be significantly more administratively burdensome than the operation of such mechanisms. In any event, Argentina could, in our view, alleviate the administrative burden, for instance by requiring importers to supply supporting documentation for purposes of claiming compensation.[578] Moreover, we consider that the increase in net tax revenue which Argentina claims RG 3431 and RG 3543 make possible by far exceeds the administrative cost which would result from the compensation of importers.[579] We are therefore

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575 Such average rates could be calculated for various terms of investment or borrowing. It should be pointed out in this connection that the Working Party on Border Tax Adjustment found that, for purposes of border tax adjustment and in cases where the calculation of the exact amount of adjustment was difficult, it could in principle be administratively sensible and sufficiently accurate to calculate the average taxation of categories of products rather than the actual tax levied on a particular product. See the Working Party Report on Border Tax Adjustment, supra, at para. 16. We believe that the same reasoning applies to the calculation of the appropriate interest rate in the present case.

576 We consider that Resolution 1253 confirms that compensation along these lines is possible. Resolution 1253 lays down a particular rate - 0.5 percent per month - for the interest payable by the Argentinean government, as of the filing date of a refund request, in cases where the pre-payments of the IG made result in overpayment of the IG. See Argentina's reply to Panel Question 45(e). In referring to the example of Resolution 1253, we do not, however, pronounce on the appropriateness of the interest rate laid down in Resolution 1253.

577 It may be noted here that, in our understanding, the relevant compensation period must be determined as well for purposes of interest payments pursuant to Resolution 1253. It appears from Argentina's reply to Panel Question 45(e) that interest accrues from the date of filing of a refund request until the date of the actual refund. Thus, the relevant compensation period will be different depending, inter alia, on the date of filing of a refund request.

578 In particular, as already mentioned, importers claiming compensation could be required to provide evidence regarding the date of the various pre-payments made pursuant to RG 3431 and RG 3543.

579 Argentina has repeatedly stated, for instance, that thanks to the various regimes for the pre-payment of the IVA, Argentina has been able to significantly increase its tax revenue, which it attributes, inter alia, to the fact that the pre-payment regimes have made it possible also to tax infor-

not persuaded by Argentina's argument that compensating importers for the additional interest lost or paid would result in an excessive administrative cost and would cause the failure of RG 3431 and RG 3543.

11.328 Lastly, we turn to Argentina's assertion that no changes to the current pre-payment mechanisms are possible, as this could preclude Argentina from meeting its deficit commitments to the IMF. In support of its assertion, Argentina has referred us to an Economic Policy Memorandum and a Technical Memorandum, which Argentina says are part of an agreement with the IMF.[580] However, in neither Memorandum is there a statement to the effect that Argentina is under an obligation to impose a discriminatory tax burden on importers. Nor do we see a requirement in those Memoranda which would bar Argentina from compensating importers for the discrimination suffered. Furthermore, Argentina has in any event not presented argument and evidence sufficient for us to find that it would be impossible for Argentina to meet its deficit targets if it were to compensate importers for the additional interest lost or paid. It should also be recalled in this context that Argentina has not invoked Article XX(d) on the basis that RG 3431 and RG 3543 are necessary to secure compliance with IMF commitments, but on the basis that they are necessary to secure compliance with the IVA Law and IG Law.[581] For these reasons, we do not consider that, in the present case, Argentina's commitments to the IMF provide a justification for not compensating importers.

11.329 Another course of action available to Argentina would be to eliminate the rate differentials themselves. Argentina rejects this course of action as not viable. Argentina argues, in essence, that any narrowing of the current rate differentials would have as an inevitable consequence that tax evasion could not be combated as effectively because there would be less transparency on taxable transactions. Argentina has not fully convinced us that the extra tax burden imposed on importers is justifiable on this basis. In particular, we have not been provided with persuasive evidence in support of Argentina's assertion that the elimination of the rate differentials would lead to more tax evasion. In any event, we note this option only as an alternative, since we have already found that Argentina could act consistently with Article III:2, first sentence, even while main-

mal sectors of its economy. See Exhibit ARG-XXI; Argentina's First Oral Statement, at paras. 56, 57 and 67; and para. 8.275 of this report. It should also be pointed out in this context that, according to information supplied by Argentina for 1999, some 30 percent of the overall collection of the IVA was possible thanks to the various regimes for the pre-payment of the IVA. The percentage of pre-payments of the IVA collected on import transactions is 18 percent (amounting to $1,189,586,000). As concerns the IG, of the overall IG revenue collected in 1999, 48 percent were the result of the regimes for the pre-payment of the IG. The percentage of pre-payments of the IG collected on import transactions is 10 percent (amounting to $416,078,000). See Exhibit ARG-XXXIX.

580 Argentina's reply to Panel Question 57; Exhibit ARG-XL.

581 See para. 8.240 of this report.

taining the existing rate differentials, by compensating importers for the additional interest lost or paid.[582]

11.330 It follows from the foregoing considerations that the application of RG 3431 and RG 3543 results in "unjustifiable discrimination" within the meaning of the chapeau of Article XX, inasmuch as these measures impose on importers an extra tax burden in the form of interest lost or paid. Having reached this conclusion, it is unnecessary for us to proceed to an examination of the other standards contained in the chapeau.

11.331 We therefore conclude that RG 3431 and RG 3543 do not meet the requirements of the chapeau of Article XX. For that reason, and even though RG 3431 and RG 3543 fall within the terms of Article XX(d), we do not accept Argentina's claim of justification under Article XX as a whole.

## XII. CONCLUSIONS

12.1 In light of our findings in Section XI.A, we conclude that it has not been proved that Resolution (ANA) No. 2235/96 is inconsistent with Argentina's obligations under Article XI:1 of the GATT 1994.

12.2 In light of our findings in Section XI.B, we conclude that Resolution (ANA) No. 2235/96 is inconsistent with Argentina's obligations under Article X:3(a) of the GATT 1994.

12.3 In light of our findings in Section XI.C, we conclude that General Resolution (DGI) No. 3431/91 is inconsistent with Article III:2, first sentence, of the GATT 1994.

12.4 In light of our findings in Section XI.C, we conclude that General Resolution (DGI) No. 3543/92 is inconsistent with Article III:2, first sentence, of the GATT 1994.

12.5 In light of our findings in Section XI.C, we conclude that General Resolutions (DGI) No. 3431/91 and 3543/92, although they fall within the terms of paragraph (d) of Article XX of the GATT 1994, fail to meet the requirements of the chapeau of Article XX and are therefore not justified under Article XX as a whole.[583]

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[582] We note that the European Communities does not argue that Argentina cannot, consistently with Article III:2, first sentence, maintain the current rate differentials. See paras. 8.25 and 8.47 of this report. The European Communities argues, rather, that Argentina cannot maintain the extra tax burden imposed on importers in the form of interest lost or paid.

[583] With respect to our conclusions in Section XI.C, we wish to note that they do not preclude Argentina from continuing to require the pre-payment of the IVA and IG with respect to the importation and the internal sale of goods. However, Argentina must ensure that the requirement to pre-pay the IVA and IG does not discriminate against imports.

12.6 In light of the above and in accordance with Article 3.8 of the DSU, we further conclude that there is nullification or impairment of the benefits accruing to the European Communities under the GATT 1994.

12.7 We recommend that the Dispute Settlement Body request Argentina to bring Resolution (ANA) No. 2235/96 as well as General Resolutions (DGI) No. 3431/91 and 3543/92 into conformity with its obligations under the GATT 1994.

# UNITED STATES - ANTI-DUMPING ACT OF 1916

## Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Award of the Arbitrator
A.V. Ganesan
WT/DS136/11
WT/DS162/14

*Circulated to Members on 28 February 2001*

## I. INTRODUCTION

1. On 26 September 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Reports in *United States - Anti-Dumping Act of 1916* (" *United States - 1916 Act* ").[1] On 23 October 2000, the United States informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this case.[2] The United States said that it would require a "reasonable period of time" for implementation, under the terms of Article 21.3 of the DSU, and that it would consult with the European Communities and Japan on the matter.[3]

2. On 17 November 2000, the European Communities and Japan submitted a joint letter to the Chairman of the DSB requesting, in view of the impossibility of reaching an agreement with the United States on the time required for the implementation of the DSB's recommendations and rulings in this case, that the "rea-

[1] *United States – Anti-Dumping Act of 1916* ("*United States – 1916 Act*"), adopted 26 September 2000, *Complaint by the European Communities* ,WT/DS136/R and Corr. 1 (the "EC Panel Report"), DSR 2000:X, 4593; *Complaint by Japan* WT/DS162/R and Corr. 1, (the "Japan Panel Report"), DSR 2000:X, 4831, as upheld by the Appellate Body Report, WT/DS136/AB/R and WT/DS162/AB/R, DSR 2000:X, 4793. Two separate Panel Reports in these disputes were rendered by two Panels composed of the same three persons. The appeal of both Panel Reports was addressed in one Appellate Body Report. As the parties have treated the two disputes as a single case for purposes of determining the reasonable period of time under Article 21.3(c), I shall do the same for purposes of this Arbitration. Therefore, I will refer to the two disputes as "this case" and to the European Communities, Japan and the United States as the "parties to this dispute".

[2] WT/DSB/M/91, 30 November 2000, para. 55.

[3] *Ibid.*

sonable period of time" for such implementation be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[4]

3. By a joint letter of 19 December 2000, the European Communities, Japan and the United States notified the Director-General that they had agreed, under the terms of Article 21.3(c) of the DSU, that I act as Arbitrator in the binding arbitration to determine the "reasonable period of time" for implementation in this case.[5] In that letter, the parties also stated that they had agreed to extend the period of time for the arbitration, fixed by Article 21.3(c) of the DSU at 90 days from the date of adoption by the DSB, until 28 February 2001.[6] The parties further stated that they had agreed that, notwithstanding this extension of the time-period, the arbitration award shall be deemed to be the award for the purposes of Article 21.3(c) of the DSU. My acceptance to serve as Arbitrator was conveyed to the parties by a letter of 20 December 2000.

4. Written submissions were received from the European Communities, Japan and the United States on 10 January 2001, and an oral hearing was held on 7 February 2001.

## II. ARGUMENTS OF THE PARTIES

### *A. United States*

5. The United States submits that a "reasonable period of time" for implementation of the recommendations and rulings of the DSB in the present case is 15 months, taking account of the nature of the United States' legislative process, the recent changes in the United States Presidency, Administration, and Congress, the language of Article 21.3(c) of the DSU, and previous arbitration awards under this Article.

6. The United States considers that, in determining the "reasonable period of time" under Article 21.3(c), an arbitrator should first examine the particular circumstances which make immediate implementation impracticable. In this case the conclusion of the previous session of Congress in December 2000, and the fact that the current session of the new Congress has only just begun, mean that it is clearly impracticable for the United States to comply with the DSB recommendations and rulings immediately. The United States, therefore, needs a "reasonable period of time" in accordance with the 15 month guideline of Article 21.3(c), and the stipulation set out in that Article, that such "time may be shorter or longer, depending upon the particular circumstances".

7. The United States considers that the relevant "particular circumstances" for Article 21.3(c) are: the legal form of implementation (legislative or regulatory);

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4 WT/DS136/9 and WT/DS162/12, 21 November 2000.

5 WT/DS136/10 and WT/DS162/13, 19 December 2000.

6 *Ibid.*

the technical complexity of the measure that the Member needs to draft, adopt and implement; and the period of time in which the implementing Member can achieve the proposed form of implementation in accordance with *its own legal system* of government. Furthermore, while past arbitrators have stressed that the "reasonable period of time" for implementation is the shortest period possible within the law-making procedures of the implementing Member, they have also clearly acknowledged that this does not require a Member to use any *extraordinary* legislative procedures, as distinguished from its own *normal* legislative procedures.

8. The United States submits that it is not in dispute that implementation in this case requires legislative action. The United States emphasizes that securing the enactment of legislation in the United States Congress is a complex, nuanced and lengthy process, and that the reality is that the vast majority of bills that are approved are not acted upon until the closing weeks of a Congressional session, indicating the difficulty and length of time required to enact a piece of legislation in the United States Congress. The current session of the 107th United States Congress is expected to be adjourned in December 2001, which would roughly correspond to a period of 15 months from the adoption of the Panel and Appellate Body Reports by the DSB on 26 September 2000. According to the United States, the period of 15 months is, thus, the shortest period possible for implementation within its normal law-making procedures.

9. The United States notes that the power to legislate is vested in the United States Congress, which has two chambers, the House of Representatives and the Senate. The Executive branch of the United States government has no control over the timetable and procedures of Congress. The first step in the legislative process is for a bill to be introduced in the House or the Senate by a member of Congress. When the Executive branch initiates legislation, it may transmit a proposal to the Speaker of the House of Representatives or the President of the Senate, and draft legislation may be introduced in either its original or revised version by a member of a relevant committee. Alternatively, the Executive branch may request that an individual member or members of Congress introduce proposed legislation.

10. After introduction, as a general rule, a bill is referred to a standing committee or committees having jurisdiction over the subject matter of that bill. In the House of Representatives, a bill may be referred to a number of committees simultaneously, while in the Senate a bill is more commonly referred to the committee with primary subject matter jurisdiction and then it may be sequentially referred to other committees. Most bills are referred by the committee with jurisdiction to a subcommittee for consideration.

11. In the House of Representatives, the subcommittee normally schedules public hearings to obtain the views of proponents and opponents of a bill, including government agencies, experts, interested organizations and individuals. There is no specified time frame for committee consideration. When the hearings are completed, the subcommittee usually meets to "mark-up" the bill, that is, to make

changes and amendments prior to deciding whether to recommend the bill to the full committee. If the subcommittee votes to recommend, it is called "reporting". The subcommittee may also suggest that a bill be "tabled", that is, postponed indefinitely.

12. After receiving the subcommittee's report (recommendation), the full committee may conduct further study and hearings. There will again be a "mark-up" process. The full committee then votes whether to report the bill, either as originally introduced without amendment, or as revised, to the full House. If the full committee votes to report a bill to the House, a committee report is written by the committee's staff. An approved bill is "reported back" to the House.

13. The scheduling for consideration of legislation on the House floor is determined, as a general rule, by the Speaker of the House of Representatives and the majority political party leader, who may place the bill on the calendar for House debate. The House Rules Committee generally recommends the amount of time that will be allocated for debate and whether amendments may be offered. During the debate process, the bill is read in detail and members of Congress may offer further amendments. After voting on amendments, the House immediately votes on the bill itself with any adopted amendments. The bill can also be returned to the committee that reported it. If passed, the bill must be referred to the Senate, which may or may not have concurrent pending legislation.

14. While the Senate has similar procedures for consideration of legislation by relevant committees, there are significant differences in the way the Senate considers proposed legislation. The Senate functions in a less rule-driven manner than the House. The Senate does not have a Rules Committee, and scheduling and floor consideration are generally decided by consensus. Unlike the House, where debate is strictly controlled, debate is rarely restricted in the Senate.

15. The United States' legislative process also requires time for a conference committee to be organized to reconcile differences between the House and Senate versions of a bill, given the fact that most bills are not passed by the Senate exactly as referred by the House. Conference committee members are appointed by each chamber and given specific instructions, which may be revised every 21 days. If the conference committee cannot reach agreement, the bill expires. If the conference committee reaches agreement on a single bill, a conference report is prepared describing the committee members' rationale for changes. The conference report must be approved by both chambers, in identical form, or the revised legislation expires.

16. After the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval. Only after Presidential approval does a proposed piece of legislation become law.

17. Besides the complexity and length of its legislative process, the United States also emphasizes that there are "additional special circumstances" involved in this case that need to be considered in determining the "reasonable period of time" under Article 21.3(c). Elections took place in November 2000, and, as a result of these elections, the United States now has a new President, a new Ad-

ministration, and a new Congress. Any legislation proposed by the Executive branch will have to be approved by the new Administration prior to its transmittal to the new Congress. The new Administration took office on 20 January 2001, and the process of appointing top level officials to that new Administration is ongoing. Given the processes involved in these appointments and the need for the new Administration to develop its proposal for the implementing measure in this case, it is unrealistic to expect that legislation would be transmitted to Congress in this case before March or April 2001 at the earliest. It is also important to note that, although the new Congress was convened on 3 January 2001, members of Congress are only now beginning to conduct official business. In fact, the membership of Congressional committees was only recently finalised, and some of the relevant committees are not yet officially organized.

18. The United States also highlights a number of other factors that add complexity and uncertainty to its legislative process, such as: the large volume of legislation introduced at the beginning of every Congress; the many opportunities for individual members of Congress to delay the progress of bills; the fact that Congress often acts on comprehensive bills or legislative "packages", rather than on separate pieces of legislation; the fact that only a tiny proportion of bills introduced become law in the same session; and the fact that even bills that do become law are usually not acted upon until the last weeks or months of the legislative session.

19. The United States concludes from the above complexities of its legislative process that it is unrealistic to expect that implementing legislation in this case could be enacted earlier than the end of the first session of the 107th Congress, which is likely to adjourn in December 2001. For these reasons, the United States requests that it be given 15 months from the date of adoption of the Panel Reports on 26 September 2000 for implementation, that is, a period which would correspond to the end of the first session of the 107th Congress. According to the United States, this would be consistent with the provisions of Article 21.3(c) of the DSU, as well as with previous arbitration awards under this Article that involved implementation through legislative means. In this context, the United States also points out that the "positive resolution" of disputes is a basic objective of the dispute settlement mechanism of the WTO and that the grant of a lesser period of time would not "facilitate a positive resolution of this dispute".[7]

### *B. European Communities*

20. The European Communities submits that the "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB should not exceed 6 months and 10 days from 26 September 2000, the date of adoption of the Panel and Appellate Body Reports. The European Communi-

[7] United States' submission, para. 10.

ties emphasizes that the United States bears the burden of proving that immediate compliance is impracticable, and of establishing the particular circumstances that need to be taken into account for the calculation of the "reasonable period of time" for implementation.

21. The European Communities observes that, in order to assess the length of the "reasonable period of time", it is necessary for the Arbitrator to know the nature of the action required to implement the recommendations and rulings of the DSB in the domestic legal system of the WTO Member found to have acted inconsistently with its obligations under the covered agreements. Pointing to the fact that the findings of the Panel concerned Title VIII of the United States Revenue Act of 1916 (the "1916 Act") [8] in its entirety, rather than specific provisions thereof, and to the stipulation in Article 3.7 of the DSU that the first objective of the dispute settlement mechanism is normally to secure the *withdrawal* of a measure found to be inconsistent with provisions of the covered agreements, the European Communities believes that, for the case at hand, the United States has to repeal the 1916 Act *in toto*. The European Communities understands that this can only be achieved through another legislative act, but adds that no replacement legislation is required since the United States already has "ordinary" anti-dumping legislation and, if the United States wants to adopt additional legislation, for example in the field of anti-trust, it can do so independently of the action it must take to comply with its WTO obligations in this case.

22. The European Communities submits that the only fixed time frames that apply in the legislative process of the United States are the rules according to which a draft bill may not be considered in the House of Representatives until the third calendar day after the committee report has been made available to the members, and a corresponding two-day rule in the Senate. Noting that even these rules may be waived, the European Communities concludes that, in the United States' legislative system, there are no fixed time frames for initiating and completing each stage of the legislative process, and no rule limiting the speed with which legislative action can be undertaken. For the European Communities, the absence of any established or mandatory time frames indicates that legislation can be passed expeditiously, if the will exists.

23. The European Communities refers to two recent examples demonstrating that legislative change can be accomplished expeditiously in the United States. First, the United States modified its anti-dumping legislation with the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment")[9], which was introduced in Congress on 3 October 2000 and became law on 28 October 2000, that is, 25 calendar days later. Second, following the recommendations and rulings of the DSB in *United States - Tax Treatment of "Foreign Sales Corpora-*

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[8] Act of 8 September 1916, 39 Stat. 756 (1916); 15 U.S.C. § 72.

[9] The Byrd Amendment added a new Section 754 to the Tariff Act of 1930, and is contained in the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001, P.L. 106-387, 28 October 2000.

*tions"* ("*United States -FSC*")[10], the United States adopted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000[11] in less than 8 months after adoption of the panel and Appellate Body reports in that case. The European Communities also underlines the fact that, despite the complexity involved in the implementation, the period set in the panel report for implementation of the recommendations in the *United States - FSC* case was even shorter - 6 months and 10 days from adoption of the reports.[12]

24. The European Communities submits that implementation of the rulings and recommendations of the DSB in the present case should take no longer than the time taken to enact the legislation in the *United States - FSC* case, because the procedures to be followed are no more cumbersome, the implementing legislation needed - a simple repeal of the 1916 Act - is far less complex, and the 1916 Act has no links to other legislation. The European Communities adds that there are no other circumstances in this case that warrant a longer period of implementation. Specifically, the fact that there are ongoing civil proceedings under the 1916 Act is not a relevant circumstance to be taken into account to lengthen the "reasonable period of time" needed for implementation.

### *C. Japan*

25. Japan argues that a period of six months from the date of adoption of the Panel Reports in this case is the "reasonable period of time" for implementation by the United States of the recommendations and rulings of the DSB. The DSU requires "prompt compliance" with DSB recommendations and rulings and, in Japan's view, the "particular circumstances" of this case demonstrate that the United States can and should achieve implementation in this case within a six month period. Japan highlights the fact that, in the Japan Panel Report, the Panel took the unusual step of suggesting, "that one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to *repeal* the 1916 Act". [13] (emphasis added) According to Japan, this "unusual step" by a panel suggests a "concrete way" for implementation that should not be taken lightly, and the United States should not be allowed more time as this would involve "derogating from the suggestion of the Panel".[14]

26. For Japan, the references to "prompt settlement of disputes" in Article 3.3 of the DSU, and to "prompt compliance" in Article 21.1 of the DSU, make it clear that Members must implement DSB rulings and recommendations as soon as they possibly can. Furthermore, the implementing Member bears the burden of prov-

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[10] Panel Report, *United States – Tax Treatment of "Foreign Sales Corporations"* ("*United States – FSC*"), WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677.

[11] P.L. 106-519, 15 November 2000.

[12] Panel Report, *United States - FSC*, *supra*, footnote 10, para. 8.8.

[13] Japan Panel Report, para. 6.292.

[14] Japan's submission, para. 8.

ing that "prompt" or "immediate" compliance is "impracticable", and this burden increases with the length of the period proposed by the defaulting Member for implementation.[15] In Japan's view, the United States has not satisfied its burden of proof with respect to the time proposed by it for implementation in this case.

27. Japan contends that only *legal requirements* that govern actual implementation within a Member's domestic legal system are relevant "particular circumstances" for the determination of a "reasonable period of time". In the present case, the circumstances almost uniformly point to the adequacy of a short implementation period. First, the nature of the legislative change required in this case is simple - a single sentence repealing the 1916 Act. Second, the legislative and executive steps which the United States must take to implement are not subject to mandatory time limits. Japan, therefore, argues that the length of the implementation period in this case depends only on the degree of good faith exercised by the United States.

28. Japan highlights, in this regard, the rapidity with which the United States passed the legislation for implementation of the DSB's recommendations and rulings in the *United States - FSC* case, where the entire legislative process took only three months, two weeks and six days from the date the bill was introduced in the United States House of Representatives until the date it was signed into law by the United States President. Japan explains that implementation could be even faster in the present case since the legislative change required - repeal of the 1916 Act - is far simpler than in the *United States - FSC* case. The United States could, in this case, introduce identical bills, simultaneously in both the House and the Senate, and, unlike in the *United States - FSC* case, the legislation at issue is unlikely to be the subject of a substantial domestic debate. Japan adds that the United States has demonstrated that it can legislate very quickly in trade-related matters when it passed the Byrd Amendment in less than two months.[16]

## III. "REASONABLE PERIOD OF TIME"

29. Pursuant to Article 21.3(c) of the DSU and the agreement of the parties, my task as Arbitrator in this case is:

> … to determine the reasonable period of time for the United States of America to implement the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the matter *United States - Anti-Dumping Act of 1916 - Request by Japan and the European Communities* (WT/DS136 and WT/DS162).[17]

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[15] Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products – Arbitration under under Article 21.3(c) of the DSU* ("*Canada – Pharmaceutical Patents*"), WT/DS114/13, 18 August 2000, para. 47.

[16] Japan's submission, para. 25, referring to the Byrd Amendment, supra, footnote 9.

[17] WT/DS136/10 and WT/DS162/13, 19 December 2000.

The Panel and Appellate Body Reports relating to this matter were adopted by the DSB on 26 September 2000.

30. Article 21.3(c) of the DSU stipulates, in relevant part, that:

> … a guideline for the arbitrator 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.

31. Relevant context for the interpretation of Article 21.3(c) includes: the introductory language of Article 21.3, which recognizes that the question of a "reasonable period of time" for implementation only comes into play if "it is impracticable to comply immediately"; Article 21.1, which stresses that "[p]rompt compliance … is essential in order to ensure effective resolution of disputes to the benefit of all Members"; and Article 3.3 of the DSU, which also recognizes that the "prompt settlement of situations …is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

32. As previous arbitrators have held, it is clear that Article 21.3(c), read in the light of its context and in harmony with other provisions of the DSU, establishes that the "reasonable period of time" should be the shortest period possible within the legal system of the Member to implement the relevant recommendations and rulings of the DSB.[18] Within the confines of this basic principle, as stated by the Arbitrator in *Canada - Pharmaceutical Patents*:

> … it is … for the implementing Member to bear the burden of proof in showing - "[i]f it is impracticable to comply immediately" - that the duration of any proposed period of implementation, including its supposed component steps, constitutes a "reasonable period of time".[19]

33. The parties do not dispute that "immediate" implementation is "impracticable" in this case. I, therefore, consider that the United States bears the burden of proof in showing that the period of 15 months proposed by it is the "shortest period possible" within its legislative system to implement the recommendations and rulings of the DSB in this particular case. I wish to emphasize that my task as an Arbitrator is to determine the "reasonable period of time" in light of the facts and circumstances of *this particular case*.

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[18] See, for example: Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) - Arbitration under Article 21.3(c) of the DSU* ("*EC Hormones*"), WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833, para. 26; Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry - Arbitration under Article 21.3(c) of the DSU* ("*Indonesia - Autos*"), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029, para. 22; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, supra, footnote 15, para. 47.

[19] Award of the Arbitrator, *Canada – Pharmaceutical Patents*, supra, footnote 15, para. 47.

34. Turning to the question of what would constitute the "reasonable period of time" for implementation in this case, I need to look first at the type of measure proposed to be used for implementation. On this point, I note that the parties are agreed that implementation of the recommendations and rulings of the DSB in this case requires the enactment of legislation by the United States.[20]

35. There is, however, some disagreement between the parties as to the scope and content of the legislation required in this case. The European Communities and Japan contend that implementation requires, and must consist of, a "simple repeal" of the 1916 Act. In this regard, at the oral hearing, both the European Communities and Japan urged me to attach significance to the following facts: in the Japan Panel Report, the Panel suggested that "one way for the United States to bring the 1916 Act into conformity with its WTO obligations would be to repeal the 1916 Act"[21]; and the United States had not appealed against this suggestion of the Panel. The United States responds that the precise means of implementation, that is the precise scope and content of the proposed legislation, is not a matter within the mandate of an Arbitrator under Article 21.3(c) of the DSU.[22] At the oral hearing, the United States argued that the Panel, in the Japan Panel Report, suggested repeal as only "one way" of implementation, without excluding that there may be other, equally valid, ways of bringing United States' legislation into conformity with its obligations under the covered agreements; and that, because this "suggestion" had no legal significance, it could not, in any event, have been appealed.

36. At the oral hearing, I enquired whether, although it is not within the mandate of an arbitrator to determine or suggest the precise means of implementation, it is necessary for the arbitrator to know the scope and complexity of the implementing measure, as distinguished from the complexity of the Member's legislative process, in order to assess the "reasonable period of time" required to put in place the proposed implementing measure. Specifically, I enquired whether it is sufficient for the Arbitrator to know that the implementing measure will be a piece of legislation, without knowing the broad scope, content or complexity of that piece of legislation. In response, the United States stated that a legislative proposal is yet to be developed by the new United States Administration and that, therefore, it is not possible for it at this stage to indicate which option will be followed, namely, repeal or any other valid option. The United States explained, however, that regardless of the complexity of the legislation required to implement the rulings and recommendations of the DSB, this would be taken care of through the normal legislative process, and the United States does not argue for or seek any additional time on the basis of the scope, content or complexity of the implementing legislation in this case. In view of the explicit acknowledgement of

[20] United States' submission, para. 4; European Communities' submission, para. 3; Japan's submission, para. 20.
[21] Japan Panel Report, para. 6.292.
[22] United States' oral statement, para. 13.

the United States that it is not relying on the complexity of the implementing legislation as a particular circumstance to justify or lengthen the period of time needed for implementation in this case, it is not necessary for me to examine this issue.

37. The United States makes two principal arguments in support of its proposed 15 month implementation period. First, the United States argues that "the enactment of legislation in the U.S. Congress involves a complex and lengthy process which the Executive Branch does not control"[23], and cites four important characteristics of this legislative process, namely: (i) the volume of legislation introduced in the United States Congress; (ii) the minute percentage of bills introduced that are ultimately enacted; (iii) the fact that the bulk of the bills that become law are enacted towards the end of the relevant Congressional session; and (iv) and the overall complexity of the process. Second, the United States stresses the "additional special circumstances" involved in this case, namely, that, due to the recent election in the United States, a transition period of several months is needed before legislation proposed by the Executive branch can be approved by a new Administration, and before the new Congress will be sufficiently organized to consult with the Administration, and be able to begin "serious consideration of legislation".[24] I will address each of these arguments in turn.

38. In my view, factors such as the volume of legislation brought before the United States Congress, and the high percentage of bills that never become law, are not relevant to my determination of the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this case. Information of this nature may be of general interest in examining how a legislative system operates in practice, not only in the United States, but in many other countries as well. What is relevant for my determination in this case is the treaty obligations explicitly undertaken by Members pursuant to the covered agreements. Each WTO Member is *required,* under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization,* to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." More specifically, Article 21 of the DSU requires that Members comply "promptly" with the rulings and recommendations of the DSB in the event of a dispute with respect to their obligations under the covered agreements. In view of these fundamental obligations assumed by the Members of the WTO, factors such as the volume of legislation proposed, and the high percentage of bills that never become law, cannot be considered to extend the period of time needed for implementation. As for the argument that legislation passed by the United States Congress is usually passed at the end of the legislative session, this again may be the usual practice in the United States Congress, but it is not the outcome of a legal requirement. Where an international treaty obligation is

[23] United States' submission, para. 10.
[24] United States' submission, para. 32.

required to be complied with in the shortest period of time possible, as in this case, this cannot be a relevant consideration for extending the period of implementation.

39. Turning to the complexity of the United States' legislative process, I note that the United States has explained, in sufficient detail, the multiple and time-consuming steps involved in the enactment of legislation within the specific context of the legislative system of the United States. It is generally accepted that certain of these steps are not required by law, and that the majority of these steps are not subject to compulsory minimum time limits. In other words, the United States' legislative process, while complex, is characterized by a considerable degree of flexibility. That this flexibility is exercised to achieve the prompt passage of legislation when this is considered necessary and appropriate is revealed by the fact that bills have been passed by the United States Congress within short periods of time, using its "normal" legislative process. The United States has stated that it "will make every effort to promptly implement the DSB's recommendations and rulings" in this case.[25] Since this is a case where the United States has to enact a piece of legislation to bring it into compliance with its international treaty obligations under the covered agreements, the United States Congress may reasonably be expected to use all the flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible.

40. The United States also urges me to take account of the "additional special circumstances" involved in this case, that is, the need for a period of transition to a new President, a new Administration, and a new Congress, and the accompanying shifts in the balance of power between the two principal political parties in the United States. Even allowing for these unusual circumstances, I note that what is significant for the case at hand is that the first session of the 107th United States Congress has been in progress since 3 January 2001. It is, therefore, possible for the United States to introduce a legislative proposal and have it passed by the Congress as speedily as possible, using, as I have stated earlier, all the flexibility available within its normal legislative procedures.

41. In light of the fact that all the parties in this case have, by a joint letter dated 19 December 2000, agreed to this binding arbitration, I do not consider it necessary to deal with the arguments that the United States could have enacted the required legislation by the close of the second session of the 106th Congress in December 2000. With respect to the action taken by the United States since 26 September 2000, to implement the recommendations and rulings of the DSB, I note, without comment, the statement of the United States at the oral hearing that it has been engaged in consultations and in the task of developing a suitable proposal for implementation, but that this work could not be carried over until the

[25] United States' submission, para. 3.

new Administration and new Congress were in place and available for consultations.

42. Lastly, I note that the United States cites, in support of its proposed 15 month period for implementation, a number of examples of relatively straightforward trade legislation that took several years to become law, for example the extension of Permanent Normal Trade Relations to Albania and Kyrgyzstan.[26] On the other hand, the European Communities and Japan have placed great reliance on the short periods of time in which the United States Congress enacted the Byrd Amendment[27] and the FSC Repeal and Extraterritorial Income Exclusion Act.[28] They draw my attention to the period of 6 months and 10 days that the panel allowed the United States to implement the rulings and recommendations of the DSB in the *United States - FSC* case.[29]

43. Taken together, these examples simply illustrate that, in some cases Congress acts extremely rapidly, and, in others, rather slowly. As each case is influenced by its own facts and circumstances, the examples are not, to my mind, determinative one way or another, for my Award in this case. I find it, however, difficult to accept the argument of the European Communities and Japan that the period of 6 months and 10 days given to the United States to implement the rulings and recommendations of the DSB in the *United States - FSC* case should be the outer limit for the "reasonable period of time" at issue here. The *United States - FSC* case involved prohibited export subsidies which, under Article 4.7 of the *Agreement on Subsidies and Countervailing Measures*, must be withdrawn "without delay". The recommendation of the Panel in that case was, thus, based on a different legal standard. Nevertheless, I note that to comply with its treaty obligations under the covered agreements, the United States enacted the FSC Replacement Act in a period of less than eight months - within the ambit of its normal legislative process - showing the flexibility that is available in that process.[30]

44. Having considered the particular and special circumstances relevant to this Arbitration, I am not persuaded that a period of 6 months, as suggested by Japan, or a period of 6 months and 10 days, as suggested by the European Communities, would constitute a "reasonable period of time" for implementation in this case. Given that the current session of the United States Congress began on 3 January 2001, neither such period would leave a reasonable time for the consideration and passage of the required legislation. In my view, the United States is reasona-

[26] United States' submission, para. 22, referring to the Trade and Development Act of 2000, P.L. 106-200, May 18, 2000.

[27] Supra, footnote 9.

[28] Supra, footnote 11.

[29] Panel Report, *United States – FSC*, *supra*, footnote 10, para. 8.8.

[30] In United States – FSC, the DSB approved, at the request of the United States, a one month extension to the time-period recommended by the panel for compliance in that case. See WT/DS108/11, 2 October 2000 and WT/DSB/M/90, 31 October 2000, paras. 1-7.

bly entitled to a period of a few months beyond the time of introduction of such a bill to enable it to enact the required legislation within its normal legislative process. At the same time, I do not accept the argument of the United States that such a reasonable period must necessarily extend to the end of the current session of the United States Congress.

## IV. THE AWARD

45. For the reasons set out above, I determine that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this case is *10 months* from the date of adoption of the Panel and Appellate Body Reports by the DSB on 26 September 2000. The "reasonable period of time" will thus expire on *26 July 2001*.

# CANADA - TERM OF PATENT PROTECTION

## Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes

Award of the Arbitrator
Claus-Dieter Ehlermann
WT/DS170/10

*Circulated to Members on 28 February 2001*

## I. INTRODUCTION

1. On 12 October 2000, the Dispute Settlement Body (the "DSB") adopted the Panel Report [1] as upheld by the Appellate Body Report [2] in *Canada - Term of Patent Protection* ("*Canada - Patent Term*").[3] At the DSB meeting of 23 October 2000, Canada informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that it would implement the recommendations and rulings of the DSB in this dispute and that it would require a "reasonable period of time" to do so, under the terms of Article 21.3 of the DSU.

2. In view of the impossibility of reaching an agreement with Canada on the period of time required for the implementation of those recommendations and rulings, the United States requested that such period be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.[4]

3. By joint letter of 10 January 2001, Canada and the United States notified the DSB that they had agreed that the duration of the "reasonable period of time" for implementation should be determined through binding arbitration, under the terms of Article 21.3(c) of the DSU, and that I should act as Arbitrator.[5] The parties also indicated in that letter that they had agreed to extend the time-period for the arbitration, fixed at 90 days from the date of adoption of the Panel and Appel-

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[1] Panel Report, *Canada – Term of Patent Protection* ("*Canada – Patent Term*"), WT/DS170/R, adopted 12 October 2000, DSR 2000:XI, 5121.
[2] Appellate Body Report, *Canada – Term of Patent Protection* ("*Canada – Patent Term*"), WT/DS170/AB/R, adopted 12 October 2000, DSR 2000:X, 5093.
[3] WT/DS170/7, IP/D/17/Add.1.
[4] WT/DS170/8, IP/D/17/Add.2.
[5] WT/DS170/9, 10 January 2001.

late Body Reports by the DSB, until 28 February 2001.[6] Notwithstanding this extension of the time-period, the parties stated that the arbitration award would be deemed to be an award made under Article 21.3(c) of the DSU. My acceptance of this designation as Arbitrator was conveyed to the parties by letter of 11 January 2001.

4. Written submissions were received from Canada and the United States on 22 January 2001, and an oral hearing was held on 5 February 2001.

## II. ARGUMENTS OF THE PARTIES

### *A. Canada*

5. Canada requests the Arbitrator to fix the "reasonable period of time" at 14 months and two days, so that the "reasonable period of time" will expire on 14 December 2001, that is, the last day the Canadian Parliament is scheduled to sit before its Christmas recess in 2001.

6. Canada submits that compliance will require amending its *Patent Act*.[7] Past arbitrations have established that a legislative change is likely to be more time-consuming than an administrative change. Canada also submits that, to comply with the WTO ruling in this dispute, it needs to amend not only Section 45, but also Sections 78.1, 78.2 and 78.5 of its *Patent Act*, as well as Section 46 of the "Old Act", that is, Section 46 as it read before 1 October 1989.

7. Canada notes that there have been relatively few arbitrations to date under Article 21.3(c) of the DSU in which implementation of the recommendations and rulings of the DSB required legislative change. In the arbitration award in *Japan - Taxes on Alcoholic Beverages* ("*Japan -Alcoholic Beverages*"), the arbitrator referred to the guideline of 15 months in Article 21.3(c) of the DSU and stated that he had not been persuaded by the particular circumstances cited by the parties, to justify a departure of the 15-month guideline either way.[8] In *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities - Bananas*"), the arbitrator ruled in a similar manner as in the previous case and awarded the European Communities a period of 15 months and five days to implement the recommendations and rulings of the DSB.[9] The arbitrator did not find any particular circumstances that justified deviation from the guideline. In *EC Measures Concerning Meat and Meat Products*

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[6] *Ibid.*

[7] Canadian Patent Act, R.S.C., 1985, c.P-4, s.45.

[8] Award of the Arbitrator, *Japan – Taxes on Alcoholic Beverages* -Arbitration under Article 21.3(c) of the DSU ("*Japan – Alcoholic Beverages*"), WT/DS8/15, WT/DS10/15, WT/DS11/13, 14 February 1997, DSR 1997:I, 3, para. 27.

[9] Award of the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas - Arbitration under Article 21.3(c) of the DSU* ("*European Communities – Bananas*"), WT/DS27/15, 7 January 1998, DSR 1998:I, 3, para. 19.

*(Hormones)* ("*European Communities - Hormones*"), the arbitrator arrived at a similar result and awarded the European Communities 15 months.[10] Again, the arbitrator did not find any circumstances that justified deviation from the guideline.

8. Canada notes that in *Korea - Taxes on Alcoholic Beverages* ("*Korea - Alcoholic Beverages*"), the arbitrator granted Korea 11 months and two weeks.[11] According to Canada, Korea had claimed a relatively short period for the completion of its legislative process. The arbitrator granted Korea the period it had requested to pass the required legislation, but ruled that the required regulatory change could be completed at the same time as the legislation.[12] Canada notes that, according to the arbitrator, "[a]lthough the reasonable period of time should be the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB, this [did] not require a Member, in [his] view, to utilize an *extraordinary* legislative procedure, rather than the *normal* legislative procedure, in every case." [13]

9. Canada recalls that in *Chile - Taxes on Alcoholic Beverages* ("*Chile - Alcoholic Beverages*"), the arbitrator fixed the "reasonable period of time" at 14 months and nine days.[14] According to Canada, the arbitrator recognized that the management of legislation before it is introduced in the legislature is important, particularly when the legislation is politically sensitive, and held that this should be taken into account.[15]

10. Canada also submits that in *United States - Section 110(5) of the US Copyright Act* ("*United States - Section 110(5)*") the arbitrator set the "reasonable period of time" at 12 months, without explaining his rationale.[16] According to Canada, the arbitrator dismissed the relevance of "controversy", in the sense of domestic "contentiousness", as a relevant consideration in determining the "reasonable period of time". Canada submits that the arbitrator erroneously relied on a statement of the arbitrator in *Canada - Patent Protection of Pharmaceutical Patents* ("*Canada - Pharmaceutical Patents*").[17] In Canada's view, the arbitrator

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[10] Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU* ("*European Communities – Hormones*"), WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833, para. 48.

[11] Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages, Arbitration under Article 21.3(c) of the DSU* ("*Korea – Alcoholic Beverages*"), WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937, para. 48.

[12] Award of the Arbitrator, *Korea – Alcoholic Beverages*, supra, footnote 11, para. 46.

[13] *Ibid.*, para. 42.

[14] Award of the Arbitrator, *Chile – Taxes on Alcoholic Beverages Arbitration under Article 21.3(c) of the DSU* ("*Chile – Alcoholic Beverages*"), WT/DS87/15, WT/DS110/14, 23 May 2000, DSR 2000:V, 2589, para. 46.

[15] *Ibid.*, para. 43.

[16] Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act - Arbitration under Article 21.3(c) of the DSU* ("*United States – Section 110(5)*"), WT/DS160/12, 15 January 2001, para. 47.

[17] The arbitrator stated:

should have taken into account that the legislative process in a democratic state inevitably involves debate. Such legislative debate will be more intense and longer when there are competing legislative approaches for the implementation of the recommendations and rulings of the DSB. Canada adds that it is important to emphasize that it is not so much the "controversy" or the "contentiousness" of the measure as such that should justify allowing more time than would otherwise be the case, but rather the inherent necessity of providing adequate time for debate when legislative choices need to be made in a democratic system of government.

11. Canada further recalls that in the *Canada - Certain Measures Concerning Periodicals* dispute, the United States and Canada agreed on an implementation period of 15 months.[18] The legislation was relatively non-complex from a technical point of view, but it was politically contentious. The agreement between the parties in that dispute recognized this political reality.

12. Canada justifies its request for an implementation period of 14 months and two days by reference to its normal legislative process. In accordance with normal procedure, officials of the Department of Industry have informed the new Minister of Industry (who is responsible for the *Patent Act*) of the obligations resulting from the recommendations and rulings of the DSB in this case. As part of the preparatory process, a draft Memorandum to Cabinet ("MC") is being prepared. The MC is the formal document that sets out the government's policy intent and, upon Cabinet approval, provides the authority and instructions for the Department of Justice to draft the bill.

13. Canada notes that due to the recent elections in Canada, and the convening of the new Parliament on 29 January 2001, the timing of consideration of the MC in Cabinet Committee and full Cabinet is uncertain.[19] Once the MC has been approved by the Cabinet, the Department of Justice will be instructed to complete the drafting of the bill and put it in final form. It is expected that once Cabinet has given its policy approval, the finalization of the drafting of the bill will take approximately one month. Once the drafting of the bill has been completed, the Government House Leader will review the bill, determine its priority in the gov-

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> I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation.

Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Patents - Arbitration under Article 21.3(c) of the DSU* ("*Canada – Pharmaceutical Patents*"), WT/DS114/13, 18 August 2000, para. 60.

[18] Pursuant to Article 21.3(b) of the DSU. See Canada's statement at the DSB meeting of 25 September 1997, WT/DSB/M37, 4 November 1997.

[19] In response to questioning from the Arbitrator, Canada clarified that the MC would be considered by the Cabinet Committee during the week of the oral hearing.

ernment's legislative calendar, and report back to Cabinet so as to seek the delegated authority of the full Cabinet to schedule the introduction of the bill.[20]

14. According to Canada, the setting of the legislative agenda is the prerogative of the Government House Leader. This will have an impact on the priority that can be given to the introduction of new business, and when such new business can be included in the schedule of the House of Commons for debate. Canada outlines the legislative process in Canada as follows. The first stage is the introduction, and the first reading of the bill in Parliament. At this stage, the Minister of Industry will inform the House of his intention to proceed with the tabling of the bill. The purpose of the first reading is for the bill to be introduced so that it can be printed and distributed to all Members of the House. During the second reading, Members debate and vote on the principle of the bill. The bill is then referred to Committee. The Committee undertakes a clause-by-clause review and study of the bill. The timetable associated with consideration of the bill by the Committee is difficult to predict, and depends on the number of witnesses and experts that are summoned or interested in testifying. Once the bill has been approved, including any amendments, the Committee refers the bill to the House clearly indicating any amendments proposed.

15. The full House considers any amendments and votes for or against them. If amendments to the bill are made, the bill must be re-drafted and reviewed by the Legislation Section of the Department of Justice. The bill can then be scheduled for a third reading. During the third reading, the Members debate and vote on the bill as amended. Although unusual, it is possible for amendments to be introduced at this stage. Once the bill has gone through a third reading in the House, it will be sent to the Senate for consideration.

16. Consideration of the bill in the Senate follows a similar process to that of the House, including the first reading, second reading, consideration in Committee, and third reading. The Senate may propose amendments to the bill, which will then have to be sent back and considered by the House of Commons.

17. Following passage by both the House of Commons and the Senate, the bill is prepared for the Governor General for Royal Assent. Generally, an act will come into force on the date on which it receives Royal Assent unless another date of entry into force is specified in the statute, or the date may be left by the statute to be determined by order of the Governor-in-Council.

18. Canada explains that the House of Commons is scheduled to sit for 135 days in 2001. Of the 135 scheduled sitting days, certain days are allotted for certain specific debates and other emergency and special debates, leaving a maximum of 104 days for government business. Of the 80 sitting days between February and June 2001, five days are reserved for specific debates. This leaves a maximum of 61 days for consideration of legislative business during this period. The bill

[20] At the oral hearing, Canada declared that the Government of Canada's aim is to introduce the bill for the first reading in early March 2001.

would likely be in committee phase when the House adjourns for its summer recess. Unlike the House, the Senate does not have a set calendar.

19. Canada submits that the required amendment to its *Patent Act* will have an impact on Canada's health care system. Therefore, it can be expected that there will be significant debate on the amendments that the government will propose. The debate, which is likely to be divisive, will affect the amount of time required by Parliament to process the legislative proposal. Any attempt by the government to use extraordinary procedures to limit debate could cause political reactions jeopardizing the chances of early enactment of the legislation and may result in more time being required to complete the legislative process than would otherwise be the case. Therefore, the government will have to carefully manage the legislative process and engage in consultations with stakeholders and the provinces, both before and during the debate in Parliament.

### *B. The United States*

20. The United States asks the Arbitrator to determine that the "reasonable period of time" is six months from the date of the adoption of the Panel and Appellate Body Reports by the DSB in this dispute.

21. The United States submits that if Canada is permitted to delay its implementation of the recommendations and rulings of the DSB in this dispute, thousands of patents will continue to expire "prematurely", causing irreparable harm to patent owners that are United States nationals. For the United States, this is an issue of extreme urgency "in which every day counts".[21] According to the United States, on average, 1,149 patents will "prematurely" fall into the public domain every month of 2001.

22. The United States agrees that a legislative amendment is the most appropriate means of implementing the recommendations and rulings of the DSB. The United States is not, however, persuaded by the implementation schedule proposed by Canada. The United States considers that this implementation schedule does not properly reflect the objective of prompt compliance, nor does it take sufficient account of the flexibility Canada has in its parliamentary system.

23. The United States submits that the awards issued in previous arbitrations have made it clear that the "reasonable period of time" determination shall be based on the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB. The clearest guidance for any arbitrator in making this determination is the text of Article 21.3(c), which provides that the "reasonable period of time" should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

[21] United States' submission, para. 3.

24. The United States argues that the context of Article 21.3(c) makes clear the overriding purpose of prompt compliance. Not only does this Article emphasize that a "reasonable period of time" is available only "[i]f it is impracticable to comply immediately with the recommendations and rulings", but Article 21.1 affirms that "[p]rompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Similarly, Article 3.3 of the DSU cites the "prompt settlement" of disputes as "essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

25. Referring to the award in *Canada - Pharmaceutical Patents*, the United States submits that Canada carries the burden of establishing that the "reasonable period of time" it seeks is in fact the shortest period possible for compliance within its legal system.[22]

26. According to the United States, while "particular circumstances" considered in previous arbitrations include the form of implementation, the complexity of the steps necessary for implementation, the legally binding nature of these steps for implementation and their timing, the existence of domestic controversy or "contentiousness" is not a relevant factor.[23]

27. The United States asserts that an examination of the form of Canada's implementation, the lack of complexity in the steps involved in that implementation, and the discretion built into Canada's parliamentary system shows that the shortest period of time possible for implementation under Canada's legal system is six months from the date the recommendations and rulings of the DSB were adopted.

28. The United States submits that the bureaucratic process of drafting the bill and obtaining Cabinet approval under the Canadian parliamentary system is highly flexible, and can be completed quickly if desired or necessary. The United States is of the view that even approval through Cabinet committees and the full Cabinet can be, and often is, expedited. There are no mandatory procedural rules or time requirements for such a process.

29. According to the United States, to ensure that all patents filed before 1 October 1989 obtain the term of at least 20 years from the date of filing, as established by the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement* "), requires only a simple, narrow amendment of Section 45 of Canada's *Patent Act*. Furthermore, any conforming amendments to other sections of this Act, if they are required, can only be technical and non-substantive in nature.[24] Thus as, an amendment to Section 45 would be narrow, any conforming amendment must also be narrow.

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[22] Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para. 47.

[23] *Ibid.*, para. 60.

[24] At the oral hearing, the United States stated that while a technical correction to Section 78.1 of Canada's Patent Act might be needed, it would appear that no additional changes to the Patent Act will be necessary.

30. The United States contends that the process for approving a legislative amendment at the Cabinet level prior to its submission to the Parliament is neither complicated nor time-consuming. The Cabinet and its Committee typically meets weekly. Cabinet consideration is often *pro forma* after a proposal has been approved through Committee. As the required amendment to Canada's *Patent Act* is straightforward and is merely conforming Canada's law to an obligation under the *TRIPS Agreement* that Canada has already assumed, there is no policy issue to debate and no complexities in terms of legal drafting.

31. The United States submits that Canada has a parliamentary system, which means the government with its parliamentary majority can effectively ensure that whatever legislation it wants to pass will be passed in as short a time-period as it likes. Thus, if Canada is committed to passing the bill promptly, there is ample scope to do so using the legislative steps outlined by Canada, particularly given the controlling majority of the Liberal Party in the Parliament following the recent election, and the fact that the legislative procedural rules only require an average of one mandatory sitting day each for the first reading, the second reading, the committee stage, and the report stage and third reading taken together.

32. The United States asserts, as past practice illustrates, many bills have been swiftly passed by this government. For instance, in the 36th Parliament (1997-2000), of the 78 government bills that received Royal Assent, 40 were passed in four months or less. Indeed, bills have been enacted in as short a time-period as one week.

33. According to the United States, with Canada's ability to promptly pass legislation, the underlying question is whether Canada will make the passage of the bill a priority in its legislative agenda. For the United States, the answer must be a resounding "yes". Canada must make the compliance of its obligations under the *TRIPS Agreement* a priority in its legislative proceedings.

34. The United States concludes that there are no compelling reasons why Canada needs more than six months to implement the recommendations and rulings of the DSB in this case.

## III. "REASONABLE PERIOD OF TIME"

35. Canada has said that it will comply with the recommendations and rulings of the DSB in *Canada - Patent Term*, but has requested a "reasonable period of time" under Article 21.3 of the DSU in which to do so.[25] As the duration of the "reasonable period of time" in this case has not been agreed by the parties, they have requested that I determine this period of time through binding arbitration under Article 21.3(c) of the DSU.[26]

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[25] Canada's statement at the DSB meeting of 23 October 2000. See, supra, para. 1.
[26] WT/DS170/9, 10 January 2001.

36. Article 21.3(c) of the DSU provides that when the "reasonable period of time" is determined through arbitration:

> … a guideline for the arbitrator 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.

Thus, when the "reasonable period of time" is determined through arbitration, the guideline for the arbitrator is that this period should not exceed 15 months from the date of adoption of the panel report and/or the Appellate Body report. This does not mean, however, that the arbitrator is obliged to grant 15 months in all cases. Article 21.3(c) makes clear that the "reasonable period of time" may be shorter or longer, depending upon the "particular circumstances". The applicable "particular circumstances" thus influence the determination of what is a "reasonable period of time" for implementation, as has been stated by previous arbitrators.[27]

37. The meaning of Article 21.3(c) is elucidated by its context. This context includes the introductory language of Article 21.3, which recognizes that the question of a "reasonable period of time" for implementation only comes into play if "it is impracticable to comply immediately"; Article 21.1, which stresses that "[p]rompt compliance … is essential in order to ensure effective resolution of disputes to the benefit of all Members"; and Article 3.3, which also recognizes that the "prompt settlement of situations … is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

38. Thus, the DSU explicitly emphasizes the importance of "prompt" compliance. In recognition of this principle, previous arbitrators have established that the most important factor in establishing the length of the "reasonable period of time" is the following:

> … it is clear that the reasonable period of time, as determined under Article 21.3(c), should be the *shortest period possible within the legal system of the Member* to implement the recommendations and rulings of the DSB. [28] (emphasis added)

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[27] See, for example, Award of the Arbitrator, *Chile – Alcoholic Beverages*, *supra*, footnote 14, paras. 39, 41-45; Award of the Arbitrator, *Canada – Certain Measures Affecting the Automotive Industry - Arbitration under Article 21.3(c) of the DSU* ("*Canada – Automotive Industry*"), WT/DS139/12, WT/DS142/12, 4 October 2000, DSR 2000:X, 5079, para. 39; and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para. 48.

[28] Award of the Arbitrator, *European Communities – Hormones*, *supra*, footnote 10, para. 26; quoted with approval in Award of the Arbitrator, *Korea – Alcoholic Beverages*, *supra*, footnote 11, para. 37. See, also, Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry - Arbitration under Article 21.3(c) of the DSU* ("*Indonesia – Autos*"), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029, para. 22; and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para. 47.

39. Although the "reasonable period of time" should be the "shortest period possible within the legal system of the Member" this does not require a Member to utilize an "*extraordinary* legislative procedure" in every case.[29]

40. I now turn to an examination of the arguments made by Canada and the United States in order to determine what would be a "reasonable period of time" in the "particular circumstances" of this dispute.

41. At the outset, I note that the parties agree that the means of implementation in this dispute is legislative, rather than administrative. I recall the statement of a past arbitrator that a legislative change is likely, absent evidence to the contrary, to be more time-consuming than an administrative change.[30]

42. Canada proposes that I set the "reasonable period of time" at 14 months and two days from the date of adoption of the Panel and Appellate Body Reports by the DSB, so that the "reasonable period of time" will expire on 14 December 2001, that is, the last day the Parliament of Canada is scheduled to sit before its Christmas recess in 2001. Canada justifies this request by reference to its usual legislative process. In support of its position, Canada invokes two factors: the limited number of available sitting days of the House of Commons; and the character of the debate, which is likely to be "divisive".[31] According to Canada, any attempt by the government to use extraordinary procedures to limit debate could cause political reactions jeopardizing the chances of early enactment of the legislation. Therefore, the Government of Canada will have to manage carefully the legislative process and engage in consultations with stakeholders and the provinces, both before and during the debate in Parliament.

43. The United States requests that I set the "reasonable period of time" at six months from the date of adoption of the Panel and Appellate Body Reports by the DSB. According to the United States, the process of drafting a bill, gaining Cabinet approval and passing legislation is highly discretionary and can be completed quickly; Canada has a parliamentary system in which the government with its parliamentary majority can ensure that legislation will be passed in as short a time as it likes. The United States considers that Canada must make compliance with its obligations under the *TRIPS Agreement* a priority in the legislative proceedings.

44. Before I turn to the essence of this dispute, it is useful to first address two points on which the parties generally agree. The first concerns the "complexity", or rather the absence of "complexity", of the implementing measure in this case. In two previous arbitration awards, it has been expressly recognized that the

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[29] Award of the Arbitrator, *Korea – Alcoholic Beverages*, *supra*, footnote 11, para. 42. See, also, Award of the Arbitrator, *United States – Section 110(5)*, *supra*, footnote 16, para. 32.

[30] Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para. 49, quoted with approval by the arbitrator in *United States – Section 110(5)*, *supra*, footnote 16, para. 34.

[31] Canada's submission, paras. 29 and 32.

complexity of the proposed implementation can be one of the "particular circumstances" which may influence the length of the "reasonable period of time".[32]

45. The parties in this dispute hold different views on the exact number of provisions of the Canadian *Patent Act* which need to be amended.[33] The parties do agree, however, on the nature of these amendments. In response to questioning at the oral hearing, Canada accepted that the proposed bill addresses narrow technical issues. Thus, Canada recognizes that its request for a "reasonable period of time" of 14 months and two days is not justified by the "complexity" of the envisaged implementing legislation. Canada, rather, seems to admit the position of the United States that the required legislative change is "simple".[34]

46. A second point of convergence between the parties concerns the significance, under Article 21.3(c) of the DSU, of the economic consequences of the expiry of certain patents during the "reasonable period of time" for the implementation of the recommendations and rulings of the DSB. I recall the United States' assertion that, if Canada is permitted to delay its implementation of the recommendations and rulings of the DSB, thousands of patents will continue to expire "prematurely", causing irreparable harm to patent owners; on average, 1,149 patents will fall into the public domain each month during 2001.[35]

47. At the oral hearing, Canada accepted the statistics presented by the United States, but submitted that they are misleading as they fail to indicate whether or not the "prematurely" expiring patents have any commercial significance. According to Canada, "in the period between 2001 and 2009, where the last of the 53,500 term-deficient patents will expire, there are only 34 patents which both fall into the class of affected patents and the class of those known to have some current commercial value." "[B]etween now and December 2001, only 12 of these patents which have commercial value will expire".[36] The United States disagreed with this assertion made by Canada.

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[32] Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para 50. See, also, Award of the Arbitrator, *European Communities – Bananas*, *supra*, footnote 9, para. 19.

[33] According to Canada, the amendment of Section 45 of its Patent Act entails not only an amendment of Section 78.1 of the same Act but also an amendment of Sections 78.2 and 78.5 of its Patent Act, and Section 46 of the "Old Act", that is, Section 46 as it read before October 1989. According to the United States, the amendment of Sections 78.2 and 78.5 of Canada's Patent Act and of Section 46 of the "Old Act" appear not to be necessary.

In order to avoid any misunderstandings, I would like to stress that I am mindful of the limits of my mandate in this arbitration which relates exclusively to determining the "reasonable period of time" for implementation under Article 21.3(c). See, Award of the Arbitrator, *European Communities – Hormones*, *supra*, footnote 10, para. 38; Award of the Arbitrator, Australia – Measures Affecting Importation of Salmon - Arbitration under Article 21.3(c) of the DSU ("*Australia – Salmon*"), WT/DS18/9, 23 February 1999, DSR 1999:I, 267, para. 35; Award of the Arbitrator, *Korea – Alcoholic Beverages*, *supra*, footnote 11, para. 45; and Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, paras. 40 – 43.

[34] United States' submission, paras. 15 and 19.

[35] United States' submission, para. 3.

[36] Canada's opening statement at the oral hearing, paras. 12 and 14.

48. Canada advanced the argument about the small number of patents with commercial value for the first time at the oral hearing. It is obvious that this argument would raise a major procedural problem if the commercial value of the patents expiring during the "reasonable period of time" had any relevance as a "particular circumstance" for the determination of the length of the "reasonable period of time" in this case. However, in my view, this is not so. Measures taken by Members, which are inconsistent with one of the covered agreements will, naturally, or at least very often, cause irreparable harm to economic operators who are nationals of other Members. In this respect, violations of the *TRIPS Agreement* will generally not differ from violations of one of the other covered agreements. The precise assessment of damage caused to a group of economic operators or to single individuals, or companies, may well be more difficult to evaluate than in the present case. However, this does not distinguish the present case from other cases involving violations of covered agreements for the purposes of determining the "reasonable period of time", under Article 21.3(c). I note that this view corresponds to the position taken by the United States at the oral hearing according to which the argument of urgency was raised to provide context. The United States acknowledged that the commercial value of the expiring patents is not relevant to the determination of the shortest period possible, within the Canadian legal system.

49. I now turn to Canada's main argument in support of its request for a "reasonable period of time" of 14 months and two days. I recall Canada's observation that the required amendment of its *Patent Act* will have an economic impact on Canada's health care system, so that it can be expected that there will be significant debate which is likely to be divisive, and that, therefore, the Government of Canada will have to carefully manage the legislative process. In support of its argument, Canada refers to the arbitration award in *Chile - Alcoholic Beverages.*[37]

50. The United States considers that previous arbitration awards have made clear that the existence of domestic controversy, or the "contentiousness" of proposed implementation, is not a relevant factor in determining a "reasonable period of time". The United States refers to the arbitration award in *Canada - Pharmaceutical Patents*, in which the Arbitrator said:

> I see nothing in Article 21.3 to indicate that the supposed domestic "contentiousness" of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a "reasonable period of time" for implementation. All WTO disputes are "contentious" domestically at least to some extent; if they were not, there would be no need for recourse by WTO Members to dispute settlement.[38]

[37] Award of the Arbitrator, *Chile – Alcoholic Beverages*, *supra*, footnote 14, para. 43.
[38] Award of the Arbitrator, *Canada – Pharmaceutical Patents*, *supra*, footnote 17, para. 60.

51. The United States also refers to the award in *United States - Section 110(5)*, in which the arbitrator, quoting from the earlier award in *Canada - Pharmaceutical Patents*, said that:

> … any argument as to the "controversy", in the sense of domestic "contentiousness", regarding the measure at issue is not relevant.[39]

52. Canada considers that the arbitrator in the latter case ignored the fact that the *Canada - Pharmaceutical Patents* award concerned implementation by *administrative* promulgation of an *executive* regulation while the arbitration in *United States - Section 110(5)* concerned implementation by *legislative* means. According to Canada, the arbitrator in the latter case should have taken into account that the legislative process in a democratic state inevitably involves debate. Such legislative debate will be more intense and last longer where there are competing legislative approaches for the implementation of the recommendations and rulings of the DSB.

53. The issue raised by Canada is of great importance, both from the point of view of the implementation of recommendations and rulings of the DSB, that is, the respect of international treaty obligations, and from the point of view of fundamental principles of the democratic process. I do not believe, however, that I have to decide the controversy between the parties for the implementation through legislation in general. My only task is to determine the "reasonable period of time" for the case before me. My reasoning, therefore, applies to this case only.

54. I recall that Canada is obliged to bring Section 45 of its *Patent Act* into conformity with its obligations under Article 33 of the *TRIPS Agreement* which states that "[t]he term of protection available shall not end before the expiration of a period of twenty years counted from the filing date". Article 33 prescribes a precise result. It defines the earliest date on which the term of a patent may end.[40] Canada may establish a longer period before a patent expires, if it so wishes. However, Canada is not allowed to provide for a period of patent protection shorter than 20 years counted from the filing date.

55. In prescribing a precise result, that is, the duration of the minimum period of patent protection, Article 33 of the *TRIPS Agreement* is quite different from provisions which limit only marginally the discretion of the legislator, such as prohibitions of discrimination between imported and domestic goods or services. Such discrimination can, of course, be eliminated in several ways, while a violation of Article 33 of the *TRIPS Agreement* can only be remedied through one action, that is, by providing for the required minimum period of patent protection.

56. Thus, with respect to the minimum period of patent protection, Article 33 of the *TRIPS Agreement* leaves no room for any legislative discretion or legislative

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[39] Award of the Arbitrator, *United States – Section 110(5)*, *supra*, footnote 16, para. 42.
[40] Report of the Appellate Body, *Canada – Patent Term*, *supra*, footnote 2, para 85.

choices. In amending its *Patent Act*, Canada has to ensure that the term of patent protection does not end before the expiration of 20 years counted from the date of filing.

57. Canada cannot, and does not, contest this reasoning. Canada's argument relates, in reality, to "competing legislative choices" that are outside the strict boundaries of the implementation of the recommendations and rulings of the DSB in this case. In particular, Canada has mentioned the view of the Canadian Drug Manufacturers Association, that is, the generic segment of Canada's pharmaceutical industry, that "if the patent term is amended to 20 years from application, it must apply to all patents." [41]

58. The treatment of existing patents which benefit from a longer period of protection than the period prescribed by Article 33 of the *TRIPS Agreement* may be highly controversial and closely connected politically with the amendment of Article 45 of the Canadian *Patent Act*. However, as I have already said, this issue is outside the strict boundaries of the implementation of the recommendations and rulings of the DSB. Consequently, the "contentiousness" of this issue is certainly not a "particular circumstance" which I should take into account in determining the "reasonable period of time" in the present case. Therefore, Canada cannot invoke legislative choices and the likely divisiveness of the debate in the Canadian Parliament to justify its request for a "reasonable period of time" of 14 months and two days.

59. While Canada invokes the controversial character of any amendment to its *Patent Act* which will have an impact on the Canadian health care system, the United States emphasizes that under Canada's parliamentary system, the Government of Canada controls the majority in both Houses of Parliament, the House of Commons and the Senate. According to the United States, with this majority, the government controls the legislative process, and sets the timetable for both Houses of Parliament from start to finish; the Government of Canada can essentially pass any legislation it wishes in whatever time it likes.

60. It may well be possible that Canada's political system and the actual distribution of seats among the political parties in Canada's Parliament facilitate the passage of legislative initiatives taken by the present Canadian government. I am, however, very reluctant to take these factors into account in determining the "reasonable period of time". These factors vary from country to country, and from constitution to constitution. Even within a given country, they will change over time. In addition, their evaluation will often be difficult and highly speculative. I also note that such factors have never been considered as "particular circum-

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[41] Canada offered this explanation at the oral hearing, see Canada's opening statement, para. 32. In response to questioning by the Arbitrator, Canada explained that, according to the Canadian Drug Manufacturers Association, an extension of the existing period of patent protection (to 20 years from the filing date, as required by Article 33 of the TRIPS Agreement ) should be accompanied by a reduction of the period of protection of all existing patents to exactly the same period of 20 years.

stances" in any of the earlier awards under Article 21.3 (c) of the DSU. Thus, the political factors mentioned in the preceding paragraph, and invoked by the United States in support of its request for a "reasonable period of time" of six months, are not relevant to my task.

61. Having examined these arguments advanced by Canada and the United States, I now turn to the evaluation of the requested "reasonable period of time" in the light of Canada's normal legislative process.

62. Contrary to other cases,[42] I do not believe that it is necessary to examine the pre-legislative phase of Canada's law making process, as it is likely that this phase will be practically completed by the time that this award is made public. Canada has said that, anticipating the comments made by the arbitrator in *United States - Section 110(5)*, it has made good use of the period following the adoption of the panel and Appellate Body Reports by the DSB.[43] At the oral hearing, Canada indicated that the government's aim is to introduce the bill for the first reading in early March.

63. Canada has described, in detail, in its written submission the different steps of the legislative phase of its law making process. The passage of legislation requires, in essence, three readings in both Houses of the Canadian Parliament, that is, the House of Commons and the Senate. The process includes an examination of the proposed legislation by committees, which normally takes place between the second and the third reading. Once the House of Commons has considered the bill, it is sent to the Senate for its consideration. After approval by the Senate, the bill is given Royal Assent by the Governor-General. The different steps in this process and their sequence are clearly structured and defined. With respect to timing and scheduling, however, the process is flexible, as Canada acknowledged at the oral hearing. Use of this flexibility does not require recourse to extraordinary procedures.[44] Following earlier arbitration awards, I consider this flexibility to be an important element in establishing the "reasonable period of time".[45]

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[42] See, in particular, Award of the Arbitrator, *Chile - Alcoholic Beverages*, *supra*, footnote 14, para. 43.

[43] In this award, the arbitrator said:

> Arbitrators will scrutinize very carefully the actions an implementing Member takes in respect of implementation during the period after adoption of a panel and/or Appellate Body report and prior to any arbitration proceeding. If it is perceived by an arbitrator that an implementing Member has not adequately begun implementation after adoption so as to effect "prompt compliance", it is to be expected that the arbitrator will take this into account in determining the "reasonable period of time".

See, Award of the Arbitrator, *United States – Section 110(5)*, footnote 16, para. 46.

[44] I recall that, although the " 'reasonable period of time' should be the 'shortest period possible within the legal system of the Member', this does not require a Member to utilize an 'extraordinary legislative procedure' in every case." See, supra, para. 39 and footnote 29.

[45] See, Award of the Arbitrator, *United States – Section 110(5)*, *supra*, footnote 16, for legislative action. See, also, Award of the Arbitrator, *Canada – Automotive Industry*, *supr*a, footnote 27, para. 47 and 48, for regulatory action.

64. Ultimately, the "reasonable period of time" appears to be a function of the priority which Canada attributes to the amendment of its *Patent Act* in order to bring it into conformity with its obligations under Article 33 of the *TRIPS Agreement*. I recognize that in all democratic societies, legislative initiatives designed to satisfy different needs and wishes compete with each other. I share, however, the view expressed in a recent arbitration award concerning another Member, which I adopt only to the extent that it fits the present case concerning Canada; it seems to me that this is the type of matter for which the Canadian Parliament should try to comply with the international obligations of Canada as soon as possible, taking advantage of the flexibility that it has in its normal legislative procedures.[46]

65. Canada justifies its request for a "reasonable period of time" of 14 months and two days on the basis that the fall session of the Canadian Parliament ends on 14 December 2001. I consider that, in the circumstances of this case, the inclusion of the fall session of the Canadian Parliament is not justified. Turning to the position of the United States, I note that the end of an implementing period of six months would fall in the middle of the spring session of the Canadian House of Commons, that is, 12 April 2001. However, this period seems to me to be unreasonably short.

66. I note that the last sitting day, actually foreseen by the Canadian House of Commons calendar, before the summer recess is 22 June 2001. However, establishing the "reasonable period of time" so that it ends on this day does not seem to me to be appropriate. Fixing the "reasonable period of time" to coincide with a date which is not determined by constitution or by statute, but which can easily be modified, would give the actual calendar of the House of Commons a legal value and significance that it simply does not have. In addition, I note that the bill must also pass the Senate and be given Royal Assent. I, therefore, determine the "reasonable period of time" independently of the date actually foreseen by the Canadian House of Commons calendar for the beginning of the summer recess of the House of Commons.

## IV. THE AWARD

67. For all the above reasons, I determine that the "reasonable period of time" for Canada to implement the recommendations and rulings of the DSB is *10 months* from the date of adoption of the Panel and Appellate Body Reports by

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[46] Award of the Arbitrator, *United States – Section 110(5)*, *supra*, footnote 16, para. 39.

the DSB on 12 October 2000. The "reasonable period of time" will, thus, expire on 12 August 2001.

# EUROPEAN COMMUNITIES - ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

## Report of the Appellate Body

WT/DS141/AB/R

*Adopted by the Dispute Settlement Body on 12 March 2001*

| | |
|---|---|
| European Communities, *Appellant/Appellee* | Present: |
| India, *Appellant/Appellee* | Bacchus, Presiding Member |
| Egypt, *Third Participant* | Abi-Saab, Member |
| Japan, *Third Participant* | Feliciano, Member |
| United States, *Third Participant* | |

**TABLE OF CONTENTS**


| | | | | Page |
|---|---|---|---|---|
| I. | INTRODUCTION | | | 2050 |
| II. | ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS | | | 2052 |
| | A. | Claims of Error by the European Communities - Appellant | | 2052 |
| | | 1. | Article 2.4.2 of the *Anti-Dumping Agreement* - Practice of "zeroing" | 2052 |
| | B. | Arguments of India - Appellee | | 2053 |
| | | 1. | Article 2.4.2 of the *Anti-Dumping Agreement* - Practice of "zeroing" | 2053 |
| | C. | Claims of Error by India - Appellant | | 2055 |
| | | 1. | Article 2.2.2(ii) of the *Anti-Dumping Agreement* - Data from "other exporters or producers" | 2055 |
| | | 2. | Article 2.2.2(ii) of the *Anti-Dumping Agreement* - "actual amounts incurred and realized" | 2056 |
| | D. | Arguments of the European Communities - Appellee | | 2056 |
| | | 1. | Article 2.2.2(ii) of the *Anti-Dumping Agreement* - Data from "other exporters or producers" | 2056 |

Page

2. Article 2.2.2(ii) of the *Anti-Dumping Agreement* - "actual amounts incurred and realized" .............................. 2057

E. Arguments of the Third Participants ............................................... 2057

1. Egypt ................................................................................... 2057

2. Japan ................................................................................... 2058

3. United States ....................................................................... 2059

III. ISSUES RAISED IN THIS APPEAL ......................................................... 2060

IV. ARTICLE 2.4.2 OF THE *ANTI-DUMPING AGREEMENT* ...................... 2060

V. ARTICLE 2.2.2(II) OF THE *ANTI-DUMPING AGREEMENT* ................. 2068

VI. FINDINGS AND CONCLUSIONS ............................................................ 2073

# I. INTRODUCTION

1. The European Communities and India appeal certain issues of law and legal interpretations in the Panel Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (the "Panel Report").[1] The Panel was established to consider a complaint by India with respect to definitive anti-dumping duties imposed by the European Communities on imports of cotton-type bed linen.

2. On 13 September 1996, the European Communities initiated an anti-dumping investigation into certain imports of cotton-type bed linen from, *inter alia*, India.[2] The European Communities made its preliminary affirmative determination of dumping, injury and causal link on 12 June 1997, and imposed provisional anti-dumping duties with effect from 14 June 1997.[3] The European Communities made its final affirmative determination of dumping, injury and causal link on 28 November 1997, and imposed definitive anti-dumping duties with effect from 5 December 1997.[4] The factual aspects of this dispute are set out in greater detail in the Panel Report.[5]

3. The Panel considered claims by India that, in imposing the anti-dumping duties on imports of cotton-type bed linen, the European Communities acted inconsistently with Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 5.3, 5.4, 12.2.2, and 15

[1] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (the "Panel Report"), WT/DS141/R, circulated to Members on 30 October 2000.

[2] Panel Report, para. 2.3.

[3] Commission Regulation (EC) No 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, Official Journal, No L 156, 13 June 1997, p. 11.

[4] Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, Official Journal, No L 332, 4 December 1997, p. 1.

[5] Panel Report, paras. 2.1-2.11.

of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").[6]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 30 October 2000, the Panel concluded that:

> … the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:
>
> (a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),
>
> (b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),
>
> (c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),
>
> (d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),
>
> (e) establishing industry support for the application (India's claim 26), and
>
> (f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).[7]
>
> … the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:
>
> (g) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing (India's claim 7),
>
> (h) failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4 (India's claim 11),
>
> (i) considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry (India's claim 15, in part), and
>
> (j) failing to explore possibilities of constructive remedies before applying anti-dumping duties (India's claim 29).[8]

5. The Panel recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[9]

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[6] The Panel did not examine the claims withdrawn by India in the course of the Panel proceedings and declined to consider certain claims falling outside the scope of its terms of reference. Furthermore, the Panel did not deem it necessary nor appropriate to make findings on a number of other claims in light of considerations of judicial economy. See Panel Report, para. 7.3.

[7] Panel Report, para. 7.1.

[8] Panel Report, para. 7.2.

6. On 1 December 2000, 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 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 pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 11 December 2000, the European Communities filed its appellant's submission.[10] On 18 December 2000, India filed an other appellant's submission.[11] On 4 January 2001, Egypt filed a third participant's submission. On 8 January 2001, India and the European Communities each filed an appellee's submission. On the same day, Japan and the United States each filed a third participant's submission.[12]

7. The oral hearing in the appeal was held on 24 January 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

## II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

### A. *Claims of Error by the European Communities - Appellant*

#### 1. *Article 2.4.2 of the Anti-Dumping Agreement - Practice of "zeroing"*

8. The European Communities appeals the finding of the Panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by "zeroing" the "negative dumping margins" established for certain models or product types of cotton-type bed linen - the product under investigation - when calculating the overall rate of dumping for bed linen. The European Communities alleges the following specific errors committed by the Panel in reaching its finding.

9. The European Communities first claims that the Panel, in making its finding, did not follow the rules of interpretation of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[13] In particular, the Panel did not begin its analysis with the text of the provision at issue, Article 2.4.2, but, rather, with another provision, Article 2.

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9 Panel Report, para. 7.5.

10 Pursuant to Rule 21 of the Working Procedures.

11 Pursuant to Rule 23(1) of the Working Procedures.

12 Following a joint request by the European Communities and India, the Division hearing the appeal decided on 12 December 2000, pursuant to Rule 16(2) of the Working Procedure and in the light of the "exceptional circumstances" in this appeal, to extend the time-period for filing the appellee's and third participant's submissions from 2 January 2001 to 8 January 2001.

13 Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

10. Next, the European Communities submits that the interpretation of the Panel fails to give proper meaning to the word "comparable" in Article 2.4.2. Article 2.4.2 requires only that weighted average normal value be compared with weighted average export prices for "comparable" transactions. By determining a dumping margin for individual product types, i.e., for "comparable" transactions, this is precisely what the European Communities did.

11. Furthermore, the European Communities contends that in this case, the calculation of the *overall* rate of dumping for the product under investigation does not fall within the express terms of Article 2.4.2. Article 2.4.2 provides no guidance as to how the "dumping margins" determined for individual product types should be combined in order to calculate an overall rate of dumping for the product under investigation.

12. The European Communities then argues that the Panel's interpretation is based on the erroneous premise that dumping margins can be established only for the *product* under investigation. The concept of "dumping margin", as used in the *Anti-Dumping Agreement*, may refer not only to the dumping margin for the *product* under investigation, but also to the dumping margin established for each *product type* or for each *individual transaction*.

13. The European Communities further claims that the Panel's interpretation would distort price comparability and disregard the notion of "normal value", as the existence of dumping margins would depend on the product mix sold by the exporter. By requiring "positive dumping margins" to be offset by "negative dumping margins", the Panel is effectively requiring comparison of a weighted average normal value for *all product types* of bed linen with a weighted average export price for *all product types*.

14. In addition, the European Communities submits that the Panel's finding would disadvantage Members applying anti-dumping duties on a "prospective" basis because a Member applying anti-dumping duties "retrospectively" is not required to give credit for transactions with a "negative dumping margin". Another result of the interpretation of the Panel is that Members would not be able to counter dumping targeted to certain product types.

15. Finally, the European Communities argues that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. In particular, in interpreting Article 2.4.2, the Panel never referred to Article 17.6(ii), and did not determine whether Article 2.4.2 admits of more than one permissible interpretation.

### *B. Arguments of India - Appellee*

#### *1. Article 2.4.2 of the Anti-Dumping Agreement - Practice of "zeroing"*

16. India submits that in interpreting Article 2.4.2 of the *Anti-Dumping Agreement*, the Panel properly followed the rules of interpretation of the *Vienna Convention*. Article 2.4 and the remainder of Article 2 of the *Anti-Dumping*

*Agreement* constitute the context of Article 2.4.2, since the entire Article relates to the determination of whether dumping exists. Accordingly, the Panel properly began its analysis with the text of Article 2.4.2 and correctly considered it in its context.

17. Next, India is of the view that the Panel correctly interpreted the word "comparable" in Article 2.4.2 of the *Anti-Dumping Agreement* in the light of its context. Even assuming that the word "comparable" carries with it a different meaning in Article 2.4.2, it does not follow that zeroing of these "comparable" data is allowed. The European Communities incorrectly represented the historical background of the word "comparable" and of Article 2.4.2. India believes that the addition of this word in the last phase of the Uruguay Round negotiations does not mean that "comparable" has a different meaning than in Article VI of the GATT 1994 or the rest of Article 2 of the *Anti-Dumping Agreement*.

18. India also claims that the Panel rightly applied Article 2.4.2 to the calculation of the overall rate of dumping for the product under investigation. The calculation of the amount of dumping for various models or types of the product under investigation is not separate from the calculation of the dumping margin for the product under investigation. Both fall within the terms of Article 2.4.2. Furthermore, the drafting history does not support the European Communities' view of Article 2.4.2 as allowing the practice of "zeroing".

19. Next, India argues that the Panel correctly determined that the concept of "dumping margin" in Article 2.4.2 of the *Anti-Dumping Agreement* refers only to the dumping margin established for each product, and not for each model of that product, or for each individual transaction. India distinguishes the *dumping results or amounts*, that is, the differences between the normal value and export price on a per type basis, and the *dumping margin*, that is, the final expression of the total of these amounts (for the product, for a particular producer). It is clear from Articles 2.1 and 2.2 that a "dumping margin" is to be calculated for the "product under investigation".

20. Moreover, the interpretation of the Panel neither distorts price comparability nor disregards the notion of "normal value". For India, the finding of the Panel does not disadvantage the importing Members applying anti-dumping duties on a prospective basis. Results under a prospective system should not necessarily be the same as under a retrospective system and a retrospective system should not necessarily form a bench mark for the prospective system.

21. With regard to the question whether the Panel's finding would preclude Members from countering dumping targeted to certain product types, India's view is that the Panel's finding rightly disallows Members to do so. The text of Article 2.4.2 does not provide for the possibility to counter dumping targeted to certain product types.

22. Finally, India believes that the Panel applied the appropriate standard of review pursuant to Article 17.6(ii) of the *Anti-Dumping Agreement*. The Panel was not faced with a choice between multiple "permissible" interpretations, requiring deference, because the ordinary meaning of the terms of Article 2.4.2, in their

context and in the light of the object and purpose of the *Anti-Dumping Agreement*, is clear.

### *C. Claims of Error by India - Appellant*

#### *1. Article 2.2.2(ii) of the Anti-Dumping Agreement - Data from "other exporters or producers"*

23. India argues that the Panel erred in finding that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied in circumstances where data is available for only one other exporter or producer. The Panel's ruling to this effect is inconsistent with the rules of treaty interpretation in the *Vienna Convention*.

24. India stresses that Article 2.2.2(ii) refers to the "weighted average" of the "amounts" incurred and realized by other "exporters or producers". The use of the plural form of "amounts" and "exporters or producers", in combination with the reference to a "weighted average" of the "amounts", indicates that figures for multiple exporters or producers must be available if Article 2.2.2(ii) is to be relied on. The Panel's conclusion that Article 2.2.2(ii) may be applied where data is available for only one exporter or producer ignores the clear meaning of these words.

25. India further argues that the Panel should have examined whether the choice of the European Communities of the method to calculate the amounts for administrative, selling and general costs and for profits set out in Article 2.2.2(ii) was "objective and fair". Article 17.6(i) of the *Anti-Dumping Agreement* requires that the evaluation of the investigating authorities of the facts be "unbiased and objective". With viable alternatives, such as Article 2.2.2(i) and Article 2.2.2(iii), available, the insistence of the European Communities on using the second option cannot have been "unbiased and objective". By failing to consider whether this choice of methodology was proper, the Panel erred in law.

26. Finally, India contends that the finding of the Panel that the European Communities was not obligated to look at available information outside the sample is not only inconsistent with the standard of review set out in Article 17.6(i), but is also incompatible with the later finding of the Panel that "it is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved."[14] In the circumstances of this case, data for an additional producer was available to the European Communities in the "reserve sample" it had established for the investigation. Information from this producer should have been taken into account when relying on the methodology provided in Article 2.2.2(ii). India recalls that, in examining the question of injury to the domestic industry, the European Communities relied on information from outside the sample, and the Panel upheld this decision by the European Communities. Failure to take into account the available

[14] Panel Report, para. 6.181.

information of an exporting producer included in the reserve sample for dumping, while simultaneously taking into account information outside the sample when establishing whether injury to the domestic industry had occurred, does not constitute an "unbiased and objective" investigation. The Panel's failure to reach this conclusion violates the standard of review set out in Article 17.6(i).

#### 2. *Article 2.2.2(ii) of the Anti-Dumping Agreement - "actual amounts incurred and realized"*

27. The Panel found that it is permissible to exclude sales outside the ordinary course of trade in calculating amounts for administrative, selling and general costs ("SG&A") and for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*. According to India, such finding is contrary to the text and context of Article 2.2.2(ii). The text of Article 2.2.2(ii) explicitly refers to the "amounts incurred and realized", whereas, by contrast, the text of the chapeau of Article 2.2.2 requires to consider the relevant data "in the ordinary course of trade". Nothing in the terms of Article 2.2.2(ii) suggests that only "amounts" of profitable sales are concerned. Article 2.2.2(ii) simply does not contain an "ordinary course of trade" restriction.

28. India contends that the context of Article 2.2.2(ii) confirms this interpretation. It would be illogical to read into the three alternative options a principle appearing in the chapeau of Article 2.2.2, since the alternative options come into play when the chapeau does not apply. Further, none of the main principles contained in Articles 2.1 and 2.2 contain any specific "ordinary course of trade" requirement with regard to the calculation of amounts for SG&A and profits. According to India, the negotiating history of the *Anti-Dumping Agreement* supports its view on this point.

### D. *Arguments of the European Communities - Appellee*

#### 1. *Article 2.2.2(ii) of the Anti-Dumping Agreement - Data from "other exporters or producers"*

29. The European Communities submits that the Panel correctly found that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be invoked even when only one other exporter or producer has eligible data. The Panel performed an analysis of the ordinary meaning of the words in Article 2.2.2(ii), and properly took account of the phrase "weighted average". The interpretation of the Panel does not undermine the effect of the phrase "weighted average" in Article 2.2.2(ii), since another arithmetic mean could have been set out therein for cases involving two or more exporters or producers.

30. Next, the European Communities rejects India's contention that the anti-dumping investigation at issue in this case was not "unbiased and objective" as required under Article 17.6(i) of the *Anti-Dumping Agreement* because the European Communities chose to apply Article 2.2.2(ii) rather than Article 2.2.2(i). According to the European Communities, this is not a proper subject for appeal,

and India's claim fails to raise any substantive issue. India's contention was not set out in its request for a panel nor in its submissions to the Panel and, therefore, it is not a proper subject for this appeal, since Article 17.6 of the DSU confines appeals to issues of law or legal interpretations developed by the panel. In addition, India's allegation may raise new legal issues which could require proof of new facts. India's argument is not a substantive claim, because Article 17.6 of the *Anti-Dumping Agreement* establishes that the obligation of national authorities to be unbiased and objective applies to the evaluation of the facts of the case.

31. Finally, in the view of the European Communities, India's allegation that the implementation of Article 2.2.2(ii) by the investigating authorities of the European Communities was not "unbiased and objective", for not taking account of certain data from an additional producer, is similarly not a proper subject for appeal, for the same reasons as above.

##### 2. *Article 2.2.2(ii) of the Anti-Dumping Agreement - "actual amounts incurred and realized"*

32. The European Communities argues that investigating authorities are allowed to disregard data relating to sales that are not made in the ordinary course of trade, in particular those made at prices below cost, when establishing a constructed normal value pursuant to Article 2.2.2(ii) of the *Anti-Dumping Agreement*. As the Panel observed, if sales not in the ordinary course of trade were considered, "the constructed value could be equal to cost and thus would not include a reasonable amount for profit"[15]. Moreover, the "ordinary course of trade" principle in Article 2 and in the chapeau of Article 2.2.2 would become meaningless, and therefore redundant, if sales not in the ordinary course of trade were included.

33. With regard to the context of Article 2.2.2(ii), the European Communities suggests that the exclusion of sales not in the ordinary course of trade in Article 2.2.2(i) is not "impossible". The *Anti-Dumping Agreement* merely authorizes Members to exclude those sales but does not require to do so. Finally, India's claim that under the Panel's interpretation of Article 2.2.2(ii) exporters would be unfairly treated, because at the time of selling, they would not be in a position to anticipate whether their sales would be found to be dumped, has no merit and should be rejected.

#### E. *Arguments of the Third Participants*

##### 1. *Egypt*

34. Egypt welcomes the finding of the Panel that the practice of "zeroing" employed by the European Communities in calculating the margin of dumping vio-

[15] Panel Report, para. 6.86; European Communities' appellee's submission, para. 46.

lated the provisions of Article 2.4.2 of the *Anti-Dumping Agreement*. Furthermore, Egypt argues that the European Communities violated the provisions of Article 2.2.2(ii) of the *Anti-Dumping Agreement* for not having properly applied the method identified therein nor met its requirements.

35. In addition, Egypt submits views on certain issues that it considers to be fundamental for the proper legal interpretation of the *Anti-Dumping Agreement*. In particular, Egypt makes a number of comments on the findings of the Panel in relation to Articles 3.4, 5.3, and 15 of the *Anti-Dumping Agreement*. However, since none of these findings have been appealed, Egypt's comments do not directly bear upon this appeal.

#### 2. *Japan*

36. Japan argues that the analysis of the Panel relating to the practice of "zeroing" of the European Communities was consistent with the rules of interpretation of the *Vienna Convention*. Japan submits that the decision of the Panel with respect to "zeroing" was also consistent with the standard of review in Article 17.6(ii) of the *Anti-Dumping Agreement*.

37. Furthermore, Japan underlines that the European Communities did not justify the need for introducing the concept of "overall rate of dumping", a concept not referred to anywhere in the *Anti-Dumping Agreement*. Moreover, the use of the plural form of the word "margins" in Article 2.4.2 of the *Anti-Dumping Agreement* is merely indicative that there may be more than one exporter involved in an investigation. According to Japan, the Panel correctly interpreted the word "comparable" in Article 2.4.2, finding that it echoed the overall mandate in the *Anti-Dumping Agreement* that dumping calculations be based on fair comparison, and made between "comparable transactions".

38. Moreover, according to Japan, the argument of the European Communities that the interpretation of the Panel would disadvantage Members applying anti-dumping duties on a prospective basis is irrelevant. In the view of Japan, the Panel correctly focused its findings on Article 2.4.2, since the dispute was related to the calculation of dumping margins for the product under investigation. The manner in which duties may be collected under the *Anti-Dumping Agreement* is relevant, only if, and only after, the investigating authorities find dumping for a particular producer as a result of a proper application of the methodologies set out in the *Anti-Dumping Agreement*.

39. Finally, Japan finds the "policy" argument of the European Communities regarding "product targeting" not persuasive. The European Communities ignores the fact that Article 2.4.2 does not include "product targeting" as a specific form of dumping justifying an exceptional calculation methodology, whereas Article 2.4.2 identifies three other forms of "targeting" justifying such exceptional methodology.

### 3. *United States*

40. In the view of the United States, the Panel failed to interpret the weighted-average comparison provision of Article 2.4.2 of the *Anti-Dumping Agreement* in its context and in the light of the object and purpose of the *Anti-Dumping Agreement*. The *Anti-Dumping Agreement* does not require that importing countries reduce dumping margins by amounts by which export prices exceeded normal value on other, non-comparable transactions. The United States supports the methodology of the European Communities for calculating the overall margin of dumping.

41. Next, the United States contends that the Panel failed to account for the remaining provisions of Article 2.4.2. The Panel should have addressed the totality of Article 2.4.2 before turning to Article 2.1 for providing the context to Article 2.4.2. The Panel incorrectly emphasized the word "all", and lost sight of the fact that Article 2.4.2 refers to only all "comparable" export transactions. Article 2.4.2 makes it clear that averages must be limited to "comparable" transactions.

42. The United States submits that the Panel was correct in holding that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data concerning only one other exporter or producer. The phrase "weighted average" is not determinative of this issue, but simply clarifies the method to be employed when there are two or more companies from which data will be utilised pursuant to Article 2.2.2(ii). Likewise, the word "amounts" in Article 2.2.2(ii) is not determinative, since it refers to the "amounts for administrative, selling and general costs and for profits", provided for in the chapeau. There is no guidance as to whether these amounts can be drawn from a single company or multiple companies. In addition, the phrase "other exporters or producers" is also not determinative, in the United States' view, because it cannot be read to exclude a single exporter or producer without creating "absurd results" throughout the *Anti-Dumping Agreement*, which often uses plurals as including the singular.

43. Moreover, the United States argues that the Panel was not required to examine separately whether the choice of the European Communities of the method set out in Article 2.2.2(ii) of the *Anti-Dumping Agreement* was objective and fair, pursuant to Article 17.6(i) of the *Anti-Dumping Agreement*, as compared with the alternative methods provided for in Articles 2.2.2(i) and 2.2.2(iii).

44. The United States concurs with the Panel and the European Communities that pursuant to Article 2.2.2(ii) of the *Anti-Dumping Agreement*, below-cost sales may be excluded from constructed normal value calculations. Nothing in the text *requires* this exclusion, but nothing in the text *forbids* such an exclusion either. It is therefore permissible, though not mandatory, to exclude sales outside the ordinary course of trade from the calculations made pursuant to Article 2.2.2(ii). In addition, excluding the profit on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii) is consistent with the overall operation of Article 2 of the *Anti-Dumping Agreement*.

## III. ISSUES RAISED IN THIS APPEAL

45. This appeal raises the following issues:

(a) Whether the Panel erred in finding that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*; and

(b) Whether the Panel erred in finding that:

(1) the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and

(2) in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

## IV. ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

46. The first issue raised in this appeal is whether the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

47. The practice of "zeroing", as applied in this dispute, can briefly be described as follows[16]: first, the European Communities identified with respect to the product under investigation - cotton-type bed linen - a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model.[17] Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calcu-

[16] For a more detailed description, see Panel Report, para. 6.102.

[17] For these latter models, in other words, dumping had not occurred, as the export price exceeded the normal value.

lated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero - hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, the Panel found that:

> … the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[18]

49. The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of *all* export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides *no guidance* as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. On this reasoning, the European Communities asserts that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Accordingly, the European Communities concludes that the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2[19], erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation[20], and erred in its overall analysis of this issue on the premise that dumping margins can be established only for a *product*.[21]

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18 Panel Report, para. 6.119.
19 European Communities' appellant's submission, paras. 14-20 and 38-41.
20 European Communities' appellant's submission, paras. 21-30.
21 European Communities' appellant's submission, paras. 31-37.

50. As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the *Anti-Dumping Agreement* states:

> Subject to the provisions governing fair comparison in paragraph 4, the *existence of margins of dumping* during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

51. Article 2.4.2 of the *Anti-Dumping Agreement* explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states:

> For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

> The *proceeding covers bed linen of cotton-type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.
>
> ...
>
> Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.[22] (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Commu-

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[22] Commission Regulation (EC) No 1069/97, supra, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, supra, footnote 4, para. 9.

nities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product* - cotton-type bed linen - and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must be established:

> … on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions …

55. Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value."[23] By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not*

[23] Panel Report, para. 6.115.

establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions - that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions - such as the practice of "zeroing" at issue in this dispute - is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

56. We are mindful that Article 2.4.2 provides for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions". (emphasis added) In our view, the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added)

57. The ordinary meaning of the word "comparable" is "able to be compared".[24] "Comparable export transactions" within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[25] However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types … constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics* and *essentially the same use*".[26] (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

> The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as well as cot-

[24] The Concise Oxford Dictionary of Current English (Clarendon Press, 1995), p. 269.
[25] European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.
[26] Commission Regulation (EC) No 1069/97, supra, footnote 3, para. 10.

> ton-type bed linen produced in Egypt, India and Pakistan and sold on the Community market and on their domestic markets were alike.
>
> …
>
> The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-type fibres*. Therefore domestic and export types in the countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 … [27] (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

> A *fair comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (emphasis added)

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in … physical characteristics".

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability".

[27] Commission Regulation (EC) No 1069/97, supra, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, supra, footnote 4, para. 9.

Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[28]

61. In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation.[29] With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find *a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62. This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[30]

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[28] See supra, paras. 57-58.

[29] European Communities' appellant's submission, paras. 46-49.

[30] The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the exis-

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.[31] On this, we observe that Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.[32] Having interpreted Article 2.4.2 accordingly, the Panel found:

> … that the European Communities acted *inconsistently* with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[33] (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

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tence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the Anti-Dumping Agreement. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[31] European Communities' appellant's submission, paras. 50-58.

[32] Panel Report, para. 6.46.

[33] Panel Report, para. 6.119.

## V. ARTICLE 2.2.2(II) OF THE ANTI-DUMPING AGREEMENT

67. The two other issues raised in this appeal both concern the Panel's interpretation of Article 2.2.2(ii) of the *Anti-Dumping Agreement*. Pursuant to Article 2.2, the margin of dumping for the product under investigation may, in certain circumstances, be determined by comparison of the export price of the product with a constructed normal value consisting of the cost of production of the product in the country of origin plus a reasonable amount for administrative, selling and general costs ("SG&A") as well as for profits. Article 2.2.2 sets forth how the amounts for SG&A and profits are to be calculated in such circumstances. Article 2.2.2 states:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin. (emphasis added)

68. The first issue raised is whether the method of calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer. The second issue is whether, in calculating the amount for profits under Article 2.2.2(ii), a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

69. With respect to the first issue, the Panel found:

> As we have concluded that Article 2.2.2(ii) may be applied in a case where there is data concerning profit and SG&A for only one other producer or exporter, we conclude that the European Communities was not precluded from applying the methodology set out in that provision in this

> case, and therefore did not act inconsistently with Article 2.2.2(ii) in this regard.[34]

70. With respect to the second issue, the Panel found:

> Thus we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible. We therefore conclude that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade.[35]

71. India appeals both these findings. With respect to the first of these two findings of the Panel, relating to the applicability of Article 2.2.2(ii) where there is data for only *one* other exporter or producer, India argues that the text of Article 2.2.2(ii), and, in particular, the use of the terms "amounts" and "exporters or producers" in the plural, in combination with the reference to a "weighted average" of the "amounts", clearly indicate that Article 2.2.2(ii) cannot be applied where there is data for only *one* other exporter or producer.[36] Furthermore, with respect to this finding, India argues that the Panel failed to meet the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*.[37] With respect to the second of these two findings of the Panel, relating to the exclusion of sales by other exporters or producers that are not made in the ordinary course of trade, India argues that the text of Article 2.2.2(ii) states that the amount for profits must be based on "amounts incurred and realized", and that nothing in these terms suggests that they relate only to profitable sales.[38] According to India, this reading of Article 2.2.2(ii) is confirmed by the chapeau of Article 2.2.2, which, in contrast with Article 2.2.2(ii), explicitly excludes sales made outside the ordinary course of trade.

72. On the first of these two issues on appeal - that is, whether the method for calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer - we recall that Article 2.2.2(ii) states that, when this method is chosen by the investigating authorities, the amounts for SG&A and profits must be calculated on the basis of:

> the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

Here, we note especially that Article 2.2.2(ii) refers to "the *weighted average* of the actual *amounts* incurred and realized by *other exporters or producers*". (emphasis added)

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[34] Panel Report, para. 6.75.
[35] Panel Report, para. 6.87.
[36] India's appellant's submission, paras. 5-7.
[37] India's appellant's submission, paras. 8-17.
[38] India's appellant's submission, paras. 18-32.

73. In construing this provision, the Panel found that the phrase "other exporters or producers":

> … as a general matter, admits of an understanding where the plural form includes the singular case - the case where there is only one other producer or exporter. … In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product.[39]

74. We disagree. In our view, the phrase "weighted average" in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase "other exporters or producers" in the plural as including the singular case. To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer.[40] Moreover, the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean.[41] In short, it is simply not possible to calculate the "weighted average" relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer.

75. The requirement to calculate a "weighted average" in Article 2.2.2(ii) is, in our view, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is indispensable to the entire provision - which deals only with the mechanics of that calculation. We disagree with the Panel that "the concept of weighted averaging is relevant only *when there is information from more than one other producer or exporter* available to be considered."[42] (emphasis in the original) We see no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average *some* of the time but not *all* of the time. In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a "weighted average" out of the text in some circumstances.

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[39] Panel Report, para. 6.70.

[40] "Average" is defined in The Concise Oxford Dictionary of Current English, supra, footnote 24, p. 86, as follows: "an amount obtained by dividing the total of given amounts by the number of amounts in the set".

[41] "To weight" is defined as "multiply the components of (an average) by factors to take account of their importance". See The Concise Oxford Dictionary of Current English, supra, footnote 24, p. 1589. "Weighted average" is defined as "resulting from the multiplication of each component by a factor reflecting its importance". See The New Shorter Oxford English Dictionary (Clarendon Press, 1993), Vol. II, p. 3651.

[42] Panel Report, para. 6.71.

In those circumstances, this would substantially empty the phrase "weighted average" of meaning.[43]

76. In our view, then, the use of the phrase "weighted average", combined with the use of the words "amounts" and "exporters or producers" in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from *more than one* exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available.

77. Accordingly, we reverse the finding of the Panel, in paragraph 6.75 of the Panel Report, that the method for calculating amounts for SG&A and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement*, may be applied where there is data on SG&A and profits for only one other exporter or producer.

78. We recall that India also argues that the Panel's finding in paragraph 6.75 of the Panel Report on the applicability of Article 2.2.2(ii) was inconsistent with the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. However, since we have already concluded that the finding of the Panel in that paragraph is inconsistent with Article 2.2.2(ii), there is no need for us to examine whether the Panel in making this finding also acted inconsistently with Article 17.6(i).

79. On the second issue relating to the Panel's interpretation of Article 2.2.2(ii) - that is, whether in calculating the amount for profits pursuant to Article 2.2.2(ii), Members may exclude sales by other exporters or producers that are not made in the ordinary course of trade - we recall that the amounts for SG&A and profits for an exporter or a producer under investigation are, under Article 2.2.2(ii), calculated on the basis of:

> the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

80. Here, we note especially that Article 2.2.2(ii) refers to "the weighted average of *the actual amounts incurred and realized* by other exporters or producers". (emphasis added) In referring to "the actual amounts incurred and realized", this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase "*actual* amounts incurred and realized" includes the

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[43] We note that in a case where there is data relating to only one other exporter or producer, a Member may have recourse to the calculation method set forth in Article 2.2.2(iii), provided, of course, that the specific requirements for the use of this calculation method are met. We recall that Article 2.2.2(iii) states that amounts for SG&A and profits may be calculated on the basis of :

> any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

*SG&A actually incurred*, and the *profits or losses actually realized*[44] by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the "actual amounts incurred or realized". It follows that, in the calculation of the "weighted average", *all* of "the actual amounts incurred and realized" by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the "weighted average" under Article 2.2.2(ii).

81. We find support for this textual interpretation of Article 2.2.2(ii) in the context of this provision and, in particular, in the first sentence of the chapeau of Article 2.2.2, which sets out the principal method for calculating amounts for SG&A and profits. The method set out in Article 2.2.2(ii) is one of three alternative methods which may be applied *only* in circumstances where the amounts for SG&A and profits cannot be determined by the principal method set out in the chapeau of Article 2.2.2.[45] In setting out this principal method, the first sentence of the chapeau of Article 2.2.2 states:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits *shall be based on actual data pertaining to production and sales in the ordinary course of trade* of the like product by the exporter or producer under investigation. (emphasis added)

82. In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to "actual data pertaining to production and sales *in the ordinary course of trade*". (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.

83. The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the con-

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[44] It is worthwhile noting that "realized" is a word used with respect to both gains (profits) and losses. See Black's Law Dictionary (West Group, 1999), p. 1271, which speaks of both "realized gain" and "realized loss".

[45] See second sentence of the chapeau of Article 2.2.2.

text of Article 2.2.2(ii). In our Report in *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* we stated:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[46]

84. Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

85. In view of our findings in paragraphs 77 and 84 of this Report, we conclude that the European Communities, in calculating amounts for SG&A and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the *Anti-Dumping Agreement*.

## VI. FINDINGS AND CONCLUSIONS

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

(1) upholds the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*; and

(2) reverses the findings of the Panel in paragraphs 6.75 and 6.87, respectively, of the Panel Report that:

(a) the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and

(b) in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade;

and, as a consequence, concludes that the European Communities, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the *Anti-Dumping Agreement*.

87. The Appellate Body recommends that the DSB request that the European Communities bring its measure found in this Report, and in the Panel Report as

[46] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 45.

modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* into conformity with its obligations under that Agreement.